Scott A. Merriman

VOLUME 1

RELIGION and the LAW in AMERICA

An Encyclopedia of Personal Belief and Public Policy

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ABC CLIO

Santa Barbara, California Denver, Colorado Oxford, England

Library of Congress Cataloging-in-Publication Data
Merriman, Scott A.
Religion and the law in America : an encyclopedia of personal belief and public policy / Scott A. Merriman.
p. cm.
Includes bibliographical references and index.
978-1-85109-863-7 (hardcopy : alk. paper) — 978-1-85109-864-4 (ebook)
1. Freedom of religion—United States—Encyclopedias. 2. Religion and law—United States—Encyclopedias. 3. Church and state—United States—Encyclopedias. 4. Religion and law—United States—Cases. I. Title.

KF4783.A68M47 2007
342.7308'5203—dc22
2007002579

11 10 09 08 07 1 2 3 4 5 6 7 8 9 10

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130 Cremona Drive, P.O. Box 1911
Santa Barbara, California 93116-1911

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To my mentors who have been teachers,
inspirers, believers, prophets, and friends;
to my wife, Jessie, who has been all of those
and more; and to my daughter, Caroline,
who makes me laugh and smile.

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VOLUME 2

INTRODUCTION

Freedom of religion is probably the freedom that Americans hold the dearest, at least publicly. However, the limits of that freedom, and the limits of the corresponding First Amendment clause against a governmental establishment of religion, are very murky, especially when the freedom of one individual's religion begins to clash with the prohibition against the government's establishment. This encyclopedia identifies some of the boundaries of those freedoms, seeks to explain the overall development of the freedom of religion, and highlights some of the important judicial decisions that have shaped it. The encyclopedia discusses the interaction between religion and the law in America; it does not aim to give legal advice.

Before we look at the history of freedom of religion in America, a short explanation is in order about the workings of the U.S. court system and how cases come before the U.S. Supreme Court. The Supreme Court is generally seen as the top court in America—and it is, for America, especially in the area of religion. However, in many matters, the U.S. Supreme Court is mostly irrelevant as one can take a case to that court only if the federal Constitution is in some way involved. Thus, if the matter involves a state law and no provision of the U.S. Constitution is implicated, the case must end at the highest level of state courts and often does not even get there. If only the state constitution or a state law is involved, the case would probably begin in the lowest state court, and if an acquittal occurred (assuming it was a criminal case) the matter would end there. If a conviction occurred, or if a civil case was decided under a civil law (civil law is concerned with personal rights, such as contracts), then whoever lost could appeal it; if the person did not appeal, the matter would end. Many cases end just like that. Above the lower court is an appeals court (even though each state's court system has different names for each level), and there can be more than one level of appeals courts. The loser there can again appeal, and the state's highest court often has choice, or what is called discretionary authority, to decide whether to hear the appeals. After the highest level of the state court, if there is a federal constitutional issue involved, like the First Amendment for issues of religion, the case can be appealed to the U.S. Supreme Court. The federal court system hears all cases under federal law, whether civil or criminal law, and also can hear cases involving federal issues that began in state court. Cases start at the district court level; there are ninety-four district courts, with most handling the cases that arise in a certain geographical district. The loser (except in the case of an acquittal with a criminal trial) can always appeal the verdict from the district court to a circuit court of appeals. There are thirteen circuit courts of appeals in the United States, and all but one have geographical jurisdictions (the last handles almost all cases dealing with patents, trademarks, and trade, among others, from across the nation). The circuit courts of appeals generally must hear the cases brought before them, and appeals can be taken from these courts to the U.S. Supreme Court. The U.S. Supreme Court, however, has discretion in deciding what cases it hears, and at least four Supreme Court justices must vote to hear a case before it will be heard. The Supreme Court also hears relatively few cases—only around one hundred cases a year in recent years.

The American colonies were founded for many different reasons, and as many different desires led people to come to this country;

only one of these was religion. Thus, the often cherished idea that people came to America solely for religious freedom is clearly not true. However, it is also true, obviously, that religion did motivate some. Many of the early colonies had established churches, as religious freedom meant, to many early colonial leaders, freedom to practice the religion of the colony's founders, not freedom to practice any religion (and certainly not the freedom to be without a religion). Many pitched ideological battles were fought over religion in the early colonies, and a few—most notably Rhode Island and Pennsylvania—expressly granted toleration to all religions. By the time of the American Revolution, official churches had been removed in several colonies, and the trend was clearly to slowly move away from an official church.

The American Revolution itself did little to change religion, but the colonies all had to create their own constitutions once independence had been declared, and this process led some to formally remove the state-supported church or to alter its status. The national government created during the American Revolution also did little with religion, but this was in large part because the Articles of Confederation gave the federal government little power in any area. When the time came to change the articles, the result was our current Constitution (even though it has been amended several times since). The new Constitution gave much more power to the central government, enough that some people became nervous, fearing that a tyrannical government would emerge and that all the people's rights would disappear. This fear was not sufficient to stop the Constitution's adoption, but it was pervasive enough that several states called for the national government to adopt a bill of rights that would spell out the limits on the federal government. The first Congress undertook this assignment, and James Madison was the leading figure in the discussions. He took the states' suggestions and drafted a number of different amendments; after discussion in the Congress, twelve were formulated and passed on to the states for ratification. The states passed all but the first two of those, and the resulting ten amendments became what we today know as the Bill of Rights. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Thus, the First Amendment contains two parts, both a prohibition against the government's establishment of a religion and the prohibition against the government's interference with someone's freedom of religion. The first part has frequently been called the establishment clause and the second part the free exercise clause, and neither is, obviously, self-defining.

Even though there is ambiguity about the First Amendment's precise boundaries in the area of religion, the First Amendment seldom came before the Supreme Court in the first one and a half centuries after the amendment's passage. This was largely due to two factors. The first was that the First Amendment was held to apply only to federal actions. Thus, if a state acted in a way that might be viewed as infringing a person's freedom of religion or as establishing a religion, the First Amendment did not come into consideration. If a state constitution had provisions similar to those of the First Amendment, the state's law might still be unconstitutional, but it would be so because it violated the state constitution, not the federal one. The reason was because the Supreme Court in 1833 ruled that the Bill of Rights limited only the federal government and did not limit the state governments. The second is that the states were the most likely bodies, particularly at the time, to pass laws in the area of religion. The federal government did not concern itself much with education or personal conduct in the states, and those are the areas

where most questions of religion arise today. Thus, it is not surprising that few cases involving religion made it to the Supreme Court.

In the few that did, federal power was generally upheld at the expense of religion. In the last half of the nineteenth century, the federal government did pass laws that regulated conduct in the federal territories, and some of these involved religion. The best-known law was one banning polygamy (or being married to multiple women at the same time), which was passed in 1862. The law was aimed at the Mormon Church in the Utah territory, as it sanctioned multiple marriages among its church leaders. Congress passed a series of laws directed against that practice, eventually removing the vote from anyone who publicly supported the practice and revoking the charter of the Mormon Church. The Supreme Court, starting in 1879 and running through the 1890s, decided several cases that upheld the right of the federal government to pass such laws, holding that churches advocating illegal acts were not protected by the freedom of religion clause and that illegal practices, even when based in religion, were still illegal. Those decisions have not been overturned and are still binding precedents today.

The First Amendment's religion clauses increased in both importance and frequency of use in court cases starting in 1925. In that year, the Supreme Court held that the Fourteenth Amendment extended the reach of the First Amendment. The Fourteenth Amendment had been passed after the Civil War to protect the rights of the former slaves, and it held that state governments could not, among other things, infringe upon anyone's right of liberty without due process of law. The Supreme Court in 1925 held that liberty included some of the items that many Americans hold dear, and the Court specifically mentioned the freedom of the press and the freedom of speech contained in the First Amendment. This meant that state actions that infringed upon our liberties, not just federal actions, might be held unconstitutional under the First Amendment. The Supreme Court did not give any reason for deciding to interpret the Fourteenth Amendment in this way, nor did they give a reason for not including the freedom of religion, but the case in question involved freedom of speech and the press, and that probably was why these were the only two freedoms mentioned. It is also clear that the liberty mentioned in the Fourteenth Amendment is not self-defining, and so the Supreme Court was right to define it, regardless of one's opinion on whether the First Amendment is part of that liberty. In 1940, the Supreme Court took the next step in applying the First Amendment against the states and held that the liberty of the Fourteenth Amendment which limited the states included the freedom of religion. Thus, states could no longer infringe upon the free exercise of religion, and in 1947 the Supreme Court completed the process by adding that states could not create an establishment of religion either. In twenty-two short years, the Court moved the religion clauses of the First Amendment from being relevant only in federal actions to applying in all state actions. This process greatly expanded the scope of the First Amendment and protected more of our freedom of religion and limited the government much more in what it could do in terms of establishing a religion. Since 1947, there has not been much serious reconsideration of reversing these decisions and thus applying the First Amendment only to the federal government again.

Instead, for the last half century, the Supreme Court has been forced to consider a wide range of government actions, on both the state and federal levels, which people have considered as either creating an establishment of religion or interfering with a person's freedom of religion. The general trend of the courts, over the long term, has been to increase the protections and to decrease government power, but that trend has become less pronounced in recent years. The first Court to consider issues in this area was the Stone

Court, which examined state provisions ordering students to say the Pledge of Allegiance and state restrictions on religious canvassing. (Supreme Courts are frequently described by the name of the chief justice at the time, and thus the Stone Court was the Court led by Harlan Stone. The current Court would be thus described as the Roberts Court.) In the first cases, several Jehovah's Witnesses objected to states' requirements that they recite the Pledge of Allegiance. The Jehovah's Witnesses believed that swearing an oath to a flag was worshiping a graven image, and that worship had been banned by the Bible. Thus, being forced to state the pledge was a violation of their free exercise of religion. The Supreme Court at first upheld the states' requirement that students recite the pledge, but three years later (in 1943) the Court reversed itself and held that the free exercise of religion portion of the Constitution prohibited states from ordering students to recite the pledge. The Stone Court also considered a case dealing with a conviction of a Jehovah's Witness as he had gone through a town trying to convince people to join his religion. The man had been orderly, but his religious message had been opposed and so the Jehovah's Witness had been convicted of a "breach of the peace," or what most people today might describe as disorderly conduct. As the only reason for his conviction had been opposition to his religion, the Supreme Court overturned his conviction, stating that religious conduct, if it was legal, was protected by the First Amendment. This expanded the free exercise of religion portion of the First Amendment to include some religious acts as well as religious beliefs.

The next Court, the Vinson Court, continued to deal with religion cases. Most of their major cases addressed "released-time" programs, which allowed students to be released from their public school classrooms to attend religion classes. The Supreme Court first struck down a program permitting students to be released to attend classes in their own schools, as they held that the government was establishing a religion; but a few years later, the Court allowed a program that released students to attend programs at sites off the school grounds. This was believed to be a reasonable accommodation of religion that did not rise to the level of being an establishment of religion. The Supreme Court also upheld a program that reimbursed parents for the cost of transportation to religious schools, holding that this program was neutral in the area of religion; it did not favor religious schools over public schools as transportation was being provided to both.

The Warren Court, much to the consternation of many conservatives, considered several freedom of religion cases in its later years and provoked much controversy. In 1962, the Court considered a case involving mandatory Bible reading and reciting of the Lord's Prayer to open each school day. The Court struck down this program as an establishment of religion, as it put the force of the state behind the Christian religion. The next year, the Court considered a state-mandated prayer from New York and struck down this program as well, once again holding it to be an establishment of religion. These two decisions sparked a firestorm of protest. People saw this as taking God out of the public schools, and many saw communism as the driving force for the decision. One of the main differences between the United States and the USSR, America's opponent in the Cold War, was the importance of Christianity in the United States (the USSR was atheist), and this decision seemed to undermine that difference. The Warren Court also entered the area of evolution in the public schools for the first time, striking down an Arkansas law that banned the teaching of evolution. The Court held that the only purpose of this law was to protect the Christian religion and such a law was an unconstitutional establishment of religion. The Warren Court returned to an area associated with religion in 1967, that of marriage. Marriage is, for many people, both a religious and a civil issue, even

though the state considers it only in the civil context. Some states in the South had banned marriages between people of different races and the Supreme Court struck down this ban, holding it to be a violation of people's privacy to tell them that they could not marry someone of a different race. The Supreme Court also, although it was not as controversial as the other decisions, held that a state cannot impose a substantial burden upon someone's free exercise of religion unless there is a compelling interest behind that burden. This greatly increased the free exercise of religion.

After the Warren Court came the Burger Court, which many expected to roll back the Warren Court's decisions in many areas, including that of religion. However, the Burger Court mostly maintained things the way they were rather than advancing or rolling back the decisions of previous courts. In 1971, the Supreme Court set up a test for determining the constitutionality of any given government regulation. The Court held that regulations had to have a secular purpose, had to have a primary effect of neither enhancing nor hurting religion, and had to avoid an excessive entanglement of the state and religion. That test, although often challenged, still in many ways remains the basis of the tests used today. In 1972, the Supreme Court entered an area that has become even more charged with religion than it was then, that of abortion. In *Roe* v. *Wade,* the Court held that laws preventing abortion, especially in the first trimester of pregnancy, must generally yield to a woman's privacy interest. The Burger Court continued the Warren Court's trend in the general area of religion, holding that a state could not order Amish children to attend school past the eighth grade as this would damage the Amish religion, thus again upholding the free exercise of religion versus governmental attempts to regulate general conduct. The Supreme Court also continued to be active in the area of governmental aid to private schools, mostly striking down any direct aid and being very restrictive in what type of general aid was allowed that also went to private religious schools. The Court also forbade private schools from receiving government aid on school grounds. Thus, programs that aided students in private schools might be legal off school grounds, such as remedial tutoring, but not on school grounds. In 1980, the Supreme Court dealt with the issue of posting the Ten Commandments in schools, holding that the state could not order their display as this was an establishment of religion. In 1983, though, the Supreme Court did allow tax deductions for parental expenses for education, even though most of the deductions taken were for expenses at religious schools. The Burger Court in 1985 dealt with another major issue of religion and the law in the form of a moment of silence. Arkansas had passed a law allowing a moment of silence for "meditation or prayer" and the Court held that the mention of prayer made this unconstitutional as the state was telling you how to spend your moment of silence.

The Rehnquist Court, lasting from 1986 to 2005, dealt with a plethora of cases dealing with religious issues and issues associated with religion. In 1987, evolution again entered the Supreme Court, as the Court struck down a Louisiana law mandating that evolution and creation science be given equal amounts of time in the classroom. Proponents of creation science argued that there was scientific evidence to back up a literal reading of the book of Genesis, and the Court held that the ordering of this scientific idea along with evolution amounted to an establishment of religion. In 1990, the Supreme Court returned to the issue of the general regulation of conduct in areas associated with religion, holding that the state could regulate conduct if it had a general reason to do so, and did not need a compelling state interest; so the Court upheld an Oregon law banning peyote use, which conflicted with the religion of some Native Americans. The Supreme Court in 1992 dealt with school prayer, holding that school prayer at graduations, even when it was nondenominational,

was still unconstitutional as it amounted to government promotion of religion. In 1997, the Court struck down a congressional law aimed at overturning the 1990 decision and thus forcing states and Congress to have a compelling state interest to regulate religion-related conduct. The Court also reversed an earlier court decision, and held that private schools could receive aid on their grounds, as long as the aid was of a secular nature.

The new decade did not bring an end to religious cases or controversial ones in the Supreme Court. In 2002, the Court upheld an Ohio law allowing the use of vouchers in the schools. Vouchers allowed parents to choose whether their students attended private school or public school, under certain circumstances, and if private school was chosen the state would pay for part of the cost. Many private schools are, of course, religious, and so this program, in one side's view, seemed to allow the state to subsidize religion, and in the other, it allowed school choice and better schools. The Supreme Court allowed the program, holding that the state was not establishing religion as the parents' choice, not the state, was directing the money into the religious schools. In 2003, the Court turned to an area that is tinged with religion—homosexual rights. The Court struck down a Texas law that penalized only homosexual sodomy. The Court did not consider religion, even though religion is the basis of many people's opposition to giving any rights to homosexuals or their conduct. In 2004, the Pledge of Allegiance returned to the Supreme Court, as a parent protested his child being forced to say the pledge; the parent claimed that as the pledge, in its current incarnation, contained the words "under God," this constituted an establishment of religion. The Supreme Court avoided the issue, holding that the parent did not have custody of his child and so did not have the right to sue. In 2005, the Court decided that under certain circumstances, the Ten Commandments may be posted in public places. A Texas display was allowed to remain, as it had existed for forty years without challenge, whereas a Kentucky display was struck down, largely because it was challenged very soon after it was erected. Thus, the Supreme Court, through the end of Rehnquist's tenure as chief justice, remained embroiled in the area of religion and the law.

The Roberts Court will, undoubtedly, also be involved in the area of religion and the law, even though it has not heard that many major cases. One of the few to have come before the Court involved a congressional law attempting to protect the rights of churches and prisoners, holding that prisons that get state funding and churches involved in interstate commerce (meaning nearly all churches and all prisons) could not have their rights restricted unless the government had a compelling state interest. This differs from the law struck down in 1997 as the connection with governmental funding and the commerce issue gives Congress authority, which the Court said they lacked with the previous law. This law was upheld when the Supreme Court considered it in 2006, thus increasing protection for religion for certain individuals and groups.

Even though one cannot predict the decisions of the Court on future issues, it is safe to predict which issues will definitely arise again. Those issues include evolution, the Pledge of Allegiance, prayer in public schools, and school funding. Evolution seems destined to appear again, as new policies have been developed to once more remove evolution from the public schools. In 2005, a district court struck down a Pennsylvania school district's attempt to mandate that the school mention intelligent design. This idea holds that the world is so complicated in some of its parts that there must have been an intelligence involved. The idea was struck down as an establishment of religion. Thus, religion is here to stay as an issue in the courts.

Besides the U.S. Supreme Court, another factor in religion and the law is the executive

and legislative branches of the system. While the court system is legally the one responsible for interpreting the U.S. Constitution, the executive and legislative branches are still involved. The executive branch is connected as the arm of government that enforces Supreme Court decisions. The 1954 *Brown* decision banning school segregation was slow to be implemented in large part because presidents Eisenhower and Kennedy were not interested in enforcing it. In the legislative branch, as mentioned previously, on a number of occasions Congress has tried to pass legislation overturning the decisions of the Supreme Court. While the Court has looked with displeasure on most direct efforts, some of these have still been successful. Recent congressional moves to increase the legal protections for prisoners and churches succeeded. The Court is always very careful to make sure that congressional legislation, especially any that attempts to overturn or limit Court decisions, has a firm constitutional basis. Congress is also the origin of attempts to pass constitutional amendments aimed at overturning Court decisions. In every session of Congress, bills are introduced to pass constitutional amendments aimed at allowing school prayer and banning abortion, just to name the two most popular. These efforts, though, seldom reach a vote on the floor of the Senate or the House of Representatives, and since such bills almost always fail to be considered, they may be introduced simply to placate the voting public.

Congress has also passed legislation that has reshaped the interaction of religion and the law. For instance, Congress passed Title VII of the Civil Rights Act of 1964—legislation banning most instances of religious-based discrimination in the workforce. This effort was not in response to any specific Supreme Court decision but was aimed at ending discrimination (the same act also banned discrimination on the basis of race in employment), and the Supreme Court upheld the legislation. Thus, Congress can and often does act to protect people in the area of religion and can also act, sometimes successfully, in protesting Supreme Court decisions.

The public is also involved in the interaction between religion and the law, even though (obviously) there is not any direct public vote on Supreme Court cases or nominees. For instance, there was long (and still is, in many people's estimation) a bias against Catholic candidates for public office, and in the 1800s there was often a bias against Catholic immigrants. A whole political party, the Know-Nothing or American Party, was formed to push for anti-immigrant legislation. The fear was that Catholic immigrants would remain loyal to the pope and could not be trusted to become good Americans. Catholics also wanted a different version of the Bible used in the public schools; they favored the Douay version rather than the King James translation preferred by Protestants, and this difference in opinion created tension. Riots broke out in many cities in the 1840s over the issue and tensions remained even after the riots had ended. Throughout the nineteenth and early twentieth centuries, Catholic candidates for president did not fare well in seeking their parties' nomination, as the first Catholic presidential candidate did not win nomination until 1928. Even then, a full eighty years after the Bible riots, many feared that if Al Smith, Democratic nominee in that campaign, was elected, the pope would be in control of America. It is difficult to assess the number of votes this controvery cost Smith, as the battle over the Catholic issue pushed many Catholics, who might have stayed home otherwise or voted for the Republican candidate, to come out and vote for Smith; but the level of hostility caused by the issue demonstrates that religion played a role in politics throughout the period. Religion next played a major role in presidential elections in 1960, when John F. Kennedy battled Richard Nixon. Kennedy tackled the issue head-on and managed to blunt its impact, but many at the time (and later) believed that a significant number of votes, both for and against Kennedy, were

moved by the religion issue. Even in 2004 some put forth religion as an issue with John Kerry. The complaint against Kerry, however, was not that he was too Catholic or that the pope would have too much power, as was the charge with Kennedy and Smith; rather, Kerry was accused of not being Catholic enough as he did not share the pope's views on abortion. A final area where religion shapes the law is in many people's attitudes—most prominently, the subject of abortion. Many people's decisions on the abortion debate/maelstrom (or mud-throwing contest if you prefer) are based in their religion. Thus, religion continues to influence politics and public attitudes, both of which in turn shape the law.

Battles over religion and politics are often said to produce much heat and little light, and when the two are combined, that cliché might be expected to be squared. Many people hold their religion dear, and when one considers the subject, this attitude is quite understandable. Religion for many tells them who they are and what they believe, and religion (oddly enough, along with politics) is often the most important mutable characteristic of an individual's personality. Sex and race are not characteristics that people choose, so religion and political affiliation often become the most important markers of who a person decides to be. Thus, the laws that shape religion, and how religion is implemented, are vitally important. The same has been true of law and religion throughout American history. America has become more tolerant over the years, and the colonies also became more tolerant as they moved toward what became the United States, but that does not mean that this toleration was easily gained or granted. The current wide scope of the First Amendment did not just occur the day after that amendment was passed; it has developed slowly over the nation's history.

Another ongoing tension arises between the establishment clause of the First Amendment, which holds that government cannot establish a religion, and the free exercise clause, which says that people should be free to worship as they choose. However, those in political power often feel justified by their religion (and within their free exercise rights) to use that political power in the area of religion (or morality in their minds), and this, of course, conflicts with others' free exercise rights and their rights to have a government free of religious entanglement. The First Amendment is simple in its concept: government cannot establish a religion and must allow people to worship freely—but the devil comes in the details, and the exact contours of that amendment are forever changing. To make a complex situation more difficult, of course, religion is very important to many Americans, and to many of the rest, the right to be left alone to practice no religion is equally important. Thus, religion and the law will always intersect, but this interaction must be considered with thoughtfulness as it represents a vital balance in the freedoms so essential to the nation.

Acknowledgments

I would be truly amiss if I did not thank my friends who have shepherded me along and provided me with laughs and companionship. These include Dennis Trinkle, Paul Wexler, Elizabeth Hill, Fred "Bud" Burkhardt, Linda Ruggles, and David Staley, among many others. I would also like to thank my family, including my parents and sisters.

I would like to thank the history department and my students at the University of Kentucky, particularly Dr. Robert Ireland and Dr. Robert Olson. These two professors have given me numerous opportunities to expand my learning, and my students constantly make me reconsider my ideas, and remind me why I became a historian with their interests and questions.

I would also like to thank all those who took the time to answer my questions throughout this project. This includes all the librarians, scholars, and religious figures I contacted during the course of the work. Without their help this project would have been much more difficult.

I would like to especially thank the Church of Jesus Christ of Latter-day Saints headquarters in Salt Lake City, Utah, as a number of people there took the time to discuss several issues with me at length and to return my long-distance calls.

Though it feels peculiar to express gratitude to someone dead for nearly two centuries, I would like to thank James Madison. Without his work adding the freedom of religion to the Bill of Rights, our religious freedom would not be nearly as expansive as it is today. Similarly, the Taft Court needs to be thanked for its decision in *Gitlow* v. *New York,* which began the process that broadened the freedom of (and from) religion to include the states.

The editorial team at ABC-CLIO has been stellar throughout the project. My thanks go out especially to Steven Danver, lead acquisitions editor, and to Alex Mikaberidze, submissions editor. Their input and feedback helped me immeasurably in the preparation of this manuscript. I would also like to thank copyeditor Patterson Lamb, senior production editor Vicki Moran, and media editor Ellen Rasmussen. Their careful and meticulous editing and research, along with their patience, have greatly improved this encyclopedia.

However, any faults that remain in this work are my responsibility alone.

This volume is dedicated to my mentors, who have pushed me to be better while still believing in me, who have given me encouragement and have shown me by example how to be a true scholar. True mentorship is knowing how to encourage, support, and push all at the same time, and many people have filled this role in my life. This volume is also dedicated to my wife, Jessie, who has been my most important supporter, and to my daughter, Caroline.

TIMELINE

1215 The Magna Carta is issued by King James; this document set forth the rights of Englishmen, particularly the lords, and is seen as the first written set of rights in Western civilization.

1607 Jamestown is founded, with a focus more economic than religious. Virginia, principally economic in its founding, is somewhat less influenced by religion and so is more favorable than Massachusetts toward separation of church and state.

1620 Plymouth Colony is founded by the Pilgrims, who wanted to separate from the church of England and avoid its influence.

1630 Puritan migration from England. John Winthrop issues his "City on a Hill" sermon setting up Massachusetts as a model to encourage the rest of the world, particularly England, to behave better (and thus become Puritan).

1633 Maryland is established as a haven for Catholics, but it also accepts Protestants.

1635 Roger Williams is forced out of the Massachusetts Bay Colony, eventually settling in what will become Rhode Island. Rhode Island is the first colony to grant religious toleration.

1637 Anne Hutchinson is banned from Massachusetts Bay Colony.

1649 Toleration Act is passed in Maryland, allowing religious toleration for Catholics and Protestants. This act is in effect for only five years, as in 1654 Maryland passes laws removing religious freedom from Catholics.

1681 Pennsylvania is formed as a religious haven for Quakers and others. In 1682, Pennsylvania announces its governing laws, including religious toleration for all. Pennsylvania is the second colony, after Rhode Island, to grant religious toleration.

1689 The English Parliament passes the Act of Toleration as part of the Glorious Revolution, which grants toleration to all Protestant sects, but only Protestants.

1692 Salem Witch Trials. This is one of the most noted instances in which the church and state worked together, with about 300 people accused of being witches, 100 being jailed, 20 being executed, and 1 being pressed to death by stones during an investigation.

1720–1740 First Great Awakening. This is a period of great religious fervor and results in several new religious denominations in the colonies.

1776 U.S. Declaration of Independence.

1782 Jefferson writes the Virginia Bill for Establishing Religious Freedom. It allows religious freedom to all, ends payments by the state to an established church, and does not allow government penalties for religious infringements. It is not passed until 1786.

1786 Virginia passes the Bill for Establishing Religious Liberty. James Madison is largely behind this passage, as Jefferson is in France.

1787 Constitutional Convention meets and writes the Constitution.

1789 In response to state requests, twelve amendments are passed by Congress and sent on to the states for ratification.

1791 Amendments Three through Twelve are adopted by the states, becoming our First through Tenth Amendments (the Bill of Rights). Amendment Three, which becomes Amendment One, or the First Amendment, contains the following language: "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof. . . ."

1800–1840 Second Great Awakening. This is a series of religious revivals that generates both new Christian denominations, including Mormonism, and a new interest in reform, leading to abolitionism and temperance. The connection between religion and reform of others' personal lives will remain a dominant theme in the nation. The abolitionist movement continues past the Great Awakening, and it, along with some of the works generated under its influence, like Harriet Beecher Stowe's *Uncle Tom's Cabin,* helps move the nation toward the Civil War in 1860 and the eventual end of slavery in 1865.

1802 Thomas Jefferson, president at the time, writes a letter that contains the phrase "wall of separation between church and state." This phrase is seen by many as what Jefferson and Madison believed the First Amendment to be, an act completely severing church from state. However, this interpretation of what the First Amendment means is opposed, not surprisingly, by others, largely those who want to allow the interaction of church and state.

1810 Congress passes a law calling for mail delivery to occur and postal offices to be open on Sundays, leaving them open seven days a week. Opposition from those who want Sunday to be a holy day of rest finally ends Sunday mail delivery in 1830, except for a few towns like Loma Linda, California, where Saturday is the day mail is not delivered due to the large percentage of Saturday Sabbath observers, and Sunday mail delivery continues.

1833 Bill of Rights is held to apply only to the federal government; Massachusetts, the last state to maintain a tax-supported church, formally disestablishes its Congregational Church.

1840–1860 This period sees a surge of anti-immigrant sentiment, particu-

larly in response to the arrival of millions of Roman Catholics from Ireland, who face opposition both for being Irish and for being Catholic. A political party forms in the time period—the American, or Know-Nothing, Party. Though the party is ultimately unsuccessful, tension over immigration continues. Disputes over which Bible to use in the schools (Catholics favor the Douay Bible and the Protestants favor the King James Bible) lead to rioting in several cities.

1843 Most members of the Mormon Church leave Illinois and head out to the Utah territory, arriving there in 1847.

1859 Charles Darwin publishes his *Origin of Species,* which, as articulated largely in his 1871 book *The Descent of Man,* postulates that man evolved from other species. This view is eventually taken by many to challenge the biblical account and in time it leads to a great controversy over the amount of evolution that should be taught in the schools.

1862 The Morrill Act, mostly aimed against Mormons, is passed, allowing the federal government to begin prosecuting bigamy in the federal territories.

1868 The Fourteenth Amendment is passed, guaranteeing that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1879 *Reynolds* v. *United States,* decided by the Supreme Court, upholds a conviction under a federal anti-polygamy law, creating a distinction between religious belief (always protected) and action based in religion (sometimes protected).

1890 U.S. Supreme Court upholds seizure of Mormon Church property under an act allowing the seizure of property belonging to any organization that supports polygamy. Mormon Church renounces polygamy the same year.

1899 The Supreme Court finds that the government can provide funds for a hospital operated in Washington, D.C., under the direction of nuns.

1907 Kansas mandates a flag salute in the public schools.

1910 The Illinois Supreme Court forbids Bible reading in the public schools because the King James Bible discriminates against Catholic children. Catholic children had been allowed to be excused, but the court held that this exclusion also stigmatized the children and so was not allowable. Most other states, though, do not follow this ruling.

1916 Woodrow Wilson appoints Louis Brandeis as the first Jewish Supreme Court justice. Brandeis faces opposition due to his religion and his progressive views, but is eventually confirmed.

1919 The Eighteenth Amendment, prohibiting manufacture and possession of alcohol, is ratified, going into effect in 1920. It is repealed, but not until 1933.

1925 Scopes "Monkey" Trial occurs in Dayton, Tennessee, where a high school teacher deliberately violates a law banning the teaching of evolution; he is tried for that violation in a highly politicized courtroom event. He is found guilty and fined $100, but the fine is overturned on a technicality. The Supreme Court, in *Gitlow* v. *New York,* in the same year, extends the protections of portions of the Bill of Rights, including the freedom of speech, against state, as well as federal government, actions.

1928 Al Smith of New York, nominated by the Democratic Party, is the first Roman Catholic to be nominated for president by a major political party.

1940 In *Cantwell* v. *Connecticut,* the Supreme Court holds that the Bill of Rights extends the religion clauses of the First Amendment against the states and uses this holding to overturn the conviction of a Jehovah's Witness on a charge of breach of the peace. The same year, the Supreme Court upholds the expulsion from school of two Jehovah's Witnesses for their failure to salute the American flag in *Minersville* v. *Gobitis.*

1943 The Supreme Court strikes down a Pennsylvania ordinance requiring licensing of door-to-door solicitors as it violates the free exercise of religion, specifically for the suing group, Jehovah's Witnesses. The Supreme Court in the same year, in *West Virginia* v. *Barnette,* reverses its *Gobitis* decision and strikes down a West Virginia law, ruling that the state cannot force students to salute the flag, as doing so creates an establishment of religion.

1945 The United States is on the winning side of World War II, but tension soon breaks out between America and its wartime ally the USSR, starting the Cold War. One main difference between the two countries, particularly in the minds of Americans, is the atheist nature of the USSR and the Christian nature of the United States, and thus many people push the nation to demonstrate national Christianity more openly.

1947 The Supreme Court, in the *Everson* case, first rules in the area of education and religion in terms of a state program, holding that the state could reimburse parents for the cost of transportation of students to a private religious school.

1948 The Supreme Court first rules on the question of religious education in the public schools, disallowing a program in Illinois (the *McCollum* case) where religious education is taking place on public school grounds.

1952 Varying from their 1948 ruling, the Supreme Court in *Zorach* approves a program of religious education that takes place off school grounds.

1954–1956 Due in large part to Cold War–era pressures, the United States adopts "In God We Trust" as a national motto and adds the words "under God" to the Pledge of Allegiance.

1960 John F. Kennedy becomes the first Catholic to win a U.S. presidential election.

1961 The Supreme Court upholds a blue law, in *McGowan,* allowing states to set aside Sunday as a day of rest. The Supreme Court holds that while the original purpose may have been religious, there are now secular (nonreligious) reasons supporting the practice.

1962 The Supreme Court, in *Engel* v. *Vitale,* rules that state-created prayer in public school is unconstitutional.

1963 In the *Abbington Township* case, the Supreme Court rules that Bible reading is unconstitutional in public schools. The Court also rules there that a balancing test must be used to determine whether rules that infringe on religious practices are constitutional, with the rules being constitutional only if the infringement caused by the rule is needed to advance a compelling state interest. It should be noted that the law itself may still stand, but that all who bring legitimate religious objections to its application would be exempted. This decision, along with *Engel,* creates a firestorm of opposition with many people labeling the Supreme Court "atheistic" or "godless" or calling for the impeachment of the justices (or all of the above). The Supreme Court, in *Sherbert* v. *Verner,* states that a Seventh-Day Adventist who refused to work on her day of religious observance, Saturday, cannot be denied unemployment compensation.

1964 Congress passes Title VII of the 1964 Civil Rights Act forbidding religious discrimination. The larger bill is aimed at prohibiting discrimination on the basis of race. Note that religious belief and practice are protected outside the workplace, but only religious belief is protected inside it, generally. Religious practices in the workplace need to be accommodated, a later amendment states, only if an employer can do so without undue hardship. Religious organizations are still allowed to discriminate when religion is part of a true job prerequisite (a bona fide occupational qualification, in the words of the act) and religious entities are still allowed to control their own hiring and firing.

1968 The Indian Bill of Rights extends the Bill of Rights to Native Americans but exempts tribes from the establishment part of the First Amendment. This means that tribes can establish religions if they choose. Traditionally many tribes mixed religion and government, and the Indian Bill of Rights allows them to continue doing this.

1970 The Supreme Court, in *Walz,* upholds tax exemptions for

churches, stating that the practice is supported by history and public policy. Note that tax exemptions need to be given to all bona fide churches in order for such a policy to be legal. Tax exemptions could not legally be given to Christian churches but denied to Jewish synagogues, for example.

1971 The Supreme Court, in *Lemon* v. *Kurtzman,* creates the *Lemon* test, a three-part test for determining whether a law in the area of religion is constitutional: a law must have a secular purpose, must neither advance nor retard religion as its primary effect, and must not create an excessive entanglement for the government with religion.

1972 The Supreme Court, in *Yoder,* allows Amish families to remove their children from public high schools.

1973 The Supreme Court, in *Roe* v. *Wade,* strikes down a law restricting an abortion and recognizes, for the first time, a nationwide right to abortion under certain circumstances. This decision touches off much widespread protest, including religious-based protests.

1978 Congress passes the American Indian Religious Freedom Act, which professes to force the federal government to respect the religious rights of Native Americans but really does little. The Supreme Court ignores it for the most part and slights it when it does recognize it, and Congress also does not take strong steps to force increased rights for Native Americans.

1980 Ronald Reagan is elected president. He is greatly supported by the Moral Majority, founded by Jerry Falwell, a Baptist preacher and college president from Virginia, and their fund-raising efforts. The Moral Majority aims, among other things, to reintroduce prayer into public schools and to overturn *Roe* v. *Wade.* Reagan promises to appoint judges who agree with his views on these issues. The Supreme Court, in *Stone* v. *Graham,* orders the removal of the Ten Commandments from public school classrooms.

1981 Reagan appoints Sandra Day O'Connor to the Supreme Court, the first woman to so serve. While it is generally assumed that O'Connor agrees with Reagan's views, she eventually moves toward the center on the abortion issue, voting to uphold a woman's right to an abortion even while allowing the state to impose more restrictions on them.

1982 Reagan makes good on his campaign promise to support an amendment allowing prayer in public schools. However, the amendment fails.

1983 *Mueller* v. *Allen* allows tax deductions for expenses in both public and private schools (but private school parents are the ones who use them the most). This is the first decision upholding such a tax code provision.

1984 Congress passes the Equal Access Act. This act orders schools to allow equal access (hence the title of the act) to all groups of students who wish to meet, and thus schools are no longer able to ban student groups purely on religious grounds.

1985 The Supreme Court, in *Wallace* v. *Jaffree,* overturns an Alabama statute that had permitted a moment of silence for prayer in schools.

1987 The Supreme Court holds that the secretary of defense can force an Orthodox Jew to remove his yarmulke if that Jew is in the military in *Goldman* v. *Weinberger.* In *Edwards* v. *Aguillard,* the court strikes down a Louisiana law requiring evolution and creation science to be taught equally, if either is taught at all.

1988 Congress passes legislation ordering the secretary of defense not to follow the *Goldman* decision and to allow some religious exceptions to military dress codes, within reason.

1990 In *Employment Division* v. *Smith,* the Supreme Court reverses the decision of *Sherbert* v. *Verner* (1963) and holds that only a rational relationship is needed between a state interest and a law before the state can burden the free exercise of religion if the law is neutral in terms of religion.

1992 In *Lee* v. *Weisman,* the Supreme Court rules that prayer at a public school graduation is unconstitutional, even when the prayer is nondenominational, if it is done at the behest of the school authorities.

1993 Congress passes the Religious Freedom Restoration Act (RFRA), which is aimed at reversing *Employment Division* v. *Smith* and restoring the compelling state interest test.

1997 The Supreme Court, in *Boerne* v. *Flores,* overturns the Religious Freedom Restoration Act when it is applied against the states, ruling that Congress had gone beyond the powers granted to it by the Constitution in reinstating the compelling interest test. The compelling government interest test of the Religious Freedom Restoration Act, however, is still considered a restraint against the federal government, as Congress can almost always legislate for the federal government but cannot create new rights while claiming to protect old ones, as the Supreme Court saw Congress doing here.

1998 Congress attempts to pass the Religious Freedom Amendment, which does not go back to the Religious Freedom Restoration Act, as some might expect, but instead goes back against *Lee* v. *Weisman* and against *Engel* v. *Vitale,* in many respects. It attempts to allow voluntary school prayer and prayer at graduations as well as the posting of the Ten Commandments on school grounds and the printing of "In God We Trust" on our currency. It should be noted that the last instance had been already upheld by the Supreme Court. It fails by two

votes in the House of Representatives and so is not sent on to the Senate.

2000 Joe Lieberman, vice-presidential candidate on the Democratic ticket, is the first Jewish vice-presidential candidate. Congress considers using a Catholic priest as its chaplain, but the move is opposed, as some see the priest as unavailable to help families due to his celibacy, while others oppose his appearing as the U.S. chaplain in clerical vestments. Congress uses a Protestant clergyman instead, as it always has. Congress also passes the Religious Land Use and Institutionalized Persons Act (RLUIPA), which aims to give more protection to religious organizations in their land use and to people who are in prison. It requires that the state and federal government demonstrate a compelling interest before imposing a substantial burden upon these two groups.

2002 The Supreme Court, in *Zelman,* approves Ohio's program of school vouchers, where the parents choose which schools their child attends (and which school receives money from the state through a voucher) even though most of the schools chosen have a religious affiliation and thus a large amount of funding is channeled to religious schools. The parental choice, in the eyes of the Court, keeps this from being an endorsement of religion by the government.

2003 The Supreme Court, in *Lawrence and Garner,* strikes down a Texas law criminalizing private homosexual sodomy because it violates the constitutional right to privacy. Those on the Court opposed to this decision cite as one of their reasons the belief that this decision will lead to same-sex marriages.

2004 John Kerry is the third Catholic presidential nominee. Kerry fails, but unlike the situation in 1960, opposition to him in the area of faith does not come from those who feel that he follows (and would follow as president) too strict an adherence to his religion, but from those who feel that he follows it too loosely, particularly in the area of abortion; Kerry is pro-choice, putting him at odds with the official church doctrine. The Supreme Court, in *Newdow,* rules that a California parent who sued, on behalf of his daughter, against the phrase "under God" in the Pledge of Allegiance, did not have standing to sue. As Newdow did not have custody of his daughter, the Court ruled he could not sue for her.

2005 President George W. Bush, in August, suggests that intelligent design and evolution should be taught equally in the classroom. Some suggest that this move is to boost his ratings with the social conservatives. In December, the case *Kitzmiller* v. *Dover Area School District* is decided by the District Court for the Middle District of Pennsylvania. It declares unconstitutional Dover's policy of requiring teachers to read a

disclaimer noting that evolution is only a theory and suggesting an alternative textbook based on intelligent design. The Supreme Court also rules, in *Cutter,* that the RLUIPA, adopted in 2000, is constitutional.

2006 The Supreme Court, in *UDV,* rules that the RFRA is constitutional in requiring the federal government to prove a compelling interest before it can ban a drug used in a religious ceremony. This, in many ways, is seen as a move back toward reversing (or at least limiting) *Employment Division,* which allowed the government to penalize use of peyote, another drug used in religious ceremonies.

Essays

Church-State Relations

Government has had a shaping influence on the scope of organized religion in this country, at the federal, state, and local levels. Similarly, organized religions have had some subtle and not-so-subtle influences on the U.S. government. This might seem to clash with the idea of freedom of religion, and, indeed, sometimes it has done so, but the relationship between church and state is much more complicated than it might seem to be at a brief glance. Church efforts to shape government affairs and government attempts to influence church positions can be examined in legal cases. A brief study of the issues arising when an organized religion is restricted by government practice will help illustrate how difficult it can sometimes be to separate church from state and vice versa. Some cases deal with individuals, but the decisions arising from those cases affect an entire religion. (Discussions of individual freedoms of religion and direct attempts by the state to establish religion appear elsewhere in this encyclopedia.)

The state has had a shaping influence on many areas of church policy. Despite the beliefs of some, the state is allowed to generally regulate the nonreligious behavior of churches, especially when that behavior is pretty much fully separate from religion. Thus, if a religious organization operates a day care program in its building, the program is still subject to the same safety and health regulations that any other day care program would be. The same is true for the regulations of the workers, except in the area of religion, or where religion affects the worker. For instance, churches are not allowed to discriminate on the basis of sex except when the discrimination is shown to stem from direct religious belief.

The Seventh-Day Adventists were allowed, in a lawsuit decided in 1985, to discriminate against women and not hire a woman minister because they had a preexisting specific and clear doctrine that they did not hire women as ministers. In another case, though, the Seventh-Day Adventists were not allowed to discriminate on the basis of sex in their general hiring practices, as there was no specific doctrine that the church could point to that justified their action. (As a matter of fact, the church claimed not to discriminate against women generally.) Religious organizations are allowed a lot more leeway in the hiring and firing of ministers than in the hiring of other employees, as the ministers are directly involved with religion in a way that other employees are not.

Churches, and even church-run organizations, are allowed to stipulate that general employees be members of a specific religion or that they observe the church's standards, or both, and those qualifications have been upheld. However, discrimination outside of those religious qualifications is not allowed. For example, a religious school was allowed to fire a person for divorcing and then remarrying without having the first marriage annulled, as Catholic doctrine required, because the teacher was previously informed of this in the handbook containing the code of conduct. However, a church was not allowed to use religion as a defense against an age discrimination suit because it had no religious doctrine dictating age discrimination.

Religious discrimination is also permitted when the religious qualification is an important part of the job, or, in the words of the law, a "bona fide occupational qualification." Even groups that are not traditionally thought of as being a religion are allowed to discriminate on

the basis of religion. Loyola University, a college that is affiliated with the Jesuits, was not defined to be a religion but was allowed to have a religious qualification for hiring professors in some departments, as the school wanted to keep its Jesuit orientation. One way to do this, and a legitimate way in the eyes of the courts, was to require the hiring of Jesuits in some departments.

However, just because some organizations or companies think of themselves as religions, the courts are not required to consider them as such. A company that believed itself to be religious required church service attendance from its employees. But it learned it was not allowed to fire people for not attending those services. Just having religious people run a company does not make that company a religion. Similarly, a children's home believed itself to be religiously affiliated but it did not require church services or require children to have a Bible. The children's home was allowed to fire its director and hire a minister (of the same religion) in his place because the decision was determined to have been based on an educational requirement. However, the home would not have been allowed to discriminate based on the actual religion practiced by its director. These two cases show that companies must be directly controlled by a church, or at least have a strong affiliation with one, and act in ways to reinforce that affiliation to be able to discriminate on the basis of religion. Generally, all other discrimination will be open to scrutiny, even though it may turn out to be justifiable if the church or company can support it with specific church doctrine.

Another item to examine is what generally applicable regulations, outside of employment, are allowed to be applied to religions, either in the area of their worship or in their general practices. First, most such generally applicable regulations do still apply to religions. This is especially true when the laws only incidentally burden the practice of religion. An evangelist protested California's tax law, which required his church to pay sales taxes on all items sold during a revival that occurred in California. The Supreme Court held that this tax could be applied to the items sold as long as the tax was not aimed, either on its face or in how it was written, at religions in general or this type of religion in particular. As the issue occurring here was the regular sales tax being applied to the pamphlets sold by the church, collecting the tax was allowed. Laws that incidentally burden religion, similar to those that incidentally benefit religion, are both permitted as the first is not a ban on the freedom of religion nor is the second an establishment of religion. This rule has generally held true for the last seventy years, ever since the First Amendment was applied against the states in the area of religion.

Laws that have a substantial effect on religion but are general in nature, have a more checkered response from the courts. In the 1960s, in *Sherbert* v. *Verner,* the Supreme Court dealt with an employee who had first been fired for refusing to work on her religious Sabbath (Saturday in this case) and then was denied unemployment benefits on the basis of what was considered an unwillingness to work. The system considered her refusal to work on Saturdays to mean that she was unwilling to work at all, but the Supreme Court held that the policy infringed upon the employee's freedom of religion and so was illegal. The Court held that a "compelling state interest" was needed to justify regulations that impacted religion through their effect. This was a pretty high burden to meet, and while fewer regulations could do so, some were still allowed. For instance, a state law requiring certain businesses to close on Sundays was upheld, as a regulated day of rest was deemed a compelling state interest. Past laws regulating public conduct were also cited as being able to meet this test, including a law banning polygamy, which was upheld as part of the state's police power.

In 1990, the Supreme Court reversed *Sherbert* in *Employment Division* v. *Smith.* Similar to the facts in *Sherbert,* unemployment benefits

were once again involved. In this case, two Native Americans had used peyote in a religious ceremony and then were fired from their jobs at a drug treatment facility. The state then denied them unemployment benefits, as they had been fired for misconduct. Those suing argued that this regulation basically banned their religion, as a part of their religion required them to use peyote. The Supreme Court held that the regulation and denial of benefits was admissible and fashioned a new rule for testing the constitutionality of laws that impact religion. The Court first commented, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (494 U.S. 872: 878–879). The Court also refused to order that an exception to the drug laws be allowed for religious drug use. Thus, laws only had to be general and justified, and they could burden religion.

Laws that are not general, however, are still very much suspect. When it can be proven, either through the way the law is written or the way the law is applied, that the law is targeting a certain religion, then the law will probably be struck down. This is not always the case, however, and the courts do not have to admit this. For instance, the regulation just noted banning polygamy was passed to restrain the Mormon Church. However, rather than examining it as a law targeted at one religion, all of the courts looked to see whether polygamy was an evil, and as it was held to be such, it was allowed to be banned.

Recent courts have often been a bit more suspicious of legislation and have often struck down laws that seemed to be aimed at only one group. In one of the more recent attempts, the city of Hialeah regulated the Church of the Lukumi Babalu Aye out of existence. That church practiced the Santeria religion, which originated in Cuba and moved to the United States and includes animal sacrifice in some of its rituals. The city claimed not to be trying to ban the religion but to be regulating the killing of animals, citing a number of interests, including protecting health in general, preventing animal cruelty, and protecting children (who might have been harmed by watching the sacrifices). The Supreme Court, however, did not accept this justification. They first articulated the standard for laws that were not neutral and not general, and that standard was that laws "must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest" (508 U.S. 520: 531–532). This standard, of course, is very close to that of the *Sherbert* case. The Court then found that the law was targeted against the Santeria religion, as, for instance, it allowed the killing of animals for food purposes, but did not allow it for animal sacrifices. The Court also found that the laws were not narrowly tailored and that the city had not been as vigilant about going after other practices that affected the same claimed interests. Thus, if the city was not really interested in protecting these interests, there was no reason for it to pass those laws except to ban the Santeria religion, which clearly was unacceptable under the First Amendment.

The Supreme Court has also struck down legislation that appears to be neutral but really uses the parameters of the majority to suppress the minority, particularly in religion. A prime case of this is in *Cantwell* v. *Connecticut,* decided in 1940. There, a Jehovah's Witness was going door to door and asking to play a record. Upon playing the record, which contained an attack on the Roman Catholic Church, Jesse Cantwell (and his brother and father) were all arrested for failure to register their intent to canvass door to door and for "breach of the peace." The registration statute was struck down as it created a prior restraint upon the religious freedom of the three, and the Supreme Court weighed the interest in religious freedom versus the interest of the public to keep peace. The Court did not deny that the public has an interest in keeping the peace but pointed out that no riot had erupted and that Cantwell would have moved on if he had been asked to do so. Thus, the

Court held that the hearers could not shut off discussion of ideas they found offensive as that would mean that only the majority would be heard, and this idea of the majority having an absolute veto violated the First Amendment's right to freedom of religion. This is an example of a case that dealt with an individual but affected an entire religion. One duty of Jehovah's Witnesses is to witness, and if the Cantwells' convictions had been upheld, others in that religion would have had a more difficult time protecting their right to practice their religion.

The Jehovah's Witnesses came before the Court several times in the 1930s and 1940s in precedent-setting cases. Two cases came from Alabama in the early 1940s, and the first case upheld the conviction of Jehovah's Witnesses for canvassing without a license. The Witnesses would have been required to pay for a license as the state argued that their practice was similar to a door-to door business, and both should be regulated. It was a narrow decision, and the case was heard for re-argument the next year. After the new set of arguments, the convictions were overturned. In the mind of Justice Douglas, writing for the Court in the second case, the state was never allowed to tax ideas in advance. Taxes after the fact, like sales and income, might be allowed, but never prior taxes. He wrote, "Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights" (319 U.S. 105: 116). Thus, religious licensing taxes were not allowed after the early 1940s, and neither were arrests merely because what was heard disturbed the person hearing it, when that was not the purpose of the person undertaking the religious message.

Jehovah's Witnesses were also the subjects of the cases *Lovell* v. *Griffin* (1938) and *Marsh* v. *Alabama* (1946). In *Lovell,* the Court held that distributing literature was part of the freedom of the press and that a state ordinance was censorship when it required that everyone distributing literature first apply to the city council for permission; this kind of censorship was banned under the First Amendment. *Lovell* did not directly consider the religious nature of the publication, preferring to deal with the freedom of the press, and the legal background of freedom of the press had been more defined at that point, but the case was still an important landmark for the freedom of religion. In *Marsh,* the Court considered a company town that had posted a notice not allowing any distribution of literature without written permission. The company town had claimed that they were a private company and so were not covered under decisions such as that announced in *Lovell*. The Court, however, weighed the corporation's property interest versus the right of the people to be informed and the right of the Witnesses to practice their religion and held that the First Amendment guarantees must triumph.

The Jehovah's Witnesses are not the only ones who have had potential restrictions on their recruiting/proselytizing considered by the courts. Among the other groups are the Jews for Jesus and the Hare Krishnas. The Jews for Jesus had been passing out literature and asking for contributions in the Los Angeles International Airport. In order to curtail these activities, the airport commissioners passed a simple ban on "all First Amendment activities" in the airport. The Supreme Court struck down this ban as being overbroad. With First Amendment activities, a significant government interest must justify restrictions and the restrictions need to be narrowly drawn, but the ban here was so broad that nothing could have justified it. The Hare Krishnas consider it part of their religious duty to ask for contributions and to pass out literature, and thus often congregate in airports and at other public events. One airport banned both solicitation and liter-

ature distribution from the Hare Krishnas, and the Supreme Court upheld the solicitation ban, but struck down the ban on literature distribution. The reason for the split was that one justice in the middle felt that there was enough of a concern about fraud to justify the restriction on solicitation, but the fraud vanished when only literature distribution was considered. A second justice felt that this was a public area and so should be open to discussion of issues, but could be restricted in the area of solicitation of funds. It should be noted that four justices did feel that both bans were acceptable, as concerns over litter and congestion were enough to allow both bans. In another case, a fair adopted a regulation requiring the Hare Krishnas to stay in one place and the Supreme Court found this to be allowable as the minimal restriction on the First Amendment rights of the Hare Krishnas was acceptable when balanced against the fraud concerns of the state (and other concerns). Thus, limitations on the freedom of religion are allowable, as well as even more strict limitations on solicitation as part of the freedom of religion, but no total bans are allowed, which says that the state can limit religion more closely when religion steps outside of the traditional church and into the public sphere.

Religious groups have also tried to influence the state and encourage it to pass legislation. The efforts discussed here generally regard those individuals and groups who pushed for legislation on behalf of a specific religious faction rather than those religious individuals who pushed for legislation on their own. One particular movement that saw the influence of religion was the move toward the addition of the phrase "under God" in the Pledge of Allegiance in the 1950s. The Pledge of Allegiance, in a slightly altered form, was originally written in the late 1890s and was adopted in 1942 as the national flag salute. In the 1950s, the Cold War was in full swing, and some argued that the pledge could be said equally for the United States and the USSR by just changing the name of the nation, and so those people argued for language identifying the United States as different from the USSR, focusing on the religious element of this country. Among those groups were the Knights of Columbus, a fraternal group that had been formed to give Catholics a fraternal organization to join (many of the existing fraternal groups limited membership, either officially or unofficially, to Protestants). Individuals were also important in pushing this change through, one of whom was the Reverend Dr. George M. Docherty, a Presbyterian minister from Washington, D.C.

Religiously oriented groups were also behind part of a more recent controversy (at least more recent in terms of when it reached the Supreme Court). In the 1960s, the Fraternal Order of Eagles set up on the statehouse grounds in Texas, as they did in other places in a variety of states, a large monument displaying the Ten Commandments. The Eagles believed that by stating the Ten Commandments they would be fighting juvenile delinquency and other things they believed to be running rampant in the 1950s. The Fraternal Order of Eagles required belief in a supreme being before allowing membership to an individual, and their belief that a Christian lifestyle was the best way to fight that delinquency left little doubt as to which supreme being they favored. This monument was not challenged until 2001 (and the challenge was struck down), but it does clearly demonstrate that throughout the 1950s and 1960s, religiously oriented groups were trying to shape public legislation and public monuments to favor religion.

In the 1970s and 1980s, religious groups took a more direct approach to shaping the state. The Moral Majority, led by Southern Baptist minister Jerry Falwell, was formed to funnel support to conservative political candidates. This group was a strong supporter of Ronald Reagan and argued for a variety of conservative laws. The "pro-life" movement, which sprang up after the *Roe* v. *Wade* decision, was led in part by many conservative Protestant

Evangelist Jerry Falwell, founder of the "Moral Majority," greets GOP presidential candidate Ronald Reagan as he arrives to address the National Religious Broadcasters in Lynchburg, Virginia, on October 3, 1980. (Bettmann/Corbis)

ministers and drew from conservative Protestants and Roman Catholics. In the early 1980s, when AIDS was first discovered, many conservatives argued that this was "God's wrath" on homosexuals for their behavior, and this view was the main reason that the Reagan administration took so long to fund AIDS research. Indeed, it is generally accepted that Reagan changed his opinion only when Rock Hudson, a Hollywood leading man in Reagan's era, was publicly revealed to have AIDS. Falwell, in the early 2000s, supported President Bush's programs that provided funds to churches and other groups to provide social services, in the effort called Faith-Based Initiatives (later also called Faith-Based and Community Initiatives). The idea was that churches were good avenues for providing social services.

Separation of church and state is often debated in America, particularly in terms of exactly what degree of separation is supposed to exist between the two. American legal history clearly demonstrates, regardless of what future politicians, courts, and populaces determine, that the church has not been wholly free from state regulation, even while the state has given it more leeway than other similarly situated organizations, and that the church has also attempted, with a modicum of success, to influence the state. Thus, pundits, who, when asked what they thought about the separation of church and state, simply responded "it would be a good idea," still clearly have a point.

Freedom of Religion

The freedom of religion is one of the most treasured individual freedoms in American history and is, in many people's minds, the reason large groups of immigrants came to America. However, freedom of religion is not self-defining, and many Supreme Court cases have therefore examined exactly what limits may be placed on the freedom of religion. The focus here is on individual freedom of religion rather than freedom from government establishment of religion or the government's legal interactions with churches, though the discussion brushes on both of those topics. Those topics are covered elsewhere in this volume.

Freedom of religion, particularly for the individual, was not part of early American history. Many of the early colonies had state-established churches. It is true that many groups left England, particularly the Pilgrims, because they faced harassment for their religious choices. But those groups did not necessarily want, in turn, to give others religious choices. They merely wished to have the freedom to establish their own religion. Many of those established churches were aided by state-collected taxes. Eventually some colonies moved to a policy of allowing individuals to choose which churches their taxes supported, but people were still forced to support an individual church. Some might have considered this freedom of religion, since the choice of churches was available; however, many felt it was not freedom at all, as not

supporting any church was not an option. For much of American history, many people did not think that freedom of religion included freedom not to have a religion, and a significant percentage of people today still hold that view. However, situations in which the freedom of religion included the freedom to choose no religion were (and generally are) considered freedom of religion cases by the Supreme Court, and the whole spectrum of religious choice needs to be available in order to have true understanding of freedom of religion in this country today.

In early American history, few legal cases arose purely from individuals seeking freedom of religion. Some did try to have the state reduce or abolish support for a government-approved religion, but those campaigns against established state-chosen and supported churches are more freedom from an establishment of religion than freedom of religion. Those who believed that a state was not treating a religion fairly often just went elsewhere or suffered in silence. The Supreme Court also did not consider many cases dealing with the freedom of religion in the early years, as the First Amendment was held to deal only with federal laws, while most laws were (and are) passed at the state level. The federal government generally dealt, especially in the country's early history, only with the federal territories. It was not until the early twentieth century that the First Amendment was extended to also regulate the laws of states, in *Gitlow* v. *New York*.

Shortly before that, the Supreme Court heard the first major cases focused on freedom of religion. These were a series of cases dealing with polygamy in Utah. The Latter-day Saints, after their founding, relocated to Utah in response to fierce opposition to their religion. Mormon doctrine included polygamy, and it was a relatively prevalent practice, particularly among the leaders. Brigham Young, longtime leader of the Mormons, had twenty-seven acknowledged wives. The U.S. government fiercely opposed polygamy, in part because of the moral and political issues involved. Congress, acting for the territories, quickly banned polygamy, and then, when that did not seem effective, added an act disenfranchising anyone who believed in polygamy. In 1887, Congress completed the anti-Mormon and anti-polygamy legislation by revoking the church's charter and seizing its property.

The Supreme Court first heard a case dealing with polygamy in 1879 in *Reynolds* v. *United States.* There the secretary of the Mormon Church was convicted of polygamy, and the Court held that claims of a free exercise of religion could not stand against bans on illegal actions. While belief was held not to be regulated (at this time), actions that ran contrary to society were not allowed, as the Supreme Court believed that allowing religion to excuse illegal actions would create anarchy. In 1890, the Supreme Court heard a case dealing with someone disenfranchised for believing in polygamy, and held that polygamy was enough of a crime that advocating it was also allowed to be a crime. The final case, also in 1890, tested the 1887 law disenfranchising the church and also upheld that, but examined the contracts issue rather than religion. Even though the Supreme Court had previously held contracts to be generally unable to be voided, the Court here held that corporations that did illegal deeds, like polygamy, or advocated them, could be dissolved. The Mormon Church later disowned the practice of polygamy and was allowed to reestablish itself as a religion, and in 1894 Congress gave back its remaining funds.

The Supreme Court did not return to the freedom of religion until 1940, well after the First Amendment had been held to apply against the states in *Gitlow* v. *New York,* which was decided in 1925. In 1940 the case of *Cantwell* v. *Connecticut* tested the constitutionality of a breach of the peace statute that had been applied against Jesse Cantwell, a Jehovah's Witness. Cantwell had been traveling through New Haven, Connecticut, playing a record that attacked the Catholic Church among other

Walter Gobitis and his children William and Lillian at the U.S. District Court in Philadelphia, Pennsylvania, on February 16, 1938. The children testified that saluting the American flag violated their religious principles as members of the sect known as Jehovah's Witnesses. (Bettmann/Corbis)

things as a way to promote the Jehovah's Witnesses. Even though he offered to move along, he was arrested. The Supreme Court struck down the statute as infringing upon Cantwell's free exercise of religion and thus formally extended the protection of the First Amendment against state laws.

The next major Supreme Court case that focused on freedom of religion was *Minersville* v. *Gobitis* in the same year as *Cantwell,* which examined the right of Jehovah's Witnesses not to salute the flag. By this time, Jehovah's Witnesses considered flag salutes to be the worship of a graven image, which is strictly prohibited in that religion. Thus, the mandatory flag salute existing at the time violated their religion. Many Witnesses refused to salute the flag and, before 1939, it was not often a legal matter. After 1939, though, war was brewing in Europe and many states moved to force patriotism in their citizens; one way to do this was a mandatory daily flag salute and saying of the Pledge of Allegiance. When the Witnesses refused, they were considered un-American. Thus the chances for controversy and the stakes were raised by the coming of war in Europe. However, the actual first Supreme Court case on the topic had started before 1939, when, in 1938, Lillian and William Gobitis had been suspended for refusal to salute the flag. Two lower courts ordered that they be allowed to attend school and held in their favor. In 1940 their

case reached the Supreme Court, which reversed the two lower courts, holding that the state could force Witnesses to salute the flag. The opinion reverberated with war overtones, holding that states were able to force their citizens into patriotic exercises. Many Witnesses still refused and they were treated very poorly by their communities. In part due to this reaction, and in part perhaps due to the improving war results throughout 1942 and 1943, and in part due to a rethinking of the law, the Supreme Court reversed itself in 1943 and held in favor of another set of Witnesses in *West Virginia* v. *Barnette.* This decision was celebrated by the law reviews and periodicals that had condemned the *Gobitis* decision, but it also received a negative review from those who had been attacking the Witnesses, both verbally and otherwise.

After the *Barnette* case, the Witnesses were generally left alone on the flag salute issue, even though they continued to have difficulty with the law in the area of their door-to-door religious activity. Part of the doctrine of the Jehovah's Witnesses (and hence their name) is that they should travel and spread the word of their beliefs. While many religions are willing to discuss their beliefs and advocate them, the Witnesses are some of the most forward, particularly in the area of reaching out, as they literally witness door to door. This has caused quite a few prosecutions. The Witnesses were first arrested for a breach of the peace in the *Cantwell* case noted above. The Witnesses were next arrested for refusal to register, as many towns had ordinances that one could not go door to door without a permit and/or without registering, and many Witnesses either refused to register or to pay for a permit. A series of cases, starting in the 1940s, held that communities could not force Witnesses to pay licensing taxes or to register, or to get prior approval of their witnessing and materials, as all of these were infringements on their freedom of religion; in the case of the approval of materials, the laws were also infringements on their freedom of the press. Freedom of speech also sometimes entered into the equation. These cases have not gone away, as in 2002 the Supreme Court again heard a case concerning an Ohio village ordinance that required registration, striking the ordinance on an 8–1 vote (*Watchtower Bible and Tract Society of New York* v. *Village of Stratton,* 536 U.S. 150).

After the Jehovah's Witnesses cases in the 1940s, the next time the Supreme Court ruled on items it considered related to the freedom of religion was dealing with religious observances. The first case the Court considered concerned the so-called "blue laws" that required certain businesses to close on Sundays, or required certain things not to be sold on Sundays. These were challenged in the instance of Sunday closings as a restriction on the free exercise of religion by Orthodox Jews who argued that these laws required them to close twice, once on Saturday to observe their religious holiday, and then on Sunday. The Supreme Court upheld these laws, saying they had moved from religious to secular regulations, as the purpose was a mandated day of rest, and that regulations neutrally drawn that infringed upon one religion more than another were still valid. A different result about Sabbath observances was reached in 1963 in *Sherbert* v. *Verner.* That case considered the situation of a Seventh-Day Adventist who refused to work on Saturdays, as that was her day of religious observance. For this refusal, she was fired from her job and then denied unemployment compensation, as the state allowed such compensation only if one was willing to work and was looking for work, and the state defined her refusal to work on Saturdays as not being willing to work. The Warren Court overturned the state's decision, holding that it was a restriction on the woman's freedom of religion to require her to work on her Sabbath. Restrictions on the freedom of religion were still allowed, but only if the state could demonstrate a compelling state interest that was served by the regulation. The Court found none, and differentiated that from the Sunday closing laws in

holding that providing a day off each week, and ordering Sunday to be that day, was both a compelling state interest and the only way to reach that goal. Thus, by the end of the 1960s, Sunday closing laws were upheld while a state could not order those who observed their religious Sabbath on Saturdays to work.

The Burger Court, which followed the Warren Court, considered once again the reach of the free exercise of religion, but this time in the context of secondary education, in *Wisconsin* v. *Yoder.* While the Burger Court is generally considered to be more conservative than the Warren Court, here the Burger Court reaffirmed the holding in *Sherbert* that a compelling government interest is required to restrict the free exercise of religion. In this case, the state of Wisconsin had passed a compulsory education law requiring students to attend high school until graduation or age sixteen. The Amish did not object to having their children attend the first eight years of schooling, but felt that high school would threaten their lifestyle, as the ideas taught there clashed with their Amish values. The Supreme Court agreed with the Amish and did not find that Wisconsin had advanced a compelling state interest in the case. Subsequent plaintiffs, particularly those who were not as appealing as the Amish to the Court, did not have as much success under the free exercise of religion clause, but *Sherbert* was not overruled—just ignored or limited. For example, a Jewish air force psychiatrist wished to wear his yarmulke. He did so for five years without incident, but then was reported after testifying in his yarmulke in a court case, and it is suggested that the report may have been retaliation for the testimony. Regardless, the psychiatrist had his career ended and so he sued. The Supreme Court upheld the military dismissal, not wanting to challenge the military and also arguing that all neutrally written laws (like the military clothing regulation here) should be upheld. It should be noted that Congress ordered the secretary of defense to change the regulation the following year.

The Supreme Court's major response to *Sherbert* came in 1990 in *Employment Division v. Smith.* That case concerned two Native Americans who had taken peyote as part of a religious ceremony and then been fired from their jobs as drug counselors. They then were further denied unemployment compensation as their firings were caused by what the state considered misconduct related to their jobs, a circumstance that did not allow unemployment compensation. The Supreme Court upheld the denial of unemployment benefits, holding that neutrally written laws that were justified by a government interest are constitutional, unless the free exercise claims in the area of actions were combined with other interests, such as free speech or freedom of the press or parental rights. Thus, the free exercise clause was made less important than the other parts of the First Amendment. Many people were outraged by this case, not so much because it hurt Native American religion (the Native Americans have been, unfortunately, regularly on the losing end of decisions, especially in the area of religion, for most of the twentieth century), but because it threatened other religions. If Native Americans could be penalized for using peyote, could Jews be penalized for wearing yarmulkes or Catholics for wearing crosses? Some might say that the behavior was different, but all are parts of the free exercise of religion in the area of actions. Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 to try to restore *Sherbert* and the compelling interest test.

The Supreme Court, however, relatively soon acted to strike down this act in *City of Boerne* v. *Flores.* There, a Catholic church had wished to expand its facilities, but the city had denied its application for a housing permit. The church sued, claiming that the city lacked a compelling state interest. The Supreme Court in 1997 agreed with the city, striking down the RFRA requirements in that case. The reason given was that Congress had used its enforcement powers under the Fourteenth Amendment to pass this law, saying that they were enforcing the people's

religious rights. However, the Supreme Court held that they were reinterpreting the rights, not enforcing the existing rights. Enforcement was still within the bounds of Congress, but interpretation, and what was protected and with what standard, was the Supreme Court's province. Unlike the original *Smith* decision, which was a 5–4 decision, this decision was unanimous in holding that Congress had gone too far—although the Supreme Court was still divided over whether the compelling state interest standard or the *Smith* standard should hold. Thus, even those who dissented in Smith agreed that the RFRA was wrong.

Since *Boerne,* Congress has continued to try to reverse *Smith,* at least in the area of zoning. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). In the area of zoning, it holds that states cannot burden the free exercise of religion without a compelling interest, and even with such an interest the state must use the "least restrictive means" available. It holds that prisoners and others who are institutionalized (like those in nursing homes) have the right to the free exercise of religion. This differs from the RFRA in that it does not increase (at least arguably) the religious rights of people but just makes it more difficult for a state to infringe on them. Congress also limited the legislation to prisons that receive federal dollars and churches connected to interstate commerce, both of which areas give Congress more power to legislate.

The courts have generally upheld RLUIPA. In 2005 and 2006, the Supreme Court upheld the RLUIPA and the RFRA. In 2005, the Supreme Court held that prison officials can be forced to accommodate the religious rights of prisoners. The Court added that safety was still a consideration, but that prison officials could not summarily dismiss the religious rights of prisoners, particularly those of prisoners who belonged to faiths with few adherents. Among those suing in the 2005 case were a Satan worshiper and a witch. The Court held that this law did not promote religion but merely leveled the playing field. In 2006, under the RFRA, the Supreme Court ruled that the federal government could not prevent a church from using an otherwise illegal drug in its ceremonies. The drug in question was DMT (diemethyltryptamine), used in a tea drunk by adherents of the Union of the Plants (or UDV after its Spanish name Uniao Do Vegetal) religion. The Court held that the federal government had not proven the compelling interest necessary to ban DMT from the ceremonies. It should be noted that this case concerned only a preliminary injunction, which is harder to obtain than a trial verdict—the federal government still had the right, if it chose to, to return to court and try the case under the normal channels, but the federal government could not receive that preliminary injunction to prevent the UDV from using the DMT until trial. Thus, even though the RFRA does not apply to the states, it has been upheld as applying against the federal government and the RLUIPA has been upheld as applying against the states.

One final area in which government regulation intersects with freedom of religion is that of blood transfusions. Some religions, most notably the Jehovah's Witnesses, do not believe in blood transfusions, and some of these religions do not believe in certain kinds of modern medicine. Generally, when there is an adult involved and no other party's interests are at stake, the adult will be allowed to refuse treatment, including refusing blood transfusions. However, when a child's health is at issue, or when a child's interests become involved, the state then takes a more active role.

States have repeatedly intervened to force medical treatment of children including forcing blood transfusions, and the courts have generally sided with the state, holding that a parent's freedom of religion does not extend to being allowed to put the child's life at risk. One of the leading cases on this issue is *Application of the President and Director of Georgetown College* (1964), when a woman at the Georgetown University Hospital who was the mother of a

seven-month-old child wished to refuse a transfusion. To protect the interests of the child, the court ordered the transfusion. In 1991, a Massachusetts court had to decide whether to order a woman to accept blood transfusions in the future, as she had recovered once without the need for a blood transfusion but probably would need one in the future, so the hospital wanted an order allowing future transfusions. The woman, a Jehovah's Witness, had a young child, but there were also others in the family who could care for the child (the father worked so much that he was not able to be considered as a caregiver), and the court found for the woman, as the child would not have been abandoned, and they found that her interest in being able to reject medical treatment outweighed that of the child. The court here looked at it as a case of being able to reject medical treatment, not as a case of the freedom of religion.

Courts have also found, though, that those parents who do not seek medical treatment for their children due to their own religion, are still liable for any harm, including death, that might befall the child from their decisions. Thus, freedom of religion is a factor, but only one to be balanced off against other interests, in rejecting medical treatment for oneself if one has a child, or in rejecting medical treatment for one's children.

The free exercise clause has not ceased to be controversial, even with the movement by the *Smith* decision in decreasing protection for that right. Cases filed relatively recently have ranged from the religious rights of prisoners to when high school sports tournaments may be played. In the latter area, some groups of Saturday Sabbath observers have sued sports tournaments, holding that the placement of the sports tournaments finals on Saturdays forces them to choose between their religion and their sports.

New areas are continuing to emerge in the discussion over the free exercise of religion, and the old areas are not going away either. With the first cases testing the Jehovah's Witnesses' right to go door to door now being over sixty-five years old, one would expect the issue to be settled (especially as nearly every significant court case has upheld that right). However, villages still try to pass legislation to restrict door-to-door solicitation, and the Jehovah's Witnesses are still going to court over that legislation. The last significant Supreme Court case on the issue was in 2002 with *Watchtower* v. *Stratton,* when the Supreme Court struck down an Ohio village's regulation requiring prior registration of those people traveling door to door for any religious or commercial purpose.

America is a democracy, so many laws reflect what the majority of the people desire. However, a majority is far from an entirety, and some people's opposition to a given law may very well be based in religion, particularly when control of one's body or control of one's most personal behavior is at issue. In the early years of American history, few laws were struck down at the federal level as interfering with the freedom of religion, in large part because the First Amendment limited only federal action, and most questionable laws were at the state level. In the twentieth century, though, the freedom of religion was held to include and protect those groups that the majority in society might find disruptive, such as the Jehovah's Witnesses who went door to door. It was also held to include the right to refuse medical treatment, as long as the actions did not result in permanent harm to a child. Thus, blood transfusions could be refused as long as those refusing were not directly (and solely) responsible for a young child. In the mid- to late twentieth century, the freedom of religion was held to protect from laws that targeted the impact of religiously motivated behavior, such as missing work on Saturdays if that was the religious Sabbath, but not the taking of peyote. At first the Supreme Court held that the state needed a compelling state interest to restrict religion but then determined that neutral laws could restrict religion, as long as the laws were

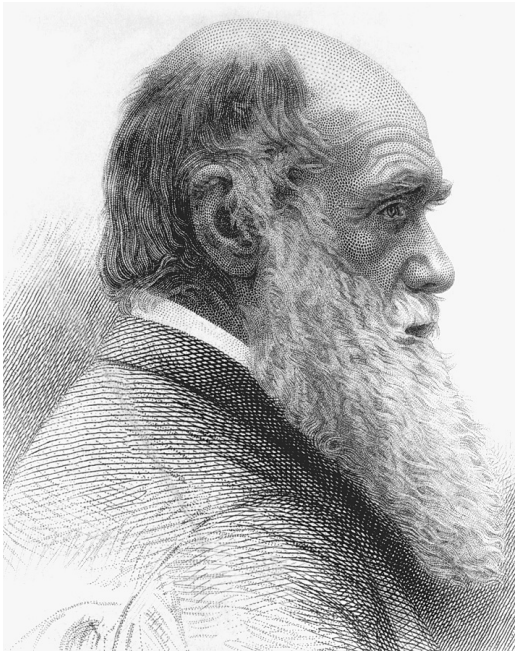
general in scope. Congress tried to overturn the neutrality decision on two occasions, and the first law was ruled unconstitutional, but parts of it were supported by Congress as recently as 2006, and the second is still under scrutiny in the courts.

Government Involvement in the Teaching of Creationism and Evolution

The controversy over teaching evolution in public schools, nearly one hundred years after it began, is still going strong. It is relatively easy to see, if the issue is considered objectively, why it has such longevity and such public appeal. In ways few other religious controversies do, the contest pits some people's core values against others' core values. For those who believe strongly in evolution, the idea that evolution should not be taught, or that, in their minds "pseudoscience" should be taught along with it, is repulsive. It is to them as if the schools were saying, "science is dead." For those who believe that evolution is a direct contradiction of creationism, as it is taught in the Bible, teaching evolution destroys the very centerpiece of their religion and, in their minds, threatens their souls. It is as if the schools were saying "God is dead." Thus, the debate between creationism and evolution creates much heat and often little light (and no closure). Government involvement between these two groups comes in several forms. School boards, both local and state, are government-backed institutions, court decisions are backed by government authority, and it is the relationship among courts, school boards, and the public that forms the crux of the controversy.

The whole idea of evolution was publicly debuted, in most people's minds, with Charles Darwin and his *The Origin of Species* (1859). However, scientists before Darwin had considered evolution and tried to determine the origins of the vast number of species they studied. For a variety of reasons, including the fact that his explanations worked better than those of his predecessors and the increasing importance of science generally and biology specifically in the nineteenth century, Darwin received the most attention. He argued for "survival of the fittest" in terms of species. He stated that species tend to be different, that not every representative of a species is the same, and that the organisms with the differentiation most suited to the environment the group is in will tend to survive and then will pass down that difference to their children, for the most part. Over time, argued Darwin, species change enough to create new ones. This idea so far might not seem to be religiously objectionable, but it was (and is) to some. The problem for some is the idea that entire new species can appear today.

Some religious groups believe that the whole Bible is meant to be taken literally, and that the Bible is the only pronouncement from



Author, natural historian, geologist, and botanist Charles Darwin formulated and popularized the controversial theory of evolution in the mid-nineteenth century and published The Origin of Species *in 1859. (Library of Congress)*

God. The first book of the Bible, Genesis, is the one that creates the most controversy with evolution. The creation accounts state that God created the earth and all of the creatures. After that initial creation, there is nothing else in the Bible that discusses God making any more animals. No more animals, according to some literal interpreters of the Bible, means no species originating after the initial creation. A second problem is that evolution (and also other sciences such as geology) suggests that the world is millions of years old. A literal reading of the Bible produces a different age for the planet. The Bible tells us that creation took six days, then Adam was born, and the lives of Adam and all of his descendants are listed and enumerated, up to Jesus Christ, whose birth was later used as a starting point for the Christian era. If the days of creation are six days of twenty-four hours each, a specific age for the earth can be determined, and a Protestant Anglican bishop in the seventeenth century, James Ussher, did the calculation and came up with the date of 4004 B.C. for the earth's creation.

Thus, the very foundations of evolutionary thought come into conflict with some readings of the Bible. Not all Christians believe evolution conflicts with their religion. Some feel evolution could be part of God's plan. Others, however, primarily fundamentalists in the southern United States, feel very strongly that teaching evolution represents a threat to their religion. It should also be noted that the conflict did not start as soon as Darwin wrote his book. The original response to Darwin from religious figures was somewhat muted. The Catholic Church at the time held that evolution and Christianity were not irreconcilably opposed, and many of the Protestant denominations did not oppose it as of the end of the nineteenth century. The period of the late nineteenth and early twentieth centuries, however, saw a rise in fundamentalist Christianity, many of whose followers combined anti-modernism with a belief in the literal truth of the Bible. It was, in many ways, a return to simplicity—no complicated urban modernization, no complicated religion, and no need for change; the Bible was correct as it was written, word for word, and the family and national system was correct as created in American life in the past. A series of traveling revivalists brought these ideas to a wide audience and millions believed in them, partly because of the perceived challenges of modernism and radicalism—the latter of which included communism, anarchism, feminism, and socialism in many people's minds. Evolution was linked directly to those threatening ideas.

Many fundamentalists in the 1920s campaigned for laws prohibiting the teaching of evolution. Some fifteen to twenty states considered bills, and the first state to pass one was Tennessee. The opposing side in this controversy did not sit by idly but argued against the fundamentalists from the very beginning. Some believers in evolution traveled far and wide to debate the fundamentalists, and the American Civil Liberties Union (ACLU), in its infancy in the 1920s, volunteered to defend anyone fired for teaching evolution. John Scopes in Dayton, Tennessee, was recruited to take the ACLU up on its offer and the Scopes "Monkey" Trial was on. This trial, in many ways, had it all: international media coverage, radio coverage (probably the first trial covered live by radio), famous attorneys (Clarence Darrow for the defense and William Jennings Bryan for the prosecution), and big issues. Scopes was fined $100 for teaching evolution, but Darrow got Bryan to be willing to come to the stand to defend the anti-evolutionary platform and the Bible's literal truth. Bryan did not explain his case well, and his performance caused many to look badly upon fundamentalists. It did not, however, cause many fundamentalists to change their views. The Tennessee Supreme Court overturned the Scopes verdict on a technicality and then dismissed the case, seeking to be done with it, as it had embarrassed Tennessee in the eyes of many. Only two states out of the fifteen considering

anti-evolution legislation at the start of the Scopes Trial eventually passed any.

After 1925, many nonfundamentalists believed that the battle was over, that evolution had won, and it would appear in science classrooms thereafter. Many fundamentalists complained about modernism and focused on keeping evolution informally out of the schools. Control over textbooks and teachers became their goal, as opposed to laws banning the teaching of evolution. The events in the world also turned attention away from the controversy as the Great Depression, World War II, and then the Cold War were much more prominent than evolution in people's minds. In 1968, however, attention returned to the issue as the Supreme Court, in *Epperson* v. *Arkansas,* considered the issue for the first time.

The law in *Epperson* was quite similar to that in *Scopes.* It essentially banned the teaching of evolution in state-supported schools and universities because of the perceived conflict with Christianity. However, federal law had evolved in the time between *Scopes* and *Epperson.* Only one month before *Scopes,* the Supreme Court had announced its decision in *Gitlow* v. *New York* that the First Amendment also applied to the states (the text of that amendment applies directly only to Congress) but the decision did not specify how the amendment limited the states in any practical manner. By the time of *Epperson,* the Supreme Court had decided several cases dealing with state laws and the freedom of religion, most notably *Lemon* v. *Kurtzman,* which held that state laws need to have a secular (nonreligious) purpose, among other things. The Supreme Court concluded that there was no secular purpose to the law being contested in *Epperson,* and it was struck. Tennessee, after this decision, removed its statute.

Those opposed to the teaching of evolution denounced the Court, and during the interim between *Scopes* and *Epperson* they had also been working to use science against evolution. Some anti-evolutionists decided that the best way to defeat evolution was to disprove it scientifically. So scientists formed institutes and groups to promote research aimed at disproving evolution. Some groups hoped to scientifically prove the occurrence of Noah's flood, feeling that this would explain fossils and vanished species. Others believed they could prove the earth could be only 6,000 years old. The name given to this overall movement was creation science, which aimed, as the name suggests, to give scientific support to the idea of a biblical creation. In the classroom, having been largely defeated in their attempts to use laws to forbid evolution's teaching, those opposing evolution sought to combat it in other ways. Some supported the idea of "equal time," which held that evolution was only a theory (misunderstanding and misusing the scientific definition of "theory"), and it should not be taught as fact. From this, people argued that evolution should be given only as much time as the idea of creationism, which they argued was also a plausible theory.

Their mission reached fruition in Louisiana in the early 1980s when that state passed a bill mandating equal time for both positions, if either were taught. The supporters of the bill, for the most part, at least publicly claimed that they were only helping science, as they were testing the idea of evolution just exactly as the scientific method suggests. Thus, they argued that equal time teaching was more scientific and more fair than the mere straightforward teaching of evolution. They also stated, and cited scientists to prove their point, that there was scientific support behind creation science, which is what they labeled the discussion of the scientific aspects of a relatively young earth. Not surprisingly, the law was challenged and went all the way to the Supreme Court, which decided in *Edwards* v. *Aguillard* that the law was unconstitutional, as it did not have a secular purpose. Two justices, Rehnquist and Scalia, dissented, holding that the purpose of the law was to create a balance, and that even if there was a religious purpose, that would have been acceptable as long as the law did not

advance a religion. The whole idea, these two suggested, was that laws were supposed to be neutral to religion. Their two votes, of course, were not enough, but they did give some comfort to those supporting this bill.

Opponents of evolution were not dissuaded by this defeat. They continued their research and institutes and worked at the local school board level. Another important development in education during this time was the rise of standardized testing. Use of statewide assessment tests grew as people called for accountability in education. Tests were given to students at various levels, and if students performed poorly on the tests, districts were not funded and teachers were reprimanded, which led some teachers to teach solely what was on the tests. This related to evolution, as states set forth standards for the students to be tested on, and if evolution was ignored in those standards (or given little attention), then students weren't taught it. Educators in some states removed the term "evolution" from their state standards, with Kentucky preferring the term "change over time," for instance. Other states merely gave little attention to the issue.

Other concepts entered the discussion as well, as it grew broader. One of the most prominent at the present time is the idea of intelligent design. That holds that the world is so complex that it could not have arisen merely by chance, which is how some proponents of intelligent design describe the whole idea of evolution. Among the current examples commonly used by proponents of intelligent design are how blood clots and proteins work. Similar arguments in the past have used examples like the human eye and wings. Intelligent design, in its most scientific form, does not specify who the intelligent designer is, or if there is more than one intelligent designer working (or who worked, if the designer has left) on the project. Thus, in this way, the proponents of intelligent design state that this is a scientific theory without any required religious component. The proponents of intelligent design point out that their idea accommodates all religious perspectives, and intelligent design websites argue that there are agnostics among their supporters.

The opponents of intelligent design (which is often shortened to ID by both opponents and proponents) point out that the idea is not testable, as it is impossible to prove that proteins, for instance, were designed by an intelligent designer. The proponents of the theory admit to using inferences but argue that these are the most probable answers. Opponents of intelligent design also point out that even though there might be a low chance of some things, such as DNA, occurring purely by chance, this does not mean that they did not arise by chance, which is the center of the ID perspective.

Some supporters of ID took over directly from creationists. Some of the creationists shifted their allegiance to the ID movement, and at least one textbook widely used in ID circles was alleged to have been written from a creationist viewpoint but with the term "intelligent design" entered for "creationism" during the editing process after the *Edwards* decision. Other supporters of intelligent design state that their intelligent designer could only be the Christian god, using the same logic, that this is the most probable correct conclusion, as is used to support the entire intelligent design theory. Other supporters of ID, as noted, hold no public religious connection.

The positions and religious views of both the supporters and detractors of intelligent design are often, but by no means always, linked. Supporters of both ideas adopt their views because they do not conflict with their religious opinions. The belief in intelligent design and religion are connected for many Christians who believe in science, because intelligent design is a good way to reconcile the two potentially conflicting ideas. Similarly, many who support evolution but have no religion, finding no evidence of God in the world, believe in evolution because it does not require interven-

tion from a god. There are plenty of non-Christian supporters of intelligent design, and plenty of Christian supporters of evolution, further muddying the waters. And last are those supporters of intelligent design who also believe some form of evolution is a possibility. Some discussants in the evolution debate want to paint the battle as religion versus science, but the discussion today, especially when dealing with intelligent design, is much more complex than that. When this discussion is carried into the science classroom, evolution's proponents argue that with teaching time already extremely limited, the true effect is to completely forestall any understanding of evolution by launching straight into an argument about its merits and detriments. (And some, though hardly all, ID supporters would be very happy with this result.)

Evolution opponents, whatever alternative they propose, were active in twenty-eight states as recently as 2001, and this did not count, of course, those states where quiet efforts to remove evolution are still ongoing through book selection and curriculum control. The most publicly known recent efforts have been in Kansas and Pennsylvania. In Kansas, in 1999, the state board of education removed evolution from those areas tested on statewide high school science tests. With the increased emphasis on testing, this was the equivalent of telling all the high schools in the state that they could ignore evolution. Indeed, it was the equivalent of telling high schools that they probably *should* ignore evolution, as teaching information that will allow a student to pass a test carries more weight in funding circles than does teaching information for which no tests exist. In the 2000 elections, voters effectively overturned this decision by electing new members to the board, but in 2004 the board, again with even more new members, returned to the controversy by supporting intelligent design. One school board in Pennsylvania went one step further by voting to require that teachers use and read a statement suggesting that students keep their minds open on the question, noting what intelligent design was and noting a specific pro-intelligent design reference book to consider. The action of this board was challenged in federal district court and in late 2005, Federal District Court Judge John Jones ruled that these instructions were unconstitutional as they created a state endorsement of religion, barred by the First Amendment. Jones cited several reasons for the ruling, including that ID was not science, as it was not testable, and that while many of ID's arguments did tend to point out problems with evolution, this was not the same as supporting an opposing viewpoint. Finally, he noted that ID was not generally supported in the scientific community.

Judge Jones's decision hardly ends the debate overall, even though it might end it in this school district. Beliefs about evolution teaching in public school classrooms are and will continue to be deeply held. As the two events that might end the debate will not happen any time soon—those being irrefutable proof of evolution or irrefutable and public proof of the existence of a supernatural being—the debate will extend and change. Similarly, as education increases in importance in the twenty-first century, control over school policies will increase in importance as well. Governments are also responsive to the will of the people, and when one side or the other protests loudly enough, as happened in Kansas twice in four years, the governmental pendulum will swing. The issue even reaches all the way to the presidency, as President George W. Bush in August 2005 stated that intelligent design should be taught as an alternative to evolution, even though he seemingly contradicted that point by saying that school boards, not the national government, should set policy. Whether these remarks were intended to announce his views on the issue or to push people into supporting ID or to satisfy social conservatives (all of which are possible motives), such comments do little to settle the debate. For all of these reasons, it is unlikely that the controversy over

the teaching of evolution will go away, even though the Scopes Trial, in many people's views, "settled" the controversy over four score years ago.

Important Organizations in the Development of Religion and the Law

While movies and novels often focus on the one person fighting against the state all alone, the individual litigant stands little chance of success in today's (and most of yesterday's) legal environment. To be successful, an individual often needs backing from an organization, and some of those organizations have played a shaping role in the development of religion and the law. While some unsupported individuals have had legal success, the focus here is on nongovernmental organizations. Indeed, many cases known by the names of individuals also had important organizations involved. For instance, *Brown* v. *Board of Education* is named for litigant Oliver Brown, who sued on behalf of his daughter Linda Brown, but the NAACP, whose backing of Brown provided the means for that lawsuit's success, is an example of a similar situation in another context.

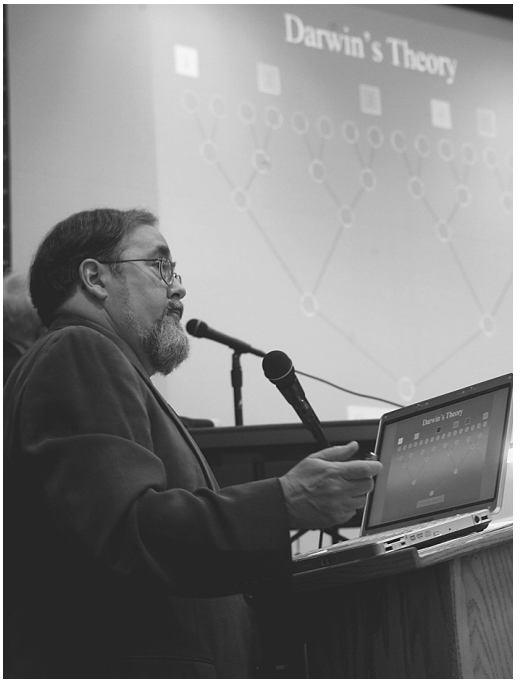
Rather than use judgmental terms that will likely bog down the discussion with arguments of which group's perspective is correct, this essay will admittedly use a wide tent approach to gather those who have litigated into two main groups: the accommodationists and the separationists. The accommodationists are those who argue that, either for policy or historical reasons or both, the First Amendment allows the government, both at the state and federal levels, to accommodate religion. The separationsts argue that, once again for either policy or historical reasons or both, the First Amendment tells the government that church and state should be kept far apart. None of the lists discussed below are either exclusive or definitive, as they try to highlight the most significant groups. It should also be noted that, of course, each group believes that it is correct in its view of the First Amendment's religion clause, or how the First Amendment's religion clauses affect its particular interest.

Those groups who have fought for a more accommodationist view of the First Amendment will be discussed first, and they include two main subgroups. The first is those who have appeared in court in general, and the second is those whose interests are in only one area.

Among the important groups who favor accommodation and who have regularly appeared in court is the Rutherford Institute. This group was founded to help conservative causes and early on worked against what it saw as improper actions on the part of school boards. The group was founded in large part with donations from Christian conservatives, among them, Howard Fieldstead Ahmanson, Jr., who was also a large donor to the Discovery Institute, noted later. Among those things protested by the Rutherford Institute were AIDS prevention efforts and condom distribution. The Institute soon moved into areas of the First Amendment, particularly the religion clauses. Among the well-known cases in which the Institute has filed amicus briefs are the *Newdow* case, on the use of the phrase "under God" in the pledge—the Supreme Court decided that the person suing did not have a legal right to bring the case (the Institute believed the phrase to be legal); the *Lee* v. *Weisman* case, in which the Supreme Court struck down prayer at graduation (the Institute again believed it to be legal); and the *Bowers* v. *Hardwick* case, in which the Supreme Court upheld a Georgia law penalizing homosexual sodomy (the Institute filed on the side supporting the law, and the *Bowers* decision has since been reversed). The Institute has also filed amicus briefs or appeared, in the area of religion, in suits defending a Muslim woman's right to wear religious garb to class, defending a church's right to display a religious message in a public light show alongside those of secular organizations, and

defending a church against an adverse decision by a zoning board. In other areas of the First Amendment, the Rutherford Institute often takes a libertarian view and sometimes agrees with the ACLU, as court cases make strange pairings. For instance, both groups have opposed the Patriot Act and opposed the detentions without counsel allegedly resulting from the war on terror.

A second important group that has filed amicus briefs in many Supreme Court cases dealing with religion is the Christian Legal Society. This group was founded in Chicago and now is headquartered in Springfield, Virginia. The group requires its members to be Christian but is nondenominational. The society requires its members to accept the Bible as the word of God and to accept a bodily resurrection and the virgin birth. The society also includes law school students, having over one hundred chapters, a sizable number compared to the number of law schools existing. Members do not have to be a lawyers. The Christian Legal Society has founded the Center for Law and Religious Freedom, which, since 1993, has been fighting laws legalizing abortion, as it considers one of its purposes to defend all lives and it believes life begins at conception. Among the recent well-known cases in which the Christian Legal Society, acting through the Center, has filed briefs are *Boy Scouts* v. *Dale,* in which the Boy Scouts were successful in maintaining their policy excluding homosexuals from being Scout leaders; *Santa Fe* v. *Doe,* in which the Santa Fe School District tried unsuccessfully to allow student-led prayer at football games; and *Zelman* v. *Simmons-Harris,* in which the Cleveland School Board was allowed to implement a voucher program that included private religious schools. The society favored the Boy Scouts and both school districts in the above litigation. In other recent amicus briefs, the Center appeared in support of the United States in their passage of the Religious Land Use and Institutionalized Persons Act. This statute aimed to increase the rights of those in state prisons partially funded by the federal government. The Center has also appeared in actions recently challenging California's denial of tax-free financing to religious schools and supporting a church that attempted to use the Religious Freedom Restoration Act to defend its members against prosecution for use of an illegal drug during a religious ceremony. The society, in addition to its efforts in defending religious freedom, also aims to provide contacts, create prayer groups, link attorneys to like-minded attorneys and individuals, and try to help the poor.



Dr. Jonathan Wells of the Discovery Institute and a supporter of intelligent design, puts on a presentation on the first day of hearings held by the Kansas State Board of Education on the teaching of evolution in Kansas schools on May 5, 2005. (Larry W. Smith/Getty Images)

A third accommodationist organization important nationally is the Catholic League for Religious and Civil Rights, more generally known as the Catholic League, headquartered in New York City. This organization has the

most members of any Catholic organization concerned with religious freedom. The Catholic League's positions generally mirror those of the Catholic Church, and it has been in existence since 1973. The Catholic League is active in a number of areas, including countering what it sees as anti-Catholic attacks, working against bills that it considers to be attacking Catholics, and working through the courts for redress of damages done to Catholics. Among the well-known cases that the Catholic League has been active in are *Edwards* v. *Aguillard,* in which the Catholic League defended the right of Louisiana to require equal time in science classrooms for creation science and evolution (the Supreme Court disagreed, striking down the legislation); and *Bowers* v. *Hardwick,* in which the Catholic League wrote in defense of Georgia's law penalizing homosexuality (the Supreme Court agreed; as previously mentioned, however, the Court has since overturned *Bowers*). The less well-known cases that the Catholic League is interested in include the current policy of the New York public schools to prohibit manger scenes while allegedly allowing the menorah to be displayed in schools, and an attempt by New Hampshire to repeal the priest-penitent privilege in the area of child abuse by requiring priests to report any suspected cases of child abuse. The Catholic League opposes the latter, of course, as it infringes upon the confessional. In addition to its legal actions, the Catholic League also encourages boycotts of groups it feels are hostile to Catholicism, defends the Catholic Church in the media, and publishes a journal (and a website) to publicize its efforts.

Among the important specialized areas that have promoted a lot of litigation is that of teaching evolution in the public schools. A wide variety of groups on both sides of the issue have started (or continued) their scientific research into the topic and have also become involved in the legal battles. Of course, those on the accommodationist side say, or at least some groups on that side say, that evolution can be banned, that only creationism can be taught or that a balanced treatment is needed between the two, and that intelligent design can be taught or that a balanced treatment is needed between those two issues.

Among the important groups on the accommodationist side of evolution is the Discovery Institute, headquartered in Seattle, Washington. This group is a strong proponent of the idea of intelligent design, which argues that the universe must have had an intelligent force involved at some point. The reasons advanced are that the universe has elements too complex to have merely arrived by chance, that certain elements have both a very specified function and a very complex nature and that could not have arrived by chance either, and that the universe works too well together to have just arisen by chance. The Institute's goal, in the area of intelligent design, is to present evolution as a theory with far too many flaws and evolution's defenders as simply unwilling to consider other arguments and hiding from reality rather than pursuing it. Following this second argument to its natural end, the Institute argues that intelligent design should be taught along with evolution to further the pursuit of reality. The proponents of intelligent design, especially the Discovery Institute, state that intelligent design goes beyond creationism, which will be discussed next, and that religion does not have to play a role in classroom discussions of intelligent design. The Intelligent Designer may just be an intelligent designer, and discussions of who that designer might be are not necessary, stresses the Institute.

Another important group, although it has been outshadowed by the Discovery Institute recently, is the Institute for Creation Research, headquartered in San Diego, California. This institute argues that the world is only 6,000 years old. It takes a literal view of the first chapter of Genesis, meaning that the creation account there, having the world created in six days, is correct. Furthermore, the six days are taken to be six twenty-four-hour days, and the

rest of the Bible is to be taken literally as well. The biggest problem that is publicly known with this idea is the fossil record, which the Institute for Creation Research explains as having been created by the great flood noted later in the Genesis account. The group requires belief in the inerrancy of the Bible and also produces research that works to square science with religion. Unlike the Discovery Institute's public stance that religion is not a required part of their worldview, the Institute for Creation Research publicly proclaims such a requirement. The Institute for Creation Research was directly linked to the 1980s attempt by the Louisiana legislature to mandate the teaching of both creation science and evolution when either was taught, as the Institute was one of the main places cited to which creation scientists belonged.

The other side of the table from these groups is very often filled by, or at least joined by, those groups who favor a more separationist approach. Similar to the accommodationist camp, there are those who are interested in multiple issues, or in the overall separation of church and state, and those involved in only one issue.

One of the more important groups on the separationist side that is interested in the First Amendment as a whole is Americans United for Separation of Church and State, which often refers to itself as Americans United. That group is headquartered in Washington, D.C., and has existed for roughly sixty years. In contrast to some portrayals of anti-accommodationist views, like Americans United, as atheist, the early founders of the group, along with current members, are very much connected with organized religion. Among the early founders were the president of Princeton Theological Seminary, one of the nation's leading religious training grounds, and the president of the Southern Baptist Convention. The group has been active in the courts over the past six decades, and among the recent lawsuits in which Americans United has filed amicus briefs were *ACLU* v. *McCreary County,* dealing with the posting of the Ten Commandments on public property in Kentucky; *Edwards* v. *Aguillard,* dealing with the required teaching of creation science if one taught evolution in Louisiana; and *Hibbs* v. *Winn,* dealing with tax credits for scholarships to private schools. Americans United believes in the wholesale separation of church and state, and, besides litigation, also works in the areas of public education and with school boards and government in trying to resolve areas of difficulty without litigation. This group is currently involved in a wide variety of areas dealing with religion and the state, believing that the state bans on gay marriage are unconstitutional, as some religions favor allowing gay marriage, the bans favor one religious view over another, and they impose a religious element on marriage, a state-sanctioned status. The group also opposes vouchers for education as it forces the public to subsidize religion and also creates problems with the schools. Also, because many religious schools discriminate on the basis of religion, the group believes vouchers force the state to subsidize religious discrimination. Americans United also opposes faith-based initiatives, which allow money to be given to religious groups to perform social work.

A second important group in the separationist camp is the American Civil Liberties Union (ACLU). This group has been around since the early 1900s, having been founded during World War I to attempt to protect those who protested against that war. The ACLU was originally active mostly in the areas of free speech but gained notoriety in the area of freedom of religion as it served to defend John Scopes in the 1925 Scopes Monkey Trial over the teaching of evolution in Tennessee. The ACLU now fights to keep the government out of religion, in the areas of both establishment and free exercise. An example in the first area would be the ACLU's recent fight to remove an anti-evolutionary sticker from schoolbooks in Georgia. The sticker suggested that evolution

needed to be approached with an open mind, but a court struck down use of that sticker as evolution was the only scientific idea mentioned and its selection would cause a reasonable observer to see an endorsement of religion. The ACLU also recently protested against the removal of two jurors for religious reasons unrelated to the case, as a prosecutor had believed that religious people were more friendly to the defense. The court agreed with the ACLU that this was an unacceptable practice. Among the more well-known recent cases that the ACLU has been involved in are the *Kitzmiller* case in Pennsylvania dealing with the attempt of the school board to force biology teachers to read a disclaimer before teaching evolution in biology classes (the federal district court ultimately struck down the disclaimer), and in the *Newdow* case, decided by the Supreme Court in 2004, dealing with the term "under God" in the Pledge of Allegiance (the Court ruled that Newdow did not have standing to pursue the case). The ACLU is also involved in other less well-known cases, such as attempts by districts to force students to stand for or recite the pledge and attempts by transit districts to prevent religious groups from advertising.

A third important overall group on the separationist side is the American Jewish Congress (AJC). It was originally formed in 1918, and its original purpose was to protest against anti-Semitism. While that remains one of its important goals, the AJC has moved beyond that to other issues in America and the world, including defense of the state of Israel and support of its peaceful existence with the rest of the Middle East, and, importantly for this essay, belief in the separation of church and state. The AJC has recently filed amicus briefs in a wide variety of cases, including *Edwards* v. *Aguillard,* in which the AJC protested against the Louisiana legislature's decision to grant equal time to creation science and evolution if either was taught (the Supreme Court eventually agreed with its view), and *Lee* v. *Weisman,* with the AJC protesting against a school board's decision to invite a rabbi to graduation to deliver an invocation (the Supreme Court decision agreed with the AJC perspective). It has also helped in the litigation of other cases, including appealing against the decision of the government-funded Americorps to support teachers in religious schools, in a case that was denied review by the Supreme Court, which allowed the government grant of teachers to continue. The AJC also protested against a voucher program by the Florida government, which was eventually overturned by the Florida Supreme Court. Besides the courts, the AJC has also been involved in a wide variety of other efforts, including helping the state of Israel by commissioning studies and establishing liaisons, promoting women's causes such as breast cancer research and pay equity, and supporting the Oslo peace process. The AJC has been particularly interested in efforts that bridge its interests, such as studying the incidence of breast cancer in the worldwide Ashkenazi Jewish population; the group also produces a variety of publications.

One of the significant separationist groups favoring separation of church and state in the area of the teaching of evolution is the National Academy of Sciences (NAS). This group was founded in the 1860s as a society for the leading scientists of America, and one becomes a member only by invitation. The NAS is interested in a number of different scientific areas, including futuring, but the main area that combines science, religion, and the law is the teaching of evolution. The NAS lends its scientific weight in the discussion and provides information about the issues. It also has created many different standards in the area of education, and these standards are often the base of statewide standards. The academy has withdrawn copyright permission from some states that discount evolution and lean toward the side of either teaching both evolution and creationism, or that are teaching nothing on evo-

lution in their standards. This group has also filed statements and briefs in evolution cases.

One organization that focuses exclusively on the issue of evolution and desires a strong wall of separation is the National Council for Science Education (NCSE). It claims to be the only group founded for the specific purpose of defending evolution in the schools. Among the organization's activities are the publishing of a journal to keep its members informed on the evolution issue, continuous collection of state-by-state reports of activity in the evolution–anti-evolution tussle, and educating the public about evolution. The NCSE does not itself hire lawyers to fight against anti-evolution efforts, but it does help groups encouraging the teaching of evolution by referring them to like-minded lawyers, and it provides a wealth of materials. This group aims to counter the anti-evolution forces by providing experts who will debate them on national talk shows and other public forums. Thus, the NCSE is an important force in the evolution area of religion and the law, even though they do not directly enter the courtroom as lawyers.

The stereotypical view of the battleground in the area of religion and the law has a single lone plaintiff challenging a government decision about either religious practice or the potential government establishment of religion. However, that view is much too simplistic. Very often the forces on both sides are supplemented by the briefs, arguments, and funding of various interested organizations. Sometimes the federal government also makes arguments in favor of state legislation or vice versa, and the federal government and state government may appear in litigation that seems to be between two private forces. Organizations, as noted, represent a wide variety of viewpoints, and sometimes form strange alliances on some issues. Some organizations are interested in only one issue, while others express opinions on most facets of the church-state relationship. Without such organizations few checks would exist against the powerful in society and the government, even though the powerful in turn often help to fund these same organizations.

Issues of Taxation and Funding and Religious Groups

The ways in which taxation and funding influence religious groups cannot be considered in isolation from other issues, such as the establishment of religion and the free exercise of the First Amendment. The reason for this is that if the government funds a religious group, then it may be establishing a religion, but if it prevents a religion from being funded the same way any other charitable organization is funded, it may be discriminating against the free exercise of religion. Of course, the issue becomes even more complicated when one religion is treated differently from another. Thus, the issues of how a religious group is funded and how the tax system treats religious groups are complex ones and interact with many other facets of the whole relationship between religion and the law.

Only issues that have a direct effect on how religious groups are funded will be considered here and those with indirect effects will be excluded. For instance, government regulation of the health and safety conditions of a day care program in a church may indirectly affect a church's finances, but that will not be considered here. Whether the government could tax the employees in that day care operation will, however, be considered. Some of these issues are discussed in other essays, as the relationship between religion and the law is many faceted.

First, the issue of taxation is examined—whether the government can (and must) tax a religious organization if it taxes other similar organizations. Generally, it has been held that a government can tax a religion if its taxes are neutral. For instance, the government has been able to put sales taxes upon religious sales. A

revival in California was sued for sales taxes on the religious publications that were sold during the revival. The church noted a prior Supreme Court decision not allowing a city to force door-to-door proselytizers to be licensed, but that license was held to be a tax preventing the spread of ideas, or a prior restraint. Prior restraints, as a form of censorship, are especially odious to the Constitution, but taxes after the fact are less so. Property taxes on church property have also been allowed. In both cases, the taxes do result in less money being available to the church and so they have some impact on religion, but this was not held to be sufficient to be a restriction on the free exercise of religion. As religions are generally protected more than (or equal to) religious institutions, if a religion can be taxed, a religious institution such as a religious college can be taxed also.

The issue of income taxes and other employee taxes has also been addressed by the federal court system on numerous occasions with regard to religious institutions. Some churches have claimed that their beliefs require them to follow the law of God and that they do not have to follow the law of man. These churches have generally not come into the court system until they have been forced to do so, but the federal courts have not been generally receptive to their arguments. Freedom of belief is absolute, but freedom of action based on those beliefs is somewhat limited and does not excuse the believer, or the church, from participation in government programs of taxation that are applied on a neutral basis, including income taxes. The courts have also considered direct challenges to the Social Security taxes on the grounds of religious belief. Some churches have argued that their religious convictions require them to take care of their own and have made provisions to do so, desiring no interference of government. The Amish, who have long attempted to live separately from society, are among those issuing such protests, lest it be perceived that these were just contrived tax protests or new beliefs. It should also be noted that the Supreme Court agreed that religious freedom would be somewhat infringed by taxation. The Court, however, held that the government interest in creating and administering a standardized tax system justified this infringement as the need for a consistent and workable tax system was held to be substantial enough to justify the infringement. Some have also argued for being able to withhold taxes because they or their churches disagree with how the money is being spent. Specifically, a group of Quakers wanted to withhold some of their taxes as they disagreed with taxes being spent to support the Department of Defense. The court, however, disagreed, and held that the taxes were still due, with penalties and interest. Some churches have disagreed with other taxes imposed, such as workmen's compensation taxes (generally gathered at the state level) in a recent case in Ohio. Similar to the arguments made about Social Security, some churches feel that they should take care of their own and that workmen's compensation programs have someone else intervene. Ohio law did allow self-insurance, but the church did not take advantage of this. As with the income tax, with a sufficiently important government interest, burdens on religion are allowed, and in this case, as with the other taxes, the court held that the government interest justified the burden.

A final issue considered by the courts is whether licenses can be required of door-to-door religious proselytizers and whether they can be subject to prior registration. Both of these questions were answered in the negative, as prior registration and prior licensing have been held to be prior restraints and thus censorship. Controls on the time, place, and manner of soliciting have been held to be acceptable, but overall registration and especially the payment of fees for the privilege of discussing one's religion have been struck down.

Besides the issue of whether a tax can be applied to a religion, in taxation there is also the

matter of whether (and when) a tax exemption can be removed from a religion or religious institution. That issue was before the Court in 1983, when the Court considered the case of Bob Jones University. The IRS had long given tax exemptions to universities, and these exemptions helped with the university's tax burden and also allowed donors to give money to these causes and then have a tax benefit. The rationale behind this exemption was that the universities conferred a benefit upon the public and thus could merit a tax exemption in return. It should be noted that most universities received (and receive) tax-exempt status. However, if a university violates IRS rules, the exemption can be withdrawn. In the case of Bob Jones University, the exemption was removed because Bob Jones practiced racial discrimination, forbidden by the IRS. The school had claimed that its religion required this discrimination, but the Supreme Court sided with the IRS, holding first that controls on religious action could be justified only by a compelling government interest, but that preventing discrimination was such an interest. While Congress is supposed to be in charge of tax policy, the IRS was set up to determine the specifics, and as past removals of tax-exempt status had not been changed by Congress, Congress was presumed to have affirmed by its silence. Thus, tax exemptions can be removed for actions taken under the color of religion, but that removal has to be justified by a compelling government interest, not just a trivial one. Note that this removal of a tax exemption was from a specific group for a specific act, not from all religious colleges or even all religious colleges of a particular religion. Churches have also had their tax-exempt status revoked because of participation in forbidden political activities. One church lost its exemption because it placed ads in newspapers against a presidential candidate, and this violated the IRS rule against any activity in campaigns against any individual candidate by the church. The courts upheld this revocation upon review, as the ads clearly constituted involvement in a campaign against a candidate.

A more complex question is the relationship between the government and religious groups in terms of the amount of funding the government is allowed to give to churches. The government is generally not allowed to charge more for religious speech than for other noncommercial speech. A school board allowed religious groups to meet, but charged religious groups more than other noncommercial ones that were not religious if the religious group had met for more than five years at the facility. The reasoning of the school board was that it wanted to discourage religious groups from using the facility in a permanent manner to avoid the appearance that the school board was promoting religion. The courts struck down this justification, holding that one could not discriminate against religion, and that the amount of use of the facility by religious groups was not enough to justify that discrimination.

On the other hand, the government can choose not to fund religious speech as long as it does not discriminate against religious institutions in general. The government has been allowed to provide funds and support for religious institutions, such as colleges, and insert the restriction that the funds be used only for secular purposes. Religious colleges have been provided with building grants, with the caveat that these buildings be forever used only for secular activities. These colleges have also received lower-cost government-supported bonds for building purposes, with the caveat that the buildings be used for secular purposes until the bonds are repaid. Thus, while the government can provide religious institutions with money, that funding can also carry government restrictions.

A related question is whether government-regulated universities can distribute money to religious organizations. Some protested against the decisions of state schools to support religious organizations, as they did not want their money going to groups that they found to be objectionable. The courts, though, have found

that universities can charge students a general fee, and then redistribute that money to groups that some might find to be objectionable as long as the criteria and process used are neutral with regard to the organization's content. Thus, while groups that some might find objectionable can be funded, the fact that they are religious in nature cannot be used as a criterion to deny their funding. In a related manner, the courts also found that a university can simply choose not to fund all organizations that are generally religious. A university adopted the same test the government uses against laws, the *Lemon* test, which states that an organization, to be funded, must have a nonreligious purpose, must have a general effect of neither advancing nor retarding religion, and must not entangle the school in religion through the oversight of the funding. The court system upheld this test, holding that the university did not have any obligation to fund anyone and that the university had created a limited area for funding; therefore it could discriminate as long as nonreligious criteria were used. Schools, however, have been prohibited from refusing support for religious magazines on the basis of their content. A school wished to deny a religious magazine funding on the basis that it was religious; this was not allowed as the magazine met the school's printed nonreligious criteria for the funding. Thus, secular standards need to be used.

Tied in with this question is the whole issue of whether government grants that are given to individuals and organizations may wind up in the hands of religious schools, and whether religious schools and majors must be treated the same as nonreligious ones. The answer to the first question is yes, if the government is not the one making the decision as to where the money goes. The courts have held that the government may provide support for nonreligious matters, such as interpreters for the deaf or scholarship support for the unemployed, and it is acceptable for this money to be used at religious schools through the choice of the recipient. The courts have gone so far as to say that support should not be revoked when students choose to attend a religious school. Thus, if a deaf child attends a religious mainstream school, the state should still provide that child with an interpreter, if that interpreter would have been provided at a nonreligious school.

States and schools have, however, been allowed to decide not to fund religious studies. A state provided scholarships for students to attend colleges but required that recipients not study religion as a major. A student at a private school sued, claiming religious discrimination, but the Court upheld the state's decision. While the state could have decided to allow study of religion, as one of many majors, it was not required under the First Amendment to make that allowance; thus, funding the study of religion was neither banned nor required.

A related and very intricate matter is the funding of religious education, particularly at the high school and lower levels. The state, at the most basic level, is generally required to allow private religious schools to exist. It may regulate them the same way that it regulates all other private schools and may extend some of the same regulations to those private schools as it does to public ones, such as state-mandated testing. However, the state may not directly fund religious education. In the late 1960s, some states tried to help private education by providing teacher supplements to private schools, including religious schools. The court system struck this program down, and in doing so provided the *Lemon* test, described earlier.

The controversy then shifted from the funding of religious schools to the funding of auxiliary, nonreligious, services for religious schools. Transportation was a large issue, and the courts held that states can provide transportation of students to religious schools, as long as that transportation is provided on an equivalent basis as the transportation to public schools. Other services provided to private schools include the loan of nonreligious textbooks, provision of audiovisual materials, and provision of instructional personnel for remedial instruc-

tion. The loan of materials was challenged in a wide variety of cases and produced a quixotic set of rulings. For instance, lending books was held to be acceptable, but not maps, and so, as one justice noted, what about a book of maps? The Court recently has upheld providing materials in general, but by a narrow decision. Different factions of the Court disagree, even among those allowing financial support, how much oversight of the funds is necessary. When the federal government (or states) provides materials to a religious school, the school saves money. The critical question here is whether the private schools should have strict oversight to prevent them from shifting to religious instruction the funds saved by the government grant of materials, as this would have the effect of the government promoting religion. The most accommodationist wing of the Court, led by Scalia and then Chief Justice Rehnquist, would allow almost any program providing secular materials open to all, regardless of any diversion. A middle faction, led by Justice Breyer and then Justice O'Connor, would desire oversight, and the separationist wing, led by Justice Stevens, would ban all such programs.

A related issue is providing teachers for remedial and assistance services and the use of funds provided for low-income students in private schools. Many private school students, similar to public school students, need some assistance, such as speech therapy, and the federal government programs for low-income students are given to all, regardless of where they go to school. At first, cases required that the assistance not be given on the site of private schools, as the chance for religious indoctrination was too high and would require too much oversight, resulting in entanglement. Such assistance then was often given in temporary buildings, often trailers, set up on the school parking lots of private schools so that the aid was not provided on

With the U.S. Capitol in the background, proponents and opponents of school vouchers take part in a rally outside the Supreme Court in Washington on February 20, 2002. (AP Photo/Rick Bowmer)

school grounds. However, in the late 1990s, the Supreme Court reversed itself and allowed the funding of such education on school grounds.

A more recent battleground, and one more directly related to school funding, is that of school vouchers. Under voucher programs, districts and schools are ranked (similar to what occurs elsewhere) based on student scores on standardized tests. Those graded as failing must allow students to go elsewhere, and the voucher pays a certain amount to the school or district to which the student moves (the school or district receiving students must want more students). Those favoring the programs see them as creating student choice, allowing students and parents to "vote" to leave failing schools. Those opposing them would rather fix the current system and note that the vast majority of students using vouchers who enter private schools enter private religious schools, which in turn creates a massive government subsidy of religious schools. The Supreme Court, however, has upheld this program, stating that the aid is neutrally available, as students can choose to attend a private nonreligious school, a private religious school, or a public school, and that the student choice is what directs the money to religious schools, not the government; thus, there is no government establishment of religion. A voucher program in Cleveland, Ohio, has been approved by the Supreme Court, but one in Florida was struck down by the Florida Supreme Court, relying on language in Florida's constitution. Thus, whether a voucher program is constitutional not only depends on who is on the Supreme Court and what their views are, as is always true, but also what court (state or federal) hears the case, what state the case originates in, and what language is in the state's constitution.

Recently, faith-based programs have come under scrutiny. In these, churches are given funds to provide social services, such as feeding the homeless. This idea is controversial, not because people want hunger to continue but because people do not want the government funding religion. Some religious people oppose these grants also because the one who pays the bills often controls the action, and they do not want government interfering with their actions (even though they sometimes would like the money). Other religious people fear that the "wrong" religion will be funded. These programs have been allowed by the courts but continue to be controversial.

The ban on establishment and the allowing of the free exercise of religion, both in the First Amendment, seem like relatively simple ideas. However, there are few hard-and-fast rules in the question of how taxation and funding treat religious groups. The government is not allowed broadly to fund religion or to ban religion from tax exemptions. However, tax benefits for religious groups are allowed when other charitable groups receive those benefits. Government funds are also allowed to flow to religious groups when the stated purpose of the grant is not the promotion of religion and when those funds are available on neutral terms. Thus, while the large ideas seem simple, the building blocks of a program's constitutionality or lack thereof are often in the fine print or in the details of administration.

Major Court Cases Involving Religion in U.S. Legal History

Many significant court cases have shaped American legal and constitutional history in the area of religion. It would be impossible to describe all of them in a short essay or to provide a comprehensive list of such cases. With those disclaimers, however, it is helpful to survey some of the major cases to understand their impact on American society and the fields of the law that they help to establish.

The First Amendment only limits the actions of Congress, but the majority of First Amendment cases that come to the Supreme Court involve the states, and so an introduction to religion and the law should begin with an explanation of this apparent paradox. The

whole of the Bill of Rights, not just the First Amendment, was held in 1833 to limit only Congress. Thus, the liberties outlined in the Bill of Rights did not protect the citizens of each state from the state governments, which were reliant upon the state constitution and the state courts for their liberties. After the Civil War, the Fourteenth Amendment both declared that all freed slaves were American citizens with the same rights as every other American and limited the powers of the states in terms of what liberties they could infringe. The exact reach of the Fourteenth Amendment in the eyes of those who wrote it has been (and will forever be) unclear, but in the early days after the Civil War, the Fourteenth Amendment was read narrowly and did not greatly increase the rights of the freed slaves or of anyone else.

However, in 1925, a Supreme Court decision began to change that situation. In 1925, in *Gitlow* v. *New York,* the Supreme Court held that Fourteenth Amendment language mandating that states could not infringe upon a person's liberty did not mean liberty as an abstract concept only but also included some specific liberties, including parts of the First Amendment. Thus, the *Gitlow* case, and other cases building on it, are the root cause of much of our liberty today and consequently the underpinnings of the fetters on power at the state level. While the federal government has more power than any state, state laws have the most impact on liberty in our daily lives. They affect how our schools are operated, how we marry, what monuments are created, and so on. Thus, the *Gitlow* decision was very important in increasing our religious freedom, even though it did not specifically address the freedom of religion portion of the First Amendment. It was the foundation that the Supreme Court used in 1940 to specifically extend the freedom of religion protections to apply against the states in *Cantwell* v. *Connecticut.*

Since *Gitlow,* there have been important court cases in several specific areas of religion and the law, but there have also been important general cases. The most important general case is that of *Lemon* v. *Kurtzman* (1971), which dealt with the general question of how to determine whether a state program is legal when it involves both the state and religion. The *Lemon* case involved state aid to private education, but it is more important for the test that it established. The *Lemon* test has three parts: first, it requires that the program, to be constitutional, must have a secular purpose; second, the program must neither advance nor hinder religion as its primary effect; and third, the program must not excessively entangle the state and religion. The secular purpose is required because the government is not allowed to enact programs for religious reasons, and a program without a secular purpose is assumed to have a religious one when programs enter the area of religion. The government must be neutral in the area of religion, and that is why the program must neither help nor hinder religion as its main effect. No program that touches religion can have absolutely zero effect, of course, but whatever effect it has on religion cannot be its main goal. This is sometimes viewed as the neutrality test, and according to some justices this is enough: if the program neither advances nor retards any specific religion as its main effect, it should be allowed. Other justices just see this as one part. The entanglement issue is relevant as the government is supposed to stay out of areas of religion, and while some entanglement is inevitable, justices can review precedents and relevant information to determine what level of entanglement is acceptable.

In addition to such general cases, which apply to nearly all religion and the law situations, the courts have also made a number of rulings with more narrow application. One of the most controversial of these areas is school prayer. Many people who feel that American civilization is declining tie that decline, rightly or not, to the ban on vocal prayer and mandated Bible readings in public schools. Originally, many states, but by no means all, allowed local school districts to decide whether prayer was

allowed or mandated or banned and to decide whether to have Bible readings to open the school day. Some states, most notably Illinois, banned those readings, but most did not. In the 1950s, the Cold War terrified America, and many looked for ways that the United States was better than and different from the USSR, our main opponent in that contest. The principal difference most often voiced was the status of the United States as, in most people's eyes, blessed by God (and/or Christian, depending on who was asked), compared to the USSR, which was officially an atheistic nation. To differentiate the two countries further, many chose to emphasize the religious difference, and to do that they aimed to increase the amount of religion in public life, focusing particularly on the schools. Several states, including New York, mandated a statewide prayer in the public schools; others instituted (or already had) mandatory Bible reading in the public schools. To challenge these practices was seen by some as equivalent to agreeing with the USSR. Of course, those opposed to these practices saw them as a state endorsement of religion, banned in the First Amendment. In 1962, *Engel* v. *Vitale* came before the Supreme Court, dealing with New York's school prayer. The justices there struck down the practice, holding it to be an endorsement of religion in violation of the First Amendment. The next year, in 1963, the Supreme Court struck down mandatory Bible readings and saying of the Lord's Prayer in *School District of Abington Township* v. *Schempp.*

These two decisions together created a whirlwind of opposition. While the decisions drew support from religious minorities and others who had felt marginalized and pressured to become Christian, the more common reaction was outrage. Many returned to the reason that the policy was adopted in the first place, often charging the Supreme Court with being communist or supporting communism, or being atheistic, or all three. As the United States survived the Cold War, fears proved unfounded that communism would triumph due to the banning of school prayer. Since the early 1960s, there have been numerous efforts to introduce constitutional amendments to allow school prayer (the banning of Bible reading provoked less controversy), and just as many efforts to get around the prayer ban. Some of the more recent include efforts to allow a moment of silence at the beginning of the day. Supporters state that it allows students and teachers time to reflect, and that students can do whatever they want in that time, including pray, and the school boards officially take no stand on the activity. The Supreme Court has allowed this but has struck down efforts to pass mandates for a moment of silence that added the suggestion that these could be used for prayer. The difference might seem negligible, but in the Supreme Court's eyes, the second rule puts the school boards behind prayer as they are stating that prayer is a good thing. Prayer at public school graduations and other events has also been struck down.

Besides the issue of prayer in the public schools, another area of controversy decided in a major court case is the posting of the Ten Commandments on public property. Similar to those who favor school prayer, those who want to see the Ten Commandments displayed in public places, particularly government buildings and schools, often believe that society has declined and that exhibiting the Ten Commandments in schools and in courthouses will bring about an improved society. Others believe that the government should not support the display of religious documents in public places as this indicates the government's approval, either in truth or in public perception, of the religions that use those documents. A frequent answer to that charge is that Judaism, Islam, and Christianity, listed in reverse alphabetical order, all use the portion of the Bible that has the Ten Commandments in it (although in multiple versions in multiple places). Thus, the argument continues, the government is not promoting any one religion, but is either (a) advancing morality or (b) promoting reli-

gion in general—and promoting the religions to which the vast majority of the population belong; some believe that promoting religion in general is constitutional as long as no single religion is favored. The Supreme Court has divided on the issue, hearing two cases on the topic in 2005. In *Van Orden* v. *Perry* and *McCreary County* v. *ACLU,* the Court allowed a display in Texas to continue, but struck down one in Kentucky. The Texas exhibit was allowed to continue for two reasons: first, it contained other items in addition to the Ten Commandments; second, it had been displayed for forty years without any lawsuits against it. The Kentucky display was struck down as it contained only the Ten Commandments at first (others were later added), and it had just recently been erected. The future of other such displays is still an open question and one that provokes controversy while enjoying some support and serving as a good grandstanding issue for politicians; all of these reasons guarantee that attempts to erect such displays and legal challenges to them will not end soon. (Indeed, some areas of Kentucky have already acted against the Supreme Court ruling to post the Ten Commandments again.)

Besides prayer and the Ten Commandments in public schools, the control of schools in general has also been very important and decided in large part by Supreme Court cases. One issue is the right of parents to send their children to the school of their choice. There were some efforts in the early twentieth century to ban private schools, particularly Catholic schools, in large part due to the xenophobia of the era. However, the Supreme Court held that parents could not be forced to send their children to public schools as long as the children were schooled in some way. The major Supreme Court case was *Pierce* v. *Society of Sisters* (1925), which determined that states could not ban private schools. Parents still have a responsibility to send their children to some school or to home school their children in a regulated environment, but states may not say that public schools are the only schooling avenue available. Nearly fifty years after *Pierce,* the Supreme Court took what seemed to be a significant step back from the rule of universal schooling, at least on the face of it. In *Wisconsin* v. *Yoder* (1972), another major case, the Court ruled that Wisconsin could not order Amish parents to send their children to school beyond the eighth grade. The Court's logic was that the Amish system of values was threatened by the worldly values infused in high school, and to preserve their religion, the Amish could withdraw their children after eight grades. However, the Amish system, the Court held, was successful in presenting their children with enough community support to prevent the children who would drop out after eighth grade from becoming a burden on society, and the Amish society had a long history. Thus, this ruling was unlikely to be (and has not yet been) enlarged beyond the Amish to other religions who feel threatened by school. A court's likely answer to those groups would be for them to establish their own regulated private high school.

A further area of school controversy is that of evolution. Ever since 1925 and the infamous Scopes Trial (and indeed even before that), evolution has burned white hot in schools and courtrooms around the country. Evolution argues that the current species evolved from different ones over millions of years and that human beings represent one of those species. Both these ideas conflict with some religions, especially those that read the Bible literally; for them, the earth is about 6,000 years old; was formed in six, twenty-four-hour days; and after the creation there were no new species. Also, humans were formed in the image of God, in the Christian, Muslim, and Jewish religions, and one implication of that belief is that humanity probably was created as a separate, different species. Thus, humans could not have evolved from some other species. Human evolution is the sticking point for most who disagree with evolution, as humans are seen as different from all the rest of the creatures, while evolution

holds that humans share common ancestors with some of those creatures. Several states banned the teaching of evolution in the early twentieth century. The Supreme Court did not deal with one of these bans until 1968 in *Epperson* v. *Arkansas.* There, the Court held that the ban on teaching evolution imposed by Arkansas was unconstitutional as its main reason was the conflict between evolution and the Bible, which in turn meant that the government was creating a curriculum with an eye toward religion. This decision touched off a great amount of criticism, but the Supreme Court has never seriously reconsidered the decision.

Opponents turned to science in order to fight science. Many opposed to evolution started or continued funding research aimed at proving the literal truth of the Bible. Once these groups believed they had gathered enough evidence to prove that the earth was only 6,000 years old, they began a push to have creation science—their name for the scientific evidence behind a 6,000-year-old earth—taught side by side with or in place of evolution. The announced goal was either to widen debate, by bringing in both views, or to correct the errors of evolution. The shadowed goal for many was to either remove evolution entirely or to muddy the waters enough that the students would not learn any evolution. A law mandating equal time for creation science and evolution (school districts could also choose to skip both evolution and creation science entirely) was passed in Louisiana in the early 1980s and came to the Supreme Court in 1987. *Edwards* v. *Aguillard* held that this program's purpose was to advance religion and so was unacceptable.

Undaunted, some creation scientists continued their work and others shifted their focus to promoting an idea called intelligent design. This idea held that some things in the universe were so complex that they could not have arisen by chance, and so there must have been some intelligence directing it. The age of the earth is not posited by this theory, and it holds that evolution can be true in most instances but not all, and again it suggests that this theory should be taught alongside evolution. Its proponents publicly claim, similar to creation science, to be widening the debate or correcting the errors of evolution. Sometimes publicly, but often more quietly, some proponents also cite the religious benefits of this theory. Several school districts have considered adopting a policy teaching both or a disclaimer to be read before teaching evolution noting the other theory (intelligent design). A school district in Pennsylvania adopted the latter approach, and it was immediately challenged. In *Kitzmiller* v. *Dover Area School District,* a district court ruled that such a policy of forcing the disclaimer was motivated by religion and thus was illegal. While the claimed policy aim was to widen debate, the judge took notice of a wide variety of other comments made by certain school board members to refute this assertion. Although that decision is only at the district court level, it is the highest decision to test a specific school board policy. Neither intelligent design nor creation science have been ruled constitutional, so the debate over evolution in the schools is sure to continue.

Outside of the schools, religion and the law do intersect in a number of ways. The federal government has acted to control state action in several specific ways involving marriage, for example. One major court case in this area is *Reynolds* v. *United States* (1879). Generally, the states have control of marriage, but here, a territory was involved, and the federal government controls those areas of the United States that are territories and not states. The case dealt with the Utah territory, and the church in question was the Church of Jesus Christ of Latter-day Saints, commonly referred to as the Mormons. The Mormon Church at that time advocated polygamy, and many of the church leaders were polygamous. The United States passed laws to outlaw the practice and eventually removed the charter of the Mormon Church for its advocacy of polygamy. Justification for the law was that it was illegal to advocate an illegal act, and so reli-

gions could be restricted for doing so. On several occasions in the late nineteenth century, but especially in *Reynolds,* the Supreme Court upheld the government's attempts to outlaw polygamy and eventually to seize the property of the Mormon Church. In the 1890s the main branch of the Mormon Church changed its views and so was allowed to be rechartered and to regain its property. Today, some offshoots of the Mormon Church that are not recognized by the main church advocate polygamy, and the federal government still encourages prosecution for polygamy.

A related important court case in the area of religion and personal relations dealt with homosexual rights. Much of the justification for criminalizing homosexual relations and for treating homosexuals differently from heterosexuals comes from religion. The Supreme Court until recently allowed such different treatment by states in the area of homosexual sexual relations, based on its 1986 *Bowers* v. *Hardwick* decision. Many states penalized homosexual sex more stringently than heterosexual sex, while others phased out these laws. Some remained, though, and the Supreme Court, in *Lawrence and Garner* v. *Texas* (2003), held that having increased penalties for homosexual sodomy (over what exists for heterosexual sodomy) was illegal, overturning the *Bowers* decision. Where *Lawrence and Garner* intersects with *Reynolds* is in the area of homosexual marriage, and these two cases obviously suggest different results. The Court was clear in *Lawrence and Garner* that homosexual marriage was different from penalizing homosexual sex and that they were not ready yet (if ever) to rule that states must allow gay marriage under any federal constitutional provision. Thus, the cases of *Lawrence* and *Reynolds* are major ones as they state some of the areas of personal relations in which the Supreme Court will allow religious influence and what areas of personal relations shaped by religion the Supreme Court will allow to be regulated by the state or federal government.

Some areas of personal relations have been greatly shaped by Supreme Court decisions, and religion has been seen by the public to be a shaping influence, even though the Supreme Court tried to steer clear of religion at the time. The major issue in this area is abortion, and the major case is *Roe* v. *Wade* (1973); it created a framework for telling when abortion was allowable, and created a general right, in the first trimester, for women to have abortions. The original decision, for the most part, tried to keep religion and the state separate, but it did not ignore religion. It noted that religions have greatly varying ideas of when life begins, and thus there is no clear answer from the area of religion; to pick one specific date would be to put those religions into law. This moved religion off to the side of the discussion, focusing more on the individual's privacy rights against the state's right in protecting what was eventually a life. The Supreme Court noted that the woman's right to control her own body and her privacy conflicted with the state's interest, which caused the Court to create this system of allowing the woman the majority of control in the first trimester and the state an increasing amount of control after that. While unwieldy, it was the only possible solution in the Court's eyes. The Court mostly, as noted, steered clear of religion, but negative reactions since have largely been based in religion. Many who favor outlawing abortion do so because of their belief that life begins at conception, a view based in their religious outlook. Some who favor allowing the woman to choose have the belief that life begins at birth, which often again is based in their religious outlook. However others believe in a woman's right to choose regardless of their own position on when life begins, as they do not feel that their own religion gives them the right to tell others what to do in this area. The controversy continues today, and later Supreme Court decisions have limited *Roe* without overturning it. *Roe* is thus clearly a good example of a case whose public profile is shaped by religion even though the

Court tried to avoid religion when originally reaching the decision.

Besides the areas of control over marriage and control over one's body, another important area decided by a major court case is that of door-to-door proselytizing. Several religions, including the Jehovah's Witnesses and the Mormons, require their members to go door to door spreading their faith, at least at certain times. However, this effort has also provoked opposition from those who wish to be left alone in their homes. Cities have often regulated door-to-door salesmen (or simply tried to ban them), and cities have also tried to ban these religious travelers. These religions have fought their convictions in court and carried their cases all the way to the Supreme Court. The major Supreme Court case on this issue is *Cantwell* v. *Connecticut* (1940), and it was one of the first that extended the First Amendment's protection, as applied to the states through the Fourteenth Amendment; and *Gitlow,* to the area of religious liberty. *Cantwell* held that freedom of religion included the freedom to act, and that otherwise legal conduct would not be illegal just because it involved religion. The Cantwells had been opposed and arrested due to their religious views, and the Supreme Court held that religion could not be a basis for the arrest. Regulations could still be put on door-to-door travelers but not on the basis of whether they were religious. This decision was important for the protections that it gave to those who wished to travel and promote their religion, but it was even more important as it was the first time the Supreme Court specifically said that the states had to follow the First Amendment's religion clauses in the same way as the federal government.

One final area actually returns this discussion to its beginning, as both cases involve the interaction of religion, the law, and public schools. However, these cases differ from the others in that they examined the significance of the Pledge of Allegiance and its role in American life. In the 1940s, *Minersville School District* v. *Gobitis* (1940) and *West Virginia* v. *Barnette* (1943) addressed mandatory flag salutes and sayings of the Pledge of Allegiance in public schools. In the 2000s, *Elk Grove* v. *Newdow* (2004) addressed the inclusion of the phrase "under God" in the pledge. The first cases dealt with a mandatory salute to the American flag and a mandatory saying of the Pledge of Allegiance. The Jehovah's Witnesses objected to these items as they saw them as a form of idol worship specifically banned in the Bible. Thus, the Witnesses concluded that to salute the flag would be a violation of their religion. In the late 1930s and early 1940s, the storm clouds of World War II were hanging over the world, and many in America wanted to increase America's patriotism; they felt that mandatory flag salutes and pledge recitations were a good way to do this. Initially, in *Gobitis,* the Supreme Court held that the nation's need to encourage patriotism trumped any religious objection, and that the mandatory salutes and pledge recitations were constitutional. The Jehovah's Witnesses, however, still resisted saluting and found themselves the victims of frequent assaults. The freedoms that the United States was fighting for abroad seemed, to many, to be denied to Witnesses at home. As the fortunes of the U.S. forces in World War II improved, the Court reconsidered the issue. How these three factors—the assaults, denial of freedoms, and improved wartime outlook—weighed in the mind of the Court is difficult to determine. Regardless, in 1943, the Supreme Court held that a forced salute and saying of the pledge violated the religious liberty of the Witnesses.

In the 1950s, in the midst of the Cold War, Congress added the phrase "under God" to the Pledge of Allegiance. People objected from time to time, and some school districts made the pledge voluntary to all, not just to those whose religions opposed a flag salute, but no case reached the Supreme Court until 2004, in *Newdow.* The Supreme Court did not address the issue, as they used a procedural matter to dismiss the case, but some on the Court noted

that they thought the pledge was allowable with that phrase. Thus, *Barnette* established that our religious liberty trumps government efforts to force or encourage (depending on one's point of view) a flag salute, but *Newdow* shows that the issue is far from over.

How we are educated, who we marry (and if we can marry), what we can and cannot be forced to see (or encourage others to see) in our public buildings, whether we can follow the dictates of our religion, whether the government can force us to violate our religion (and when it can do so), and when the government can promote a religion or a religious agenda are all areas that affect us deeply. As they are so personal, they also are subject to a wide array of interpretations, as one person's establishment of religion may very often be another person's promotion of morality, and a third person's freedom of religion very often might constitute trespassing to a fourth. It is thus clear that while the First Amendment is only forty-five words long, it will not be decisively limited or protected by forty-five million words of the Supreme Court, nor will it be settled by that many, and the controversy will continue over exactly what the First Amendment means. It is also clear that the major cases of the Supreme Court in the area of religion, some of which were detailed here, do still play an important role in the life of America.

Personal Issues of Religion and State

There are issues of personal freedom in which religion creates a clash between an individual and the state or federal government. Among the areas discussed here are marriage, polygamy, gay marriage, divorce, abortion, and the right to refuse medical care. A more general discussion of the issues surrounding freedom of religion receives treatment in a different entry.

The state generally has considerable control over defining marriage, particularly any marriage that moves away from the perceived norm. In the area of marriage the term "state" used here does not mean government in general, but specifically state government, as the federal government has little control over marriage. Each state generally controls its own marriage and divorce laws. Thus each state can set minimum age, residency requirements, and so on for marriage and divorce. States also impose restrictions on how long applicants must wait after getting a marriage license to actually marry. Different states have long had different standards. Most states now use the age of eighteen as the age of consent, but a couple require people to be older than that to marry without parental permission. For instance, the Nebraska age requirement is nineteen. Some states impose additional requirements for those under twenty-one as opposed to those over twenty-one, such as the presentation of a birth certificate for anyone between eighteen and twenty-one. States also sometimes allow those between sixteen and eighteen to marry, but only with certain stipulations, such as parental consent or marriage counseling. Most states also have restrictions on who one can marry—the most common of which is that most states allow marriage only between people of different sexes. There are also restrictions on marriage within the immediate or extended family, as many states have bans on marrying first cousins. Some states used to have restrictions on interracial marriage, but those restrictions were declared unconstitutional by the Supreme Court in the 1960s. These requirements have been upheld as legal and generally have no direct connection to religion, other than the belief that religion helped to form morality.

States often also impose restrictions on who can perform marriages. Preachers and judicial officials are the most common individuals allowed to perform marriages, but in some states captains are allowed to perform marriages at sea. Some states have very liberal requirements on who can be qualified to serve as a preacher,

and some states have even allowed marriages via the telephone or Internet. In the past, proxy marriages, in which the bride, groom, or both sent stand-ins to the wedding due to their own inability to attend, were not uncommon. Thus, states have a large amount of control over the marriage process, even though the controls are much less restrictive than they used to be.

The federal government and all states have barred polygamous marriages. The Mormons were the main religious group to argue for polygamous marriage, and they officially ceased the practice in 1890. The Latter-day Saints was not originally a polygamous group, but polygamy had developed as a church practice by the 1840s; this was around the time the Mormons were driven to the deserted Utah territory by the society of the rest of the United States, who disliked their secrecy. Mormon church leaders decided polygamy was supported by the Old Testament and so adopted it. For a time in the mid-nineteenth century, the church argued that all good Mormons should be polygamous.

This threat to the traditional family was strongly opposed by the American government. In 1862, during the American Civil War, the federal government passed an anti-bigamy act, covering the federal territories. (Marriage was, and is, generally under control of the states, but in those areas which were not states, or not states yet, the federal government generally set policy. Today the federal government sets policy for only Washington, D.C. and a few small island territories.) A major concern of the Grant administration was wiping out polygamy. After the federal government banned polygamy, the practice declined, although not fast enough or with enough certainty to please Congress. The 1887 Edmunds-Tucker Act eliminated the Mormon Church and removed the vote from women (women in Utah were seen as more favorable to the Mormon Church than men were as most women there were in Mormon families). Before 1887, however, the Supreme Court had already had a chance to consider whether the ban on polygamy was a violation of the First Amendment. In 1879, the Court decided *Reynolds* v. *United States,* in which George Reynolds, secretary to Brigham Young, the leader of the Mormon Church, was prosecuted for bigamy. The Supreme Court upheld the conviction, ruling "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (98 U.S. 145: 564). This differentiation between belief and practice has been continued in Supreme Court doctrine until today.

The Supreme Court continued, over the next two decades, to enforce strongly the prohibition against polygamy and to rule against the Mormons. In 1890, prior to the Church of Jesus Christ of Latter-day Saints' renunciation of polygamy, the Supreme Court upheld a decision removing the right to vote from a man who had lied when he took an oath stating that he did not believe in polygamy and did not belong to any group who believed in polygamy (i.e., was not a member of the Mormon Church). Even though this was clearly focused on belief and not on action, the Court held that it was illegal to advocate illegal acts (making it illegal to advocate polygamy then), and so the state could remove the vote from people who supported groups that did illegal things. The same year, the Supreme Court upheld the 1887 law eliminating the Mormon Church and seizing their assets, holding that it was illegal to belong to a group doing illegal things for whatever reason, religious or otherwise, and thereby revoking the church's charter, the general belief in the sanctity of contracts notwithstanding. The same year the leader of the church issued a statement urging all Mormons to follow federal law and not engage in polygamy. After that time, the federal government allowed the church to recharter. However, breakaway sects maintained the practice, and in 1896, when Utah wanted to become a state, the federal government forced Utah to forever ban polygamy in its constitution. The

issue slowly died down and is now heard of infrequently. However, some sects throughout the United States still advocate and maintain the practice, leading to renewed concerns about the health and safety of the women and children involved in such practices.

The Supreme Court has continued to uphold its polygamy decisions, including upholding a conviction for violating the White Slave Act (the Mann Act) for polygamous men who took their underage wives across state lines and upholding a Utah state decision removing custody from those who had told their children that polygamy was acceptable even though they themselves did not practice it. Thus, polygamy is one area where personal control, religious belief, and legal practice have interacted much more heavily in the past than in the present.

Polygamy has also been trotted out recently in the whole gay marriage debate, as some gay marriage opponents argue that gay marriages represent the same threat to the traditional family as polygamy and, indeed, that gay marriage can be equated with polygamy. However, such opponents forget that very few people ever strongly advocated polygamy, and no church has supported it since the Mormons officially banned the practice in 1890; gay marriage, on the other hand, has many well-known supporters whose morals are generally acknowledged to be among the highest, and the idea is accepted by a growing number of religions.

Indeed, gay marriage is probably the best-known current area where the personal issues of religion and state interact. Those opposing gay marriage believe that if the state allows it, the state would be mandating that gays be accepted as equals in the area of marriage, and these opponents consider this a violation of their religion. Many of the opponents believe their religion bans gay marriage, either because God (as most of those opposing gay marriage are Christians and see the Christian God as opposing the practice) set up marriage for only a man and a woman or because God ordained sex as between a man and a woman and so banned homosexuality in general (or, of course, both). Those in favor of gay marriage see its opponents as imposing individual religious qualifications on marriage, which they believe the state should treat solely as a legal issue. Gay marriage supporters also point out that there are religions, indeed, Christian religions, that accept gay marriage and believe it *should* be equal with heterosexual marriage. Remember that if one couple is married in a church and another is married before a justice of the peace, in the eyes of the law, the weddings are equally valid. Thus, the religion of those opposed to gay marriage, in the eyes of the supporters of gay marriage, should not enter into the question of the practice's legality. Some supporters of gay marriage believe there should be no interaction between the state-controlled union of two individuals and religion. It is not as simple as that for others, however, both supporters and opponents. Marriage was originally a church matter, and though it is now controlled by the state, religion is still intertwined with marriage in the eyes of many, even if the exact reasons for the connection cannot be articulated.

Some churches fear being ordered to marry gay couples if gay marriage is legalized, but that is simply not true. Currently, churches cannot be ordered to marry any particular heterosexual couple, and the same would be true of any gay couple; if the church decided not to perform gay marriages, the church could not be ordered to do so. Indeed, in Canada, where gay marriage was recently legalized, Parliament officially declared that no church in that country would be required to marry a gay couple.

Gay marriages were originally legalized by the courts in the state of Hawaii in 1993, but by 1996 Hawaiian voters had amended the state constitution to prohibit gay marriage. In the interim, a firestorm raged as the whole issue of marriage and respect of one state for another was reconsidered. As of 1993, all states respected every other state's decisions on marriage and divorce: if married in one, married in all, and if divorced in one, divorced in all. It

had not always been that way, but as of 1993 this had been the practice so long that it was accepted. However, many states did not want their morality disturbed by another state's decision to legalize gay marriage. Supporters of gay marriage were thrilled, in 1993, thinking that they did not have to fight to legalize gay marriage anywhere anymore, as the courts had done it in Hawaii. In 1996, Congress passed and President Clinton signed the Defense of Marriage Act (DOMA), which held that one state did not have to respect another state's marriage if the marriage was between two people of the same sex and the first state did not allow gay marriage. This issue is far from settled as Canada has legalized gay marriage, Massachusetts has acted to legalize gay marriage, and California will likely soon be considering a law relating to the practice.

Connecticut, New Jersey, and Vermont all permit civil unions to both gay and straight couples. Civil unions are an interim step between having no legal relationship and being married, and those states that have adopted them grant the people in civil unions the same tax benefits and status that married couples have, without declaring the couples to be legally married. Importantly for the rest of the country, no other states have to recognize that status, as most states do not have civil unions. Thus, Vermont, Connecticut, and New Jersey's decisions to create civil unions and the civil unions created there remain there. Some gay marriage advocates feel these unions are not stepping stones toward an eventual acceptance of gay marriage but permanent roadblocks relegating gay couples to second-class status; some gay marriage opponents, on the other hand, oppose giving any rights (or formal recognition) to any gay couples. As the imposition of belief stemming from religion causes many to deny the recognition of gay marriages, this issue shows the interaction of religion, personal freedom, and the state.

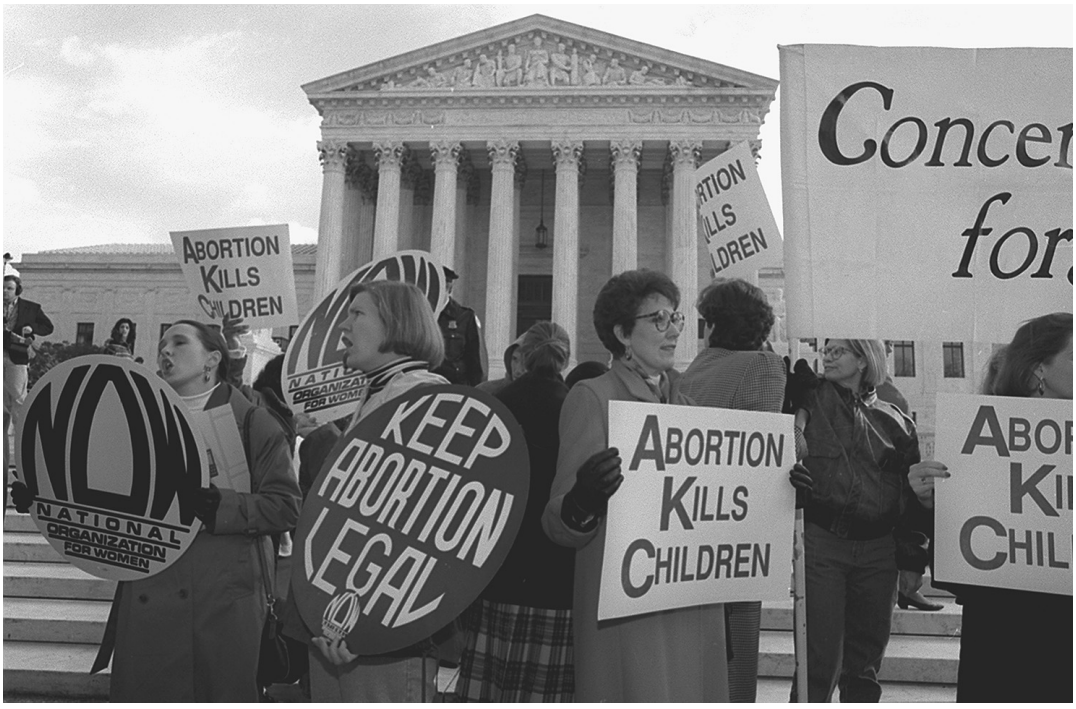
Divorce is another area in which state law influences one's personal life. Similar to marriage, most regulations on divorce are created at the state level. Unlike the Defense of Marriage Act, there are no divorce regulations created by the federal government and applied to the whole nation—no Defense of Divorce Act, if you will; therefore, all states must still honor one another's divorces. Divorce standards vary from state to state. Some states are quite strict about divorce, while others are quite liberal. The requirements differ in a number of ways, including how long applicants for divorce must be residents of the state in which the divorce is applied for and the causes that have to be given for the divorce. Many states have no time limit if both spouses are residents of the same state at the time of the divorce. The time limit if only one spouse is a resident varies greatly. For instance, New York requires that the resident spouse be a resident for two years, while Nevada only requires six weeks; some, like Alaska, require no residency period, even though applicants must reside in the state.

The acceptable causes for a contested divorce also vary. For example, in a contested divorce in New York, if the divorce does not come after a separation decree, the state still requires that the filing spouse either prove adultery, long-term abandonment, imprisonment, or cruel and inhumane treatment. Nevada, on the other hand, requires only that the filing spouse in a contested divorce prove that he or she is mismatched with his or her spouse or that the couple has not lived together for at least a year. Of course, if the divorce is uncontested, most states allow relatively easy disjoining of the couple.

In many ways, state regulations are directly related to religion, and religious ideas have always shaped divorce law. Historically, divorce was believed to violate the will of God, so very strict standards were imposed on who could divorce. For instance, Massachusetts, the earliest colony in New England, allowed divorce only in cases of adultery, bigamy, desertion, and physical cruelty. Such cases were difficult to

prove, and divorce was rarely granted. In the first century of Massachusetts' existence, it allowed about one divorce every other year. This was still more than the rate in England, however, where Parliament, the ruling body for the entire country, had to grant a divorce, and the official church rarely granted annulments. At times, states did not recognize divorce decrees from other states, but now nearly all states do, at least in general. Fewer courts now allow attacks on divorces from neighboring states than in the past. Such a policy has actually led to a loosening of divorce regulations in some states, as stricter regulations merely mean that rich people can go and live for a short time in another state and be divorced, while poor people must stay married. Thus, divorce is another area where personal freedom and the state connect, with the regulations based at least in part on religion.

Another area where personal freedom interacts with state regulations, which originate, at least in part, from religion, is the area of abortion. The main rationale advanced behind most laws banning abortion wholly is that life begins at conception. The belief that life begins at conception, in turn, comes in large part from the religion of those supporting the position, though anti-abortion organizations also point to such factors as a fetus's heartbeat beginning eighteen days after conception to support their perspective. Biblical and religious quotes can be seen on many of the bumper stickers and billboards advocating an anti-abortion stance. Courts have also recognized that there is a religious element to the abortion controversy. The case legalizing abortion on a national level, *Roe* v. *Wade,* stated, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine,



Abortion rights advocates and anti-abortion activists square off during a demonstration outside the U.S. Supreme Court on December 8, 1993. Ever since the court upheld the legality of abortion in the landmark case Roe *v.* Wade *(1973), abortion has been one of the most divisive personal and political issues in American society. (AP/Wide World Photos)*

philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question" (410 U.S. 113: 159–160). While *Roe* v. *Wade* claims that religious positions are too fragmented to state a consensus, many people move from their own religious beliefs to positions on abortion, particularly those in the pro-life camp, as it is called by its adherents.

The Supreme Court doctrine on abortion started with *Roe* in 1973. That case held that states cannot ban abortions in the first trimester, can regulate them in areas related to maternal health from the end of the first trimester up to the point of viability (where the fetus is able to live, should it be necessary, outside the womb), and can regulate and even ban the practice after viability, except when the life of the mother is at risk. That case sparked a huge controversy, in part because it was the first time the Supreme Court had ruled on abortion, a very sensitive subject, and in part because it relied on the right to privacy, a right that was not directly stated anywhere in the Constitution. Those opposed to abortion called it legalized murder, while those in favor of allowing women to choose viewed it as leveling the field across the nation and giving women control over their bodies. Not all states banned abortion before *Roe,* as roughly one-third of the states allowed some access to abortion, and most states granted an abortion when the mother's life was at risk. Also, there was a thriving practice in foreign abortions (for those who could afford to fly out of the country) and back-alley abortions (for those who could not), and there were medical risks associated, particularly with the latter. Other women disappeared for six months at a time, ostensibly to visit an unknown aunt, in order to avoid the shame of an unwed pregnancy. The baby would be given up to an orphanage or for adoption, and no one, public thought went, was the wiser. Thus, the absence of legal abortion did not mean that abortions were not performed or that no one had premarital (or extramarital) sex, as some commentators suggest.

Since *Roe,* abortion has become a hot-button political item. Most Republican presidential candidates have promised to appoint pro-life Supreme Court justices, and most Democratic presidential candidates have promised to appoint pro-choice Supreme Court justices. Many Supreme Court decisions have limited the holding in *Roe,* but no decision has overturned it. Among the most important decisions since are *Harris* v. *McRae* (1980), which held that the federal government could refuse to fund abortions under Medicaid, and *Planned Parenthood* v. *Casey* (1992), which held that the key point now was viability and that burdens were allowed on abortions as long as they were not undue burdens, even while *Roe* in general was affirmed. Thus, even after thirty years of attempts to place justices on the Supreme Court to overturn *Roe*—and all of the justices but two appointed since 1973 were appointed by Republicans—*Roe* still stands. *Roe* and the cases that follow have little direct connection with religion, as religion has not been used often as a rationale for deciding the cases, but abortion as an issue has a lot to do with religion, as religion greatly helps to form most people's opinions on the issue.

A final area to be considered is the right to refuse medical care. Dying adults are generally allowed to refuse medical care, so long as they make the decision while conscious and lucid. Therefore, many people make living wills, dictating that their lives not be maintained artificially in the event that such a decision must be made while they are not conscious or lucid. These living wills can specify whether a hospital should resuscitate an individual who has stopped breathing as well as what measures should be done to keep alive an individual who has passed into a vegetative state. Without proper medical documentation, this becomes a quite complex issue, as was shown in the Terry

Schiavo case in Florida in 2005. Religion did not enter directly into the *Schiavo* case, but it could have, as different religions take different stands on the amount of medical assistance that should be allowed, and many of the groups supporting Terry Schiavo's parents, who wanted to keep her alive after she had passed into a medically vegetative state, were religious. Some religions go so far as to prevent consultation with regular medical personnel, rather referring one to medical healers within the faith. Adults who makes the express wish to avoid care or avoid extraordinary care can generally expect to have their desires granted. However, the issue becomes more complicated when children's rights become involved. The child's rights to care are then weighed against the religious rights of the adult. When someone is a sole caregiver, the right to refuse treatment may be denied, as the child would be left with no one to care for him or her; but if there are other caregivers for the child, even if the person refusing treatment is the primary caregiver, then the interests of the adult are often held to outweigh the interests of the child.

When the person is a child and the parents are the ones making the decisions, the state may step in to protect the interests of that child. Many parents who belong to churches that do not believe in Western medicine and/or blood transfusions want to have their children follow these practices, and so refuse that care for their children. Of course, the children are not old enough to decide on their own, and so the state will try to force the care when it is needed to save the child's life to allow the children to grow up to make their own decisions. The state has often won these legal battles and treatment has been forced. Thus, if only the individual is concerned and is an adult, the state is generally not allowed to interfere in this personal area. However, when the person concerned is a child, the state can interfere and force the child to be treated. Here, the question is not religion motivating the state law, as in other areas, but the state law, which is religiously neutral, coming into contact with religiously motivated personal actions.

Religion moves large parts of many people's daily lives, and also motivates, directly and indirectly, many state laws. When religiously inspired state laws intersect with individual action, or when individual action that originates in religious belief clashes with state laws, the First Amendment's bans on state establishment of religion or state interference with religious freedom no longer seem as clear as they might have at first blush. Religion is seldom used as the main defense for a state law, as doing so would run afoul of the First Amendment's establishment clause, but religion does still push some state laws, many of which have been upheld on nonreligious grounds. Likewise, religious conduct that violates state law is neither always upheld nor denied, as the actions taken, how much they violate the social mores, and the people affected always need to be considered. Personal issues of religion and the state are thus as varied and as intense as the people from whom they emanate.

Prayer and Bible Reading in Public Schools

The issue of prayer and Bible reading in the public schools is one of the more heatedly discussed topics today, even though there is little prospect for any real change on either of those issues. To understand this issue further, several areas should be examined, including the practices of the states in the period leading up to the 1960s, the Supreme Court cases dealing with prayer and Bible reading in the schools, the reaction to these cases, and the current state of the law.

Most states did not have uniform policies dealing with Bible reading and prayer prior to the 1960s. As late as the early twentieth century, only one state had a law mandating Bible reading, that being Massachusetts, and the reading was supposed to be done without comment.

This does not mean that other states did not have Bible reading or prayers to start the day, but control of this was left to the local school boards. To determine the actual percentage of students who had Bible reading or prayers in their public schools would require an analysis of every school board's policy in a certain year and then to assume that schoolteachers were following the board's directions. Thus, until the twentieth century, no real uniformity existed. The twentieth century saw some attempts at uniformity in the area of Bible reading and prayers for a number of reasons. First, states became convinced that a good way to fight communism, during the Cold War, was to inject God into the classroom both with Bible reading and prayer. The adoption of Bible reading had not been without controversy at the local level, and part of the widespread reform movements of the early 1900s was aimed at settling that controversy. People were convinced of the need for prayer but knew also that a prayer that satisfied Catholics would not satisfy Protestants, and vice versa, never mind the religious minorities or those who did not belong to (or believe in) organized religion. Some states developed official state-mandated prayers that aimed to satisfy Catholics, Jews, and Protestants (but not other groups).

Another issue of concern was whose Bible to use and what part of the Bible to read. Catholics and Protestants used quite different Bibles at the time, with the Catholics using the Douay version and the Protestants generally using the King James Version, and thus, even the decision of which Bible to read from provoked controversy. Some school boards tried to defuse the issue by turning it over to even more local control than the school board—in the neighborhoods where Catholics were in the majority, the Douay would be used, and in the neighborhoods where Protestants were the majority, the King James would be used. Another consideration was what part of the Bible to read from. In order not to anger Jews, the Old Testament was often used from Christian Bibles, either Douay or King James. Neither of these reforms, of course, pleased those who wanted government to stay wholly out of the issue of religion.

While the 1960s are seen as the time when God was removed from the classroom (and, correspondingly, by those supporting Bible reading and prayer, as the time when America began to decline), the 1960s were not the first time that the courts had heard the issue of Bible reading and prayer, merely the first time that the U.S. Supreme Court had ruled on it. In the 1800s, Cincinnati had seen great controversy over the question of which Bible to use for Bible reading, so much so that the whole episode came to be called the Cincinnati Bible Wars. The final decision of the school board was to end the practice of Bible reading altogether, and an appeals court held that a school board was not able to do this as it exceeded the school board's powers. The Ohio Supreme Court, however, declared that the policy was allowable, as parents were supposed to be teaching religion to their children, not the local school system. The Illinois Supreme Court decided a similar issue in 1908, dealing with the forced use of the King James Bible in public schools for Bible reading, and it struck down this practice, as the Illinois constitution prohibited religious discrimination or instruction in religious subjects in the public schools, and the court found that both occurred.

Other states had similar conflicts. Wisconsin agreed with Illinois, but Maine held that a parent could not remove his child from the public schools and teach the child at home if he disagreed with the use of the King James Bible. Thus, in a few areas, the state supreme courts had removed the reading of the Bible from the public schools, but in most places, the decisions were left to the school boards, and appeals to the courts, if any, were unsuccessful. These decisions of the courts provoked controversy at the time but later were overlooked, so when the Supreme Court decided to visit the issue in the 1960s, many people believed, erroneously, that the practices of Bible reading

and prayer were nationwide, beneficial, and previously unchallenged.

The Supreme Court considered dealing with the issue of Bible reading in the 1950s. In *Doremus* v. *Board of Education,* in 1952, the Vinson Court accepted for review a case dealing with the mandatory reading of five Old Testament verses. (Five seems to have been a common number of verses to read for an unknown reason.) However, the student who challenged the law had graduated by the time the case came to the Court, so it was dismissed as moot; and the Court denied standing to the other plaintiff, a taxpayer. In 1962, the Supreme Court returned to the issue in *Engel* v. *Vitale.* There, the New York State Board of Regents (a powerful board that sets standards for education and exams across New York) had constructed a prayer that they felt should be acceptable to Catholics, Jews, and Protestants (groups listed alphabetically). The Regents stated that prayer in the public schools would protect students from atheism and juvenile delinquency, and encourage them to lead moral lives. (Lee, Francis Graham. *Church-State Relations: Major Issues in American History.* Westport, CT: Greenwood Press, 2002.) The prayer was not mandated in schools, but each school board could choose to adopt it. The Hyde Park School Board did, and their decision was challenged in *Engel* v. *Vitale.*

The Supreme Court, in a 6–1 ruling, struck down use of the prayer as unconstitutional. The prayer in question read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (370 U.S. 421: 422). Justice Black wrote the opinion of the Court, and he believed in a strong wall of separation between church and state. For Black, this prayer was clearly religious and so clearly a violation. However, he believed that history proved his case and reviewed the development of religious freedom in this country and why he thought the First Amendment established an absolute wall. The fact that no coercion was used and no denomination was promoted was no reason to allow the prayer, nor was the reason that many people in America's history were religious. Black answered that last argument by stating, "There were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to" (370 U.S. 421: 434–435). As New York had stepped in and promoted a religion by writing an official prayer, it had pierced the wall between church and state. One dissent by Justice Stewart pointed out the instances of government invocation of religion, including the cry of "God save this honorable court," before each Supreme Court session, and that none of these established a religion. However, Stewart did not carry the day.

This decision was widely criticized. In the politicized Cold War atmosphere, many thought it was removing God when America needed religion most. Many church leaders, but by no means all, criticized the decision, and many Americans, but once again by no means all, disagreed with it. Notably, though, President Kennedy and Governor Rockefeller (of New York) supported the decision. Much of America was challenged in the 1950s and 1960s, and many did not like at least parts of the changes. However, the Supreme Court is not supposed to rule by public opinion polls.

If they had ruled by such polls, to take it a step further, they would not have put forth the *Abington Township* v. *Schempp* decision the next year. That decision dealt with Bible reading in

the schools, and the companion case *Murray* v. *Curlett* dealt with Bible reading and the saying of the Lord's Prayer. In Pennsylvania, origin of the *Schempp* case, ten or more verses of the Bible had to be read each day, and in Maryland, origin of the *Murray* case, either five verses of the Bible had to be read, or the Lord's Prayer had to be said, or both. The Supreme Court struck down both practices. The Supreme Court first noted that religion was important in American history, holding, "It is true that religion has been closely identified with our history and government" (374 U.S. 203: 212). But the Court noted that religion was not the only factor to consider: "This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly embedded in our public and private life" (374 U.S. 203: 214). Thus, neither factor ruled, and the Court turned to past cases.

After reviewing past cases, the Court reminded the public that the overriding principle was one of neutrality, and that the First Amendment limited the states just as much as it limited the federal government—and the government cannot favor religion over nonreligion just as it cannot favor one religion over another. The Court then stated a direct test for constitutionality of a legislative enactment under the First Amendment: "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion" (374 U.S. 203: 222). The Court held that Bible reading was clearly a religious activity and that this program violated the First Amendment, as its purpose was not secular but religious. The majority opinion answered the charge that has been made often since, that by removing the Bible the Court was being hostile to religion and thus establishing a religion of hostility to religion, or a religion of secularism. However, the Court here held that merely removing the Bible did not create hostility to religion.

Justice Douglas wrote a concurrence. He outlined the various ways that an establishment could be created, noting that in all of the ways "the vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church's efforts to gain and keep adherents" (374 U.S. 203: 228). He added that the establishment clause "also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone" (374 U.S. 203: 228). The funding of a religion was illegal, but it was also illegal to promote religion indirectly through the schools for which the public spent its funds. Justice Brennan also concurred, looking not at the history but at the effect, holding that "a more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent" (374 U.S. 203: 236). He held that the programs did. Brennan also argued that the First Amendment needed to evolve with the times, as education had, and religious practices in America had. He also pointed out that the churches should be concerned with attempts of the state to mandate religion, as "it is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government" (374 U.S. 203: 259). Brennan noted that even though prayer had long opened school days, a mandated prayer and Bible reading was much newer, and that these practices were innately religious, even if they had other benefits

as well. That religious element could not be overlooked, and so the Court struck down the practice. Brennan concluded, as a principle, that "what the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government" (374 U.S. 203: 295).

Justice Stewart dissented. He argued that more of a record was needed and held that "religion and government must necessarily interact in countless ways . . . there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause" (374 U.S. 203: 309). He argued that the Court used too mechanical a definition in the establishment clause, and that the free exercise clause was superior here, "for there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible" (374 U.S. 203: 312). He also suggested that the cases should be remanded to see if any coercion existed. Concerning the argument that children needed to be saved from the religious influence of the Bible, Stewart held that "even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief" (374 U.S. 203: 316–317). This presaged Justice Scalia's argument, much later, that tolerance in a society needs to run both ways, with those children who do not like prayer being tolerant of those who do.

After *Schempp* and *Engel,* the Supreme Court experienced a large amount of criticism. Also criticized was the plaintiff in the *Murray* case, Madelyn Murray, later Madelyn Murray O'Hair, who had sued on behalf of her son. She was viewed by many as a gadfly, and she was proud of her militant atheism and of her vigorous efforts to oppose what she saw as the state's establishment of religion—which brought down firestorms of criticism from time to time. At the national level, though, the Supreme Court received most of the negative press. Many called for a constitutional amendment allowing prayer in the public schools (less effort has been made to allow Bible reading in the public schools). Part of the reason for this firestorm has been political gamesmanship: it is very easy and very good for a politician's political standing to introduce an amendment allowing voluntary prayer when constituents favor it, even when that amendment will never be voted on and will never cost the politician anything in political capital. Roughly 300 amendments that would make voluntary prayer or Bible reading constitutional were introduced in 1962 and 1963 alone. Only three such amendments promoting voluntary prayer as constitutional, total, have made it to the floor of the Senate for a vote since *Schempp,* and all three have failed to pass, generally by at least ten votes (out of the sixty-seven generally needed).

The Supreme Court did not again hear any case directly calling for prayer in the public schools or Bible reading. This is in keeping with its general practice of not hearing cases dealing with the same situation as established law unless two lower courts conflict or the law generally

First-graders share a moment of silent prayer at the start of their day in a South Carolina school on September 8, 1966. Though the Supreme Court banned school prayer as unconstitutional in 1962, many state legislatures have supported the practice of providing a brief moment of silence during the school day that could be used for prayer. (UPI/Bettmann/Corbis)

changes. The opposition from below did not abate, though. Many states passed laws calling for voluntary prayer, and many school districts may have just ignored the Supreme Court's ruling and had prayers until someone sued. It is interesting that prayer, as in the proposed amendments, was the main focus, not Bible reading. The Supreme Court, however, did hear other cases on prayer, including moments of silence.

In 1978, Alabama passed a law calling for a moment of silence. That law was twice amended until it allowed a moment of silence "for meditation or voluntary prayer" (472 U.S. 38: 40). As amended, a suit was brought against it, and the Supreme Court ruled on that case in *Wallace* v. *Jaffree* in 1985. The Supreme Court held, "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority" (472 U.S. 38: 52). The Supreme Court looked at the purpose of the two amendments and held that they, especially the latter one adding voluntary prayer, were aimed at encouraging religion. However, the decision did not strike down the moment of silence. Thus, moments of silence are constitutional as long as the legislature and school board do not indicate, either in the wording or in the hearings accompanying it, that they would like prayers undertaken in that moment of silence. In the dissent, however, Justice Rehnquist ar-

gued that the only thing banned was preference for one religion over another, that the purpose test should be abandoned in favor of a neutrality test, and that the First Amendment's history was silent here, and so a moment of silence, even explicitly perhaps to be used for prayer, should be allowed. Lower courts have considered moments of silence, and as long as a secular purpose has been noted and no call for prayer has been made, they have been allowed.

The Supreme Court also has considered occasional prayers in the public schools, such as those at graduation and at football games, and has ruled against both of those. The Supreme Court first dealt with prayer at graduations in 1992. This practice was held unconstitutional. The procedure was that the principal would invite a local clergyman and tell him to deliver a nonsectarian prayer. Even though the prayer was offered by a private individual, he was invited by the school board (through the principal), and the Supreme Court held that people were being coerced by the prayer. The dissent argued that people who did not like the prayer simply had to remain silent, but the majority held that this was too much, as peer pressure would encourage individuals to pay attention, and the government was compelling participation in a religious exercise, a violation of the First Amendment. In the area of prayers at football games, decided in 2000, the procedure was that students would vote on whether to have a prayer before the game, and then, if the vote was yes, there would be another vote on who would give the prayer, and it had to be a student. Even though attendance at the football games was theoretically voluntary (at some high schools, expectation of attendance at the football games on Friday night is greater than expectation of presence in school on the weekdays), the Supreme Court held that the process forwarded the will of the majority, whereas the purpose of the First Amendment was to protect minorities and prevent the government from taking a stand on religion. The dissent held that preventing a prayer was hostile to religion and that having the occasion "solemnized" (which was the official purpose of the occasion) was acceptable. Thus, occasional prayer at public schools, whether at graduation or at football games, is supposed to be illegal—of course, as noted before, whether everyone follows the wishes of the Supreme Court is another matter entirely. Thus, prayer, whether occasional or often, and Bible reading, when not done for clear curriculum-related purposes, are currently unconstitutional.

Several areas of current Supreme Court doctrine are the subject of widespread dispute, including prayer in public schools, abortion, and the death penalty. Of those, the area of prayer, particularly daily prayer, seems to be the most settled. Politicians from time to time push for an amendment allowing prayer, but the Supreme Court has settled that issue, seemingly (one must say seemingly as the Supreme Court doctrine is never truly permanently settled) or at least until such an amendment would pass. Even with the new 2005 and 2006 appointments, a full five justices have held that prayer cannot be offered at graduation, which means clearly that daily prayer cannot be offered in public schools, even while a moment of silence, with no religious mention in its statement of purpose, is allowable. The exact difference may not be clear to a layman, but the issue is seemingly settled to those on the Supreme Court. Also, even the dissent arguing against a ban on prayers at football games did not suggest that it was time to reconsider *Engel* v. *Vitale,* which had banned prayer in the schools in the first place. Thus, while creating much heat and little light, like many discussions over religion, the battle over prayer in the public schools continues, even while not being likely to see any significant Supreme Court changes in the near future.

Religion and Issues of Employment

Religious tests for public office, at the federal level, have been prohibited since the ratification

of the Constitution in 1789. On the state level the practice, however, continued until much more recently. Of more importance to most workers today is how religion is allowed to affect the workplace, and what protections exist against religious discrimination.

The federal Constitution specifically prohibited religious tests for public office. This was a direct break from practices in England and most of Europe where there were state religions and religious qualifications for public office. The federal government, though, did not pass regulations prohibiting specific types of religious discrimination for nearly another 170 years. The Supreme Court also did not strike down religious tests for state office for about the same period of time, finally acting in 1961. Thus, for much of America's history, only the federal government specifically prohibited discrimination, and then only for public office. Furthermore, policies have not always dictated federal practices. Until the 1880s, the main qualification for public office was to be well connected, and if the party and candidate for whom a political functionary had encouraged public appeal won public office, the reward might be a job, most often in the post office. This was called the "spoils system." Thus, publicly, *who* you knew was more important than *what* you knew, and most political connections also involved religious connections.

After the late 1880s, applicants had to take tests for federal jobs, and while there were no religious qualifications for those, being connected still helped, and not all jobs were covered by the civil service. Eligibility for federal service jobs was also affected by the overall religious discrimination dominating the era. For example, many universities did not accept certain religious minorities, most often Jews. Because they could not graduate from some of the top universities and did not have the same educational credentials as Christian candidates, they were not seriously considered for some federal jobs. One specific note about the prevalence of this in the American legal system: the first Jewish Supreme Court Justice was Louis D. Brandeis, appointed in 1916, a full 125 years after the creation of the Supreme Court.

The same system affected those in the private sector, and often more harshly. Connections, including graduating from the same university and being in the same fraternity, were enormous helps to people seeking white-collar jobs in the nineteenth and early twentieth centuries, and those jobs often had religious tests. It was also important to belong to the right country clubs and move in the right social circles, which sometimes meant attending the right churches. While the focus of this encyclopedia is the relationship between religion and the law, it is important to realize that these same criteria were also used to exclude women and African Americans. This system did not change largely until the 1960s, with the passage of Title VII of the 1964 Civil Rights Act. This act barred discrimination, generally, on the basis of religion. It stated, as amended, that it was illegal "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" (U.S. Code, *Pub. L. 88–352,* Vol. 42, Title VII of the Civil Rights Act of 1964).

For religious organizations, the act held that religious discrimination was acceptable "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (U.S. Code, *Pub. L. 88–352,* Vol. 42, Title VII of the Civil Rights Act of 1964). For universities, the act held that religious discrimination was acceptable when "such school, college, university, or other edu-

cational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion" (U.S. Code, *Pub. L. 88–352,* Vol. 42, Title VII of the Civil Rights Act of 1964).

Religion included both practice and belief, as the act stated that "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" (U.S. Code, *Pub. L. 88–352,* Vol. 42, Title VII of the Civil Rights Act of 1964).

Thus, employers are generally not allowed to discriminate on the basis of religion, particularly those companies that have little to do directly with religion. For corporations that employ individuals whose job is directly shaped by religion and thus for whom religion is a "bona fida occupational qualification" (BFOQ), religious discrimination is allowed, but the BFOQ must be part of the business's necessary operation. For nonreligious corporations, that would generally be difficult to prove. For religious corporations, when a religious group runs the corporation or is directly involved, preference for a specific religion is allowed. Religious accommodation is also required of employers, but only at a reasonable cost.

An examination of the various areas affected by Title VII will demonstrate how religion interacts with types of employment. First, the federal and state sectors are considered. The federal government has been subjected to relatively fewer claims of discrimination than the private sector. One area that has had claims of religious discrimination is the military. Religious claims to be exempt from the draft are dealt with elsewhere in this volume and will not be discussed here. Once indoctrinated into the military, all soldiers become subject to the same regulations, regardless of religion, within reason. In 1986, a suit made it all the way to the Supreme Court dealing with whether a Jewish person could be forced to remove his yarmulke while on duty. It did not interfere with his work at all, and other factors may have been behind this person's suffering the forced removal, but the Supreme Court still upheld the action. The policy did not last long, as the next year Congress reversed the policy. However, general conformity in dress is required in the military. This is less of a problem now than it was in the past, as the draft no longer exists, and so participation in the military is voluntary; people who enter the military now generally know about and accept these regulations. By contrast, in the past, people would be unwillingly drafted and forced to wear military garb, even those strict pacifists who did not support the military in any way, and their claims of religion were not enough then to change the regulations or secure for them a religious exemption from the military.

The whole educational sector is also affected by Title VII of the Civil Rights Act of 1964. For instance, a school district was allowed to order that a teacher put away the Bible he was reading during quiet reading time. This was considered an improper endorsement of religion by the teacher, allowing the school district to ban the activity. School districts have also been allowed to tell employees what to teach and what not to teach. They have been upheld in ordering teachers not to teach creationism and intelligent design and in ordering teachers to teach evolution. Public education institutions have also not been allowed to promote religion by the calendar, meaning public schools are generally not to close on Good Friday. Schools are also allowed, somewhat, to control the dress of employees, but this varies based on circumstance and setting. One school

district banned religious clothing while teaching, and its firing of teachers for violating this policy was upheld. Another district, however, fired a third-grade teacher for wearing a head covering, claiming that it was religious dress recognizable to students, which represented an unacceptable promotion of religion. However, that decision was overturned, as the Court held that third-grade students would not recognize the head covering as religious and so would not view it as an endorsement of religion. Some general statewide laws banning religious clothing have also been upheld.

Most private sector employers are generally prohibited from exhibiting religious discrimination. Of course, complainants still have to prove that discrimination occurred and that it was due to religion, both of which may be difficult. Once one becomes an employee, policies can legally discriminate against a religion in their effect, but they cannot be written or aimed at doing so. Promoting only those in a single church would be illegal, if that were the stated policy, but it would be hard to prove that such a practice occurred without a written policy to support the claim. Employers also have to try to accommodate religious practices, but they only have to make reasonable accommodations. One school board (this is an example based in education, but it works in other areas as well) fired an employee who wished to take paid leave for religious holidays, over and above the three paid days for personal reasons, including religion, that were negotiated. Personal business days were allowed, but the policy specifically banned their use for religious services. Another employer was upheld in refusing to give an employee Saturdays off for worship (his worship day was Saturday) as it would have cost the employer overtime to have other employees to work the person's shift, a cost held to be more than a "reasonable" one.

Some state laws forcing accommodation of religious days have been upheld, but others have been struck down. Blue laws, which require a business to close on a Sunday, have been upheld, even against complaints suggesting that they discriminated against those businesses whose religious day was not Sunday, as it forced them to close two days a week. Some people have also been fired for refusing to work on their Sabbath. Unemployment laws require people to search for work in order to qualify for unemployment compensation, and some who refused to work Saturday and were fired for doing so could not obtain work that did not require them to work on that day. They were initially denied unemployment compensation on the grounds that they were not making a reasonable attempt to work, but the Supreme Court struck down that denial. In a seemingly similar case, the Supreme Court ruled that a law guaranteeing Sundays off was unconstitutional. Thus, the entire area concerning work on religious days is fraught with complications. Unlike the laws for accommodating religious practices, Title VII does not even carry the somewhat clear notation that an employer must make reasonable accommodations for religious holidays.

Companies that claim religious justification for their actions but are not directly religious in their own natures have generally had little success. One private school that had been established with a bequest that required all of its teachers be Protestant was held to be in violation of the law. The school was not aimed at increasing Protestantism, and so requiring one to be Protestant was not a BFOQ. Another corporation claimed to be a "religiously" oriented corporation; it had a mandated church service and penalized employees for failure to attend, but the beliefs of the owners were not held to be sufficient to make the company religious. A press was held to be a religious corporation, as it was directly tied to a specific church, but it could not point to a specific religious doctrine that would allow it to discriminate on the basis of sex, and so the discrimination was not allowed. Discriminating on the basis of religious qualifications for ministerial positions was held to be acceptable.

Religious groups are generally allowed more leeway by Title VII but are not allowed total control. Congress originally set the exemption for religious groups to cover only religious activities but then broadened it to encompass all activities, and religiously oriented colleges are also covered here as long as the church has a significant amount of control over the college. For instance, a gynasium run by a church but open to the public was allowed to discriminate against an engineer on the basis of religion, and a religiously oriented college, part of whose mission required it to have "an adequate Jesuit presence," was allowed to have a religion test for hiring in some departments. Schools must announce such requirements in job ads and other areas. Schools are also allowed to restrict the behavior of their employees by forcing them to follow the rules of the sponsoring church. A Catholic school was allowed to fire a Protestant teacher when the teacher divorced and then remarried without getting an annulment of the first marriage. At religious colleges, statements slurring the sponsoring religion or arguing against the beliefs of the majority religion very well might be justification for firing, even if such statements would be allowed at a public college.

Schools also cannot mask anything they wish to do under the cover of religion. Schools that wish to discriminate on the basis of sex, not religion, need very specific doctrinal support for that discrimination and need to be hiring for religious positions. One church refused to hire a minister because she was a woman (the seminary allowed women students as the church allowed women to serve in positions that required seminary training, but the church as a whole did not employ women ministers), and the courts upheld this. However, some colleges that wanted to discriminate on the basis of sex were not allowed to, even though the courts stated that the schools would have been allowed to discriminate based on the viewpoints of those hired. The Salvation Army was allowed to discriminate against a woman minister as the Salvation Army was sufficiently religious and the position considered was that of a minister, and the courts have been reluctant to interfere with the relationship between a church and its ministers. On the other hand, those church-affiliated colleges, even when their churches banned women ministers, were not hiring for minister positions, and so were not allowed to discriminate on the basis of sex. Thus, some gender discrimination by religious groups was allowed, but the groups were sufficiently religious and the discrimination was carefully based on religious doctrines.

The federal government also has crafted for itself a continuing role in overseeing these groups for the most part. State and federal commissions have generally been allowed to investigate the practices of religious institutions. A local religiously oriented school required, as a condition of employment, that people waive their right to sue, and the Supreme Court held that this was illegal and that a civil rights commission could investigate. Another school claimed that the Age Discrimination Employment Act did not cover it as the school was religious, and the courts ruled against that school as well; the Fair Labor Standards Act was also held to cover church schools. The Equal Employment Opportunity Commission was prohibited from gathering data from religious schools for some types of employment, but only about those employees chosen on the basis of religion. Thus it could gather information about staff and administrators who were not chosen on the basis of religion. One seminary claimed that the faculty, staff, and administrators were all ministers whom the EEOC was therefore prohibited from surveying, but its claim was denied.

Of course, with any of these, discrimination must be proven, and this is often difficult to achieve. Prohibitions of discrimination on the basis of religion are not nearly as cut and dried as discrimination on other bases, such as that based on race, sex, national origion, and religion, and the system is much more even-handed than it has been in the past. The system

is not perfect, but discrimination is generally harder to prove, and the law is now on the side of the employee. Also, discrimination on the basis of religion is generally not allowed unless the employer is religious and/or the religious element is part of a bona fide occupational qualification. Employers also need to make reasonable concessions to the employee's religious desires, but defining what is religious can be difficult. Spelled-out policies, if they are reasonable, are usually enforceable as well, particularly in the area of religion and religious practices.

For those interested, the entire text of Title VII of the Civil Rights Act of 1964 can be viewed online at *http://www.eeoc.gov/policy/vii.html*.

Religion and Politics in American Public Opinion and Public Attitudes toward the Free Exercise of Religion

Many people believe a democracy is consistently ruled by the majority. However, the Constitution and the Bill of Rights also limit government infringement upon specific rights. What the government is supposed to do when politics and public opinions run into the Constitution and Bill of Rights is a vexing question, particularly in the area of religion.

The battle between religion and politics began early in American history. The second colony, Massachusetts, was attempting to set an example for the rest of the world, and particularly to England, in the right way to live and govern. The colony's leaders believed they had a divine mandate to pursue perfection; as a result, they believed God should have an influence on the state, and so they had a state-established church. Disagreements from individuals were looked upon very unfavorably by the church/state leadership, and the church pushed the state to expel the early religious radicals, including Anne Hutchinson and Roger Williams. There were no early public opinion polls, but the Puritans and John Winthrop, the leader of the time, did maintain power for years afterward.

Massachusetts was also the scene of another case where religion and politics intermixed, this time with more tragic results. In 1692, the Salem Witch Trials brought accusations of witchcraft against hundreds. Here, the state allowed religious matters to be brought into the courts in two ways. First, the witchcraft charges were brought in state courts. Second, the use of "spectral" evidence was allowed. Spectral evidence was the report of ghosts, spirits, or shadows in the shape of the alleged witch that the accusers said they had seen, particularly at night. Religion and politics also interacted in more subtle ways. Not surprisingly, it was often the social pariahs, who failed to achieve acceptability in the eyes of "upright" religious citizens, who bore the brunt of the accusations, though some stalwarts were accused as well. Moreover, political strife, including Native American attacks, is now thought to be one of the aggravating factors in Salem. The question is not really why people were accused at Salem, but why the village turned to mass hysteria, accusing some 300 people of witchcraft before the state acted to curb the excesses. Across America, there were frequent allegations of witchcraft, but the mass hysteria of Salem is somewhat unique. In the end, 20 were hanged for being witches, 1 was pressed to death by stones, another 100 were convicted, and another 200 were accused—and politics probably helped end the crisis as the governor became more involved with the case after his wife was accused of being a witch.

Religion and politics continued to interact freely throughout the eighteenth and nineteenth centuries. One sign of this is the political backing received by the religiously motivated reform movements of the early and late nineteenth century. In the early nineteenth century, reform movements included temperance and abolition, both of which came largely from

religious motivations, with early nineteenth-century religious revivals arguing all people could be perfected and made to live without sin. If all could be saved, the logic followed, then alcohol abuse could be ended, and no one would be enslaved as no man deserved to own another. These movements in turn had effects on politics; one state banned alcohol, and others took faltering steps toward that end. And the abolition movement helped to break up the Whig Party and start the Republican Party, even though the latter initially only argued for "free soil," meaning no slaves moving into the federal territories, rather than the abolition of slavery in the South. In the late nineteenth century, social gospel movements arose, arguing that it was God's will to raise up (and potentially convert) all those living in poverty and slums, and the social gospel idea was one of many behind the Progressive movement, which radically transformed politics.

Politics also interacted with religion in the 1924 and 1928 presidential elections. In 1924, Al Smith and William McAdoo were the leading candidates for the Democratic Party nomination. Al Smith was from New York and a Catholic, and William McAdoo was from the South. Smith had more support but could not garner the two-thirds vote of the convention then necessary for the nomination. The main opposition to Smith stemmed from his Catholic religion, as many felt that the Catholic pope would be in control of America if Smith was elected. Neither candidate was willing to withdraw, and the Democratic convention produced vote after vote, with neither candidate amassing the two-thirds majority. Eventually, after over one hundred ballots, both withdrew and a relatively unknown candidate, John Davis, was selected. Davis suffered a stunning defeat by Calvin Coolidge. While Coolidge was popular, and no candidate might have been able to defeat him, if not for the Catholicism issue at the Democratic convention Smith would have probably received the nomination and fared much better than Davis in the national polls. Smith ran for the nomination again in 1928, receiving it this time, and losing to Herbert Hoover by a sizable margin. Many Catholics voted for Smith, perhaps more than the number that voted for the average Democratic candidate, but many others voted against Smith due to his Catholicism. It is unclear what the exact effect of Smith's Catholicism was on his vote total, but it is clear that religion directly shaped many people's votes in the 1928 election, as it had also done in the 1924 battle for the Democratic nomination.

While none of these events deal directly with American public opinion, these elections are a good indicator of American public opinion, as few accurate public opinion polls existed before the 1950s. Of course, voting records have a lot of flaws as reflectors of public opinion: disenfranchised groups often do not vote, and there is no way to measure how informed the average voter is. It is unclear whether Smith's Catholicism hurt or helped him in the 1928 election, but it definitely hurt the Democratic Party in 1924 by causing them to promote a weak compromise candidate. The polls that Americans are so familiar with today are a late twentieth-century phenomenon. Polls were taken only haphazardly in the early twentieth century and often brought inaccurate results. In 1936, the magazine *Literary Digest* forecast a stunning victory for Alf Landon over Franklin Delano Roosevelt in the presidential election. Of course, the stunning victory was the other way around. The reason was that the *Literary Digest* essentially surveyed only its own readers, all of whom could afford to subscribe to the magazine, and so failed to sample any other groups of voters. In 1948, polls predicted that Thomas Dewey would handily defeat Harry Truman in the presidential race—to the extent that Dewey stopped campaigning and some polls ceased surveying. The *Chicago Tribune* even printed newspapers announcing Dewey's defeat of Truman before voting results showed the opposite result. At that time, most polls were conducted via telephone, and this

naturally limited the respondent base to those who could afford to be hooked up to the local exchanges. Dewey appealed largely to the affluent, who represented the largest percentage of the polling base at that time. With few working-class votes actually taken into account, pollsters had only a partial grip on the nation's opinion when they thought they understood the country's perspectives quite well indeed. Thus, surveying the public response to the interaction of politics and religion is somewhat hit and miss in the pre-1950 era.

After 1950, religion continued to interact with politics, but public opinion became easier to survey with the introduction of random opinion polls, particularly the Gallup poll, which attempted to garner responses from a much wider base than the straw polls and readership surveys conducted by magazines and newspapers up until that time. One of the most noted public responses to the interaction between religion and politics was in the 1960 election. Many people did not want to vote for John F. Kennedy, because of his Catholicism. Some 51 percent of the respondents to one poll said that they would vote for Kennedy if he were not Catholic, whereas only 40 percent said they would vote for Nixon (Gallup Poll #627: 04/26/1960). This was a much more lopsided result than the actual election, which was nearly a 50–50 split, suggesting that a significant percentage of the respondents really did feel that a Catholic should not occupy the White House. Similar to the 1928 election, many people believed that if Kennedy were elected, the pope would direct U.S. policy, particularly U.S. foreign policy. Catholics, on the other hand, voted heavily for Kennedy.

Public opinion also has been used in two of the more heated topics in the political arena over the last half century: school prayer and abortion. After the 1963 *Schempp* decision, which banned Bible reading in the public schools, and the 1962 *Engel* decision, which banned school prayer, people were outraged, at least according to the polls. Both of these cases were decided under the establishment of religion part of the First Amendment, with the Court holding in both that forcing Bible reading and forcing school prayer created a government establishment of religion. However, the supporters of school prayer and Bible reading (more prayer than Bible reading) argued that such a ban interfered with their freedom of religion and that removing the Bible from classrooms would lead to the decline of American civilization. Regardless of exactly the reasons used, a number of polls showed great public opposition to both decisions. Nearly five out of six people polled favored a constitutional amendment allowing school prayer (Gallup Poll #682: 12/12/1963–12/17/1963). In another interesting poll, however, when asked if school prayer took place in their communities, about 30 percent said it did, about 25 percent said it did not, and some 45 percent said they did not know (Gallup Poll #661: 07/26/1962–07/31/1962). Politicians used the polls supporting school prayer to argue for just such an amendment allowing school prayer or to say that the Supreme Court was wrong.

With the second argument, and similar arguments against Supreme Court decisions, a valid question is the exact relationship between public opinion and the Supreme Court. The Supreme Court is not immune to public opinion, but the role of the Court, in our justice system, is to protect against constitutional infringements. If a policy truly does infringe upon the Constitution, is the Supreme Court supposed to be overruled merely because of public opinion, as recorded in polls? And if so, what percentage of the public has to agree before a constitutional violation is considered permissible? And does the percentage have to be even higher if more than one constitutional amendment is violated? Some believe the Court should follow the intent of the founders, who insulated the Court from the public partly for that reason—they wished to avoid the influence of mass opinion as part of the government's system of checks and balances. Politi-

cians have generally answered this question by saying that the will of the people should rule. This is a compelling reelection argument, if not a particularly constitutional one. Although efforts to amend the Constitution to allow prayer failed in the 1960s and 1970s, two efforts at the end of the 1960s did at least come to a vote, as did one in 1984. All have fallen at least eleven Senate votes or twenty-five House votes short of the needed majority.

In the area of abortion, politicians have also appealed to public opinion to try to overturn a court case, in this situation *Roe* v. *Wade.* Unlike school prayer, however, where the question is relatively simple ("Do you favor having prayer in public school?") and the poll data relatively uncontested, responses to abortion polls often revolve around how the questions are worded or how the results are interpreted. In one poll in 2005, 26 percent of people favored keeping abortion legal regardless of the circumstances, another 16 percent thought abortion should always be illegal, and the majority, some 56 percent, favored keeping abortion legal under certain conditions (Gallup Poll November Wave 1 2005: 11/11/2005–11/13/2005). Thus, one could argue from these results that 71 percent of people favor abortion restrictions (combining the second and third groups) or that 82 percent of people favor keeping abortion legal (combining the first and third groups). It is important to remember that often the wording of a question will affect a person's answer, and that conflicting replies often cast doubt on the accuracy of the polls and the consistency of our opinions.

The creation of questions aimed at reaching the results the pollsters want has come to be called push polling. Thus, in the area of abortion, there is both the question of whether public attitudes should control the Supreme Court and exactly what those attitudes are. Politicians opposed to *Roe,* however, have not worried themselves about these constitutional issues but instead have clamored to appoint Supreme Court justices who agree with their views and to propose a constitutional amendment overturning *Roe.* The second effort has been much less successful than the first, as a vote has never been held on such an amendment, and the first has been much less successful than those opposed to the decision hoped. Since 1973, some eleven justices have been appointed to the Supreme Court, with all but two appointed by Republicans and all but three believed to be opposed to *Roe,* but *Roe* still stands, even though it has been limited by later rulings. Of course, it is unknown how Justice Alito and Chief Justice Roberts will vote on a case asking them to overturn *Roe* v. *Wade.*

Besides *Roe* and school prayer, religion has also been used in American foreign policy throughout the second half of the twentieth century, and in American domestic policy in general. In foreign policy, religion was used as a way to differentiate the United States from the USSR. The USSR was officially an atheist nation, and some in the United States in the 1950s thought that there was not enough, in the average person's mind, to distinguish the United States and USSR. A few writers even suggested that one could read the Pledge of Allegiance and substitute the words "the Union of Soviet Socialist Republics" for the words "the United States of America," without having to change anything else. For this reason, they advocated adding the words "under God" to the pledge, and, to further remind people of the Christian nature of the country, changing the national motto to "In God We Trust." Opposition to these measures was equated with communism, and a general Cold War paranoia existed, and so the measures passed. Similarly, most of the country continued their view that "God" blessed America, apparently to the exclusion of other nations around the world. Politicians and presidents invoked God's blessing on America, and they still take their oaths of office on the Bible, adding "so help me God" to their oaths of office in the present day. Thus, politicians used religion to reinforce their legitimacy and to try to reinforce the legitimacy of America

throughout the 1950s, 1960s, and 1970s, and religious references from the president are still considered acceptable today.

Religion was again invoked in the 1980s to justify a militaristic policy toward the USSR. The 1980s was not the first time that the United States took an aggressive stance toward the world. Woodrow Wilson viewed America's mission as including the spread of democracy around the world and believed that the United States should be an example. Ronald Reagan continued this theme in the 1980s, repeatedly invoking the image of America as a model to the rest of the world, a "shining city on a hill"—words that had been used by John Winthrop and the Puritans to describe the Massachusetts colony. More subtly, but arguably present because of his heavy fundamentalist religious backing, was the idea that challenging Reagan's ideas on America and foreign policy was tantamount to challenging God, as God was the one who had set up this city and made it shine. Reagan early in his political career linked the idea of a city on a hill to God and later used it as an example in foreign policy. Reagan enjoyed high popularity ratings and was able to involve the United States in a high-spending, high-stakes race that ultimately concluded peacefully (fortunately) with the Cold War's end in 1989.

Both wars in Iraq had (and have) indirect religious elements. Democracy was a more frequently cited motive for the first Gulf War as George H. W. Bush frequently insisted the logic for the war lay in Iraqi aggression. However, as did his predecessor, the elder Bush had heavy fundamentalist backing, and his perspectives often carried religious overtones. After the attacks on 9–11, the younger Bush said that the United States was being attacked for its role in spreading freedom around the world. Bush then argued for attacking Afghanistan and Iraq in order to spread freedom. During the two Gulf Wars, anti-Islamic sentiment in the United States has run high. Many, including news analysts and media figures, incorrectly assume that anyone Arab in the Middle East is Muslim, and they often then equate being Muslim with having an anti-American sentiment. Some have also suggested that the second Gulf War carries the assumption that the idea of democracy will instantly appeal to all in Iraq. While this simplistic assumption is largely cultural, it does retain some religious elements. The religion and the overall culture of the Middle East are assumed to be less advanced than those of the United States. Those who believe this further assume that as soon as America's superior culture and political system are shown, a conversion of sorts will occur. Ideas of this sort have been part of U.S. foreign policy, unfortunately, for over a century.

One piece of evidence cited to demonstrate that the nation's leaders believed this argument is that the federal government in Washington repeatedly proclaimed that once the war had been declared successful, the troops would come home soon afterward. This slogan was in fact used by George W. Bush once the official invasion was over, but the fighting did not end, nor were many troops recalled. While not solely religious, there are definitely religious elements to this paradigm of foreign policy.

Public attitudes toward the limits of the free exercise of religion are more difficult to determine. Very few polls have asked questions directly about each clause of the First Amendment's religion guarantees, and few consider the rights of others to their free exercise of religion when considering their own freedom of religion. For instance, in one poll about a Ten Commandments display in Alabama, some three-quarters of all respondents believed that the display should remain due to the freedom of religion, but no question was asked about how this squared with others' freedom of religion as other people also had a right not to have the government suggest which religion was correct (Gallup Poll Social Series: Governance: 09/08/2003–09/10/2003). In that same poll, only about 20 percent of the re-

spondents believed that complete freedom from government establishment of religion should cause the display to be removed. Thus, the answer seems to be that personal individual freedom of religion matters, but extending that right to those with divergent views is much less important.

This is not to suggest that people do not find freedom of religion at an abstract level to be important, only that freedoms are personal and one is often more concerned with one's own freedom than anyone else's. Freedom of religion was one of FDR's Four Freedoms in World War II, and after the war ended, some 80 percent of people answered that a government ensuring freedoms, such as those of religion and the press, was more important than a government ensuring a good paycheck to people (Gallup Poll #416: 04/07/1948–04/07/1948). In 2003, nearly sixty years later, a poll asking how important freedom of religion was found 84 percent of those responding, or five out of six people, saying that it was at least very important (Gallup Poll November Wave 1 2003: 11/10/2003–11/12/2003). Thus, freedom of religion matters, but where that freedom of religion stops for one person and begins for another, and where the prohibition against governmental establishment of religion enters into the picture in general are not well understood. On particular issues, like school prayer and abortion, people have strong responses, but the general issues are often not as well thought out as they could be.

The First Amendment states four freedoms in fewer than fifty words, but brevity does not guarantee clarity. Similarly, something as important as freedom is often thought to be enduring, and not to be related to public opinion. Thus, many people's answer to the question of how public opinion impacts religious freedom might be that it should not at all, but such is truly not the case in a democracy. Others might argue that the majority should always rule, but if the majority rules, then how enduring is freedom? This tension between majority rule and the freedoms that are supposed to endure, combined with the difficulty that freedoms are neither self-defining nor self-executing, has produced many landmark Supreme Court cases in the area of religion, among others. America, to its credit, has accepted those rulings, even when many of the people (and more of the politicians) have railed against them and sometimes worked to overturn them, and that fact, never reflected in a public opinion poll, perhaps should be remembered first when considering religion and politics in the area of American public opinion.

For further reading

Gallup Poll footnotes with complete interviewing dates and sample sizes and the inclusion of a URL.

Gallup Poll #627. Question 30. Sample size: 2759. 4/26/1960. Available *http://brain.gallup.com/documents/question.aspx?question=95124&Advanced=0&SearchConType=1&SearchTypeAll=kennedy%20nixon*

Gallup Poll #682. Question 48. Sample size: 4126. 12/12/1963–12/17/1963. Available *http://brain.gallup.com/documents/question.aspx?question=89464&Advanced=0&SearchConType=1&SearchTypeAll=school%20prayer*

Gallup Poll #661. Question 6a. Sample size: 4040. 7/26/1962–7/31/1962. Available *http://brain.gallup.com/documents/question.aspx?question=87903&Advanced=0&SearchConType=1&SearchTypeAll=school%20prayer*

Gallup Poll November Wave 1 2005. Question 15. Sample size: 1006. 11/11/2005–11/13/2005. Available *http://brain.gallup.com/documents/question.aspx?question=155110&Advanced=0&SearchConType=1&SearchTypeAll=abortion*

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question.aspx?question=146244&Advanced=1&SearchConType=1&SearchDateADa=1&SearchDateAft=True&SearchDateAMo=12&SearchDateAYe=2002&SearchDateBDa=15&SearchDateBef=True&SearchDateBMo=1&SearchDateBYe=2004&SearchOpenNew=False&SearchResuNum=10&SearchResuOrd=dated&SearchTypeExa=freedom%20of%20religion

Religion and Politics in the Framing of the Constitution

Religion was an important issue for many Americans in their personal lives at the time of the American Revolution and the ratification of the Constitution, but it does not appear to have played a significantly formative role in the Constitution's creation. Politics and negotiation did play an important role, but politics do not seem to have had much of a publicized interaction with religion. For this reason, it is difficult to determine what role our Founding Fathers expected religion to play in the nation.

Religion played a formative role in many of the colonies at the time of their founding. Several, including Massachusetts and Virginia, established official state-supported churches, and others limited the role of religious minorities. Freedom of religion did increase in the period between the founding of Virginia in 1607 and ratification of the Constitution, specifically with Maryland's Toleration Act and the formation of Rhode Island and Pennsylvania as colonies with mandated religious freedom. It also increased in England, with the English Toleration Act following the Glorious Revolution. The latter act protected only Protestants, but that was an increase in religious liberty from before, when the Anglican Church had been the only one protected.

In America, during the first three-quarters of the eighteenth century, religion had varied in significance, though it remained quite important. In the early 1700s, Enlightenment ideas dominated American thought, particularly among the elite. However, life was not easy in America, with epidemics, crop failures, and occasional Native American (and French) attacks. Thus, most attended church regularly. Estimates of church attendance vary, but 80 percent of the population may have belonged at some level and at some time. This attendance, along with the need for religion, helped to spark the First Great Awakening in the 1730s and 1740s, which revived religion for a time and caused many to think for themselves. As a result, many people, or their children, were willing to rebel against England when the time came, even though they may not have thought of rebellion in religious terms. New denominations also came out of the First Great Awakening, including the Presbyterians and the Baptists.

At this same time, a less Christian religion came about in Deism. This held that Jesus was not divine but merely a great teacher, and that all religion should be tested, similar to the way scientific ideas were tested. Deists also believed in a Watchmaker God who had created a working universe and then stepped aside, similar to a watchmaker making and winding a watch. Among the adherents of Deism in America were Thomas Jefferson, Benjamin Franklin, and John Adams. Many more people were believers in the Enlightenment, it should be noted, than were Deists, and most Enlightenment believers were still members of traditional congregations. There is still dispute about whether George Washington was a Deist.

Religious liberty was slowly emerging as an idea at the time of the Declaration of Independence, but that document still notes that "God" entitles nations to exist and that a "Creator" gives people rights. The document as a whole is relatively unreligious in terms of the colonists' complaints, but it does contain two other references to a God. Religion also was important in the American Revolution as ministers who favored the colonists' side preached sermons that said colonists were doing the right thing in the eyes of God, and other ministers predicted that the founding of a new nation would be the first step to the Second Coming.

Benjamin Franklin, a Deist, achieved worldwide renown as a writer, scientist, statesman, and diplomat. (National Archives)

During the period between the American Revolution and the Constitutional Convention, the government under the Articles of Confederation did little for anyone, never mind for religion. The Articles of Confederation said little about religion. That government did, however, see some role for religion, appointing chaplains in the armed forces and attempting to promote Christianity among the Native Americans. It also promoted the publication of Bibles and issued proclamations aiming to increase religious devotion. The Continental Congress (which was the ruling body under the Articles of Confederation) also passed the Northwest Ordinance, which set up schools in the Northwest Territory, and part of the schools' goals included the promotion of "religion, morality and order."

State governments in the period between 1776 (America's independence) and 1787 (the Constitutional Convention) were very busy. Every one of them had to establish a new constitution, as all of the old constitutions had been charters issued by England; America was then independent of England, so these were invalid. Some passed wholly new constitutions, while others edited their former charters slightly to remove the language referencing the Crown. The colonies also greatly varied on their view of official churches. As noted, certain of them had already created some level of religious liberty, and others took this period to do so, although not without controversy, and still others kept their state-supported churches. Some states, in their new constitutions, passed a tax to support the official church but also allowed taxpayers to divert that support to whichever church they chose. Massachusetts was among these, and in the new constitution were the words that "it is the right as well as the duty of all in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession of sentiments; provided he doth not disturb the public peace or obstruct others in their religious worship" (Article II). Thus, in Massachusetts, freedom of religion existed, but only for those who still worshiped regularly without disturbing the public.

Other states attempted to keep the publicly supported church, but failed. Virginia is the most well known of these. Virginia attempted to pass a tax, under the new state constitution, to support ministers, but James Madison and Thomas Jefferson, among others, defeated the attempt and instead passed the Bill for Establishing Religious Freedom, which had been written by Jefferson. Jefferson was in Paris at

this point and so did little directly to pass the bill, even though he had written it. Madison is also one of the main proponents of the eventual Bill of Rights, so his support of the bill is often surveyed to attempt to see his views on religion. Virginia and Massachusetts provided the first six presidents of the United States, and so they are worthy reflections of American leaders' opinions on that score, but they also show the range of opinion about religion in America at the time the federal Constitution was written.

The religion of those at the Constitutional Convention has been a much studied topic. It is often referenced by those who want to introduce religion into America today, backed by the federal government. The argument goes along these lines: most of the Founding Fathers at the Constitutional Convention in 1787 were religious, and thus they would not have objected to ___ (insert topic here: prayer in the public schools, the phrase "under God" in the Pledge of Allegiance, etc.). That argument merits a bit of discussion. First, it assumes that whatever our Founding Fathers wanted, we should uphold, perhaps always, or perhaps only until we have a constitutional amendment ratifying the change. However, many things have changed since 1787, and only some of those have been changed by amendments. Slavery was banned by an amendment, but women have many more rights than they did in 1787, and only their right to vote was given in an amendment. Other changes of this nature can also be enumerated. Second, the argument assumes that religious men necessarily thought it was the role of the federal government to advance religion. Many religious people at the time and since, from Roger Williams on, wanted religion and the state to be separate, not to protect the state but to protect the church from the state's corrupting influence. Others thought that religion should be left to the states rather than the federal government. A third view notes the vast religious divisions of the times, holding that many of the founders thought that religion was a very divisive topic, which is why they left it out of the Constitution. If that view did prevail, of course, then the Founding Fathers would have wanted the federal government not to take a stand on religion at all. That does not mean, however, that they would not have wanted the states to take a role. The states were seen as more united and able to do things that the federal government could not, particularly after the federal government was limited by the First Amendment. Thus, the religiosity of the Founding Fathers is informative but not determinative of what they would have wanted the government to do in the area of religion, nor does that end the debate on what religion should do today, without an agreement of the current populace that it should do so. This does not mean that religion should or should not be a part of our federal government today, but only that America needs to move beyond the belief that the federal government should promote religion because the Founding Fathers were mostly Christians.

The religion of the Founding Fathers who attended the Constitutional Convention needs to be considered, along with their occupations. Of those attending the Constitutional Convention, only one, Abraham Baldwin, had been a minister, a Congregationalist, even though his primary occupation by the time of the convention was as a lawyer. Several others had studied the ministry for a time but were not practicing ministers. Of those fifty-five who were Convention delegates, over half, thirty-one, were identified as Episcopalian by one source or another; the others were, among other denominations, Presbyterian, Congregationalist, Quaker, and Catholic. The most common thread among the delegates, it might be noted, was the law, as some thirty-five, or about two-thirds, had a connection to the law, either at the time or before. Several of the delegates were adherents at one time or another of more than one religion, and some attended multiple services at different times. All founders were adherents of at least one religion at some time in their lives. For in-

stance, Benjamin Franklin, widely regarded as one of the more scientific of the founders and generally thought to be a Deist, attended a revival by George Whitfield, a leading preacher, and even publicly admitted making a significant contribution to him. Thus, the whole web of religion and the founders is a very tangled one, even as we try to figure out what religion each one belonged to (never mind believed in), much less determine the effect of that religion in the founding of the nation.

Politics played a large role, much more so than religion, in the ratification of the Constitution. The document did not command unanimous support, even among those delegates who attended the convention—of the fifty-five who attended, only thirty-six, or a little over two-thirds, signed the Constitution. Many who liked the Articles of Confederation wanted those to continue, and many others thought the Constitution gave the federal government too much or too little power or had other flaws. Thus, a battle erupted over the Constitution. The name given those who favored the Constitution was Federalists; those who opposed the Constitution were the anti-Federalists. Among the complaints about the Constitution was that it lacked a Bill of Rights that would protect the liberties of the people. The whole process by which the United States has a Bill of Rights will be considered in a bit, but the Federalists eventually did carry the day, and the Constitution was ratified.

Important in convincing the nation to ratify the Constitution were the Federalist Papers, a series of essays written by Alexander Hamilton, James Madison, and John Jay. Their views of religion and national government are quite important for three main reasons: first, they demonstrate what three of the founders thought about the Constitution; second, they were influential in helping the Constitution to be adopted; and third, they are often still cited today by scholars and the Supreme Court when making arguments about the Constitution's meaning. The Federalist Papers, on the topic of religion, had very little formal to say. In one, Jay advanced the argument, in passing, that all Americans professed the same religion and so should unite (he was arguing against a looser confederacy, such as that existing under the Articles of Confederation). Religion was often used as an example of things groups could form factions about, and statements about religion and government were quoted, but the focus was more on government. In the main place that religion was mentioned directly, the famous Federalist No. 10, Madison wrote, "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source" (Madison, 1787) *(http://www.yale.edu/lawweb/avalon/federal/fed10.htm)*. Madison's overall argument in that document was that the larger nation is safer from tyranny than the individual state, but if the nation was to have no power to check the tyranny in an individual state, little would be gained for the protection of that state. Madison mentioned no solution for the state, within the nation, that succumbed to tyranny, but his focus here was more the virtues (and benefits) of forming the United States under the Constitution, not helping the individual states. Thus, the Federalist Papers have little to say on the whole issue of religion.

As mentioned before, one demand placed upon the Federalists by the anti-Federalists was that the nation adopt a Bill of Rights, something lacking in the national constitution that was present in many of the state constitutions. James Madison had been opposed to the whole idea of a Bill of Rights, thinking that such documents did little in practice to protect rights and that any rights excluded from the Bill of Rights might be considered as not guaranteed to the people; in this way, a bill of rights would actually limit the rights of the people rather than assure them. He believed in a limited government, meaning that if the government had no specified power to legislate in an area—for example, religion—then it could

not do so constitutionally. Thus, as religion is not mentioned as an area for congressional power in Article II of the Constitution, there was no need for a religion clause in the Bill of Rights. Madison was not able to convince others of his argument, and the Federalists were pushed into supporting a bill of rights. There was little interest in the topic, though, in the First Congress, and Madison became the one pushing Congress to consider the bill. Madison, it is thought, introduced the Bill of Rights at least in part to safeguard the Constitution and to avoid calls for another Constitutional Convention, and so his interest was not wholly in the rights of the people. It is unclear from the House debates exactly what was meant by the "freedom of religion" eventually adopted by the group, and the Senate's debate (as well as that in the states) was even shorter. It is clear, however, that the freedom of religion, as proposed in the Bill of Rights in 1789, applied only to Congress, as Madison's suggestion that the amendment should also prohibit the states from infringing upon freedom of religion was not adopted by those writing the Bill of Rights. It should be noted that the current First Amendment was originally third when the Bill of Rights was sent to the states; the first two, dealing with apportionment and congressional pay, were rejected at the time, so what was third became first. (The original Second Amendment was eventually passed in the late twentieth century, becoming the Twenty-Seventh Amendment). Of course, the Fourteenth Amendment, added in 1868, did prevent the states from infringing on a person's liberty without due process of law. Whether the term "liberty" included religious liberty, of course, remains open to debate.

Politics played a much larger role than religion in the Constitution's creation. Religion was a matter, it seemed, for the individual states, and those states with an established church did not even manage to block the First Amendment. Probably they felt that the federal government would never interfere with their state churches, but this is not clear, and there were no public opinion polls to tell the view of the public toward the Bill of Rights or the Constitution in any area, much less in the area of religion. It appears that religion was largely left up to the states, some of which, in turn, left it up to the individual (and some of whom still pushed for a church or churches with state support). Thus, religion, while important to the generation that created the Constitution, did not have much impact on that document, and we have little guidance about the limitations that should be placed upon either part of the First Amendment's religion clauses today.

Religion in Times of War

It has often been said that law is silent in times of war. Religion, by contrast, can often be clearly heard when a nation goes to battle. It has been used to justify and oppose wars throughout U.S. history. Surveying the role of religion in America's wars will help readers understand the interaction between religion and warfare in this country. It will also help to clarify the role religion plays for many conscientious objectors (COs) to war.

In the American Revolution, religion, particularly the Christian religion, was used by both the British and American sides to defend their causes. Preachers in congregations supporting the revolution would praise revolutionary efforts in their sermons, when previously their sermons would have praised the king. This was particularly true in those Anglican churches that had been, of course, controlled by England and that now favored the revolutionary cause. Preachers thus reassured the revolutionaries and their families that what they were doing was right in God's eyes. Religion was also used by Loyalist preachers to rally their followers. The Continental Congress appointed military chaplains to serve with the troops, and some ministers even fought. The Quakers, on the other hand, were a pacifist group. They, therefore, opposed the war, regard-

less of whether they thought the colonists were in the right. During the end of the American Revolution, the Articles of Confederation were passed, and the Continental Congress became the Confederation Congress. That body also had some dealings with religion, telling the American troops to live justly (even though it did not regularly pay them). Moreover, during the American Revolution, Congress appointed a chaplain for itself, and toward the end of the war it approved the printing of a Bible in the United States as the British blockade cut off delivery of all the Bibles from Europe. Thus, the Continental Congress and the people of America had a very active religion during the American Revolution.

Most of America was not directly affected by the War of 1812. Other than naval clashes, there was very little activity on land. The British invaded in only four places: Baltimore-Washington, New Orleans, the Great Lakes Region, and a portion of Vermont, and none of these incursions constituted a serious threat to the nation. The United States, for its part, invaded Canada on three occasions, even burning present-day Toronto in 1813, but there was never really any chance to conquer the country. This was a significant war for American morale, but it had few battles, and its battles did not represent particularly decisive victories for either country. Not surprisingly, therefore, the War of 1812 had only a small impact on religion. Religious revivals, on the other hand, created divisions among the people over the War of 1812. Both those who favored and those who opposed the war spoke their views at the pulpit. The war was most opposed in the Northeast, and it was those preachers, especially the Congregationalists, who inserted the most anti-war views in their sermons. Southern preachers, particularly the Baptists, felt that God was giving the United States approval to become involved in the war. England was painted as a corrupt and diseased nation, and God was shown as therefore favoring the United States. Political divisions from before the war were largely maintained during it, even while the war was integrated into sermons as an issue. Remember that the War of 1812 was fairly unpopular, and the minority party, the Federalists, opposed it all along, wanting to end it by negotiation right up to the point that a peace treaty arrived. After the war, both northern and southern religionists turned their attention to reforms of various kinds, particularly of the individual.

The next formal war involving the United States was the Mexican-American War. This was over quickly in most areas, except for a somewhat extended campaign in Mexico. Religion played a small role with the troops but a larger one at home as it was a major factor in promoting both general and specific opposition to the war, especially in terms of the war's potential effects. Oppositionists believed it had been undertaken at the behest of pro-slavery forces as the conquered areas would be new territories for the spread of slavery. Thus, those opposed to slavery, some of whom based their opposition in religion, generally also opposed the Mexican-American War. Among those in opposition were Ralph Waldo Emerson, Henry David Thoreau, and former president (and at the time congressman) John Quincy Adams. It was in this period that Thoreau wrote his "Civil Disobedience" essay to explain his views on the war and spent a day in jail for refusing to pay his taxes for the past six years. (The Mexican-American War was one of his reasons not to pay.) Abraham Lincoln opposed the war as well, but not on religious grounds; he felt that the incident that started the war had occurred on Mexican, not U.S., soil, and that this should have been enough to keep the United States out of the conflict. Some also opposed the war on generally pacifist grounds, such as the Quakers, who opposed all war. On the other side of the coin, religion, in a nationalistic sense, was also a cause of the war. Many people felt that the United States, as part of its Manifest Destiny, had the patriotic and religious right and duty to expand to the Pacific and to

civilize all of the lands that would be conquered. The war's end result was a large territory gained by the United States but no peace achieved between the pro- and anti-slavery forces who disagreed about the war's necessity.

In many ways the Mexican-American War led directly to the U.S. Civil War. The territory gained provoked even more fierce debate over slavery, and the admission of California as a state touched off another fierce debate as it broke the balance between the number of free and slave states. Before California there had generally been as many slave as free states, but California tipped the balance toward free, and the resulting Compromise of 1850 only served to further inflame passions. Thus, in many ways, there is a straight line from the Mexican-American War to the U.S. Civil War.

The Civil War had many ties to religion. First, both the North and the South thought that God was favoring their side. The "Battle Hymn of the Republic," written by Julia Ward Howe in 1861 and praising the northern forces, includes in its lyrics, "Mine eyes have seen the glory of the coming of the Lord . . . Glory! Glory! Hallelujah! His truth is marching on." Its tune was taken from another northern anthem, "John Brown's Body," which had among its lyrics, "He's gone to be a soldier in the Army of the Lord" and "The stars above in Heaven now are looking kindly down." The South felt equally sure of God's blessings, as at least one version of "Dixie," probably the best-known song today from the Civil War, contained the lyrics, "Swear upon your country's altar . . . Never to submit or falter— . . . To arms! To arms! To arms, in Dixie! . . . Till the Lord's work is completed!" "Dixie" was not the only southern song to reference God, as one southern tune was titled "God Save the South."

Second, religion was one cause for the war, especially for some Northerners. As noted before, religion was a motivating factor in some people's opposition to slavery; this caused the North to oppose the spread of slavery, which in turn angered the South. However, few politicians called for the removal of slavery from the South, as this would have required a constitutional amendment. Even with the admission of California and Oregon, there were only seventeen free states and fifteen slave states. Thus, thirteen more free states would have had to enter the union before the free states would have had the two-thirds majority necessary to pass an amendment banning slavery (and that assumes, of course, that all of the free states' representatives would have voted to abolish slavery).

Religion also affected the way women worked during the war. The United States Christian Commission played a significant role in providing nurses to the war, using women in its work (although they were unpaid). Clara Barton and Dorothea Dix both were instrumental in organizing nurses and medical supplies. Barton was motivated largely by her father, who had told her always to serve others as Christians should. Many of those serving on this commission, also called the United States Sanitary Commission, were motivated by religious reasons. In the South, women also served significant roles as nurses, often motivated by religion.

Opposition to the war, especially to the Union draft, also had a religious component. Many Irish Catholics were Democrats and opposed the war both from the Democratic perspective and because they feared African American competition for their jobs. The draft act told these men that it was their duty to fight and also allowed rich men to purchase their way out of the draft. These factors produced the 1863 draft riots in New York City, where four days of riots produced lynchings and much property damage. Thus, religion did lead some to oppose the war, and religion played a significant role in the overall Civil War.

While not officially a war, the movement to eliminate the Native Americans from the western part of the United States (and earlier from the eastern part) was influenced substantially by religion. Most white Americans considered themselves superior to Native Americans, and religion was one reason for this opinion. They

believed God had given America to the white people for their use, and since Native Americans were not using it—as the white population thought it should be used —they could be removed. White Americans also gave little consideration to the religion of the native people, considering all aspects of Native American society, including religion, to be primitive. The enlightened plan for Native Americans was to herd them onto reservations, teach them how to be yeoman farmers on small plots of land (similar to the lifestyle of white settlers), and give them a Protestant culture, which included Protestant religion, of course. The unenlightened plan was simply to exterminate all of the Native Americans. Somewhere between the two lay the idea that Native Americans would simply die out of their own accord. Thus, religion played a part in the idea of rounding up Native Americans, herding them onto reservations, and "civilizing" them.

Civilization was an important theme of America's next war as well, the Spanish American War. That war erupted, at least in part, due to American jingoism and boisterism in the late nineteenth century, as America aimed to make a mark for itself on the world stage. Manifest Destiny was also important. Similar to the Manifest Destiny of the mid-nineteenth century, the late nineteenth-century version said that it was America's God-given right to take its place in the world alongside other nations, but instead of instructing Americans to expand across America to the Pacific, it instructed them to expand across the Pacific and create an American dominion there. America originally claimed that its goal in the Spanish American War was only to help Cuba against the Spanish, but the United States soon launched an attack in the Philippines, a Spanish possession halfway around the world from Cuba. When the smoke cleared, the United States had gained not only the Philippines but also Guam and Puerto Rico, and it was not sure that Cuba was ready for independence. The reason that Cuba and the Philippines were not ready for independence, in most minds, was that they were not "civilized" enough, and part of civilization, to white Americans, was Christianity. America's goals in the Philippines included converting and civilizing its population. Fighting raged in the Philippines for four years, and over 4,000 U.S. soldiers and 20,000 Filipinos died. Cuba was not given its freedom until 1901, and the Philippines were not given theirs until 1946. During the initial war, religion did not play a large part, but the campaign to subdue the Philippines was quite brutal; one reason for this was the idea that the United States was superior due to its cultural, religious, and racial strengths vis-à-vis those of the Filipinos. Thus, religion played a role in the initial reasons to go to war, in the fighting to subdue the Philippines, and in the justifications for keeping the Philippines (and Cuba for a time) as American territories.

America next became involved in World War I, and religion played a substantial factor in the decisions of many about whether to support the U.S. war effort and about their initial approach to the European conflict. When World War I broke out, many pacifists, who opposed all wars, opposed this one as well, and many others saw the United States as superior to the Old World of Europe, which was mired in a conflict reminiscent of the imperial mindset Europe represented. Over time, many of the U.S views, particularly that of Woodrow Wilson, changed, and Wilson began to believe that the United States had a religious and civilizing mission to go into Europe, create a just peace, and "make the world safe for democracy." Wilson, at least in his own mind, saw America as being able to create a peace so that this war would be "the war to end all wars." Other reasons existed for the change in public opinion as well, including British propaganda that portrayed the Germans as un-Christian and uncivilized Huns. (The war pitted the British and French on the one side against the Germans and Austro-Hungarians on the other for the most part, at least on the Western

Woodrow Wilson was a distinguished professor of political science and president of Princeton University before he began his remarkable political career as governor of New Jersey (1911–1913) and president of the United States (1913–1921). (Library of Congress)

Front.) While not always expressed in religious terms, Wilson's stern moral ideas and upbringing (he was the son and grandson of preachers) showed through in his rhetoric.

Pacifists who had backed Wilson's call for neutrality throughout his first term often acted from ideas based in religion as well, and most did not change their views when Wilson did. Those who had favored Germany all along also had a religious basis for their views. Irish Catholic Americans supported Germany largely because it was opposed to Great Britain, which had owned Ireland and treated it questionably for centuries; not surprisingly, they were opposed to the United States entering the war on the side of the British. Other reasons for opposing U.S. involvement included the socialist perspective that this was a rich man's war and a poor man's fight, even though their ideas were not expressed in purely religious terms.

Once the war started, religion did not go away. Many stories about the war emphasized the morality and goodness of the side the United States was fighting on and stressed the evil of the other side, using religious or pseudo-religious terms to do so. This view of the war continued until its end, and the victory was proclaimed as a righteous one. Wilson in part believed his own rhetoric and expected the rest of the victors (including Great Britain and France) to follow his lead—being magnanimous to the losers and proclaiming a just peace. This mistaken belief created great problems at the Paris Peace Conference and may have been largely due to Wilson's own religious bearing, which held that those who agreed with him were on the side of God and that all others belonged in hell.

Many pacifists before the U.S. involvement in World War I remained so, even at the risk of, or in the face of, government persecution and prosecution. Often those who opposed the draft did so because of their religious views. Among these were the forerunners of the group that would become the Jehovah's Witnesses, and they tried to be exempted from the draft as they were against all war. Some offshoots of the Amish religion found their members jailed as they proclaimed pacifism and refused to wear the army uniform. Pacifists also found themselves physically assaulted on many different occasions. Quakers were active in opposing the war and the draft, and they found themselves accused of being un-American as well, even though they had been in America for more than two centuries. Some ministers were fired for opposing the war. The whole selective service system did not have a good way to evaluate who should be exempted as a conscientious objector or one whose religion forbade him to be involved in any war. Consequently, many religious pacifists were either jailed for opposing the draft or inducted into the armed forces, and then dealt with by the military justice system; this system of justice resulted in even harsher penalties than meted

out by civilian courts and at least some deaths from mistreatment in the prisons of the armed forces. Thus, pacifists found themselves abused by both the public and the military system for their religious views.

World War II saw fewer problems related to religion. Part of this was because World War II in general was a much more popular war than World War I—many people did not understand why we were fighting World War I, but few had this difficulty about World War II, resulting in less opposition to the war for religious reasons. Also, the draft system had been revised, which led to an easier time for those who were pacifists and wished to request a conscientious objector exclusion. Most conscientious objectors were allowed to perform alternative service, and only a very few (especially when compared to the overall number drafted) totally refused any service at all, claiming that taking any part was still supporting the war. However, most pacifists were willing to serve in hospitals or in noncombatant positions. Some groups, however, were more likely to be given conscientious objector status than others. It has been estimated that only 500 African Americans were granted conscientious objector status out of the three-quarters of a million drafted. (To give a frame of reference, roughly 34 million were subjected to the draft in World War II.) In total, only some 72,000 individuals applied for conscientious objector status in World War II. Of those, some 25,000 performed noncombatant service (they agreed to serve in the military but in a noncombat status), 12,000 did alternative service (they served on the home front in a hospital or as a test subject for vaccines, etc.), around 20,000 were denied conscientious objector status overall, and about 15,000 had claims that were never acted on (their request was not considered by the draft board or they were rejected for other reasons). Of the 20,000 denied conscientious objector status, some 6,000 were imprisoned for refusing to serve.

Religion also played a role in how World War II was defined. It was not one of the stated reasons for why the war began, as there really was only one: Pearl Harbor. As for why we were fighting the Germans, technically it was because they had declared war on us after we declared it on Japan, and so we returned the favor by declaring war on Germany. However, in the popular estimation, German fascism was considered evil and immoral. Most Americans also viewed Japan as evil and had a similar feeling toward the Nazis in Germany, and religion colored Americans' understanding of evil. One of the Four Freedoms, which Roosevelt sought to preserve through fighting the war, was freedom of religion. Thus, at both the diplomatic and popular levels, religion was a factor in the popular understanding of why we were fighting World War II, even though it was not one of the most direct reasons.

Of course, Hitler had decidedly religious motivations for his own involvement in the war. He wanted nothing less than Aryan world domination and the extinction of all Jewish people. He equated race and religion as one and the same and applied stereotypes to justify his position. The concentration camps housed members of a number of unpopular religions, including Catholics and Jehovah's Witnesses. However, the Holocaust became well known only after the fact, and most Americans supported the war for more patriotic reasons. Indeed, America was among the countries that denied entry to many Jews fleeing Europe, refusing to grant them protection from annihilation.

The next war, the Korean War, was somewhat ignored at the time in the public perception. The troops in the Korean War came generally from the regular armed forces and the National Guard and also from the draft. The Korean War was more popular than the Vietnam War, so fewer problems occurred with that draft than the one for Vietnam. Also, as fewer people were needed than in World War II, fewer chances arose for problems, even though there were certainly conscientious objectors. During the Korean War, about 25,000 people received conscientious objector status,

a rate relatively comparable to that of World War II (when many more people were considered by the selective service system). From the start of World War II to Vietnam, most who received CO status were Mennonites, and of all COs during this same period, 98 percent had a specific religious affiliation. Thus, most conscientious objectors were religious, as the system required an applicant to request the status because of religious belief and training; in 1948, Congress added language requiring belief in a "Supreme Being." It was not until the Vietnam War that the category was widened.

Religion was a significant factor in the reasons the United States fought against communism in Korea and later in Vietnam. The Soviet Union, who backed the U.S. opponents in Korea and Vietnam, was officially an atheist country, and the United States had always viewed itself as religious, a perception that Congress underlined in the 1950s. At that time the United States adopted as its motto "In God We Trust" and added "under God" to the Pledge of Allegiance. Both of these actions were taken to differentiate the United States from the atheist USSR. Cold War attitudes often carried a zeal reminiscent of the medieval crusades, which encouraged the United States to fight communism everywhere, including in Korea and Vietnam.

During the Vietnam War many problems arose with the issue of religion in wartime, as the number of conscientious objectors skyrocketed—some claiming religious reasons but many objecting on nonreligious grounds. Compared with 72,000 who applied for conscientious objector status in World War II, more than 162,000 were granted this status between 1964 and 1973 during the Vietnam War. These figures become significant in the context of the overall draft: about one-fifth as many men were drafted by the selective service during the Vietnam War as in World War II (10 million were drafted during World War II, and slightly fewer than 1.8 million in the Vietnam War). Conscientious objectors were not the only people opposed to the Vietnam War, even among those of draft age; some 200,000 were charged with violating the draft laws, and probably another 350,000 violated the laws but were never indicted.

Around 1966, the need for military manpower became acute, and the selective service was asked to provide about 300,000 men a year to the armed forces; between 1966 and 1969, the military grew from 2.5 million to 3.5 million troops, most of whom were drafted. The majority of these did not serve in Vietnam, but the risk of being sent into the war zone greatly shaped people's reaction to the draft.

During this war, the allowable reasons for claiming to be conscientious objectors were expanded. At first, one had to believe in a Supreme Being and oppose the war on religious grounds. However, in 1965, the Supreme Court considered the case brought by Dan Seeger, who was truly opposed to war but did not claim belief in a Supreme Being, and the Supreme Court allowed Seeger to be excluded from the draft. They held that although Seeger did not profess a religious belief, elements of his philosophy were parallel to belief in a Supreme Being, among others. In 1970, in *United States* v. *Walsh,* the Supreme Court considered the case of a person who was opposed to war due to his beliefs. The Court again widened the definition of religion, holding that if a person's beliefs occupied a place in his or her life similar to the place held by religion in others and these beliefs were in opposition to all war, an exemption should be granted. This wide definition held until 1973, when the draft was canceled and an all-volunteer army was put in place.

Since the Vietnam War, the draft has not existed in practice, even though all young men since 1980 have been required to sign up with the selective service system at the age of eighteen. A system for a draft is in place, with the necessary requirements and procedures, should the country ever need to mobilize a large

military service, but doing so would be very unpopular. Recent calls during the second Gulf War for a renewed draft garnered two votes in the U.S. House of Representatives out of over 400 voting. Some of those in the military did apply for conscientious objector status during the first Gulf War (technically named Operation Desert Storm) as they protested America's actions in the area, and some were given discharges, but many more were jailed: although estimates vary, about 100 were discharged and another 2,000 were jailed. During the second (and much longer) Gulf War (technically named Operation Iraqi Freedom), soldiers who were conscientious objectors were still allowed out of the military, and it is estimated that hundreds have applied for CO status, with probably many more looking for other ways out or not re-enlisting. These numbers are undoubtedly much lower than they would have been under a draft, as everyone who joined the service was a volunteer. Although some of these volunteers chose the armed forces as the only way to afford a college education rather than out of devotion to combat of any kind, they did so with awareness of the possibility of war. Particularly those who enlisted after September 11, 2001, have done so knowing that they would probably be sent into battle. Some of these opposed to war probably have religious objections, but those who were religiously opposed to all war are not very likely to have signed up in the first place. This is not to imply that those conscientiously objecting to the war in Iraq do not have real objections to it, but that they are not likely to be religious pacifists, like most of those who were COs in World War I, World War II, and the Korean War.

Religion has also figured in America's military involvement since Vietnam. Although many motives were stated for going to war in Iraq both times, a definite factor was the religious beliefs of the opponents. The initial reasons for the first Gulf War were not religious (Saddam Hussein headed a Baathist or secular regime), nor were they religious for the first part of the second Gulf War; however, most Americans (and probably most policy makers) see our opponents as Islamic, and some express this opinion using racial, religious, or ethnic slurs. This attitude definitely was a factor in the decision to go to war. The popular media regularly analyze Islamic beliefs and discuss the religious positions of the Iraqis. Country radio stations play Lee Greenwood's "God Bless the USA," which expresses the sentiment that God favors U.S. military actions, with the implication that all U.S. military actions are undertaken to secure American freedom and democracy. Irving Berlin's "God Bless America" is also frequently played as a less politically charged but still religious anthem for the country.

Thus, conscientious objectors who are (or were) motivated by religion have long existed in American history. Similarly, religion has long figured in our motives for fighting wars and in our national commitments. America tends to view itself as a country spreading goodness and light and freedom and fostering religious plurality; also, the decline of religion or increasing secularization is frequently cited as a threat to Western civilization. But deep down, religion still plays a large role in influencing America's actions and colors many people's views of war—one war or all wars in general.

Religious Proselytizers and the Law: One Person's Religion versus Another's Right to Be Left Alone

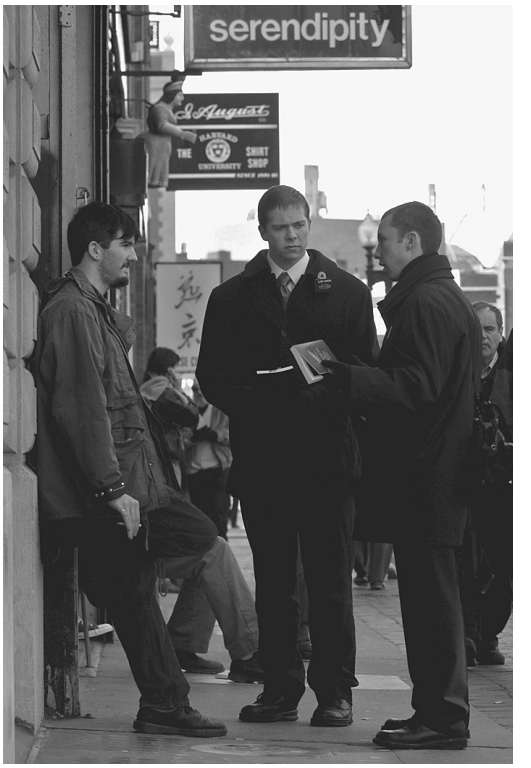
A well-known area of religion where the establishment and free exercise clauses of the First Amendment clash, and the law often gets involved, concerns door-to-door religious proselytizers. Very often, believers of a certain faith are instructed to promote their religion to those who are not members of the faith and to spread the word. Some religions, though, go further than most, ordering the active conversion of

others rather than just welcoming interested parties at their temple doors. Thus, the followers of certain religions, including the Jehovah's Witnesses and the Mormons, feel that the only way to spread the religion effectively and find new converts is to go door to door promoting the faith. However, many of those contacted often feel offended, irritated, or trespassed on by the spreading of that word and wish to be left alone. They sometimes feel that their freedom to believe something else, or at the very least their freedom to be left alone, is being infringed on by these conversion efforts. Thus, the law often has been asked to step in and determine where the proselytizer's freedom of religion ends and the other person's freedoms, religious and otherwise, begin.

This note considers those proselytizers who are sincere in their efforts to promote their religion to others. In religion, as in other areas, there are those who use religion as a cloak for their desires to get rich. This group includes some televangelists, revivalists, and door-to-door preachers who are sometimes more interested in their own wallets than in anyone's salvation. However, the issue in those situations is fraud, not the freedom of (and from) religion, which is what this note considers. All authorities are allowed to prevent fraud and have less concern about religious infringement in those situations than in the area of sincere door-to-door religious proselytizers.

Two of the best-known groups that go door to door are the Latter-day Saints, referred to often (and in this essay) as the Mormons, and the Jehovah's Witnesses. The Mormons' founder, Joseph Smith, believed he had been visited by an angel of God, who led him to golden tablets in upstate New York. These tablets, when translated with a special key on stones also revealed to Smith, told of Jesus' visit to the area that is now the United States after his death and resurrection. According to the tablets, the people who lived in that area were descendants of the tribes of Israel, and Jesus had revealed himself to them, but they did not follow him. The tablets said that God had become angry at this and, as a punishment, turned the Native Americans' skin dark. (This curse is similar to the curse of Ham in the Old Testament, used by some to try to justify white supremacy.) The message of Mormonism soon spread, and Smith moved west with his followers. He was met with a violent response, and a mob killed him in Carthage, Illinois, in 1844. Most of the Mormons then traveled to the Utah territory, initially isolating themselves from the world.

Relatively quickly, the Mormons began looking outward to spread their message and came to believe that all male Mormons should serve a two-year mission in their late teens or early twenties (generally late teens), with the purpose of telling non-Mormons (whom the Mormons call Gentiles) about the Mormon



Mormon missionaries talk with a pedestrian in Cambridge, Massachusetts. The Idaho natives, both twenty-one years old, were on a two-year mission. (AP Photo/William B. Plowman)

faith. Even in the mid-1800s, while most Mormons lived in Utah, Mormon missionaries were spreading the word about their faith. Young Mormon women are not under the same obligation, although some do serve, and they are expected to spend only a year and a half in missionary work, not two years. It is estimated that about one-half of Mormon boys will be involved in such a mission. The Mormons serve these missions both in the United States and around the world. The total number of Mormons worldwide is now estimated to be 11 million to 12 million, with 6 million in the United States.

The second group of door-to-door preachers, as noted, are the Jehovah's Witnesses. The Witnesses were founded, although not under that name, in 1879 under the leadership of Charles Taze Russell. Russell was a pastor who organized study groups and did research on the Bible, becoming convinced, as did many others over time, that the end of the world was near. Russell set the ending date as 1914; he believed that only a certain number of people would be saved, and that it was important to be among the fellowship of those relative few. Russell originally limited the focus pretty much to the group itself, as only 144,000 were supposed to be saved. The group was originally called Russellites after their founder. The second leader (Russell died in 1916), Joseph Rutherford, transformed the group, explaining that after the original 144,000 were saved, the rest of the people on earth who behaved properly would live on earth after the Second Coming, and so the Witnesses needed to spread the word. They began their practice of going door to door, giving away magazines, playing records, and spreading the doctrine of the faith.

The group attracted attention early for other reasons than the proselytizing, as they opposed World War I, believing that all war was immoral, and also refused to salute the flag, because Exodus 20 held that graven images should not be worshiped, and they believed the flag to be a graven image. The title Jehovah's Witness was based on Isaiah 43, and the name, Jehovah's Witnesses, was adopted in 1931. The group grew internationally, and total membership is now estimated to be over 5 million, but might be as high as 15 million, with about 1 to 2 million of those in the United States.

The Jehovah's Witnesses seem to provoke more opposition than other movements, and they definitely have been involved in more Supreme Court cases, particularly in terms of proselytizing, than the Mormons or other groups. Historically, this may be explained by the Mormons' significant head start in time over the Jehovah's Witnesses, and currently it may have to do with the Mormon Church's tendency to work with the local authorities in the areas where they do missions. Another source of opposition may stem from the claims of the Jehovah's Witnesses concerning the Second Coming of Jesus Christ. They have predicted five different dates for this event, the first said to have occurred in 1914. Currently, most Witnesses claim that Jesus came in 1914 but only in an invisible state, and some of the official Jehovah's Witnesses' literature and websites note how much the world did change in 1914 (which was, of course, the start of World War I). Another reason for opposition is the strongly held beliefs of the Witnesses. These strong beliefs make the Witnesses perhaps more noted than the Mormons and thus perhaps more opposed. A third reason for opposition to the Jehovah's Witnesses is their ideas that deviate from the mainstream, such as a refusal to salute the flag, to have blood transfusions, or to participate in the military.

The first well-known case of a Jehovah's Witness gaining Supreme Court attention for his treatment by the legal system was *Lovell* v. *City of Griffin* (1938). Alma Lovell was a Jehovah's Witness in the city of Griffin in Georgia. Griffin, like many other municipalities, required people to have permits before distributing literature. Other cities who had such ordinances claimed that their purpose was to prevent fraud and litter and to protect the public against

strangers coming to their doors. Lovell, for her part, refused to listen to any city regulation, as she claimed that she had to listen only to God. The Supreme Court, deviating from Lovell's freedom of religion concern, found Griffin's permit requirement to be a restriction on the freedom of the press, as it was a prior restraint on the distribution of information. Prior restraints, in the area of the press, are viewed as particularly odious both because they were used by Great Britain in the colonial period and because they operate as a total ban on dissemination of information.

The second noted case was *Cantwell* v. *Connecticut* in 1940. The Witnesses, under Rutherford, were increasing their efforts to draw in new members and, with this, increasing their attacks on those who did not agree with them, particularly Roman Catholics. Jesse Cantwell and his sons were Jehovah's Witnesses who played records for those who would agree to listen to them. The record leading to their arrest was called "enemies," and it basically described the Roman Catholic Church as an enemy of everyone, and provoked resistance in a Catholic community. Cantwell was arrested for breaking the peace and for not registering. His convictions were overturned, as he had not posed a threat in any way (in fact, the state admitted that he had moved along when asked and had requested permission before playing the record), and his religious freedom gave him the right to play the record and to witness.

Throughout the 1940s, the Witnesses were involved in a number of legal battles. Some of these involved refusals to salute the flag or cooperate with the draft, but a fair number involved door-to-door operations. Twice the case of *Jones* v. *Opelika,* when Roscoe Jones challenged the right of Opelika, Alabama, to require a license to go door to door, came in front of the Supreme Court. This case was different from that of *Lovell,* in that the licenses were not predicated on what was being distributed. Rather, the law was intended as a control on who went door to door. At first, the Supreme Court held that a city could require a license, especially if it guaranteed all applicants universal approval, so long as the license tax was paid. Taxes were allowed, as were controls on the time, place, and manner of distribution of literature. The next year, 1943, however, the Supreme Court reversed itself and held that ideas cannot be taxed, as that ran counter to the First Amendment, which aimed for an open marketplace of ideas.

The Jehovah's Witnesses very often involved their children to pass out magazines and help in witnessing, and this attracted attention from the police. Whether it attracted more attention than would have been directed at someone of a majority faith doing something similar is, obviously, unknown, but several cases of charges against parents for allowing their children to be involved in witnessing also came before the courts. One of the earlier such cases was *Pierce* v. *Massachusetts* in 1944. There the Supreme Court upheld the conviction of a parent for violating child labor laws for unlawful selling of magazines by a child and for having her work in an illegal way. The child in question was nine years old and was selling magazines at nearly nine o'clock on a school night. The Supreme Court narrowly upheld the rule, saying that the interests of the state needed to be balanced against the interests of the child and parent in religion.

Some have suggested over time that the door-to-door solicitation practiced by the Jehovah's Witnesses does not have as much claim to religious protection as more formal types of worship carried on in places of worship such as sanctuaries and synagogues, but the Supreme Court rejected that rationale, holding that door-to-door contact for religious purposes did have ancient roots and so needed to be protected.

Martin v. *City of Struthers* (319 U.S. 141, 1943) focused on the delivering of handbills door to door, in which the Witnesses rang the doorbell to hand the flyers to a home's inhabitants. This case dealt with a blanket ordinance

that prohibited ringing doorbells (or knocking on doors) to pass out such material, and the person involved had been fined $10. The Supreme Court pointed out that the ability to distribute literature and ring doorbells was important to many groups, including those selling war bonds (the case occurred during World War II) and held that a blanket prohibition was illegal. Thus, even though the Jehovah's Witnesses were the groups bringing these issues, the courts did not feel that the Witnesses were the only ones affected by such statutes. The Supreme Court has also always been reluctant to allow bans on certain practices, particularly in the area of religion, on the grounds that only one small group is affected and thus not that many people's rights are violated. The Court in the door-to-door handbill case also pointed out that a home owner could still post a "no soliciting" sign and the city could still arrest those violating that sign. The Court has felt that the reasoning of the prohibiting law, in and of itself, represents religious discrimination banned by the First Amendment, which prohibits the government from favoring one religion over another, at the very least. Judicial authorities over time have also pointed out that freedom of speech and of the press in many of the cases litigated by the Witnesses also applied in other areas such as labor union organizing.

The Jehovah's Witnesses have not ceased coming before the Supreme Court. One of the most recent cases was *Watchtower* v. *Stratton* (2002) (Watchtower is the name of the Jehovah's Witnesses formal organization, the Watchtower Bible and Tract Society of New York). There the village of Stratton, Ohio, required all people going door to door to promote "causes" to first register and get a permit. The Supreme Court struck down this regulation in an 8–1 vote, holding that it violated the First Amendment in the areas of religion, speech, and press. The main offenses appear to be that the regulation was overly broad and it made the registrants too easily identifiable to later hostile groups as registrations were made public. The ban covered not only commercial activity but all activity. Two concurrences accompanied the decision. The first noted that crime, which was cited in the lone dissent by Chief Justice Rehnquist as a reason for the ordinance, was not even advanced by the village in the lower courts and so could not have been very much of the justification. The other argued against some of the justifications advanced for striking down the ordinance in the majority opinion, including that getting a permit would violate some people's religions. Justice Scalia, who wrote the second concurrence, stated that a religious objection to a statute should not be a reason for its being invalid if it was otherwise acceptable. As noted, the only dissent was by Rehnquist, who suggested that rampant crime might result if such ordinances were not allowed, and he cited some examples of crime and assaults by door-to-door salesmen and people posing as such.

Most of these stated cases have involved the Jehovah's Witnesses, not the Mormons. The reasons are not exactly clear, particularly in the early cases, but possibly the more recent founding of the Jehovah's Witnesses, established in the twentieth century, has some impact. In its early years, the Mormon Church had no federal recourse against state and local laws. It was not until 1925 that *Gitlow* applied the First Amendment against the states, making the Witnesses' complaints against state and local ordinances possible at the federal level. In later years, the Mormon national headquarters has worked strongly with local communities and law enforcement agencies to attempt to inform those groups about the constitutional rights of the traveling Mormon missionaries in their towns. These efforts probably decreased the arrests and prosecutions of Mormons, particularly relative to the Jehovah's Witnesses, as the Mormons are a larger church than the Jehovah's Witnesses in the United States, having approximately 5 to 6 million members in the United States to the 1 to 2 million members of

the Jehovah's Witnesses. Also, all Jehovah's Witnesses are expected to witness, whereas only those who are on missions are expected to be active frequent witnesses for the Mormons. Thus, there are more Jehovah's Witnesses who witness and a smaller organization to back them.

It should be noted that individuals do not have an absolute right to be left alone, nor is that right stated in the Constitution. There is definitely the right to not be disturbed by the authorities in one's home without a search warrant, and there is, throughout, a sense of the right to privacy, but such a right is not expressly stated. Thus, the right to privacy is less clear, especially in terms of its boundaries, than the right to freedom of religious expression, against which privacy is being balanced. In addition, in their own homes, people do not have to answer the door if they choose, and thus home owners do not have to deal with religious proselytizers. Similarly, if a resident displays a "no trespassing" or "no soliciting" sign, he or she has a legal right to expect those signs to be honored; and if they are not, cities can pass regulations criminalizing a refusal to obey those signs (as does the state). Thus, when considering this topic, the nature of the rights needs to be kept in mind.

Most court cases dealing with the conflict between those who travel door to door to spread religion and the people's right to be left alone have dealt with the Jehovah's Witnesses. Many different laws existed to prevent door-to-door solicitation, and the Witnesses have been subjected to most of them. It has been estimated that the Witnesses have been involved in over fifty Supreme Court cases in the area of door-to-door witnessing and other areas. However, the Mormons are also involved in door-to-door proselytizing, even if they have been less often visibly prosecuted for performing this activity. The Supreme Court has clearly stated that Witnesses and others have a right to travel and proselytize—and the Latter-day Saints now regularly post amicus curiae briefs in the Witnesses cases—and that areas cannot uniformly ban door-to-door religious activities. Individual home owners, on the other hand, can act to prevent unwanted visitors with "no trespassing" signs. It also must be remembered throughout the discussion, when considering the interaction of home owners' (and other individuals') rights and the right to religious proselytizing, that this is a balancing act for our society and the courts, and neither side can expect complete victory. Thus, the desire to ring doorbells and the desire to not have them rung, which exist often throughout society, will continue to be balanced by the court system for the foreseeable future.

The Development of Religion and State in America and the World

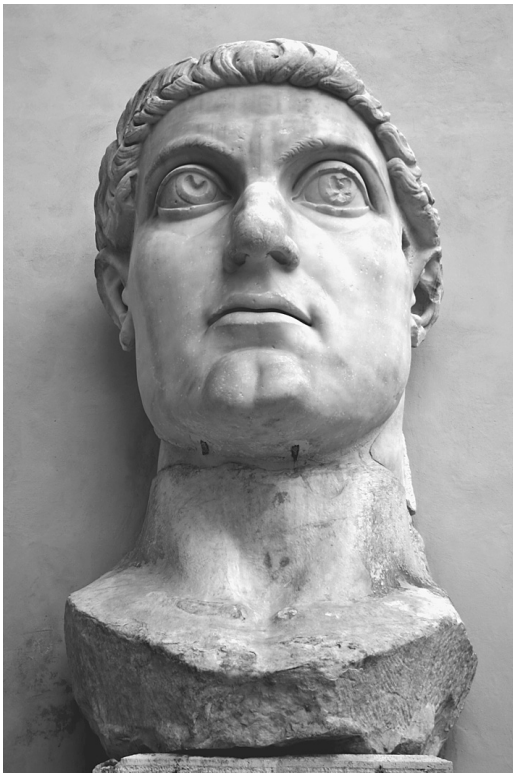
The United States of America does not exist in a vacuum. Thus, the interaction of religion and the state in America needs to be considered in light of current and historic world events. This topic is broken up into two areas: first, the development of religion and the state in Europe and the Mediterranean area, and then the development of religion and the state in the rest of the world. For each, the history of the development will be considered first, and then the current state of the interaction of religion and the state.

This essay is limited to developments since the founding of the Greek city-states around 500 B.C.E. While this is an arbitrary date, the Greeks are often the society the United States looks back to as initiating democracy, and Greek society therefore makes a good starting point for what is, ultimately, an analysis of U.S. political culture. Each Greek city-state had its own patron god, such as Athena at Athens. Greek leaders allowed the worship of other gods, but each state focused on its patron god or goddess, who was consulted through divination before major decisions. To obtain a divine

command, the political leader would go to an oracle and ask the god/goddess for advice on such things as wars. Greeks, as Greek philosophy developed, began to focus more on the individual, and in varying amounts, the state allowed this philosophy to develop. With the rise of Greek democracy, more power in the area of one's own beliefs was given to the individual, in turn allowing individuals to choose which gods to follow. In the classical Greek period of Socrates, shrines to many gods existed, and many different Greek gods had followers; the state supported these groups by building temples, but did not force idolization.

After Greece, the next major power in the area was Rome, and Rome had its own set of gods and goddesses, closely modeled after those of the Greeks. Rome was more interested in power than philosophy, and the interest in the gods was similarly practical. Leaders of the republic of Rome and the ensuing Roman empire both wanted the gods to bless their endeavors, and so Roman religion was very polytheistic, with gods for home, wars, city gates, and so on. The early Roman Republic did fairly well and so seemed to be in favor with the gods. With the political upheaval at the end of the Roman Republic and the founding of the empire, religion became less important, and the Roman emperors made themselves into gods. Augustus publicly proclaimed himself as divine. Most people were happy with the general developments of the period, even if they did not believe Augustus to be divine, as the empire, particularly Italy, prospered. Augustus did promote religion, rebuilding temples and providing for priests who had been neglected financially during the turmoil of the fall of the republic.

Rome, under the emperors, was generally tolerant of most faiths, even though it was notably intolerant of Christianity. This was primarily because Christians refused to make the same sacrifices to the emperor made by the followers of other religions. Christians also worked in small groups and covertly, as a new faith might, and so were suspect, as many societies fear those who act in secret and by themselves. From time to time, Christians were persecuted and some were even used in public spectacles, such as the infamous feeding of Christians to the lions. However, for the most part, Roman emperors wished to have peace, and they left religion largely separate from the state, so long as the appropriate sacrifices were made. Around the start of the fourth century C.E., the Roman Empire was undergoing many difficulties, and the emperor Diocletian undertook one of the most brutal persecutions ever. His successor, Constantine, went in exactly the opposite direction, converting to Christianity, proclaiming it the religion of the Roman Empire, and putting



Roman emperor Constantine I, known as Constantine the Great, restored order to the Roman world and laid the foundation for the empire's success for centuries to come. He is particularly significant for his conversion to Christianity. (iStockPhoto)

the force of the Roman Empire behind the new state faith. This was the first formal state religion in a long time in Western civilization.

The Roman Empire, in the era of Constantine, split in two—the Eastern (or Byzantine) Roman Empire, headquartered in Constantinople (present-day Istanbul) and the Western Roman Empire, headquartered in Rome. The Western Roman Empire continued the use of Christianity, but its main concern for the next century (after Constantine) was survival. It failed in this effort, finally collapsing in 476 C.E. The Eastern Roman Empire continued, surviving until 1453. In the East, the emperor was also the head of the church and used the state to promote religion (and religion to promote the state). For the next ten centuries, with varying amounts of success, the Byzantine Empire promoted Christianity and spread the Orthodox religion with a view of the state and the religion as one. This concept strongly influenced much of eastern Europe, particularly Russia. There, once a state formed, the rulers installed a state-controlled bishop to maintain local order, but they used the Cyrillic alphabet to stay away from full Byzantine control. The same idea permeated the Balkans. Thus, the concept that the church and state should be united was prevalent throughout eastern Europe, and the Byzantines were directly responsible for this in large part, even while the Byzantines were unable to fully control the area politically. Local rulers, in order to maintain their power (and hoping to increase it), promoted their own culture, language, and writing while allowing the Byzantine Church, with an eye toward limiting the Byzantine influence.

In western Europe, for three centuries after the formal end of the Western Roman Empire, small-scale states existed where any existed at all. The bishop of Rome created for himself a position as leader of the Western Christian Empire, titling himself pope of the Catholic Church, where Catholic means universal. The pope determined that Peter was the key figure in Christianity following Jesus, that Peter had become bishop of Rome, and that successors to that seat should also be the religion's key figure, meaning that the bishop of Rome, now pope, could appoint bishops and work to determine church doctrine. The popes did just that, establishing an official translation of the Bible, with an official list of the correct books to be included, and trying to establish direct control of all of the church. Of course, the church in the Byzantine Empire did not listen to the pope, and many local princes opposed him when it was in their interests, but princes also sought the pope's blessings when it served their purposes, and the princes and popes worked together to keep out other religions. Thus, although religion and the state fought each other, there was no separation of church and state in any practical way. This situation of anarchy in politics and growing power for the pope continued until 800 when the Holy Roman Empire under Charlemagne was established.

Charlemagne was a Frankish leader who managed to unite much of central Europe, including most of present-day France and Germany, and he believed that humans should not wait for God to establish a kingdom in the future, or to wait for an afterlife, but that humans should try to establish a City of God in the here and now, borrowing from St. Augustine. Membership in this city depended on following God in the right way rather than on race. God ruled in the heavens, and God wanted Charlemagne to rule on earth. Church and state worked hand in hand for Charlemagne, and he rescued Pope Leo III in 799. Pope Leo then crowned Charlemagne Holy Roman Emperor the next year. Charlemagne's empire did not last long, being divided within the next fifty years, but the idea of church and state unity continued throughout the next several centuries in western Europe.

The other main religion affecting Europe in this period was Islam. That religion was founded in 622 by Muhammad. Muhammad claimed to have had visions over the past dozen years or so and used what was seen in those vi-

sions to create a new religion. Unlike other prophets, most notably Jesus, who clearly differentiated between Caesar and God, Muhammad combined religious and political aims and created a new kingdom. With that combination, it is not surprising that Islamic kingdoms did not have separation of church and state. What is surprising is that the Islamic kingdoms did not demand fidelity to Islam as a precondition to remaining in their realms. Christians and Jews were allowed to stay in the areas conquered but did have to pay higher taxes, and others very often were forced to convert. Thus, while there was no separation of church and state in Islamic territories, there was not only one religion in those territories, unlike other places where church and state were unified. The Islamic empires conquered most of North Africa, much of what we generally call the Middle East, and parts of Spain. Most of what is generally considered the Western world was controlled by either the Islamic world, the Byzantine Empire, or the fragmented Holy Roman Empire.

This situation pretty much prevailed in Europe and the Mediterranean world from 600 C.E. to about 1500 C.E. Western Europe eventually developed larger states and more of a state apparatus, but the Catholic Church was still the choice of nearly all kings, as was true of the Orthodox Christian Church in eastern Europe. Separation of church and state was nonexistent. Those in the majority fared well in terms of how the ruling forces treated their religion, which is always the case, but a better estimation of the interaction of church and state can be gained by considering the fate of religious minorities in these areas. The Jews were the main religious minority in both areas. Jews were usually treated better in Muslim lands than in Europe. The stated goal of European rulers was forced Jewish conversion, whereas Muslim nations merely wished to encourage conversion. Jews were also more able to supervise their own affairs in Muslim lands—they did not have full power over their communities but generally had more than they did in Europe. The same was true for Christian communities in Muslim lands. In Europe, however, whole communities of Jews were sometimes wiped out, and Jews were forced to live in only certain areas of the city, which is where the term ghetto comes from: it refers to the Jewish quarter of the city. Jews were prominent in the banking area for two reasons: first, Jews were not accepted in other businesses, and second, Christianity for a time had a rule against lending money with interest, meaning Jews were able to make a profit from banking while Christians were not. This made Jews more likely to be bankers than Christians but also fostered Christian hatred of the Jews. This hatred showed clearly in the Elizabethan era in the stereotypical picture of the usurer displayed by Shylock in Shakespeare's *Merchant of Venice.* Jews were also blamed for the Black Death in the thirteenth century. All the Jews in Spain were expelled in 1492, and the Spanish government followed this up by expelling all Muslims in 1504. Thus, minorities often fared better in Muslim lands, even if the idea of toleration, as understood today, was not a possibility.

In South America, with the arrival of the Christian conquerors, the native religions, which were greatly tied in with the states, were almost completely destroyed. The conquerors' goals were often summed up as God, Gold, and Glory, with God being the extending of Christianity to the Native Americans. If the local people did not want Christianity, they had little choice, as they were soon conquered. Christianity was then forced on those natives who lived through the conquest and the diseases brought by the conquistadors.

Today, in most of Europe, the church is generally far separated from the state, even if the state does support the church at times. For instance, in France, the state pays for all religious schools, but the church is expected to stay out of state matters. In Eastern Europe, religion was generally banned under the communist regime, and some communist states, such as Albania,

went so far as to close down all of the churches. In the Americas, church-state separation varies greatly. Separation of church and state is the norm in Canada, but a good deal of power is allowed at the provincial level for each province to adapt to its religious groups. In the United States, the level of religious involvement in the state often varies depending on what political party is in power. The country seems contradictory, proud of both its separation of church and state and its religious heritage, with many invoking "God bless America" every chance they have. In the Muslim countries of the Middle East and North Africa, in those states where a religious group has influence, very often religion forms the basis for the state law. In Saudi Arabia, for instance, even visiting women are required to dress in relative conformity with local law. In states where the state is the controlling influence—for example, in dictatorships—much less power is given to religion as the state reigns supreme. Thus, the relative ratio of toleration, which favored the Middle East over Europe in the Middle Ages, has now shifted to favoring Europe.

Besides Europe and the Americas, of course, there are also Africa and Asia to consider when discussing the interaction of religion and the state. In Africa, before European colonialism, most societies had established sets of gods, or a single god, and an afterlife was generally believed in. In addition to its own set of gods, some societies adopted Islamic or Christian beliefs. If one belonged to a particular society, one at least publicly worshiped its god or gods. Islam moved into the area in the 600s, reaching Africa soon after its establishment. In the Islamic societies in Africa, similar to those in the Middle East and elsewhere, other religions were tolerated, even if they were taxed more heavily. This is not to suggest that all Islamic societies were the same, as each mixed items of the local culture into it. Ethiopia, by contrast, was a Christian kingdom, Axum. In West Africa, the kings originally ruled by assuming the mantle of divine right, but many of these kings adopted Islam as a state religion, as that religion also allowed the kings to increase their authority. While less is known about southern Africa, it is relatively safe to assume that at the very least, culture often reinforced religion. With the arrival of European colonial conquerors in Africa, which occurred on the edges of Africa until the nineteenth century and then all across Africa, Christianity was introduced in large scale.

In Asia, the Hindu and Buddhist faiths coexisted in India before the seventh century C.E. The upper classes tended to prefer the Hindu faith, in part because it gave them special rights and privileges, while the lower classes tended more toward Buddhism, often because it claimed equality for all. In time, starting in the 700s, Muslim forces, such as that of the Mahmud of Ghanzi, moved into India, crossing the Indus River. Over the next six centuries, up to about 1300, Islamic forces increased their empires and promoted the religion of Islam by imposing increased taxes on the non-Muslims.

In Southeast Asia, spirit worship was originally prevalent, but Hindu and Buddhist beliefs made a strong entrance as well, between 1 and 1000 C.E. Many of the local rulers liked this as it increased their power and allowed the kings to perform rituals, giving the king an air of legitimacy.

In China, by the early centuries C.E., three main religions competed for influence: Buddhism, Daoism, and Confucianism. Confucianism provided little emotional satisfaction in the eyes of many, who turned to Buddhism or Daoism. Buddhism was supported by some rulers in the early seventh century C.E., when the Tang dynasty was beginning, but eventually many rulers turned against it, promoting Daoism and Confucianism instead. Eventually, most Chinese emperors promoted Confucianism, as it melded well with the Chinese tradition of focusing on the family and hard work. Thus, for Chinese dynasties, it largely was not a question of whether to support religion but which religion to sup-

port. China was largely ruled by government officials who had studied Confucianism, and this both continued the support of Confucianism and decreased change.

In Japan, the main religion was Shinto, and this religion was strongly promoted by the state. The spirit worship common to Southeast Asia was also apparent in Japan, and this worship evolved into Shinto, which focuses on nature and purification. The Japanese state linked the divine emperor with Shinto.

In Asia, in the sixteenth century C.E. and after, the arrival of Europeans played a large role in shaping the relationship between church and state. Most Asian countries became colonies of European powers, which, in turn, allowed Christian missionaries to attempt to convert the local populace. The Europeans did not universally remain, however. For instance, in the Philippines, the Spanish established a colony that would remain from the 1500s until the defeat of the Spanish in 1898 in the Spanish American War. However, the British and French were forced out of Burma and found Vietnam to be unprofitable and so left by the end of the seventeenth century. England and France and many other European nations would soon return, however. The British focus turned to India, conquering it between the mid-1700s and the beginning of the nineteenth century. Christian missionaries followed, and the British rule, often through colonial allies, promoted these missionaries, although it did not force conversion. France returned to conquer Vietnam and much of the rest of Southeast Asia from the 1850s to the 1890s. England and France, unlike 300 years earlier, were not as motivated by religion, but their conquest of the areas did allow missionaries, supported by the colonial powers, to move in.

Africa and Asia threw off the colonial yokes in the 1950s and 1960s and assumed a relative level of independence. A listing of all the countries' current policies on religion would take a volume of its own, but a survey will help in understanding how the United States interrelates with these areas. In Algeria, for instance, Sunni Muslim is the state religion. To go to the other end of the pole, in China, similar to most communist countries, religion is severely marginalized; religion is opposed by the state rather than just separated from it, as the country is officially atheist. North Korea, also socialist in government, takes things in a different direction; there are government-sponsored religious activities, as the state wishes to appear tolerant of religion. In the Middle East, Islamic law forms the basis for several states' legal systems, including those of Saudi Arabia and Jordan. In Africa, the basis for law varies, as does the treatment of religion. For instance, in Chad, the legal system is based on French law and Chadian custom, leaving religion largely up to individuals; in Kenya, the bases include English common law, Kenyan common law, Islamic law, and tribal law, to cite a few. Thus, law comes from a huge variety of places in some African countries, resulting in a more hands-off approach to religion. Much of Africa is also attempting to move toward democracy, which promotes a greater separation of church and state, at least in theory.

Religion and state have typically been united throughout most of world history, with the notion of separating church and state developing only recently. Even since the 1700s, when this idea developed, most states and ruling entities, particularly in the colonies, did not allow separation of church and state, with some promoting a certain religion and others trying to ban all religion. However, in the last few years, more areas have moved toward allowing a separation of church and state, and the United States continues to promote this policy that is written into its Constitution.

The Supreme Court and the Establishment Clause

Freedom of religion as described in the First Amendment is made up of two parts, known as the establishment and free exercise clauses.

The first is often referred to as the freedom from religion and the second as the freedom of religion. They state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part is generally called the establishment clause, as it means, in a near universal reading, that the federal government, and since 1925 the states, cannot create an establishment of religion. (The second part is the free exercise clause, discussed generally in a separate essay.) However, the question remains, what is an establishment of religion?

The establishment clause is sometimes less debated than the free exercise clause, as more cases arise from questions about how an individual worships than from claims that the government is establishing a religion. However, this does not mean that the establishment clause is irrelevant. Far from it, as those cases stemming from the establishment clause have been among the most controversial in the nation's history. School prayer, school vouchers, and the Pledge of Allegiance are all issues that deal with the establishment clause. Many of the hottest debates come out of areas where one side feels tradition is being wiped away and civilization threatened, and the other feels that the government is trying to tell them which god to worship (and whether to worship a god).

Many people have the idea that the Founding Fathers came to America for religious freedom, and this is partially correct. Many of the original immigrants to America, of those who came willingly, came for the opportunity to practice their own religion. This is not, however, the same idea as religious freedom. Often one religious group generally controlled a colony or settlement, and their religion was considered the state religion. So the colony or settlement founders had freedom to practice *their* religion, but there was truly no religious freedom as the rest of the colony had to practice that religion as well. Many different colonies established their own religions as the colony-approved religion (and the only option): Massachusetts was Puritan, Connecticut was Congregationalist, and Virginia was Episcopalian. Famous religious dissenters also dot our early history, including Anne Hutchinson and Roger Williams. In the late eighteenth century, in the period leading up to the American Revolution, several colonies had established the idea of religious toleration and freedom, including Pennsylvania and Rhode Island, but others still had a state-supported church.

Religion was not a large element in the American Revolution, as issues of taxation, general economics, and power were greater motivating forces. The original Constitution is also relatively silent on the whole issue of religion, save for one clause, which holds that no religious test can be used for holders of federal offices. This meant the central government could not require officeholders to profess a certain religion. However, the original Constitution did play an important role, in hindsight, in the development of religious freedom in America. It did this through its opponents, known as the anti-Federalists. One complaint of the anti-Federalists was that the Constitution gave too much power to the federal government, and early in the first session of Congress in 1789, James Madison proposed a series of amendments to the Constitution to satisfy these critics. With revision, most of these amendments became our Bill of Rights. The freedom of religion has become part of what we now know as the First Amendment, but it was actually third in the original list sent out to the states—the first two were not ratified. Madison was relatively silent on the meaning of the religion part of the First Amendment, as he was fairly silent on what he thought the whole Bill of Rights meant. Regardless, the Bill of Rights became law in 1791 and has remained so since. One first needs to realize that the First Amendment is explicit in that its restrictions bind only Congress, and the whole of the Bill of Rights may have been intended to limit only Congress. This, at any rate, was what the Supreme Court said in 1833. The

First Amendment would be applied to the states only later, after the addition of amendments specifically referring to the states.

There are several possible interpretations of what the First Amendment aimed to do. One of these is that the main goal was to move away from any governmentally mandated or supported church on the federal level. The federal government could still support religion as an idea but could not favor any one church over another. Another is the idea that the First Amendment is intended to protect the churches by prohibiting the government from interfering in ideas of the church. This goes back in many ways to the arguments of Roger Williams, who thought that the secular state, sinful by nature, should have no role in religion, as such interaction would commute the sins of the state into religion and pollute that area as well. A third is that the government should have nothing at all to do with religion. Thomas Jefferson, in 1802, wrote that the First Amendment created a "wall of separation" between government and religion, and some people take those words to be their metaphor for how the government and religion should interact. Jefferson was a good friend of Madison, but it is hard to know what Madison thought the First Amendment should mean in 1789.

Others describe Madison as not overly interested in any individual liberty but more interested in protecting federal power as a whole and the federal Constitution. These scholars argue that he managed the Bill of Rights debate and process with an eye toward that end, which would suggest that Madison had thought little about what the establishment clause really meant. Each of these positions have merit, and as Madison left relatively few clues about what he thought the clause meant, it has been up to the Supreme Court to determine its meaning.

In 1833, the Supreme Court declared that the Bill of Rights limited only the federal government, and the federal government did little to directly control religion. Thus, few cases arose under the First Amendment's religion clauses before 1900. Some that did dealt with the issue of polygamy in the Utah territory. In the 1850 to 1890 period, Congress passed many laws outlawing polygamy in federal territories (the main Mormon settlement was in the Utah territory, centered around modern-day Utah), and these laws were eventually challenged. All of them, including disenfranchisement of people for believing in but not practicing polygamy and the disestablishment of the Mormon church, were upheld. Utah was even required to insert into its state constitution an irrevocable provision stating that polygamy would not be practiced. These were, however, the main cases testing the freedom of religion on a national level before the 1920s.

In the 1920s, challenges arose, and slow change began. After the Civil War, the federal government passed laws guaranteeing civil rights to African Americans, with the aim of offering some protection to former slaves. To make these rights more permanent, the federal government passed (and the states approved) the Fourteenth Amendment, which guaranteed the rights of due process and equal protection for all against any state infringement. It was not clear what these rights meant though, and early court interpretations of them limited the scope of the Fourteenth Amendment, along with the reach of the Thirteenth and Fifteenth Amendments, which had also aimed to protect the former slaves. In 1925, this all took a radical change. The case of *Gitlow* v. *New York* dealt with the conviction of Benjamin Gitlow under an anti-sedition law. The conviction was upheld, but Gitlow had argued that the Fourteenth Amendment, by its guarantee of due process, also guaranteed the rights stated in the Bill of Rights against state infringement. To put it more concisely, Gitlow argued that the Bill of Rights should also protect the people against the states. The Supreme Court in an almost casual manner, said "for present purposes we may and do assume that freedom of speech and of the press—which are

protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" (268 U.S. 652: 666). The Supreme Court never explained its logic for applying the freedom of speech and the press against the states, and did not at the time enumerate in any more detail what other rights were part of the fundamental rights and liberties applied against the states. However, since that ruling in 1925, the whole idea of incorporating at least part of the Bill of Rights against the states has not been seriously challenged at a national level (even while the debate over what to incorporate raged), and the idea that the First Amendment's guarantee of religious liberty and nonestablishment, once accepted, has also been generally applied.

The Supreme Court continued to develop the idea of applying the Fourteenth Amendment against the states over the next decade and a half. In 1937 the Court stated that fundamental liberties were within the idea of liberty guaranteed by the Fourteenth Amendment and in 1938 stated that the specific guarantees of the Bill of Rights also applied against the states. Religion was added to the list later, coming in 1940 in *Cantwell* v. *Connecticut*. In that case, three Jehovah's Witnesses were going door to door and playing a record vilifying the Catholic Church. They were arrested for a breach of the peace. The Supreme Court read the First Amendment rather widely, incorporating the actions these men were taking to be included in the freedom of religion. The Court also included that freedom of religion in the overall idea of liberty created in the Fourteenth Amendment and thus applied the First and Fourteenth Amendments against the states, overturning the Witnesses' convictions. The Supreme Court also stated that the establishment clause of the First Amendment applied against the states but did not use that clause to strike down any laws for a few years after the *Cantwell* case. In 1947, the first time an establishment clause case came before the Supreme Court after *Cantwell,* the Court upheld a law repaying the costs of parents who paid bus fare for their children to attend private school.

Many of the establishment clause cases are somewhat similar to the first one in one significant aspect—they deal with education, largely because schools are where the government has a captive and easily molded audience. (The government also has a captive audience in the military, but soldiers are generally adults and not considered to be as easily molded as children in schools.) The cases in education dealing with the establishment clause can be divided into three areas: aid to private schools, prayer in public schools, and religious education for public school students, or what is often called released time.

One of the most litigated issues has been that of aid to private schools, most of which are religious. This issue hinges on both the establishment and the free exercise clauses of the First Amendment: if states provide too much aid to religious schools, they are seen to be establishing religion, but if they provide none at all or provide too many obstacles to these schools, they may be interfering with the free exercise of religion or parental liberty. Early in the twentieth century, some states tried to ban private religious schools, but this was held to be unconstitutional, both for contract reasons (as schools that already had charters could not have them summarily voided) and for reasons of liberty (as parents have the right to raise their children as they see fit, within certain parameters).

The issue of aid was first litigated in the 1940s, dealing with reimbursements to parents of schoolchildren who took the city bus to private schools. This aid was held to be constitutional, as it paid the fares of children to attend any private (or public if necessary) school, and it was not aimed specifically at helping religious schools. The Court said that all public safety programs, such as road maintenance and traffic

safety, aid religious schools indirectly, and the Court was not about to ban all such programs. The issue returned to the Court in the late 1960s. New York had a program of lending secular textbooks to private schools, with the goal of maintaining neutrality between teaching in the public and private schools. The state argument was that the public school students did not have to pay for their textbooks (which were all secular), and private school students should not have to pay for their secular textbooks. The Supreme Court agreed, allowing these loans, as the program was neutral, having neither the purpose nor the primary effect of advancing religion. Those two tests, the purpose test and the primary effect test, have continued to play an important part in First Amendment jurisprudence ever since.

In 1971, the Supreme Court created what has proven to be the most lasting test of whether a legislative act related to religion is constitutional. The case was *Lemon* v. *Kurtzman,* and the programs at issue gave supplements to private schools for the salaries of teachers who taught secular subjects. The Supreme Court struck down the programs, holding that they overly entangled the state in religious matters, as the state would have to monitor the teachers to be sure they were teaching only secular subjects. A three-part test emerged: first, the legislation must have a secular purpose; second, the primary effect of the legislation must be to neither advance nor retard religion; and third, the legislation must not create excessive entanglement with religion. The legislation here violated the third part of the test. The Supreme Court, for most of the 1970s, continued to move in the direction of limiting governmental programs that were involved with religion. It struck down a program providing tuition reimbursement or tax credits to parents who sent their children to private schools because the program advanced religion.

By the 1980s, however, the Supreme Court began to swing in the other direction; with the appointment of more generally conservative justices, programs began to be allowed if they were "neutral" and if they allowed the individual to have a choice in where the aid was directed. Tax deductions for expenses of sending students to schools, including religious schools, were allowed, even though tax credits had earlier been struck down. In one case, a student was receiving government assistance because he was blind, and the Supreme Court allowed him to attend a religious school and to keep his aid as the program was neutral and the student chose where to attend. However, in 1985 the Supreme Court struck down programs in which public employees drawing state salaries taught secular subjects in private schools on private school grounds. The solution was to allow them to teach such subjects just off private school grounds. By the 1990s, the Supreme Court had reversed this trend, allowing aid to both private and public schools when that aid was distributed on a neutral basis.

The Court in 1997 reversed its 1985 decision and allowed the public employees to teach directly on private school grounds. Their reasoning was that the teachers could be trusted not to teach religious subjects and that the aid was neutral. The Court next, in 2002, ruled that a voucher program that allowed students to select from a wide variety of schools was constitutional, even though most students picked religious schools; in determining the constitutionality, the Court ruled that the aid was neutral and the parents' choice directed the aid. Thus, by the early years of the twenty-first century, neutrality of a program with regard to religion became the guiding idea in many of the decisions, even though calls to abandon the *Lemon* standard did not meet with success. Many different justices announced a disagreement with the *Lemon* standard and crafted their own alternatives, but no other standard has, as of 2006, received a majority of the Court's approval.

The next major topic is probably the most contentious of the three and one of the most divisive issues the Supreme Court has had to deal with, except for civil rights and abortion:

the issue of school prayer and Bible reading. School prayers were quite common in many public schools, although by no means all, as was the practice of Bible reading. Many programs of school prayer and Bible reading acknowledged the religious diversity of this country, requiring readings from the Old Testament, which were generally acceptable to Catholics, Jews, and Protestants, and prayers that were supposed to be acceptable to all three religions. Muslims, adherents of less popular religions, agnostics, and atheists were all ignored. The first challenge to Bible reading, on a state level, occurred in 1908, with the Illinois Supreme Court declaring that the practice violated the state constitution. The main issue at that time was not so much whether to read the Bible, but which Bible to read, as Catholics and Protestants favored different versions of the Bible. The U.S. Supreme Court first took up the issue in the 1950s, but once the case reached the Court, dismissed it on a technicality. In 1962, the Court returned to the issue in *Engel* v. *Vitale,* striking down New York's program of prayer, as it created an establishment of religion, even though the prayer was written to be broad. This created a firestorm of criticism, as one reason school prayer was being pushed in the period was to differentiate America from the atheistic USSR, the nation's opponent in the Cold War.

The next year, the Supreme Court struck down the practice of Bible reading, and some saw the Court as attacking all that was traditional in America—prayer, Bible reading, and, for white Southerners, segregated schools. Many railed against the Court's decisions, and signs appeared in some places in America suggesting that America should impeach Earl Warren, who was chief justice at the time. However, attempts to pass a constitutional amendment allowing school prayer or Bible reading failed every time it was introduced, both in the 1960s and later. President Kennedy and Governor Rockefeller (of New York) supported the school prayer decision, and this may have caused some in the middle to accept it. The rationale for striking down both programs was the same—that the programs created a government religion and put the government's force behind a certain religion. The Bible reading cases added an idea that would have increasing importance as the century progressed, that the government should be neutral in the area of religion.

These decisions did not lead to acceptance from much of the country. Many school districts continued to have prayers, sometimes publicly, sometimes quietly, and lawsuits over the issue continue. State legislatures also passed statutes calling for school prayer or for the posting of the Ten Commandments. Hundreds of amendments have been proposed on both the school prayer and Bible reading issues, with more being offered on the school prayer issue. One main element in many of the statutes and proposed amendments was that participation was theoretically voluntary. Some also called on Congress to remove school prayer from the jurisdiction of the Supreme Court. As with the amendments, though, the efforts failed. Those supporting school-sponsored prayer (and fighting publicly for it, as opposed to those who were quietly praying in school and, having the support of the community, not worrying about being caught) argued instead for a "moment of silence" rather than a prayer. The supporting idea was that those who wanted to pray could do so, but those who did not want to were not being forced to—they simply had to remain silent. The U.S. Supreme Court has never ruled directly on the issue, even though they did strike down a moment of silence statute that had added that the moment could be used for silence or voluntary or spoken prayer. Other moment of silence statutes, not mandating a purpose for the moment, have been generally accepted, even though the Court has never directly ruled on the issue.

The other main area of school prayer is occasional school prayer, either at football games or graduations. The U.S. Supreme Court has

Billboard in Decatur, Illinois, in 1963 demands the impeachment of U.S. Chief Justice Earl Warren who supported racial desegregation in public schools. (AP Photo)

generally held both of these practices to be unconstitutional, with a variety of rationales. It seems relatively clear that the 1962 *Engel* decision is here to stay, no matter how despised or circumvented it is in many parts of the country. The edges might be chipped away by moments of silence or prayer at certain events, which some suggest might be allowed in certain forms, depending on how the new justices rule on the issue.

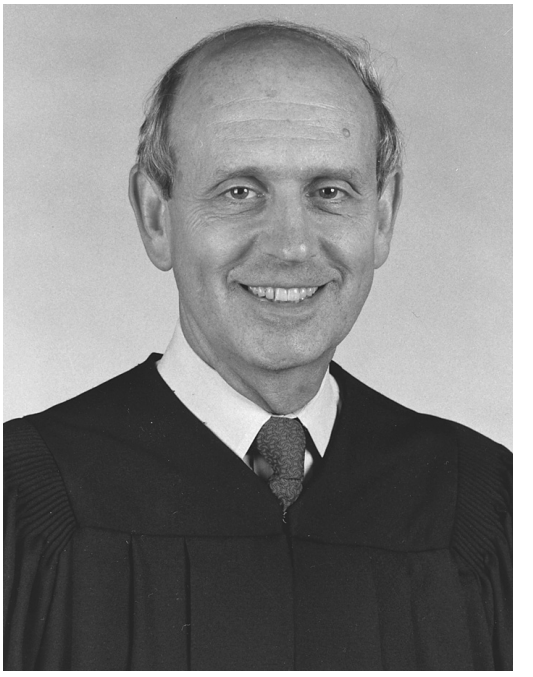
Finally, the issues surrounding released time programs were contentious in the middle of the twentieth century but have decreased in significance. Most released time programs (called such as students were released from public schools to attend religious classes) also included an element of physical release, as students left the school campus to attend religion classes elsewhere. In 1948, the Supreme Court considered a system of religious classes that were conducted on public school grounds and struck down the program. The reasoning of the Court, through Justice Black, was that government and religion were supposed to be wholly separate, with a tall wall of separation, and the wall was clearly breached with the schools and churches working together. The minority of the Court agreed with the idea that the schools and churches were working too closely together but did not condemn all

released time programs, just those with too much collusion. One dissenter, Justice Reed, suggested that all things short of a national church should be allowed. In 1952, the Court somewhat reversed itself, allowing a released time program that occurred off the premises of the school. Changing political climates, with the heating up of the Cold War and increasing attention to public religion in the nation, also may have helped to shape the Court's decisions, as did the fact that four new justices were appointed between 1948 and 1952. Released time is not as much of an issue now as it was then, as students are generally able to commute from their schools to religious classes outside of school hours, negating the need for released time programs, and fewer students take religious classes after school.

The Pledge of Allegiance has also been controversial under the establishment clause, as have Christmas displays. In the 1950s, Congress added the phrase "under God" to the pledge, in order to differentiate the United States from the USSR, which was officially an atheistic nation. This addition brought little legal challenge at the time, but with the easing and then end of the Cold War, challenges came in the 1980s and 1990s. In 2004, the Supreme Court heard the case *Elk Grove* v. *Newdow,* in which a father challenged his daughter's recitation of the pledge every day. The claim was that by forcing students to say "under God" in the pledge, the government was taking a stand on religion. Similar challenges to the national motto had been turned away in the past—in the 1950s, the phrase "one nation under God" was adopted as the motto. The Supreme Court decided the case on a legal issue, but three justices did argue that had the case been heard, the pledge with the words "under God" would have been declared constitutional. One reason given is that some justices, including just retired Justice O'Connor, felt that the phrase "under God," whether in the pledge or in our motto, have so entered our national fabric that they have ceased to be purely religious and have become more nationalistic.

Displays of nativity scenes have not fared as well. The Supreme Court in the 1980s heard several cases on displays of nativity scenes and other religious symbols, such as menorahs, during the holidays. The basic rule that seems to have emerged is that if the symbol has a mixed meaning combining the religious and the secular, such as Christmas trees and Santa Claus, it will probably be allowed, or if the nativity is combined with many other items, it might be allowed. However, if a nativity scene is placed by itself, it may very well be disallowed.

The final issue to emerge recently is the posting of the Ten Commandments on public grounds. Some groups have called for placing the Ten Commandments in public places on moral grounds, arguing that these are the basis for many of our modern laws and should be displayed. Others, of course, call for their place-



Stephen Breyer, an associate justice of the U.S. Supreme Court, is considered a moderate liberal. (Collection of the Supreme Court of the United States)

ment on religious grounds, but such a religious purpose would never be allowed, either under the neutrality principle or the *Lemon* standard. In Alabama, Kentucky, and Texas, among other places, monuments and placards were erected and then challenged. Cases concerning two displays in Kentucky and one in Texas reached the Supreme Court. In all three cases, the commandments were displayed with other texts, such as the Bill of Rights. The Supreme Court, in a narrow decision, struck down the exhibits in Kentucky, but allowed the one in Texas, as the Texas display had been in place for an extended time. Because it had existed for a long time without protest and the Ten Commandments were combined with other documents in the display, Justice Breyer (the swing vote in the decision) was convinced that the commandments had enough of a historical meaning that most people considered them historical and part of a moral message rather than religious. Breyer was the key justice as he voted to strike down the Kentucky displays while allowing the one in Texas.

The establishment clause has produced many of the hottest issues concerning the First Amendment's treatment of religious liberty. The Supreme Court did not hear many establishment cases until after 1950, but the magnitude of the cases in many ways has made up for the lost time. The Court first held that some aid to private schools was allowed, even while overt religious activities were not. Thus, busing and textbooks for private schools (when allowed for public students also) were acceptable, but a prayer and Bible reading were not. In the 1970s, the Supreme Court moved to its strongest position, denying programs that aided religious schools, striking down the loan of maps and tax credits for public schools, holding that allowable programs had to have a secular purpose, had to have a primary effect of neither helping nor hurting religion, and had to avoid excessive entanglement with religion. The Court then reversed itself for the next two decades, allowing programs that resulted in aid to private schools as long as these programs were neutral and the aid was directed to the private schools through an individual's choice, not the state's choice. While the whole question of the establishment clause is certainly not totally resolved, it appears that the states will continue to be limited by that clause, that public debate over exactly how that provision limits the states and federal government will continue to rage, and that no clear and easy test will soon emerge for the Supreme Court to use.

A

"Absolutist" interpretation of the First Amendment

When approaching the U.S. Constitution, Supreme Court justices can take the position that the words of our forefathers were intended to be unraveled by the Supreme Court and that they were written with room for a variety of interpretations. Or the justices can take the position that the words of the country's founders should be interpreted literally, and that this is the only way to ensure the appropriate dispensation of justice. This second position is known as the "absolutist" interpretation. Hugo Black was among the most famous justices favoring an absolutist interpretation of the Constitution with regard to the First Amendment.

In order to interpret the First Amendment and relate it to American laws, the justices must decide several important things. They must consider, especially when dealing with the question of the freedom of and from religion, what the amendment means as a whole. The amendment reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (U.S. Constitution, Amendment I, 1787). The Supreme Court has been repeatedly called on to define the phrases "establishment of religion" and "the free exercise thereof." However, another question, one often overlooked and one the absolutist interpretation focuses on, is "what does the phrase 'Congress shall make no law' mean?" Several interpretations are possible.

The first interpretation says the amendment means Congress cannot legislate in the areas of freedom of speech, press, or religion. Under this, the absolutist interpretation, what these freedoms are still needs to be determined, but once something is accepted to be in one of them, then it is off limits to the legislation of Congress and the states. One note should be made here: this does not necessarily mean that the freedom of religion is going to be overly broad. It means that the absolutist takes a literal view of the phrase "no law" in the First Amendment. Absolutism asks only whether a legislative act creates an establishment of religion or interferes with the free exercise of religion. Having once answered yes, for the absolutist, the law must be stricken, because "no law means no law" (*New York Times* v. *US,* 403 U.S. 713: 717).

A second possible interpretation is that the Constitution needs to be read as a whole and that the powers granted to Congress and the executive branch throughout the document sometimes allow them to restrict the freedom of speech or religion when it is necessary. Historically, Supreme Court justices who have taken this position did not favor an absolutist interpretation of the First Amendment. This non-absolutist attitude would suggest that while some activities, such as protesting the draft, would generally be allowed, laws calling for the arrest of draft protestors might be acceptable in the case of a national emergency. Such an emergency might only include a war, or might also include a "police action" like what occurred in Vietnam and what is occurring currently in Iraq.

A third possible interpretation, suggested by Eugene Volokh, among others, is that interpretation is necessary in all areas of the Constitution and that the "no law" clause is as subject to interpretation as any other. Volokh argues that it is impossible to work with the concept that "no law" means exactly that. He suggests areas in

which regulation is clearly allowed. His suggestions fall outside the scope of religion, but the parallels can be clearly seen. He writes, "The text of the First Amendment sounds categorical—'Congress shall make no law . . . abridging the freedom of speech, or of the press'—but it can't be taken as a literal protection of all speech, all the time. Is Congress forbidden from restricting the use of loudspeakers in residential D.C. neighborhoods? Do people have a constitutional right to send death threats to the president, or publicly threaten other forms of terrorism?" ("First Myths: Some on the Right Are Getting the First Amendment Wrong"). Many of these regulations can be justified. For instance, the loudspeaker regulation is a typical "time, place, and manner" restriction that limits when and where loudspeakers can be used without banning their overall use (general bans have typically been overturned). These laws still clearly restrict "freedom of speech," which is Volokh's point. A clear ban on such laws is not workable.

Hugo Black was the main defender of a literal interpretation of the "no law" clause. (It should be noted, however, that he never carried the Court to agree with him on this issue, and that he applied this position more often to the "freedom of speech" part of the First Amendment than to "freedom of religion.") He would frequently carry a copy of the Constitution and pull it out, noting exactly where the Constitution says "no law" and thunder "no law means no law" (*New York Times* v. *US,* 403 U.S. 713: 717). Black used this position in *New York Times Co.* v. *US* (also known as the Pentagon Papers case). In that case, the *New York Times* wanted to publish government documents, known as the Pentagon Papers, relating to the Vietnam War. These documents tended to show that the United States had known, as early as 1965, that it was losing the Vietnam War, even while publicly claiming it was winning. The government, therefore, had clear reasons (the twin desires to avoid negative publicity and retain public trust) for wanting to prevent publication of the papers. They also wanted to avoid having sensitive material revealed while the Vietnam War was still in progress. In general, governments also try to avoid allowing the publication of classified material (which this material was). A preliminary injunction against publication was issued, and the case made it quickly to the Supreme Court. The majority held for the paper, and publication was allowed. Black went even further than the majority, holding that the injunction should never have been issued, writing "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment" (*New York Times* v. *US,* 403 U.S. 713: 714–715).

If Black's position were extended to the First Amendment in the area of religion, no restrictions would be allowed on the freedom of religion, and the government could not in any way create "an establishment of religion." Of course, some concerns are immediately apparent, as one individual's freedom of religion may interfere with another's. For instance, some religions require their participants to go door to door to profess their beliefs. This often comes into conflict with the religions of those who answer the doors. Under absolutist interpretations of the First Amendment, Congress should make no laws supporting either party. However, the Supreme Court has ruled in favor of the right of groups like Mormons and Jehovah's Witnesses to carry their religion door to door. The "no law means no law" position, on the other hand, comes to mind whenever the Supreme Court strikes down a case as a government establishment of religion, or as going too far in allowing freedom of religion.

Thus, even though vexed by complexity and problematic, to say the least, in its implementation, the absolutist interpretation is still considered one valid approach to the First Amendment. Indeed, one of the best-known Supreme Court Justices of the twentieth century, Hugo Black, supported this method.

See also Hugo Black; First Amendment; Felix Frankfurter

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Abstinence, government grants to force teaching of

Sex education in schools is a controversial subject aimed at preventing unwanted pregnancies and limiting the spread of sexually transmitted diseases (STDs). However, some feel that these classes do more harm than good or that the classes are too sexually explicit. Others feel that discussion of some topics is taken by students as permission to do certain things. For instance, some feel that a discussion of birth control tells students that it is acceptable to have sex so long as pregnancy does not result. Those defending the teaching of various methods of birth control argue, on the other hand, that students are having sex anyway, and it would be better to try to prevent pregnancy than to naïvely assume students will act with restraint or wholly abstain from sex.

Public schools generally teach what they have been funded to teach. Funds are very often provided through federal grants, the lifeblood of many school districts, which often spell out conditions for spending the money. If funding is not provided for music, for instance, music is not taught. It is no different for sex education. If funds are provided to teach about preventing pregnancy through birth control methods, then that is what will probably be taught by many school districts. If funds are provided to teach only abstinence, that is what will be taught. Recently the Bush administration created the SPRANS (Special Programs of Regional and National Significance Community-Based Abstinence Education) program (among others), which grants money only for those agencies that teach abstinence solely as the way to avoid pregnancy. A report from the U.S. House of Representatives Committee on Government Reform Minority Staff noted that the programs funded by this initiative often present erroneous information, including errors about the effectiveness of contraceptives, inject religion into the area of science, reinforce stereotypes, and contain errors in their scientific facts. Among the ways that religion is inserted into

Protester yells at a rally outside the Centers for Disease Control–sponsored National STD Prevention Conference on March 10, 2004, in Philadelphia, Pennsylvania. About 250 demonstrators attended the rally to criticize President Bush's plan to expand abstinence-only education in the fight against sexually transmitted diseases. (Jeff Fusco/Getty Images)

the curriculum are the use of the term "Creator" (capitalization in original) and statements that life begins at conception.

The impetus behind the abstinence programs is largely religious based. The religious belief of the current administration has an impact on its funding of sex education programs, and thus in this way religion affects the law.

The question of what method of birth control empirically best prevents pregnancy and STDs is one that is fraught with controversy, and many different studies have been done in this area. Some reports have concluded that abstinence programs are of little value. Planned Parenthood offers a pamphlet stating that just under 90 percent of those who pledge virginity break their vows. Reports discussing the federal initiatives that are currently being promoted also may demonstrate that the abstinence-only programs have little effect. The group Advocates for Youth surveyed the results available for ten states (the only results released so far), and that concluded abstinence programs had no long-term success.

These funding issues are not limited only to educational programs in school districts. The federal government, over the last two decades, has often refused to fund any United Nations (UN) programs that help to pay for abortions, and UN programs that provide family planning services but also may fund abortions have been de-funded. The reason for this funding withdrawal is religious, with advocates arguing that abortion goes against God's will. Some religions, including the Catholic Church, are opposed to any method of birth control.

Some of the abstinence programs are offered through churches, and indeed the funding carries a clause requiring schools to involve religious and other charitable organizations. A policy of the federal government requiring one to "involve religious and charitable organizations" in return for funds came in front of the Supreme Court in 1988 (487 U.S. 589: 596). The Court upheld that program, stating that it had a secular purpose—to reduce teen pregnancy, did not advance religion even though religious groups could receive funds, and did not excessively entangle church and state via the reporting requirements that had to be followed to monitor how the money was spent. This means the federal government can require that schools involve religious organizations as long as those organizations do not spend the funds to advance religion.

Thus, religious organizations can be mandated to be involved in programs, and the federal government can mandate that abstinence be taught, even though religion and state are directly mixed by the first consideration, and the second is based in religious considerations and beliefs rather than science.

See also Celebration of Halloween and singing Christmas carols; *Harris* v. *McRae;* 1995 statement on "Religious Expression in Public Schools"; *Roe* v. *Wade*

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Abuse of nonreligious conscientious objectors in World War I

Conscientious objectors to World War I routinely experienced abuse. Those whose resistance to the war was based in something other than religion often fared the worst. In order to understand the relative conditions faced by religious conscientious objectors, it is necessary also to be aware of the nonreligious conscientious objectors. Economic, cultural, and personal factors could also act as bases for nonreligious objections to the war. Those who objected on economic grounds were opposed to the war because they saw it as a tool of capitalists and/or of the wealthy. Cultural objectors felt an affinity to either the nation or the ethnic group that they had emigrated from or still belonged to, which was at war with the United States. An Austrian immigrant, for example, might not want to support a war against the Austro-Hungarian Empire, which was fighting alongside Germany in World War I. Finally, those who objected to the war on personal grounds were opposed to any war but did not base their pacifism, and therefore their claim for conscientious objector status, in religion. These objections were greatly opposed by both the government and the public. The government generally refused to assign conscientious objector status for other than religious reasons and then only for those in recognized pacifist faiths.

Those who refused to register for political reasons were often made to kiss the flag or were tarred and feathered. These punishments

Conscientious objector is publicly humiliated for refusing to join the U.S. Army in 1915. (Hulton Archive/Getty Images)

were used against other people who objected to the war as well. Often war protestors were tarred and feathered, and then, assuming they survived, fired from their jobs or horsewhipped, and then handed over the authorities, who might induct them into the army anyway and then subject them to army discipline.

Pacifists were viewed as pro-Germans in general, and police shut down meetings of pacifist groups and arrested people who attended such meetings for disturbing the peace and obstructing traffic. Those who argued against the war in public and refused to enlist on grounds of conscience were, if they were lucky, arrested by the government and tried for obstructing the draft, and many of these were sentenced under the Espionage and Sedition Acts to years in jail. Unlucky objectors were forcibly registered by the government and then tried by the military courts. Some 540 were court-martialed, with nearly all being convicted. Nearly 200 of these were sentenced to either death or life imprisonment. "All of the death sentences were reversed," and many of the rest were reduced later, but some individuals spent up to three years in jail, the last person being released in 1920 (Peterson and Fite, 1957: 138). The objectors were also treated very poorly, with many beaten and some dying from the abuse. Others were so tormented that they committed suicide. The aim of these beatings very often was to convince the pacifist to serve in the armed forces. At times this worked, as some people's resistance was weakened, others chose survival over principles, and still others became so debilitated that they could not prevent others from taking their hands and forcing signatures.

See also Abuse of religious conscientious objectors in World War I; African American draft resisters during the Vietnam War; African American religious conscientious objectors in World War II

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Abuse of religious conscientious objectors in World War I

During World War I, conscientious objectors who cited religious grounds routinely experienced abuse. While the United States fought for freedom abroad, we did not allow much of it at home, especially for those who claimed religious reasons not to fight. Unlike in wars closer to the present, most religious conscientious objectors were lumped, by the public, into one category. (In World War II and Vietnam, certain conscientious objectors, like members of the Quaker faith, which was viewed as an established religion, were given more of a "pass" by the public and so were subjected to less abuse.) The government also, in World War I, was less forgiving of religious conscientious objectors than in recent conflicts.

The government in World War I allowed people to avoid serving as a combatant if they could prove membership in "a well organized religious sect or organization" (Peterson and Fite, 1957: 122, quoting the Secretary of War's Statement Concerning the Treatment of Conscientious Objectors in the Army) whose beliefs "forbade members to engage in war" (Peterson and Fite, 1957: 122). These men were, however, still inducted into the army. The army then tried to break the men and either force them into the fighting army or, at the very least, force them to do work. A sizable percentage of religious conscientious objectors refused to have any connection with the army, even attempting to refuse to wear the uniform. The military often forced them to wear the uniform over their objections and court-martialed them for refusing to work. At least a dozen members of the Mennonite faith were sentenced to jail terms of over twenty years for refusing to cut down flowers (the banal task

they had been assigned as an alternative to combat duty), and another group was given similar terms for refusing to wear uniforms. Other difficulties resulted with those whose faiths taught them to dress or live in a manner not in accordance with the army's regulations. Several Hutterites, who believed that for religious reasons they could not cut their beards, experienced forced shaves. Scores were treated badly enough to die as a result of the abuse, and some were even dressed in military uniforms before their bodies were shipped home. The majority, though, who were willing to work at non-combatant jobs, were treated relatively decently by all reports, even though they were looked down on by the rest of the military.

The public often was not as kind. Very often conscientious objectors were beaten up or given forced haircuts, and their homes were destroyed or their wells polluted. They were also brought before the legal apparatus. Those who spoke out against the war and suggested that God did not want the members of their religion, or people in general, to fight were charged with opposing the draft or "creating insubordination"; they were often convicted and then sentenced to up to twenty years in prison. In rural areas, many Holiness preachers opposed the war and found themselves in front of district courts when the public reported them. Vigilante incidents against people who objected to the war on religious grounds occurred frequently. Thus, those who were religiously opposed to the war were treated well by the army only so long as they helped out in a non-combatant fashion. They were treated poorly by the public in general, and very badly by the military if they refused to cooperate at all.

After World War I, the public came to view those opposed to war with a bit more kindness. Part of this was because more people supported World War II, and with less opposition came less hatred (relatively) of those opposed. In World War II, and in Vietnam also, there was less vigilante violence against those opposed, as the nation moved away from vigilante methods. Thus, after the "Great War," religious conscientious objectors were treated somewhat better, but those opposed to war in general, rather than on religious grounds, still faced an uphill battle for exemption from the draft.

See also Abuse of nonreligious conscientious objectors in World War I; African American draft resisters during the Vietnam War; African American religious conscientious objectors in World War II; *United States* v. *Seeger*

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ACLU—goals and efforts of the ACLU in the area of religion

The American Civil Liberties Union (ACLU) has long been involved in religious issues, although issues of free speech and freedom of the press were its main concerns early in its existence. Indeed, the ACLU often has greater recognition for its efforts in fighting for freedom of speech. Religious freedom, however, is one of the group's central goals. The ACLU fights for freedom of religion, to have a free choice among religions or not to have a religion, and freedom from religion—to have no imposed religion at all.

The ACLU was directly involved in the *Scopes* case in 1925 when the state of Tennessee wanted to ban the teaching of evolution, claiming that it went against religion. Clarence Darrow defended John Scopes in this trial, and his services were provided by the ACLU. The ACLU also made headlines over fifty years later in 1977, when it defended the right of the Nazi Party to march through Skokie, Illinois. This case mixed the issues of religion and freedom of speech. The ACLU was on the side of freedom of speech, as it felt that the civil liberties of the Nazis were being restricted by the refusal of Skokie to allow the march. Certainly, the

ACLU did not endorse the Nazi message, but it felt that even groups making a repugnant statement have a legal right to do so in this country. The city of Skokie had a high Jewish population, many of whom had survived or had relatives who had survived the Holocaust. Not surprisingly, many residents felt their right to believe and live without being harassed due to religion was being violated. The ACLU finally won but lost many members over its stance.

The ACLU is today much more involved in fighting against what they view as religious indoctrination by the states or federal government or, and this is less reported, fighting against what they view as interferences with the free exercise clause. For instance, the ACLU in 2004 filed amicus curiae briefs in a case against a prosecutor who removed two potential jurors from a pool for religious reasons. The prosecutor claimed that their outward shows of religion would cause them to be the sorts of people who favored defendants. (One of them wore Muslim attire, and the other was a missionary.) The court, however, held that such a removal was illegal as it would lead to having fewer jurors from those groups who tend to show religion with their clothing or activities. The ACLU also continues to be active in its support of those who oppose teaching intelligent design theory side by side with evolution in the classroom. Intelligent design theory argues a scientific basis for belief in an intelligent creator of the universe and is often promoted by Christian groups as an alternative to evolution theory. Recently, in Georgia, a school district proposed a sticker to be placed in schoolchildren's biology textbooks. The sticker would have read, in its entirety, "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered" (*Selman et al.* v. *Cobb County,* CIVIL ACTION NO. 1:02-CV-2325-CC).

The ACLU filed suit. The District Court for the Northern District of Georgia used the *Lemon* test, and first turned to the purpose of the legislation, holding "the Court continues to believe that the School Board sincerely sought to promote critical thinking in adopting the Sticker to go in the textbooks" (*Selman et al.* v. *Cobb County,* CIVIL ACTION NO. 1:02-CV-2325-CC, 25). Thus, the stickers' secular purpose was accepted by the court. However, the stickers failed the other two prongs of the *Lemon* test. The second prong holds that a government cannot endorse a religion, and the court believed "an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion. That is, the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders" (*Selman et al.* v. *Cobb County,* CIVIL ACTION NO. 1:02-CV-2325-CC, 31). The court went on to say that the sticker was unconstitutional, as it had the effect of promoting religion. Therefore, the sticker was not allowed.

In March 2006, Georgia's lawmakers enacted a law allowing Bible literacy classes in public school classrooms. The law did not require any school district to adopt the policy.

Similarly, a Little Rock, Arkansas, school board agreed to remove stickers from their textbooks when the ACLU protested. The ACLU's concerns hinged on the description of evolution as a controversial theory and their suggestion that the origins of life could not be explained only by evolution but must include an intelligent designer.

The ACLU is also part of an ongoing case in Dover, Pennsylvania. Teachers in Dover have been required to read their classes a statement to the effect that Darwin's theory of evolution is not a fact, and that, indeed, gaps in the theory cannot be explained by any existing evidence. They are required to inform students that the book *Of Pandas and People* is available

for independent reading in the subject of intelligent design.

The book in question, *Of Pandas and People,* was written by Percival Davis and Dean H. Kenyon and was published by the Foundation for Thought and Ethics, a group the ACLU describes as a Christian organization designed to promote Christian understanding of the Bible. The ACLU has opposed both the statement and the teaching as they see them as an imposition of religion on the schools. In 2004, the ACLU filed a lawsuit in Pennsylvania against the suggested Dover school board policy, along with Americans United for Separation of Church and State, and other groups. The ACLU's involvement is consistent with its aims of protecting the rights of individuals to the freedom of and from religion. The trial was decided in favor of the ACLU and the parents in late 2005, and thus the ACLU is quite active presently.

Looking at the past, it was not until the 1940s that the Supreme Court first ruled on the interaction of government and religion, and later still before the ACLU became involved in this issue. In the 1940s, two flag salute cases involved Jehovah's Witnesses; the question was whether the government could force students to salute the flag. The Witnesses did not want to salute the flag as they considered it worshiping a graven image, and thus blasphemous. However, the ACLU did not participate in either case and did not defend Jehovah's Witnesses in 1940, when a case came in front of the Supreme Court on the charge of creating a breach of the peace. A Jehovah's Witness had played a recording on a street, and the recording was deemed insulting. The Jehovah's Witness moved on, as asked, after playing the record, but he was arrested. The Supreme Court held that the Witness did not create a "clear and present menace to public peace and order" and so should not have been arrested (310 U.S. 296: 311). The Court also ultimately found the Jehovah's Witnesses could not be forced to salute the flag, but only after the second time it ruled on the issue.

However, the ACLU reversed its early trend and has been active in recent Pledge of Allegiance challenges. It was involved in the recent Supreme Court case *Elk Grove Unified School District* v. *Newdow.* It there supported Michael Newdow, who opposed his daughter's being forced in school to recite the Pledge of Allegiance because of its phrase "under God," which Newdow viewed as a violation of his daughter's First Amendment rights. Newdow was unsuccessful, but not on First Amendment grounds. The Court dodged the First Amendment question, holding that Newdow lacked legal standing as he did not have custody of his daughter.

The ACLU is active in the area of the forced recitation of the Pledge of Allegiance in other areas beyond their support to recent Supreme Court challenges. The ACLU in Virginia protested a decision of a school board to force students to stand during the saying of the pledge. The ACLU had protested a planned law forcing students to both stand and to say the pledge, and the law was amended to allow students to sit and/or to remain silent. However, one school board was still going to try to force students to stand until the ACLU protested against it, when the school board returned to their original policy of allowing students to sit.

The ACLU is also active in some areas of religion that would surprise many conservatives, who often paint the group as an extremist liberal organization that exists to harm conservative and religious causes. The ACLU in 2002 challenged the right of the Massachusetts Bay Transportation Authority (MBTA) to reject ads based on their content and filed suits against decisions by the MBTA to reject ads arguing for a wider discussion of the anti-drug laws, and ads, supported by a different group, arguing against the current secularization of Christmas. The ACLU won in the first case but lost in the second; it criticized the Court's ruling, arguing that this was a violation of the church's right of free speech and a restriction of the freedom of religion of the church.

Thus, the ACLU is a strong fighter for freedom *of* religion and freedom *from* religion. It fights for the rights of religious groups not to be treated any differently than any other group and also fights for the rights of those who choose not to believe in a dominant religion not to be treated disparagingly. The ACLU also fights what it sees as government endorsement of religion. Not all religious groups are always happy with the ACLU, of course, as many religious groups might favor a government endorsement of their religion; and sometimes, as with Skokie, the ACLU's activities in favor of freedom of speech may ultimately seem to some to be harmful to the freedom of religion.

See also American Civil Liberties Union (ACLU) establishment; *Cantwell* v. *Connecticut; County of Allegheny* v. *Greater Pittsburgh ACLU; Elk Grove Unified School District* v. *Newdow; McCreary County* v. *ACLU;* 1995 statement on "Religious Expression in Public Schools"; Saluting the flag; *Scopes* v. *Tennessee*

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ACLU of Kentucky v. *McCreary County*

354 F.3d 438 (6th Cir. 2003)

Whether a public building can display a religious symbol has long been a contested topic. Concerning seasonal religious symbols, the Court has allowed a cross, as long as that cross was not displayed in isolation. The Court, though, has struck down a large picture of Jesus in a high school. The case here turns on the question of the display's context.

A note about the history of the case is first in order. In McCreary County, Kentucky, in 1999, the county had established a display of the Ten Commandments; similar displays had been made in Pulaski County, and the school board had done something similar in Harlan County. After the ACLU filed suit, all three agencies added documents to the displays such as the Bill of Rights, the Declaration of Independence, the Star-Spangled Banner, and the Magna Carta. Other than the Declaration of Independence, of which the Ten Commandments were said to "provide the moral background," none of the documents were linked in any way to the Ten Commandments. The district court granted a preliminary injunction against the displays and the case was appealed.

The Sixth Circuit Court of Appeals, sitting as a three-judge panel, first noted that an injunction should not be issued unless the case had "a strong likelihood of success on the merits." The decision then turned and examined that issue. The court first held that the *Lemon* test, regardless of what the circuit court felt about it, still applied, and the court considered the first part of that test, the "purpose" issue. While governments are "given some deference" in what they state to be the purpose of an action, courts still must decide whether the stated purpose is the real one. Here the court stated that the governments had five stated purposes: to display the commandments constitutionally, to show how those commandments led to the American government, to show how they led to the Declaration of Independence, to "educate" the citizenry about important past documents, and to "create a limited public forum" to display these important documents. The court held that the first goal was irrelevant, as simply wanting something to

be constitutional did not make it so. The court then said that the commandments could be displayed constitutionally if they presented a secular message, as the Supreme Court had stated in *Stone* v. *Graham* (1980).

Even though the district court had not considered these factors, the circuit court did so. First, in the school board displays, the court noted that the Ten Commandments were in no way integrated with the other documents, and thus the Ten Commandments, even with the other documents as a whole, still presented a message that was "patently religious and in no way resembles an objective study of the role that the Ten Commandments, or even the Bible generally, played in the foundation of American government" (354 F.3d 438: 451). The courthouse displays made the further claim that the Ten Commandments had influenced the Declaration of Independence. The circuit court agreed with those defending the commandments that the commandments had influenced laws in the colonial period, but held that no influence on Jefferson's Declaration of Independence could be found.

The court next examined the "context of the displays," holding that even though no extra emphasis was given to the commandments, the commandments were still seen as religious. Also, as the commandments began by themselves and had other documents added, the purpose of this display was religious and that the activities of the government in first showing the commandments by themselves could be considered by the court in order to determine the purpose of the display. The court then turned to the "endorsement" part of *Lemon*. The court held that as the historical documents (the Bill of Rights and the other historical documents) were not related in any clear way to the Ten Commandments, and as the documents were in the courthouses and the schools, the display clearly endorsed religion. The majority opinion closed by noting that the high probability of success by the ACLU in its suit against the Ten Commandments was enough to cause the court to grant the preliminary injunction.

One judge filed a concurrence, agreeing with the court's opinion, but also noting that he offered "no opinion as to whether the displays violated the 'effect/endorsement' prong of the *Lemon* test" (354 F.3d 438: 462). The concurrence also argued against the dissent, claiming that the dissent is wrong to argue that the majority held that religion did not influence the government, and that the dissent is wrong to hold that the majority established broad law as it spoke only to the facts of this case.

Circuit Judge Ryan dissented, holding that *Lemon* did apply, but that *Lemon* has difficulties. Even so, Ryan held that this display passed the *Lemon* test. The dissent then examined all five of the cited purposes for the display, holding all to be legitimate, and that religion did play a role in the founding of the country. He then cited several historians to back up his view, noting that the Fifth Circuit and Third Circuit upheld displays, even while the Eleventh Circuit had struck them down. The dissent also said that the majority wrongly relied on *Stone* and should instead rely on *Allegheny,* which had allowed other religious symbols and would, in his opinion, allow the display. For all these reasons, he held the display to be constitutional as the various agencies had secular purposes for establishing the displays. Ryan also held that the display does not create an endorsement and thus does not violate the second prong of *Lemon,* as it is made up of nine secular documents and one that is religious.

The court, sitting as a whole, held a hearing on the state's motion for a retrial of the case in 2004, but denied the request. Two justices of the court answered a dissent of two other justices by noting that the display needed to be considered as a whole and with relation to its purpose, and that the court had not applied a higher standard for courthouses but had held that people were forced into courthouses, which made them a "captive audience."

This decision did several things. It reaffirmed the *Lemon* test; noted that since those suing were likely to win at trial, a summary judgment was in order; and held that the use of the Ten Commandments was religious. It ruled that merely adding other documents was not enough to keep the Ten Commandments display from violating the First Amendment; the decision also set up a test to determine whether a display of the Ten Commandments violated the First Amendment. The Supreme Court, in 2005, ruled on this case again, and a companion display in Pulaski County, in *McCreary County* v. *ACLU.*

See also Celebration of Halloween and singing Christmas carols; *County of Allegheny* v. *Greater Pittsburgh ACLU;* "In God We Trust" on U.S. currency; *McCreary County* v. *ACLU*; *Stone* v. *Graham*

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Addition of "under God" to Pledge of Allegiance

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

Like many other national symbols, the Pledge of Allegiance did not start out being widely used. First written in 1892 by Francis Bellamy (1855–1931), a Christian socialist, the original pledge read, "I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all." (Baer, "The Pledge of Allegiance," 1992). The word "to" was added before "the" a short time later. Bellamy originally considered adding the word "equality" to liberty and justice, but he left that word out, knowing many of his contemporaries did not believe in equality for certain groups, including women and African Americans. Bellamy was related to Edward Bellamy, author of *Looking Backward,* a utopian novel that anticipated the United States in the year 2000 to be a nation in which wealth was evenly distributed, national industry kept everyone employed, and class divisions were erased. It is ironic that a document written by a socialist was later changed to distinguish the United States from the USSR (Union of Soviet Socialist Republics), a country that used the word "socialist" in its name, in the Cold War.

Bellamy drew his ideas and ideals from several contemporary models. He had previously written a Columbus Day proclamation, in which he discussed "divine providence," but he did not include a reference to "God" or "divine providence" in his pledge. Bellamy was also not the first to create a flag salute. In New York City, with one of the largest student populations, George Balch had developed a flag salute. "The students in his New York Public Schools gave his 'American Patriotic Salute' as follows: students touched first their foreheads, then their hearts, reciting, 'We give our Heads—and our Hearts—to God and our Country.' Then with a right arm outstretched and palms down in the direction of the flag, they competed the salute 'One Country! One Language! One Flag!'" (Baer, *"Under God,"* 1992).

Bellamy was charged with creating his pledge for a Columbus Day celebration of the 400th anniversary of Columbus's landing in the Americas. He developed the above pledge and also a way to honor the flag. Near the start of the pledge, here is what was supposed to hap-

pen: "At the words, 'to my flag,' the right hand is extended gracefully, palm upward, toward the Flag, and remains in this gesture until the end of the affirmation; whereupon all hands immediately drop to the side" (Baer, *"Under God,"* 1992). This pledge was first used in 1892, but there is no record of how quickly it spread. In 1923, the First National Flag Conference adopted the pledge but varied it slightly, revising it to read "I pledge allegiance to the Flag of the United States and to the Republic for which it stands, one nation indivisible, with liberty and justice for all" (Baer, *"Under God,"* 1992). The Second National Flag Conference the next year added the words "of America" after United States. The pledge remained unaltered (and still not a formal national symbol) until World War II, when Congress in 1942 adopted the 1924 version, added it to the National Flag Code, and later in 1942 refined the flag salute, adopting the current one of hand over heart in place of the upraised hand, palm downward, apparently noticing (a full decade after Hitler took power and a full year after the United States entered the war against Germany) the similarities between the U.S. and Nazi salutes.

Francis Bellamy was a Christian socialist and author of the original Pledge of Allegiance in 1892. (Library of Congress)

The next modifications did not come until 1954. In that year, Congress added the term "under God" after "one Nation." There is no comma after "one nation" although most people pause there. God in the pledge was not the only Cold War change made by Congress in the 1950s. Congress also changed the country's official motto from "E Pluribus Unum" (one out of many), which it had been since the founding of our nation, to "In God We Trust." Both of these changes can be traced to anti-communist hysteria during the period. The United States, wanting to distinguish itself from the USSR and its atheist positions, went to great extremes to demonstrate that God was still supreme in this country.

Who was important in the drive in the 1950s to add those words to the pledge? One group was the Knights of Columbus, a fraternal organization originally founded for Catholics, in part to give them a place to socialize as they were excluded from many other fraternal groups. By the 1900s, the group's aims included aiding the Roman Catholic Church and "do[ing] good works." With the start of the Cold War in the 1940s, fighting communism became part of one of those "good works." The Sons of the American Revolution (SAR) were also involved in the push to add "under God" to the flag pledge. This organization allows into membership only those men who can trace their ancestry back to a person who fought in the American Revolution (women can join the Daughters of the American Revolution, the DAR). In Illinois, in 1948, Louis Bowman had added "under God" after "one Nation" and claimed that his idea originated from President Lincoln's alleged inclusion of the phrase in the Gettysburg Address. It should be noted that the phrase "under God" does not appear in the

written versions of his address, meaning Lincoln must have added it while speaking, if at all. Over the next few years, Bowman convinced the SAR and DAR to back the addition. The SAR also enlisted the help of the Hearst newspaper chain. The early 1950s was the height of the Red Scare. Joseph McCarthy, who influenced the nation from 1950 to 1954, created an atmosphere in which the USSR, with its perceived hordes of Godless communists, was feared across the nation. It must be remembered that McCarthy attacked first, berated second, created evidence third, and proved never.

However, the early 1950s also saw the Soviet Union explode its first hydrogen bomb, catching up to the United States in that technology in only nine months. Thus, public pressure, real fear, and the created hype of McCarthyism all pushed the country to want to be more anti-communist. The addition of "under God" to the pledge was seen as an important part of this process. One of the most direct supporters to link the two (the "under God" and anti-communism) was the Reverend Dr. George M. Docherty from Washington, D.C. "His point was that a Soviet atheist could easily recite the Pledge without compunction by substituting the 'Union of the Soviet Socialist Republics' for the 'United States'" (Baer, *"Under God,"* 1992).

After the end of McCarthyism and the second Red Scare, several years passed before the phrase was publicly challenged. Those who support the phrase often cite its historic nature without being aware that it was added only in the 1950s. Those who oppose the phrase do so on the basis of U.S. efforts to promote freedom of religion. Those who originally inserted the phrase may not have considered that the USSR, by asserting universal atheism, removed from its people the right to choose whether or not to have a religion. Some of those who argue against the phrase "under God" in the American Pledge of Allegiance hold that it hinders our ability to have freedom of or from religion. Indeed, Bellamy's daughter believed her father would have opposed the addition. Considering the phrase's history of revision, it may well be changed in the future. The Supreme Court declined to judge the constitutionality of the phrase "under God" in 2004. However, any final decision about retaining the phrase as a part of the Pledge of Allegiance is likely to be decided by that body.

See also *Elk Grove Unified School District* v. *Newdow;* Saluting the flag

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African American draft resisters during the Vietnam War

The military has long had a mixed relationship with its African American soldiers, especially after the Civil War when independence and technical equality were theoretically given to all. On the one hand, the army, particularly in the late nineteenth century, provided a job with some level of independence for African Americans, as all soldiers lived on army bases with set rules and regulations. On the other hand, the army did not give them equality even though they were fighting for the rights of all.

The situation was not any better in the declared wars, including the Civil War, the Spanish American War, World War I, and World War II. In the Civil War, African Americans were kept in segregated units, and until late in the war they were paid less than whites and

charged for their uniforms, which the whites were given free. The African Americans in the last three wars were very often trained in the South in segregated cities and were always in segregated units. African Americans generally unloaded ships and served as mess boys in the navy. During World War II, African Americans took a step forward and argued for a "Double V" campaign—Victory over the enemy abroad and Victory over discrimination at home. Many African Americans were quite proud to serve their country, as they felt it to be worth defending, but they felt strongly that the military needed to give them equal treatment. The armed services desegregated in 1948, some twenty years before the rest of America, but some racism lingered.

Given this history of mistreatment, even in wars that were generally popular with the public, it is not surprising that the Vietnam War, which was controversial and largely unpopular at home, also brought its share of racial inequality. Young African American men subject to the draft generally did not want to serve any more than did young white men who were draft age, but the African Americans actually were called on in greater numbers. There were three reasons for this. The first was the overall draft system. One way to avoid the draft legally was to gain a student exemption. Undergraduate students—and, for a time, graduate students—were automatically exempted. As more colleges were available for white students, who were generally better off financially, more of them proportionately could go to college (and did so) than could African Americans. A second reason was the composition of draft boards, which were usually predominantly white. Twenty-three states did not have a single African American on their draft boards. These boards often ignored conscientious objector claims from African American draftees and sent them to Vietnam much more often than white individuals. A third reason was the National Guard. Many white draftees who still had to serve chose the National Guard, which generally kept them out of Vietnam. The same power structure controlling the draft boards dominated the National Guard assignments, and fewer African Americans were assigned to the National Guard for this reason. Class also played an issue—the poor were twice as likely to wind up in combat than the middle class, and when race and class combined, poor African Americans were up the proverbial creek without a paddle.

For all these reasons, many African Americans asked for conscientious objector status and other legal exemptions from the armed forces. Those who objected to the draft on a racial basis were not likely to receive much sympathy. One man who objected to being drafted on the grounds that his draft board was all white was given a five-year sentence, which was one of the longer sentences given. Many African Americans argued that the war was unfairly targeting them and they had nothing against the Vietnamese, so they had no business fighting in Vietnam. Many said it was a rich man's war and a poor man's fight. Others, at least in the lore of the period, asked that the following, or something similar, be put on their tombstones: "Here lies a black man killed fighting a yellow man for the protection of a white man." Many Black Muslims opposed the war, but the Nation of Islam was not given much consideration as a faith back then, and the draft boards were even less kind to Black Muslim requests for deferments than to African American ones in general.

The civil rights movement had an odd relationship with those who opposed the draft. Most civil rights groups, at least for a time, tried to separate themselves from black draft resisters as the civil rights groups did not want to be seen as unpatriotic. SNCC (the Student Nonviolent Coordinating Committee) was one of the main groups willing to protest the draft. Some SNCC protestors got three-year sentences merely for picketing draft centers. Martin Luther King, Jr., in time, moved against the war but lost some of his influence because

of this stance. Thus, the civil rights movement was not as supportive of African Americans protesting against the draft as it could have been, and those who protested against the draft by using racial issues were not very successful.

African Americans had a long history of involvement with the armed forces in America's defense. However, like much of America, most African Americans questioned the war in Vietnam, and also questioned, quite rightfully, why such a large percentage of African Americans were being sent into that conflict. Such protests were not well received, and many African Americans were sentenced to jail terms for either protesting the war and draft or for draft resistance. This issue has not returned with such force, as America began to use an all-volunteer army toward the end of the Vietnam War and since, but many still question whether this all-volunteer army is really a cross section of America or if it is disproportionately made up of the poor and minorities who see the armed forces as the only way to an education or the only job available.

See also Abuse of religious conscientious objectors in World War I; African American religious conscientious objectors in World War II; Religious elements of the civil rights movement; *United States* v. *Kauten; United States* v. *Seeger*

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African American religious conscientious objectors in World War II

African American religious conscientious objectors were generally treated poorly during World War II. A history of African Americans fighting in America's wars sets the stage for this discussion. African Americans had been a part of U.S. fighting efforts since before there was a United States. During the period before the American Revolution, African Americans had answered the call. Crispus Attucks was one of the five men killed in the Boston Massacre and was the first African American to die fighting for America's freedom. African Americans continued to serve valiantly in the War of 1812 and the Mexican American War. During the Civil War, African Americans wanted to enlist even before the Emancipation Proclamation, but enlisted in droves after that. Perhaps the best-known troop of USCTs (United States Colored Troops), as African American soldiers were known back then, was the 54th Massachusetts Infantry, whose gallantry was recounted in the film *Glory.* African Americans also served during the Spanish American War. Most African Americans during World War I had answered the call to fight when asked, falling behind W. E. B. Du Bois who urged African Americans to put away their dislike for America's racism and "close ranks" behind the president. Many of those serving in World War I, though, expected America to repay its African American veterans and all African Americans with equal treatment after the war. This did not occur, and so by the time World War II rolled around, African Americans were not willing to have a repeat of World War I. Some followed the protest methods of A. Philip Randolph, which resulted in the executive order banning discrimination and setting up the Equal Employment Opportunity Commission (EEOC). Others decided to refuse to serve for political reasons or decided not to muffle their religious protests.

One must realize that most African Americans who were called to serve did so. Few deferments were granted in general, and few African Americans became conscientious objectors. The number of conscientious objectors varies from source to source, but all accounts

agree that fewer than 500 African Americans, which is minuscule compared to the nearly three-quarters of a million who eventually served, were given conscientious objector status. In general, few deferments were given African Americans, as the percentage of deferments in each area was smaller than the percentage of African Americans in the population, except for agriculture, which was only slightly larger (and probably less than the percentage of the agricultural population who were African Americans). One must also realize that fewer African Americans served than could have because of the general U.S. draft policy. Draftees were taken based on racial quotas, as the U.S. Army did not want any more than 10 percent of its forces to be African American. Thus, once a draft board achieved its given quota of African Americans, it stopped calling them, even if this meant going through many more white men's files. African Americans also were not allowed to serve in combat, and because of this many poor whites, much more than their percentage of the population, became combat troops. Some college students were given exemptions (few African Americans went to college in this period and so few received exemption), and more-educated whites were supposed to be given skilled jobs; this policy was administered poorly, however, so unskilled people might be given desk jobs, and greatly skilled people might be sent to the infantry.

In the area of religious exemptions, during World War II a person did not officially have to belong to a pacifist sect to be exempted, and in practice this made the exemption much easier. How established one's church was also played a role. Those in the Quaker religion were generally given a much easier road to exemption than those in newer faiths, including newer African American faiths. The makeup of the draft board also played a role, and here African Americans suffered markedly. Across the nation, less than 1 percent of draft boards, or about one-tenth of the percentage of African Americans in the population, were African American. Across the South, where most African Americans still lived, only seventeen draft board members (in only three states) were African American, and these members, not surprisingly, were given power to rule on only African American draftees. That was the situation African Americans were dealing with in the war.

As noted before, most African Americans served when called rather than receiving exemption. Those who desired exemption on religious or moral grounds did not fare well. Many who desired exemption on religious grounds were members of newer churches, and this may have played a role as well. Many members of the Nation of Islam, or the Black Muslims, were turned down for exemption, and over sixty were arrested in 1942 in a mass raid in Detroit. Elijah Muhammad, leader of the Nation of Islam, was sent to prison for five years for opposition to the draft. Muhammad opposed the draft as he was a Muslim and as he did not want to participate in war with "infidels," or non-Muslims, which most of the U.S. troops were, in his opinion. The Espionage and Sedition Acts were not used as widely as in World War I, but some of those who came under it were African Americans who opposed the war. These African Americans generally based their resistance in their religion, even though the religion also had political overtones. Other members of African American religions had a similar lack of success. A member of the Black Hebrews was sentenced to fifteen years in prison for promoting resistance to the draft. Others combined their political and religious issues. Some twenty-one members of the Church of Freedom League were imprisoned as they tried to combine a general opposition to this war and how the United States was handling their troops with a general religious opposition to war.

More African Americans opposed being involved in the war because of the segregation in the military, but few of these had any success in preventing their being drafted, if they were

called. Ernest Galloway opposed the war and refused to serve when called but did not ask for conscientious objector status; he was sentenced to three years in prison. Winnifred Lynn refused to serve, citing the segregation existing in the army, and he was told that he would have to join the army to be able to sue it. He did this and was eventually shipped overseas. When his case came up for trial, the courts refused to rule on it because he was not present, and because no one could produce him (because he was overseas, of course), the case was declared moot.

The level of segregation was pervasive in the army, as there was only one African American general, and the army actually segregated some northern bases. However, protests against this segregation in the army in the legal arena to avoid service had little success. Note that African Americans who refused to serve generally did so with an eye on only the Pacific Theater, noting that they should not be sent to fight "the yellow man" (as some described the Japanese), and some even noted an affinity for all other non-white races. Gunnar Myrdal was allegedly told by an African American that he wanted the following put on his tombstone: "Here lies a black man killed fighting a yellow man for the protection of a white man" (Mintz, 2003). Most African Americans were more supportive of the fight against Hitler, noting that he hated African Americans (and all black people) worse than white Americans did.

Thus, most African Americans who were called served, and they were called less than they could have been, but they also received few exemptions. Specifically, African Americans were generally unable to be granted exemptions to induction on religious grounds, and protests on political grounds seem to have been universally unsuccessful.

See also Abuse of nonreligious conscientious objectors in World War I; Abuse of religious conscientious objectors in World War I; African American draft resisters during the Vietnam War; Religious conscientious objectors in World War II; *United States* v. *Kauten; United States* v. *Seeger; Welsh* v. *United States.*

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Agostini v. *Felton*

521 U.S. 203 (1997)

Aid to parochial schools has provoked many lawsuits, with one of the first being *Everson* v. *Board of Education* (1947), which held that transportation to school at state expense was allowable. Direct aid to schools was even more controversial, and for a dozen years before *Agostini,* the ruling case was *Aguilar* v. *Felton,* which declared that aid to private schools was allowable as long as that aid did not occur on parochial school grounds.

Agostini was a 5–4 decision overturning *Aguilar* v. *Felton.* The same parties who had sued in *Aguilar* sued again, this time to have the injunction of *Aguilar* lifted. The Court, in an opinion written by Justice O'Connor and joined by Justices Scalia, Kennedy, and Thomas and Chief Justice Rehnquist, granted that request, holding that remedial education for private school children could now be provided on private school sites rather than having to be

provided in mobile classrooms or vans off site, or in an off-site location to which the children were transported. The Court held that changes in the law since *Aguilar* required lifting of the injunction, and some five justices had noted the same in a past case, *Kiryas Joel* (512 U.S. 687 [1994]), which had encouraged the filing of the lawsuit. The Court first noted that for the order issued in *Aguilar* to be lifted, either the facts or the law had to be changed, and that the facts had not. The Court then looked at the law, and used the three-pronged *Lemon* test. The test, as announced in *Lemon,* was "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion" (403 U.S. 602 [1971]: 612–613). The Court noted the violations of the *Lemon* test that the 1985 Court had found in *Aguilar* and then noted that the *Lemon* test still stood as the standard to use, but that the Court's attitude toward two particular practices had changed.

The Court then stated changes in this area of law since *Aguilar.* First, they noted that decisions no longer presumed, as they had before 1985, that the very presence of public school officials on private school grounds meant that states were promoting religion or that states were creating a union of church and state. The Court stated that in past cases, decisions had moved away from *Ball*'s strict rule that "all government aid that directly assists the educational function of religious schools is invalid" (521 U.S. 203: 225). *Ball* was a companion case to *Aguilar,* decided at the same time.

O'Connor wrote that contrary to *Ball* and *Aguilar,* the current Court did not believe that public school employees would indoctrinate the students (a concern voiced in those earlier cases) and that no symbolic union was created between church and state by these programs. As these aid programs were allowable for private school students on public school grounds, they should also, the Court held, be allowable in private school classrooms. The Court rejected Justice Souter's argument made in his dissent that these services provided by the state would save the private school money and held that since the services were allowable provided off site, there was no reason not to allow them to be provided on site. The Court also noted that the test used to determine whether a student received aid was neutrality on the issue of religion, which meant that the program did not violate the *Lemon* test on that basis. The last test was whether an excessive entanglement of religion was created by this program—that is, did the program force the secular authorities to become overly involved, thus entangling them more than necessary in religious issues. *Aguilar* had held that it did, as the employees would need to be watched to prevent them from making religious comments. Cases in the interim, though, had held that teachers were to be trusted, and that no difficulties had occurred in past programs of a similar nature. For those reasons, no excessive entanglement was seen. The Court ended with an examination of stare decisis, trying to see if the fact that *Aguilar* had been good law for ten years prevented its being overruled. They concluded that if the facts changed, stare decisis did not prevent a change in decision, particularly when the change desired was a lifting of the injunction created by the previous case.

Four justices, however, dissented. The first dissent was filed by Justice Souter and joined by Justice Stevens and Justice Ginsberg, and Justice Breyer joined it in part. Souter argued that *Ball* and *Aguilar* were both correctly decided, and he focused more on the fact that programs, such as the one desired here, to put teachers directly on school grounds, and the ones in *Ball* and *Aguilar,* subsidized religious education. This direct aid, the dissent argued, violated the First Amendment. The courses provided, Souter argued, would have been provided by the religious schools if the state had not done so, and this helped out the religious schools. Souter held "there is simply no

line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious" (521 U.S. 203: 246). Souter's solution was to allow teaching only off site, as that would make the school probably offer remedial classes, and thus the school would not be expected to save money. The dissent also argues that the majority opinion has stretched far beyond its boundaries; *Zobrest*'s holding that sign interpreters are acceptable. Souter also argued that the program here is far wider than that approved in *Zobrest* and must be considered as such. He ended by suggesting that stare decisis should rule and that while the goals of this program are noble, they are still unconstitutional, and drawing "constitutional lines [is] the price of constitutional government" (521 U.S. 203: 254).

The second dissent was by Justice Ginsburg and she argued that the Court should not have heard the case. This case was brought by the defendants seeking an overturning of the previous decision, and Ginsburg held that the Court should have waited until a new case came along to reconsider its decision rather than hearing this one. She disagreed with the analysis of the majority that the law had changed sufficiently for a rehearing, instead suggesting that the Court should have waited.

Since *Agostini,* the issue has been relatively quiet at the Supreme Court level, even while being heard at the circuit court and district court levels. School aid is thus allowed on private school grounds. Recently the controversy has shifted more to voucher plans in which the state provides funds for schoolchildren in public schools to choose what school to attend. These have been challenged as unconstitutional, as most of the schools chosen are private and also often religious schools, but the Supreme Court in 2002, in *Zelman,* upheld the vouchers as legitimate and not a violation of the separation of church and state.

See also *Aguilar* v. *Felton; Everson* v. *Board of Education; Lemon* v. *Kurtzman; McCollum* v. *Board of Education;* Sandra Day O'Connor; *Zelman* v. *Simmons-Harris*

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Aguilar v. *Felton*

473 U.S. 402 (1985)

Aid to parochial education has long been one of the more divisive issues in church-state education. Those who run parochial schools desire the aid generally, as do parents who send their children to these schools, but their desires are opposed by those who prefer a total separation of church and state, as well as by others. The program in question here dealt with remedial education in parochial schools.

This decision was a 5–4 decision with Justices Marshall, Brennan, Blackmun, Powell, and Stevens voting in the majority and Justices O'Connor, Rehnquist, White, and Chief Justice Burger dissenting. The majority decision was written by Brennan. He first examined the program, noting that the program originated in the 1965 Elementary and Secondary Education Act, which provided funds to help low-income children. For the private schools, it was

administered to provide remedial education. The teachers who worked in this program were regular public school teachers who had volunteered to be in it, and there was oversight of the program. The Court then noted the similarities between this case and *Grand Rapids* v. *Ball*. The Court focused first on the issue of entanglement, as the *Lemon* test had banned programs that created "excessive entanglement of church and state" (473 U.S. 402: 410). The precedents were reviewed, with the Court noting that the unique nature of the high school environment must be considered, and so precedents from the college level did not apply. The Court then held that there was entanglement here similar to that banned before. "First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message" (473 US 402: 412). As continual monitoring was needed to prevent state support of religion, which is illegal under *Lemon,* this continual behavior would in turn create an entanglement. Thus the program was ruled unconstitutional.

Justice Powell filed a concurrence. Powell emphasized the issue of entanglement and wrote to explain "why precedents of this Court require us to invalidate these two educational programs that concededly have 'done so much good and little, if any, detectable harm'" (473 U.S. 402: 415). Powell noted that precedents of the Court required that the Court invalidate the program on the issue of entanglement and added that "there remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources" (473 U.S. 402: 416). Powell suggested that aid in a state with many different religions like New York was bound to cause controversy and strife, which gave another reason to strike down the program on the issue of entanglement. The concurrence noted that this program also aided education in that it "amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require" (473 U.S. 402: 417). Powell, though, did hold that some aid might be allowable, but the current program "provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools—resulting in both the advancement of religion and forbidden entanglement" (473 U.S. 402: 418).

Chief Justice Burger filed a short dissent. He argued that the program had many beneficial features and that the majority opinion did not "identify any threat to religious liberty posed by the operation of Title I." He also argued against the sole use of the *Lemon* criteria and viewed the majority as finding religion everywhere, while the only thing really there was helping children to read.

Justice Rehnquist also dissented, and accused the majority of taking "advantage of the 'Catch–22' paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement" (473 U.S. 402: 420–421). Rehnquist also saw the Court as violating the intent of the First Amendment, suggesting "we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need" (473 U.S. 402: 421).

A final dissent was filed by Justice O'Connor, who looked at the actual practice that had occurred under this program in New York. Rather than religion being advanced regularly or even occasionally, O'Connor reminded the Court that "in 19 years there has never been a single incident in which a Title I instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense'" (473 U.S. 402: 424). O'Connor also argued that on-site remedial instruction should be allowed as the Court

would have allowed off-site remedial instruction. O'Connor argued against the Court's holding in *Meek,* that public school teachers might indoctrinate students when those teachers were teaching in religious settings. She also noted that the level of supervision was not enough to create an entanglement and that no real controversy had been created by this program, other than the current case. O'Connor suggested that just because public and private schools worked somewhat together, this did not create an entanglement, remarking "if a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion" (473 U.S. 402: 430).

O'Connor closed by noting that the majority decision did not end the program, even for parochial schoolchildren, but just moved it off the school grounds, ending it only for those whose school could not create such an arrangement. She criticized the Court for this, holding "for these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school" (473 U.S. 402: 431).

Thus, in a very split decision, the Court held that aid to schoolchildren who went to parochial schools was not allowed on school grounds but was allowed off school grounds. One result is that many parochial schools had auxiliary services, such as working with disabled children, provided in trailers on the school's property where the trailers were provided by the state and thus the aid was not on parochial school grounds. Only certain aid was allowed and only in certain places, which produced a minefield for parochial school administrators and public officials trying to navigate it. The situation remained this way until *Agostini* v. *Felton* in 1997.

See also *Agostini* v. *Felton; Everson* v. *Board of Education; Lemon* v. *Kurtzman; McCollum* v. *Board of Education;* Sandra Day O'Connor

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Airport Commissioners v. *Jews for Jesus*

482 U.S. 569 (1987)

City councils, airport commissioners, the police, and other public officials have always had a hard time balancing one group's right to worship in public versus the right of others using the facility to use it and be somewhat left alone. Of course, this assumes that those in power want to allow protest or worship in public, which is not always the case. The First Amendment, though, allows freedom of religion, and this constitutional right of one's freedom of religion came into play in this case, as a group believed that their religion required them to solicit in public.

The airport commissioners had tried to deal with a large number of people, religious and nonreligious groups, who tried to have activities in the airport. To control this in a simple way, and perhaps to prohibit the presence of Jews for Jesus, the commissioners banned "all 'First Amendment activities'" in the airport (482 U.S. 569: 570). The case reached the Supreme Court, and the regulation was struck down.

Justice O'Connor wrote the decision for the Court, and held that the Court did not need to decide what type of a "forum" the airport was, as the regulation was unconstitutional regardless. The type of a "forum" is relevant, as, if something is a "traditional public forum," individuals have more rights to speak, and the regulations generally can only apply to the "time, place, and manner" of the activities. The Court held that this regulation was extremely overbroad, banning everything, up to and including talking, and that "no conceivable governmental interest would justify such an absolute prohibition of speech" (482 U.S. 569: 575). O'Connor went on to say that the regulation had no way to be constitutionally narrowed and so must be struck down. The Court of Appeals had ruled it unconstitutional as violating the First Amendment, but the Supreme Court struck it down as being overbroad.

Justice White and Chief Justice Rehnquist concurred, but also noted that they did not see the Court as holding that the airport was a "traditional public forum." Reading between the lines, this suggests that these two justices did not think that the airport was such a place, and so people there deserved less protection of their First Amendment rights than would have happened in a "traditional public forum." What White and Rehnquist appear to have been hinting was that regulations adopted by boards governing airports might be legal if they treated the airport as a public forum created by government designation or as a nonpublic forum. In the former, the protections are similar to those in a traditional public forum, but in the latter, as noted in O'Connor's opinion "access to a nonpublic forum may be restricted by government regulation as long as the regulation 'is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view'" (482 U.S. 569: 573). However, the problem for all the justices here, without question, was the sweeping nature of the ban and the fact that the religious pamphleteers were clearly being singled out due to the nature of their activities and their views. Thus, restrictions on pamphleteers, or others worshipping in public, might be legal, but total bans were not.

Balancing the rights of one group against a larger society is a tricky call, and this case did little to make that process easier. It did, however, send a clear sign that the rights of the minority (in this case Jews for Jesus) needed to be respected and that a ruling body could not simply solve the issue by banning all activities of a religious nature.

See also *Bronx Household of Faith* v. *Community School District No. 10; Cantwell* v. *Connecticut; Chapman* v. *Thomas; Employment Division* v. *Smith; Good News Club* v. *Milford Central School; Heffron* v. *International Society for Krishna Consciousness, Inc.; International Society for Krishna Consciousness* v. *Lee; Watchtower Bible and Tract Society of New York* v. *Village of Stratton*

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American Civil Liberties Union (ACLU) establishment (NCLB at founding)

The American Civil Liberties Union (ACLU) was originally called the National Civil Liberties Bureau (NCLB); it changed its name in 1920. Largely the work of Roger Baldwin, the NCLB grew out of efforts to defend those who refused to fight in World War I and those who were more generally opposed to the war. The NCLB also had origins in the American Union Against Militarism (AUAM), founded in 1914. One of the founding members of the AUAM and the NCLB, Roger Baldwin received a firsthand taste of government repression during World War I. Opposed to war, he refused to register for the draft and was sentenced to a year in jail. Fortunately for Baldwin, he was not forcibly inducted into the army over his objections and then tried, as this course of action generally resulted in longer sentences. Other founders included Albert Desilver and Crystal Eastman. The NCLB's success defending those who were opposed to the war was limited during World War I.

Baldwin had graduated from Harvard and taught at Washington University in Missouri. He had formed the Fellowship of Reconciliation, a Christian pacifist group whose main

Roger Nash Baldwin was the principal founder of the American Civil Liberties Union (ACLU) in 1920 and its director for thirty years. (UPI-Bettmann/Corbis)

claim to historical note was that it helped to form CORE (the Congress on Racial Equality), which became a leading civil rights group. After the fellowship, Baldwin helped to form the AUAM and served as its executive director in 1916; the NCLB followed in 1917. Crystal Eastman was one of the earlier woman lawyers, graduating from New York University School of Law in 1907. She was the sister of Max Eastman, one of the defendants in the infamous *Masses* case during World War I. (In that case, *Masses Publishing Co.* v. *Patten,* the Second Circuit Court of Appeals decided in 1917 that a revolutionary journal, the *Masses,* was eligible for prosecution under the Espionage Act.) Other famous people in the AUAM included Lillian Wald, Oswald Garrison Villard (grandson of William Lloyd Garrison, the abolitionist), and Jane Addams. Also noted on the NCLB's active roster was Norman Thomas, later six-time Socialist Party candidate for president.

The NCLB tried to defend people during World War I, especially those who resisted the draft. The bureau, though, had a significant number of difficulties. First, its position on the war conflicted with the standard American perspective, so it had difficulty raising funds. Second, of course, each battle it undertook was an uphill fight. It did, however, have a great advocate in Roger Baldwin. Baldwin had been active in the AUAM, and he became head of the Civil Liberties Bureau (CLB) of the AUAM, which then became the NCLB. The CLB told young men who were opposed to war to register and "when you register, state your protest against participation in war" (Cottrell, 1997). The CLB also tried to get decent treatment for those who opposed the war and communicated often with government officials like Secretary of War Newton Baker. Baldwin and the CLB were placed under government surveillence, even while the CLB tried to stay within the law. Baldwin protested the Espionage Act, the later Sedition Act, and the treatment received by those opposed to the war. In August and September 1918, Baldwin started his own long trip down the road to jail for failure to register. The NCLB was also raided on August 31 of that year, and many documents were taken. Thus, the NCLB was, not surprisingly, not extremely effective during World War I.

Roger Baldwin emerged from jail a changed man. He was originally a Progressive, believing in the force of government to bring about a better society. His time in jail, however, convinced him that another force was needed to restrain government. In 1920, Baldwin moved to help create this force with the establishment of the ACLU. He would serve as its leader until 1949—nearly thirty years.

The ACLU was established to fight for the rights of the people. At its founding, it identified the Bill of Rights as a document designed to protect Americans' rights and the rights of minorities of all persuasions—racial, cultural, and ideological. This was a revolutionary idea, as in 1920, the Bill of Rights was not yet applied against the states in any way. The ACLU was originally somewhat conservative, attempting to limit its membership to the top of society who would work to protect the rest. The ACLU also, through the first decades of its existence, tried to avoid having radical members, believing this would bring criticism. Baldwin banned communists from being officers of the ACLU. The ACLU was originally interested largely in civil rights and free speech cases, defending John Scopes in the Scopes Monkey Trial, defending James Joyce's *Ulysses,* and originally defending the Scottsboro Boys. (It dropped out of that defense once it became clear that the communist-dominated International Labor Defense, ILD, would play a major role.)

In the early years, and when Baldwin remained active, religion was not one of the major topics of the ACLU's efforts. However, the organization did become active in this area later, fighting against what it saw as erosions of the separation between church and state, including government attempts to put up the Ten Commandments in public places.

See also ACLU—goals and efforts of the ACLU in the area of religion; *County of Allegheny* v. *Greater Pittsburgh ACLU; McCreary County* v. *ACLU*

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American Indian Religious Freedom Act

The goal of this 1978 act was to help Native Americans protect their religion. The act, however, was not effective, doing little to help Native Americans practice or preserve their religion. In the past quarter of a century, this act has been ineffective, and little has been done since its passage to help protect Native American religion. The act itself refers to the group as American Indians; this note will use the term American Indian only where it directly refers to government descriptions of Native Americans.

Native Americans, in the centuries before 1978, were largely ignored or abused by the larger white society. The goal of past government policies was largely one of extermination and land seizure, moving the Native Americans onto reservations. In the 1880s, government decided to encourage Native Americans to become white with the 1887 Dawes Act, which gave land to individuals rather than tribes, encouraging the breakdown of the tribe into family units of sedentary farmers. (Naturally, the land offered to these families was substandard, at best.) Landholdings had previously been largely at the tribal level, where any idea of ownership existed at all, and so this was a radical change. Because of the poor quality of the land, many Native American farms failed, and white people then bought the land from them, often unethically. Another portion of the Dawes Act encouraged the Native Americans to adopt white religions, in the hope that they would eventually become good white citizens, melting away their Native American identity.

This process largely failed, but it did immeasurable damage to Native Americans. Little was done before the 1960s to try to restore the Native American culture that was lost. In the 1960s, many facets of American policy came under attack, including Indian policy. Native Americans lobbied and marched for change. Like many other groups, some Native Americans became more militant in the late 1960s, seizing Alcatraz Island and the site of the Wounded Knee Massacre. They particularly protested against religious restrictions and against museums that held Native American bodies and sacred relics.

In 1978, President Carter signed the American Indian Religious Freedom Act. The act was intended to respond to Native American concerns about federal policies that affected opportunities for Native Americans to worship and protect their religious practices in general. The first part of the act stated this intention and noted that the government would begin a policy of respecting Indian rights. The second part ordered the president to evaluate all of the current laws and within a year have all of the divisions under him report on what actions were taken to improve the treatment of Indians. However, no actions were mandated. It was, in many ways, more of a moral comment that the U.S. government should be nice to Native American culture rather than a specific command. The act also did not contain any specific enforcement provisions.

Indeed, the act has really done little to improve the treatment of Native Americans. It did cause some places to return artifacts that they had acquired from Native American grounds, but that was its main positive effect.

The Supreme Court, both times it has prominently dealt with Native American religion, ignored the spirit of the act. In 1988, in *Lyng,* the Supreme Court upheld a decision by the U.S. government to build a road through a sacred religious area, stating that as long as the government's action did not prohibit the Native Americans from practicing their religion, it was permissible. It determined that a mere burden on religion should not be considered and thus ignored the purpose of the American Indian Religious Freedom Act. The Court did consider the act, but noted it was merely a resolution of Congress, not a specific prohibition. In 1990, the Supreme Court returned to the issue in *Employment Division* v. *Smith,* in which two Native Americans had taken peyote and been fired, and then were refused unemployment benefits as they had been fired for illegal behavior. The Supreme Court held that the law in question was religiously neutral and should be upheld, and the Court once again ignored the spirit of the act.

The act also ran into difficulties in its wording, even when it was considered. It provides that Native Americans should have visitation rights to sacred lands but if religious worship depends on those lands, then more permanent rights are needed. Native Americans tried twice to block construction of dams that would put their religious grounds underwater, but the courts used a balancing test—balancing the effect on religion versus the need to build a dam, and both times held that the dam was more important.

In 1990, Native Americans did gain some measure of comfort from the Native American Graves Protection and Repatriation Act. This act ordered museums to make an inventory of all human bones, to publish that inventory, and to allow Native Americans to make claims for return of their relics. This differed greatly from earlier policy in which governments did not consider the stealing of Native American artifacts grave robbery, as it would have of any white grave. This act does prohibit future looting of graves. Though it does not cover private land or private collections, it is a significant improvement that has led to the return of many Indian artifacts.

Thus, the American Indian Religious Freedom Act led to little improvement for Native Americans, even though it was an important symbolic step. The courts have ignored the spirit of the act, and the act itself had no enforcement provision. Thus, if Native American religious freedoms and grounds are to be truly protected, more will need to be done.

See also Dawes Severalty Act; *Employment Division* v. *Smith; Lyng* v. *Northwest Indian CPA;* Native American combination of religion and law

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American Revolution's effect on religion

The American Revolution shaped religion in America in a number of ways. It did not create an American religion, which many European political upheavals did, but instead it helped to create an American system of religion. Particularly, the Revolution brought an end to state-sponsored churches as the states drew up new constitutions promoting an increased diversity in religion. And the push for democratization in politics coming out of the Revolution spread to a push for democratization in church structure, supporting the growth of new Christian churches.

The American colonists were very religious in the eighteenth century. Nearly 80 percent of the colonists regularly attended church and

some colonies had state-supported churches. Religious variety was also increasing at this time with the development of new denominations such as the Presbyterians and the Baptists.

The American Revolution directly affected what preachers said in many pulpits. Before the American Revolution—and especially before the Stamp Act in 1765, which effectively touched off the resistance—English monarchs were directly praised, but after the Revolution, anti-British preachers stopped praising the king and instead praised the nation. In time, the Revolution also caused people to revere the early documents of the United States, like the Constitution and the Declaration of Independence, with the kind of ardor normally reserved for religious symbols. Thus, in the Revolution, America made it possible to create for itself political-religious icons.

The American Revolution also, in time, brought fewer public references to God. Many early references to God were, in part, attempts to gain legitimacy for America. God was combined with public celebrations, but the Founding Fathers, in some ways, did attempt to move God out of the center, the place He held in the European mind. One sign of this is the ban in the Constitution of a religious test oath for federal officeholders. One probable reason that the founders did this was to remove the issue of religion from the national discussion, as states varied in terms of their religious fervor and which religion(s) they favored.

The American Revolution had two direct effects on the Anglican Church in Virginia. There (and elsewhere), the Anglican Church in the colonies looked to its headquarters in England for leadership. After the American Revolution, the Anglican Church in America had to establish its own church headquarters, doing so in the Episcopal Church. The Anglican Church had also been state established in Virginia, but after the American Revolution, Patrick Henry's efforts to reestablish a tax for supporting the church failed. Therefore, the Episcopal Church was not state sponsored as the Anglican had been.

This trend continued after the American Revolution. Some colonies that had established churches did not reestablish them when the colonies became states, instead increasing religious diversity and freedom and decreasing church-state interaction. Other states reimposed the tax that had existed to support churches when they were colonies but allowed their citizens to choose which church received the money. Thus, there was more church freedom and diversity than before the Revolution. The reason all the colonies had to pass new constitutions, which in turn caused them to consider the role of the established churches, was because they had received their charters (which created them and allowed them legally to exist) from the Crown, and the American Revolution had declared the colonies free from the Crown. After the Revolution, the newly formed states had to justify their very existence. The states looked to their citizens and, through representative bodies (theoretically), created new constitutions justifying their own existence.

In time, states moved even further away from established religion until all of them removed all support for an established church. Connecticut, for example, ended its support of churches in 1818. Massachusetts was the last to act, in 1833. The democratization movement, sparked in some ways by the Revolution, helped to decrease the appeal of some of the older religions and increase that of new ones. For example, the Methodists argued against the rational appeal of the Congregationalists, instead preferring a ministry of passion, and thereby gained many followers in the first half of the nineteenth century. All can participate in a ministry of passion, whereas a ministry of ideas, like that of the Congregationalists, can be directly understood only by those who have more sophisticated ways of thinking. The new ideas of democracy that were shaping the nation politically also shaped it religiously, as more people wanted to be able to participate directly in their relationships with God.

Democratization helped to promote the argument that people can play a role in their own salvation, and this idea was the spark of the Second Great Awakening in the early 1800s. In addition to spawning the growth of the Methodist religion, this movement ignited revivals across the country. One central idea was that all could choose either good or sin, and so could save their own souls. This idea also helped people become interested in saving each other, leading, in part, to the ideas of abolitionism and temperance, among others. In these ways, the American Revolution had long-lasting and far-flung effects tied to religion directly for another ninety years and indirectly for many more than that.

See also Bible controversy and riots; Establishment of Pennsylvania as religious colony for Quakers; Anne Hutchinson; Punishment and religion

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Americans United for Separation of Church and State

This group is one of the leading forces, along with the ACLU, fighting against the support of religion in the public sphere. It tries to educate the public about the need for the separation of church and state, and files lawsuits to remedy situations when it believes that the wall of separation between church and state has been breached. It also advises public officials about potential violations and tries to work with those who it feels have breached that wall in order to end violations without resorting to lawsuits.

This group was founded in 1947, in response to several incidents, including the *Everson* v. *Board of Education* decision in that year and President Truman's proposal for an official U.S. ambassador to Vatican City. A group of people met in Chicago and generated a statement noting their apprehension over the eroding of the church-state barrier, which they titled "A manifesto." Among the group's founders were Louie Newton, president of the Southern Baptist Convention; John McKay, president of Princeton Theological Seminary; and William Scarlett, an Episcopal bishop. The group's early goals included informing the public about the historical basis for the wall of separation, opposing President Truman's proposed ambassador, and opposing public support for religious schools. Many attacked Americans United for its opposition to school prayer, and with the 1950s Red Scare, it is not surprising that the organization was painted by their opponents as soft on communism. Among the recent cases in which Americans United has filed briefs are *ACLU of Kentucky* v. *McCreary County,* which dealt with the posting of the Ten Commandments; and *Hibbs* v. *Winn,* which dealt with tax credits for scholarships to private schools. Among current issues of interest to Americans United are the proposed federal amendment defining marriage as being between a man and a woman, vouchers for public schools, faith-based initiatives, the posting of the Ten Commandments on public property, and prayer in public schools.

Americans United is opposed to the current move for an amendment to define marriage for three main reasons. The first is the one that people would expect, as the current drive for the amendment is backed by several large churches, including the Southern Baptists and the Roman Catholic Church; for those reasons, Americans United sees this amendment as imposing a religious dimension on marriage, and, as the organization is opposed to the interaction of church and state, it opposes this. Americans United also cites the decision of several denominations, including the Unitarians and the United Church of Christ, to allow gays and lesbians to be married. As these denominations

allow marriages to occur, while others do not, to state that these marriages were invalid would show a preference for one religion over another, a position that is prohibited, in the view of Americans United, by the First Amendment. Finally, the group points out that the amendment, as currently worded, goes well beyond just denying marriage rights, removing a whole host of other rights that have been granted to gays and lesbians.

Americans United also opposes vouchers for private, religious-based education. It sees vouchers as underwriting churches and argues that taxpayers should be able to contribute only to the religious groups to which they wish to contribute. Most schools that participate in voucher programs, particularly most private schools, are religiously affiliated, and Americans United argues that the use of vouchers creates taxation without representation, as the vouchers subsidize education that the public has no control over. Americans United also points out that many religiously affiliated schools discriminate on the basis of religion, thus vouchers support either (a) having tax dollars subsidize discrimination or (b) forcing religiously affiliated schools to change to get tax dollars. Even though the Supreme Court upheld vouchers in 2002, Americans United argues that these two factors make the vouchers an unacceptable breach of the wall between the church and the state envisioned by the Constitution. The group also points out that in religion-based schools, the views of the religion generally influence the education, which is not supposed to be the goal of secular education.

Finally, Americans United opposes faith-based initiatives in which tax dollars are used to fund charity programs run by churches. One reason for its opposition is that the churches providing the aid often discriminate in employment and in other things on the basis of religion; this, in turn, means that government dollars are being used to support discrimination. Those groups who receive funds are even allowed to continue discriminating in hiring, even when using government funds. The group also points out that people who receive services might very well be coerced to attend church or become members of the church where the services are provided. Americans United also notes that even though the government is giving these groups a fair amount of leeway, there will be increased regulation with the funds given, and this creates the risk of entanglement between the church and the state. This whole concern is relatively new, as only under George W. Bush have these initiatives really been pushed at the federal government level.

Americans United has been active in a wide variety of areas dealing with the separation of church and state. It has filed a large number of lawsuits and briefs in cases, with some success, and, as it was founded nearly sixty years ago, its historical basis demonstrates a long-term commitment from its members.

See also Abstinence, government grants to force teaching of; *ACLU of Kentucky* v. *McCreary County; Everson* v. *Board of Education;* Gay marriage; *Hibbs* v. *Winn; McCreary County* v. *ACLU; Zelman* v. *Simmons-Harris*

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Ansonia Board of Education v. *Philbrook*

479 U.S. 60 (1986)

The state and federal governments are not supposed to discriminate against religion, and hiring or firing on the basis of religion is a clear in-

dicator of discrimination. However, when a policy that seems neutral nevertheless hurts one because of his or her religious choice, it is harder to state whether religious discrimination occurs. That was the issue addressed in this case, which dealt with a school employee whose religion required him to miss school days for religious observances. His contract allowed him only three days, but he missed six. He would have been permitted to use sick days for personal business but not for a religious observance. The school board refused to allow him to use his sick days for religious observances, even after he repeatedly requested to do so. They instead offered him the three additional days as unpaid leave. He therefore sued under Title VII of the 1964 Civil Rights Act, which requires employers to reasonably accommodate an employee's religion (479 U.S. 60).

The case came before the Supreme Court, which initially remanded the case to a lower court for further research. When the case once more reached the Supreme Court, it found in favor of the school board and against Philbrook. Chief Justice Rehnquist wrote both the initial opinion for the court, remanding the case to a lower court, and the second opinion, finding for the school board. In his first decision, he was fully joined by six other justices. Justices Marshall and Stevens concurred partly and dissented partly. After reviewing the history of the case and the collective bargaining agreement that covered Philbrook, Rehnquist turned to what the Court saw as the crux of the issue: whether an employer had to make reasonable accommodations when those accommodations were not shown to cause an undue hardship on the employer (479 U.S. 60: 66). The court of appeals had held that an employer was required to adopt the employee's desired solution unless that accommodation caused such a hardship. The Supreme Court disagreed, holding that "by its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation" (479 U.S. 60: 68). Rehnquist argued that the legislative history supported this view, and that both the needs of the employer and the employee were supposed to be taken into account. The Court then considered whether the bargaining agreement took into account the needs of Philbrook, holding that unpaid leave for religious observances would generally be acceptable.

However, the court believed the personal business clause was extremely open-ended, and so might discriminate against religion, as one was generally allowed to take three more days of sick leave for most sorts of personal business as long as it was not religious. It was on this point that the Court remanded the issue to the district court for more fact finding. The district court found then that the personal leave days were administered consistently with the contract and did not discriminate against religion, allowing only some specified types of personal business and nothing else.

Justice Marshall agreed with the finding of the Court that more factual inquiry was needed at the district court level. However, he disagreed that the undue hardship issue was irrelevant, holding that if other teachers were allowed six days of paid leave for religious and personal business, then the school board could allow Philbrook the same without undue hardship, and he argued that the employer still had a duty to accommodate. Even though the statute was supposed to allow for both sides to have their needs taken into account, according to Marshall, the school board still needed to work with the employee. Marshall also pointed out that unpaid leave was not really a solution, as that forced Philbrook "to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay" (479 U.S. 60: 74). Accordingly, Marshall wanted to return the case to the lower court "for factual findings on both the intended scope of the school board's leave provision and the reasonableness and expected hardship of Philbrook's proposals" (479 U.S. 60: 74).

Stevens dissented in part and concurred in part, holding that the Court should have merely reversed the court of appeals' ruling. He held that neither claim had merit: neither Philbrook's claim of discrimination in the leave policy nor his claim that the board should be required to have proven an undue hardship before rejecting his accommodation. The leave policy, Stevens suggested, was neutral as it denied leave for other things besides religion. Indeed, he went so far as to say the board's policy might even benefit religion, as it allowed three days off a year for religious observances, which occurred annually, while the other occurrences allowed for paid leave, such as weddings, occurred rarely. Stevens also held that the only harm that occurred to Philbrook was having to make up missed work (he ignored the issue of lost pay), and he held that all people who missed work experienced this harm, which meant that Philbrook could not claim religious discrimination.

Upon remand, Philbrook lost the case, appealed again to the Second Circuit, where he lost, and, finally, requested another review by the Supreme Court, where he lost for a final time. This issue has not been litigated frequently in the Supreme Court in the two decades since the *Ansonia* decision, but it remains one that is still important today. Some firmly believe that any employer's policy that would force an employee to choose between religion and paycheck is discrimination; others feel that even granting three days off for religion, and not counting those against the total number of days off, benefits religion, which is also illegal.

See also *Braunfeld* v. *Brown; Cheema* v. *Thompson; Corporation of Presiding Bishop* v. *Amos; Employment Division* v. *Smith; Goldman* v. *Weinberger; Trans World Airlines* v. *Hardison*

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Answers in Genesis

Answers in Genesis is a twentieth- and twenty-first-century creationist group that interprets the Bible as literal truth. Answers in Genesis argues that the Bible answers all questions, with a particular focus on Genesis 1–11. The group is planning to build a Creation Museum, set to open in 2007. The group holds that God created the earth in about six twenty-four-hour periods. It also holds that all genetic defects are because of the Curse of Eve eating the apple and believes that the current generation is not as smart as previous ones. Those participating in this group sponsor research and publish materials arguing against the scientific basis for evolution. The group opposes evolution and its teaching because they consider it not to be scientifically supported, and because they believe that some atheists think that evolution, if proven true, would destroy Christianity, and so the atheists want it taught for this reason.

In an interesting twist, this group allows for some natural selection, the very mechanism on which evolution is dependent and the most controversial element of Darwin's theory. Under the theory of natural selection, evolution takes place because those traits most suited to a particular environment are the ones most likely to survive in a species, because those members of the species possessing the traits are the ones who will live to procreate. Answers in Genesis allows that changes within

a species can occur, but still disagrees with the theory of evolution. In evolutionary theory, natural selection eventually leads to new species, but Answers in Genesis holds that no new species can grow up. The group accepts the possibilities for new types within a species to occur, so that wolves, dingoes, and dogs all have a common ancestor. However, the group denies the possibility that these changes can produce any new species, which is the key component in evolution. Answers in Genesis believes, for instance, that humans have similarities to apes, not because they evolved from a common ancestor, but because they had a common creator and common habitats.

In another interesting twist, the group holds that only those things in Genesis that are directly stated and commonly thought to have happened actually did happen, and those things that are not stated but go along with the common theme could also have occurred. For instance, the reason they believe the six days of creation must be six twenty-four-hour periods is because that is what the Bible says. However, the Bible does not mention Cain's wife's origins, and this group explains that Cain's wife was descended from another son of Adam, who came after Cain, but before Cain killed Abel, and who had a daughter who then married Cain.

This group is important in the religion and law debate primarily in the area of evolution. If evolution can be scientifically discredited, or if the majority of people come to believe it less than they do now, then evolution can either be removed from the schools or another theory, such as intelligent design, can also be taught. While the aim of Answers in Genesis is to destroy evolution theory, other groups, including those such as the Discovery Institute, which supports intelligent design, may be just as interested in the secondary effects of this group in the evolution versus creationism or evolution versus intelligent design debate, as an Answers in Genesis success in the evolution debate would help intelligent design advocates as well.

See also Avoidance of the issue of evolution in many teaching standards; Creation Research Society; Creation Science Research Center; Disovery Institute; Intelligent design; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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Avoidance of the issue of evolution in many teaching standards

Religion and law interact in many unexpected places. Other issues, however, have become such common points of contention that their regular appearance in the news comes as no surprise to most viewers. One such issue in the expected places is teaching evolution in public schools. Those who oppose the teaching of evolution believe that it violates their religion and is untrue. Those who believe evolution should be taught think that it has nothing whatsoever to do with religion and is part of accepted scientific doctrine. This second group often feels that any restriction represents an imposition of fundamentalist Christianity on public education. A related area that has sparked noted interest concerns national and state teaching standards. These are lists of items or goals or points decided by a national commission (or a state commission) to be covered in classroom instruction, and very often these standards are tied to an exam that all students must take. As the exam reflects what is on the list, and generally only that, the list content generally governs what material teachers cover in their classrooms. Thus, from the point of view of the evolution controversy, if evolution is listed, it probably will be taught, and if not listed, it probably will not be taught.

At the national level, the main standards for testing teachers are covered by the PRAXIS exams, and students are tested by the Advanced

Placement (AP) exam. The PRAXIS system, created by the Educational Testing Service, tests potential teachers in areas of content knowledge and knowledge about teaching. It has a number of different exams that cover high school biology. The most in-depth one, a two-hour exam covering biological content, which represents 45 percent of the test's content, covers evolution in two areas: genetics and evolution, and diversity of life, plants, and animals. Over forty states use PRAXIS as part of their licensing standards. High school students in advanced classes generally take the AP exam, created by the College Board. High scores on an AP exam are rewarded by many colleges with college-level credit. The AP biology exam includes one hundred multiple choice questions and four essay questions, with the multiple choice section taking slightly less than one-half of the time and counting for 60 percent of the exam score. Roughly 25 percent of the multiple choice and one of the four essays focus on heredity and evolution, meaning that college-bound high school students need at least some knowledge of evolution if they hope to receive pre-enrollment college credits.

Besides the national teaching standards, each state has its own teaching standards and tests. Most states require students to pass these tests either to graduate or to receive certain types of diplomas. Many require tests to cover specific issues. This is one way in which some states have evaded the evolution debate. While many states do require students to deal with evolution, others avoid it and still others avoid the use of the specific word but cover the concept. Other states have changed their positions over time. For instance, the state of Kentucky used to use the term "change over time" to refer to evolution, but beginning in 2007, students will be tested using the term "evolution."

Other states have had more controversy with their treatment. Kansas became involved in a controversy with its teaching standards on the issue in 1999 because it removed evolution entirely. A new board, elected in 2001, restored evolution to the standards. In 2004, a conservative board was elected again, and it decided to revert back to its 1999 stance, once more removing evolution. In 2006, a school board favorable to evolution was again elected. Such frequent shifts make it difficult to ensure any level of standardization in the testing at all and can do more to turn the science classroom into a political field than to confirm that all students receive a basic education.

Federal standards, developed in large part in the No Child Left Behind legislation, also encourage judging education based on the results of standardized tests, further encouraging teachers to teach with the tests in mind. These tests are no small matter either, as they govern the amount of funding a district receives and the need for state intervention in a district. As mentioned, as long as teachers deal with the teaching standards, they are generally permitted to skip anything that falls outside the perimeter. If evolution is not, therefore, included in the standards, a teacher could probably exclude it from the curriculum with no repercussions. This is especially true since over a quarter of the school year, ten weeks, is consumed by either formally reviewing for the tests or actually taking them. That leaves only thirty weeks for teachers to cover new material, for students to understand that material, for the school to test students on that material outside of the standardized testing and to grade the students, and for all of them to deal with all non-academic matters.

Thus, standardized tests, especially those given at the state level, generally govern an individual school's willingness to teach evolution. The content of the standardized tests varies by state and can even vary from year to year within a state, depending on who sits on the state board. While this change can help to ensure that test material does not get stale, it can also lead to schools becoming political Ping-Pong balls for controversial issues like evolution, which may be included by one state board but excluded by the next. One thing is

certain. This area is sure to remain a point of intersection for religion and the law for the foreseeable future, as the evolution debate carries with it overtones of both the freedom of religion and the freedom of speech clauses of the First Amendment to the Constitution.

See also *Edwards* v. *Aguillard; Epperson* v. *Arkansas;* Equal time laws; *Kitzmiller* v. *Dover Area School District;* National Academy of Sciences; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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B

Baehr v. *Lewin*

852 P.2d 44 (1993)

This decision, addressing at the state level the issue of gay marriage, came before Hawaii's Supreme Court and had national, and, indeed, international, repercussions, because it determined that to forbid gay and lesbian marriage was unconstitutional in Hawaii. It dealt only with Hawaii law, creating a standard of review for Hawaii's marriage law. However, the law would have consequences elsewhere, as every state in the United States was generally supposed to recognize marriages (as of the time of the ruling in *Baehr*) performed in other states. Thus, while only a procedural ruling, *Baehr* was much more important (and created much more sound and fury) than most procedural rulings.

Plaintiffs in the Hawaii same-sex marriage trial, Ninia Baehr, left, and Genora Dancel appear at a news conference on December 3, 1996, in New York. The judge barred Hawaii from denying marriage licenses to gay couples, a decision that influenced similar cases in other states. (AP Photo/Serge J. F. Levy)

The opinion was written by Judge Levinson and joined by Chief Judge Moon. Levinson first reviewed Hawaii's marriage law, noting that sex was the sole reason that the marriage application of the plaintiffs was denied (the plaintiffs were three same-sex couples). He then turned to the legal matters of the case, noting that the evidentiary record was very light, that judgment should not have been granted for Lewin, head of Hawaii's Department of Health (DOH), which granted marriage licenses. He examined Hawaii's constitution, stating that it considered privacy a fundamental right. However, he also said that the court did not "believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people" that "failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions" (852 P.2d 44: 57). The court then considered the equal protection issue, noting that marriage did create benefits, and holding that "the applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status" (852 P.2d 44: 58). The court then ruled that "HRS § 572–1, on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution" and that the state would need to provide a "compelling" reason for the discrimination (852 P.2d 44: 59). The opinion noted that Hawaii's constitution went further than the U.S. Constitution and prohibited any discrimination based on sex. Levinson considered Lewin's answer to the charge, which basically was that same-sex couples could not marry because marriage was defined as being between a man and a woman, and found that argument to be circular. The court reviewed past court decisions in other states advanced as defense of marriage being between one man and one woman and argued that in the past, interracial marriage had been banned on the same rationale and reminded the parties that the Supreme Court had overturned bans on interracial marriage in 1967. From this, the Hawaii court held that "constitutional law may mandate, like it or not, that customs change with an evolving social order" (852 P.2d 44: 63).

The main question remaining was what standard of review to use when considering questions regarding regulations based on sex. The court reviewed various Hawaii and U.S. Supreme Court decisions and held that "accordingly, we hold that sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution n33 and that HRS § 572–1 is subject to the 'strict scrutiny' test" (852 P.2d 44: 67). From this, the court took the next step and held that the marriage regulation "is presumed to be unconstitutional . . . unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights" (852 P.2d 44: 67).

Judge Burns concurred in the decision. He agreed with the remand to the lower court, holding that judgment for the defendant had been too early. He added an issue that he thought should be considered, though—whether homosexuality was biologically determined. Burns believed that the Hawaii constitution protected only those elements of sex that are biologically determined, and so the lower court needed to decide whether homosexuality was controlled by our biological makeup.

Judge Heen dissented, holding that sex and race were not analogous, and so the logic of *Loving* could not be extended to this case. He also held that no sex discrimination occurred as both sexes were treated equally, as both were prohibited from being involved in same-sex marriages. He also stated that since no sexual

discrimination occurred, there was no need for an evidentiary hearing and no need to remand the case to a lower court. Heen also stated that the court was entering into an area better reached by the legislature and accused the majority of "creating" a civil right.

The case was remanded to a lower court, which set the issue for trial. It did return to the Hawaii Supreme Court as *Baehr v. Miike* in 1996, as the Latter-day Saints (the Mormons) had asked to intervene in the case. (To intervene, legally, means to be allowed to be heard by the court on a case because the group intervening has legal interests at stake.) The Mormons claimed that this case might force them to perform same-sex marriages, giving them an interest in the case. The court, however, found that no church would be forced to perform marriages ever against their precepts and forbade the Mormons from intervening. At trial in the lower court, witnesses for both sides were heard, and the state was not held to have met its burden of proof. Thus, the regulation was struck down. The case then headed back to the Hawaii Supreme Court, but in 1998 Hawaii acted to amend its constitution, defining marriage as being between one man and one woman, ending the debate. On a national scale, while this case was going on, Congress in 1996 passed the Defense of Marriage Act (DOMA), which held that states did not have to recognize marriages unless they were between a man and a woman, and that in federal law, marriage was defined similarly. Just north of the United States, Canada legalized gay marriage in most of its divisions in 2003, and the whole issue of whether to recognize Canadian marriages is still controversial, as is the whole issue of gay marriage itself. *Baehr v. Lewin* was one of the first state supreme court decisions to deal with gay marriage, but by no means will it be the last.

See also Comity doctrine between states in the area of marriage and divorce; Divorce, marriage, and religion; Gay marriage; *Loving* v. *United States; Pace* v. *Alabama*

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Jim and Tammy Faye Bakker scandal

Jim (1940–) and Tammy Faye (1942–) Bakker were two of the leading televangelists during the 1980s. Tammy Faye's fondness for huge amounts of makeup was long the subject of public mockery, and after the scandal erupted, she became an object of even greater ridicule, thanks to bouts of copious weeping. The scandal centered around a swindle Jim was orchestrating with their Praise the Lord (PTL) Network, but it included their extravagant lifestyle and Jim's sexual affair with PTL secretary Jessica Hahn as well.

Married in 1961, the Bakkers went touring as revival preachers. The puppet show they developed led to their being invited to appear on Pat Robertson's Christian Broadcasting Network (CBN). Jim then helped to create and launch the *700 Club,* and he co-hosted it for a time before Robertson claimed it for himself.

In 1974, Jim and Tammy Faye created the PTL (the initials also stood for "People That Love"), and worked as the show's primary televangelists. It featured tears, interviews with celebrities, and, particularly, Tammy's singing. Stations in every state and many foreign countries aired the show, and about 10 percent of

Televangelist Jim Bakker addresses an audience with his wife Tammy Faye Bakker in 1986. Jim Bakker was implicated in a sex scandal involving his former secretary Jessica Hahn in 1987 and two years later was sentenced to forty-five years in federal prison for fraud, tax evasion, and racketeering. (AP Photo)

America watched it. The Bakkers then went on to found the Heritage USA theme park, which used Christianity as its basis and trailed only Disneyland and Disney World in attendance. However, anti-Bakker televangelist Jimmy Swaggart, along with the *Charlotte Observer,* revealed that Jim had been involved in an adulterous relationship with PTL secretary Jessica Hahn in 1980 and later used PTL funds as part of an apparent payoff to her. This scandal broke in the late 1980s, and the financing of Bakker's theme parks and other ventures came under scrutiny as well.

The PTL's scam was to sell people lifelong access to nonexistent hotel rooms at Heritage USA for $1,000 deposits or memberships. After this was revealed, the network quickly went bankrupt, and Jim Bakker went to jail, eventually serving over five of the forty-five years to which he was sentenced. The Bakkers had lived quite well, holding that God rewarded those who served him and that Jesus did not teach poverty. Eventually that high life, along with Jim's sexual scandals and creative financing schemes, caught up to them.

Tammy Faye divorced Jim in 1992, marrying Roe Messner, who later went to jail for bankruptcy fraud. Jim Bakker is generally acknowledged to have been more culpable, but he was also further from the spotlight. He is now attempting to return to ministry, and he continues to earn royalties from his books. Tammy Faye also lost her notoriety. She has since attempted a talk show (failed) and a business creating wigs. After serving his five years in jail, Jim wrote a book, *I Was Wrong,* apologizing for his behavior, and remarried. Tammy Faye endured a bout with cancer and lost a lot of the weight that had haunted her in her PTL days. She, too, has written several books, including *I Will Survive,* which discusses her divorce from Jim. The PTL was taken over by

televangelist Jerry Falwell and ultimately filed for bankruptcy.

See also *Bob Jones University* v. *United States; Swaggart Ministries* v. *California Board of Equalization*

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Banning of suicide in law and its interaction with religion

Most states consider both suicide and attempted suicide to be crimes. The fact that suicide is viewed as a crime, rather than a decision made by an individual regarding his or her body, is at least partially related to religion. Religious views still shape our legal and personal conceptions about suicide today.

Christian philosophers ranging from St. Augustine to Thomas Aquinas describe suicide as both a sin and a crime. Nonreligious philosophers were less likely to condemn suicide. Rousseau described it as being caused by society, and Hume thought that suicide was simply a change that one made in his nature, similar to other changes that people made in nature.

Much of the early logic for viewing suicide as wrong and therefore illegal is religious in nature. Life was viewed as a gift from God, one that suicide threw away. People were expected to show gratitude to God for the gift of life, and suicide obviously showed none of that. Additionally, it was argued that God established a link with humans by creating them, and suicide broke that link. Moreover, suicide was seen as a cowardly means to evade mortal suffering, and God did not like cowards. Thus, there were many religious reasons (and justifications) to ban suicide.

Some used nonreligious, natural law arguments against suicide, arguing that suicide changes the laws of the universe, changes one's natural end, and violates the will to live that most people have deep down. This logic believed that, as suicide violated natural laws, man's law should also ban it.

Some philosophers have actually offered religious reasons for allowing suicide. Margaret Battin, in her book *Ethical Issues in Suicide,* notes that among these religious-based arguments are that suicide is "self-sacrifice," and that it allows "reunion with the deceased" and "release of the soul" (Battin, 1995: 58–59). Sacrifice is something that many religions, including Christianity support as a concept, at least in the abstract. Of course, there are also many Christian martyrs, or people who allowed themselves to be killed for the cause of Christianity, and these include many of the early saints. Their deaths, however, are generally not considered suicides.

Religious arguments that oppose suicide have been more influential than those that favor allowing it, as suicide remains banned in most places, and nearly all of these also make assisting a suicide a crime. This issue is far more than merely theoretical, of course, as it figures into the battle over assisted suicide and the right to die, which deal with whether those who are terminally ill should be allowed to take their own lives to end their suffering.

See also Battle against pornography—religious elements; Capital punishment and religious-based opposition to it; Right to die and religion

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Battle against pornography—religious elements

The overall battle over pornography often has religious overtones. These overtones are seen both in who is active in the battle against pornography and in how they view their opponents.

One area that religion influences is how one defines pornography. Two authors, Louis Zurcher and R. George Kirkpatrick, describe one effect of religion on the definition of pornography. They comment that some studies "have demonstrated that persons who are older, less educated and more religiously active are more likely to judge a film, book or magazine to be pornographic" (Zurcher and Kirkpatrick, 1976: 255). They also note that these people have not, in their own estimation, generally seen pornography but still believe they know what it is. This idea is somewhat parallel to the statement of Justice Potter Stewart, who said he knew pornography when he saw it, even though he was unable to define it.

Another area that religion influences is how the two sides in battles over pornography see each other. Those arguing for restrictions on material (which one side sees as censorship and the other sees as protecting morality) describe their opponents in religious terms. Zurcher and Kirkpatrick note that the producers of questionable material are often defined as essentially faithless by their opponents, whose arguments strongly imply that no good religious soul would enjoy pornographic material. The pornography opponents studied also believed they had stronger religion as well as better self-control and better backgrounds (Zurcher and Kirkpatrick, 1976: 257). Those opposing this censorship, Zurcher and Kirkpatrick went on to say, saw their adversaries as "religious fanatics" (Zurcher and Kirkpatrick, 1976: 259).

There are also larger issues at work here with religious overtones. Those wishing to restrict materials believe they are participating in a battle between good and evil, in which they represent the good and pornography supporters represent the evil. This whole concept, of course, originated in religion. Finally, many of the groups promoting restrictions are religiously linked. The Knights of Columbus, which limits its membership to Catholic men, has been active for a long time in arguing against what it sees as pornography. The Moral Majority, a fundamentalist Protestant group, also opposes what they consider pornography.

The battle over pornography is and has been greatly shaped by religion. Issues of sexism and abuse are also raised by the issue of pornography, but this entry is concerned with the religious elements of the debate. Those on each side of the debate sometimes define their opponents and themselves in religious terms. Also, religion can influence who is active in the battle. Indeed, it can be argued that religion creates the overall concept of pornography, as restrictions on pornography assume that there is one correct standard, at least in each community, and that community leaders have been given the power by someone to impose that standard on all.

See also Abstinence, government grants to force teaching of; Banning of suicide in law and its interaction with religion

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Berg v. *Glen Cove City School District*

853 F. Supp. 651 (U.S. Dist. Ct. for Eastern District of New York, 1994)

This case dealt with the effect of religious belief on law, specifically in the area of vaccination. The Bergs wanted to send their children to public school, but they did not want their children to be vaccinated. In a variation from typical vaccination controversies, the Bergs did not belong to a religious group who opposed vaccination (it is unclear [and irrelevant to the law] whether the Bergs belong to any temple), but professed themselves to be Jewish, a faith that did not oppose vaccination. The Bergs wished to have their children put into public kindergarten, and the school district opposed

them. The Bergs sought a temporary restraining order, which was granted, allowing the children's admission.

The parents detailed the biblical basis of their belief; however, the school board did not find this defense adequate, resulting in the litigation. Judge Wexler first noted the background of the case and the statute. The statute required immunization, except where the parents held "genuine and sincere religious beliefs which are contrary to the practices herein required" (853 F. Supp. 651: 653). Wexler then noted that past versions of the legislation had required membership in a religion that opposed immunization, that the legislation had been redrafted as it favored membership in certain churches over others, and that the old version had been made a violation of the establishment clauses. The court held that the only tests were those in the statute, that the belief had to be genuine and sincere as well as religious in nature. Wexler noted that the objections were religious, even though the Bergs' interpretation of what it meant to be Jewish differed from the school board's experts. He then held that their beliefs were apparently sincere and genuine, noting that the Bergs had acted consistently with them for the last six years, and so granted the exemption.

Nonreligious opposition to vaccination would surely result in only a minute chance of success, no matter how sincere and genuine the belief, as the medical evidence heavily favors vaccination, and the right to privacy has not been extended to cover vaccinations. One does not, however, have to belong to an established religious group that opposes vaccinations to have a religious objection to them.

See also *Duro* v. *District Attorney, Second Judicial District of North Carolina; Employment Division* v. *Smith;* Failure to treat due to religious beliefs; *Goldman* v. *Weinberger; United States* v. *Board of Education for the School District of Philadelphia*

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Bible controversy and riots

Some of the worst riots over religion were the 1844 Bible riots in Philadelphia. Mob riots over religion were not uncommon in the late eighteenth and early nineteenth centuries, with over twenty-three disturbances in New York City alone. In the nineteenth century, rather than a debate to test whether public schools were even the correct sphere in which to teach from the Christian Bible, there was instead great controversy in the public schools over which Bible to use. This battle is evidence of the larger cultural struggle between Protestants and Catholics taking place at the time.

Many Protestants wanted Catholics to be required to use the Protestant Bible so as to convert them, believing that if Catholics saw the "correct" Bible they would cease to follow the pope. Many Protestants also did not want any Catholic influence, feeling that all political or other decisions made by Catholics would be dictated by the pope. This feeling was directly tied to the larger question of how much influence Catholics should be allowed to have. Schools were also sometimes hostile to Catholics, and some teachers called the Catholic Church "the whore of Babylon" and called the pope the "antichrist" (Feldberg, 1980: 11). Catholics generally wanted to use the Douay Bible in the classroom, and Protestants, by the nineteen century, generally wanted to use the King James Bible.

In addition to general fear about Catholic control, Protestants also had concerns about the Douay Bible's origins. In 1578, English-speaking Catholics worked on an English language translation of the Bible, as they knew that priests and others needed to be able to quote the Bible in

their own language. This was not to communicate specific passages to the parishioners but more to allow the priests to argue with others who focused strongly on religion. Latin was still held to be the best language for the Bible and services overall, and it was used in mass. This translation of the Bible was started by the College at Rheims and finished at Douay, when the college moved there—hence its title of Douay or Rheims Bible. The purpose of the translation was not to make the Bible understandable to the common man, and it adhered closely to the Latin. The King James Bible, by contrast, was the translation made at the request of King James I of England. Its purpose was, in fact, to make the Bible readable by the common literate man. Services using the Bible were held in English so the parishioners could better comprehend God's words.

One specific difference between the Douay Bible and the King James is that the Douay contains more books, particularly in the Old Testament. Protestants generally took their cues about the Old Testament from the Jewish Bible, while the Catholics allowed more books in and organized them chronologically. The books generally not included in the Protestant Bible are the texts often called the Apocrypha. Sometimes today these are included in Protestant Bibles in a separate section called by that name. Some seven books appear in the Douay Bible that do not generally appear in the Protestant Bibles, including the King James Version of the Bible.

The books of the Apocrypha were generally given little credence in many Protestant churches. The Westminster Confession of 1648 declared the Apocrypha useless (to Protestants) as these books had no real value beyond their historical interest. In the Protestant view, therefore, treating the Apocrypha as biblical truth was tantamount to heresy, and Protestants did not want it taught in their children's schools.

The Philadelphia school board ordered its schools to use the King James Version, and the Catholic bishop there quickly asked for approval to use the Douay Version. The request, of course, was denied. With a Protestant majority on the board and in the district, the school board did not want to create the perception that it was giving Catholics special privileges. This was tied in with larger issues, as many calling themselves nativists wanted to remove from public schools all influences they considered un-American, including the influence of the Mormons, the Irish, and indeed all immigrants. Schools were sometimes quite hostile to Catholics. This nativist campaign was also related to the whole idea of Christian reform, with some reformers' goals including the removal of Catholicism, the preservation of Sunday as a holy day by banning all amusements (including the sale of alcohol and mail deliveries, practices that persist today in many places), and supporting the colportage movement, which aimed to give the Protestant Bible to all. The Catholic bishop in Philadelphia, Francis Patrick Kenrick, basically asked for equality of the two Bibles, allowing both to be used. However, most people at the time saw any such action as equivalent to removing the Bible from public schools entirely—and this was of course unpopular. The school board denied the request, but the superintendent did allow teachers to suspend Bible reading until a compromise was worked out. The public, again, saw this as removing the Bible from the schools.

There was a nativist rally on May 3 in an immigrant, largely Irish Catholic, area. Shooting from some of the immigrants drove the nativists out. They returned on May 6, and a battle erupted. Some nativists died, and so the group, by now a mob, returned on the following day, May 7. Again, there was shooting, and the nativists set fire to immigrant buildings. Rioting continued over the next two days, and then martial law was declared by the city government. Six people were killed, fifty were injured, and much destruction took place. The destruction was very targeted, including the superintendent of the public school's house, immigrant churches, and the homes of those

believed to have housed snipers. Rioting returned after the Fourth of July, resulting in another battle between nativists and Irish Catholics.

The Bible riots in Philadelphia were a good example of how religious disputes in eighteenth- and nineteenth-century America could turn violent. There were also riots against some German Catholics, although less frequently than riots against Irish Catholics. The Mormons were ultimately driven out of Illinois by riots. Ultimately, this violence led to general use of the Protestant Bible in public schools until the twentieth century, when the appropriateness of any Bible in the public school classroom came under heavy fire.

See also *Engel* v. *Vitale; Lee* v. *Weisman; Santa Fe Independent School District* v. *Doe; School District of Abington Township* v. *Schempp*

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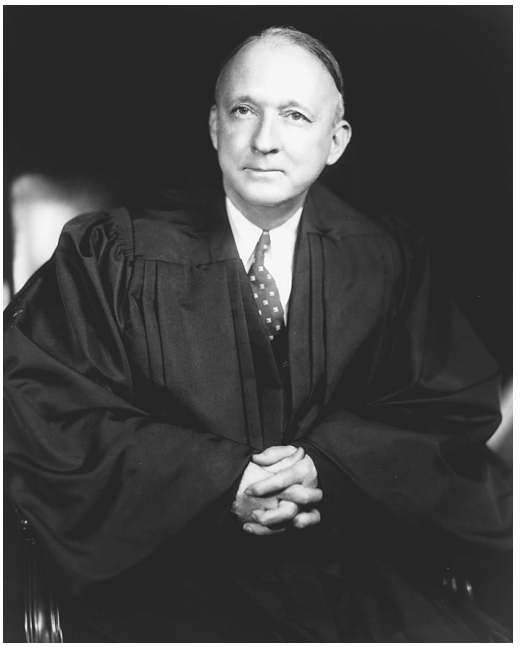

Hugo Black was a strong advocate of judicial activism during his thirty-four-year career as an associate justice of the U.S. Supreme Court. Black was appointed by President Franklin D. Roosevelt in 1937 and served until his death in 1971. (Library of Congress)

Hugo Black

Supreme Court Justice
Born: February 27, 1886
Died: September 25, 1971
Education: Birmingham Medical School (1903–1904) and then attended law school (graduated in 1906)
Sworn in: August 19, 1937
Retired: September 17, 1971

Hugo Black considered becoming a doctor and actually attended medical school for a year, but ultimately chose law school, graduating at the age of twenty. He immediately began practicing in Ashland, Alabama, where he was born, interrupting his practice in 1915 to become county solicitor for Jefferson County (Birmingham's location) for two years. In 1917, he joined the U.S. Army and served until 1918. After the war, he resumed his legal practice and served until 1927, when he was elected to the U.S. Senate. He was reelected in 1933. Black was a strong supporter of President Franklin Delano Roosevelt (FDR), and he backed FDR's controversial court-packing plan. To reward him, in 1937, the president appointed him to the first court seat that opened up.

Black had some difficulty being approved by the Senate, considering that it was 1937 and presidential appointees generally were accepted without question. Black had been a member of the Ku Klux Klan (KKK) in Alabama, and knowledge of his membership led to protests by some of his fellow senators. In a speech over the radio he tried to explain why he had become a member and then later left the Klan. He said his membership had been trifling and he did not consider himself a Klansman. Though his explanation proved unsatisfactory

to many, he was still approved by a vote of 63 to 19. (However, his approval was with the second-largest number of negative votes cast against any successful nominee in the 1930s.)

Black, once on the Court, gave little evidence that any of the KKK's views influenced him. He was a literal interpreter of the Constitution, especially the First Amendment, and a general supporter of civil rights. He claimed that the term "no law" in the First Amendment meant just that, that Congress could not make any law that restricted free speech or freedom of the press.

In general, he believed that the Constitution's provisions should be read more broadly and should limit Congress. He also believed that judges should not hesitate to strike down legislation that was unconstitutional. This second view has sometimes been called judicial activism. In this, he differed from Felix Frankfurter, who believed that the provisions of the Constitution should be read narrowly, and that legislation should be upheld except when there was a clear violation of the Constitution, generally something written directly into the Constitution. This second view has sometimes been called judicial restraint. Black also believed that the whole of the Bill of Rights should be applied against the states, which is called total incorporation, while others believed that only parts of the Bill of Rights should be applied against the states, in what is been called selective incorporation.

Black was not always hesitant to grant the government's wishes, however. In 1940, he agreed with the majority when it allowed the state government to order schoolchildren to salute the flag in *Minersville School District* v. *Gobitis.* He did reverse his position by 1942, suggesting, along with Douglas and Murphy, that *Gobitis* had been wrongly decided. In 1943, Black concurred with the majority and wrote his own position as well in *West Virginia State Board of Education* v. *Barnette.* This case determined that Jehovah's Witnesses could not be forced to salute the flag. This decision reversed *Gobitis.* Also during World War II, Black agreed with the majority, writing no separate opinion, in *Hirabayashi* v. *United States* (1943), which held that Japanese Americans could be interned. The next year, he wrote the opinion for the court in *Korematsu* v. *United States* (1944), which upheld the internment, and he argued that military necessity justified this policy exclusion.

However, in the 1950s and 1960s, Black began to lean more toward granting power to the individual, serving as the anchor for the liberal wing of the court in those years. He was much more interested in crafting majorities and working for some level of consensus, even if it was in dissent, than his fellow liberal, Justice William O. Douglas.

When asked, later in life, which of his opinions he considered most important, he cited, among others, one dissent and one majority. The dissent was *Adamson* v. *California* (1948). In *Adamson,* the majority had held that the Fifth Amendment's protection against self-incrimination did not apply against the states, allowing the state to use against a defendant the defendant's refusal to testify. Black dissented, arguing that all of the Bill of Rights should apply fully against the states, but this view never has been adopted. In *Chambers* v. *Florida,* Black wrote the majority opinion. This opinion held that improperly obtained confessions could not be used to bring about a conviction for a capital crime. In this case, four young black men had been sentenced to death after five days of continuous questioning had brought about confessions from three of them. These confessions were then used in Court against all four. Forced confessions were thus held to violate due process, which the Fourteenth Amendment applied against the states, and this opinion is the start of today's constitutional interpretation that requires the states to follow minimum standards of justice in their legal systems.

Besides those cases that Black considered the most important, he also was instrumental in several cases that have reshaped constitutional law up to the present. These include *Everson* v.

Board of Education (1947), which allowed the state to repay parents for their expenses in transporting their children to private schools; *McCollum* v. *Board of Education* (1948), which struck down a system of voluntary religious classes in the public schools on public school grounds; *Engel* v. *Vitale* (1962), which struck down a mandatory state-approved prayer used daily in some public schools; and *Gideon* v. *Wainright* (1963), which created a defendant's right to an attorney at state expense for anyone too poor to afford legal representation. Thus, several cases that are still important in litigation over the issue of church-state relations or still generally cited today were written by Justice Black.

Black suffered a severe stroke in the summer of 1971 and retired on September 17 of that year. He died eight days after his retirement.

See also *Engel* v. *Vitale; Everson* v. *Board of Education;* Felix Frankfurter; *Lemon* v. *Kurtzman; McCollum* v. *Board of Education;* Saluting the flag; *Zorach* v. *Clauson*

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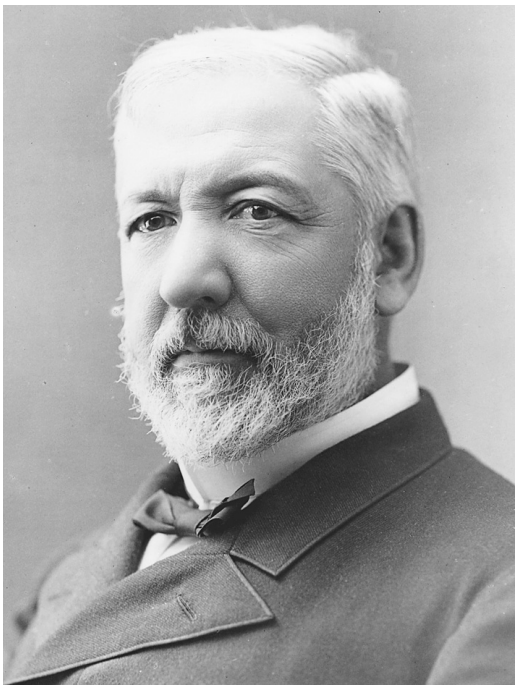
Blaine Amendment

America's treatment of its Catholic citizens has not always been stellar. During the nineteenth century, there were repeated instances of anti-Catholic bias in national politics. One such instance was the 1840s Bible riots when anti-Catholic riots raged through several cities due to disagreements over which Bible, the Catholic (Douay) or Protestant (King James), should be used in the schools. A second example is the formation of the Know-Nothing, or American, Party, formed in the 1850s to attempt to decrease recent immigrants' influence and limit immigration, particularly of Irish Catholics. A third attempt, at both the state and national levels, was the Blaine Amendment, which aimed at preventing any federal money or federal lands from going to help parochial schools in any way.



James G. Blaine was frequently proposed as a Republican presidential candidate, but his main influence was as Speaker of the House and as secretary of state under President Benjamin Harrison. (Library of Congress)

The Blaine Amendment was first proposed in 1875. It held that no tax money, either raised for schools or otherwise, and no state lands could be given to any church, and thus by extension not to church-controlled schools. It was drafted in response to fears that the Catholic Church was gaining too much influence and that the state would begin to funnel

money to the Catholic Church, particularly under the influence of administrations controlled by Catholic voters. Thus, no federal money could go to help a church, but students could still pray in school. The federal government was given power to enforce the amendment, so the issues of state versus federal power and monies to churches were already involved. The Senate altered the amendment specifically so as not to prohibit prayers in school, weighing it down with a third church-state issue. The amendment passed the House easily but stalled in the Senate, where, though the majority of senators voted for it, it failed to receive a full two-thirds majority support. However, it did not go away. It was reintroduced several more times between 1875 and 1930 before it was finally abandoned.

Although it had failed on a federal level, the effort was not totally abandoned. On the contrary, its failure in Congress spurred its supporters on the state level to more action. Indeed, the whole issue had started at the local level. In the nineteenth century, other than setting aside land for schools and colleges, the federal government did little for education. Nearly all of today's federal grants (Title I, which provides funding to school districts with low-income students; the National Endowment for the Humanities, NEH, which supports education and access to the arts, among other things; the National Science Foundation, NSF, which supports science education, etc.) are products of the second half of the twentieth century. It should be noted that the amendments at the state level were not called Blaine amendments at the time but have been given that title later. Most school boards were controlled by Protestants, so a Protestant Bible and prayers acceptable to Protestants were used in most schools, and most voters in many states were Protestants, so money would not have been expected to go to Catholic schools, even without Blaine-type amendments. However, the Republicans in the North were fighting the Democrats for supremacy, and many Democrats were Catholics; therefore, demonizing the Catholics to influence swing voters was a strategy that appealed to some politicians. Some states adopted such measures in political fights, but more adopted them into newly established constitutions. Unlike the federal government, which has had the same basic constitution (albeit with twenty-seven amendments) for the last 200 years, most states have revised their constitutions from time to time by amending them and by calling conventions and adopting new constitutions. Kentucky, for instance, has had four constitutions, and New York, to use a northern example, has had five, and both states adopted Blaine-type amendments at their constitutional conventions.

Between provisions inserted in the new state constitutions and the amendments adopted separately, some thirty-three states (there were at most forty-eight states in this period) adopted Blaine-type amendments. New York's constitution prohibited aid of any kind, including land, money, or financial backing for any school controlled by a church or in a school where a particular religion was practiced. Of course, it should be noted that this was not held to prohibit prayer in the public schools, as long as the prayer was nondenominational. Prayer in the public schools became much more of an issue in the 1960s, and the Supreme Court has had to address the issue several times. New York's current constitution was approved in 1938, and it contained a prohibition against aid to religious schools at the time it was adopted. The current constitution continues that prohibition, although it allows districts to pay for transportation to parochial schools (a provision that was also in the 1894 constitution). It was New York, in fact, that created the prayer struck down in the *Engel* v. *Vitale* case (1962), which banned any mandatory prayer in the public schools across the nation.

The Blaine amendments on the state level have not been removed from most state constitutions, and they still influence the public sphere to some degree. For instance, in Florida,

Governor Jeb Bush's plan to implement school vouchers—which would allow students in poor-performing schools to choose where they go to school, even to attending private schools partially at state expense—was recently declared unconstitutional at the state level due to the Blaine-type amendment in place in Florida. Thus, the Blaine Amendment's influence is alive and well at the state level, even if never passed at the federal, and the anti-Catholic bias underlying its original creation has greatly diminished in favor of more general concerns about church-state separation.

See also Bible controversy and riots; *Engel* v. *Vitale;* 1960 election and role of anti-Catholic sentiment; State constitutions and the federal First Amendment; *Zelman* v. *Simmons-Harris*

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Board of Education Kiryas Joel Village School v. *Grumet*

512 U.S. 687 (1994)

This case dealt with New York's decision to establish a special village made up of residents of only one religion. New York had allowed a group of Hasidic Jews to establish its own village. Village children were mostly raised in religious schools, and the public school took care of serving handicapped children only and for providing transportation to the religious schools for the other children. The action creating the school district was then challenged.

Justice Souter wrote the opinion for the Court. He first noted that the statute delegated authority to a religious group. Even though the school board had been elected, this was irrelevant as the village had been limited to Hasidic Jews, guaranteeing that the school board would consist solely of Hasidic Jews. Souter concluded that "we therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions'" (512 U.S. 687: 702). In other words, the legislative action was not neutral to religion and was therefore illegal. Souter held that "here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole, . . . and we are forced to conclude that the State of New York has violated the Establishment Clause" (512 U.S. 687: 705). Souter then considered the dissent's claims that the decision had held that religiously oriented groups could never hold power, and he disagreed, as these groups could hold power, as long as that power was "conferred on it without regard to religion" (512 U.S. 687: 708).

Justice Blackmun concurred, mostly writing to note that he still agreed with the *Lemon* test, first announced in 1971. That three-part test held that policies had to have a secular purpose, had to have a primary effect other than promoting or retarding religion, and had to avoid an excessive entanglement with religion. Justice Stevens also concurred. He noted that the state had a proper interest in helping out the Hasidic schoolchildren who were seen as different by many in the state, but held that the state had many ways of promoting good interaction other than creating a separate school district.

Justice O'Connor concurred in part, though she reached her conclusion by different logic. O'Connor first pointed out that some accommodation is acceptable, noting "religious needs

can be accommodated through laws that are neutral with regard to religion" (512 U.S. 687: 714). She found the fatal flaw in this law to be that it was specific legislation that benefited only this one district, commenting, "There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation" (512 U.S. 687: 717). She also noted that the *Lemon* test did not work in all cases and should not, in her opinion, be applied in all cases.

Justice Kennedy also concurred in the judgment. He wrote to argue against a possible reading of the Court's holding "that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group" (512 U.S. 687: 722). Kennedy stated that the problem with this district was that the state had used a religious test to create its boundaries. Kennedy also noted that the problem might not have occurred had not the Court forced schools to stop treating handicapped children from religious schools on public school grounds, which was one of the factors leading to the creation of this district.

Justice Scalia dissented, joined by Justice Thomas and Chief Justice Rehnquist. Scalia mocked the holding of the majority, suggesting that they had held that this particular sect, Satmar Judaism, was being established as a state religion. He commented, "I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an 'establishment' of the Empire State" (512 U.S. 687: 732). Scalia viewed this decision as being misguided and wholly divorced from either the law or history. "Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion" (512 U.S. 687: 732).

Scalia gave several reasons why he thought that this decision moved away from precedent. He first noted that no aid was going to private religious schools, which had prompted many past cases. He also argued that segregating students by religion had been allowed by past cases. In response to the majority's suggestion that the state had transferred power to the Satmar Jews, Scalia said that power could be given to a religious group, but not a church. Scalia also noted that there was a secular purpose for the law, that of educating the handicapped children, and that it was acceptable for New York to create the specialized school district, as it could have focused on cultural issues, not religious ones when it created the school district. He also argued that even special accommodation on the basis of religion was allowed, as the only reason, in Scalia's mind, that such as system was seen as unconstitutional by the majority was that a similar religious minority might not be given favorable treatment in the future. Scalia closed by disagreeing with the three concurrences. Scalia commented on O'Connor's discussion of the problems of *Lemon* by arguing that he thought *Lemon* should be wholly abandoned. "The foremost principle I would apply [in place of *Lemon*] is fidelity to the longstanding traditions of our people" (512 U.S. 687: 751). On the whole, Scalia held that the decision of the plurality was "unprecedented—except that it continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration" (512 U.S. 687: 752).

See also *Agostini* v. *Felton; Employment Division* v. *Smith; Mitchell* v. *Helms; Valley Forge College* v. *Americans United*

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Board of Education of Cincinnati v. *Minor*

23 Ohio St. 211 (1872)

This case was one of the first in which a state court held that reading the Bible in public schools could be prohibited. The case involved a well-known controversy at the time, the Cincinnati "Bible wars," and Judge Alphonso Taft, who was fairly well known himself, but he is better known to history as the father of future president (and Supreme Court chief justice) William Howard Taft.

Cincinnati had erupted into controversy in the 1860s. The root of the conflict was disagreement about which Bible to use—the Protestant King James Bible or the Catholic Douay Bible. Part of the difference between the two Bibles is in the books they contain, and the larger issue was whether to favor the Catholic or Protestant way of thinking. Cincinnati was particularly torn because the city was about equally divided between Protestants and Catholics. No easy solution seemed possible, so the Cincinnati School Board took the radical step of simply removing the Bible from the schools. Those in favor of keeping the Bible were outraged, and so they first asked the city attorney, called the city solicitor, to sue the school. This did not produce any lawsuit, so those opposed, some of whom were taxpayers, sued the school board. Most of those who sued favored keeping the Bible that had been in use at the time of the division—the King James (Protestant) Bible.

The main argument that took hold with the courts at the superior court level (the name of the lower state court in Ohio at the time) was whether the school board could ban the Bible. Legally the school board had no existence of its own but existed only at the request of the state. Thus, could such an agency ban the Bible from the schools? While that question might seem a bit ridiculous to us today, as present-day school boards set the policy in all areas, the lower court found that the school board had gone beyond its powers. Alphonso Taft was a member of that court and strongly disagreed. Taft did not focus on the school board's own powers but on the Ohio Constitution and Bill of Rights. The Ohio Constitution had within it a guarantee of religious liberty, and Taft found that teaching the Bible in schools interfered with that guarantee. As keeping the Bible in the schools violated the Ohio Constitution, of course the school board could ban it, in the mind of Taft.

The school board then appealed the case to the Ohio Supreme Court, who agreed with Taft and held for the school board in 1872. In addition to arguing that the school board had gone beyond its powers, those opposed to the change argued that the Bible had been in schools since the first Ohio Territory schools had been established, and that many students' only exposure to the Bible was in the public schools. Those opposed also made the interesting argument that biblical passages were in other school materials, such as the readers, and so it made no sense to ban the Bible. The school board, on the other hand, argued that the readers were not religious and that the schools were not responsible for providing religious instruction, even to those who received none elsewhere.

The Ohio Supreme Court first found that the school board was within its powers to pass

a ban on Bible reading. The court then asked quite the opposite question, the one asked in most Bible-reading cases today: whether Bible reading is allowed. However, in 1872, the question was whether Bible reading was required by the Ohio Constitution or Ohio's laws. The court shied away from the larger questions of whether Christianity was the best religion or how much religion was allowed. The court focused on whether courts were allowed to step in to the point of banning or forcing religious instruction, and answered the overall question in the negative, leaving it up to the legislature, which had, in turn, already delegated the power to the school board. While the Ohio Constitution did order moral instruction, the legislature had never acted to order Bible reading, and, the court held, until the legislature did act, the courts were unable to intervene. The court also went forward and answered the claim that this was a Christian country and so Christianity should be taught and added into the laws, as, the claim continued, Christianity was implied in the original laws and constitutions when they were written. The Ohio Supreme Court did not agree with that, finding that even if they agreed that it was so, there were no provisions in the Ohio Constitution for forcing the nation to be Christian. The court also added that Christianity saw a separation between God and man, and as Christianity's laws came from God, it did not want the help of man. Religion was to be left up to the individual. For all of these reasons, the Ohio Supreme Court held that the lower court had gone beyond its powers in ordering the Bible back into the classroom.

See also *Donahoe* v. *Richards; Lee* v. *Weisman; McCreary County* v. *ACLU; Santa Fe Independent School District* v. *Doe; School District of Abington Township* v. *Schempp; Wallace* v. *Jaffree*

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Board of Education v. *Pico*

457 U.S. 853 (1982)

This decision dealt with the level of discretion that a school board had in removing books from their library. A school board had ordered removal of certain books because they were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," holding "it is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers" (457 U.S. 853: 857). The students sued for the books' return and ultimately won their case in the Supreme Court. However, the Supreme Court decision was very divided.

The plurality opinion, favoring the students, was written by Justice Brennan and joined by Justices Marshall and Stevens and mostly joined by Justice Blackmun. Brennan first reviewed the history of the proceedings and then noted the question at hand, holding that this was not a question of curriculum but only of the availability of books in the school library for optional reading. He summarized the questions here as "first, does the First Amendment impose any limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably

to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations?" (457 U.S. 853: 863). Brennan, for himself, Marshall, and Stevens, noted the limitations placed on school boards by the First Amendment and the importance of ideas being available for students. He then turned to the specific limitations of the First Amendment here, ruling for the Court.

While school boards had discretion, the use of that discretion could not violate the First Amendment, as Brennan held that "our Constitution does not permit the official suppression of ideas" (457 U.S. 853: 871). He summarized the Court's holding as saying "that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" (457 U.S. 853: 872). Justice Blackmun concurred, arguing that schools could not decide between ideas in an unconstitutional manner, which he saw happening here.

Justice White also concurred, but only in the judgment, holding that the plurality had gone too far. Summary judgment should not have been issued by the district court, in his opinion, as there were still issues to be resolved, and he would have merely stated that and returned the case.

Chief Justice Burger, joined by Justices O'Connor, Rehnquist, and Powell, dissented. Burger accused the plurality of becoming their own school board, establishing a right to certain books in the school library. He argued that just because there needs to be access to ideas does not mean that the school board must aid in providing that access, and that "schools in particular ought not be made a slavish courier of the material of third parties" (457 U.S. 853: 889). Burger argued that the court had overstepped its bounds and provided no workable standards for regulating school boards or for helping school boards to work. Justice Powell also dissented separately, arguing that this decision destroyed the system of school boards in place by encouraging litigation over every little decision. He also argued that by destroying the democratic system of school boards, the Court was not allowing the school board to model the democracy the school boards were supposed to be teaching.

Justice Rehnquist also dissented, in an opinion joined by Justice Powell and Chief Justice Burger. He argued that Justice Brennan decided a hypothetical question and noted that the Supreme Court was not supposed to decide such questions. He then argued that Brennan should not have been concerned about the school board's suppressing ideas, as the schoolchildren could still discuss the books, even though they could not have checked them out of the school library. Rehnquist then argued that the school board here was acting as an educator, not as an agent of the state, and that, as an educator, the board should have been given more leeway than if it had been the state prohibiting the selling of such books. He went on to argue that Brennan had created a new constitutional right in the right to receive ideas. Freedom of speech, Rehnquist argued, did not guarantee "a right of access to certain information in school" (457 U.S. 853: 911). He went on to argue that censorship was necessary to education, holding that "education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information" (457 U.S. 853: 914). How this squared with his comment above, that the students still had access to the books even if they are not in the school library, is not explained. For Rehnquist, the fact that the government was educating controlled everything here, as he held, "I think the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is

subject to more stringent limitations than is the role of government as employer, property owner, or educator" (457 U.S. 853: 919).

Justice O'Connor wrote a short opinion allowing that the school board had the power to remove the books from the library, but only if it stopped there. "If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it" (457 U.S. 853: 921).

This opinion, like that in the case of *Des Moines* v. *Tinker,* which held that a school board cannot remove students from the classroom just because it disagrees with the political message of their clothing, holds that there are constitutional limitations on school boards. However, the fractured nature of this opinion, along with the fact that the removals would have been allowable had the school board not come directly out and stated that they were censoring the books for their political and religious views, means that the practical limitations on school boards are few and far between. The religious implications of this case were not directly touched on by many of the justices, but the same message holds as to the political cause for removing some of the books—a school board cannot remove books just because it views them as un-Christian.

See also *Bronx Household of Faith* v. *Community School District No. 10; Good News Club* v. *Milford Central School; Roberts* v. *Madigan;* Saluting the flag; *Smith* v. *Board of School Commissioners of Mobile County; Wiley* v. *Franklin; Wisconsin* v. *Yoder*

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Board of Regents of the University of Wisconsin System v. *Southworth et al.*

529 U.S. 217 (2000)

The case at issue here dealt with a general fee that University of Wisconsin students were required to pay. A variety of student organizations received this money, with the aim of creating a variety of viewpoints on campus. Those suing claimed they were being forced to support views they did not agree with, but the Supreme Court disagreed.

Justice Kennedy wrote the opinion for the Court. He first surveyed the history of the university and the program. He noted the ways that groups are funded and that the university admitted that some groups "engage in political and ideological expression" (529 U.S. 217: 224). Both sides in the dispute agreed that the program was administered "in a viewpoint-neutral fashion" (529 U.S. 217: 224). The student body could also vote to approve or disapprove the funding for any group. Also, only certain expenses were allowed, and those that were "politically partisan or religious in nature" were not allowed (529 U.S. 217: 225). Those opposed to the general fee had argued that the program "violated their rights of free speech, free association, and free exercise under the First Amendment. They contended the University must grant them the choice not to fund those RSO's [student organizations] that engage in political and ideological expression offensive to their personal beliefs" (529 U.S. 217: 227).

Kennedy first noted that the actor was the university, not a government, and that an open

public forum existed here. He held that the students could demand safeguards. Kennedy then differentiated this from mandatory membership in an association, as members in a mandatory membership setting (such as in a union) had been held to be able to object to supporting objectionable (in their view) speech that was not central to the purpose of the association. The university setting was different, as the university wanted, as part of its mission, to broaden the range of speech available, so the previous test would not work. Kennedy concluded that "the University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends" (529 U.S. 217: 233). Justice Kennedy did state that viewpoint neutrality was necessary.

Justice Souter concurred, along with Stevens and Breyer. He did not think that government neutrality in administration was the key issue, but a weighing of the issues of the students' rights versus the program. He held that it was a proper government interest (Souter viewed the university as part of the government) and that the students were not being forced to support speech they did not like, just to contribute to a fund that distributed monies to groups.

Religion was not directly mentioned here, other than being one of the reasons given as an objection to the program. Groups supporting religious views might very well qualify for funding, as long as religious expenses were not reimbursed. Indeed, religious views might very well be supported by certain groups (or views against certain religions). This would cause some to feel that they were being forced to support groups opposed to their religion, denying them their free exercise, and supporting, arguably, a government infringement on certain religions. The Court, however, similar to their stance on the free speech claims here, probably would not have agreed with those views, as the whole point of the program was not to create a program agreeable to all, but to encourage a wide diversity of views, which by its very nature would have views disagreeable to some. Thus, a university is allowed to mandate a fee that might dispense funds to groups disagreeable to some, as long as this fee is administered in a way that is viewpoint neutral.

See also *Chapman* v. *Thomas; Good News Club* v. *Milford Central School; Police Department of City of Chicago* v. *Mosley; Rosenberger* v. *Rector and Visitors of the University of Virginia; Widmar* v. *Vincent*

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Bob Jones University v. *United States*

461 U.S. 574 (1983)

Most foundations and universities have tax-exempt status, a condition that allows them to avoid a variety of taxes and to receive money from donors who then get tax breaks for their gifts. However, gaining this status is dependent upon preconditions. When a religious group is

Bob Jones University in Greenville, South Carolina, is a fundamentalist Christian institution founded in 1926 by Bob Jones, Sr. The university has served as a training ground for some of today's leading members of the religious right. (Wikipedia)

granted nonprofit status, or that status is removed, the question of whether that grant (or removal) has any element of religion involved in it is also put into the mix. Such a query was at the heart of this case.

Bob Jones University is a private South Carolina university that also had kindergarten through high school classes. It had racially discriminatory policies. Specifically, it prohibited the admission or reenrollment of any student who dated interracially or advocated such dating, even while the university admitted African American students. In 1970, the Internal Revenue Service (IRS) moved to deny tax-exempt status to any university that practiced racial discrimination and also to deny this status to gifts given to such a university. That policy resulted, eventually, in this case. Bob Jones's case was combined with that of a kindergarten through high school educational group from North Carolina that generally did not admit African Americans.

Chief Justice Burger wrote the opinion for the Court. He first surveyed the history of the policy, noting that a past court had approved it. He then surveyed the history of the two cases and turned to examining the history of the tax exemption policy of the IRS. The Court concluded that the government had intended for only charitable groups to receive the exemption and that being religious alone was not enough for a group to qualify for such status. Burger then noted that racial discrimination existed in opposition to government policy and that encouraging such in a school was enough to allow the government to remove the school's tax-exempt status. The opinion next examined the IRS and determined that the agency had

enough constitutional authority to remove Bob Jones's tax-exempt status without a separate action by Congress. The IRS had the authority and had removed other organizations' tax-exempt status. As Congress had not acted to correct those removals, its approval of the policy was implied, meaning the IRS acted appropriately.

Burger next turned to the issue of religion, examining whether the IRS's change in tax status improperly burdened religion, which would be forbidden under the First Amendment. He first noted that not all burdens were unconstitutional, but only those not justified by a compelling government interest, and, Burger commented, preventing discrimination is such an interest. Bob Jones, however, claimed the university was racially neutral in admissions and was only following religion in their ban on interracial dating. The Court, however, did not agree, holding that controls on one's freedom of association, based on race, were also racial discrimination. Thus, the Court, in an 8–1 vote, found for the IRS.

Justice Powell wrote a concurrence, agreeing with most of the Court's opinion. He argued that the issue of whether a group created a public benefit, which the majority holds to be one of the crucial tests for tax-exempt status, is incorrect. He had some difficulty accepting the denial for racially discriminatory admissions, but ultimately went along with it. However, he felt forced to comment on the public benefit issue. He saw the Court as arguing that tax-exempt organizations must be in harmony with overall governmental views, and he disagreed, holding this to mean that charities should carry out government policy, which he thought to be clearly at odds with what charities should do. He also thought that Congress, not the IRS, should be the one to make the decisions in general on whether groups were tax exempt. Thus, although Powell thought there was enough reason for the IRS to act in the *Bob Jones* case, he also thought that the larger insinuations suggested by the opinion were troubling.

Justice Rehnquist dissented, thinking that the Court had gone beyond the wishes of Congress. While the majority argued that the lack of action by Congress to reverse the policies of the IRS since 1970 meant that it agreed with them, Rehnquist held that Congress knew how to modify tax policy and if it had wanted racially discriminatory schools to be removed it would have acted. Rehnquist held that "this Court continuously has been hesitant to find ratification through inaction" (461 U.S. 574: 622). Until Congress acted, Rehnquist would have allowed the tax-exempt policy to continue for Bob Jones and other racially discriminatory institutions.

The general denial of tax-exempt status has continued for schools that practice racial discrimination, whether the discrimination is justified on religious or other grounds. Bob Jones continues to exist, and some schools today even proudly proclaim their independence from government mandate, which they believe includes not falling under the government's tax-exempt status and not receiving any government money in any form. Thus, while the case of *Bob Jones University* v. *United States* may have satisfied the issue of whether schools can be funded in a tax-exempt status when their policies run counter to compelling government goals, it did not force all such schools to quit operating, change their policies, or cause them to run out of money in short order.

See also *Boerne* v. *Flores; Employment Division* v. *Smith; Fairfax Covenant Church* v. *Fairfax City School Board; Hibbs* v. *Winn; Mueller* v. *Allen; Public Funds for Public Schools of New Jersey* v. *Byrne; Swaggart Ministries* v. *California Board of Equalization; Walz* v. *Tax Commission of the City of New York*

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Boerne v. *Flores*

521 U.S. 507 (1997)

In 1990, the Supreme Court decided *Employment Division* v. *Smith* (also sometimes called *Oregon* v. *Smith*), a case dealing with the use of peyote by Native Americans in a ceremony. Two Native Americans had used peyote and were fired from their jobs at a drug rehabilitation unit. These Native Americans then requested unemployment compensation, which was denied because the peyote use was held to be "misconduct" related to their work. They took the case all the way to the Supreme Court, which then asked the Oregon courts whether peyote use in religion was supposed to be illegal under state law. The Oregon Supreme Court held that yes, it was technically illegal, but the law violated the First Amendment, and the state of Oregon then appealed that decision to the Supreme Court. The Supreme Court then held that the state could deny the two individuals their benefits. Justice Scalia spoke for the majority, writing that one's beliefs do not excuse them from state laws, as long as those state laws are valid and neutral with regard to religion. Scalia went against the balancing test of *Sherbert* v. *Verner* (1963), which suggested that laws restricting religious practice must be prompted by a compelling state interest. Even though many states do have exemptions for religious use of peyote, Scalia did not find this convincing enough to hold that such exemptions were required under the First Amendment.

This decision prompted the Religious Freedom Restoration Act (RFRA) of 1993, which restored *Sherbert*'s compelling interest test and held it to be applicable in all cases where the "free exercise of religion is substantially burdened" and also provided an affirmative defense to those whose freedom of religion was so burdened.

However, this act was not without its own set of controversies, one of which resulted in *Boerne* v. *Flores.* This case did not arise out of a typical freedom of religion question but out of a zoning issue. In Texas, one archbishop wanted to expand a church in the city of Boerne. He applied for the permit, but the church was covered under a historic landmark designation and the applicable commission, along with the city leaders, denied the application. The archbishop sued, claiming in part that the Religious Freedom Restoration Act would exempt him from such regulations. The district court held that this act had gone beyond Congress's powers, and the case went all the way to the Supreme Court.

The Supreme Court struck down the Religious Freedom Restoration Act, holding it to be an overstepping of Congress's power under the Fourteenth Amendment. The Court agreed that Congress did have power under that amendment, but only power to restore rights or prevent future abuses, not the power to change what rights were given. The Court also held that Congress was stepping into the area that was more properly the Supreme Court's, as the law restricted the states in areas that the Fourteenth Amendment did not reach.

Justice Kennedy wrote the majority opinion. He first reviewed the history of the controversy, and then examined what powers the Supreme Court had under the Fourteenth Amendment. Kennedy first noted that the purpose of section five of the Fourteenth Amendment, which is what gives Congress power to enforce the Amendment, is to prevent future abuses or to remedy current abuses, and then he noted that this power can allow Congress to ban behavior that might not be directly related to abuses, if that ban is part of a wider constitutionally valid law. He then noted that this power was not unlimited and examined the history behind section 5, detailing how a

broader grant had been at first suggested, and how it had then been limited. Kennedy then turned and examined the act, arguing that the ban enacted went much further than was justified in order to protect those rights that arguably had been restricted in *Smith*. On the whole, the majority held, there was no connection "between the means adopted and the legitimate end to be achieved" (521 U.S. 507: 533).

Justice Stevens wrote a short concurrence, arguing that since the RFRA gives the Catholic Church (in this case) a right that no nonreligious body would have to contest a zoning decision, it is a preference for religion over non-religion and thus violates the First Amendment, which does not allow government to advance religion.

Justice Scalia wrote a lengthy concurrence, arguing against the dissent, which was criticizing *Smith*. He first argued that the historical record supported *Smith,* and, even if it did not, the historical record still supported laws that banned certain conduct as "every breach of law is against the peace" (521 U.S. 507: 540), and peace was always the goal of the law. He also argued that the framers of the Constitution were not in support of allowing religious exceptions from the law, and that the historical record as a whole supported *Smith*.

Justice O'Connor dissented, not because she disagreed with the Court's reading of the Fourteenth Amendment but because she disagreed with *Smith*. She pointed out that *Smith* could and should be reconsidered and that the Court should force a return to a standard "that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest" (521 U.S. 507: 548). O'Connor then considered the historical evidence, both from before the Constitution and from the framers of the Constitution and suggested that this evidence was more in agreement with her dissent than with *Smith*.

Justice Souter also dissented, holding that the writ of certoriari should not have been granted, and the case should be sent back to the lower courts for a full discussion and briefing of the issues of *Smith*.

Justice Breyer issued his own dissent, arguing that *Smith* needed to be reexamined, and thus agreed with O'Connor, except that the whole issue of the Fourteenth Amendment needed to be considered in this case. Breyer thus wanted *Smith* to be reconsidered without examination of whether the Religious Freedom Restoration Act was allowable under the Fourteenth Amendment.

Congress attempted to increase protection for religious practices in the Religious Freedom Restoration Act, but the Court here held that Congress had overstepped its bounds. Note that this decision applied only to the states, as Congress was held to be able to limit its own power. Since 1997, Congress has been unable to enact a direct follow-up law, even though several members of Congress did speak against *Boerne* when it was announced. *Boerne* (and *Smith*) are thus still good law, holding that *Sherbert*'s compelling interest test does not have to be used. Congress did, however, enact the Religious Land Use and Institutionalized Persons Act, which increased the protections for churches in issues of zoning, as well as for prisoners, and that act has been upheld in *Cutter* v. *Wilkinson*.

See also *Church of the Lukumi Babalu Aye* v. *City of Hialeah; Employment Division* v. *Smith; Farrington* v. *Tokushige; Lamb's Chapel* v. *Center Moriches School District; Lyng* v. *Northwest Indian CPA;* Religious Freedom Restoration Act of 1993; *Reynolds* v. *United States; Sherbert* v. *Verner*

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Bowers v. *Hardwick*

478 U.S. 186 (1986)

This case dealt with a Georgia law penalizing sodomy, whether heterosexual or homosexual. The police investigation that eventually resulted in this case began with a citation written for an open container. The day after the fine was paid, an officer entered the home of Michael Hardwick and found him and a male companion engaged in sodomy when the door to his bedroom was open. Hardwick was then arrested for sodomy, but formal charges were never presented to a grand jury. Hardwick, however, decided to use this as a test case and attempt to have the state's sodomy law invalidated. The case eventually went all the way to the Supreme Court, which supported the law. Ultimately, however, and over a decade later, the court overturned the decision made in *Bowers* with *Lawrence and Garner* v. *Texas,* which supported the right to privacy of the individual and struck down laws against consensual sodomy.

Justice White delivered the opinion of the Court. He first reviewed the history of the case, noting that the Court was not going to create a "fundamental right to engage in homosexual sodomy" (478 U.S. 186: 192). He noted the "ancient roots" of Georgia's antisodomy laws and stated that the Court should not create new rights. White also noted that while the home creates additional rights, it does not prevent all conduct in the home from being criminalized, which meant the state could still criminalize sodomy. He concluded by stating that the law had a rational basis in morality and that morality was enough to sustain this statute.

Burger concurred "separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy" (478 U.S. 186: 196). He went further, noting that "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards" (478 U.S. 186: 196). This perspective, in particular, incurred opposition from gay rights groups who held the view was prejudicial.

Powell concurred, holding that no fundamental right was violated, but noting that the twenty-year jail sentence associated with the law (Hardwick had not been so sentenced) seemed harsh and might, in his view, violate the Eighth Amendment, which prohibited cruel and unusual punishment. However, since the defendant was not even charged here, much less sentenced to twenty years, that issue could not be raised, meaning Powell voted to uphold the statute.

One dissent was filed by Justice Blackmun, and it was joined by Justices Brennan, Marshall, and Stevens. They first noted that this case was really about "the right to be let alone" (478 U.S. 186: 199). They argued that a tradition of condemnation did not justify its continued practice. They also commented that the statute at hand prohibited all sodomy, not just the homosexual sodomy focused on by the majority. The dissenters stated that there should be a right to privacy in the area of sexual intimacy, and that the majority ignored this for those who were not in typical families. The fact that it occurred in private homes also made the decision noxious to the dissent.

Justice Stevens also dissented and was joined by Justices Brennan and Marshall. They first noted that the law, as written, invaded heterosexual married people's bedrooms and that past cases could not be reconciled with this, meaning the law should have been struck down as written. They then considered the law if it was only applied to homosexuals. They argued that homosexuals should have the same liberty in private as heterosexuals and that

there was no neutral and legitimate interest to justify the selective prosecution.

Even though the Georgia sodomy law was upheld here, the days of sodomy laws were numbered. In 2003, or seventeen years after *Bowers,* the Supreme Court heard *Lawrence and Garner* v. *Texas,* which dealt with a Texas law that criminalized only homosexual sodomy. The 2003 Supreme Court struck down the law as an invasion of privacy and specifically overruled *Bowers* v. *Hardwick*. The Supreme Court, however, was also careful to say that this ruling applied only to sodomy and did not go as far as creating a right for gays and lesbians to marry. Thus, even though sodomy laws are outlawed, the debate over gay and lesbian rights continues.

See also *Baehr* v. *Lewin; Employment Division* v. *Smith;* Gay marriage; *Lawrence and Garner* v. *Texas; Reynolds* v. *United States; Roe* v. *Wade*

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Demonstrators outside the National Council Conference for the Boy Scouts of America (BSA) protest the BSA's intolerence of homosexuality among its members in Philadelphia, Pennsylvania, on May 29, 2003. In the case Boy Scouts of America *v.* Dale *(2000), the U.S. Supreme Court ruled that, as a private organization, the BSA has the constitutional right to exclude homosexuals. (AP/Wide World Photos)*

Boy Scouts of America v. *Dale*

530 U.S. 640 (2000)

This case examined whether the Boy Scouts of America can exclude leaders because they are gay. The criteria used by the Boy Scouts to exclude gay leaders had religious origins, but the Supreme Court still held that the Boy Scouts could exclude gays, as the right to association here was held to be more important than New Jersey's law banning discrimination against homosexuals.

The Boy Scouts have long been in America; they support a code of values, among which are being "morally straight" and "clean." They argued that admitting a homosexual leader would violate those values. In New Jersey, where the suit originated, laws existed requiring groups that use places of public accommodation not to discriminate on the basis of sexuality, and the assistant scoutmaster who was excluded sued under these laws.

In a 5–4 decision the Supreme Court upheld the right of the Boy Scouts to exclude.

Rehnquist, writing the opinion, discussed some of the past cases dealing with private groups. The Supreme Court had recognized a right to "expressive association," in which a group has the right to pick its own members when engaged in the public expression of ideas. The reasoning is that if the government mandates who must be admitted to a group, then the group may lose its opportunity to express its ideas, which may be minority views. Thus, if the majority could force itself in, the group would cease to have a purpose. This right is not absolute, as the government can force admission if it has a compelling state interest.

Rehnquist first turned to see if the Boy Scouts were engaged in expressive association. He looked at the Scouts, noting that they aimed to inculcate values in boys, thus finding that they participated in expressive activity. He then examined the lower court's assertion that the Boy Scouts' had a cap commitment to accept all young men, stating that it was not the Court's goal to decide whether a group was contradicting its own principles. He did examine the history of the Boy Scouts' views on homosexuality to determine whether the Scouts had been consistent, so as to examine the sincerity of the belief, and he found out that they had been. The Scouts as a whole took a position on homosexual leaders, and this view was allowed under the First Amendment's right to expressive association. He then turned and weighed the Scouts' right to expressive association versus the governmental interest articulated in the public accommodations statute. In the past, women had been ordered admitted to certain associations, such as the Jaycees, but the Court held in those cases that the group's right to expressive association had not been affected. On the whole, in this case, the Court held that "the state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association" (530 U.S. 640: 659). Rehnquist then responded to the dissent's argument that homosexuality was gaining acceptance, holding that the popularity of an idea does not allow the government to mandate that a group accept it.

The dissent written by Justice Stevens argued that the Boy Scouts' right to expressive association was not being restricted by New Jersey's law. He first examined the teachings of the Boy Scouts, stating that nowhere did they say that homosexuality was wrong; instead, for the most part, they avoided the issue of sex, telling leaders to have others counsel Scouts on the issue. He further stated that the principles of morally straight and clean were not connected to a view of homosexuality as immoral. The dissent also noted, in an issue ignored by the majority, that the Boy Scouts do not espouse a particular religious view and so do not put themselves in the religious camp of those who view homosexuality as immoral. The dissent further stated that there was a Boy Scout policy of not accepting homosexuals, but that it was a quiet policy, only circulated among the top leaders. It also argued that the Boy Scouts, before this case, had never connected the morally straight and clean teachings to a ban on homosexuals in their leadership. The dissent agreed with the majority that the test should be whether a significant burden would be created with exclusion, but as the policy of the Boy Scouts had never been publicly announced or linked to its values, the dissent felt that no such burden would be created. The dissent also noted that the Boy Scouts could ban Dale from addressing homosexuality, were he a member, and still be within the New Jersey law and their own right of expressive association. Stevens argued against homophobia, pointing out the ancient roots of it, and noted the religious basis for the hatred, stating that the time had come to reject such attitudes and expressing his desire for the Supreme Court to do so.

Justice Souter also dissented. He argued that the Boy Scouts had not taken a strong stand on homosexuality and thus could not use that standard to exclude gays from membership. These arguments did not carry the day, how-

ever. Rehnquist was able to carry a bare majority of the Court, and the Boy Scouts were permitted to exclude homosexuals. The Supreme Court has not heard another case on this issue since 2000, and thus troops are still allowed to exclude homosexual leaders. The policy has religious roots, as much homophobia is rooted in religious precepts, but the Scouts never used religion as a justification.

See also *Baehr* v. *Lewin; Good News/Good Sports Club* v. *School District of the City of Ladue; Maguire* v. *Marquette University*

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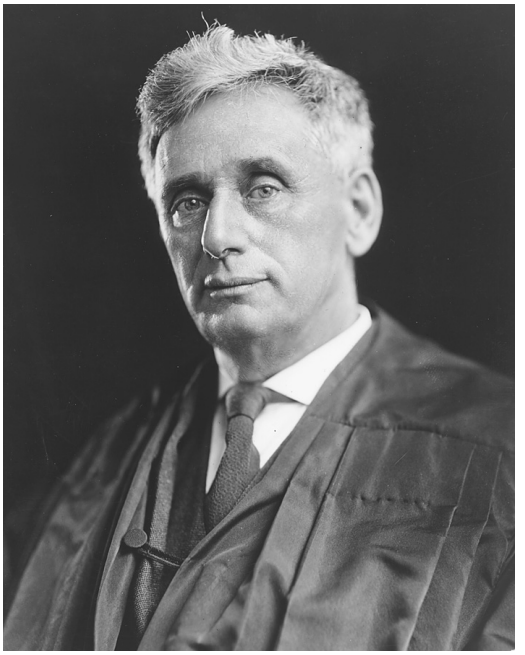

Louis Brandeis, the first Jewish member of the Supreme Court, became famous for his dissenting opinions in support of liberal causes. (Library of Congress)

Brandeis nomination and service on the Supreme Court

Louis D. Brandeis (1856–1941) grew up in Louisville, Kentucky, and was educated at Harvard Law School, graduating at the age of twenty and earning the highest average in school history. After law school he moved to Boston where he received recognition as a leading Progressive lawyer through his work in helping groups he thought would benefit society. He developed, with the help of others, the "Brandeis brief," which used sociological and medical evidence to help document industrial conditions to justify regulations that had been passed. This brief had its first success in *Muller* v. *Oregon* (1907) in which the Supreme Court upheld an Oregon law limiting women to ten working hours per day. Brandeis also opposed the efforts of J. P. Morgan to monopolize the rail lines around Boston.

Besides being a Progressive, Brandeis was also a leading Zionist, and he argued for the establishment of a Jewish homeland. He was visibly active in the worldwide Zionist movement to promote Palestine as a Jewish homeland, chairing the Provisional Committee for General Zionist Affairs. Once he became a Supreme Court justice in 1916, he worked mostly behind the scenes of the group.

Religious hostility greatly marked Brandeis's nomination and his service on the Supreme Court. His nomination by Woodrow Wilson touched off a firestorm of controversy. People opposed Brandeis for two reasons, first because he was a Progressive and second because he was a Jew. William Howard Taft, along with other past presidents of the American Bar Association, claimed that Brandeis was unfit to be a Supreme Court justice, a view based mostly in anti-Semitism.

While on the Court, Brandeis was not always treated with respect by his colleagues. At one time, Chief Justice Taft attempted to

organize a group dinner for all the members of the Court. This ran into personal prejudices, however, as Justice McReynolds remarked, "I do not expect to attend, as I find it hard to dine with the Orient [by which he was referring to Brandeis]" (Polenberg, 1987: 205). McReynolds also would leave the room when Brandeis spoke in conference. McReynolds's final insult to Brandeis was his refusal to sign the farewell letter upon Brandeis's resignation from the Court. McReynolds later extended the same general treatment to Felix Frankfurter, the Court's next Jewish member.

See also Felix Frankfurter; Jewish Seat on the Supreme Court

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Braunfeld v. *Brown*

366 U.S. 599 (1961)

Braunfeld dealt with a Sunday closing law. Many states had passed laws that forbade working on Sundays, and the original basis of these laws was in the Bible. The Ten Commandments required observance of the "Sabbath," which most Christians took to be Sunday, and Sunday closing laws came from this. Along with laws that forced most things to be closed on Sundays were laws that prohibited alcohol sales or Bingo games.

This law had been passed relatively recently (at least in its last formulation) and it required businesses selling clothing, among other businesses, to close on Sunday. Those suing were Orthodox Jews, who, by their religion, were obliged to close from Friday night to Saturday night, and thus, between their religion and the law, were forced to take two days off. The plurality opinion was written by Chief Justice Warren and was joined by Justices Clark, Black, and Whitaker.

The Court first looked at the history of Sunday closing laws, noting that they were at first religious, but now seem more aimed at making Sunday a day of rest to improve the "health, safety, morals and general well-being of our citizens" (366 U.S. 599: 603). It also noted that even after the passage of the Virginia (which is where the law was) Declaration of Rights, Sunday closing laws were still kept. The Court then carefully differentiated between belief and practice. It stated that a state cannot ban a religious belief, but that religious practices could be restricted. However, here, in the opinion of the plurality, religious practices of the defendants were not prohibited but simply made their religion more expensive. Also, only those who want to work on Sunday were hurt, said the Court. The Court held thus that this law was acceptable. However, it did not say the same applied for all such laws: "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden" (366 U.S. 599: 607). Those suing had suggested that the state should be required to allow them an exemption from the law, but the Court held that even though an exemption was constitutionally allowable, and done in other states, it was not required.

Justices Brennan and Stewart dissented. Brennan agreed with Warren that parts of the case had no merit, but Brennan, unlike Warren, did find merit in the religion claim. Brennan held that the state was forcing the Orthodox Jew to choose "between his business and his re-

ligion" (366 U.S. 599: 611). Brennan also suggested that there needed to be a "compelling state interest" before the freedom of religion could be restricted and that the state had no such interest here, but only the interest of "the mere convenience of having everyone rest on the same day" (366 U.S. 599: 614). The justice argued that this in no way justified a restriction of the freedom of religion. Justice Stewart filed a short statement agreeing with Brennan.

Justices Harlan and Frankfurter filed an opinion in *McGowan* v. *Maryland,* decided the same day, which also covered this case. Frankfurter first reviewed the history behind the First Amendment, suggesting that the ban on a government establishing a church embodied in that amendment was due largely to the dislike many had for the established church of that day and the taxes that were paid to support it. Frankfurter made a very sweeping statement in his opinion: "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country" (366 U.S. 420: 465–466). Frankfurter held that those suing against the Sunday laws could prevail only if the Sunday laws did not have a secular purpose. He then examined the laws, granting that many started with a religious purpose but have come to have a secular purpose. He also held that even though many of the statutes refer to the day taken off as "the Lord's day," this did not make the statute religious. Frankfurter also noted that many of the statutes had been recently reconsidered and so the question was not one that old attitudes still prevailed on. He also noted that even though the laws were complex, this did not make them irrational, which would have voided them under the due process clause of the Fourteenth Amendment. Thus, Frankfurter in general gave wide latitude to the legislature and seemed to need almost a prayer in the current statute to acknowledge the religious elements. Frankfurter, though, would have remanded this case to allow the Orthodox Jews a chance to argue it (the case came to the Supreme Court as an appeal of a dismissed case). Justice Harlan mostly agreed with Frankfurter but concurred in the dismissal of this case.

Justice Douglas dissented, arguing that the First Amendment deserved a much more protective treatment than that given by Frankfurter and Warren. Douglas stated that "the First Amendment commands government to have no interest in theology or ritual" (366 U.S. 420: 564). Douglas rebukes Frankfurter by noting that even though modern regulations phrased the questions in terms of what helped society, "no matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities" (366 U.S. 420: 572–573). Douglas suggested that only criminal activities could be banned in the area of religion. "There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct" (366 U.S. 420: 575). While the state could require a day of rest in seven, it could not pick the one, in Douglas's view.

The Court as a whole allowed Sunday closing laws, holding that the secular purpose outweighed the disproportionate impact on people of certain religions, and that laws that had originated in a religious forum could, over time, become secular. However, laws originating in religion and having a religious purpose still today were not allowed. Thus, "blue laws," as these laws are sometimes known, are still allowed, and

religion is still allowed to have an impact on our work schedule, even while fewer and fewer businesses are wholly closed on Sunday.

See also *Estate of Thornton* v. *Caldor; McGowan* v. *Maryland; Metzl* v. *Leininger;* Influence of religion on Eighteenth Amendment; *Loving* v. *United States; Sherbert* v. *Verner; Swaggart Ministries* v. *California Board of Equalization*

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Bronx Household of Faith v. *Community School District No. 10*

127 F.3d 207 (2d Cir. 1997)

Bronx Household of Faith dealt with whether a public building could prevent its use by a church. Many schools do not want their buildings used by others for a variety of reasons, and when religious organizations want to use the facilities, the issue of promoting religion also comes into play. School boards, for obvious constitutional reasons, do not want to promote religion and so many deny use. Religious organizations, however, have a need for facilities and so often complain against these restrictions. It was this sort of conflict that brought about this case in the Second Circuit Court of Appeals.

The facts of the case were that the church wanted to use the school auditorium for services, and the school refused and so the church sued. A summary judgment had been issued in favor of the school, and the church appealed. The decision was upheld on appeal. Circuit Judge Miner wrote the opinion. The school district had set up a policy to determine what the building could be used for, and the policy specifically stated that "no outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school" (127 F.3d 207: 210). However, the school district did allow some religious activities, as that same policy held that "the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible" (127 F.3d 207: 210). The school had been used for a variety of purposes by several different groups over the years and the Bronx Household of Faith had even used it for various things, including a banquet. However, requests for a service were denied.

The opinion then examines the objections of the church to the school board's ruling. The first claim considered is that of freedom of speech, and the court ruled first on the type of forum that the school had created, in whether it was a limited or open public forum. The opinion first held that this was a limited public forum, differentiating it from *Lamb's Chapel* as that decision dealt with a film series while this case was clearly a religious service. The court also stated that as the school had consistently maintained a limited public forum, the church's citation of cases dealing with open public forums was irrelevant. The court held that these regulations were reasonable and were viewpoint neutral, as the school had always maintained a ban on religious services. The court also examined the case and determined that the school board's regulation did not interfere with the free exercise of the

church's religion, as the school board was simply saying that the church needed to find somewhere else to practice its religion.

Judge Cabranes agreed with the majority in part and dissented in part. He agreed that the school was a limited public forum and agreed that the ban on religious services was allowable as it was reasonable and viewpoint neutral. However, he disagreed with the ban on religious instruction, as he found it to be not viewpoint neutral. Cabranes read the *Lamb's Chapel* case differently from the majority. He read it to mean that one could not discriminate on viewpoint, and that banning religion while allowing secular instruction did just that, stating that "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination" (127 F.3d 207: 220). Thus, even though bothered by the ban on religious services, Cabranes would go along with the majority's ban on such services, even while desiring to reverse their ruling upholding the ban on religious instruction; he saw this ban on instruction as discriminating on the basis of viewpoint, which was not allowable in a limited public forum. Thus, Cabranes would allow a ban on services even while striking down a ban on religious instruction. One can ban a subject, but once allowing a subject, one cannot discriminate on the basis of viewpoint.

A school board can ban religious services from its facilities as long as that ban extends to all religious services. The dissent suggested that a ban on religious instruction might not be constitutional, but that did not carry the day. One cannot ban all religious items, though, unless one bans all outside groups, and this case continues the view announced by the Supreme Court in *Lamb's Chapel* in that one cannot ban religious groups from using the facilities for uses other than instruction and services if it allows other groups to use the facilities for such purposes. Religious groups are therefore allowed equal opportunity with secular groups to use the facilities.

See also *Employment Division* v. *Smith; Good News Club* v. *Milford Central School; Lamb's Chapel* v. *Center Moriches School District; Rosenberger* v. *Rector and Visitors of the University of Virginia; Tipton* v. *University of Hawaii*

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C

Cantwell v. *Connecticut*

310 U.S. 296 (1940)

This case dealt with a group of Jehovah's Witnesses, a father and two sons, who went around New Haven, Connecticut, visiting homes. They asked, upon knocking at a door, if they could play a record, and played the record if allowed to. They also offered for sale books and pamphlets, and, if the attempt to sell was unsuccessful, respectfully asked for donations. If asked to leave, they did so. They were convicted of a breach of the peace and the father was also convicted of failing to have a license to solicit. The case came before the Supreme Court in 1940. It was one of the first times that the Court had had to deal with the issue of freedom of religion after *Gitlow* v. *New York*. *Gitlow* is significant here, as it extended the protection of parts of the First Amendment against the states, in addition to the federal government, and it was the first case to do this.

Justice Roberts wrote the Court's opinion in *Cantwell*. He surveyed the facts of the case, and then quickly held "that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment" (310 U.S. 296: 303). He surveyed how the Fourteenth Amendment applied the First against the states, noting that the freedom of religion "embraces two concepts—freedom to believe and freedom to act" and that "the first is absolute but, in the nature of things, the second cannot be" (310 U.S. 296: 303–304). Roberts then held that legislation may restrict the time, place, and manner of solicitation, but that the regulation here did not do that. The Supreme Court granted that a regulation similar to the one here where registration was required might be permissible, but this regulation worked through a state official who had the power to grant or deny the license to solicit. This was found to be unacceptable, as the Court held that "such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth" (310 U.S. 296: 305). The court reviewed the safeguards in place and concluded that "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution" (310 U.S. 296: 307). Thus, the requirement of a license that could be granted or denied by a state official was struck down as an infringement of the First Amendment.

The Court went on to examine the issue of the conviction for "breach of the peace." The Court noted the calm and nonoffensive demeanor of Jesse Cantwell, who played a record for two men and then left after the two men were offended and asked him to leave. Roberts stated, "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion" (310 U.S. 296: 310). The Court thought Cantwell's solicitation was, under the circumstances, acceptable, as it was also deemed an exercise of his freedom of religion. The Court found, about religion in general, that "in the realm of

religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy" (310 U.S. 296: 310).

Thus, the convictions for breach of the peace and for soliciting without a license were overturned. This case established two different principles that have largely lasted until today. First, time, place, and manner restrictions can be placed upon those who go door to door or solicit, but these regulations must be applied generally and cannot single out those who are going door to door for religion. Second, while the probable effect of a communication upon the receiver is allowed to be considered, a common law offense (i.e., one that is based upon custom and not upon a specific statute) is not going to be generally upheld if the person starting the communication is peaceful. Laws, not surprisingly, that do aim to create codified versions of things similar to "breach of the peace" have generally been carefully scrutinized to make sure that they were not targeted against religion. A heckler's veto, where those opposed to speech are allowed to force it to end, has generally not been upheld, and here, where the heckler's veto was attempted to be turned into a heckler's indictment, was, not surprisingly, not upheld either. One may not like door-to-door religious solicitation, but the Supreme Court here says that one person's annoyance is another's liberty and the First Amendment sides with the liberty, particularly when the religious observant is faithfully polite about it.

See also *Chapman* v. *Thomas; Church of the Lukumi Babalu Aye* v. *City of Hialeah; Employment Division* v. *Smith; Heffron* v. *International Society for Krishna Consciousness, Inc.; International Society for Krishna Consciousness* v. *Lee;* Saluting the flag

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Capital punishment and religious-based opposition to it

Many religions are opposed to the death penalty, others allow their individual members to choose a position on this issue, and still others clearly permit capital punishment. Hindu worshipers can choose how to follow the right path, and there is a plurality of opinion about capital punishment in the religion. However, by and large, its use is discouraged, as criminals are supposed to have the chance to fix the problems they have created with the social order. Buddhism focuses on behaving correctly to achieve enlightenment, and its followers are forbidden from taking life. Islamic law allows for the death penalty, but ideas of capital punishment vary from one Islamic country to another, and the focus of laws is generally on keeping a society functioning. Similarly, Judaism and Christianity allow for a plurality of belief about the death penalty among their followers.

One Christian religion clearly identified with opposition to capital punishment in recent years is the Catholic Church. The Catholic Church has not always opposed the

Sister Helen Prejean, an anti–death penalty activist, outside the Texas capitol in Austin in January 1998. She wrote the popular novel Dead Man Walking *(1994), about her experiences as the spiritual advisor to death row inmate Patrick Sonnier in 1982. The cross she wears was a gift from a condemned prisoner who was later executed. (Andrew Lichtenstein/ Corbis Sygma)*

death penalty, but moved, since the 1950s, and really since the 1970s, into opposition. Christian Brugger argues that the death penalty, in current Catholic doctrine, is only acceptable "if and only if the need to defend people's lives and safety against the attacks of an unjust aggressor can be met by *no other means*" (Brugger, 2003: 20, emphasis in original). The official pronouncements of the Catholic Church support this view. Catholic catechisms only allow killing in self-defense and hold that "any killing that results (and any harm, for that matter) must not be willed for its own sake or as a means to some future end, but rather must be accepted as a side effect, perhaps foreseen, of an act of force intended to render an aggressor incapable of causing harm" (Brugger, 2003: 3). Rehabilitation, even for those who have committed crimes that might bring the death penalty, is still an important goal for criminal justice in the eyes of the Catholic Church. The 1997 catechism directly stated that the death penalty is not an exception to the commandment not to kill.

Several of the best-known opponents of the death penalty are Catholic figures. These include Sister Helen Prejean, who wrote *Dead Man Walking,* later made into a movie. She noted that "the paths of history are stained with the blood of those who have fallen victim to 'God's Avengers.' Kings and Popes and military generals and heads of state have killed, claiming God's authority and God's blessing. I do not believe in such a God" (Prejean, 1994: 21).

In addition, Quakers also oppose the death penalty, and some as early as the eighteenth

century, argued for abolition. Pennsylvania, under their influence, eliminated the death penalty for a time except for the crime of murder. While those Quakers and Catholics who opposed the death penalty have not been wholly successful, they have managed to help the effort to abolish it in some states and to create a religious answer to those who justify the death penalty with biblical invocations that seem to call for equal retribution. It should be noted that there is also a vigorous debate over whether the biblical passages really justify the death penalty and whether, for Christians, Jesus' teachings in the New Testament arguing for forgiveness trump the Old Testament readings and thus forbid the death penalty.

See also Influence of religion on Eighteenth Amendment; Witchcraft and the law—past and present

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Capitol Square Review and Advisory Board v. *Pinette*

515 U.S. 753 (1995)

The First Amendment guarantees freedom of religion, and religious symbols are not supposed to be, generally, regulated by the government. However, when religious symbols are used by a group for either a nonreligious purpose, or at best a purpose with both religious and nonreligious elements, the question arises as to whether a government can regulate that use. Also, if a group wants to use a public area to erect a religious symbol, can they be prevented on the grounds that the government is not supposed to support religion? The group was, in this case, the Ku Klux Klan (KKK), who wanted to set up a cross in the public square. The government denied this use on the grounds that it did not want to violate the establishment clause, claiming that if it allowed a cross it would be establishing religion; but the KKK claimed the denial was because of hatred of the Klan's ideas.

The Supreme Court looked only at the establishment issue, with most of the opinion written by Justice Scalia. The Court first held that this was private expression, saying "respondents' religious display in Capitol Square was private expression. Our precedent 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" (515 U.S. 753: 760). The Court stated that since "the State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups" (515 U.S. 753: 763), then the state should treat their petition the same as the other private groups. There ended Scalia's portion of the opinion that held for the entire Court.

Speaking for four justices, Scalia further wrote that the government's claim that some might misinterpret the Klan's cross, since it was in a square very close to the seat of government, as endorsed by the government, was fallacious. He argued that as the square was traditionally open, all those familiar with it should know that the government does not control it in terms of content and that the opinions of those unfamiliar with this policy did not matter. Scalia further suggested that Ohio could require each display to be identified with its sponsor, and thus people would know that the Klan had erected the cross, but the government could not ban its display. The overall

opinion of the Court held that the restriction was unconstitutional as it misused the establishment clause.

Justice Thomas filed a concurrence, noting that the establishment clause could not be used to deny the petition, but that the Klan used the cross as a political symbol, not a religious one, and thus the establishment clause should not have been at issue at all.

Justice O'Connor wrote a concurrence, which was joined by Justices Souter and Breyer, and she agreed that the petition asking for the right to put up the cross had been wrongly denied but did not give as much leeway to the side of those wanting to use the traditional public forum as Scalia had done. O'Connor held that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer" (515 U.S. 753: 773). For that informed observer, the establishment clause should step in sometimes, O'Connor argued, even when the state was acting only by allowing a private group to speak. "When the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid" (515 U.S. 753: 777). O'Connor went on to argue that "where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, . . . the Establishment Clause is violated. This is so . . . because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement" (515 U.S. 753: 777). By using the "reasonable observer" standard, O'Connor would still allow the display as that observer would know that historically many different groups have used the area.

Justice Souter concurred separately, noting that a reasonable observer could have held that endorsement occurred and that the plurality gave too much power to the state, which it could use to endorse religion. He voted with the judgment, however, as he felt that the board did not use its "most narrowly drawn" option to prevent this observer from wrongfully receiving the impression of a government endorsement of religion.

Justice Stevens dissented, holding that this unattended symbol was a religious symbol and needed to be considered as such. Stevens suggested that the standard used should be the image understood by a "reasonable observer," and he argued that such an observer would, with a cross right next to the seat of Ohio's government, view it as an endorsement. Stevens made much of the fact that the display was unattended and thus allowed observers to put their own understanding on the display. Stevens then suggested that the Court should have held that the "Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government" (515 U.S. 753: 806–807). In the end, Stevens noted that "the Court's decision today is unprecedented. It entangles two sovereigns in the propagation of religion, and it disserves the principle of tolerance that underlies the prohibition against state action 'respecting an establishment of religion'" (515 U.S. 753: 815).

Justice Ginsberg wrote a short dissent, noting that the state had not required a disclaimer on the cross, and thus the decision must be made with the cross having no identifying marks, and thus should not be allowed.

Discrimination against speech is not allowed by government just because the government disagrees with the viewpoint expressed in the speech, and that is one complicating factor here. The government of Ohio may have disliked the Klan and wished to ban their cross, and also may have been worried about establishment issues, as the cross was to be constructed near the seat of government. Neither reason for the ban was upheld by the Supreme Court, though, as the first reason was not considered and the ban was far too wide to be justified by fears of observers believing that Ohio

was creating an establishment of religion. Some of the Court, however, allowed that Ohio could have regulated the cross by requiring a disclaimer, but the Court's opinion was silent on this issue, as four justices thought that the mere presence of a traditionally open forum in the square removed the need for a disclaimer. Thus, Ohio's desire to prevent the cross on political grounds, as suspected, would have to continue unabated and concerns about establishment issues would have to wait for another attempt by the Klan to erect a cross. The battle between the Klan, which stands for freedom of religion here, and the state, using concerns over the establishment clause to fight against what it sees as racism, still rages on until the present.

See also *Airport Commissioners* v. *Jews for Jesus;* Celebration of Halloween and singing Christmas carols; *County of Allegheny v. Greater Pittsburgh ACLU; Employment Division* v. *Smith; Lamb's Chapel* v. *Center Moriches School District*

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Celebration of Halloween and singing Christmas carols

Even the questions of what holidays can be celebrated in public schools turn on the question of how religion interacts with the law. Celebration of Halloween has generally been allowed, whereas the question of whether Christmas carols can be sung is a more complex one.

One of the leading cases in the area of Halloween is *Guyer* v. *School Board of Alachua County,* which was decided by the court of appeals of Florida in 1994. In that case, a parent of two students sued the school board, arguing that the Halloween observances created an establishment of religion. In particular the parent was opposed to the "depiction of witches, cauldrons, and brooms included in decorations placed in the public elementary schools in Alachua County, . . . [and to] teachers dressing up as witches in black dresses and pointed hats" (634 So. 2d 806: 806–807). The parent argued that the use of these symbols created an establishment of the Wicca religion. The trial court had granted summary judgment to the school board and the parent appealed. The court of appeals held that under the *Lemon* test, there was a secular purpose to the decorations and costumes, that of having fun, and that the wide variety of costumes, along with the fact that witches and cauldrons were in the context of Halloween, assured that the parties would be viewed secularly. Thus, it ruled no establishment existed and allowed the celebrations.

Christmas carols are a much murkier issue, however. A school can prohibit the singing of Christmas carols in its policy. In New York, a school board had banned the singing of Christmas carols, and the supreme court of New York upheld this ban. Other states, however, have allowed schools to choose to sing Christmas carols. In one district in South Dakota, a Christmas celebration sparked concerns, and so the school district formulated a new policy, which was challenged. The challenge came, eventually, in front of the Eighth Circuit Court of Appeals, who decided the case in 1980 (*Florey* v. *Sioux Falls School District 49–5*). The court noted that the *Lemon* test controlled this case.

The court turned first to the purpose of the new policy, examining both its stated purpose and its actual restrictions. It held that the policy's aim "was simply to ensure that no religious exercise was a part of officially sanctioned school activities" (619 F.2d 1311: 1314). It then turned to the second part of the *Lemon* test, the effect of the policy. The appeals court commented that "the rules guarantee that all mate-

rial used has secular or cultural significance" (619 F.2d 1311: 1316–1317). From this, and from a general review of the program's effect, the appeals court found that "since all programs and materials authorized by the rules must deal with the secular or cultural basis or heritage of the holidays and since the materials must be presented in a prudent and objective manner and symbols used as a teaching aid, the advancement of a 'secular program of education,' and not of religion, is the primary effect of the rules" (619 F.2d 1311: 1317). In terms of Christmas carols, the court concluded, in a footnote, that it was acceptable, "it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district" (619 F.2d 1311: 1316).

The court finally turned to the issue of entanglement, holding that the new rules were intended to reduce entanglement and that they had that effect, meaning they passed the third prong of the *Lemon* test as well. On whether school celebrations violate the free exercise of religion, as forcing one to participate in an activity that would violate his or her religion might do, the court noted that the school board rules expressly required students to be allowed to be excused.

One judge did dissent. He argued that, first, there was not a clear secular purpose to the rules. In particular, he held that "to the extent the policy and rules focus only on religious holidays, I would find the policy and rules unconstitutionally operate as a preference of religion" (619 F.2d 1311: 1324). The dissent further argued that the secular purpose of increasing knowledge about holidays might be better served by focusing on holidays less well known, such as Hindu and Muslim holidays rather than the better-known ones, like Christmas, which were also the ones studied. As far as the effect went, the dissent held that "Christmas assemblies have a substantial impact, both in favor of one religion and against other religions and nonbelief, on the school district employees, the students, the parents and relatives of the students and the community" (619 F.2d 1311: 1327). The dissent also found that the policy increased controversy, violating the entanglement clause and that even though excusal was allowed, peer pressure at the school level might prevent those opposing religion from being excused, thus violating the freedom of religion.

The Eighth Circuit found that singing of Christmas carols was allowed, but the whole question is a more closely divided one than that of Halloween. Courts have generally allowed Halloween celebrations, as there was no credible evidence of school boards promoting any religion. However, Christmas celebration and Christmas carol rulings have varied from state to state.

See also *County of Allegheny* v. *Greater Pittsburgh ACLU; Engel* v. *Vitale; Lee* v. *Weisman; Lemon* v. *Kurtzman; Metzl* v. *Leininger*

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Center for Law and Religious Freedom

The Center for Law and Religious Freedom is one of the leading litigation groups arguing for allowing the government a role in religion. This group describes its mission as an effort to use the court and educational systems to protect the sacredness and liberty of human lives.

The group has filed amicus briefs in many recent cases, including *Elk Grove Unified School*

District v. *Newdow,* where the Center argued on the side of Elk Grove, suggesting that the phrase "under God" did not violate the First Amendment but rather admitted that a Creator was the source of the rights of humanity and supported the idea that the U.S. government had limits. The group considered the Supreme Court's throwing the case out on a technicality as a total victory for the phrase. This is overstating its case a bit, of course, as the Court did not rule on the issue of "under God" being in the pledge directly but instead decided that case on the basis of the issue of standing, as it held that Newdow did not have standing to challenge the pledge. (Three justices in their rulings affirmed that Newdow did have standing and ruled that the pledge should have been upheld.)

The Center has recently worked in a variety of areas in several different ways, including litigation, filing friends of the courts briefs in litigation started by other parties, and working to gain its objective through prelitigation negotiation. One case that the Center has litigated recently is against a Maryland school district: the district refused to distribute flyers from a group wanting to hold after-school meetings (the case is still in the courts and the Center argues that the denial was discriminatory). Another case was filed against Ohio State University (OSU) because the university wanted to "de-recognize" a student religious group because that group did not follow OSU's nondiscrimination policy. (After the lawsuit OSU agreed to continue recognizing the group and not to force them to follow the policy.)

The Center filed an amicus curiae (friend of the court) brief in a case in which the Boy Scouts were denied aid by the Connecticut State Employee Charitable Campaign because they chose not to use homosexuals as leaders. (The Center argued that since the Supreme Court had held this practice of denying leadership roles to homosexuals to be legal, the denial of aid violated the First Amendment.) It also filed a brief in a case in which a Catholic charity had asked the Supreme Court to reconsider a lower court ruling forcing those groups that offered health coverage to cover prescription contraceptives. (The charity argued that the forced coverage violated the First Amendment.) It also filed a brief in *Locke* v. *Davey,* in which Washington State had set up a scholarship program for certain people but refused to fund students who went to a religious school and majored in theology. (The Center argued that the program was not neutral in respect to religion and that the Constitution merely required neutrality, not avoidance of any aid to religion.) In *Locke,* the Supreme Court ruled that while the denial of funding was not required by law, it was allowed.

The Center has also worked to achieve its goals through prelitigation negotiation. One negotiated situation involved a religious group at the University of Virginia. The group was denied funding to attend a conference the university believed would give religious training, and the religious group thought that the denial was religious discrimination. After an appeal, the funding was still denied. In another situation, a church was renting space in the community center and someone protested the use. After a letter from the Center, the group was allowed to continue to rent space.

The Center previously has worked for laws that they see as beneficial, including the Religious Freedom Restoration Act (RFRA, passed in 1993) and the Equal Access Act (EAA, passed in 1984). The RFRA aimed to overturn the *Employment Division* v. *Smith* case and required that the government not overburden the free exercise of religion unless that burden was proven necessary to advance a compelling government interest and was imposed in a manner using the least possible restrictions. The EAA required, as the name suggests, equal access to school facilities by religious non-school groups if nonreligious groups were allowed. It also required the school to give equal access to religious and nonreligious clubs. The RFRA, however, and this is

not mentioned directly on the Center's website, was struck down in 1997 by the Supreme Court as it held that Congress, by enacting this requirement, had expanded the First Amendment (or at least the free exercise portion of it) and so had encroached on the rights of the judiciary. The Center has some 4,500 attorneys who are members of the Christian Legal Society and has five attorneys on staff who participate in activities. Thus, this is a relatively small group that enlists many members across the country to advance its goals.

See also Americans United for Separation of Church and State; *Boy Scouts of America* v. *Dale; Elk Grove Unified School District* v. *Newdow; Employment Division* v. *Smith; Locke* v. *Davey;* Religious Freedom Restoration Act of 1993

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Chapman v. *Thomas*

743 F.2d 1056 (1984)

This case dealt with a residence hall at a university and whether the university could create a rule forbidding distribution of religious materials. The particulars here were that Chapman was a student at North Carolina State University, a public university, and he felt that the rule was an interference with his First Amendment rights, so he sued. The case went as far as the Fourth Circuit Court of Appeals, which determined that the university could forbid religious solicitation.

The opinion first reviewed the facts of the case and then examined the nature of the venue being considered. The court of appeals quoted a previous case as saying the "character of the property at issue" played a large role in determining what types of rules were allowed (743 F.2d 1056: 1058). In traditional public forums, content-based regulations must be narrowly drawn and serve a compelling state interest, even though content-neutral time, place, and manner restrictions are allowed. If a forum is not a traditional public forum but is opened by the state to the freedom of expression, then the same rules apply. Public property that is not opened for the freedom of expression is considered a nonpublic forum. In those areas, the court quoted an earlier case as saying that the state "may [also] reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view" (743 F.2d 1056: 1058).

The court then considered the type of forum the university dorm was, holding that that this had not traditionally been a place for free expression and that regulations had existed on it prior to the lawsuit, making it a nonpublic forum. The court also held the regulations to be reasonable, as the university had the reasonable right to protect students from intrusion, and the university also could create an exception for the most important student government roles, as student government was an important and broadly aimed campuswide student group.

The nature of the forum was the controlling factor here. As campus dormitories have not been places for the freedom of expression, preventing religious solicitation there was quite reasonable, in the eyes of the court. Of course, had it been a building generally aimed at producing student discussion, like the student union, the court might very well have had a different reaction.

See also *Airport Commissioners* v. *Jews for Jesus; Board of Regents of the University of Wisconsin System* v. *Southworth et al.; Rosenberger* v. *Rector*

and Visitors of the University of Virginia; Widmar v. *Vincent*

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Cheema v. *Thompson*

67 F.3d 883 (9th Cir. 1995)

The freedom to practice one's religion is guaranteed in the First Amendment, but that freedom is not absolute. Most people agree that one time the freedom of religion can be restricted is when it interferes with the rights of another. In this case, one group's interest in practicing their religion interfered with another group's right to safe schools.

This case dealt with schoolchildren who wanted to carry kirpans (sacred knives) that were required by their Sikh religion. In their policy the school district banned the carrying of such weapons, additionally citing two state laws in their defense. The district court denied an injunction allowing the students to carry the weapons and the children appealed. The Ninth Circuit Court of Appeals returned the case to the district court, ordering both sides to prepare a record and to try to negotiate a compromise. The negotiations failed, and the district court, as the appeals court had instructed, imposed a remedy. The case then returned to the appeals court.

The Ninth Circuit Court of Appeals upheld the district court, and Judge Hall wrote the opinion. The main issue on this appeal, legally, was whether the district court had abused its authority, and the appeals court held that it had not. The solution the district court imposed weighed the issues of religious freedom against the issue of safety on the part of the school district, as required under the 1993 Religious Freedom Restoration Act, and tried to work out a compromise. The kirpans were allowed, but they had to be dull, "sewn tightly to its [their] sheath" (67 F. 3d 883: 886), worn under the clothing of the student, and district officials were allowed to inspect the student to make sure that these regulations were followed. The district, for its part, had to make sure that the Sikh students were not harassed. The total ban was not allowed as the district had not shown, and never claimed to be able to show, that the ban was the least restrictive alternative available to the district, which still guaranteed the safety of the other students.

One judge dissented, holding that the school district was protecting "a compelling government interest" (which the Religious Freedom Restoration Act required). He stated two such interests, that of the "safety of [all] the students" and that of producing a "peaceful learning environment" (67 F.3d 883: 889, 892). The dissent went into the district court record and noted that one expert for the children admitted, basically, that the kirpans were still dangerous. The judge summarized the expert's findings by saying "his testimony, however, not only convinces that wearing the kirpan is an integral part of the Khalsa Sikh faith, but also that kirpans pose a threat to the safety of the District's classrooms" (67 F.3d 883: 890). The dissenting judge also believed that producing a "peaceful learning environment" was a fundamental interest, even though the majority of the court did not, and that the compromise reached was not the "least restrictive means" (which was required under the Religious Freedom Restoration Act). The judge suggested that riveting the knives into the sheaths would protect the fellow students, even though this was opposed by the children's parents as they believed it would violate their faith. He stated "the least restrictive means of furthering these admittedly compelling interests is to require that any knives in school be short and non-removable" (67 F. 3d 883: 893). In the end, the dissenting justice concluded, "It is axiomatic that we owe our children a safe, and effective, learning environment. The current plan of ac-

commodation, however, does not allow the school district to provide either. I trust that a better decision will be reached at the conclusion of the pending trial. We simply cannot allow young children to carry long, wieldable knives to school. Period" (67 F.3d 883: 894).

Thus, the children who were part of the Sikh faith were allowed to carry their knives into school, and the total ban was not allowed. This was due to the Religious Freedom Restoration Act, which ordered that a compelling government interest be shown before religious freedoms be restricted and that the least restrictive means be used. However, in 1997, the Religious Freedom Restoration Act itself was overturned, and so it is unclear what result would be reached today, even though the interests of the school board would probably be given more weight in the absence of the act.

See also *Boerne* v. *Flores; Church of the Lukumi Babalu Aye* v. *City of Hialeah; Employment Division* v. *Smith; Goldman* v. *Weinberger; Lamb's Chapel* v. *Center Moriches School District; Lyng* v. *Northwest Indian CPA; Reynolds* v. *United States; Sherbert* v. *Verner*

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Church of the Holy Trinity v. *United States*

143 U.S. 457 (1892)

This case dealt with U.S. immigration policy. At the time of this policy, there were not nearly the number of controls on immigration that there are today, but immigration still had restrictions. In the restriction being challenged here, non-U.S. citizens were not allowed to be brought to the United States to work under contracts. The Church of the Holy Trinity had brought a preacher into America from England, and the move was held to be illegal. The preacher and the church challenged the move, and the case went all the way to the Supreme Court, which held in their favor.

Justice Brewer wrote the opinion. He first reviewed the legislation and then held that he did not think Congress intended the policy to reach religious figures. The Court examined the title of the legislation, which aimed to prohibit imported labor, and Brewer commented that "obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain" (143 U.S. 457: 463). The Court also examined the intent of the program, and Brewer held that "it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers" (143 U.S. 457: 464). Thus, for several reasons, the Court held that the legislation did not reach the preacher.

However, the Court also held that America could not have intended to oppose religion. Brewer wrote, "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people" (143 U.S. 457: 465). Brewer cited a long litany of proclamations, grants, and state constitutions, all of which referred to God. He also stated that if a law had been proposed banning the import of religious talent, that law would not have passed, and this meant Congress could not have intended to ban such importation in the legislation challenged here.

Thus, Brewer felt that Congress did not intend to prevent ministers from coming to this

country, and the Court overturned the conviction. The First Amendment was not directly addressed here, even though the decision limited the federal government. Brewer looked more at the United States as a religious country, which therefore could not have acted against religion. This opinion is a good snapshot of the public view of religion at this time and something of a view of the legal opinion of religion at the time. The reason for the First Amendment's omission is not clear. The decision is still sometimes cited today for its words on interpretation of a congressional statute, even though immigration policy has changed markedly.

See also American Revolution's effect on religion; *Employment Division* v. *Smith;* Established churches in colonial America

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Church of the Lukumi Babalu Aye v. *City of Hialeah*

508 U.S. 520 (1993)

This case dealt with the Santeria religion "which employs animal sacrifice as one of its principal forms of devotion" (508 U.S. 520). The city had passed regulations prohibiting animal sacrifice and had passed these laws as general laws rather than laws targeting the Santeria religion. The religion sued, and the district court and court of appeals upheld the regulations. The majority opinion at the Supreme Court level was written by Justice Kennedy.

Kennedy first went through a history of the Santeria religion, noting how it had been persecuted in Cuba, how it had been brought here, and its history and rationale for animal sacrifice. Kennedy next noted that the church had been planned in Hialeah and that the community had reacted by passing laws to ban animal sacrifice. The opinion stated that the city did try to follow applicable state law. At the district court level, the district court had found that the state had four compelling state interests, including those of protecting health, protecting children from the harm of watching the animal sacrifice, preventing suffering of animals before sacrifice, and controlling the health risks of housing animals for sacrifice. The court of appeals then upheld the district court opinion, stating that the district court had employed a stricter test than that of *Employment Division* v. *Smith,* and so its opinion could still be upheld (*Smith* had been decided after the district court's decision).

The Supreme Court, after noting this history, examined the First Amendment, holding that the laws in question were not neutral with respect to religion and were not generally applicable and so "must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest" (508 U.S. 520: 531–532). The Court examined the laws, finding that although they were neutral on their face, their purpose was to ban the Santeria religion, both in terms of how they were applied and the city council's stated purpose for the legislation when it was passed. The opinion noted that killing animals for food purposes was allowed, as was the treatment of animals in a kosher plant, but that ritual sacrifice was banned, which, in the Court's eyes, meant that this law was aimed only at this one religion.

Justice Kennedy also observed that these regulations were passed and enforced only after the Santeria Church came into the picture, further proving their discriminatory intent, but this was the opinion of Kennedy alone and did not hold for the entire Court.

The Court as a whole then examined whether this law targeted religion only, and examined the claimed purposes of health and preventing cruelty to animals. After reviewing the laws and their scope, the Court concluded "that each of Hialeah's ordinances pursues the city's governmental interests only against conduct

motivated by religious belief" (508 U.S. 520: 545). As this law specifically targeted religion, it could be allowed only if it "advance(d) 'interests of the highest order,' and must be narrowly tailored in pursuit of those interests" (508 U.S. 520: 546). The Court held that these laws did not, as they were not tightly drawn, and the state had not prohibited most other practices that threatened these same claimed interests. For these reasons the laws were struck down.

Justice Scalia and Chief Justice Rehnquist concurred in part and concurred in the judgment in a statement written by Scalia. His dispute was with the test used to strike down the law. He argued that the ideas of neutrality and general applicability that the Court held necessary were not as far different as the Court made them seem and disagreed with the Court when it tried to determine the reason the city council passed the law, holding this analysis to be impossible. He argued that an analysis of the effects was all that is proper.

Justice Souter agreed with the result but did not agree with the *Smith* decision, and wrote arguing against *Smith*. He stated that the rules here were not generally applicable, and so should be struck down on that basis, not on the basis of *Smith*. The decision in *Smith* held that selective laws burdening religion could not be enforced, even though generally applicable laws could: "If prohibiting the exercise of religion results from enforcing a 'neutral, generally applicable' law, the Free Exercise Clause has not been offended" (508 U.S. 520: 559). Souter suggested several problems with *Smith,* one of which was that it had not been subjected to a full discussion by the Court at the time of its adoption. Souter also suggested that the original intent of the First Amendment needed to be considered, and this was not done in *Smith*. Thus, Souter suggested several reasons to reexamine *Smith*.

Justices Blackmun and O'Connor also wrote to agree with the result but not the reasoning, and they also attacked *Smith*. Blackmun argued that the proper test was one that had been present before *Smith,* and that "when the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by 'showing that it is the least restrictive means of achieving some compelling state interest'" (508 U.S. 520: 578). He added that laws that were either underinclusive or overinclusive failed to be constitutional and that laws targeting religion were either underinclusive or overinclusive and would automatically fail the "strict scrutiny" they would justly face. The concurrence also hinted that if the law had been a general law covering all animal abuse and the church had wanted to be excused from it, which was different from the situation in this case, then Blackmun and O'Connor's votes might have been different. But as that was not the case here, that issue was not decided. In the end, Blackmun held, "Thus, unlike the majority, I do not believe that '[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.' In my view, regulation that targets religion in this way, ipso facto, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, '[t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices'" (508 U.S. 520: 579–580).

The city of Hialeah disliked the religion of Santeria and moved to use laws to ban it. The fact that the laws were, on their face, generally applicable, was not enough to save them at the Supreme Court level as the Court found that these laws were targeted against that religion. Laws that impact a fundamental freedom like religion should be both generally applicable and neutral, and this is what the *Smith* decision held. As this law was neither, it needed to advance a fundamental government interest, and the majority held that it did not. Not all of the Court agreed with the *Smith* decision, and some called for a reinvigoration of the prior

standard, which held that laws that burdened religion and were not generally applicable were not allowed and that laws that were generally applicable required a substantial government interest to justify them. As neither of these tests was met, even those who disagreed with *Smith* voted to strike down this law.

See also *Berg* v. *Glen Cove City School District; Boerne* v. *Flores; Cheema* v. *Thompson; Employment Division* v. *Smith; Lyng* v. *Northwest Indian CPA; Police Department of City of Chicago* v. *Mosley; Reynolds* v. *United States*

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Comity doctrine between states in the area of marriage and divorce

Comity, in all areas of the law, means basically that one state must generally recognize a final, binding judgment of another state on a given issue. The basis of comity is the full faith and credit clause of the Constitution that states "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state" (U.S. Constitution, Article IV, section 1). The reason is that if one state did not respect another, people who commit a legal infraction could simply flee the jurisdiction with impunity and never have to worry about obeying laws they disliked, even if found. Comity is part of the larger question of how a court deals with conflicting laws.

There are three main points to conflicts between laws in different states: the choice of the law used, the question of which state has jurisdiction, and the question of how judgments are enforced. Each state uses its own procedures, and each state has a system of deciding which state's substantive law is used. Substantive law refers, among other things, to whether something can be the subject of a lawsuit. For instance, is it an injury if one is hit by a car? If it is in some states and not in others, then which law applies? It might seem that the full faith and credit clause means that each state has to follow the others' laws, but that would produce a circular judicial system, as Indiana would follow Ohio's law, and Ohio would follow Indiana's, and so on. In order for a law to be applicable, a state first has to have jurisdiction over a case. Once a court reaches a final judgment, if its state had jurisdiction, and if the procedural law of that state was followed, then every other state must follow that judgment and agree to enforce it.

Comity, in the area of marriage, has not always been practiced between the states and is not necessarily always practiced today. In the 1800s, many states did not recognize marriages or divorces from other states, so a couple might find themselves married in one state but not in another, or, more commonly, divorced in one state but not in another. These different standards existed largely for religious reasons. States' marriage and divorce laws often reflected the views of the largest religious group or groups in the state, and neither the states nor the religious groups wanted to accept the views of states whose religious groups held greatly different perspectives. This lack of acceptance of other states' laws eventually changed in the area of divorce and marriage.

Loving v. *United States* (1967) effectively extended racial equality in marriage to all fifty states. The case struck down antimiscegenation laws preventing people of different races from marrying in a state that allowed interracial marriage and then going as a married couple

to a state that prohibited interracial marriages and would not recognize their marriage.

Indeed, for quite a long time most states used the "comity" doctrine between each other in the areas of marriage and divorce. This effectively meant that whatever minimum standard one state had for marriage and divorce now applied to all states, providing that the first state had jurisdiction over the marrying and divorcing couple. In fact, when the couple in question consists of a man and a woman, the comity doctrine is still generally in place. However, the comity doctrine was one of the factors behind the controversy over Hawaii's 1993 ruling that gays and lesbians could marry, because it could have meant that all states might have to respect marriages performed in Hawaii. However, such recognition did not happen for several reasons; for one, Hawaii's voters revised their state constitution to prohibit same-sex unions, and second, Congress enacted the Defense of Marriage Act (DOMA) in 1996, which held that states did not have to respect marriages that were not between one man and one woman. Other states have since moved to legalize gay marriages or to create civil unions for both heterosexual and homosexual couples. These civil unions are generally considered the legal equivalent of marriages, but all states are not required to accept those marriages and unions when the couple is homosexual.

Public policy sometimes negates the comity doctrine in marriage and divorce between men and women, as well. Some states have voided marriages for being between people who are too closely related, even though those marriages would have been legal in the state where they were contracted. This situation has occurred mostly between close relatives (uncle and niece, first cousins, etc.) and in cases in which the people returned to the more restrictive state soon after the wedding. It also depends on how long the marriage has existed without controversy, particularly if one of the parties to the marriage is seeking to have it declared void. Divorces are generally accepted, and the state granting the divorce always uses its own standards for causes. Annulments, however, generally follow the law in the state where the marriage occurred. Because an annulment says essentially that the marriage never took place, the laws that established the union originally control the annulment.

A related area in which the states generally follow the full faith and credit clause is that of child custody. States now accept the ruling of a sister state that has jurisdiction so that a parent who has legal custody in California, for example, will still have custody in New York. Otherwise, when that parent came to New York, whose courts might have granted the other parent custody, the parent might be guilty of kidnapping a child in New York but would still have custody when the plane touched down in California. The full faith and credit clause holds that when the correct state rules, the other states need to respect their rulings in the custody area.

Thus, the whole idea of the full faith and credit clause is that each state should respect the judgments of its sister states, and the recognition of those judgments is called comity. Each state generally respects another state's judgments, important to the issue of religion and the law in the area of divorce and marriage, among others, and only inquires as to whether the state issuing the decree had jurisdiction. This prevents problems of being married in one state and not in another, at least for heterosexual couples. As more states enable gay marriages and civil unions, DOMA is likely to come into question at the Supreme Court level, meaning the comity doctrine will likely appear in the news again before long.

See also Custody battles; Divorce, marriage, and religion; Gay marriage; Marriage—right to conduct; State constitutions and the federal First Amendment

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Common law marriage

Common law marriage exists when a man and woman cohabit for a specific period of time, presenting themselves, for all practical purposes, as married, but no formal wedding vows are ever taken. Some eleven states and the District of Columbia still recognize this type of marriage, with another four acknowledging those created before the state stopped recognizing them, but this number is fewer today than it was in the past.

Common law marriage is not only important in studying marriage but is also important in studying the interaction of religion and the law. The reason is this: marriage in the United States has often been viewed as a contract between a man and a woman, a legal state, and a binding covenant. In a common law marriage, however, a man and a woman can create a marriage merely by agreeing to it, with little state intervention, so long as both abide by the agreement for a specific period of time. Religion played more of a role in common law marriages in the early American West, where traveling preachers covered large territories and rarely reached the more distant communities on their circuits. In these towns, it was considered acceptable for a couple to announce their wedding with no formal vows so they could begin their married lives, rather than having to wait the three or four months it might take for the minister to return to the area. The couple would generally receive the minister's blessing on his next visit.

More recently, with weddings performed by justices of the peace and with religious facilities readily available to those of nearly all faiths, this justification (and need) for common law marriage has decreased. Now, these marriages serve a different role in society, and religion's part in that role has changed drastically. After all, many gay and lesbian couples have long since fulfilled the requirements for a common law marriage in the states where they reside, but their relationships are not formally recognized. Indeed, many have even had their unions blessed by religious officials, but most U.S. states still will not issue them a marriage license. Opponents of gay marriage often base their views on religious precepts. Massachusetts, the one state that recognizes same-gender marriages as of this writing, is not one of the states that has a common law marriage. Similarly, New Jersey and Vermont, which allow same-gender civil unions, do not allow common law marriages.

The requirements for a common law marriage vary, but they generally include living together for a specific and significant period of time and for the pair to present themselves as

Which States Recognize Common Law Marriage?

Alabama	Colorado
District of Columbia	Georgia (if created before 1/1/97)
Idaho (if created before 1/1/96)	Iowa
Kansas	Montana
New Hampshire (for inheritance purposes only)	Ohio (if created before 10/10/91)
Oklahoma	Pennsylvania (if created before 1/1/05)
Rhode Island	South Carolina
Texas	Utah

a married couple. Although common law marriages are not possible in all states, a common law marriage in one state must be recognized in another, generally. One other note on common law marriages—there is no such thing as a common law divorce in any state. If considered married in a common law marriage, a couple wishing to part must go through a legal divorce through the courts, just like any other married pair.

See also Comity doctrine between states in the area of marriage and divorce; Divorce, marriage, and religion; Gay marriage; Marriage—right to conduct

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Confidentiality for religious figures

Confessions to clergy and other religious parties, particularly secrets revealed to priests in confessionals, are supposed to be held in strict confidence, even when crimes are discussed. However, the law obviously has an interest in criminal details, and so one question in religion and the law is whether the court system can have access to conversations between criminals and their religious confessors. Generally the court system has said no, and the religious system has definitely said no. For a variety of reasons, courts have granted specific individuals the privilege of keeping secret any information given in confidence. The privilege granted to religious conversations has been based in the First Amendment, while other privileges are based in societal considerations. The case *Jaffee* v. *Redmond* (518 U.S. 1), decided by the U.S. Supreme Court in 1996, extended the privilege to a social worker, and the federal rules of evidence also generally extend the privilege to a psychotherapist. The Supreme Court upheld a lower court's decision in this case, stating that the privilege of privacy is necessary to build the patient-therapist trust needed for a successful treatment and cure. The Court also noted that all of the states give a psychotherapist this privilege, although it varies in extent.

For religious figures, a privilege has generally been granted. Churches, of course, support this privilege, and the Episcopal Church greatly supports it. It holds that the sanctity of the confessional cannot be violated, and that priests should not testify to what is said in the confessional, even if the person who confessed has now waived that privilege. A more complicated question occurs when a figure in a court trial is working with someone who is both a clergy member and a social worker (or a psychiatrist, etc.). The conversations then may not be privileged, depending upon state regulations. The central question becomes the nature of the meeting between the figures: if the meeting is religious, the conversations will probably be protected; if the nature of the meeting is more psychiatric, the conversations may not be protected and the clergy member will then be treated like any other psychiatrist or social worker. On a very few occasions, taped confessions to clergy have appeared in the courtroom, but courts have almost universally not allowed their use. In general, the law and religion agree in this situation: even criminals have the right to confide in private religious figures whose lives revolve around issues of sin and salvation.

See also *Nally* v. *Grace Community Church of the Valley; Ohio Civil Rights Commission* v. *Dayton Schools*

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Corporation of Presiding Bishop v. *Amos*

483 U.S. 327 (1987)
Pime v. *Loyola*
(803 F.2d 351) (1986)

Most corporations and organizations are not allowed to discriminate on the basis of religion. The main exceptions to this law involve religious corporations or organizations. Of course, one would not expect a church to have to give equal standing for a member of its own faith and a member of a different faith when considering which minister to hire. The question, of course, is how far does that exception go, and the *Pime* v. *Loyola* and *Corporation of Presiding Bishop* v. *Amos* cases partially answer that question. Both were filed under Title VII of the 1964 Civil Rights Act, which generally forbade any discrimination on the basis of religion. One exception was that it allowed religious organizations to discriminate on the basis of religion, and in 1972, the exception had been broadened from religious activities in those organizations to all activities in those organizations.

Pime v. *Loyola,* decided in 1986 by the Seventh Circuit Court of Appeals, came about when Loyola University decided to hire Jesuits as the next three members of one university department and Professor Pime sued. Loyola claimed that part of the 1964 Civil Rights Act allowed religious discrimination when the institution was controlled by a religion and also allowed discrimination when the religion was a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (803 F.2d 351). The court noted that though Loyola had long been controlled by Jesuits, most of its faculty were not Jesuits and that the school had taken steps, including the one challenged here, to increase the number of Jesuits. The court then reviewed Pime's history and held that even if Pime had been discriminated against on the basis of his religion, being Jesuit was a bona fide occupational qualification and so establishing this as a requirement was acceptable.

Judge Posner concurred, and he examined what was required to make a case under this part of the 1964 Civil Rights Act. He held that because a specific religious order was required here "casts doubt on my brethren's assumption that the mere fact of reserving one or more slots for members of a religious order establishes a prima facie case" (803 F.2d 351: 354–355). Posner claimed that neither a disparate impact on one religion nor intentional discrimination had been argued, and so a prima facie case of discrimination had not been proven. Posner would have stopped the court there, as he also argued that being Jesuit should not have been characterized as a bona fide occupational qualification. Posner also cast doubt on whether Loyola could be described as being controlled by the Jesuits. Posner, though, held that Pime had not proven his case of discrimination, meaning it was not necessary to address the issues of the 1964 Civil Rights Act.

Corporation of Presiding Bishop v. *Amos,* decided by the Supreme Court in 1987, was also filed under Title VII of the 1964 Civil Rights Act. The facility in this case was a gymnasium, run by the Latter-day Saints but open to the general public. The person in question had worked at the gymnasium for over a decade as an engineer and then was fired for not being a Mormon. Ultimately, the court determined that the firing was legal.

Justice White delivered the opinion of the Court, in which four other justices fully joined. First, the Court determined that the engineer's work was not religious in nature and then looked at the section of the Civil Rights Act relating to nonreligious activities in religious organizations. He determined that the law as worded in the Civil Rights Act was constitutional, as it met all of the provisions of the *Lemon* test. First, it had a secular purpose,

that of minimizing government interference with religion. Without the enlarged exemption, there would always be the question of whether an activity was religious, and without the original exemption, churches' activities would be greatly interfered with. The Court also held that the government itself had not advanced religion through this statute, even though religion might have benefited. White concluded that the equal protection statute was not offended, as it treated all religions equally and that the statute did not impermissibly entangle the government and religion.

Justice Brennan authored a concurrence, joined by Justice Marshall. They focused on the nonprofit nature of the gymnasium, holding that a blanket exception could be allowed. Having an exemption only for religious activities would, Brennan believed, cause excessive entanglement. Implied but not stated is the condition that were a religious group to organize a for-profit venture, then in only those things that were religious could discrimination be allowed.

Justice Blackmun issued a short concurrence but mostly joined in one by Justice O'Connor. O'Connor concurred but mostly wanted to note problems with the *Lemon* test. She argued that the effect of a government law, in the characterization the Court puts on it, will almost always be to allow a church to advance religion, rather than the government advancing it. Because of this, she would have desired to see the whole *Lemon* test reevaluated rather than simply being used as precedent. She argued that rather than examining the effect, justices should examine what a "rational observer" would see—whether the observer would see the government as advancing religion (not allowed) or as accommodating the free exercise of religion (allowed).

Thus, organizations, when held to be religiously controlled, or religiously enough controlled, and churches, even when doing things outside what many think of as religious, are allowed to discriminate in the hiring of their employees. This is one of the few general exceptions allowed to the 1964 Civil Rights Act, which generally forbade discrimination on the basis of religion.

See also *Ansonia Board of Education* v. *Philbrook; Farrington* v. *Tokushige; Lemon* v. *Kurtzman; Ohio Civil Rights Commission* v. *Dayton Schools*

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County of Allegheny v. *Greater Pittsburgh ACLU*

492 U.S. 573 (1989)

This case dealt with the construction, with state permission, of a crèche (manger scene) inside a city building and a menorah just outside a city building in Allegheny County, Pennsylvania. Some members of the community considered this an unconstitutional violation of the separation of church and state, as the state might very well be saying that some version of Judeo-Christian teaching was favored by the state. Thus, establishment of a religious icon in a city building would naturally be controversial, as it was here, and this case made it all the way to the Supreme Court.

Justice Blackmun wrote the opinion of the Court. He concluded that the crèche was not permissible while the menorah was, both based largely on their physical settings and surroundings. Blackmun first surveyed the physical settings of both items. The manger scene was largely isolated whereas the menorah was near a larger Christmas tree and a sign describing the lights on the Christmas tree as a sign of liberty around the world. Blackmun then recounted

the history of the legislation. The Court noted the First Amendment and the history of cases and ideas leading up to the three-pronged *Lemon* test. Blackmun stated that the key here was the second prong, which he concluded as holding, in issues like this one, that "the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief" (492 U.S. 573: 593–594). He then looked at past decisions, and at the crèche itself, holding that the crèche was the only thing on the staircase and that the sign stating "glory to God in the highest" clearly endorsed religion. He disagreed with the dissent, which would have allowed the crèche, stating that there was a distinct difference between the reference to God on our money, the allowing of chaplains in our legislature, and this display, as the display endorsed one specific religion. Blackmun also disagreed with the dissent, which painted the majority as antireligious, and Blackmun noted that in order to be fair to all, the government must promote no single religion.

Blackmun then turned to the menorah. He noted that the menorah is a clear symbol for Hanukah, but he also noted that Hanukah was both secular and religious. He also noted "moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty" (492 U.S. 573: 614). The Christmas tree was important, in Blackmun's analysis, as it was wholly secular, and the three things combined together made the overall display simply a note of the "winter-holiday season" and so were allowable (492 U.S. 573: 616). The tree was also significantly taller than the menorah, decreasing the menorah's religious message.

O'Connor, with whom Brennan and Stevens agreed in part, concurred. She first discussed the *Lynch* case, in which the Supreme Court had, some five years before, allowed a crèche that was mixed with a large number of secular symbols and was placed in a private park. The crèche in the *Allegheny* case was in the county courthouse and was alone, and this was enough to fatally condemn it for O'Connor. She also argued against the dissent, which wished to rework or drop the endorsement part of the *Lemon* test. O'Connor also invoked the idea of "ceremonial deism," which she held as meaning practices whose purpose was "solemnizing public occasions" and "expressing confidence in the future" (492 U.S. 573: 630). Those practices, which she held as including chaplains in legislatures and "In God We Trust" on the currency, were acceptable. The crèche, however, went far beyond that. She also agreed with the majority that there was no hostility to religion here. As far as the menorah went, O'Connor saw the three symbols combined as more of a sign of respect for "pluralism and freedom" than any endorsement of religion or a totally secular message, which is how Blackmun had painted it (492 U.S. 573: 635).

Justice Brennan wrote a partial concurrence, joined by Marshall and Stevens. They would have disallowed both the crèche and the menorah. They did not think that you could divorce the Christmas tree from Christmas, which they thought was necessary to allow it to continue, nor could they divorce the menorah from Judaism.

Justice Stevens also wrote a concurrence, joined by Marshall and Brennan. Stevens surveyed the history of the First Amendment, arguing that there should be a "presumption" against any religious symbols on government land and agreeing with Justice Brennan on the incorrectness of the menorah and crèche.

Justice Kennedy dissented in part and concurred in part and was joined by Justices White and Scalia and Chief Justice Rehnquist. He held that Justice Blackmun's opinion regarding the crèche, and the ideas behind it, "reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents" (492 U.S. 573: 655). Kennedy would have liked to discard *Lemon* but thought that working within it, the county could still have a crèche. He argued that past decisions allowed a

government to recognize the "central role religion plays in our society," and he saw the crèche as this (492 U.S. 573: 657). Kennedy certainly wanted to ban coercion, but he wanted to allow "accommodation." Kennedy also argued that banning any recognition of the religious elements of Christmas was hostile toward Christianity. Those who disliked the religious displays, he suggested, could "ignore them, or even . . . turn their backs" (492 U.S. 573: 664). Kennedy stated that a temporary crèche could not be coercion and so was allowable, and he did not think that the placement of the crèche by itself or on city property was important. He also argued that how a reasonable observer would view the display was the most important thing, and he did not think that such an observer would object. He then cited numerous religious elements in public life, like "In God We Trust" on our money and stated that the majority was rejecting these and thus moving to invalidate them or ignoring them. He argued that the state should be allowed to accommodate religious elements of holidays without running afoul of the First Amendment, and failure to allow this was hostility to religion. Of course, with all of this, the four dissenters on the crèche also agreed the menorah should be allowed.

Thus, the crèche was struck down as too religious while the menorah, in its setting along with the Christmas tree and the sign recognizing liberty, was allowed. This decision, while straddling the fence, did not satisfy either side of the debate. It neither outlawed nor allowed all religious symbols but continued the need for a case-by-case adjudication that was begun in *Lynch*.

See also *ACLU of Kentucky* v. *McCreary County; Capitol Square Review and Advisory Board* v. *Pinette; Elk Grove Unified School District* v. *Newdow; Marsh* v. *Chambers; McCreary County* v. *ACLU*; *Metzl* v. *Leininger*

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Creation Research Society

The Creation Research Society (CRS) is among a growing number of groups who aim to demonstrate scientific proof behind theories claiming the earth's creation by God. Generally backed by fundamentalist Christians, these groups have grown increasingly popular in the current wave of backlash against teaching evolution in public schools. CRS was founded in Michigan as a tax-exempt charity, its membership secretary is in Missouri, it has a research center in Arizona, and thus it exists throughout the middle of America. It makes several statements about what its members must believe. Particularly, they must believe in biblical creation of the universe and earth, as opposed to evolution being responsible for either. The group emphasizes that its membership includes research scientists.

Like other such groups, CRS believes the earth and its inhabitants were created during the week of creation described in the book of Genesis. Members also believe that while change within one type of animal is possible, no new animals have evolved. The group founded its own journal after established scientific journals refused to publish their work. CRS now publishes a variety of periodicals, including a newsletter and a quarterly journal. The quarterly journal includes articles it terms scholarly that support intelligent design theory, one current popular belief designed to oppose evolution. Some of the articles in this journal are, indeed, extremely technical in nature. Published every other month, the journal includes letters, some articles, and short subjects. It has printed

articles written by a medical doctor who specializes in pathology, a podiatrist, and a physicist.

The group has also produced a number of books on the topic of intelligent design, including a rhyming book for children about the creation, a copy of Ussher's chronology of the earth, a defense of the creationist position about the lack of ice ages, and an astronomy designed to introduce students to the heavens without causing them to doubt the Bible. Videos are also available for sale on the group's website, and their topics range from plate tectonics, to how the Grand Canyon proves the great flood actually occurred, to evidence in the fossil record that the group believes supports a creationist viewpoint. The society includes scientists from a wide variety of fields. Its board includes four physicists, a physical geographer, a botanist, an anatomist, a computer scientist, a geologist, and an animal scientist, all with Ph.D.s. All members of the board of directors appear to be white males.

Like other creationist groups, CRS supports the teaching of intelligent design in public schools and opposes evolution theory, considering it harmful and un-Christian. Groups like these have gained in popularity in attempts to prove that those who oppose evolution are not stupid and backward. That the group must currently overcome such public perceptions demonstrates the lasting power of the Scopes Trial, in which those in Tennessee who opposed evolution were presented as backward in a highly publicized manner. However, as national lawmakers become increasingly involved in determining the content of science classrooms, these groups will represent a force with which those who favor evolution will have to contend.

See also Answers in Genesis; Avoidance of the issue of evolution in many teaching standards; Creation Science Research Center; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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Creation Science Research Center

The Creation Science Research Center is based in San Diego, California, and aims to fight against the teaching of evolution in public elementary and high schools. Its self-stated guiding principle is to protect Christian children from having their faith in God as Creator threatened. The group has existed since 1967 and it began to achieve some level of notoriety in 1980, when it sued California for teaching evolution. One of its main aims is to produce material that reconciles science with a belief in creationism, and then to provide those materials to home schools, to public and private schools to be adopted in the curriculum (the Center's hope), and to individuals who wish to do private faith-based investigation. The Center's ultimate goal is to have creation science prevail over evolution. Their materials are designed specifically to connect the biblical creation record with scientific data. The group believes it is acting on God's commission to bring the country to a decision for or against creationism.

The Creation Science Research Center puts out a variety of publications. Some of these are books, including *The Handy Dandy Evolution Refuter* and *The Creation Explanation,* and some are multimedia, set up as "Little Talkers." These are animal stories relating a biblical message. The series includes a whole host of materials, including coloring books, videos, MP3s, parent guides, and quizzes. The Center also produces student kits aimed at helping public school students refute the school's teaching of evolution. It should be noted that not all Christian religions are accepted by the Center. The Center does not be-

lieve that either Roman Catholicism or many of the major Protestant denominations are true Christian religions. Thus, the Center's message should not be considered to represent, by far, the whole Christian population.

The Center is run by a group called the Parent Company, whose aim seems to be to produce sales materials for companies. And in spite of its rejection of most of the majority Christian religions, the Creation Science Research Center is one of the best-known groups fighting evolution in the public schools and producing materials to help students (and their parents, of course) in this battle.

See also *Edwards* v. *Aguillard; Kitzmiller* v. *Dover Area School District;* National Center for Science Education; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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Crowley v. *Smithsonian Institution*

636 F.2d 738 (D.C. Cir. 1980)

Crowley, along with a case from South Dakota, dealt with a challenge to evolution. A person filed a legal challenge to a Smithsonian exhibit that was titled The Emergence of Man. The exhibit supported evolution and Crowley opposed this, claiming the government support for the Smithsonian and such an exhibit created secular humanism, or a secular religion.

The exhibit in question demonstrated adaptation of things to the environment and used them as support of evolution. It did not, however, criticize religion or support evolution as the only answer. The D.C. Circuit Court of Appeals held that even if evolution could not be proven and had to be accepted as a thoroughly tested scientific theory, this did not mean that such acceptance created a religion. The court said that the Smithsonian had the right under its charter to set up this exhibit. On the issue of religion, the decision stated that a balance needed to be made between freedom of religion and the right to learn. "This balance was long ago struck in favor of diffusion of knowledge based on responsible scientific foundations, and against special constitutional protection of religious believers from the competition generated by such knowledge diffusion" (636 F.2d 738: 744). Thus, the district court's decision was upheld and the challenge was struck down.

Besides the government's right to create exhibits concerning evolution, there has long been a concern about how much evolution is required in the classroom. One question is how much time a teacher can spend on the whole question of evolution versus creationism. This issue was resolved in *Dale* v. *Board of Education, Lemmon Independent School District* (1982). There, the supreme court of South Dakota upheld Lloyd Dale's firing for teaching creation science. The local school board had established teaching guidelines for Dale, who was given "up to one week of class time to teach the theories of evolution or creation" (316 N.W. 2d 108: 110). Thus, he could still teach some creationism. However, he spent too much time on creationism as opposed to evolution, and so the school district fired him. The court found that the appeals court's rulings were not erroneous and so did not have to be overturned. Perhaps the best comment on Dale's case came in a concurrence, which held "essentially, Mr. Dale wanted to be a preacher, not a teacher. This is intolerable in a classroom under our state law, state constitution, and federal constitution" (316 N.W. 2d 108: 115).

Thus, the court's decisions reflected the government tendency to uphold religious freedom. It determined, in *Crowley,* that the Smithsonian was not establishing a state religion when it created an evolution exhibit. It determined, in *Dale,* that when teachers were permitted to teach creationism, they had to

Smithsonian Institution's old administration building, built in 1854. The Smithsonian Institution in Washington, D.C., is the official museum of the United States. The institution was created from an inheritance given to the United States by British scientist James Smithson to increase and diffuse knowledge of science, technology, and the arts. (PhotoDisc, Inc.)

balance their teaching with evolution, as dictated by the local school board. These decisions, particularly *Dale,* reflect the government mandate to maintain a separation of church and state, which prohibits the government from favoring any one religion over another.

See also *Edwards* v. *Aguillard; Epperson* v. *Arkansas; Scopes* v. *Tennessee*/Scopes Monkey Trial; *Tilton* v. *Richardson*

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Cults, law's treatment of people in

The very word "cult," it should be noted, is a loaded term. After all, one person's cult may be another's religion. However, cult will be used here in the sense of a religious sect whose general philosophies are widely considered extremist or false. And the concept of cults suggests groups of people, often with charismatic leaders, who follow an idea obsessively and carry out extreme behaviors with what they claim are religious justifications. Jim Jones, for instance, led his cult to Guyana in South America where they founded Jonestown and committed mass suicide. David Koresh holed up with his Branch

Fire engulfs the Branch Davidian compound near Waco, Texas, on April 19, 1993. Eighty-two Davidians, including leader David Koresh, perished as federal agents tried to drive them out of the compound. (AP Photo/Ron Heflin)

Davidians in their group compound in Waco, Texas. The group engaged in a tense standoff with government officials over weapons possession, ending in a fire that destroyed the compound, causing many deaths.

The law interacts with cults in a number of different ways. To begin with, laws are sometimes used to try to shut down religious minorities. Very often those religious groups fight the laws in court. A relatively recent lawsuit of this type was in Florida. The case went all the way to the Supreme Court in *Church of the Lukumi Babalu Aye* v. *City of Hialeah* (1993). There, a city had tried to shut down the Santeria religion, which practiced animal sacrifice. The city council passed a law regulating all animal sacrifice, justifying the law with its intent to protect animals and health, not any attempt to prevent the practice of Santeria. However, it was widely recognized that the city council considered the Santeria religion to be a cult and wanted their activities halted. The Supreme Court ruled in favor of the Lukumi Babalu Aye, stating that laws that were not neutral in the area of religion needed a compelling government interest and needed to be narrowly written, and the city of Hialeah's law failed these tests.

Cults and the people in them hit the newswires heavily in the 1960s and 1970s. The Symbionese Liberation Army kidnapped and brainwashed heiress Patty Hearst into participating in its bank heists. Charles Manson brainwashed a group of people who called itself The Family. Members of that cult went to the home of actress Sharon Tate, killed her and several of her guests on Manson's orders, and also murdered another couple.

Beginning in that era and continuing to the present are the efforts of parents to retrieve their children from cults. Specifically, and less well known than famous cases but still heavily

reported from time to time, are parents' attempts to kidnap their children and have them deprogrammed. There is a more direct legal connection when it is believed that a cult has entrapped someone into it, or when the parents of a young member kidnap that person out of the cult. Parental kidnappings are often based strongly on three ideas. First, of course, is the belief that the young person did not go willingly or was lured under false pretenses and that the cult presents a danger. Second is the belief that a bit of persuasion, or, to use the term that was bandied about in the 1970s, deprogramming, will remove the cult's influence and the young person will be well again. Third is the hope that true religion or faith will resist deprogramming, while false religion or the religion of cults will not. A cottage industry of deprogrammers grew up in the 1970s.

In court cases stemming from such deprogrammings, questions have included the level of honesty required of cult leaders. However, similar to all other religions, there are really few regulations on the leaders of cult movements. Leaders and recruiters for any religion do not have to inform their potential recruits of their goals. Those who dislike a group after they leave it generally cannot sue but can, instead, campaign against it, try to get the government to go after it, or become deprogrammers themselves.

A second legal question is what actions can be brought against parents for their actions in taking their children out of cults. Civil actions by the people who were kidnap-rescued have sometimes been successful, but those placing the suits must have generally been adults at the time of the deprogramming efforts and resisted deprogramming throughout. It is generally not acceptable for them to be successfully deprogrammed, remain with their parents or deprogrammers, and then sue. Even when a kidnap-rescue victim recovers monetary damages, these damages are generally small. It is also difficult to compare the behavior of parents kidnapping their children out of what they considered a cult against the behavior of parents who merely object to a child's religious choices. Most parents would be aghast if someone broke into a monastery and stole their adult child who had decided to become a priest, even if they disagreed with their son's decision. However, the same parents might initiate the kidnapping if they felt their children were in danger from a cult. Parents are given more legal control until children reach the age of majority, which is generally eighteen, and there is also natural sympathy with the parents who want to be able to protect their children against cult recruiters. But danger is often in the eye of the beholder, and the law must balance the religion's right to exist against the parents' rights to protect their child. In the area of kidnapping, the criminal law and the civil law often side with the parents, as noted, even of adult children.

A related question is what level of honesty religious groups have to have in selling things. In one case, a religious group was allowed to sell scientific equipment which had allegedly been mislabeled, as long as the group made only religious and not scientific claims about the equipment. On the other hand, deceptive practices such as lying about what use will be made of donated money have been found to be illegal, even for religious causes. Courts cannot investigate the truth of religious beliefs, but they can investigate the sincerity of them, or how fully and strongly they are held. Courts have also considered whether groups can be held responsible for promising to perform miracles (for money, generally, in the cases that came into the courts) and then failing. Judges have generally focused more on the sincerity of the belief than in the actual ability to perform miracles.

Another of the most famous cults in the twentieth century, the Branch Davidians, made headlines as much for perceived government interference as for their extremist beliefs and practices. Led by the charismatic David Koresh, the cult had hoarded a large number of weapons at its compound in Waco, Texas. The

weapons cache was declared illegal, and law enforcement officials attempted to seize the weapons and arrest cult leaders. However, the group turned its compound into a fortress, refusing the government entry and threatening to burn themselves to the ground. Eventually, the compound was burned, and eighty-two lives were lost. As the compound was on private property and some of the dead were children, the government's need for involvement came under heavy question after the fact. Indeed, this situation highlights the crux of the relationship between cults and the law. A careful balance between public safety and religious freedom must be preserved. When the balance shifts in either direction, lives are generally lost. The Manson Family killed others, and Jim Jones and his followers, along with groups like the Heaven's Gate cult, committed mass suicide due to their extremist beliefs. However, the Branch Davidians may have died as much because of the government's strong-handed tactics as because of their nonstandard practices.

The interaction of religious cults and the law thus raises a number of difficult issues. The courts generally side with religious groups in allowing them a relatively wide latitude to advertise themselves and to raise monies. However, the law often sides with parents who rescue their children, even if adults, from those same cults. The law is on the side of the federal government when it wants to corral groups who are extremist and possess weapons, but public opinion is not, if the raids are not successful. In a dicey pinch, however, if the raids are not carried out, and harm results, public opinion is not on the side of government then either, even though the law technically is. As new cults form and come under legal scrutiny, legal officials will have to continually balance these factors to achieve even a semblance of justice in such murky ground.

See also *Airport Commissioners* v. *Jews for Jesus; Church of the Lukumi Babalu Aye* v. *City of Hialeah; Heffron* v. *International Society for Krishna Consciousness, Inc.; Jones* v. *Opelika*

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Curriculum of home schools and reporting

For a number of reasons, parents choose to home school their children rather than send them to traditional classrooms. Many parents simply feel public and private schools are inadequate to the task of educating a child. However, others choose to home school for religious reasons, desiring to incorporate religion into their children's curriculum in their own ways. The stereotypical portrait of this second type of home-school parent depicts a backward fundamentalist who believes there is too little God in public school, or too much secular humanism. However, parents who choose to home school for religious reasons actually come from a broad variety of perspectives, and most feel strongly that they can control their children's educations better than the state. Thus, it is easy to see why some parents who choose to home school for religious reasons feel that a state-controlled reporting system or a state-guided curriculum might represent a breach of the wall between church and state. Several cases in the last two decades have set guidelines for what reporting and curriculum guidelines the state can legally establish for home schools.

One of the leading cases testing the constitutionality of such requirements is *Mazanec* v. *North Judson-San Pierre School Corporation,* decided by the Seventh Circuit Court of Appeals

Diane Toler, director of the Catholic Homeschoolers of New Jersey, plays a game to help improve the math and writing skills of her children at their home in Cherry Hill, New Jersey, in May 2004. (AP Photo/Daniel Hulshizer)

in 1987. There the court found that mandatory attendance and reports can be required. States can prosecute for failure to file such reports, and a prosecution, even if against a home school whose creation was religion based, cannot be, absent of proof, assumed to be motivated by religion. The court held that the parents in this case had not cooperated and so deserved any prosecution they received. The court held "thus, even in a state with a constitutionally perfect education law and system, people like the plaintiffs who frustrate state officials in enforcing the compulsory education law will be prosecuted" (798 F.2d 230: 236). Also, the court held that cooperation was necessary at the most basic level before the parents could argue that a less restrictive method of reporting should have been used.

Another question is whether states can force home schoolers to file reports if parents think they have to report only to God. This issue was addressed by the Supreme Court of Iowa in 1993 in *State* v. *Rivera*. The state there had a rather common requirement that forced each parent who home schooled to file a copy of the curriculum with the state. This regulation was challenged as a violation of the free exercise of religion. The parents in that case argued "that their religious beliefs mandate a course of action wherein a Supreme Being must be accorded exclusive authority over their children's home education program. Any requirement for reporting the details of that program to the state, defendants urge, impedes upon the free exercise of that belief" (497 N.W. 2d 878: 880). The court, though, held

that the reporting requirements were necessary to assure a minimal standard of education, and that the burden upon the parents' religion was acceptable in order to achieve this goal.

Two final questions are about the ability of the state to require certain elements of a curriculum, and whether a state can impose a curriculum when that action would lower the amount of religion taught in a home school. This issue was considered by the U.S. District Court for Maryland in 1995 in *Battles* v. *Anne Arundel County Board of Education*. The state there required "instruction in English, mathematics, science, social studies, art, music, health, and physical education" and that "the parent must maintain a portfolio of instructional materials and examples of the child's work to demonstrate that the child is receiving regular and thorough instruction in those areas, and must permit a representative to observe the teaching provided and review the portfolio at a mutually agreeable time and place not more than three times a year" (904 F. Supp 471: 473). The suing parent, however, objected to any government-dictated oversight, believing this same agency, in the public schools, created "atheistic, antichristian education" (904 F. Supp 471: 473). The court held that the parent did not prove that Maryland had substantially infringed upon her education merely by making her teach certain subjects and follow reporting requirements. Thus, the state was allowed to maintain the reporting and curriculum requirements.

States cannot force students to go to public schools, and that has been established law since 1925. However, states can force private and parochial schools, and those who are home schooled, to learn certain subjects and to have their curriculum monitored. Parents are also required to cooperate with these restrictions, even if they feel that their religion is being infringed upon.

See also *New Jersey* v. *Massa; Null* v. *Board of Education;* Paying for tests and other aid for private schools

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Custody battles

Custody battles often hinge on religious issues, as one parent feels the other will corrupt their mutual children against a particular religion, or that the other parent will corrupt the children *with* that religion. As in other areas, the courts here have differentiated between belief and action. The courts are not allowed to consider the validity of a belief and thus cannot rule on whether they think a child is being raised in a good religion, or whether the child would be better off being raised in a home with no religion. However, the court may consider the actions that parents take that are influenced or directed by religion and how those actions affect the child, as part of the overall consideration of the child's best interests, which is the current generally applicable standard in most jurisdictions. One threshold that must be reached first is making sure that both parents can provide for the child. If one parent cannot, religion is never an issue. In one of the earliest cases, in California, the court would have placed a child with its mother, but the mother belonged to a religion that would have detached the child from society. The court therefore held that the damage to the child's social development from this isolation required the court to place the child with the father instead.

Other courts have developed this idea to require that an alleged harm have a high probability of occurring—a potential harm was not enough. Religion has generally been held to

only be one element affecting the child's best interests and not to bear any more weight than any other factor influencing those interests. Appellate courts have also been reluctant to reverse awards of custody when the losing parent complained that issues of religion would damage the child's best interests. Generally, the appeals court has upheld the lower court, if the lower court had a reasonable basis for awarding the child's custody.

The courts, conversely, have also generally not enforced divorce agreements on religious matters. For instance, if the parents agree to raise the child in one faith at the time of the divorce and sign an agreement to that effect, but the custodial parent later changes his or her mind and stops raising the child in that faith, courts will not generally force the custodial parent to follow that original agreement. The controlling standard here again is the best interests of the child. The custodial parent is generally left alone to make those decisions.

Religious practices may be taken into account when awarding custody. However, the courts are expected to abstain from ruling on the validity of a religion's beliefs. Moreover, religion is only one element involved in the contemplation of a child's best interests, and those best interests are the overriding legal concern.

See also Divorce, marriage, and religion; Religion and attitudes toward marriage historically in the United States

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Cutter v. *Wilkinson*

544 U.S. 709 (2005)

This case was one of the first to reach the Supreme Court dealing with the 2000 Religious Land Use and Institutionalized Persons Act (RLUIPA). That act had required the states and the federal government to not substantially burden a church's land use or a prisoner's religious rights unless a compelling government interest was advanced and the means used were the least restrictive necessary, when the prison received federal funds or the church was connected with commerce. Nearly all prisons and churches fall under these umbrellas, but they are necessary to give the federal government jurisdiction over the areas. The cases here dealt with the prisoner aspect of the legislation.

This legislation returned to the issue of when a government can burden the free exercise of religion. From 1963, in *Sherbert* v. *Verner,* until 1990, the Supreme Court had required the government to have a compelling government interest to pass a restriction of the free exercise of religion. However, in 1990, the Supreme Court, in *Employment Division* v. *Smith,* ruled that the government can restrict religious liberty through legislation in other areas when it has a rational basis to do so and when done in a way that is neutral with respect to the type of religion regulated, without needing the compelling government interest. This decision provoked considerable controversy because it set the precedent that the government can restrict religious freedom through regulations in other areas. In the 1993 Religious Freedom Restoration Act (RFRA), Congress attempted to force a return to the 1963 *Sherbert* standard. The Supreme Court held firm, though, and in 1997 struck down that part of RFRA that applied to the states, arguing that Congress was creating new rights, a function outside its province. This was a large part of the reason for Congress's creation of RLUIPA in 2000. The purpose of the act, just like that of RFRA, was to require the government to abide by the compelling government interest standard. This time, however, Congress tied its legislation to the commerce and spending clauses of the Constitution,

among other areas, to indicate that it was not creating new laws.

Here, several Ohio prisoners, including Jon B. Cutter, sued for violation of their religious rights. The state had two basic arguments, and the nature of their arguments, as well as the court's response, show that the real question was RLUIPA's constitutionality rather than whether the prisoners' rights had been infringed upon. First, the state argued that RLUIPA established a religion, and second, it insisted that using RLUIPA guidelines would endanger the security of the prison institutions. However, the Supreme Court unanimously struck down these objections, finding for the prisoners and upholding RLUIPA. Justice Ruth Bader Ginsburg wrote for the Court. She first addressed the controversy, including the fact that the suing prisoners were of minority religions, including Wicca and Satanist, and that they believed they had experienced discrimination. In supporting RLUIPA, Ginsburg first turned to the establishment clause issue. She stated that the law preserved the free exercise rights of the prisoners but did not create an establishment of religion, that the law required neutrality among religions, and that it also required that those who were of no religion could not be discriminated against. Thus, she explained, there was no establishment clause violation.

She then turned to the issue of safety. She noted that RLUIPA did not try to suggest that safety was a lesser concern, only that safety had to be examined alongside the religious rights at issue to reach a balance. Safety could not be used as a blanket excuse to deny prisoners their rights. She stated that religious rights could be given more protection than other rights, as speech restrictions were maintained in prison even while religion was somewhat protected under this law. She also noted—and this was one of the points most clearly illustrating that the case was more about RLUIPA generally than it was about the rights of the specific individual prisoners suing—that Ohio was free to return to Court and try to prove that prison safety was indeed threatened by the requests of these prisoners, since RLUIPA allowed the denial of religious rights when prison security was significantly compromised.

Justice Thomas wrote a concurrence, noting that this law and federalism—or the idea that states have areas of jurisdiction and power all their own separate from those of Congress—concurred in the result. He argued that Ohio's position had no historical grounding in its argument that the First Amendment kept Congress wholly out of the field of religion at all. He also observed that the whole law was tied to federal funding, and that the states were willingly accepting the restrictions by accepting federal funding. No federalism issue existed here, in Thomas's opinion, and he did not address the crux of the federal funding problem, that most institutions receiving federal funds could not exist without them and that many, like prisons, serve an essential public function. However, this case was clearly not the place for such an argument. His point was to keep alive his idea that the First Amendment allowed government action in the area of religion (remember that Thomas would have allowed more action than previously had been accepted, as, for instance, he would have allowed prayer at graduations), and to answer the charge that federalism, an idea dear to him, conflicted with RLUIPA.

Thus, Congress's approximately ten-year-long public campaign to protect religious freedom finally met with Court approval with RLUIPA. For those not impacted with land use regulations of their religion and who are not institutionalized, this case may seem to offer little protection, but it does show that the federal government can, when the legislation is crafted carefully and is directly connected with approved government functions, like the commerce and spending clauses, protect religious

liberty from state infringement. The complete list of areas in which this power is used, of course, has yet to be seen, and it is always possible that courts will not continue to uphold the legislation.

See also *Boerne* v. *Flores; Braunfeld* v. *Brown; Cheema* v. *Thompson; Employment Division* v. *Smith; Gonzales* v. *O Centro Espirita Beneficiente Uniao Do Vegetal;* Religion and prisons; Religious Freedom Restoration Act of 1993; *Sherbert* v. *Verner*

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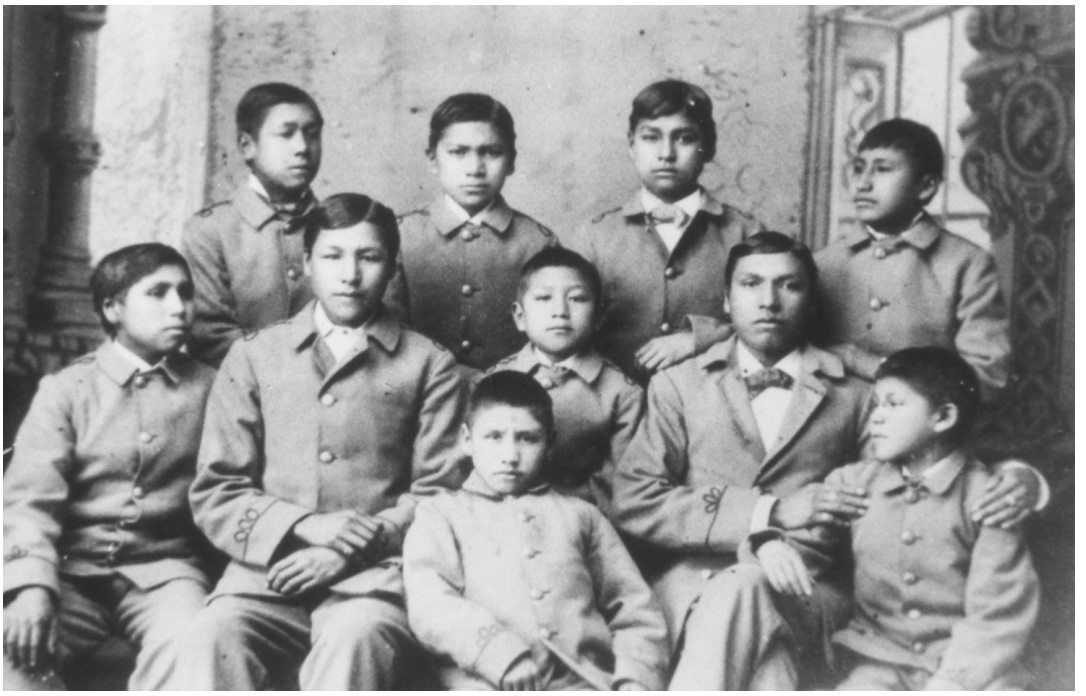
D

Dawes Severalty Act and the banning of Native American religions

Europeans long mistrusted Native Americans and their religion. One of the conquistadores' three Gs was "God," meaning the Spaniards meant to convert the inhabitants of any land they found to some form of Christianity. (The other two Gs were "Gold" and "Glory.") Soon after the Pilgrims landed as the first English presence in New England, they launched attempts to convert Native Americans. By the 1640s in Massachusetts, Native Americans, decimated by disease, were moved into praying towns, and missionaries took it upon themselves to convert them. Such was the story throughout colonial America, especially in the North.

With the push of white Americans westward, however, the aim soon became more one of conquest than conversion. This goal continued throughout most of the nineteenth century. The U.S. government accomplished its conquering goals by the 1880s, as the last rebelling groups were surrounded and put on reservations in the West. Now the question of what was to happen to the Native Americans arose again, as the question up to this point had been how the United States gained control of their land. As in the colonial period, the answer soon became one of conversion, albeit one



Omaha boys in cadet uniforms at the Carlisle Indian School in Carlisle, Pennsylvania, ca. 1880. The boys, who attended the nation's first off-reservation boarding school, were required to abandon their native clothing and hairstyles in an attempt to assimilate them into white culture. (National Archives)

combined now with the idea of racial amalgamation. The idea was to make good white Christians out of the Native Americans, whose skin color and religion doomed them to what the government and settlers considered savage behaviors. The main act that helped this along was the Dawes Severalty Act (1887).

This act combined a number of goals. In addition to the belief that Native Americans could not continue to live on their own lands, it also picked up on the unfair treatment Native Americans had received in the past. The federal government had not lived up to its promises, but the Dawes Severalty Act's solution to this problem actually exacerbated the situation. Its answer to the question of what was to be done with the Native Americans was to assign them white Christian values and desires, giving each family 160 acres of land and allowing them to become farmers. This differed from the practice of most Native Americans before this in that they had owned land, when they had that idea, on a tribal basis. Many of those in favor of the act also wanted to eliminate Native American culture, including their religion. By giving them land owned individually, which all whites wanted, and by wiping out their "savage" religion and replacing it with Christianity (preferably Protestant Christianity), a new white race would be born. The act itself was a failure. Much of the best land was taken by speculators, as not all of the reservation land was set aside for Native American families, but only as much as was needed for those families who agreed to come under the terms of the act. Native American culture also ran contrary to this act, as Native Americans generally organized in tribes, but the act dealt with them as family units.

The act resulted in the loss of much of Native American land, as, in addition to emphasizing their confinement to the reservations, it did not even allow enough land in those reservations to meet its own promises. Almost two-thirds of the land originally in the reservations had been taken by whites by the 1930s. This seizure was accomplished in two ways. First, when land set aside for Native Americans was not given to families as not enough families signed up under the act, speculators would buy the unassigned land (and often finagled the system so that the worst land was given to Native Americans and the best left for speculators). Second, many financiers loaned money to Native American families, knowing that their farms would fail and that the land that they had been given would then be sold to pay the debt.

Another effect of the act was to allow well-meaning reformers to try to eliminate the Native American religion. With the Native Americans concentrated on reservations, many whites established boarding schools for Native American children, with the intent of Christianizing them. Richard Henry Pratt sloganized his goal as "kill the Indian in Him and Save the man" (Witmer, 2002: 50). Pratt established his school in Carlisle, Pennsylvania, perhaps best known for Jim Thorpe, the Olympic and early football star. Native Americans were manipulated and coerced to go to these schools, and at the schools, they were given Christian names, forbidden to use their own names, and taught to be Christians and say prayers. Also, once the students had learned skills, they were farmed out to local families. By the turn of the century thousands of Native Americans were going to these schools, and some did assimilate into white culture, which often meant the death of their religion. Some of the children who were forced into the Indian schools returned home and made a point of learning their own cultures, but it was not an easy return. As noted, one of the whole ideas behind the Dawes Act was to exterminate Native American culture, including their religion, for their own good (even if, as the act's authors surmised, they were too uncivilized to know it), and this goal was not reversed at all until the 1930s.

By the 1930s, much of Native American land set aside on the reservations had been

taken by white people. John Collier, a white reformer sympathetic to the Native Americans, argued for an abandonment of the Dawes Act. He managed to get the New Deal to fund improvements on the reservations and tried to strengthen Native American culture by restoring the tribal structure. The tribes were restored and land loss was halted, but there was no great push for a rebirth of Native American culture in federal policy. Not until the 1960s and 1970s and protests such as those at Alcatraz and at Wounded Knee did the issues reemerge. Only later, in the 1980s and 1990s, did Native Americans finally have some successes with lawsuits. However, very often the primary venture tribes could undertake in the wake of a successful lawsuit settlement was to build a reservation casino to attract white tourists. These were often only allowed to tribes as tribes, in a policy harkening back to the 1831 *Cherokee Nation* v. *Georgia* decision, ruled by federal law, not state law. Therefore, the lawsuits of the late twentieth century did little to revive Native American religion or culture. It is now estimated that only a very few languages are currently spoken among Native Americans, and in the last census, only a fraction of the population self-identified as Native American now claim Native American religions. Some change came from a movement to revive Native American cultures and desire of some modern Native Americans who were not raised in their native tribal cultures to learn their history before it was lost completely. However, such actions occurred so long after the initial attacks from white culture that their reparative impact has been minimal.

See also American Indian Religious Freedom Act; *Lyng* v. *Northwest Indian CPA*

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Discovery Institute

The Discovery Institute is one of the leading groups involved in the battle over intelligent design (ID). The Institute is based in Seattle, Washington, and receives funding from a wide variety of sources, most of whom lean toward the conservative side of the spectrum. The Institute's interests, in the area of religion and the law, mostly focus on how to have ID introduced into public school classrooms.

The Institute was established in 1990. It was founded by George Gilder, a conservative antifeminist writer; Stephen Meyer, a philosopher of science; and Bruce Chapman, a politician and writer. The three received money from individuals and foundations, including Howard Ahmanson, Jr., Richard Scaife, and the MacLellan Foundation. Ahmanson is a believer in bringing the Bible back into public life and supports a philosophy known as Christian Reconstructionism, which holds that if the Bible is not brought back, society will collapse. To avoid this collapse, the movement argues for a return to biblical punishments and a strong condemnation of homosexuality and blasphemy. (Ahmanson also funded publications that called for the stoning of gays and lesbians.) Scaife has contributed to a wider variety of causes, most of them conservative but some liberal, including Planned Parenthood. The MacLellan Foundation believes that the Bible is literally correct as written and thus supports the six days of creation argument.

The ID efforts were promoted by the 1987 Supreme Court decision in *Edwards* v. *Aguillard,* which held that a legislature could not mandate the teaching of evolution and creation science on an equal basis, as this promoted religion. Many creation scientists turned to favor intelligent design, and the main textbook for intelligent design, *Of Pandas and People,* may

have been originally written for creation science and altered by replacing the term "creation science" with "intelligent design" with no other alterations. The Discovery Institute gave support to something that came to be known as the Wedge Theory. This argued that the first step that needed to be taken was to have the teaching of ID brought into schools under the idea that ID was another scientific answer to the world's origin, and that evolution had too many holes to be the only explanation. Supporters felt this would decrease evolution's image, which, in turn would eventually allow intelligent design to be taught. The goal of many ID supporters now is to "teach the controversy," arguing that both sides of the evolution/anti-evolution argument should be presented, in the name of academic freedom. They also want to keep evolution in question long enough for ID to find all the answers.

Since its inception, the Discovery Institute has spent a lot of money publicizing their perspective. They have produced a wide variety of publications and also do a great deal of research into the public side of the issue, taking polls and producing pieces intended to convince the wider public of ID's validity. They also have given fellowships to some of the leading ID writers, allowing them time to write about the issues. One of the leading ID writers supported by the Discovery Institute, William Dembski, was just hired by the Southern Baptist Theological Seminary, which demonstrates the connection between the religious issues and the Discovery Institute at times. The Discovery Institute has had a measured amount of success on the issue. At least three states have passed legislation allowing teachers to challenge evolution in the classroom, and many other states have seen school boards considering measures on the question. The Discovery Institute responds to requests for information and offers legal advice on the issue when questioned.

The Discovery Institute maintains that ID is agnostic, with no sacred text to defend, unlike creation science, which was wholly based in the account of Genesis found in the Bible. However, some critics have charged that this is the group's public attitude, which is belied by their alleged comments to religious groups suggesting that God is definitely part of the ID equation.

The Discovery Institute is also interested in other issues that do not receive as much publicity. Among those are cooperation between Canada and the United States in the region around Seattle, and transportation. The Bill and Melinda Gates Foundation has given a large amount of money to support the transportation initiative, but they have specified clearly that the money may be spent *only* on that issue.

In an interesting twist, Edward Larson, one of the leading scholars on the Scopes Trial, which dealt with one of the early efforts to ban the teaching of evolution, received support in the early and mid-1990s from the Discovery Institute. He, however, takes great pains to point out that he was affiliated with that group before they became as interested in intelligent design as they now are.

The Discovery Institute thus mixes support from those who favor a religious revival with those more interested in the scientific end of the ID equation. While publicly noting support for increased scientific inquiry, the Institute still privately notes a desire to implement an ID-only curriculum. Regardless of one's personal opinion of the Institute, it clearly has had, and will continue to have, an important impact on the whole debate over the teaching of evolution.

See also *Edwards* v. *Aguillard; Kitzmiller* v. *Dover Area School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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Divorce, marriage, and religion

Divorce and marriage were originally seen largely as religious events with some intersection with the state. For this reason, marriage licenses were granted by the state from early in the life of the country, but most marriages were performed by churches. Marriage and divorce standards greatly differed from state to state, and these differences often had to do with which religion was prevalent in the state. People sometimes tried to go to a different state for divorce from the one in which they lived or were married. Sometimes, these out-of-state divorces were not recognized in their home states when the individuals returned. Thus, if both parties were not amicable to a divorce, or if notice was not given, the divorce might not be recognized by the state.

One of the more famous and tragic cases in the nineteenth century was that of Abby McFarland, who lived in New York City. Though legally married to Daniel McFarland, she had separated from him and had begun to see Albert Richardson. Daniel McFarland in 1867 shot Richardson, who survived. In 1868 Abby moved to Indiana and divorced McFarland in 1869 under Indiana state laws. Abby later returned to New York, and Daniel McFarland and Albert Richardson exchanged mudslinging letters about the 1867 shooting. In November 1869, Daniel again shot Albert, who died, but not before marrying Abby. In the trial, Abby could not testify against Daniel as she was, in the eyes of New York, probably still his wife. Daniel had never been given notice of the Indiana proceedings and so they were, in New York, probably not valid. While out-of-state divorces were respected in New York, notice had to be given to the party remaining in state. Daniel, in the end, was acquitted, as his lawyers depicted him as a defender of his family, both threatened by Albert and driven insane by the thought of losing his wife to the seducer.

Divorce itself was generally disfavored by the state, largely due to the dislike of divorce by the church. Originally in England at that same time, the only form of divorce was *divortium semiplenum*. The Crown had to grant a separation order and both parties had to live apart; however, neither could remarry, and they still were married in the eyes of the law as far as property and children were concerned. In early America, after the Revolution, courts could not grant divorces, and the legislature had to act. (This is not as unusual as it sounds, as the legislatures did many things then that they do not do now. For instance, charters incorporating businesses had to be passed specifically by the legislature.) It was not until the 1820s that the first state allowed courts to grant divorces. States started out allowing them on relatively wide grounds but narrowed those eventually to desertion, cruelty, adultery, and a jail term of over five years. If the defendant issued any defense whatsoever, some states would still not allow the divorce. The standards for proving these grounds were also strict. For instance, to prove adultery, one had to prove vaginal intercourse. Not until the early twentieth century did New York adopt a looser standard allowing the assumption that a man and a woman who were not married and were in the same bedroom had committed adultery. Some states still required suspicious circumstances in addition to opportunity. Only in the 1960s did laws change to allow easier grounds again for divorce. It should be noted that the rise in the divorce rate started in the 1930s, well before this last change.

Another issue to be considered is that of annulments. Annulments were generally favored over divorces in church law, including in the Roman Catholic Church. In the Catholic Church, divorced people were not supposed to receive the sacraments. Laws also sometimes penalized those with annulments less harshly.

Annulments were originally allowed in England for only a few reasons, including that the parties were closely related, that one party was impotent, or that one person had married before.

Law, directly, issues annulments only rarely. The principal circumstances are for two people to be married in a civil ceremony with one promising the other that later they will be married in the second person's church or synagogue, then refusing to carry out that promise. A few states have granted annulments, however, when the marriage itself was never consummated due to failure to go through the religious ceremony.

Religion also enters into law in the state of families after divorce. Courts have generally been unwilling to enforce parts of private divorce decrees that control the religion in which a child will be raised. The parent who has custody is normally allowed total control over the religion of the child, even if the parent had signed documents stating that he or she would raise the child in a certain religion.

Thus, religious attitudes and holdovers from religious law have greatly affected how divorce law still is carried on today, even though this is less true than it was fifty years ago.

See also Gay marriage; Marriage—right to conduct; Religion and attitudes toward marriage historically in the United States

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Donahoe v. *Richards*

38 Me. 379 (1854)

Bible reading was very often a part of the American school day in the nineteenth century. Many Catholics opposed this policy, as the Bible used was generally the King James Bible, not the Douay Bible approved by the Catholic Church. Sometimes riots broke out over the practice, and sometimes the protests were more quiet. In Maine in the early 1850s, one student protested against reading the King James Bible and was expelled from school.

Her father sued on this student's behalf, as did the student. The father's suit was dismissed as the father had no rights, and while the student was able to proceed further, she lost as well. The reasoning used by the Maine Supreme Court was that it was not illegal for the school board to order the reading of the Bible and to expel any student who refused to read from the Bible. It held that this situation was the same as with any student who refused to read a book on the grounds of conscience. The court first held that as the school board was acting in good faith when it set up the laws and expelled the student, the school board could not be held liable as public officials were, at the time, generally given immunity. The court also examined the right of the school board to establish policy and held it to be generally unlimited. If bad books or policies were adopted, said the court, the people had the right to dismiss the board at the next election, and this was the people's sole remedy. The school board's power to force students to follow its orders by threatening penalties up to expulsion for not following the rules was also held to be necessary.

The court was a bit more circuitous in dealing with the religion issue. It first held that no sect was allowed to be promoted, and then held that no sect had been promoted by the selection of the Bible, apparently ignoring the fact that the selection of the version of the Bible supported by Protestants, by its nature, favored Protestantism over Catholicism. The court further stated that other religious texts could also be used, ignoring that only this one was used, and held that since no one was forced to believe in the Bible, no faith was

promoted. Also, this decision stated that allowing this one book to be challenged would open all to challenge, without considering that no other books were likely to be challenged. This endless series of challenges, the court suggested, would interfere with education. Finally, Sunday closing laws and the rejection of witnesses who would not swear oaths was, in the eyes of the Maine Supreme Court, acceptable; therefore, this choice of requiring the King James Version of the Bible to be read was acceptable as well. The court closed by noting that the student was the one favoring one religion over another, not the school, as her faith, in her eyes, gave her the right to challenge books in the schools.

Finally, the Maine Supreme Court viewed education as a huge benefit and one necessary for dealing with the masses of immigrants. Only through the schools could the immigrants be Americanized, and so the schools needed to be supported in their attempts and not restricted, as the court saw the plaintiff doing. This reflected the common anti-Catholic, anti-immigration bias of the day, as large numbers of Irish Catholic immigrants were wrongly stereotyped by the established populations of the country, who often equated their perception of the taint of immigrant poverty directly with Catholicism. The court noted, near the end of its opinion, "large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen. It is the duty of those to whom this sacred trust is confided, to discharge it with magnanimous liberality and Christian kindness" (38 Me. 379: 413). Apparently, though, Christian kindness did not extend to admitting that Catholics might have a point in objecting to being told that their Bible, the core of their beliefs, was the wrong one to use.

See also *Board of Education of Cincinnati* v. *Minor; Lee* v. *Weisman; McCreary County* v. *ACLU*; *School District of Abington Township* v. *Schempp*

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Doremus v. *Board of Education*

342 U.S. 429 (1952)

This case dealt with what was needed before a person could sue over a separation of church and state. If something was occurring in a school that an individual believed was unconstitutional, could that person sue if he or she had no direct involvement with that school? *Doremus* v. *Board of Education* answered the question in the negative.

This case was brought by a parent and another taxpayer (the parent was also a taxpayer) who objected to Bible reading in the public schools. The parent's child, however, had graduated, and so the court, in an opinion written by Justice Jackson, noted that the case was moot. The Court also noted that as the Bible reading could be objected to and the students excused, no injury was proven. As far as the taxpayer's case existed, no injury was stated by those paying taxes, and taxes were not shown to be directly affected by the Bible reading. The Court seemed to be saying that unless the Bible reading cost money that would change the tax levels, taxpayers could not bring suits against the schools for Bible reading. The Court differentiated this case from that of *Everson,* stating "it is true that this Court found a justifiable

Robert H. Jackson was an associate justice of the U.S. Supreme Court from 1941 to 1954. (Library of Congress)

controversy in *Everson* v. *Board of Education*. But *Everson* showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not" (342 U.S. 429: 434). Taxpayers were thus allowed to sue the school only when a direct financial interest was shown.

Justices Douglas, Reed, and Burton dissented, in an opinion written by Justice Douglas. Douglas held that these taxpayers and the parents together had enough of an interest for the lawsuit to be decided on its merits. (This Supreme Court case was only a dispute over whether the lawsuit should be dismissed as not stating a controversy.) Since all of the taxpayers could sue, why not a few, asked Douglas, holding "if all can do it, there is no apparent reason why less than all may not, the interest being the same. In the present case the issues are not feigned; the suit is not collusive; the mismanagement of the school system that is alleged is clear and plain" (342 U.S. 429: 435). He then stated that if New Jersey wanted, they could allow the taxpayers to sue, even if in federal court the suit would not be allowed.

This case, in the area of Bible reading, upheld the right of schools to order Bible readings by default as it prevented the challenge that the parent wanted to bring. It, however, did not rule directly on the correctness of that practice. Not until 1963 would the Supreme Court strike down that practice as creating a violation of the First Amendment.

See also Bible controversy and riots; *Engel* v. *Vitale; People ex rel. Ring* v. *Board of Education; Roberts* v. *Madigan; School District of Abington Township* v. *Schempp; Tudor* v. *Board of Education of Borough of Rutherford*

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Duro v. *District Attorney, Second Judicial District of North Carolina*

712 F.2d 96 (4th Cir. 1983)

In re McMillan

226 S.E. 2d 693 (Court of Appeals of N.C., 1976)

Since the mid-nineteenth century in America there have been compulsory school laws. The laws originally encountered parental objections in the area of religion, in that students were forced to read from a Protestant Bible, even if the student was Catholic, some other non-Christian religion, or not religious at all. Some court challenges in this area were successful

(and others were not), and many Catholics responded by setting up their own schools. In the twentieth century, attempts to force students to attend public schools included such radical acts as the banning of private schools, and these challenges failed. Some parents did not want to send their children to public schools for a variety of reasons. In the *Duro* case, parents objected to the compulsory school laws because of the values they saw being imposed on their children by the schools.

The Fourth Circuit Court of Appeals held for the state and the compulsory school law. Duro claimed that the mandatory attendance law violated his freedom of religion in three different areas. He was opposed to what he called the "unisex movement" that he saw in public schools, as he objected on religious grounds to any movement that made all the boys and girls the same. He also felt the public schools promoted secular humanism (or a secular religion). Finally, he did not want his children to have to interact with the different beliefs that people brought to public school. The district court initially found for Duro on a motion for summary judgment. The district court had used the *Yoder* test, which looked at two things: "(1) whether a sincere religious belief exists, and (2) whether the state's interest in compulsory education is of sufficient magnitude to override the interest claimed by the parents under the Free Exercise Clause of the First Amendment" (712 F.2d 96: 97).

The Circuit Court of Appeals agreed that the test was correct but felt that it was wrongly applied. The higher court argued that Duro, a Pentecostal, was different from the Amish in *Yoder* in that the Amish lived as a separate society and had been doing so in different societies for three centuries. The Amish also allowed their children to be educated in public schools through grade eight, whereas Duro did not want his children to attend any school at all. Duro also was unwilling to enroll his children in any type of an accredited school, and his wife, who had home schooled the children, had not been certified. "Duro has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state" (712 F. 2d 96: 99). Thus, the district court decision was reversed, and the Duro children were required to attend school. A concurrence by Judge Sprouse held that the interest of the state in educating, no matter how stated, did not increase the state's interest in this case and that the state's right to educate needed to be weighed within the First Amendment. Sprouse also noted that the children's rights were not in question here. Thus, Duro had no right to keep his children at home and to home school them in a setting with a teacher of unproven competency, and the compulsory attendance law was upheld.

Besides challenges to the overall effect of public schools, there have also been challenges to what the schools taught. In North Carolina there was a charge of neglect against parents who had kept their children out of school on the basis that the schools did not teach enough Native American heritage. That case was *In re McMillan,* or in the matter of McMillan. The parents were keeping their children out of school because "they were not taught about Indians and Indian heritage and culture" (226 S.E. 2d 693: 105). The children had no other issues of neglect other than being kept out of school, but the court of appeals of North Carolina held this to be enough to create neglect. The parent's rights were said to be different from those in *Yoder,* as a concern for one's heritage was not said to be equal with a religion. Also, "there is no showing that Shelby and Abe McMillan receive any mode of educational programs alternative to those in the public school. There is also no showing that the Indian heritage or culture of these children will be endangered or threatened in any way by their attending school" (226 S.E. 2d 693: 695). On the whole, the court concluded that "it is

fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive 'proper care' and lives in an 'environment injurious to his welfare' when he is deliberately refused this education" (226 S.E. 2d 693: 695). Thus, the court found for the state and upheld the charge of neglect.

One might have thought that the Amish's victory in *Yoder* signified a retreat of the states' power in the area of compulsory education. However, these two cases show that the retreat, if any, was minor, in that one had to be of a separate society, similar to the Amish, or had to be willing to educate the children in a home school with a competent teacher or an accredited private school. Thus, the state still had a strong right in the area of forcing children to be properly educated.

See also *Berg* v. *Glen Cove City School District; Cheema* v. *Thompson; Farrington* v. *Tokushige; New Jersey* v. *Massa; Wisconsin* v. *Yoder*

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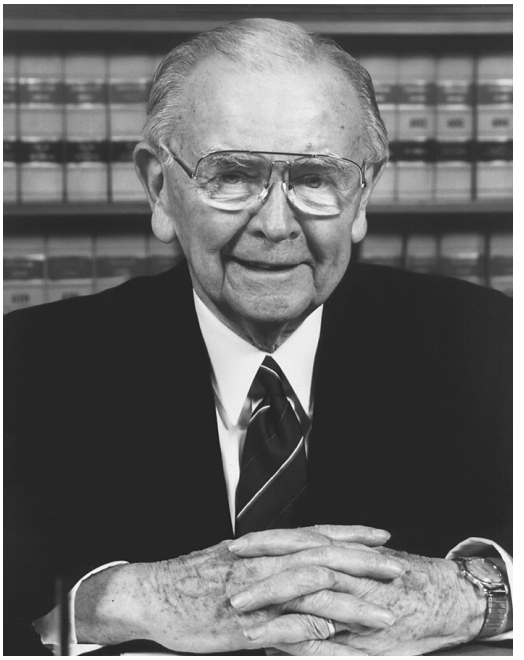
E

Edwards v. *Aguillard*

482 U.S. 578 (1987)

Ever since the Scopes Monkey Trial in 1925, the question of whether a state can ban the teaching of evolution has been answered the same way: no. The Scopes Trial was not a Supreme Court case, and, legally, did not even overturn Tennessee's law banning the teaching of evolution. It was not until 1968 and *Epperson* v. *Arkansas* that the Supreme Court weighed in on the matter, holding that the Arkansas law violated the First Amendment. However, even this ruling has not stopped those opposed to the teaching of evolution, as they have changed tactics. Opponents of evolution have also been helped by the emergence of creation science and intelligent design advocates; the first group argues that science proves the creation story of Genesis and the second group claims that science indicates there must be an intelligent being behind the formation of the world, as it is too complex to have emerged just by chance. Those opposing the teaching of evolution have seized upon these groups and argued that their theories should be given equal time as that of evolution. In 1982, Louisiana passed a law requiring that if evolution were to be taught, creation science must be given equal time and that law was at issue in *Edwards* v. *Aguillard*.



William Brennan was an associate justice of the U.S. Supreme Court from 1956 to 1990 and established a liberal reputation as a defender of individual rights. (Heinen/Collection of the Supreme Court of the United States)

Justice Brennan wrote the opinion for the Court, which was fully joined by four other justices and partially joined by Justice O'Connor. Brennan first surveyed the history of the law in question, the "Creationism Act," and noted that "no school is required to teach evolution or creation science. If either is taught, however, the other must also be taught" (482 U.S. 578, 581). He then held that the three-part *Lemon* test applied, and he defined this test as "first, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion" (482 U.S. 578: 583). While school boards and states are generally given leeway in the area of curriculum and instruction, this is much less true where the First Amendment is concerned.

Brennan then turned to the *Lemon* test and its first prong, the law's purpose. He held that there it had no clear secular purpose, as it did

not advance academic freedom nor did it create a more comprehensive curriculum. The state, however, argued, both in court and in the hearings, that it did have these purposes. Normally a court will defer to a state, so Brennan's decision that the law had no clear secular purpose was controversial. Brennan did look to what the bill's supporters stated and held that "it is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum," as Keith wanted evolution to cease being taught (482 U.S. 578: 587). He also noted that teachers' academic freedom was not advanced. The Supreme Court concluded "thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism'" (482 U.S. 578: 589).

After disagreeing with the legislature's description of what the purpose of the law was, the Supreme Court then looked at the actual purpose of the law. It first noted "there is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution" (482 U.S. 578: 590). From this, and from looking at past cases, the Court determined that "the preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind" (482 U.S. 578: 591). To support this conclusion, they examined testimony from the legislature's hearings and concluded that "the term 'creation science,' as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind" (482 U.S. 578: 592). Thus, the very curriculum that was required, if one taught evolution, had a religious viewpoint. The Court held that "because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment" (482 U.S. 578: 593). The Court also held that summary judgment had been correctly granted at the district court level and so upheld the order of the lower court that this act was unconstitutional.

Justice Powell concurred, joined by Justice O'Connor. Powell first noted the terms of the act and that the legislature did not define either evolution or creation science. Then, by turning to the legislative history, he stated that creation science implies a religious purpose. Powell examined the two main institutions behind creation science, at least as presented to the Louisiana legislature, and noted that both were religious. He concluded that "here, it is clear that religious belief is the Balanced Treatment Act's 'reason for existence'" (482 U.S. 578: 603). Powell then affirmed the general leeway given local school boards to set policy, noting that schools could teach the religious heritage of America, but he also cautioned that religious doctrine could not be advanced, which he believed was happening in Louisiana.

Justice White concurred in the judgment. He noted that lower court's interpretation of statutes was normally accepted and that there was no strong reason here to reconsider the decisions. As this was true, he affirmed the lower court's judgment. He hints that he might have a different reading of the statute's purpose, but that with the lower court's ruling as it did, he had to agree with them.

Justice Scalia dissented, joined by Chief Justice Rehnquist. He held that the Court was ignoring the true purpose of the act and substituting its own beliefs for the claimed purpose of the act as stated by the legislature. He commented that "the question of its constitutionality cannot rightly be disposed of on the gallop, by impugning the motives of its supporters" (482 U.S. 578: 611). Scalia then turned to what some scientists said, and held that only science was being discussed here, at least arguably, and so "at this point, then, we must assume that the Balanced Treatment Act does not require the presentation of religious doctrine" (482 U.S.

578: 612). Scalia argued that for a law to be struck down under the first part of the *Lemon* test, its "sole motive" must have been "to promote religion" (482 U.S. 578: 614). Scalia also held that acting on religious motives was acceptable as long as the goal was not to advance religion. He held that acting according to religion was sometimes needed as "today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims" (482 U.S. 578: 615). Scalia also held that neutrality with regard to religion was needed and that the government could act to bring this about.

Scalia then turned to the purposes, as he saw them, of this act. About the legislature, he noted "the vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their wisdom in believing that purpose would be achieved by the bill, but their sincerity in believing it would be" (482 U.S. 578: 621). He then commented how reputable witnesses testified as to the two different "origins of life" and how "both posit a theory of the origin of life and subject that theory to empirical testing" (482 U.S. 578: 622). As both had science behind them, and as, according to the witnesses heard in the legislature, "creation science is educationally valuable" (and not being taught then), the legislature had an educational goal in this bill (482 U.S. 578: 623). Scalia accepted (or at least argued that the Court should accept) at face value the bill's supporters' statement that religion was not the purpose of this act. He therefore would have allowed it. He also surveyed the evidence on academic freedom and found enough evidence there to support it as a purpose of the bill. Scalia even held that if most legislators wanted to advance religion, that might be acceptable. "In sum, even if one concedes, for the sake of argument, that a majority of the Louisiana Legislature voted for the Balanced Treatment Act partly in order to foster (rather than merely eliminate discrimination against) Christian fundamentalist beliefs, our cases establish that that alone would not suffice to invalidate the Act, so long as there was a genuine secular purpose as well" (482 U.S. 578: 633–634).

Scalia also had a direct attack on the whole "purpose" part of the *Lemon* test. He noted that the purpose part has produced a "maze" of conflicting rulings. He also said "to look for the sole purpose of even a single legislator is probably to look for something that does not exist," and so to determine the purpose of the overall legislature is truly impossible (482 U.S. 578: 637). Scalia went back to the First Amendment and held that the purpose test was not necessary as it was not supported by the text of that amendment. In closing, he commented that "abandoning *Lemon*'s purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and, as today's decision shows, has wonderfully flexible consequences—would be a good place to start" (482 U.S. 578: 640).

The attempt of the Louisiana legislature to require equal treatment for the teaching of creation science, for whatever purpose it was attempted, was struck down by the Supreme Court. Since that time, few legislatures have tried to ban the teaching of evolution or to require equal treatment. This has not stopped those arguing for a teaching of creation science, or for those advocating intelligent design, which does not hold for a scenario, however well scientifically supported it might be, that mirrors the first chapter of Genesis in the Bible. Intelligent design instead argues and posits scientific evidence for the existence of higher intelligence in the universe's creation. It contends the world is too complex for that intelligence not to exist and various things are complex enough, or designed enough, to demonstrate that. School boards and state curriculum committees have sometimes required some treatment of these and, more often, particularly with the increased need for testing after President George W. Bush's No Child Left

Behind program, have often left the issue of evolution out of the state-mandated list of subjects that must be taught. Thus, the battle between those opposed to, and those favoring, the teaching of evolution continues to itself evolve, even while direct statewide laws like the one in *Edwards* v. *Aguillard* are less common.

See also Avoidance of the issue of evolution in many teaching standards; *Crowley* v. *Smithsonian Institution; Epperson* v. *Arkansas; Peloza* v. *Capistrano Unified School District; Scopes* v. *Tennessee*/ Scopes Monkey Trial

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EEOC v. *Kamehameha Schools/Bishop's Estate*

990 F.2d 458 (9th Cir. 1993)

This decision dealt with whether a private school could require that all of its teachers be Protestant. Title VII of the 1964 Civil Rights Act generally prohibited this. Bishop had been a member of the Hawaiian royal family and had left part of her estate to form two schools, the Kamehameha schools. One stipulation was that the schools employ only Protestant teachers. A non-Protestant teacher applied and was informed of the requirement. He contacted the Equal Employment Opportunity Commission (EEOC), who sued. The case reached the Ninth Circuit Court of Appeals, which found for the EEOC.

Judge Browning wrote the decision. The schools had claimed exemption on three grounds, all of which had been granted by the district court. The grounds were that this was a "religious . . . educational institution," that being Protestant was a "bona fide occupational qualification" for the position, and that the curriculum of the school was directed at Protestants and so hiring Protestants only was allowed (990 F.2d 458: 459).

The Ninth Circuit reviewed each of these in turn. They first held that the school was mostly secular and was not sufficiently affiliated with the Protestant religion. No particular Protestant denomination had ever owned the school, and the estate itself was mostly secular. The purpose of the school was not to teach religion but to teach ethics, and the student body itself was not overly Protestant. The teachers were Protestant, as was required, but active Protestant membership was not required. The students were required to fulfill a "limited religious education requirement" (990 F.2d 458: 463). Reflecting all of these factors, the court held that "we conclude the Schools are an essentially secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not primarily religious" (990 F.2d 458: 463–464).

The court then turned to the question of whether the school itself was aimed at increasing the Protestant religion, which would have justified an exemption. The court noted that there were few previous decisions on this point, so it was covering new ground. However, the court noted "the curriculum of the Schools has little to do with propagating Protestantism," and so held that the school did not qualify.

The court finally turned to the question of whether being a Protestant was a "bona fide occupational qualification. [BFOQ]." They first noted that in order for it to qualify as such, being Protestant must be essential for job performance. The court then surveyed the trial record, the job in question, and the general range of jobs done at the school and concluded, "Except for the Schools' religious education teachers (as to whom Protestant affiliation is conceded to be a BFOQ), teachers at the Schools provide instruction in traditional secular subjects in the traditional secular way. There is nothing to suggest that adherence to the Protestant faith is essential to the performance of this job" (990 F.2d 458: 466). Thus, Protestantism was not held to be a bona fide occupational qualification. It was suggested that keeping the teachers Protestant was required to abide by the wishes of the will, but the court held that "the fact that the Protestant-only requirement appears in Mrs. Bishop's will cannot in itself alter the result" (990 F.2d 458: 466).

For all these reasons, the court held that the school could not require that its teachers be Protestant. The law since has largely continued this trend, but few schools have such an explicit statement in their charter that are not also religious schools aimed at increasing, or at least limited to, their faith. The basic point of this case has continued, though, that mere preference, however forcefully stated, for people of one religion does not create a right to hire only those of that religion, and prior practice does not make discrimination legal. While there are exemptions, the exemptions are narrowly drawn and past practice does not make one fit into those exemptions.

See also *Corporation of Presiding Bishop* v. *Amos; Farrington* v. *Tokushige; Lemon* v. *Kurtzman; Ohio Civil Rights Commission* v. *Dayton Schools*

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Elk Grove Unified School District v. *Newdow*

542 U.S. 1 (2004)

The Pledge of Allegiance is something that most American schoolchildren have said at one time or another, but relatively few have thought much about it. Many students stop saying it at the elementary level, and many fewer elementary students question their teachers than at higher school levels. Students are also, in general, taught to conform, and all of these factors mean that few students question the pledge. However, legal challenges to the pledge nonetheless stretch back to World War II and before, as Jehovah's Witnesses challenged the pledge on the grounds that it forced them to salute a graven image, an action banned by their religion. In 1943, the Supreme Court reversed an earlier ruling and held for them. In 1954, Congress added "under God" to the pledge to differentiate the United States from the "godless communists" of the USSR. After the United States won the Cold War and the USSR dissolved, the phrase remained. A father, Michael Newdow, objected to his daughter saying the pledge, as he believed the phrase created an establishment of religion, which would be illegal under the First Amendment. The case made it all the way to the Supreme Court, but a technicality ultimately allowed the Court to defer judgment on this issue.

Justice Stevens wrote the opinion, which was joined by Justices Kennedy, Souter, Ginsburg, and Breyer (Justice Scalia did not participate in the case). Stevens first held that the Court "conclude[s] that Newdow lacks standing" (542 U.S. 1: 5). He reviewed the history of the pledge and California's requirement that it

Michael Newdow, plaintiff in Elk Grove Unified School District *v.* Newdow *(2004), enters the U.S. Supreme Court on March 24, 2004. Newdow challenged the constitutionality of the phrase "under God" in the Pledge of Allegiance. (Mannie Garcia/Getty Images)*

be recited in each elementary school. Note that "the School District permits students who object on religious grounds to abstain from the recitation" (542 U.S. 1: 9).

Stevens then turned to the issue of standing. He noted that the Supreme Court has long had a history of not deciding constitutional issues unless they must, and he defended this policy since "the command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by 'a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision'" (542 U.S. 1: 15). The Court then noted that the person suing must have suffered an injury, and that generally the whole issue of custody is left to the states. At issue here was whether Michael Newdow had enough of an interest, legally, in his child, as the child's mother had custody. Newdow claimed that even though he did not have custody, he still had the "right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive" (542 U.S. 1:

22). The Court held that though Newdow had a right to discuss his religious beliefs with his daughter, he did not have a right to control what others said to her about religion, which in this case the custodial parent would have. This meant he did not have standing, and as the girl's mother was actively fighting her ex-husband's right to sue on their daughter's behalf, that ended the case for the majority.

Justices O'Connor and Thomas along with Chief Justice Rehnquist concurred in the judgment, which meant that they agreed with the Court's decision but not with the method by which the judgment was reached. Rehnquist wrote the opinion and first turned to the issue of standing. He held that the Court in the past had not gone into issues of family law only by disallowing standing in family law cases in very limited circumstances. (Rehnquist would have deferred to the Ninth Circuit, which he held as being more knowledgeable about California law, and which had granted standing to Newdow, and so Rehnquist would have granted standing.)

He turned to the issue of the pledge. Rehnquist made an interesting comment early in his discussion. "To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, 'under God' might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation" (542 U.S. 1: 41). Thus, Rehnquist admitted having an unclear grasp on what people think the phrase means. Rehnquist, though, was more concerned with the past than the present and cited many examples in which past presidents and other public figures had discussed and used "God" in public addresses and proclamations. From this he concluded, "All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character" (542 U.S. 1: 47).

Rehnquist then turned to whether the pledge was constitutional. He held "I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious exercise.' . . . Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase 'under God' is in no sense a prayer, nor an endorsement of a religion, but a simple recognition of the fact noted in [a House resolution]. . . . From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church" (542 U.S. 1: 49–50). The difference between a religious exercise and a pledging of fidelity to a nation under God (and one that was "founded on a fundamental belief in God") is not discussed. Rehnquist also argues that it is patriotism that is encouraged here, not religion, and asks where the line will be drawn with people objecting to the pledge. He states, "There may be others who disagree, not with the phrase 'under God,' but with the phrase 'with liberty and justice for all'" (542 U.S. 1: 51). Rehnquist does not state what the objection would be and whether that objection would be based in religion, but feels that such an objection should not be acceptable. He concludes, "The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they choose to do so. To give the parent of such a child a sort of 'heckler's veto' over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase 'under God,' is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of

prohibiting a commendable patriotic observance" (542 U.S. 1: 52).

Justice O'Connor also concurred in the judgment. She argued that often a reasonable observer standard was used in cases in which the issue being contested was whether a government action created an endorsement of religion. However, here she felt that such a standard was unworkable. She then argued that references to religion were acceptable in some circumstances. She reminded the Court of her past rulings, holding "I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes," and so are acceptable (542 U.S. 1: 56). She also held that such references are acceptable when they "can serve to solemnize an occasion instead of to invoke divine provenance" (542 U.S. 1: 58). O'Connor looked at four factors in allowing the phrase. First among these was its history. "Under God" had been in the pledge for fifty years and widely used and rarely challenged. Second, she argued that no prayer exists in the Pledge of Allegiance. Third, she argued that no particular religion (other than one favoring a god rather than anything else, and O'Connor notes this) is promoted. And fourth, she observed that only a small part of the pledge discusses God.

Justice Thomas also concurred and argued that this was the time to start rethinking the whole issue of the First Amendment's establishment clause. He argued that it should never have been used to limit the states. He wrote, "It makes little sense to incorporate the Establishment Clause" (542 U.S. 1: 81). The rationale he gave is "the text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments" (542 U.S. 1: 80–81). Thus, Thomas used this case to launch a call for a reconsideration of a doctrine settled for nearly a century. Since 1925, *Gitlow* v. *New York,* the establishment clause has been applicable to the states. Thomas, Rehnquist, and O'Connor would have all allowed the case to be heard and would have voted in favor of the pledge.

The Supreme Court here, on a 5–3 decision, denied standing to Newdow. Five justices believed that Newdow did not have standing, and three more thought the pledge should be upheld. Thus, all eight justices agreed that the Ninth Circuit Court of Appeals ruling, striking down the pledge, needed to be reversed. With the narrow division of the Court, the issue is sure to remain in the press. After the *Newdow* ruling, other groups and Newdow himself, moved to file (and re-file) challenges to the law with clearer meetings of the standing issue. Thus, this is surely not the last that the nation will hear of the pledge and its relationship to the First Amendment.

See also *Engel* v. *Vitale; Gitlow* v. *New York; Lee* v. *Weisman; Lemon* v. *Kurtzman;* Saluting the flag

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Employment Division v. *Smith*

494 U.S. 872 (1990)

Laws that directly prohibit religious practices and only religious practices are clearly laws prohibiting the free exercise of religion. For instance, a law banning only Catholics (or any other religion) from drinking wine would result in an easy case for a court to decide. However, laws that are general in nature but ban practices integral to a religion make for harder court cases. Such a law was in question in the case of *Employment Division* v. *Smith*.

This case arose in Oregon and is sometimes referred to as *Oregon* v. *Smith*. Oregon law banned those who lost their jobs as a result of work-related misconduct in getting unemployment compensation. Two workers at a drug rehabilitation unit lost their jobs because of the use of peyote in a religious ceremony. Using peyote was banned under state law, even though ceremonial use of it was required by some Native American religions. Thus, while there were legal grounds for the dismissal, the workers felt they had had religious justification to sue for unemployment benefits. The case actually came before of the U.S. Supreme Court twice, once in 1988, when the Court returned the case to the state courts, and again in 1991, when the Supreme Court declared that the ban on peyote was acceptable and the workers were not due any unemployment benefits.

Originally, the state court of appeals reversed the ban on the unemployment compensation as a restriction of the men's First Amendment rights. The Supreme Court in 1988 sent the case back to the state supreme court (which had upheld the state court of appeals) in order for the state courts to determine whether state law banned the use of peyote in religious services. The state supreme court held that it did but also held that the law violated the First Amendment.

The final U.S. Supreme Court opinion was written by Justice Scalia. Scalia first surveyed the history of the case and then turned to previous Supreme Court decisions. He differentiated between religious belief, which cannot be controlled, and religious acts, which sometimes can. Scalia reminded the Court that, in general, "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (494 U.S. 872: 878–879). He went further and held that general laws have been restricted only in specific circumstances. "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" (494 U.S. 872: 881).

Scalia then addressed the issue of what test to use in order to evaluate the law banning peyote, including its religious use, since such laws are generally considered acceptable. Those opposing the law suggested the *Sherbert* test. "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest" (494 U.S. 872: 883). Scalia declined to use the *Sherbert* test in challenges to generally applicable laws, thus overruling *Sherbert*. Scalia argued that this test would create "a private right to ignore generally applicable laws" and so was not acceptable (494 U.S. 872: 886). The Court feared "the rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind" (494 U.S. 872: 888). Scalia held that states could create exceptions for peyote use but were not required to do so.

Justice O'Connor concurred in the judgment. Justices Brennan, Marshall, and Blackmun agreed with most of her opinion but did not concur in the judgment. O'Connor argued that the majority was incorrectly reading the precedents. She first held that a "law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion" (494 U.S. 872: 893). She disagreed with the decision not to use the *Sherbert* test, instead holding that "once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' . . . or represents 'the least restrictive means of achieving some

compelling state interest' " (494 U.S. 872: 899). She also stated that the test had been used recently, disagreeing again with Scalia.

O'Connor then went on to use that test. She first noted that religious conduct was significantly affected by the ban on peyote and that the state of Oregon had a "significant" interest in banning the use, and thus the *Sherbert* test allowed Oregon's practices. After looking at the dangers of peyote and the reasons for the ban, O'Connor held that "I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct" (494 U.S. 872: 906). She also held that just because other states had granted exemptions did not mean Oregon had to do so.

Justices Blackmun, Brennan, and Marshall dissented. They first argued against the elimination of the compelling interest test, holding that "this distorted view of our precedents [by the majority] leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, . . . and that the repression of minority religions is an 'unavoidable consequence of democratic government.' . . . I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance" (494 U.S. 872: 908–909). They then went on to apply the compelling interest test. They argued that what must be weighed is not the state's right to ban peyote versus the religious rights of the Native Americans, but the state's right to refuse to make an exception to the ban versus the religious rights. The dissenters held that no adequate justification for the refusal, using the compelling interest standard, had been made. The dissenters argued that religious use had not been proven to be harmful and noted that the federal government allows a religious exemption. The dissenters also explained that the Native American religious authorities had regulated the use of peyote and noted some of the positive effects of the use of peyote in religious ceremonies. They also stated there was very little illegal traffic in peyote, as the "total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds" (494 U.S. 872: 916). The dissenters finally argued against the majority's claim that allowing an exemption for this would create a request for exemptions to every law by noting that the other states (and the federal government), which had allowed religious exemptions, had not been similarly flooded.

The Supreme Court upheld Oregon's ban on peyote and the denial of unemployment benefits. The larger implication of this case was that for generally applicable laws outside the area of unemployment (note that the law ultimately challenged here was outside the unemployment area even though unemployment compensation was still banned), the compelling interest test, which required the government to prove a compelling interest before affecting religious freedom, is no longer in effect. The government must only prove a rational basis for its laws. Thus, religious freedom no longer had the protection, deserved or not, that it arguably had before when generally applicable laws are concerned. Congress tried to restore the compelling interest test in 1993 when it passed the Religious Freedom Restoration Act, which basically told the Supreme Court to use the *Sherbert* standard, but the Supreme Court disagreed. In *Boerne* v. *Flores,* it struck down the Religious Freedom Restoration Act, and the issue of exactly what standard (and test) to use continues to be debated in the courts and legislatures.

See also *Boerne* v. *Flores; Braunfeld* v. *Brown; Cheema* v. *Thompson; Gonzales* v. *O Centro Es-*

pirita Beneficiente Uniao Do Vegetal; Religious Freedom Restoration Act of 1993; *Sherbert* v. *Verner*

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Engel v. *Vitale*

370 U.S. 421 (1962)

Most of the original colonies had governmentally sanctioned churches and discriminated willingly against certain religious minorities. Most canceled their official churches when they became states or relatively soon after that. This did not mean, however, that they ceased to promote religion or belief in a Western God. In the twentieth century, one of the original colonies, New York, had a state-created prayer that was mandated in all public schools; pupils who wished could opt out, and the prayer was relatively neutral in relationship to specific religions. In 1962 the Supreme Court determined this prayer was not constitutional.

Justice Black wrote the opinion for the Court. He noted that the prayer said "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (370 U.S. 421: 422). After surveying the course of the legislation, Black moved quickly to the Court's decision holding "we think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause" (370 U.S. 421: 424). He held that it was not the place of government to create prayers.

Black then turned and considered the history of America. He noted that controversies over a type of prayer drove many from England and that colonists nonetheless tried to establish a state prayer. By the time the Constitution was written, however, in Black's view, America's citizens had learned the error of their ways and so passed the First Amendment. He said, "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say" (370 U.S. 421: 429). Black noted that as the prayer was neutral and voluntary, it might be acceptable under the free exercise clause, but it still created an establishment of religion, which was prohibited. He believed the First Amendment removed religion from the purview of government. "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" (370 U.S. 421: 431–432). He held that "the New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself" (370 U.S. 421: 433).

Black then turned to the arguments of those opposed to this decision who supported the prayer. He first dealt with the argument that banning school prayer represented an opposition to religion and stated "nothing, of course, could be more wrong" (370 U.S. 421: 434). He believed banning the prayer preserved each individual student's right to the

freedom of religion. He surveyed the reason that religious men of the past had written the First Amendment and fled from prosecution, and concluded "it is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance" (370 U.S. 421: 435). For these reasons, Black felt quite justified in overturning the state prayer as a violation of the establishment clause of the First Amendment.

Douglas concurred with the decision. He argued that any government financing of religion is unconstitutional, going further than Black, who limited his ruling to school prayer. As any financing was unconstitutional, the school prayer was unconstitutional too, even though it took only a small amount of time and was voluntary. Douglas perhaps here uttered one of the better defenses of the absolutist philosophy in the area of freedom of religion, something his fellow justice Black would often do in the area of freedom of speech.

Justice Stewart dissented. He argued that "with all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation" (370 U.S. 421: 445). Stewart thought that the history of England and the early history of America was irrelevant, and that "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government" was the most important thing to consider (370 U.S. 421: 446). He reviewed a few of those practices and closed by saying, "Countless similar examples could be listed, but there is no need to belabor the obvious. It was all summed up by this Court just ten years ago in a single sentence: 'We are a religious people whose institutions presuppose a Supreme Being.' . . . I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an 'official religion' in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation—traditions which come down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world" (370 U.S. 421: 450). Stewart made the opposing argument to the school prayer case that has been made ever since, that America is a religious nation, and a prayer, when voluntary, merely recognizes this. However, his argument was not enough to carry the day. He did not address the apparent contradiction of his accepting the founders' reliance upon divine Providence with his rejection of their motives behind creating the establishment clause.

The Supreme Court has never seriously reconsidered a school prayer case since *Engel*. In other words, decisions since *Engel* have allowed or disallowed prayers in certain situations, but the overall ban on prayers to start each day has stayed put. That does not mean that it has been without controversy, however. Many politicians have campaigned against the "Godless" Supreme Court who took prayer (and God) out of the classroom and started America down the road to wrack, ruin, and the end of Western civilization. A decision in 1963 removing Bible reading from the classroom further increased the ire of these groups. One note to be made here: even though New York claimed that the prayer did not put God into the classroom (as that would have been an establishment of religion), many of those who have opposed the decision have based their opposition on an argument that it took God *out* of the classroom. Interesting how

the decision removed something that supposedly was not there. Congress also made itself heard on the whole issue of school prayer, offering amendments on the issue in nearly every single (if not every single) session since 1962. Most have not reached the floor for a vote, and those that did fell short of passage, with the closest one falling nine votes short in the Senate (or about 10 percent) in the 1960s.

The battle moved from a mandated prayer (with an option for exceptions) to a moment of silence in the 1980s. The idea was that a moment of silence was not the same as prayer and so would be constitutional. Justice Brennan, in a concurrence to a 1963 Bible reading case, *School District of Abington Township* v. *Schempp,* noted that there were many ways that schools could secularly do some of the things that prayer was supposed to do including increasing discipline, and one of the ways he suggested was a "moment of reverent silence" (374 U.S. 203: 281). Some of the moment of silence legislation has come closer to promoting prayer, in many people's eyes, than others, and it was one of these cases that made it to the Supreme Court in 1985 in *Wallace* v. *Jaffree.* That case challenged legislation written in 1978 and amended in 1982 to change it from being legislation just allowing a moment of silence to one allowing that moment for "silence or prayer." The Supreme Court struck this amended law down as an endorsement of religion. Another issue of prayer is prayer at individual events, such as football games and graduations. Courts have divided on whether a prayer at a football game is constitutional, but in 1992 the Supreme Court struck down a prayer at a graduation. Thus, in general, the Court continues to follow the line of thought begun in *Engel,* that prayer at school functions and in the school day is generally unacceptable, but this has not ended criticism of that decision, nor has it ended attempts by politicians to allow prayer in schools. Nor will the *Engel* decision end the continuation of all three of these trends for the foreseeable future.

See also *ACLU of Kentucky* v. *McCreary County; Lee* v. *Weisman; McCreary County* v. *ACLU*; *Santa Fe Independent School District* v. *Doe; School District of Abington Township* v. *Schempp; Wallace* v. *Jaffree*

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Epperson v. *Arkansas*

393 U.S. 97 (1968)

The battle over teaching evolution in public schools first received national prominence with the 1925 Scopes Monkey Trial. It is often thought that, even though the state of Tennessee upheld its law against teaching evolution, the forces of progressivism won that trial and answered the question over whether to teach evolution with a yes for all time. That, however, is misleading in that although the larger public saw Scopes and his allies winning, many in the South and in the areas favoring the ban on the teaching of evolution saw the trial as an attempt by outside forces to control their destiny. Generally, those seeking to restrict evolution sought to control local school boards and write policies that effectively eliminated evolution in actuality, even if they did not do so in their specific verbiage. However, some of the statewide bans created in the *Scopes* era remained in actual policy, and it was one of these bans that was challenged in *Epperson* v. *Arkansas.*

The Arkansas ban was passed in 1928, three years after the Scopes Trial. It made it "unlawful

Susan Epperson, plaintiff in Epperson *v.* Arkansas *(1968), challenged the state's ban on teaching evolution in schools. (Library of Congress)*

for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory" (393 U.S. 97: 98–99). The Supreme Court, in an opinion by Justice Fortas, noted that only Mississippi and Arkansas had similar statutes remaining in force and that there were no prosecutions, as best can be told, under their act. The Court, after reviewing the litigation, held that "the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group" (393 U.S. 97: 103).

Justice Fortas then turned and reviewed the legal doctrine of the First Amendment. He noted that the government was supposed to be neutral in the area of religion, and that the Court generally was wary of intervening in religion. However, he held this to be an easy case, as here the state was clearly shaping the curriculum to fit the ideas of one religion. The Court held, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence" (393 U.S. 97: 107–108). Fortas closed by saying that "Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read" (393 U.S. 97: 109).

Justice Black concurred. He first doubted that this case should even be in front of the Supreme Court, stating that the law had never been enforced, among other things. Black noted that the statute was very vague, so vague that he thought it impossible to define it enough to decide whether it violated the First Amendment. Black wanted to strike it down on the basis of vagueness. He stated that Arkansas should have the right to remove evolution from the curriculum but not on the basis of religion, and he felt the law was too vague to stand. Justice Harlan also concurred. He thought it was clear that the statute created an establishment of religion, but he felt the majority opinion delved too far into free speech in its logic.

Justice Stewart also concurred. He focused more on the potential criminal penalty for the teacher demanded by the law, not the ban on evolution. He stated that the ban on the mention of evolution infringed upon the teacher's right of free speech, if the ban was in fact cre-

ated by the statute. (The Arkansas Supreme Court had upheld the statute, but refused to give it any concrete meaning, thus leaving a great deal of vagueness in the statute.) As the law was so vague, Stewart voted to overturn it on this basis.

The Arkansas statute was struck down by the Supreme Court here and Arkansas made no direct effort to resurrect it. The days of directly banning evolution were past. Those forces opposing evolution turned their efforts into three different avenues. One was to require teachers to spend equal time on evolution and on ideas that were in accordance with fundamentalist Christianity, whether those be creation science or intelligent design. Creation science argues that science supports the first chapter of Genesis and an earth that is only 6,000 (or so) years old. Intelligent design argues that the universe is too complex to not have some higher intelligence designing it, without delving into God's edicts and beliefs. One type of this law was struck down in *Edwards* (1987), but that did not stop other attempts. A second strategy, noted before, is to control school boards. The third is to rewrite the state standards (which mandate what students will learn, and, more recently, what they will be tested on) to eliminate the issue of evolution, or to require "equal time" between evolution and other theories. Thus, clearly, the idea that the Scopes Trial ended the debate over evolution is a false one.

See also Avoidance of the issue of evolution in many teaching standards; *Crowley* v. *Smithsonian Institution; Edwards* v. *Aguillard; Paloza* v. *Capistrano Unified School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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Equal Access Act of 1984

The Equal Access Act of 1984 aimed to force schools to grant equal access to their facilities to religious student groups. Instead of trying to overturn a Supreme Court case, like much federal legislation recently has done, it instead aimed to reinforce a Supreme Court case. In 1981, the court, ruled in *Widmar* v. *Vincent* that a university, in this case the University of Missouri at Kansas City, could not deny a religious group use of its facilities as the facilities were considered public, and it allowed groups not involved with religion to use those facilities. The grounds were two: first, that the university violated the students' First Amendment rights by interfering with their freedom of religion, and second, that the university would become overly entangled with religion by having this exclusion. Congress decided to reinforce this Supreme Court ruling with legislation, and that legislation became the Equal Access Act of 1984.

The Equal Access Act had several portions and provisions. In its portion most directly relevant to the act's purpose, it held, "it shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." The act stated "a public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." These groups, however, could be restricted if the school chose to ban all such groups. If all groups were banned, the school would have created a nonpublic forum, not a limited open forum. The groups also had to be "voluntary and student-initiated," and school personnel could not lead

the groups, but could be present, and "non-school persons" could not "regularly" participate in the activities. There were also a couple of overriding educational concerns inserted. First, the act held that meetings of these groups should "not materially and substantially interfere with the orderly conduct of educational activities within the school," and second, the act held that "nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."

The Equal Access Act of 1984 was prompted by a number of concerns. First, many conservative and religious groups felt that religious groups had, in some communities, been forbidden to use school facilities, and some of these groups felt that the decision to forbid them had been based on the religious nature of their activities. They desired equal access to those facilities, and they felt that this act helped them gain that. Second, many school boards were in somewhat of a quandary. If they allowed religious groups, those who were atheists or of faiths that did not have groups at that school might feel slighted and sue, accusing the board of promoting religion. If they did not allow religious groups, then the religious groups might *all* sue. Of course, there was also the question of what religious groups to allow, and there were no guidelines on any of these matters in general federal law. A related question was what level of involvement a teacher or other employee might have. Some school districts took a cue from the *Engel* v. *Vitale* case that banned school prayer and assumed that all religion was banned. Conservative groups wanted to end these concerns of school boards and encourage the boards to allow religious groups. A third issue prompting the act was, of course, the Supreme Court's statement of approval in *Widmar* v. *Vincent,* a decision Congress wanted to reinforce. A final concern prompting the act was the general increase in religious fervor of the early 1980s as the Moral Majority gained in power, and these groups felt morally compelled bring religion into schools. A school prayer constitutional amendment did not gain enough votes in the U.S. Senate to be passed along to the states, and religious groups thought that the Equal Access Act would be a good first step. President George W. Bush has taken a second step with his support for faith-based initiatives designed to support monetarily faith-based and community-based organizations helping those in need. As a direct response, when a government agency like the Environmental Protection Agency (EPA) awards a contract, it must now, in addition to stating whether it considered an African American, woman-owned, or other minority business, state whether it considered a faith- or community-based organization for the contract.

This act has not always had the overall effect that the religious groups wanted, however. Some school districts have decided to simply ban all noncurriculum-related clubs, allowing curriculum-related activities, like band or athletic competitions, but banning noncurriculum-related clubs such as Scout groups and Bible studies. Thus, even though the act was passed, in some schools, student activities actually decreased rather than increased, and religious groups were still not allowed to meet. Additionally, some groups that the religious right might not have anticipated used this act to their advantage. As the act went beyond religion and also forbade discrimination on the "political, philosophical, or other content of the speech" used by the group wishing to meet, some underrepresented groups, including gay and lesbian, atheist, and Goth groups, have also sued to meet, using the Equal Access Act as justification.

One case, *Colin* v. *Orange Unified School District* (83 F. Supp. 2d 1135 Central District of California, 2000), upheld the right of the Gay-Straight Alliance Club to meet. Thus, many different groups, not just religious ones, have benefited from this legislation. Whether the

school district as a whole benefited from the legislation might depend on your view of the school board and the view of the group.

The overall effect on religious and other groups is statistically difficult to measure. Some high schools allowed groups such as Youth for Christ and the Fellowship of Christian Athletes to meet even before passage of the Equal Access Act, and this act may have had little effect in those schools, other than encouraging the retention of these groups. Other high schools may have been affected in their facility use policies by factors unrelated to religion, such as the availability of transportation for distant students to and from after-school activities. Few schools have acted to ban all activities as a solution, and so there has been little negative effect in that way. Some have, however, as mentioned, banned all noncurriculum-related clubs.

One Supreme Court case testing the Equal Access Act was *Board of Education of the Westside Community Schools* v. *Mergens.* In that case, a Nebraska high school prohibited the establishment of a religious club even while allowing other clubs. The Supreme Court held that the Equal Access Act was constitutional and did not violate the establishment clause by forcing the allowing of religious clubs, if other clubs were allowed. Six justices held that the school did allow noncurriculum-related clubs, and so had to allow the religious club. The justices differed on whether school officials had to follow the Equal Access Act in terms of how much they should dissociate themselves from the religious groups in question. Only one justice dissented, and he (Justice Stevens) thought that the Court was giving a broader effect to the Equal Access Act than it admitted. He argued, "Can Congress really have intended to issue an order to every public high school in the nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not" (496 U.S. 226: 271). Stevens felt that the high school had created a much more limited forum than the Court had intended, and that "an extracurricular student organization is "noncurriculum-related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views" (496 U.S. 226: 271). As the religious group did those things, Stevens felt it could be banned if the high school allowed no other such clubs, and he felt that Westside had not. The majority found that clubs such as service clubs and chess clubs were noncurriculum-related, and Stevens disagreed. The Supreme Court in *Mergens,* therefore, upheld the Equal Access Act and ordered the school in question to allow the religious club, with only one dissenting justice.

The Equal Access Act does not answer all questions of religion, nor, by any stretch, does it argue that religion must always enter the schools. For instance, it does not allow school prayer on a daily basis, and, even after this act's passage, the Supreme Court ruled unconstitutional prayer at graduation in *Lee* v. *Weisman.* The Supreme Court has upheld the Equal Access Act, and Congress, by all signs, appears to be continuing its support of that legislation. However, there are few, if any, wide-scale studies on the act's effect on the level of student involvement as a whole or the general treatment of religious groups, never mind more curriculum-related issues such as student performance or retention. (One might argue, of course, that since religious clubs are noncurriculum-related clubs, by definition, curriculum issues such as these do not matter.) More religious speech as a whole occurs in high schools, especially after hours, due to this act, but the exact effect is difficult to measure.

See also *Board of Regents of the University of Wisconsin System* v. *Southworth et al.; Good News Club* v. *Milford Central School; Good News/Good Sports Club* v. *School District of the City of Ladue; Lamb's Chapel* v. *Center Moriches School District; Lee* v. *Weisman; Rosenberger* v. *Rector and Visitors of the University of Virginia; Widmar* v. *Vincent*

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Equal time laws

Equal time laws are one of the multitudinous twists in state laws dealing with the controversial topic of evolution. Equal time laws are of two kinds: they can either require that something else be taught alongside evolution and that both be given equal time, or they can require that *if* evolution is taught, other explanations, the nature of which are usually specified, be given equal time (but the laws of the second type do not require that both be taught). Very often in both incarnations, evolution's critics or intelligent design programs are used alongside evolution in the classroom.

Equal time laws have two very different purposes. The first is their stated purpose, which is to allow students to access a plurality of viewpoints in the classroom in order to decide for themselves. The second, unstated purpose for many people who sponsored these laws is to get Christianity and, for some, especially fundamentalist Christianity, into the classroom.

Creation science used to be the favored theory to teach alongside evolution, and, although this has dwindled even as equal time laws gained in popularity, it still remains in place in some schools. Creation science holds that there is scientific proof that backs up the idea of a quick creation resembling the seven-day account in Genesis. Many groups behind creationism and creation science require belief in God and belief in the literal truth of Genesis before allowing membership. One example of this is the Creation Research Society. A good example of one of the more famous equal time laws is the one challenged in *Edwards* v. *Aguillard,* a case that reached the Supreme Court in 1987. Indeed, the Supreme Court struck down the act, as it felt its requirement that creation science be given equal time if evolution was taught promoted religion, in spite of the enacting legislature's protests to the contrary.

More recently, intelligent design has been the favored theory to teach alongside evolution. Intelligent design argues that humanity and nature are too complex to have come about by chance and that they must have an intelligent creator. It is, in many ways, simply the same argument as the one behind creation science, but wearing new clothing. Equal time acts attempt very often to use science, often dubious science, to defeat evolution. Groups supporting them rarely acknowledge the possibility that evolution may not preclude Christian theories of creation. The acts are created in retaliation against the perceived threat evolution represents to biblical discussions of nature. Their arguments focus on an insistence of scientific proof

behind the creation science and intelligent design theories and that therefore they should be included in science classes on the origins of the world and humanity. They hope to protect students' original religious viewpoints by providing them scientific justification for their creation beliefs. However, on paper, they argue that equal treatment through equal classroom time will expose students to multiple views and allow students to choose for themselves. They use the basic scientific principles of hypothesis testing to support their arguments in favor of equal time. Whether high school assessment tests look for students who decide for themselves is, of course, another matter.

It is important to keep the lawmakers' motives in mind when discussing these laws. Their goal very often is to defeat evolution teaching, and the equal time laws do this, regardless of how they are implemented. Requiring science teachers to teach another theory alongside evolution, as if that theory exists in opposition to evolution, muddles the debate, decreasing the amount students actually learn about evolution theory. It also decreases the amount of class time spent on evolution. If the law allows it, many schools simply exclude evolution from science classes in order to avoid teaching another theory along with it. Evolution is thereby removed from the curriculum, preserving the original intent of the equal time laws. Those in the legislature then claim they simply wanted all sides to be presented, but their motives are often questionable.

The effects of the equal time laws, where they are passed, are generally at least two, in addition to the inevitable court challenge. One effect is that many teachers, not having the time or inclination to teach multiple ideas in this area, where allowed, will just teach none. This means that rather than increasing the number of students with the resources to decide for themselves, the laws actually decrease this number. Another effect is that teachers who are required to teach both become embroiled in religion. This is particularly true when they have to explain the origins of creation science or intelligent design.

Direct attacks on evolution failed in the Scopes Trial, even though the particular law at challenge there was upheld. As those opposed to evolution have been consistently unable to directly prevent its teaching in the schools, they have switched to new tactics to minimize what they perceive as its negative impact, with equal time laws playing a significant role in their activities. Some proponents of these laws sincerely believe that all ideas need to be challenged, but far more seek to ban evolution by only allowing it to be taught in conjunction with another theory. Those in the second camp rise up in apparent defense of academic freedom (as they, in theory, allow more ideas to be taught) while actually reducing that freedom by effectively limiting the teaching of evolution or simply having it written out of state standards.

See also Avoidance of the issue of evolution in many teaching standards; Creation Research Society; *Edwards* v. *Aguillard;* Institute for Creation Research; National Center for Science Education; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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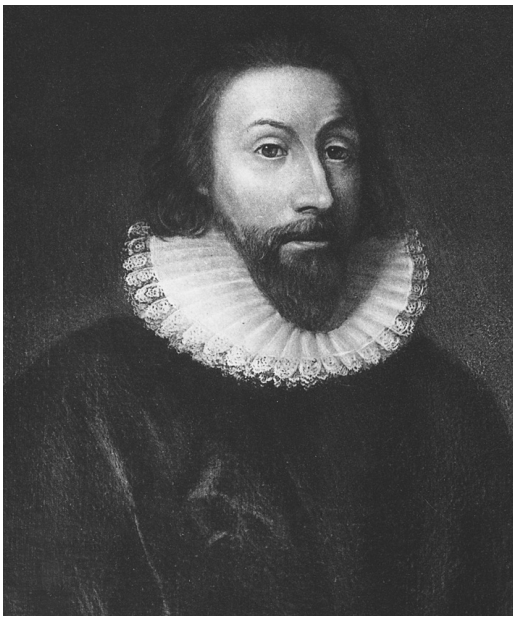
Established churches in colonial America

Most of the early colonies had established churches. Some of them were Anglican; others were Congregational. A few colonies did have freedom of religion, but most had an established church and taxes to support that church.



John Winthrop was one of the most powerful political leaders of the Massachusetts Bay Colony during its critical formative years. (Library of Congress)

The churches varied in type and power, as a survey will show.

The Anglican Church was the established church of several American colonies, including the first established colony, Virginia. In Virginia, most of the early settlers had been Anglican, and thus they supported the king and had an established Anglican Church. The established church in Virginia was run by the local rich, and the leaders were initially appointed by church officials in England and then created a continuing body. In Virginia, even though it was the church of the mother country, the church did not have as much influence as in other places as people were more spread out. Virginia was a farming society, with many large farms and plantations, so people lived farther from churches, and their ability to attend weekly services was limited. Virginia also had more of an early emphasis on wealth production. The original intent of the Virginia Bay Company had been to make money, and the colony's early settlers had been sent there with that goal rather than the aim of forming a stable society. From this and other factors, an increased emphasis on wealth evolved. Therefore, Virginians were more likely to display their wealth, unlike the settlers in Massachusetts, to use a different example.

In Massachusetts, the early settlers had been Puritans and they moved to keep the church Puritan. The Puritans were Anglicans who aimed to make their church pure and so shame the Anglican Church in England into reformation. The Massachusetts colony required people to pay taxes to support the church, a practice that continued until the American Revolution. After the Revolution, Massachusetts' new constitution in 1780 allowed more religious freedom, allowing alternatives to the Puritan church, but it still argued for a strong level of social control from religion. Taxes were still required to support churches, but now people could choose from several established, recognized churches. In 1833 Massachusetts ceased the practice of requiring state support for churches, one of the last states to do so.

Massachusetts also exercised more social control in general. A large part of John Winthrop's whole "City on a Hill" idea was to create a moral society, at both the individual and collective levels, and the only way to achieve this was by strict social control. There are many examples of these attempts at social control. One of the better-known ones was an early court case in which a man was hauled into court for overcharging for basic supplies. The court had forbidden any merchant from selling supplies for more than 5 percent over cost, and this particular merchant was arrested after he was caught charging at least 25 percent (or five times the allowable amount). He claimed he could not do business at only 5 percent because of risks such as Native American attacks and shipping losses, but the court disbelieved him and fined him. In keeping with the ideas of the time, the merchant also had to apologize in court and thus to the entire com-

munity. In many ways, Massachusetts believed in the whole idea of the commonwealth, or the wealth of the collective whole; the state is still officially called a commonwealth today. With this heritage, it is not surprising that even Massachusetts' wealthy were more reserved in their displays than were those in Virginia. Also, New England ruled through the town meeting, where all could be heard, whereas Virginia ruled through elected officials. Thus, both government, and, as will be shown, faith, were public events in Massachusetts.

The Anglican Church as a church of all people did not survive long in Massachusetts, even though the church retained more power there than elsewhere. In Massachusetts, a voter had to be a saint, meaning a full male member of the church. To accomplish that, members had to describe their conversion experiences in church. Not all were willing to do so, limiting the number of saints. Even so, a larger percentage of citizens voted in Massachusetts than in England, which had both religious and property qualifications. Baptism was available only to saints and their children. The question then became what to do about all those who were not saints, particularly those who were the young children of non-saints, but were the grandchildren of saints. In 1662, Massachusetts Puritans adopted the Half-Way Covenant, which held that children of the baptized, and thus children of those who were baptized as infants and who never became saints, were allowed to be baptized, but they had to become saints themselves in order to be full members of the church.

Churches were very much supported by local taxes. Both Massachusetts and Virginia had colonial taxes to support the church, and these taxes remained on the books until the American Revolution. After the Revolution, Virginia tried to reimpose its tax. This effort was led by Patrick Henry, who, in a twist characteristic of the complex thinking of early Americans, believed in liberty from central government, liberty from England, but state support of the church. His effort failed, largely because of a drive led by Thomas Jefferson (who believed in freedom from the church but not for African Americans) and James Madison. Massachusetts reimposed its tax in its constitution of 1780, and some other states joined it, including Connecticut.

The other colonies mostly mirrored Massachusetts and Virginia, based largely on physical location, proximity of one village to another, and the variety of faiths inside their borders. All of New England, with the exception of Rhode Island, established churches with state support soon after their founding. Rhode Island, founded by Roger Williams, believed in freedom of religion, but was more concerned about protecting the religion from the corruption of the state than protecting the state from the church's influence. In some of the middle colonies, there was state support of religion: New York, for instance, had state-supported churches, but the supported church was chosen on a town-by-town basis. Pennsylvania, on the other hand, was tolerant, as was Maryland to some extent. The southern colonies of North and South Carolina and Georgia had more religious diversity and a greater focus on the economy; for example, colonial South Carolina had an established church for only about twenty years, and in colonial Georgia, there was religious toleration of all Protestants (Catholics were not allowed to live there) but state support of the Church of England.

Early churches in America showed great religious diversity. Toleration of other religions generally did not exist except in rare places such as Pennsylvania, where the wide variety of faiths combined with the Quaker tradition to coerce some level of forced accommodation, even if the attitudes would not be what today would be called tolerant. In Maryland, Catholics were tolerated. In most other places, however, Catholics were treated quite badly. They were kept out of Georgia generally after the American Revolution, even though there was no established church there. Thus, lack of

an established church did not equate to widespread toleration, even though an established church did correlate with increased dislike of religious minorities. That was the state of church-state relations, religious toleration, and forced accommodation (or lack thereof) in the first two centuries or so of colonial history. Most of the colonies had some level of a state-established and state-supported church, and most provided little incentive, let alone encouragement or toleration, for other churches.

See also American revolution's effect on religion; Bible controversy and riots; *Braunfeld* v. *Brown;* Establishment of Pennsylvania as religious colony for Quakers; Religious freedom in Rhode Island in colonial times; *Torcaso* v. *Watkins;* Treatment of Jews, both in colonial times and after the American Revolution

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Establishment of Pennsylvania as religious colony for Quakers

Quakers were treated as a fringe group in the American colonies and persecuted in England, and they needed a safe place to practice their religion. William Penn and his followers therefore founded their own colony where they would not be ostracized for their beliefs. Indeed, this was the reason many of the original colonies were founded. However, in Pennsylvania, unlike most of the others, a plurality of religions was tolerated, making it one of the first places in the world where the freedom of religion was truly practiced. For this reason, Pennsylvania is often looked at by some as a model for America. However, its founding was not as simple as some believe, and the circumstances surrounding it serve as a lens on early America.

The Quaker religion came in large part from a man named George Fox. He traveled to England in the early 1600s and thought that religion was much too formal and complicated. He believed that religion applied directly to people's acts and that people did not need intermediaries between themselves and God. This belief negated the need for clergy or churches. According to Fox's religion, all could have salvation, and no one needed to work for salvation, as grace was granted by God. Also, and even more controversial, men and women were equal in Fox's religion, even though most churches in that era forbade women from taking any leadership roles, let alone becoming equals with men or ministers. Quakers were not allowed to own slaves, again differentiating this religion from the mainstream. The Quakers were marked by plain speech and lifestyle, and all who wished to speak were heard in Quaker meetings. Finally, the Quakers were pacifists.

Much of this ran counter to the ideas of the time, and many of the early Quakers were jailed as their beliefs ran counter to the general ideology of the time. Among the early jailed Quakers was William Penn, who had been arrested for speaking in front of a Quaker meeting, which was illegal at the time. Penn, though, had valuable assets, as the Crown had borrowed money from his father to finance its wars, and Penn had inherited his father's debt from England. The king also wished to move the religious minorities, including the Quakers, out of England, if possible, and he wished to populate his American colonies without a large expense. Penn's idea of a religious colony for Quakers al-

lowed the king to meet all his goals and to pay off the Crown's debt easily. The king did not give up all power over the colony, as Penn still had to submit all laws to the royal council for review (and indeed Penn remained in England and tried to run the colony from there).

The colony was tolerant of the religions of others. In its setup, equality was given to Native Americans and freedom of religion was granted, with few exceptions. There was no religious qualification to vote or to be a lower-level officeholder, and the only religious qualification for being a provincial officeholder was that one had to be a Christian. Jews and Muslims were also allowed into the province and were treated generally fairly. The religious laws in the colony were also less severe than in other provinces. For instance, one convicted of blasphemy in Pennsylvania was given ten days at hard labor. In contrast, in some colonies, such as Connecticut, blasphemers could be punished by death. The colony was not able to impose, if such a term be used, all of its Quaker ideas on those who lived there. There was still some slavery, and some landowners imported and used indentured servants as well, although both practices went against Quakerism. There was also some poor treatment of Native Americans, in spite of the colony's laws, but this does not appear to have been related to religious issues. The colony had a sizable number of different religions. Besides those that might be expected, the Huguenots, Mennonites, and Presbyterians were all present in the colony. Religion played a part in one of the last acts taken by the colony, as Pennsylvania was slow to go to war in the American Revolution, probably in part because of the pacifist nature of Quakers.

Pennsylvania, once it became a state, remained the mixed society that it was as a colony. In 1790, there was no dominant ethnic group, with about one-third being German, one-third English, and the rest being mostly Scots or Scots-Irish. The societies' cultures did not assimilate into one whole, even though there was a fair amount of mixing. Many who came to Pennsylvania, contrary to what some think of America's founding, did not like the low emphasis on religion and tried to change the society, or they moved on. Attempts to change the religious tenor, though, were not generally successful. Most Pennsylvanians seemed to ignore the differences between themselves and others.

After the end of the Revolution, freedom of religion was generally reaffirmed in the state constitution, but some state officeholders were still required to profess a belief in Christianity. In addition to freedom of religion, the right to *not* bear arms was also reaffirmed in the state constitution. Pennsylvania is seen as an area of compromise, and this is in large part due to the multitude of religions and ethnicities in the area. Thus, diversity brought compromise and toleration, not the other way around.

Pennsylvania was, in many ways, a unique colony. It was founded as a place for the Quakers as they were religious dissenters, but Pennsylvania never had a permanent majority of those believers, unlike other colonies. It also practiced religious toleration from its inception, unlike most other colonies. The diversity of the colony forced colonists into compromise and moderation. Thus, while Pennsylvania is a model for what many want in America today, both design and circumstances encouraged this development as an actuality rather than just an idea.

See also American Revolution's effect on religion; Punishment and religion; Religious freedom in Rhode Island in colonial times

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Estate of Thornton v. *Caldor*

472 U.S. 703 (1985)

Part of the largest debate over the First Amendment deals with the level of required accommodation that must be given someone because of the person's religion. For those who refuse to work on their Sabbath, should employers be forced to make exceptions? *Thornton* v. *Caldor* turned on this issue.

This was an 8–1 decision, with Rehnquist dissenting. O'Connor filed a concurrence and was joined by Marshall. Chief Justice Burger wrote the opinion for the Court. He first noted the facts of the case, including that Thornton, when he began working, did not have to work Sundays as the store was closed by a Connecticut closing law. Two years later the business began opening on Sundays, and Thornton worked on some Sundays but complained about having to do so a year later. Thornton claimed protection under a Connecticut law that read "no person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal" (472 U.S. 703: 706). Thornton was then transferred to a lesser position when he refused either to work on Sundays or to be transferred to a store that was closed Sundays, or to move to a lower (both in salary and rank) position that did not require Sunday work. After being demoted, he sued. Burger then cited the *Lemon* test, which he summarized thus: "To pass constitutional muster under *Lemon* a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion" (472 U.S. 703: 708).

The Court saw the statute in question as preferring religion in general, summarizing the statute as follows: "The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath" (472 U.S. 703: 709). For this reason, the Court concluded that "the statute has a primary effect that impermissibly advances a particular religious practice" and so overruled the statute and thus, as far as Thornton was concerned (or actually his heirs, as he had died in the interim), he did not have a right to protest his demotion (472 U.S. 703: 710).

Justice Rehnquist dissented without opinion. Justices O'Connor and Marshall concurred, in an opinion written by Justice O'Connor. They noted a second reason, or in their mind a different primary reason, for rejecting the statute. They held that "the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance" (472 U.S. 703: 711). O'Connor agreed with the Court that "the statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. . . . The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it" (472 U.S. 703: 711). However, O'Connor also wanted to note her opinion that this decision did not hold "that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are similarly invalid" (472 U.S. 703: 711). These provisions forbade discrimination on the basis of religion. The reason for the difference was the different purpose of Title VII. It was not aimed at protecting only those who worshiped on the Sabbath, as the Connecticut statute was, but instead protected all. O'Connor concluded

that "since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice" (472 U.S. 703: 712). Thus, this law (Title VII) was valid while the Connecticut law was not.

States cannot force employers to be unable to fire people who insist on taking their Sabbath off. It is unclear how this case differs from that in *Sherbert,* where a state was prohibited from denying unemployment compensation for one who was fired for not working Saturdays, and the majority opinion does not even mention the *Sherbert* decision. In 1990, the Supreme Court reversed *Sherbert* as a general rule in *Employment Division* v. *Smith.*

See also *Boerne* v. *Flores; Braunfeld* v. *Brown; Employment Division* v. *Smith;* Religious Freedom Restoration Act of 1993; *Sherbert* v. *Verner*

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Everson v. *Board of Education*

330 U.S. 1 (1947)

A state ban on private education, and especially a state ban on religious groups, in most everyone's mind violates the First Amendment. Thus, private religious schools clearly have the right to exist. However, the level of aid allowable to those schools by the state, and the level of aid required from the state for their upkeep is a much less clear question. The first time that the U.S. Supreme Court dealt with this issue was in 1947 in *Everson,* when the Court ruled it constitutional for the state to reimburse parents for their children's transportation to school when the state reimbursed all parents for transportation, even when the school in question was a Catholic one.

Justice Black wrote the Court's opinion. He first noted the complaint—that the local public school provided "reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system" (330 U.S. 1: 3). He then looked at the constitutional objections to this policy, moving quickly to the First Amendment issue, that the statute created an establishment of religion.

Black briefly reviewed the history of the United States before adoption of the Constitution, noting that there was prosecution against religion, both in Europe and in the early colonies, and that the writers of the Bill of Rights wanted to end this. He noted also that the government was not supposed to burden those believing in religion, even while it was not supposed to tax people to support any religion. Black concluded, "We cannot say that the First Amendment prohibits New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools" (330 U.S. 1: 17). Black saw that the system, as a whole, "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" (330 U.S. 1: 18). This decision did not mean that Black thought that the "wall of separation" between church and state should be struck down. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here" (330 U.S. 1: 18).

Justice Jackson dissented. "The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable

light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation" (330 U.S. 1: 19). Jackson first noted that students who went to private, nonreligious schools were not reimbursed and that this exclusion created problems, even though it was ignored by the Court. He also noted that the system of transportation was not being changed, as students attending religious schools were not carried on public busses. Their parents were merely reimbursed for their transportation. The justice then reviewed the Catholic school system and held that "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself" (330 U.S. 1: 24). Jackson said here that, essentially, being Catholic was what gave parents the right to reimbursement and that this created problems. "Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld" (330 U.S. 1: 25).

Justice Rutledge also dissented, joined by Frankfurter, Jackson, and Burton. Rutledge saw the purpose of the First Amendment as being "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. 1: 31–32). Any amount was an unlawful contribution, Rutledge suggested. He also saw transportation as being an essential element of education rather than being an incidental one, as suggested by the majority. He concluded, "For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed" (330 U.S. 1: 48).

Thus, reimbursement for transportation to Catholic schools, whether given directly or indirectly, was allowed by this opinion. This decision did not make things as simple as desired by those who wanted a policy of no aid, such as Justice Rutledge. Numerous cases since have dealt with what types of aid were allowed, and the ways in which the aid could be provided. The general principle determined now, even though it is still being challenged, is that aid is allowed as long as the purpose is secular, the main effect of the aid is neither to advance nor retard religion, and that there is no "excessive entanglement." Sometimes general programs of aid are allowed as well as aid that is funneled to the schools through the choice of a parent. Quite a tangled web to come out of a few trips to school.

See also *Agostini* v. *Felton; Bob Jones University* v. *United States; Flast* v. *Cohen; Lemon* v. *Kurtzman; McCollum* v. *Board of Education*

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Failure to treat due to religious beliefs

The legal right to refuse medical treatment depends in large part on an individual's age and mental capacity. Of course, the level of care being refused also makes a difference. The refusal of a simple procedure is of far less concern to the medical community than refusal of lifesaving care. Generally those under the age of eighteen are deemed to be under a parent or guardian's care for issues of medical attention. This becomes more controversial when the issue of divorce is added. The danger faced by the child if treatment is withheld also plays a factor.

Religion and the law enter the picture when a person wants to refuse medical care because of religious beliefs. One example of this would be a blood transfusion. Some faiths (including Jehovah's Witnesses) feel that a blood transfusion violates their religion as it puts artificial items into the human body. Most times, when the Court has become involved, it has allowed adults to refuse medical treatment for themselves in this area. However, the record is much more mixed when children are involved. Parents are generally allowed to impose their beliefs on their children in areas that are not life threatening. An example of this would be compulsory schooling. The Amish believe that high school is a threat to their way of life, so they are permitted to remove their children from school after the eighth grade. The state of Wisconsin opposed this, but the Supreme Court allowed it in *Wisconsin* v. *Yoder* (1972). However, one of the reasons the Court cited in holding for the Amish is that the state was not able to show that any definite harm would probably come to the children by withdrawing from school after the eighth grade. "The record strongly indicates that accommodating the religious objections of the Amish . . . will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society" (406 U.S. 205: 234). Such would not necessarily be the case in the instance of a refused blood transfusion for either adults or children.

One leading case in this area is *Norwood Hospital* v. *Munoz* (1991), decided by the supreme judicial court of Massachusetts, in which an adult wanted to refuse a blood transfusion as she was a Jehovah's Witness. To complicate this case, the woman was the primary caregiver of a young child, and the hospital argued that the government should have the right to protect the young child from losing a parent. The court allowed the woman to refuse treatment as the boy would still have his father in addition to other relatives and so would not be totally orphaned. Thus adults were held to be able to refuse blood transfusions.

However, when a blood transfusion is needed for a child, nearly all courts have held that the child's rights outweigh the parents' religious beliefs, allowing the state to intervene and force the transfusion. The supreme judicial court of Massachusetts concluded, "When a child's life is at issue, 'it is not the rights of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child'" (565 N.E. 2d 411: 413). Another issue is faith healing. Some religions believe prayer cures illnesses and precludes the need for medication. Treatment obviously could be forced, but when the state does not intervene or when the issue is not as clear as the obvious matter of a blood transfusion, the question often becomes one of responsibility

after the child has already died. Again in Massachusetts, one couple relied on faith healing as Christian Scientists, and their two-year-old child died. Medical evidence suggested that the child would have been kept alive with a safe surgical procedure. The parents had consulted their local church and read a pamphlet that suggested faith healing could be relied on without criminal penalty. While this was not an accurate legal summary, it did cause the parents to have their guilty conviction on the charge of involuntary manslaughter overturned and a new trial granted. The court ruled that the parents should have been able to advance the defense that they relied on their understanding of the pamphlet, and it was not their fault that the pamphlet was wrong.

Civil suits are a different matter, as noncustodial parents have won wrongful death suits, and these verdicts have been upheld on appeal as not violating the First Amendment. This is obviously a complex issue balancing the parents' right to religious freedom against the child's right to live. When parents divide on the issue of treatment it becomes even more complicated. However, whatever religious issues are involved, parents are generally not allowed to deny lifesaving treatment to their children, and when the children are young, their very presence factors into whether the parents are allowed to deny themselves medical care, such as transfusions. When the care is medically necessary to save a life, the state can intervene in the case of a child, but the issue becomes less clear when the medical necessity is less certain. Adults can generally decide their own care and take responsibility for it. However, when children are involved, the issue becomes more complex, and the state sometimes has the right to compel care.

See also Banning of suicide in law and its interaction with religion; *Nally* v. *Grace Community Church of the Valley;* Right to die and religion

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Fairfax Covenant Church v. *Fairfax City School Board*

17 F.3d 703 (4th Cir. 1994)

A number of Supreme Court cases, along with the Equal Access Act of 1984, have held that schools cannot discriminate against religious groups in terms of access to their buildings. One question here, of course, is what type of regulations are allowable.

The *Fairfax Covenant Church* case dealt with the Fairfax City School Board's rental policy for school buildings. The Fairfax City School Board allowed local churches and other groups to rent space before and after school but raised its rates based on how long a church had used the facility. Their goal here was to encourage short-term use, and the legal justification was that long-term use created an establishment of religion, which of course the First Amendment would have banned. It allowed "the church to pay the noncommercial rate for the first five years but, thereafter, require[d] the church to pay a rate which escalate[d] to the commercial rate over the next four years" (17 F.3d 703: 705). The court examined the rental policy and held that this case was controlled by *Widmar* and that the regulation therefore discriminated "against religious speech in violation of the Free Speech Clause" (17 F.3d 703: 707). The school board stated that it wanted to avoid domination of the school's use by religious institutions, but the court found that the actual use showed (by percentage) relatively little utilization by religious groups. Thus, the facts did not justify the school board's concern (at that time, the court left open that justification if usage changed). The court weighed the free exercise rights of those wanting to rent the school for religious reasons versus the school's estab-

lishment clause concerns, holding that the school board needed to consider both issues. It held, based on the facts of the case, that the increase in rent after five years was not justified. The court also held that the church could recover those fees that it had overpaid because it should have been charged the same rate as all other nonprofit institutions. Thus, the school board was not allowed to charge churches more than other renters; the court found that although the school board's concern about its rental policy violating the establishment clause might sometimes be justified, it was not in this case. More important, it stated that the school board must balance the free exercise and establishment portions of the First Amendment in its rental policies.

Another concern centers on use of school facilities just before and just after school, and whether use of these facilities by religious groups at those times creates "the perception of endorsement by the schools of religious instruction," an issue decided at the district court level in *Ford* v. *Manuel* (629 F. Supp. 771: 774). The court first noted that the *Lemon* test applied here. The district court reviewed past Supreme Court rulings and found that this policy did indeed create the impression that the school board wanted students to attend these events, and because students' presence was required just before or just after school gave a boost to this perception. The court held that a school was not a traditional public forum at these times and so could restrict access more than at other times.

A third concern is whether a school board can discriminate among groups based on the nature of their speech, which indirectly implicates religion. The KKK wanted to use a school building for a meeting, and a school board first granted and then denied the use. The KKK sued in *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*. The Fifth Circuit Court of Appeals first considered the historic use of the school and concluded that it had been a forum open to the public, which meant that content-based restrictions were not allowed. The school board contended that the policies of the KKK distinguished them from other groups, making restrictions allowable. However, the court held that the marketplace of ideas should include unpopular ideas, including those of the KKK. While the school board argued that this policy would be seen as the school board's endorsement of these ideas, the court held that the school board had always allowed equal access and endorsed none of the groups' views. Thus, the school board was forced to allow the meetings. The school board had the opportunity to try to prove that the KKK aimed to exclude people from its meetings. If the school board could have proved this, they could have prevented the KKK, theoretically, from meeting, as the traditional use of the school facilities had been to hold completely public meetings. However, the KKK members would have simply permitted any person to attend their meetings held in school buildings, and they were counting on the distastefulness to outsiders of the organization's views to keep nonmembers from coming. If they had ever forbidden anybody access, they could have been banned from using the building. The case has bearing on the relationship between religion and the law because a by-product of the ruling is that school boards cannot ban a religious group from using their facilities merely because the school board disagrees with that religion's perspective.

Therefore, groups cannot, in general, be banned from facilities that are traditionally kept open to the public. Concerns over the establishment of religion need to be balanced by school boards against the rights of those who wish to worship freely. In general, and this goes beyond the issue of religion, content cannot be used as a reason to deny renting or use access to any group.

See also *Bronx Household of Faith* v. *Community School District No. 10; Chapman* v. *Thomas; Good News Club* v. *Milford Central School; Widmar* v. *Vincent*

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Farrington v. *Tokushige*

273 U.S. 284 (1926)

The *Pierce* case held that states cannot ban private schools from existing. Once that was resolved, the next issue was to decide how much a state could regulate a private school's content. *Farrington,* and a variety of related cases, address that question.

In *Farrington,* the legislature of Hawaii passed a sweeping bill regulating the content taught in Hawaii schools, aiming mostly at private Japanese schools. The legislation, among other things, required proficiency in the English language, control of textbooks, proof that nothing anti-American was being taught, and the payment of fees. The Supreme Court concluded that "the School Act and the measures adopted thereunder go far beyond mere regulation of privately supported schools, where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. . . . The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue" (273 U.S. 284: 298). The Fifth Amendment was used to strike down this act as a deprivation of property against the owners of the schools, and the rights of the parents to control their children's education. These limits on state regulation of school content increase the protection of religious schools, even though the case itself does not directly relate to religion.

However, certain regulations have been found allowable. Nebraska, in order to regulate its schools, passed a variety of requirements. In addition to requiring student attendance, the regulations included a requirement that teachers have certain qualifications, including holding a bachelor's degree, and that the school have an approved curriculum. This case came before the supreme court of Nebraska in *Nebraska* v. *Faith Baptist Church* in 1981. A private religious school claimed that it had the freedom of religion to operate without interference. However, the court found that the state had a critical interest in educating its youth, and that "although parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished" (301 N.W. 2d 571: 579). The court concluded that "the refusal of the defendants to comply with the compulsory education laws of the State of Nebraska as applied in this case is an arbitrary and unreasonable attempt to thwart the legitimate, reasonable, and compelling interests of the State in carrying out its educational obligations, under a claim of religious freedom" (301 N.W. 2d 571: 580). Thus, minimal requirements were allowed as long as they were reasonable and not hostile to religion.

One of the more commonly challenged laws is the compulsory attendance law. Many religious schools that do not meet state certification run afoul of this law, as students are not attending a certified school. North Dakota's attendance law was challenged in the case of *North Dakota* v. *Shaver* on the basis of the First Amendment. Those in the church school stated that they had "religious convictions against obtaining state approval" (294 N.W. 2d 883: 887). The court held that "the burden on the parents' free exercise of religion in the present case is minimal, and is far outweighed by the state's interest in providing an education for its people" (294 N.W. 2d 883: 897). Thus, the court ruled that the church's

justification for refusing to seek state approval was not acceptable. The church held that God was the ultimate authority about everything, but the court determined this was not enough to void the state's compulsory attendance laws.

Regulations, however, cannot so restrict private schools as to eliminate the opportunity for religious instruction. Even restrictions not aimed at eliminating religious instruction might have this effect and can be stricken. That was the holding of the Ohio Supreme Court in *State* v. *Whisner.* There, the court found that "in our view, these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children" (351 N.E. 2d 750: 769). The requirements in this case were much more detailed and complex than the certification requirements and attendance laws challenged in the other cases discussed here.

Some have argued that standardized testing should substitute for the compulsory attendance requirements. Most courts have not agreed, however. The First Circuit Court of Appeals in *New Life Baptist Church Academy* v. *Town of East Long Meadow* reached this same conclusion, that compulsory attendance may be required. It first held that religious objections to the certification process that all schools must go through were not enough to overturn the procedure. It then held that the voluntary testing system preferred by the academy was not enough to replace the compulsory attendance system.

The state has the right to impose reasonable restrictions on private schools, but all of these cases served to identify some of the boundaries of such regulations. The state cannot wipe out the whole system of private schools, nor can it eliminate a private school's religious functions, but it can impose certification, minimum attendance, and curriculum review requirements. All of these, of course, must be imposed without religious tests or antireligious bias, either in the requirements as stated or in the way that they are applied.

See also *Agostini* v. *Felton; EEOC* v. *Kamehameha Schools/Bishop's Estate; New Jersey* v. *Massa; Ohio Civil Rights Commission* v. *Dayton Schools; Pierce* v. *Society of Sisters; Synder* v. *Charlotte Public Schools*

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Federal income tax and religion

Taxes are one of the two things Founding Father Benjamin Franklin felt were certain in life. As his other certainty was death, it is easy to tell that he did not look forward to paying his taxes each year. The income tax, in particular, has been a necessary force to fund the country's government for a little under a hundred years. The federal government was originally funded largely through import duties, as relatively high taxes were imposed on incoming goods, both to raise revenue and to protect American industry. American industry found this very helpful, but American farmers were endangered by the program, as it both raised the cost of industrial goods and reduced their ability to sell abroad. The latter effect came from the retaliatory high import taxes other

Reverend Greg Dixon prays on his knees along with other supporters and members of the Indianapolis Baptist Temple on November 14, 2000, as they await the arrival of federal marshals. In September, a U. S. district judge ordered the surrender of the church by noon on November 14 to satisfy a $6 million debt to the Internal Revenue Service. (AP Photo/Michael Conroy)

countries placed on goods coming in from the United States. The government's other main tax source was land. There were many protests against the high import duties and also against very rich people, who could make huge sums of money and pay little or nothing in taxes. To equalize this situation for the poor, an income tax was passed in the late 1800s. Though the Supreme Court initially struck it down, a 1913 constitutional amendment allowing federal income taxes formally authorized the program.

Such has been the state of our taxation for the past ninety years. In that time, several challenges have been mounted on the income tax as it applies to religion. The tax as a whole is difficult to attack on First Amendment grounds, as it was allowed by a constitutional amendment. However, religious groups and individuals have been seeking to avoid paying it on the grounds of religion ever since the amendment was ratified.

One group challenged tax deductions and exemptions. In *Hernandez* v. *Commissioner,* 490 U.S. 680 (1989), a group of Scientologists protested the government's denial of a tax deduction for their payments to the Church of Scientology. The deductions had been denied by the Internal Revenue Service (IRS) because, to qualify for a deduction, a gift must be made to a religion (or other charity) without

anything being received in return. If something is received in return, only the amount of the donation above the value of the item received by the donor is deductible. Here, the Scientologists were given training, which the IRS considered a tangible receipt of benefits. The Supreme Court upheld the IRS, as the regulations did not allow deductions for payments that granted access to religious services. The Court here found that the regulation had a secular purpose, that it did not primarily retard religion as it primarily made the tax code more manageable, and that it decreased entanglement between government and religion, because it saved the IRS from having to oversee religious services and evaluate their level of religiosity. Thus, payment for access to the church is not considered a gift. The regulations also were not, either at their creation or now, aimed primarily at Scientology and so were neutral.

However, in 1993, the IRS reached a private agreement with the Church of Scientology allowing its members an income tax deduction for the fees paid to attend services. A Jewish couple, the Sklars, believed that under that agreement, a portion of the tuition used to pay for religious instruction at their children's Jewish school was tax deductible. In fact, the IRS had mistakenly believed the family was deducting Scientology-related expenses and had allowed the deductions for 1991–1993, when the family filed amended returns for those years after the Scientology Church reached its agreement with the IRS. However, the family immediately corrected the IRS's misunderstanding, and, though it went ahead and allowed the deductions for 1991–1993, the IRS denied the deductions in 1994 and again in 1995. The couple sued and repeatedly lost in court. The most recent decision in the case came in 2005, when the tax court, in *Sklar et ux*. v. *Commissioner,* 125 T.C. No. 14, declared that precedents have repeatedly shown that no part of tuition to a religious school is tax deductible.

In the 1990s, members of the Quaker faith argued that the use of their federal income taxes to fund warlike activities violated their religious beliefs. They therefore withheld the portion of their federal income taxes that would have been given to the defense department. The Second Circuit Court of Appeals, though, held in *Browne* v. *United States* (176 F.3d 25 [1999]) that a religious belief does not allow avoidance of an otherwise valid law, particularly when that law is neutral with regard to religion. A similar case was *Adams* v. *Commissioner* (170 F.3d 173) decided by the Third Circuit Court of Appeal in 1999. There, the case was slightly different as the person was a Quaker and also worked for the Quaker religion. Adams volunteered to pay all of her federal income tax if she could be assured that none of it would go to fund any war activities. She used the Religious Freedom Restoration Act as grounds for her argument that the tax system was illegal as it burdened her religion by making her pay for activities odious to her beliefs. The court stated that this act merely restored the state of the law prior to 1990 and required a compelling government interest to be present to justify burdens on religion. The court found that the administration of a tax system was such an interest. The court found further that the government was able, legally, to provide Adams with an exemption, but was not required to do so.

One rare method of challenge, utilized in *Indianapolis Baptist Temple* v. *United States* [224 F.3d 627 (Seventh Circuit Court of Appeals 2000)], is a wholesale attack on the tax. The Indianapolis Baptist Temple claimed the income tax violated some people's religious beliefs. Members of the temple believed that all their possessions belonged to God and that giving any of those possessions to the state violated their religious principles. The court, however, found in 2000, that there was a strong enough interest to allow the government to apply a generally neutral law, even though it had an effect on a religion.

Thus, income taxes have been held to be constitutional, both for those deeply involved

in religion and for those less so. Religion may cause dislike for income taxes, either in application or in the use of the funds, but it does not allow anyone to escape paying the IRS.

See also *Bob Jones University* v. *United States; Hibbs* v. *Winn; Swaggart Ministries* v. *California Board of Equalization; Walz* v. *Tax Commission of the City of New York*

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Fike v. *United Methodist Children's Home of Virginia, Inc.*

709 F.2d 284 (4th Cir. 1983)

Religious groups and companies owned by a religion are sometimes, under certain circumstances, allowed to discriminate under Title VII of the 1964 Civil Rights Act. Under what circumstances one is allowed to discriminate is, of course, a valid question. Another question, of course, is what makes one either a religion or a company owned by a religion, or, to put it more broadly, what makes one an entity allowed to discriminate under those circumstances in Title VII? Three cases, including *EEOC* v. *Townley,* address that second question.

In *EEOC* v. *Townley,* the Townley Engineering and Manufacturing Company was founded by people who had told God their business "would be a Christian, faith-operated business" (859 F.2d 610: 612). They had a mandatory religious service once a week at a Florida plant, and "failure to attend was regarded as equivalent to not attending work" (859 F.2d 610: 612). The company passed out a handbook requiring attendance at the services, and then began holding the services; eventually an employee was discharged, perhaps due to his opposition to the services. The court first held that Title VII did reach church services and that the company had a duty to accommodate the employee's religious beliefs; in this case the employee was an atheist, so accommodation would mean allowing him not to attend the services. Townley, however, argued that "any attempt at accommodation would have caused it 'undue hardship,'" which was not required (859 F.2d 610: 614). The court stated that those corporations whose spiritual costs Congress had wanted considered were specifically exempted, and the Townley company did not fall into this group and would not have suffered an "undue hardship" by exempting the atheist employee.

The court next considered whether Townley was a "religious corporation," which would have exempted them from having to release the employee from required attendance. The court held that an entity did not have to be a church to be exempted, but "all [in Congress] assumed that only those institutions with extremely close ties to organized religions would be covered" (859 F.2d 610: 618). The court, after considering Townley's situation, stated that "we merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702" (859 F.2d 610: 619). The Townleys also argued that their free exercise rights required them to proselytize, and the court noted that it must weigh the Townleys' rights versus those of the employee to be left alone in religion. The court held that "where the practices of employer and employee conflict, as in this case, it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights" (859 F.2d 610: 621). The Circuit Court of Appeals held that services could continue, as long

as those who wished to be excluded were exempted. Thus, mere desire and the belief of the owners that they should serve God through their corporation were not enough to make a corporation religious. Though they were permitted to continue holding the religious services, they were required to exempt employees who did not hold with the Townleys' beliefs.

Another case, that of *EEOC* v. *Pacific Press* (1983), also considered whether a company could discriminate on religious grounds. The Ninth Circuit Court of Appeals noted that the company was "affiliated with the Seventh-Day Adventist Church and engages in the business of publishing, printing, advertising and selling religiously oriented material. All Press employees are required to be members of the church in good standing" (676 F.2d 1272: 1274). The company had discriminated against a female employee, due to her gender, and was charged with violating Title VII. Its defense was that it was a religious corporation and was following the dictates of its religion. However, the court first found that "every court that has considered Title VII's applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin" (676 F.2d 1272: 1277). The court then turned to Title VII and the Civil Rights Act in general and held that these could apply to religious corporations as a whole and that religious beliefs are not implicated as the religion, here the Seventh-Day Adventist Church, did not believe in discrimination against women, by their own admission. The church also had a doctrine of not allowing its members to sue itself, but the court held that this did not mean that Title VII could not be enforced. Additionally, the court held that this was not similar to other cases in which church doctrine was being challenged. Thus, the press was not allowed to discriminate against women. The court therefore determined the EEOC was right to intervene and challenge the company's action, as Title VII still applies against religious corporations in the area of sex discrimination, and intervention was the only way to enforce Title VII. Whatever small damage occurred to doctrine was outweighed by the nation's purpose in Title VII.

A third case, *Fike* v. *United Methodist Children's Home of Virginia, Inc.* (1983), dealt with whether a children's home was a religion. A Methodist who was not a minister had served as director, and he was dismissed so that the home could hire a Methodist minister as director. The dismissed director sued, claiming that the children's home had religiously discriminated against him. The children's home claimed it was a religious organization and so was exempt from Title VII. The court examined the facts here and held that the home did not have religious services, nor did it mandate the owning of Bibles by the children, nor did it even have a chaplain who was that interested in increasing Christianity, never mind activity in the Methodist Church. For these reasons, the home was held to not be a religious organization and so was guilty under Title VII. However, there was no religious discrimination, the court found, as discriminating on the basis of whether one is a minister does not constitute religious discrimination, as long as the person disadvantaged was a member of the same religion as the minister. The children's home, even though it received money from the state, was not closely enough connected with the state to be legally considered the state, so any discrimination it practiced was not state action; therefore, Fike could not sue.

All of these cases acted to limit the number and types of corporations and organizations that qualified as "religious organizations" for the purpose of Title VII. Unless an entity is owned or substantially controlled by a church, it probably will not qualify. Also, even if a company qualifies as a religious organization, it still has other burdens to meet before a challenged action is exempted from Title VII.

See also *Corporation of Presiding Bishop* v. *Amos; EEOC* v. *Kamehameha Schools/Bishop's Estate;*

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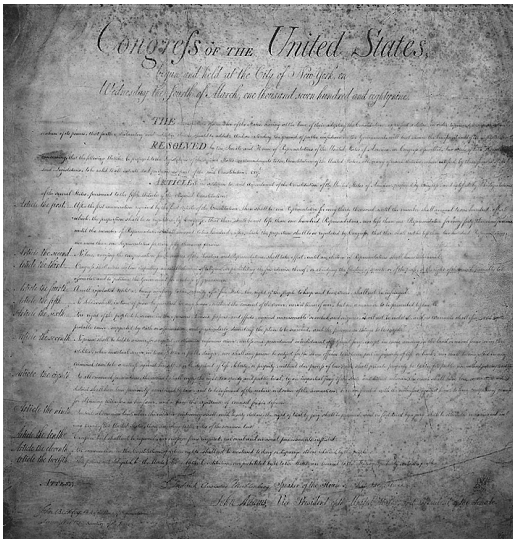

Original copy of the Bill of Rights. (National Archives)

First Amendment

The idea that America was founded for religious liberty is ingrained into schoolchildren's minds from their first social studies and history classes. However, the legal basis of our current freedom, the First Amendment to the Constitution, is generally less studied in schools and is often forgotten once studied. The First Amendment goes beyond religion and actually protects four of our most basic freedoms: assembly, press, religion, and speech (listed alphabetically). However, the current reach of the First Amendment is much larger, especially in the area of religion, than it has been in the past. To further understand this, and the First Amendment in general, a survey of its history is in order.

In the original structure of the colonial system, regulations affecting all colonies were made in England and then passed down to the colonies. However, because of the distance and slow communications of the time, most colonies were allowed to run nearly all of their affairs, except in the area of trade. Trade was regulated by England, as economic prosperity and increased trade had been one of the main reasons, if not the main reason, that England founded the colonies in the first place. England eventually tightened many trade regulations, leading in part to the American Revolution. To avoid having another controlling central government, the Articles of Confederation set up a very weak central government, which failed. To develop a successful system, the Constitutional Convention created a new government, with many more powers. However, many colonists feared this might create another tyrannical government like the one they had just escaped in England. Thus, when the Constitution came around for ratification, many pressed for the addition of a bill of rights to limit the powers of the federal government.

James Madison took charge in the first Congress of writing up a bill of rights. The Congress eventually proposed twelve amendments to the Constitution, and all but the first two were passed and adopted in 1791, becoming what Americans today know as the Bill of Rights. The Third Amendment in the numbering used by Congress, which became our First Amendment, reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." While many might think that our forefathers held the freedoms in the First Amendment to be paramount and therefore put them first, their placement in the First Amendment is, in fact, coincidental.

The First Amendment, once adopted, was put to little use for the first century of its existence. The entire Bill of Rights was held to limit only Congress in 1833, and Congress passed few laws directly impacting religion. The first real test came in 1879, dealing with a federal law banning polygamy in the territories. The Supreme Court upheld this law against a religious challenge, holding that religion does not give a person freedom to do something that is otherwise illegal.

For almost another fifty years after 1879, the First Amendment in the area of religion was discussed little in the courts. However, in 1925, things began to change. In that year, the Supreme Court in *Gitlow* v. *New York* greatly increased the amount of protection given by the U.S. Constitution to Americans' freedoms. It held that parts of the Bill of Rights limited both the federal and state governments. The reason stated was that the Fourteenth Amendment prohibited the states from infringing on the liberty of any person, and the Supreme Court held that parts of the Bill of Rights were included in the liberties that the states could not limit. Thus, if some part of the Bill of Rights, in the eyes of the Supreme Court, was a fundamental freedom, then the states could not infringe on it, just as the federal government could not. The Court did not specifically list freedom of religion as one of those fundamental freedoms in 1925, but they also did not make the list a limited one in that year.

In 1940, the Supreme Court took the next step in protecting religious freedom. In that year, the Court specifically extended the First Amendment's religion clauses against the states. There are two clauses in the religion section of the First Amendment, one protecting the free exercise of religion, generally called the free exercise clause, and another protecting from government establishment of religion, generally called the establishment clause. The 1940 case dealt with the issue of the free exercise of religion, and in 1947 the Supreme Court struck down a law as creating an establishment of religion, thus clearly demonstrating that the establishment clause also applied against the states. The establishment cause protects what people consider the freedom from religion. By 1950, then, in only twenty-five years, the Supreme Court had both informed the states that they could not infringe upon Americans' fundamental freedoms, just as the federal government was limited, and told the states that the religious freedom embodied in the First Amendment was included in those fundamental freedoms.

Since 1950, many Supreme Court cases have dealt with the freedom of religion, both in its area of the individual's free exercise of religion and in its area of the prohibition of a government establishment of religion. While these decisions often caused much controversy, the fact that states are not allowed to infringe upon religious freedom and not allowed to establish a religion has been generally left alone. The application of the First Amendment to the states through the Fourteenth Amendment's protection of liberty remains one of the most significant constitutional decisions in Supreme Court history and has allowed federal jurisdiction over cases regarding everything from prayers in public schools to newspapers' rights to publish controversial stories.

See also *Cantwell* v. *Connecticut; Gitlow* v. *New York;* Incorporation; Saluting the flag

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Flast v. *Cohen*

392 U.S. 83 (1968)

In this case a federal taxpayer sued because he thought that funds were being spent for an unconstitutional purpose. This is different from the *Doremus* case, in which a local taxpayer sued over alleged misuse of local funds. The cause of the suit was the Elementary and Secondary Education Act of 1965, and the taxpayer claimed that funds under this act were being spent to fund and provide materials for religious schools. The main issue decided here was that of standing, or whether the individual suing had the right to bring the action.

The decision was written by Chief Justice Warren. In general, taxpayers had been held to lack standing, and so taxpayers generally cannot sue. The question here was whether a claimed infringement of the First Amendment allowed a suit. The opinion then surveyed the background of the suit and explained how the monies under the act were funneled to the local authorities, who could then use them to support public or private schools. The suit claimed that some funds had gone to private schools, which was illegal, as those funds represented "compulsory taxation for religious purposes" (392 U.S. 83: 87).

The Court examined the history of similar lawsuits. Warren reviewed the 1923 case, which had held that taxpayers lacked standing to sue the federal government and that the case's holding was one based in policy considerations and not in the Constitution. The Court stated that a real case or controversy must exist, as the federal courts would not give opinions for the sake of advice; it then stated that a federal taxpayer did sometimes have a right to sue, and that the issue of improperly spent taxes was not one for the Congress and the president to decide, as the government had suggested in this case, but was one for the courts to become involved in.

The real question then was whether the person suing had standing. In determining standing, the issues involved played a large role, and Warren noted that "our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated" (392 U.S. 83: 101–102). Warren held that for federal taxpayers to sue, two requirements must be satisfied: "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked," and "secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged" (392 U.S. 83: 102). Both these requirements were fulfilled here, and so the suit was allowed. General disagreement with how tax monies were spent was not allowed to become a federal case, but if the tax was alleged to violate another part of the Constitution, in this case the establishment clause of the First Amendment, suits were allowed, and thus this suit was an allowable one. The case was then returned to the lower courts for adjudication on the issue of whether the expenditure was unconstitutional.

Justice Douglas wrote a concurrence, arguing for the abandonment of the 1923 standing rule and an overturning of the 1923 case, holding that when the Constitution was affected, taxpayers should be allowed to bring suits and that this would not, unlike what the dissent suggested, result in a flood of lawsuits. Douglas saw the proper role of the Court as being to right wrongs, and that "where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors" (392 U.S. 83: 111). Douglas did not think the First Amendment should give

one more standing to sue than any other amendment, holding "I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights" (392 U.S. 83: 113).

Stewart and Fortas wrote short concurrences, arguing that this case only established the rule that a taxpayer's claims under the First Amendment could be brought into courts, basically limiting the holding and not expanding it as Douglas wanted to.

Harlan dissented, holding that one could sue if prosecuted for failure to pay a tax when that failure occurred because of dislike of a government expenditure and that this was the proper way for such an issue to enter the Court system. He suggested that the Court had made the wrong decision on whether taxpayers in cases like this one had standing. His basic disagreement was with the increased power given the First Amendment in terms of what suits were allowed, arguing that the purpose of the First Amendment's establishment clause was not clear, and because it was not clear, it could not serve as the basis for allowing standing. Harlan would allow suits against funds being spent to support religion directly, but that is where he would draw the line. He pointed to the Congress and the president, not the courts, as the proper place to gain relief from what abuses occurred, and that the remedy given in this case would result in too many cases flooding the courts.

However, Harlan did not carry the day, and this lawsuit and similar lawsuits were allowed. In similar cases against state laws, the suits have been somewhat limited due to aggressive use of the Taxpayer Injunction Act, which does not allow one to escape payment of taxes just because of legal opposition to what the taxes are being spent on. One must pay the taxes and then sue, and in general this act, especially recently, has limited access, especially to the federal courts, to those wishing to sue in opposition to a tax.

See also *Doremus* v. *Board of Education; Hibbs* v. *Winn; Lemon* v. *Kurtzman; Mueller* v. *Allen;* Paying for tests and other aid for private schools; *Valley Forge College* v. *Americans United*

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Footnote Four of *United States* v. *Carolene Products Company*

304 U.S. 144 (1938)

Seldom do footnotes in a Supreme Court decision seem remarkable, and very often they are overlooked by all but the most ardent scholars or interested attorneys. In a couple of relatively recent instances, however, footnotes have proven to be important and informative in Supreme Court decisions. One of those was in the *Brown* v. *Board of Education* case in 1954. In footnote 11 of that decision, the Supreme Court quoted several academics about segregation's sociological effects. This was condemned by *Brown*'s opponents, and segregationists stated that the Supreme Court was not engaged in the law, but in sociology. Footnote 4 of the *Carolene Products* decision was no less important, although it did not produce much controversy at the time.

The overall decision in *United States* v. *Carolene Products Company* dealt with whether Congress could regulate "filled" (or skim) milk.

Justice Harlan F. Stone's decision held that it could, but the decision itself, unlike *Brown,* is not that remarkable. While discussing Congress's power, Stone noted that Congress only needed a rational basis for legislation. In an attached footnote, Stone added, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (304 U.S. 144: 152). This footnote means that while Congress is presumed to act constitutionally when it has a rational reason to pass legislation, it may not be (and Stone, by adding the footnote, hints that it is not) presumed to be acting constitutionally when legislation affects certain minorities, whether racial, religious or other "discrete and insular" minorities. Thus, Congress is given the power to regulate the economy generally, but there is a higher standard of proof required if the legislation is aimed at certain minorities or if it affects the rights given by the Bill of Rights, which is also somewhat applied to the states.

This footnote has come to be much more significant to the American public than the decision from which it came. In it, the Supreme Court placed a greater burden on Congress when dealing with legislation affecting racial, religious, and other minorities. The footnote has been used to justify Court decisions in several subsequent cases. For example, in *West Virginia State Board of Education* v. *Barnette,* in the 1940s, the Supreme Court used the *Carolene Products* footnote to say that people did not have to salute the flag if their religious beliefs prohibited them from doing so. However, in *Employment Division* v. *Smith,* in the 1990s, in which an Oregon employee claimed his workplace could not fire him for religious use of peyote, the Supreme Court limited the effect of the footnote by saying that laws are permitted to limit religion in their effect, so long as those laws are not directed at religion specifically and are broad ranging in their intent.

See also *Employment Division* v. *Smith; Gitlow* v. *New York;* Incorporation; *Palko* v. *Connecticut;* Saluting the flag

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Felix Frankfurter

Supreme Court Justice
Born: 1882
Died: 1965
Education: City College of New York, 1902; Harvard Law, 1906
Sworn In: January 30, 1939
Retired: August 28, 1962

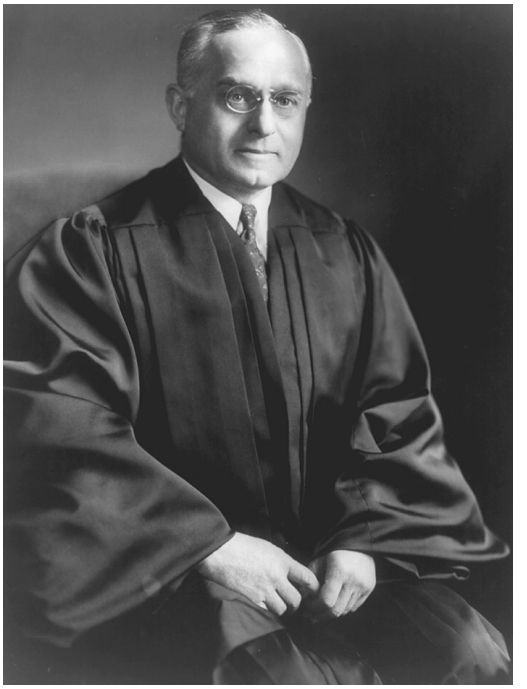
Unlike many Supreme Court justices, Felix Frankfurter did not practice law as his primary occupation for any significant period of time. He was born in 1882 in Austria and immigrated to the United States at the age of twelve. He graduated from college at the age of twenty and then attended Harvard Law School, receiving the highest academic average in the school's history to that point. For one year in New York

City he practiced law then joined the U.S. attorney's office in that city. He also served in the U.S. Department of War (something like today's Department of Defense). In 1914, Frankfurter joined the faculty of Harvard Law School and largely remained there until 1938, with a hiatus to serve as assistant to the secretary of labor during World War I.

Frankfurter, although clearly at home at Harvard, remained active in legal issues. He was at the forefront of the defense in the Sacco and Vanzetti murder trial. Although not formally a part of the government during the 1930s, he advised President Franklin Delano Roosevelt (FDR) on many issues and helped to find Harvard graduates who were interested in working in Washington. He provided law clerks for Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis, who numbered among his friends. He was chosen to replace Benjamin Cardozo on the Supreme Court when Cardozo died in 1938 because he (Frankfurter) was an advisor, an expert on constitutional law, and quite possibly because he was, like Cardozo, Jewish. Frankfurter's religion is noteworthy because in the twentieth century, beginning in 1916 when Louis Brandeis was appointed (except for a twenty-three-year gap from 1970 to Ruth Bader Ginsburg's 1993 appointment), there was always a Jewish Supreme Court justice. This led to the perception that there is a Jewish seat on the Court.

However, Frankfurter believed strongly that religion should play no role in his judgments. In addition to his Court activities, he also kept up with correspondence and advised FDR. Frankfurter wrote in a clear and witty style, making his opinions engaging reading, even when the reader did not agree with them.

Frankfurter believed in a limited role for the judiciary. He believed acts should be struck down only if they were in clear conflict with the Constitution, and other than that, the legislature should be given the benefit of the doubt and allowed wide latitude of action. Hand in hand with this view came the idea



Felix Frankfurter was an associate justice of the U.S. Supreme Court from 1939 to 1962. He advocated the exercise of judicial restraint by the Court. (Library of Congress)

that the legislature reflected the views of the people who elected it, and judges should not supplant the people's desires, except in clear cases of constitutional conflict. Among constitutional scholars, this view is known as judicial restraint, and judges who practice it generally restrain from striking down legislation. Unlike some advocates of judicial restraint, Frankfurter tried to follow this view in all areas of the law, not just those in which he agreed with what the legislature was doing.

Throughout the 1940s, Frankfurter was considered a leader among those justices who believed in judicial restraint and limited reading of the Constitution and the Bill of Rights. On the other wing were those believing in judicial activism and a broader reading of the Constitution and the Bill of Rights. This wing, led by Hugo Black, held that judges should not be afraid to strike down unconstitutional legislation. Black

and Frankfurter notoriously disagreed on most cases, and both wanted someone from his own wing to become chief justice. Frankfurter was disappointed when Truman went outside the court to select Fred Vinson and then when Eisenhower selected Earl Warren. When Vinson was selected, Justice Jackson thought that he had been promised the job by FDR, and Jackson made his thoughts public. (Black and Douglas had threatened to resign if Jackson was named chief justice, and Frankfurter and Jackson may have threatened to resign if Black was chosen.) Relations between Frankfurter and Black, never good, were worse after this. Frankfurter and Black would eventually come to terms, but, oddly enough, as theirs was the less publicized quarrel, Frankfurter and Douglas never did. (Jackson died in 1954 without coming to terms with Black either.)

Frankfurter made immense contributions to the law in his legal opinions. One of his first notable opinions came only a year after joining the Court. In 1940, he wrote the Court's opinion in *Minersville School District* v. *Gobitis,* which held that school districts could force Jehovah's Witnesses to salute the flag. He considered the flag salute to be justified in the promotion of patriotism, and he deferred to the wisdom of the legislature, writing, "The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality" (310 U.S. 586: 598). Just three years later, though, the court reversed itself in *West Virginia* v. *Barnette.* Furious as he found himself on the short end of a 6–3 decision, Frankfurter believed that Black and Douglas, among others, had reversed themselves for political reasons, which is not permitted for Supreme Court justices. Frankfurter's famous dissent in *Barnette* noted his own religion. He wrote "one who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic" (319 U.S. 624: 646–657). This is perhaps his best single statement of his view on the Supreme Court justice's role in American life and the significance he attributed to his job.

In 1962, Frankfurter resigned at the age of eighty because of bad health and lived for a few more years in Washington; however, he engaged in little activity after leaving the Court.

See also Hugo Black; Saluting the flag

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G

Gay marriage

While marriage is technically a state-based institution, it is one with unquestionable religious ties. Repressive social and religious mores forced gays and lesbians into the closet for most of America's history, and it was not until the late twentieth century that same-sex partners could have public relationships. Fundamentalist Christians, particularly, express their opposition to gay marriages (and gay rights legislation in general), and very few states support same-sex marriages.

In the nineteenth century, many women lived together in what were frequently called Boston marriages. At least some of these relationships were homosexual ones. However, this was also the only way women could live acceptably outside of a family situation. Single women living alone were assumed to be prostitutes, so in order to move to a new city or leave her parents' home without moving in with another relative, a woman had to find a roommate. Finances also contributed to such living arrangements, as most women did not make enough money to be able to live alone. Research into these arrangements has shown that some, but not all, were romantic in nature. Same-sex couples never thought publicly about marriage as their sexual preference was generally ranked a crime and therefore needed to be hidden.

With the twentieth century, more and more people who were homosexual came to accept their sexual orientation and sometimes even publicly proclaim it. In the 1940s, two important developments promoted homosexual awareness. The first was World War II, when many gays and lesbians moved from small towns into the larger cities and/or served in the armed forces, situations in which they could come into contact with other gays and lesbians and realize that they were not alone. The 1940s also saw the publication of the first Kinsey report, which focused on male sexual behavior and argued that homosexuality was not deviant, and a fair number of men were exclusively homosexual. The second Kinsey report focused on female sexual behavior and was released in the early 1950s, and its findings were similar. The studies stated that roughly 4 percent of men and 2 percent of women were exclusively homosexual.

Both of these studies offered support to gays and lesbians in the form of scientific documentation suggesting that their sexual orientation was not an immoral aberration. This encouraged them to begin to fight for their own rights at a time when gay and lesbian groups were leading increasingly closeted lives, thanks to the homosexual paranoia fostered by the Red Scare, the fear of communist infiltration of the U.S. government following World War II. The growing civil rights movement also encouraged gays and lesbians to begin to believe that they deserved rights. Indeed, both the gay and lesbian movements and the women's rights movements learned tactics from the civil rights movement.

In the 1950s, the first gay and lesbian organizations were founded. The Mattachine Society and the Daughters of Bilitis formed to provide gays and lesbians with political outlets and meeting places. The groups hoped science would ultimately prove to the mainstream populace that homosexuals were not a threat. However, they were fairly conservative and so were frequently derided by the much more radical gay and lesbian movement of the late 1960s and beyond.

By the 1960s, many gays and lesbians were becoming more open about their sexuality,

and they even persuaded the ACLU to take a stand supporting the position that a person's sexual activities in private should not be criminalized. All this set the stage for the radical gay rights movement, which began at the Stonewall Inn.

On June 27, 1969, the New York Police raided the Stonewall Bar, a gay bar in Greenwich Village, New York. The raid turned into a riot, and this is widely seen as the start of the gay and lesbian rights movement that became prominent in the 1970s. Paralleling this movement came the public iteration that gays and lesbians wanted to marry. In 1975, Jack Baker and Michael McConnell applied for a marriage license in Minneapolis to protest Minnesota's refusal to allow same-sex marriages. They were refused, and McConnell lost a job offer because of his open sexuality.

Backlash against the movement, spearheaded by the right-wing religious right, was strong. However, gays and lesbians did make significant advances in this period. In 1979, the first adoption of a child by an openly gay man was legalized. However, gays and lesbians who wanted to adopt children as couples still faced significant barriers—and in many states they continue to confront these barriers today. Indeed, until the 1990s, gay and lesbian marriages remained unheard of, and same-sex partners wishing to publicize and formalize their commitment to one another usually held private ceremonies that offered no legal status.

In Hawaii, one group of plaintiffs had some success in the 1990s. In the case of *Baehr* v. *Lewin* (later *Baehr* v. *Miike*), Hawaii's Judge Levinson found that Hawaii's constitution made it illegal to discriminate against gays and lesbians in the area of marriage and so ordered that three gay couples be allowed to have marriage licenses. This decision was upheld by the Hawaii Supreme Court. However, it created a firestorm of controversy. Meanwhile, at the national level, Congress got involved, primarily because of the full faith and credit clause of the Constitution, which generally has been held to require one state to respect the rulings of another state in certain areas. Marriage and divorce are two of these areas. If one state considers a couple to be married, it generally has been held that other states are required to consider the couple married as well. This practice used to create huge controversies, as many heterosexual couples who were too young to be married in one state went to another and got married. Divorce was generally seen in the same way, as some couples would obtain a divorce in another state with easier divorce laws, at which point the question became whether the first state had to respect the ruling of the second. In the twentieth century, the answer generally was that, yes, the first state would have to respect the second state's ruling, and this did not cause a large controversy until the issue of gay marriages surfaced. Thus, if Hawaii allowed gay marriages, all of the other states might have to respect those marriages.

Gays and lesbians and supporters of gay and lesbian rights everywhere celebrated a triumph in Hawaii's ruling, but it was relatively short-lived. Those opposed to the measure rallied support in Congress and passed the Defense of Marriage Act (or DOMA) in 1996. DOMA held that states had to respect marriages in other states only when these unions were between one man and one woman. Hawaii itself soon acted to make the point moot, passing a constitutional amendment banning same-sex marriages in 1999.

Other states, though, were not as wholly hostile to gay rights. Vermont passed a law creating civil unions in 2000, marriages in everything but name on the state level and carrying the same benefits statewide as marriages. Civil unions, however, did not have to be respected in other states. In 2004, New Jersey passed a similar measure, and in 2005 Massachusetts broke new ground in the United States, becoming the first state to legalize gay marriage. Meanwhile, in 2003, Canada legalized gay marriages on a province-by-province basis, and, as the country has no residency requirement, same-sex couples have been crossing the

border to wed ever since. The law was made national in 2005, forcing all provinces to allow same-gender unions. In September 2004, President George W. Bush's proposed constitutional amendment banning gay marriage was defeated in the Senate.

However, other states were not required to follow the leads of their progressive neighbors, health institutions do not have to honor a civil union partner as next of kin, and no federal benefits in taxes or other areas came from these civil unions and marriages. California has passed legislation giving spousal benefits to same-sex partners, and a number of universities and private organizations do the same. As recently as 2005, California's supreme court ruled that a law banning same-sex marriages was unconstitutional, forcing the issue of a constitutional amendment to a likely statewide vote. While most states have currently ratified constitutional amendments banning same-sex marriage, the U.S. Supreme Court has not made any rulings about this on the national level.

Canadian churches opposed to same-sex marriage feared they would be forced to perform such weddings, but a Canadian supreme court ruling guaranteed that they would not be required to marry same-sex couples. However, an increasing number of churches and religious organizations are accepting of gay and lesbian couples, and some encourage gay and lesbian marriages.

The battle over same-gender marriages was in no way completed by the Defense of Marriage Act in 1996 or Vermont's actions in 2000. George W. Bush's proposed constitutional amendment was based in the argument that DOMA was only an act and it could be struck down by the courts, whereas an amendment would provide permanent status to the issue. Similarly, gay rights advocates would like to see a federal constitutional amendment guaranteeing gay and lesbian couples the right to marry for exactly the same reason. Thus, in all likelihood the issue will continue to be politically and personally hot for some time to come.

See also *Baehr* v. *Lewin; Bowers* v. *Hardwick;* Divorce, marriage, and religion; *Loving* v. *United States;* Religion and attitudes toward marriage historically in the United States

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General legal treatment of Mormons

The law has generally treated Mormons with some disdain, especially in the church's first century, and the public, especially in the early years, went far beyond the law to force the Mormons west and then to scorn their church. The Mormon religion, also known as the Church of Latter-day Saints, was founded in 1827 by Joseph Smith, who claimed personal revelations as the foundation of his belief. He believed an angel had shown him a new version of the Bible, the Book of Mormon. Among its revelations were claims that many contemporaries considered blasphemous, including the belief that America had been founded by ancient Hebrews and that Native Americans were the descendants of this group, but that they had forsaken Jesus, who had also appeared in America, and were turned dark for their error.

Smith gathered a following, in part for a number of reasons not directly connected to

his revelations. To begin with, the mid-1800s was a period of religious revival and renewal in the United States, known as the Second Great Awakening. Many people were leaving their old religions and finding new ones, and Mormonism was just one of several to grow up in the atmosphere (the Shaker faith, which has died out, and Unitarianism, which still exists today, are two others). Smith claimed that America had been the site of the new revelation, and the country was special to God. American exceptionalism has always played well, and it certainly had success in this religious context. Smith also believed that human beings could be made perfect and that God had once been man and man could become God. The Mormons drew from those disenfranchised by the period's economic changes, and Mormonism provided order and answers, which people craved. However, many outside the religion thought that the Bible and the Constitution were what had made America great, and they felt that the Book of Mormon was a blasphemous text that sought to disrupt both church and state alike.

The Mormon religion also drew more negativity at its outset because it was more direct than most new sects or denominations in claiming to be the only true religion. Smith and his followers believed Mormonism would ultimately replace all other forms of Christianity. The Mormons, as a whole, were subject to persecution to the point that in 1838, the governor of Missouri, Lilburn Briggs, ordered the group to leave the state, saying that they should be killed if they failed to go.

The Mormons then settled in Illinois, where they again met with discrimination and public anger. In 1843, Smith stated that God had spoken to him again, telling him men were allowed to have multiple wives and instituting polygamy as an acceptable church practice. This, combined with Smith's desire to be president of the United States, caused him to be jailed on a charge of treason. The charge stemmed from Smith's supposed attempts to negotiate with Mexico for Mexico's allowance of a new settlement for Mormons to the Southwest (what was then northern Mexico and what is now the United States). The people, though, did not want to wait for the law to do its work. A mob forcibly removed Smith from jail and lynched him in 1844.

After Smith's lynching, Brigham Young led the Mormons, moving the group on a 2,000 mile trek west to what would become Utah. There the Mormons established their own colony, in a territory that was pretty much deserted and unwanted. Utah was, at the time, part of Mexico, and it would remain so until 1848 and the Mexican-American War, just after the Mormon migration. The area seemed largely uninhabitable, and the Mormons survived by irrigating the desert, founding Salt Lake City.

The U.S. government did not leave the Mormons alone, largely because of the practice of polygamy by the church leaders. For instance, long-term leader Brigham Young had at least nineteen wives. The United States passed a series of acts regulating the territories (as the Utah territory, like all other territories, fell under federal law) between 1862 and 1887 and outlawed polygamy very quickly. The first polygamy case came in front of the U.S. Supreme Court in 1879, and the Court upheld the law, ruling that behavior based in religion was not necessarily protected by the First Amendment. The battle culminated in the Mormon Church being stripped of its charter and possessions in 1890. The church then reversed its position on polygamy in the early 1890s, banning it. The U.S. government returned to the church what was left of its assets a few years later.

Some groups continued to push for stronger laws against polygamy or a federal amendment banning the practice, but the federal government did not act. The U.S. government has generally left the question of polygamy alone since the 1890s, even though polygamy is discussed along with the gay marriage controversy

today. The argument made by gay marriage opponents is that if gay marriage is legalized, then polygamy will also have to be legalized. Polygamy has also declined correspondingly, with the cessation of formal Mormon recognition. After 1890, polygamists generally stayed out of the limelight, and the Utah constitution was required to have a provision banning polygamy or plural marriage. The Supreme Court has occasionally gotten into the polygamy debate since 1890, as some cases involving the practice have been appealed to that body. The Court upheld a conviction of a Mormon man under the White Slave Act, as he had taken his wives across state lines and fallen afoul of that act. The Supreme Court also refused to review a Utah decision removing custody from parents who supported polygamy. In that case, the parents did not practice polygamy but merely had advocated the idea of polygamy to their families. The practice still lives on, primarily in Utah, as splinter Mormon sects not recognized by the main church still support the practice. Close to 100,000 people may be living in polygamous marriages, with no regular campaign of prosecution against them. Besides being illegal as polygamous marriages, the unions have been a source of sexual abuse and underage marriages, also illegal, in which unwilling girls are forced to marry much older men. Thus, it is not outside the realm of possibility that polygamy prosecutions will resume at some point in the future. However, few, if any, of the practice's adherents will be members of the mainstream Mormon Church, and it is highly unlikely that any successful religious defense can be mounted for polygamy.

Outside of polygamy, Mormons have generally been treated better by the law than other groups who also evangelize. Mormon men are generally required to take a two-year mission, usually around the age of eighteen, and travel around spreading their faith. Few prosecutions of Mormons have been reported for these efforts, however. This is quite a contrast from other well-known groups of evangelizers including the Hare Krishnas and the Jehovah's Witnesses. The Hare Krishnas have repeatedly come before the Supreme Court for their efforts in public places to sell their literature, solicit donations, and inform people about their faith. The Jehovah's Witnesses require each active Witness to distribute literature and spread his or her ideas, often in a door-to-door style of evangelizing. The Jehovah's Witnesses, ever since the 1930s, have been repeatedly arrested for their activities, and it has been estimated that this group has appeared in front of the Supreme Court at least seventy times on the issue of door-to-door canvassing, refusing to salute the flag, refusing to receive blood transfusions, and refusing to serve in the army, among other issues. The Mormons have not been prosecuted so heavily, but this should not suggest that they are always well received by those to whom they evangelize, just that they suffer less government intrusion.

Several possibilities to rationalize this anomaly exist, though none can be defined as the certain reason for it. The first reason is political. Mormons are allowed by their beliefs to be active in politics, while the Jehovah's Witnesses must refrain from doing so. Thus, across the nation there are elected and appointed officials who are Mormons. This presence in politics may explain why some arrests never turn into prosecutions, as the elected and appointed officials can intervene with the arresting officials and convince them not to prosecute. This is not to say that the Mormons are above the law, but just that those with friends in higher office can convince officials to drop the charges in many cases. The second is the stance of the Mormon Church on prosecutions, as the church, especially recently, works with municipalities to educate them about the Mormons' right to evangelize, while other faiths may not develop such a close relationship with local legal entities. A third possibility is the nature and frequency of the evangelization. Mormons are required to go on only a two-year mission and then only if young and male (women do

go on a mission sometimes, but less frequently). In contrast, all Jehovah's Witnesses and all Hare Krishnas, in most interpretations of their faiths, are told to witness. Thus, there is a smaller percentage of Mormon Church members proselytizing at any given time. The public may be more accepting, or at least more understanding, of an individual on a short-term one-time mission than of one on a repeating mission and less likely to push for prosecution. All of these reasons (and possibly others) probably contribute to the fewer prosecutions, but no good study has been done on the matter.

Thus, although not well received by the public in the early years of its existence, the Mormon Church has recently been less subject to prosecutions than other evangelizing churches. And those offshoots of the Mormon Church that are not under its control and still practice polygamy are also not regularly subjected to waves of prosecution. The non-Mormon public may not view the group as favorably as other religions, but the law has had fewer encounters with the Mormons in general and for evangelizing than with other churches who contact the public directly and personally in order to spread their message. While subject to intense hatred by the public in its early years, the Mormon Church has now become, more or less, part of the American landscape.

See also *Baehr* v. *Lewin; Employment Division* v. *Smith; International Society for Krishna Consciousness* v. *Lee; Loving* v. *United States; Reynolds* v. *United States; Watchtower Bible and Tract Society of New York* v. *Village of Stratton*

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Ghost Dance Massacre

In the mid-1800s, the U.S. government attempted to relocate Native Americans onto reservations. Very often these moves were accompanied by promises of supplies that were later broken. Fixed settlement on the reservations differed greatly from the many traditional Native American lifestyles in the West, which often had been very mobile, following the buffalo and moving often from season to season.

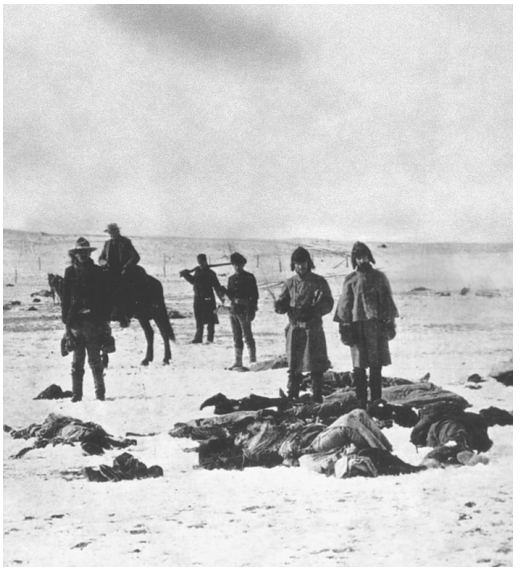
After moving the Native Americans onto the reservations and extinguishing the last of the concerted Native American military campaigns, the U.S. government passed the Dawes Severalty Act in 1887. Bluntly stated, the Dawes Act aimed to eliminate Native American culture and religion, which were inextricably intertwined, and replace them with white culture and religion. The act was designed to convert the Native Americans into white farmers by dealing with them on a family rather than a tribal basis, which was at variance with how most tribes governed their affairs. It gave each family 160 acres of land and granted them ownership of the land after a certain period. In addition to its total lack of respect for tribal culture, the act granted land that was generally not fit for farming. This was the backdrop for the Ghost Dance Massacre, also known as the Massacre at Wounded Knee. Whites originally called it the Battle at Wounded Knee, but Native Americans have consistently contested the term's accuracy, as

the white soldiers outnumbered the Native Americans by a huge number.

In 1890, the Native Americans were desperate for a revival of their culture. A Piute prophet, Wovoka, believed the world would soon end and be reborn, inherited by the Native Americans if they could live harmoniously and keep themselves free from the pollution of white culture. Wovoka did not believe in mourning, as the dead were among those he believed would inherit the earth. He told people to dance so that they might die briefly and thereby catch glimpses of the foretold paradise. These dances, called Ghost Dances, produced visions. The dances spread out from the Piute and included the Sioux in South Dakota. The visions they produced included a return of the buffalo. The buffalo had originally numbered in the tens of millions, but by the 1890s very few were left on the plains. By the end of the 1870s the herd was estimated at about 1,000, with even fewer remaining by the 1890s.

The white population greatly feared the Ghost Dances, particularly after two Native American mystics, Kicking Bear and Short Bull, began to focus on the elimination of the whites that the visions promised. Native Americans were routinely mistreated by the white people who ran the reservations. Some reduced the amount of food given out to the Native Americans, others tried to profit from their positions, and still others were simply inept.

It has been estimated that only about 4,000–5,000 Native Americans (mostly Sioux) were participating in these dances, and many of these were women and children. The dances were banned on Lakota reservations, and the U.S. Army brought in 6,000–7,000 soldiers to subdue the Ghost Dancers. The reasons for the massive show of force were multiple, but one was that the army hoped to frighten the Native Americans into surrender with a show of force. The army, headed by General Miles, also hoped to show the need for a continued western military presence so they would not have to modernize. Without the need for the military to guard the reservations, the army might have had to modernize and prepare to fight forces outside the United States, and some in the army, including Miles, did not want this. Miles and others also wanted the army, not the Indian office, to be given control over Native Americans.



Aftermath of the Wounded Knee Massacre at the Pine Ridge Agency in South Dakota in 1890. Reacting to the fervor created by the Ghost Dance, the U.S. Army mobilized a large force to control the Native Americans. Tensions at the Pine Ridge Agency led to violence on December 29, 1890, near Wounded Knee Creek, as between 150 and 300 Sioux were killed and 50 wounded in what would mark the end of 400 years of organized Native American resistance to white culture. (Library of Congress)

However, the large show of force backfired in many ways and was one of the factors leading directly to the massacres. First, along with the alarmist reports that were circulated, the presence of so many soldiers caused the white people of the region to panic. Past activities of the troops also caused problems. Earlier, even Native Americans not participating in anti-white activities had had their horses taken and their homes raided by the soldiers, and the

sheer number of troops caused them to worry as well. Kicking Bear invited Chief Sitting Bull, a remaining chief from the Battle of Little Bighorn, to join in the dances, and Sitting Bull allowed them to be taught at Standing Rock until Kicking Bear and Short Bull were removed by the army.

The Lakota who were participating in the Ghost Dances invited Sitting Bull to join them, but before he could set out, his arrest was ordered. On December 15, 1890, in the process of arresting him, and claiming he resisted arrest, government officials killed him. The remnants of his band went to join Kicking Bear and Short Bull at Wounded Knee. The army, on December 28, decided to disarm the Native Americans. There were 500 soldiers at Wounded Knee, but only around 350 Native Americans. The soldiers segregated the Native Americans, separating men from women. Four large Hotchkiss cannons, which could fire fifty heavy shells per minute, were trained on the groups. As the soldiers attempted to disarm the Native Americans, violence erupted. Though only about 150 of their bodies could be located for interment in a mass grave, around 300 Native Americans were murdered, and about two-thirds of that number were women and children. Only a small number of U.S. Army soldiers died, and most of them were killed by friendly fire. A fair percentage of the Native Americans who died were killed in execution-style incidents. Twenty-three of the soldiers participating in the massacre were given Medals of Honor.

The movement and the massacre have remained controversial and a source of tension. Government policy continued to focus on eliminating Native American culture and religion until the 1930s, and until recently, the foregone conclusion about the massacre was that a Native American fired first and that all were killed in the initial exchange. More recent research has put heavy doubt on the first conclusion, suggesting instead that when soldiers tried to disarm a deaf Native American, his gun discharged harmlessly. This research has also demonstrated clearly that people were killed after having fled the initial firing and were executed despite proving no danger to anyone. In the 1970s, the Wounded Knee site, where the massacre occurred, was the location of protests. Congress, eventually, in 1990 expressed regret, but paid no monies in reparation.

See also American Indian Religious Freedom Act; Dawes Severalty Act and the banning of Native American religions; *Employment Division* v. *Smith; Lyng* v. *Northwest Indian CPA;* Native American combination of religion and law

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Gitlow v. *New York*

268 U.S. 652 (1925)

A prosecution of a socialist for speaking against New York might seem like an odd place to increase the freedom of religion, but that was exactly what happened in the case of *Gitlow* v. *New York*. In the early twentieth century, America was quite concerned about the spread of socialism and anarchism, and many states passed laws forbidding anyone to speak against the government. A leader of the Socialist Party in New York, Benjamin Gitlow, was arrested in 1919 for criminal anarchy. His case eventually made it to the U.S. Supreme Court as *Gitlow* v. *New York*. Though his conviction was upheld, the Court's decision determined that the First Amendment did, in fact, apply to the states, because of the due process clause of the Fourteenth Amendment.

Criminal anarchy is defined as the belief that "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any

of the executive officials of government, or by any unlawful means" (268 U.S. 652: 654). The main evidence against Gitlow was two pamphlets he helped write and print. Gitlow, at trial, claimed that the statute he was accused of violating itself violated the due process clause of the Fourteenth Amendment, which held "nor shall any State deprive any person of life, liberty, or property, without due process of law." He argued that the liberty referred to in the due process clause included the freedom of speech. The Court held, first, that New York's statute did "not penalize the utterance or publication of abstract 'doctrine' or academic discussion," but aimed at those things actually overthrowing the government (268 U.S. 652: 664). However, the Court did grant "for present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" (268 U.S. 652: 666). This was the first time that the U.S. Supreme Court had held that parts of the First Amendment applied against the states. The Court went on to say that even though those freedoms were protected, they were not absolute. Thus, the punishment of Gitlow was justified, as he, in the eyes of his convicting jury, represented a threat to overthrow the state, and in the eyes of the Court, the statute was written narrowly enough to punish only real threats and not abstract doctrine.

Justices Holmes and Brandeis dissented, arguing that Gitlow did not represent a true danger to the state. Holmes wrote, "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement" (268 U.S. 652: 673). Holmes did not think that it had been demonstrated that Gitlow was enough of a danger to be suppressed.

It is important to understand what *Gitlow* held, and did not hold, as far as the First Amendment went. Gitlow's conviction was still upheld, as was New York's basic law of criminal anarchy. Indeed, even though parts of the First Amendment were applied against the states, the Court also stated that the First Amendment had its limits, as threats to the state, either written or spoken, could still be suppressed. Thus, First Amendment freedoms, now protected against interference by both the federal and state governments, were by far not without their limits. It would take several decades for the freedom of speech and of the press to be expanded to the limits we know today. It was a much narrower definition of those freedoms that was applied against the states through the *Gitlow* decision. This holding, which occurred

Benjamin Gitlow in 1928. Gitlow had been convicted of violating New York's Criminal Anarchy Law, and the Supreme Court upheld the conviction in Gitlow *v.* New York *(1925). However, the Court also, for the first time, held that the First Amendment's freedom of speech applied to the states as well as the federal government. (UPI-Bettmann/Corbis)*

almost in passing and without any citation by the Court, was applied in other free speech cases throughout the 1920s and 1930s.

In 1934, three justices of the Supreme Court, but not a majority, held that the freedom of religion is applied by the Fourteenth Amendment against the states. After that, in 1938, the Supreme Court stated that there was a higher level of scrutiny for those liberties protected by the Bill of Rights and the Fourteenth Amendment. The first time the freedom of religion section of the First Amendment was held against a state was in 1940, when it was used to strike down a state prosecution for "breach of the peace." In fifteen years, the protection of the freedom of religion against state intrusion moved from an abstract idea to enough of a concrete proposition to be used to overturn a conviction.

Since 1940, this idea that the freedom of religion is protected against state intrusion has not been seriously challenged. In 1943, the Supreme Court went so far as to argue that the First Amendment, including the freedom of religion, had a preferred position versus other rights, even other fundamental rights. Some concurrences and dissents by a few members of the Supreme Court have very recently suggested that the establishment clause should not be applied against the states, but as of this writing, such a view has not commanded a majority of the Court. Also, even within that argument, the idea that the First Amendment as a whole should be applied against the states is not challenged, but was instead granted, with the argument that the free exercise part of it applies but not the establishment clause. Thus, the ideas started officially in the *Gitlow* case have created a great deal more freedom in general, including religious freedom, by application of the First Amendment to the Constitution against state governments as well as the federal government.

See also *Cantwell* v. *Connecticut; Employment Division* v. *Smith; Palko* v. *Connecticut; Pierce* v. *Society of Sisters;* Saluting the flag

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Goldman v. *Weinberger*

475 U.S. 503 (1986)

The question here was whether the armed forces could order a soldier to remove an item of clothing that was required by his religion. In this case, a U.S. Air Force member brought a lawsuit against the secretary of defense, as a defense regulation required that he not wear his yarmulke while in the armed forces. Goldman sued because he thought the regulation infringed on his First Amendment rights. In a 5–4 decision, the Supreme Court upheld the regulation, with the majority opinion written by Justice Rehnquist. Goldman had served in the armed forces for five years as a clinical psychologist without incident and had worn his yarmulke the whole time, wearing his service hat over the yarmulke while outside. The Supreme Court first looked at the facts and held that the military was different from civilian life, holding "the military is, by necessity, a specialized society separate from civilian society" (475 U.S. 503: 506).

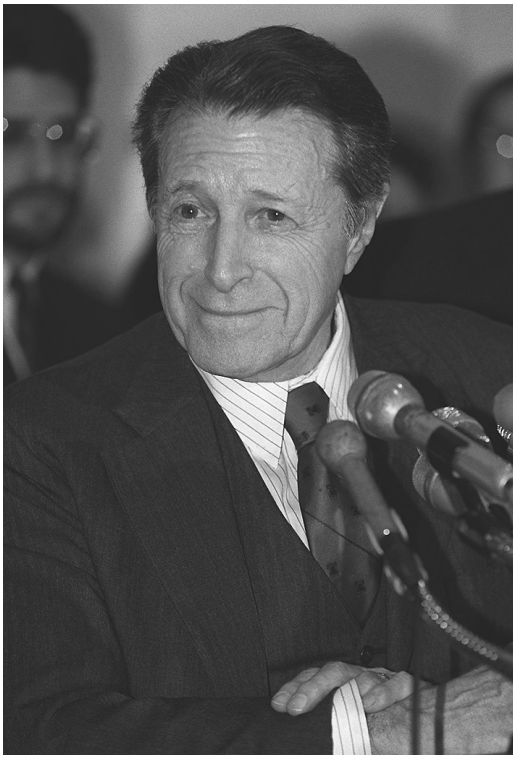
The Supreme Court then noted that it gave the military more deference than other groups in the area of the First Amendment, even while not granting total deference. The justification of the air force for the regulation was that it

"encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank" (475 U.S. 503: 508). Goldman argued that an exception should be made, but the Court held that "desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment" (475 U.S. 503: 509–510). Thus, the regulations were upheld.

Justices Stevens, White, and Powell concurred, in an opinion by Stevens. They noted that enforcement of the regulation on Goldman may have been personally based, rather than objective, and that the exception perhaps should have been allowed. However, the concurrence concluded, "The rule that is challenged in this case is based on a neutral, completely objective standard—visibility" and that an exception for yarmulkes would favor one religion over another, and so the rule should be upheld (475 U.S. 503: 513).

Justices Brennan and Marshall dissented, in an opinion by Brennan, arguing that the Court overlooked the fact that the regulation destroys Goldman's religion and focused instead on the right of the military to make regulations. They agreed that the military has more power than most areas, but did not believe that the power is needed in this case. They sarcastically described the majority's argument as that "Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies" (475 U.S. 503: 516–517). They also noted that the air force never explained why an exception for yarmulkes would destroy the desired "discipline and uniformity," citing other exceptions, such as those for rings, that were allowed. They concluded that "the Court and the military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country" (475 U.S. 503: 524). Justice Blackmun dissented, arguing that the costs of allowing the yarmulke should be weighed against the religious burden, but since no costs had ever been shown, the yarmulke should be allowed.

O'Connor also dissented, joined by Marshall, noting that the government should have to show that an "important" interest is at issue and that this interest would suffer harm before the First Amendment is restricted and that the government, and the majority, had failed to do so. While the armed forces are different,



Prior to becoming Ronald Reagan's secretary of defense and orchestrating an unprecedented peacetime military buildup, Caspar Weinberger, defendent in this case, had earned a reputation as a budget slasher at both the state and federal government levels. (AP/Wide World Photos)

O'Connor stated, that finding does not end the debate, which is what the majority believes. She also noted that the dress regulations, in their very own description, admit that they are not uniform and that Goldman served for years wearing a yarmulke without incident; therefore, the regulations in general cannot be upheld if the military has not "consistently or plausibly justified its asserted need for rigidity of enforcement" (475 U.S. 503: 532).

Thus, this regulation was narrowly upheld by the Supreme Court. The ruling, though, did not end the issue. Two years later, Congress approved a regulation allowing any armed forces member to wear clothing from his or her religion unless the clothing was found to obstruct the person's duties or if it was not "neat and conservative" (Lee, 2002: 188). Thus, even though the Supreme Court ruled that a yarmulke was not allowed to be worn, Congress acted to allow its wearing.

See also *Employment Division* v. *Smith; Sherbert* v. *Verner; Trans World Airlines* v. *Hardison;* Treatment of Jews, both in colonial times and after the American Revolution

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Gonzales v. *O Centro Espirita Beneficiente Uniao Do Vegetal*

126 S. Ct. 1211 (2006)

This case reexamined the issue of whether the federal government can ban the use of a controlled substance in a religious ceremony. *Employment Division* v. *Smith* (1990) dealt with a state's right to prohibit the use of a controlled substance, holding that a state could have such a ban. The Religious Freedom Restoration Act (RFRA), passed in 1993, aimed to reverse *Employment Division* and held that the states and federal government could not ban such substances or otherwise substantially burden religion without proving a compelling interest. The RFRA was struck down as it applied to the states in *Boerne,* but not as it applied to limiting the federal government. This case directly asked the question of whether the RFRA prohibits the federal government from banning the use of a controlled substance.

The church in question here was the O Centro Espirita Beneficiente Uniao Do Vegetal (UDV Church). The religion originated in Brazil, combining elements of Catholicism and native Brazilian religions, and its members are given communion through the use of a tea brewed from hoasca, which contains a hallucinogen banned by the federal government. The UDV Church brought the lawsuit after the federal government seized a shipment of its hoasca. The federal government claimed three compelling interests: preventing health risks to the church's members, preventing the risk of the hallucinogen's distribution from the church's stock to others, and fulfilling U.S. treaty obligations under a current treaty banning the drug. The Supreme Court ruled for the church.

The government advanced a number of different arguments in favor of keeping the ban. The first argument was that all of the drugs in the same class as this hallucinogen are very dangerous and that no exceptions should be given to any group. The Court, however, ruled that the RFRA prohibits the use of wide classes and that, instead, both the church and the context of the usage needed to be considered. The government also argued that the ban of the substance did meet this criterion, but the act in question, which set up the general drug classification, itself allowed exceptions to be made by the Department of Justice, and this undercut the broad rejection of all exceptions. The Court here cited the fact that the U.S.

Congress (at the federal level) has created an exception for peyote, used by many Native Americans in religious ceremonies, as another reason to reject the government's argument.

The government's final argument lay in an international treaty. It argued that the United States needed to uphold its treaty obligations, specifically those under the 1971 United Nations Convention on Psychotropic Substances, and granting an exception for hoasca, banned by the treaty, would undermine the war on drugs. The Court granted that the government had proven the need to fight the war on drugs but also held that the government had never proven the impact of granting this exception on that war. Failure to enforce one part of a treaty, the Court held, does not demonstrate that the war on drugs will be lost or other nations will stop cooperating. The Court did not address the question of whether peyote was also covered by the 1971 treaty.

The government urged the Court to defer to Congress and let the desire of Congress to ban illegal substances overrule the religious freedom that was being balanced against it. However, the Court pointed out a difficulty here in deferring to Congress. The Court asked which of two congressional acts should have preference, noting that Congress had enacted both the Religious Freedom Restoration Act and the ban on hallucinogens. As this question did not produce an easy answer, the Court followed the desires of Congress in the RFRA and balanced the rights of the church against the government interests demonstrated, holding that the government had not yet advanced a compelling state interest to justify the restriction. It should be noted that under the RFRA, even after the government advances a compelling state interest, it must also prove—and the Court pointed out that the government had not done this—that the action being challenged (here the ban on the hallucinogen) "is the least restrictive means of furthering that compelling governmental interest" (126 S. Ct. 1211, 1217). Thus, the government must prove either that the universal ban is the only way to restrict recreational use of the drug or that all other ways to advance the government's compelling interests would burden the UDV's religious liberty even more.

Government restrictions on liberty are never something to be taken lightly, but many people also feel that the war on drugs is one worth fighting. In both this case and in *Employment Division* v. *Smith,* the question of a government ban on a controlled substance used in a religious ceremony was considered. Here, the government did not prove a sufficiently compelling interest, as of the time of the case, to ban the UDV from using hoasca. In *Employment Division,* the Court held that Congress could not restrain the states, and that states could, but were not required to, grant religious exceptions to their drug policy. Thus, the permissibility of a universal ban on a drug depends both on what groups are restricting its religious use and what interests are demonstrated to be at stake.

See also *Boerne* v. *Flores; Braunfeld* v. *Brown; Cheema* v. *Thompson; Cutter* v. *Wilkinson; Employment Division* v. *Smith;* Religious Freedom Restoration Act of 1993; *Sherbert* v. *Verner*

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Good News Club v. *Milford Central School*

533 U.S. 98 (2001)

This case dealt with whether a school district could ban the meetings of a private religious group if it allowed meetings of nonreligious groups. In New York, a school district allowed

Reverend Stephen Fournier sits in the Milford Community Bible Church on June 11, 2001, the same day that his Christian Good News Club was awarded the right to hold meetings in the local public school by the U.S. Supreme Court. (AP/Wide World Photos)

district residents to use the school after hours for purposes including "instruction in any branch of education, learning or the arts, social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public" (533 U.S. 98: 102). However, the Good News Club was not allowed to use it for "a fun time of singing songs, hearing a Bible lesson and memorizing scripture," as this purpose was the same as worship in the eyes of the school board, and the policy forbade use "by any individual or organization for religious purposes" (533 U.S. 98: 103). This policy prompted a lawsuit, resulting in the Supreme Court case.

Justice Thomas wrote the majority opinion and ruled that the Good News Club had a right to use the space. He first considered "the nature of the forum," allowing that Milford had created "a limited public forum" (as both sides had agreed to this designation) (533 U.S. 98: 106). With this type of forum, the governing body could deny use as long as "the restriction must not discriminate against speech on the basis of viewpoint, . . . and the restriction must be 'reasonable in light of the purpose served by the forum'" (533 U.S. 98: 106–107). The Court held that viewpoint discrimination occurred here as the school allowed "morals and character development" by other groups, but not by the Good News Club (533 U.S. 98: 108). Even though this club was religiously

oriented, this difference did not allow the viewpoint discrimination. The Court also held that no reasonable person would see the school as endorsing religion, and so the school could not claim a desire to avoid violating the establishment clause as a reason to ban the club's meetings.

Besides Thomas's opinion there were also two concurrences and two dissents. Justice Scalia concurred, noting that there was no pressure here and so virtually no endorsement of religion and that the club should be allowed to give reasons for its good news without moving into being a religious group rather than one teaching morals. This was important, as the claim that the club was a religious group was what had touched off the action, and if the Good News Club could be viewed as a group teaching morals, then it would clearly be beyond regulation. Justice Breyer also concurred, noting that because this case overturned the motion for summary judgment for Milford (the decision at the district court level) did not mean that summary judgment was given for Good News—that is, just because Milford clearly lost does not mean that the Good News Club wholly won.

Justice Stevens dissented, categorizing the nature of the Good News Club's discussion as amounting to worship, which moved it away from just morals and character development; Stevens did not believe that allowing some discussion of morals meant that a school had to allow worship and that this regulation could be upheld in a viewpoint-neutral way. Justice Souter dissented, holding that "it is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion" (533 U.S. 98: 138); this thus created worship, which was banned by the policy, and the reasonableness of the policy had never been in question before this case. Souter also thought that the record was too scarce to allow the sweeping nature of the majority's conclusion.

This decision continues the trend set by other decisions of the Rehnquist Court, including *Lamb's Chapel,* and these hold, essentially, that a school board cannot discriminate on the basis of a group's views as to whether the group will be allowed to use the building. One can forbid all groups who are non-school related to use the building and could, theoretically, ban all student clubs; but if clubs are allowed, religious clubs must be allowed as well (although school personnel can restrict their involvement), and if outside groups can use the facility, then use by religious groups can be permitted if nonreligious groups who also deal with moral issues are allowed to meet in the building.

See also *Chapman* v. *Thomas; Employment Division* v. *Smith;* Equal Access Act of 1984; *Good News/Good Sports Club* v. *School District of the City of Ladue; Lamb's Chapel* v. *Center Moriches School District; McCollum* v. *Board of Education; Rosenberger* v. *Rector and Visitors of the University of Virginia; Tipton* v. *University of Hawaii; Widmar* v. *Vincent*

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Good News/Good Sports Club v. *School District of the City of Ladue*

28 F.3d 1501 (8th Cir. 1994)

Many of the most strongly fought legal battles in this country involve the use of public school

facilities by religious groups after school hours. Those backing the religious groups feel they should have the same right to use the facilities as any nonreligious group. They feel that limiting the access of religious groups to these public locations inhibits their participants' free exercise of religion. However, those opposing the use feel that the school district may be giving a benefit to a specific religion by allowing it to use school buildings. They also feel such permission encourages the participation of schoolchildren, since having the activities at school might imply school approval of the religion. Several cases have examined school district bans on religious groups.

The *Good News/Good Sports* decision dealt with this issue. The school board had established a policy of allowing only certain groups to use school facilities, those being athletic and Scout groups. The Good News/Good Sports Club was a "community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values," and it was described as "religious, but non-denominational" (28 F.3d 1501: 1502). The Eighth Circuit Court of Appeals held that the ban constituted unconstitutional viewpoint discrimination. It reiterated past decisions that "control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral" (28 F.3d 1501: 1505). Scouts were allowed to discuss issues "relating to moral character and youth development," but, the court held, as the Good News/Good Sports Club was denied this opportunity, the denial constituted viewpoint discrimination. It then turned to the issue of whether a compelling government interest justified the discrimination. The school board had argued that use of the facilities would create establishment of religion. Part of its argument was that the club met immediately after school. However, the court disagreed, holding that since students were not compelled to attend and because the club did not constitute a large percentage of the overall meetings held in the school after hours, no establishment issue existed.

One judge strongly dissented. He held "no court to date has determined that a parent-sponsored religious club has a constitutional right to meet on school property before school children have had the opportunity to depart school premises following mandatory instruction, merely because Scout and community athletic groups are permitted to do so" (28 F.3d 1501: 1515). The dissent argued that the school board had legitimate reasons to try to prevent the club from meeting and that Scouting was quite different from the club. "Scouting is a secular, skills-oriented activity analogous to and supplementary to learning which takes place in the public school classroom. The Club is a sectarian, worship-oriented activity which seems more analogous to a church-operated Sunday school for junior high youngsters" (28 F.3d 1501: 1518). The dissent also pointed out that the Scouts and athletic groups were the likely ones to suffer, as the easiest way for the school board to change their policy was simply to ban all non-school groups until after 6 P.M., which was the original starting point for religious groups.

Other school districts have used a standard of the best interests of the school district. In Colorado, one school district banned a meeting of the Million Man March, which wanted to hold an "Attitude and Consciousness Youth Forum." The meeting was banned in part because a large number of students had walked out the day before to protest, and the school board did not want a repeat of this action. However, the district court, in *Local Organizing Committee, Million Man March* v. *Cook,* held that the people who were going to speak at the forum were not connected closely enough to the walkout to justify the ban.

A final issue to consider is what makes a public school after hours a public forum. This was the issue before the Third Circuit in *Gre-*

goire v. *Centennial School District*. The school district wished to ban a group from worshiping and presenting a religious program even though the district had previously allowed a wide range of groups. The court held that when the school district "permits potentially divisive or conversion-oriented speech by outsiders to a student audience in school facilities in the afternoon and determines that this speech is consistent with the function and mission of the school system, it cannot, on maturity or 'mission' grounds, exclude the same type of speech directed to the same audience from its facilities in the evening. Where it identifies student-directed conversion speech as its criterion for exclusion, it cannot reasonably allow some members of some groups to meet with each other and deny access to others whose speech does not implicate this conversion element" (907 F.2d 1366: 1379). Thus, the regulations needed to be consistent, and denial of only a few groups did not create a nonpublic forum.

Several different questions need to be asked by school boards before deciding policy and by courts before deciding whether an exclusion is acceptable. Those include the nature of the forum created for discussion, the rules on that forum, the consistency in following the rules, and whether exclusions are based on viewpoints. Once a forum is opened for one type of discussion, such as that of morals, most courts have held that all people discussing morals, including religious groups, must be allowed. Viewpoint discrimination, including that based on religion, thus has been generally banned.

See also *Airport Commissioners* v. *Jews for Jesus; Bronx Household of Faith* v. *Community School District No. 10; Good News Club* v. *Milford Central School; International Society for Krishna Consciousness* v. *Lee; Widmar* v. *Vincent*

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Religion and the Law in America

Religion and the Law in America

An Encyclopedia of Personal Belief and Public Policy

VOLUME 2

Scott A. Merriman

ABC CLIO

Santa Barbara, California Denver, Colorado Oxford, England

Library of Congress Cataloging-in-Publication Data
Merriman, Scott A.
Religion and the law in America : an encyclopedia of personal belief and public policy / Scott A. Merriman.
p. cm.
Includes bibliographical references and index.
978-1-85109-863-7 (hardcopy : alk. paper) — 978-1-85109-864-4 (ebook)
1. Freedom of religion—United States—Encyclopedias. 2. Religion and law—United States—Encyclopedias. 3. Church and state—United States—Encyclopedias. 4. Religion and law—United States—Cases. I. Title.

KF4783.A68M47 2007
342.7308'5203—dc22
2007002579

11 10 09 08 07 1 2 3 4 5 6 7 8 9 10

Production Editor: Vicki Moran
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ABC-CLIO, Inc.
130 Cremona Drive, P.O. Box 1911
Santa Barbara, California 93116-1911

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To my mentors who have been teachers,
inspirers, believers, prophets, and friends;
to my wife, Jessie, who has been all of those
and more; and to my daughter, Caroline,
who makes me laugh and smile.

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VOLUME 2

INTRODUCTION

Freedom of religion is probably the freedom that Americans hold the dearest, at least publicly. However, the limits of that freedom, and the limits of the corresponding First Amendment clause against a governmental establishment of religion, are very murky, especially when the freedom of one individual's religion begins to clash with the prohibition against the government's establishment. This encyclopedia identifies some of the boundaries of those freedoms, seeks to explain the overall development of the freedom of religion, and highlights some of the important judicial decisions that have shaped it. The encyclopedia discusses the interaction between religion and the law in America; it does not aim to give legal advice.

Before we look at the history of freedom of religion in America, a short explanation is in order about the workings of the U.S. court system and how cases come before the U.S. Supreme Court. The Supreme Court is generally seen as the top court in America—and it is, for America, especially in the area of religion. However, in many matters, the U.S. Supreme Court is mostly irrelevant as one can take a case to that court only if the federal Constitution is in some way involved. Thus, if the matter involves a state law and no provision of the U.S. Constitution is implicated, the case must end at the highest level of state courts and often does not even get there. If only the state constitution or a state law is involved, the case would probably begin in the lowest state court, and if an acquittal occurred (assuming it was a criminal case) the matter would end there. If a conviction occurred, or if a civil case was decided under a civil law (civil law is concerned with personal rights, such as contracts), then whoever lost could appeal it; if the person did not appeal, the matter would end. Many cases end just like that. Above the lower court is an appeals court (even though each state's court system has different names for each level), and there can be more than one level of appeals courts. The loser there can again appeal, and the state's highest court often has choice, or what is called discretionary authority, to decide whether to hear the appeals. After the highest level of the state court, if there is a federal constitutional issue involved, like the First Amendment for issues of religion, the case can be appealed to the U.S. Supreme Court. The federal court system hears all cases under federal law, whether civil or criminal law, and also can hear cases involving federal issues that began in state court. Cases start at the district court level; there are ninety-four district courts, with most handling the cases that arise in a certain geographical district. The loser (except in the case of an acquittal with a criminal trial) can always appeal the verdict from the district court to a circuit court of appeals. There are thirteen circuit courts of appeals in the United States, and all but one have geographical jurisdictions (the last handles almost all cases dealing with patents, trademarks, and trade, among others, from across the nation). The circuit courts of appeals generally must hear the cases brought before them, and appeals can be taken from these courts to the U.S. Supreme Court. The U.S. Supreme Court, however, has discretion in deciding what cases it hears, and at least four Supreme Court justices must vote to hear a case before it will be heard. The Supreme Court also hears relatively few cases—only around one hundred cases a year in recent years.

The American colonies were founded for many different reasons, and as many different desires led people to come to this country;

only one of these was religion. Thus, the often cherished idea that people came to America solely for religious freedom is clearly not true. However, it is also true, obviously, that religion did motivate some. Many of the early colonies had established churches, as religious freedom meant, to many early colonial leaders, freedom to practice the religion of the colony's founders, not freedom to practice any religion (and certainly not the freedom to be without a religion). Many pitched ideological battles were fought over religion in the early colonies, and a few—most notably Rhode Island and Pennsylvania—expressly granted toleration to all religions. By the time of the American Revolution, official churches had been removed in several colonies, and the trend was clearly to slowly move away from an official church.

The American Revolution itself did little to change religion, but the colonies all had to create their own constitutions once independence had been declared, and this process led some to formally remove the state-supported church or to alter its status. The national government created during the American Revolution also did little with religion, but this was in large part because the Articles of Confederation gave the federal government little power in any area. When the time came to change the articles, the result was our current Constitution (even though it has been amended several times since). The new Constitution gave much more power to the central government, enough that some people became nervous, fearing that a tyrannical government would emerge and that all the people's rights would disappear. This fear was not sufficient to stop the Constitution's adoption, but it was pervasive enough that several states called for the national government to adopt a bill of rights that would spell out the limits on the federal government. The first Congress undertook this assignment, and James Madison was the leading figure in the discussions. He took the states' suggestions and drafted a number of different amendments; after discussion in the Congress, twelve were formulated and passed on to the states for ratification. The states passed all but the first two of those, and the resulting ten amendments became what we today know as the Bill of Rights. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Thus, the First Amendment contains two parts, both a prohibition against the government's establishment of a religion and the prohibition against the government's interference with someone's freedom of religion. The first part has frequently been called the establishment clause and the second part the free exercise clause, and neither is, obviously, self-defining.

Even though there is ambiguity about the First Amendment's precise boundaries in the area of religion, the First Amendment seldom came before the Supreme Court in the first one and a half centuries after the amendment's passage. This was largely due to two factors. The first was that the First Amendment was held to apply only to federal actions. Thus, if a state acted in a way that might be viewed as infringing a person's freedom of religion or as establishing a religion, the First Amendment did not come into consideration. If a state constitution had provisions similar to those of the First Amendment, the state's law might still be unconstitutional, but it would be so because it violated the state constitution, not the federal one. The reason was because the Supreme Court in 1833 ruled that the Bill of Rights limited only the federal government and did not limit the state governments. The second is that the states were the most likely bodies, particularly at the time, to pass laws in the area of religion. The federal government did not concern itself much with education or personal conduct in the states, and those are the areas

where most questions of religion arise today. Thus, it is not surprising that few cases involving religion made it to the Supreme Court.

In the few that did, federal power was generally upheld at the expense of religion. In the last half of the nineteenth century, the federal government did pass laws that regulated conduct in the federal territories, and some of these involved religion. The best-known law was one banning polygamy (or being married to multiple women at the same time), which was passed in 1862. The law was aimed at the Mormon Church in the Utah territory, as it sanctioned multiple marriages among its church leaders. Congress passed a series of laws directed against that practice, eventually removing the vote from anyone who publicly supported the practice and revoking the charter of the Mormon Church. The Supreme Court, starting in 1879 and running through the 1890s, decided several cases that upheld the right of the federal government to pass such laws, holding that churches advocating illegal acts were not protected by the freedom of religion clause and that illegal practices, even when based in religion, were still illegal. Those decisions have not been overturned and are still binding precedents today.

The First Amendment's religion clauses increased in both importance and frequency of use in court cases starting in 1925. In that year, the Supreme Court held that the Fourteenth Amendment extended the reach of the First Amendment. The Fourteenth Amendment had been passed after the Civil War to protect the rights of the former slaves, and it held that state governments could not, among other things, infringe upon anyone's right of liberty without due process of law. The Supreme Court in 1925 held that liberty included some of the items that many Americans hold dear, and the Court specifically mentioned the freedom of the press and the freedom of speech contained in the First Amendment. This meant that state actions that infringed upon our liberties, not just federal actions, might be held unconstitutional under the First Amendment. The Supreme Court did not give any reason for deciding to interpret the Fourteenth Amendment in this way, nor did they give a reason for not including the freedom of religion, but the case in question involved freedom of speech and the press, and that probably was why these were the only two freedoms mentioned. It is also clear that the liberty mentioned in the Fourteenth Amendment is not self-defining, and so the Supreme Court was right to define it, regardless of one's opinion on whether the First Amendment is part of that liberty. In 1940, the Supreme Court took the next step in applying the First Amendment against the states and held that the liberty of the Fourteenth Amendment which limited the states included the freedom of religion. Thus, states could no longer infringe upon the free exercise of religion, and in 1947 the Supreme Court completed the process by adding that states could not create an establishment of religion either. In twenty-two short years, the Court moved the religion clauses of the First Amendment from being relevant only in federal actions to applying in all state actions. This process greatly expanded the scope of the First Amendment and protected more of our freedom of religion and limited the government much more in what it could do in terms of establishing a religion. Since 1947, there has not been much serious reconsideration of reversing these decisions and thus applying the First Amendment only to the federal government again.

Instead, for the last half century, the Supreme Court has been forced to consider a wide range of government actions, on both the state and federal levels, which people have considered as either creating an establishment of religion or interfering with a person's freedom of religion. The general trend of the courts, over the long term, has been to increase the protections and to decrease government power, but that trend has become less pronounced in recent years. The first Court to consider issues in this area was the Stone

Court, which examined state provisions ordering students to say the Pledge of Allegiance and state restrictions on religious canvassing. (Supreme Courts are frequently described by the name of the chief justice at the time, and thus the Stone Court was the Court led by Harlan Stone. The current Court would be thus described as the Roberts Court.) In the first cases, several Jehovah's Witnesses objected to states' requirements that they recite the Pledge of Allegiance. The Jehovah's Witnesses believed that swearing an oath to a flag was worshiping a graven image, and that worship had been banned by the Bible. Thus, being forced to state the pledge was a violation of their free exercise of religion. The Supreme Court at first upheld the states' requirement that students recite the pledge, but three years later (in 1943) the Court reversed itself and held that the free exercise of religion portion of the Constitution prohibited states from ordering students to recite the pledge. The Stone Court also considered a case dealing with a conviction of a Jehovah's Witness as he had gone through a town trying to convince people to join his religion. The man had been orderly, but his religious message had been opposed and so the Jehovah's Witness had been convicted of a "breach of the peace," or what most people today might describe as disorderly conduct. As the only reason for his conviction had been opposition to his religion, the Supreme Court overturned his conviction, stating that religious conduct, if it was legal, was protected by the First Amendment. This expanded the free exercise of religion portion of the First Amendment to include some religious acts as well as religious beliefs.

The next Court, the Vinson Court, continued to deal with religion cases. Most of their major cases addressed "released-time" programs, which allowed students to be released from their public school classrooms to attend religion classes. The Supreme Court first struck down a program permitting students to be released to attend classes in their own schools, as they held that the government was establishing a religion; but a few years later, the Court allowed a program that released students to attend programs at sites off the school grounds. This was believed to be a reasonable accommodation of religion that did not rise to the level of being an establishment of religion. The Supreme Court also upheld a program that reimbursed parents for the cost of transportation to religious schools, holding that this program was neutral in the area of religion; it did not favor religious schools over public schools as transportation was being provided to both.

The Warren Court, much to the consternation of many conservatives, considered several freedom of religion cases in its later years and provoked much controversy. In 1962, the Court considered a case involving mandatory Bible reading and reciting of the Lord's Prayer to open each school day. The Court struck down this program as an establishment of religion, as it put the force of the state behind the Christian religion. The next year, the Court considered a state-mandated prayer from New York and struck down this program as well, once again holding it to be an establishment of religion. These two decisions sparked a firestorm of protest. People saw this as taking God out of the public schools, and many saw communism as the driving force for the decision. One of the main differences between the United States and the USSR, America's opponent in the Cold War, was the importance of Christianity in the United States (the USSR was atheist), and this decision seemed to undermine that difference. The Warren Court also entered the area of evolution in the public schools for the first time, striking down an Arkansas law that banned the teaching of evolution. The Court held that the only purpose of this law was to protect the Christian religion and such a law was an unconstitutional establishment of religion. The Warren Court returned to an area associated with religion in 1967, that of marriage. Marriage is, for many people, both a religious and a civil issue, even

though the state considers it only in the civil context. Some states in the South had banned marriages between people of different races and the Supreme Court struck down this ban, holding it to be a violation of people's privacy to tell them that they could not marry someone of a different race. The Supreme Court also, although it was not as controversial as the other decisions, held that a state cannot impose a substantial burden upon someone's free exercise of religion unless there is a compelling interest behind that burden. This greatly increased the free exercise of religion.

After the Warren Court came the Burger Court, which many expected to roll back the Warren Court's decisions in many areas, including that of religion. However, the Burger Court mostly maintained things the way they were rather than advancing or rolling back the decisions of previous courts. In 1971, the Supreme Court set up a test for determining the constitutionality of any given government regulation. The Court held that regulations had to have a secular purpose, had to have a primary effect of neither enhancing nor hurting religion, and had to avoid an excessive entanglement of the state and religion. That test, although often challenged, still in many ways remains the basis of the tests used today. In 1972, the Supreme Court entered an area that has become even more charged with religion than it was then, that of abortion. In *Roe* v. *Wade,* the Court held that laws preventing abortion, especially in the first trimester of pregnancy, must generally yield to a woman's privacy interest. The Burger Court continued the Warren Court's trend in the general area of religion, holding that a state could not order Amish children to attend school past the eighth grade as this would damage the Amish religion, thus again upholding the free exercise of religion versus governmental attempts to regulate general conduct. The Supreme Court also continued to be active in the area of governmental aid to private schools, mostly striking down any direct aid and being very restrictive in what type of general aid was allowed that also went to private religious schools. The Court also forbade private schools from receiving government aid on school grounds. Thus, programs that aided students in private schools might be legal off school grounds, such as remedial tutoring, but not on school grounds. In 1980, the Supreme Court dealt with the issue of posting the Ten Commandments in schools, holding that the state could not order their display as this was an establishment of religion. In 1983, though, the Supreme Court did allow tax deductions for parental expenses for education, even though most of the deductions taken were for expenses at religious schools. The Burger Court in 1985 dealt with another major issue of religion and the law in the form of a moment of silence. Arkansas had passed a law allowing a moment of silence for "meditation or prayer" and the Court held that the mention of prayer made this unconstitutional as the state was telling you how to spend your moment of silence.

The Rehnquist Court, lasting from 1986 to 2005, dealt with a plethora of cases dealing with religious issues and issues associated with religion. In 1987, evolution again entered the Supreme Court, as the Court struck down a Louisiana law mandating that evolution and creation science be given equal amounts of time in the classroom. Proponents of creation science argued that there was scientific evidence to back up a literal reading of the book of Genesis, and the Court held that the ordering of this scientific idea along with evolution amounted to an establishment of religion. In 1990, the Supreme Court returned to the issue of the general regulation of conduct in areas associated with religion, holding that the state could regulate conduct if it had a general reason to do so, and did not need a compelling state interest; so the Court upheld an Oregon law banning peyote use, which conflicted with the religion of some Native Americans. The Supreme Court in 1992 dealt with school prayer, holding that school prayer at graduations, even when it was nondenominational,

was still unconstitutional as it amounted to government promotion of religion. In 1997, the Court struck down a congressional law aimed at overturning the 1990 decision and thus forcing states and Congress to have a compelling state interest to regulate religion-related conduct. The Court also reversed an earlier court decision, and held that private schools could receive aid on their grounds, as long as the aid was of a secular nature.

The new decade did not bring an end to religious cases or controversial ones in the Supreme Court. In 2002, the Court upheld an Ohio law allowing the use of vouchers in the schools. Vouchers allowed parents to choose whether their students attended private school or public school, under certain circumstances, and if private school was chosen the state would pay for part of the cost. Many private schools are, of course, religious, and so this program, in one side's view, seemed to allow the state to subsidize religion, and in the other, it allowed school choice and better schools. The Supreme Court allowed the program, holding that the state was not establishing religion as the parents' choice, not the state, was directing the money into the religious schools. In 2003, the Court turned to an area that is tinged with religion—homosexual rights. The Court struck down a Texas law that penalized only homosexual sodomy. The Court did not consider religion, even though religion is the basis of many people's opposition to giving any rights to homosexuals or their conduct. In 2004, the Pledge of Allegiance returned to the Supreme Court, as a parent protested his child being forced to say the pledge; the parent claimed that as the pledge, in its current incarnation, contained the words "under God," this constituted an establishment of religion. The Supreme Court avoided the issue, holding that the parent did not have custody of his child and so did not have the right to sue. In 2005, the Court decided that under certain circumstances, the Ten Commandments may be posted in public places. A Texas display was allowed to remain, as it had existed for forty years without challenge, whereas a Kentucky display was struck down, largely because it was challenged very soon after it was erected. Thus, the Supreme Court, through the end of Rehnquist's tenure as chief justice, remained embroiled in the area of religion and the law.

The Roberts Court will, undoubtedly, also be involved in the area of religion and the law, even though it has not heard that many major cases. One of the few to have come before the Court involved a congressional law attempting to protect the rights of churches and prisoners, holding that prisons that get state funding and churches involved in interstate commerce (meaning nearly all churches and all prisons) could not have their rights restricted unless the government had a compelling state interest. This differs from the law struck down in 1997 as the connection with governmental funding and the commerce issue gives Congress authority, which the Court said they lacked with the previous law. This law was upheld when the Supreme Court considered it in 2006, thus increasing protection for religion for certain individuals and groups.

Even though one cannot predict the decisions of the Court on future issues, it is safe to predict which issues will definitely arise again. Those issues include evolution, the Pledge of Allegiance, prayer in public schools, and school funding. Evolution seems destined to appear again, as new policies have been developed to once more remove evolution from the public schools. In 2005, a district court struck down a Pennsylvania school district's attempt to mandate that the school mention intelligent design. This idea holds that the world is so complicated in some of its parts that there must have been an intelligence involved. The idea was struck down as an establishment of religion. Thus, religion is here to stay as an issue in the courts.

Besides the U.S. Supreme Court, another factor in religion and the law is the executive

and legislative branches of the system. While the court system is legally the one responsible for interpreting the U.S. Constitution, the executive and legislative branches are still involved. The executive branch is connected as the arm of government that enforces Supreme Court decisions. The 1954 *Brown* decision banning school segregation was slow to be implemented in large part because presidents Eisenhower and Kennedy were not interested in enforcing it. In the legislative branch, as mentioned previously, on a number of occasions Congress has tried to pass legislation overturning the decisions of the Supreme Court. While the Court has looked with displeasure on most direct efforts, some of these have still been successful. Recent congressional moves to increase the legal protections for prisoners and churches succeeded. The Court is always very careful to make sure that congressional legislation, especially any that attempts to overturn or limit Court decisions, has a firm constitutional basis. Congress is also the origin of attempts to pass constitutional amendments aimed at overturning Court decisions. In every session of Congress, bills are introduced to pass constitutional amendments aimed at allowing school prayer and banning abortion, just to name the two most popular. These efforts, though, seldom reach a vote on the floor of the Senate or the House of Representatives, and since such bills almost always fail to be considered, they may be introduced simply to placate the voting public.

Congress has also passed legislation that has reshaped the interaction of religion and the law. For instance, Congress passed Title VII of the Civil Rights Act of 1964—legislation banning most instances of religious-based discrimination in the workforce. This effort was not in response to any specific Supreme Court decision but was aimed at ending discrimination (the same act also banned discrimination on the basis of race in employment), and the Supreme Court upheld the legislation. Thus, Congress can and often does act to protect people in the area of religion and can also act, sometimes successfully, in protesting Supreme Court decisions.

The public is also involved in the interaction between religion and the law, even though (obviously) there is not any direct public vote on Supreme Court cases or nominees. For instance, there was long (and still is, in many people's estimation) a bias against Catholic candidates for public office, and in the 1800s there was often a bias against Catholic immigrants. A whole political party, the Know-Nothing or American Party, was formed to push for anti-immigrant legislation. The fear was that Catholic immigrants would remain loyal to the pope and could not be trusted to become good Americans. Catholics also wanted a different version of the Bible used in the public schools; they favored the Douay version rather than the King James translation preferred by Protestants, and this difference in opinion created tension. Riots broke out in many cities in the 1840s over the issue and tensions remained even after the riots had ended. Throughout the nineteenth and early twentieth centuries, Catholic candidates for president did not fare well in seeking their parties' nomination, as the first Catholic presidential candidate did not win nomination until 1928. Even then, a full eighty years after the Bible riots, many feared that if Al Smith, Democratic nominee in that campaign, was elected, the pope would be in control of America. It is difficult to assess the number of votes this controvery cost Smith, as the battle over the Catholic issue pushed many Catholics, who might have stayed home otherwise or voted for the Republican candidate, to come out and vote for Smith; but the level of hostility caused by the issue demonstrates that religion played a role in politics throughout the period. Religion next played a major role in presidential elections in 1960, when John F. Kennedy battled Richard Nixon. Kennedy tackled the issue head-on and managed to blunt its impact, but many at the time (and later) believed that a significant number of votes, both for and against Kennedy, were

moved by the religion issue. Even in 2004 some put forth religion as an issue with John Kerry. The complaint against Kerry, however, was not that he was too Catholic or that the pope would have too much power, as was the charge with Kennedy and Smith; rather, Kerry was accused of not being Catholic enough as he did not share the pope's views on abortion. A final area where religion shapes the law is in many people's attitudes—most prominently, the subject of abortion. Many people's decisions on the abortion debate/maelstrom (or mud-throwing contest if you prefer) are based in their religion. Thus, religion continues to influence politics and public attitudes, both of which in turn shape the law.

Battles over religion and politics are often said to produce much heat and little light, and when the two are combined, that cliché might be expected to be squared. Many people hold their religion dear, and when one considers the subject, this attitude is quite understandable. Religion for many tells them who they are and what they believe, and religion (oddly enough, along with politics) is often the most important mutable characteristic of an individual's personality. Sex and race are not characteristics that people choose, so religion and political affiliation often become the most important markers of who a person decides to be. Thus, the laws that shape religion, and how religion is implemented, are vitally important. The same has been true of law and religion throughout American history. America has become more tolerant over the years, and the colonies also became more tolerant as they moved toward what became the United States, but that does not mean that this toleration was easily gained or granted. The current wide scope of the First Amendment did not just occur the day after that amendment was passed; it has developed slowly over the nation's history.

Another ongoing tension arises between the establishment clause of the First Amendment, which holds that government cannot establish a religion, and the free exercise clause, which says that people should be free to worship as they choose. However, those in political power often feel justified by their religion (and within their free exercise rights) to use that political power in the area of religion (or morality in their minds), and this, of course, conflicts with others' free exercise rights and their rights to have a government free of religious entanglement. The First Amendment is simple in its concept: government cannot establish a religion and must allow people to worship freely—but the devil comes in the details, and the exact contours of that amendment are forever changing. To make a complex situation more difficult, of course, religion is very important to many Americans, and to many of the rest, the right to be left alone to practice no religion is equally important. Thus, religion and the law will always intersect, but this interaction must be considered with thoughtfulness as it represents a vital balance in the freedoms so essential to the nation.

Acknowledgments

I would be truly amiss if I did not thank my friends who have shepherded me along and provided me with laughs and companionship. These include Dennis Trinkle, Paul Wexler, Elizabeth Hill, Fred "Bud" Burkhardt, Linda Ruggles, and David Staley, among many others. I would also like to thank my family, including my parents and sisters.

I would like to thank the history department and my students at the University of Kentucky, particularly Dr. Robert Ireland and Dr. Robert Olson. These two professors have given me numerous opportunities to expand my learning, and my students constantly make me reconsider my ideas, and remind me why I became a historian with their interests and questions.

I would also like to thank all those who took the time to answer my questions throughout this project. This includes all the librarians, scholars, and religious figures I contacted during the course of the work. Without their help this project would have been much more difficult.

I would like to especially thank the Church of Jesus Christ of Latter-day Saints headquarters in Salt Lake City, Utah, as a number of people there took the time to discuss several issues with me at length and to return my long-distance calls.

Though it feels peculiar to express gratitude to someone dead for nearly two centuries, I would like to thank James Madison. Without his work adding the freedom of religion to the Bill of Rights, our religious freedom would not be nearly as expansive as it is today. Similarly, the Taft Court needs to be thanked for its decision in *Gitlow* v. *New York,* which began the process that broadened the freedom of (and from) religion to include the states.

The editorial team at ABC-CLIO has been stellar throughout the project. My thanks go out especially to Steven Danver, lead acquisitions editor, and to Alex Mikaberidze, submissions editor. Their input and feedback helped me immeasurably in the preparation of this manuscript. I would also like to thank copyeditor Patterson Lamb, senior production editor Vicki Moran, and media editor Ellen Rasmussen. Their careful and meticulous editing and research, along with their patience, have greatly improved this encyclopedia.

However, any faults that remain in this work are my responsibility alone.

This volume is dedicated to my mentors, who have pushed me to be better while still believing in me, who have given me encouragement and have shown me by example how to be a true scholar. True mentorship is knowing how to encourage, support, and push all at the same time, and many people have filled this role in my life. This volume is also dedicated to my wife, Jessie, who has been my most important supporter, and to my daughter, Caroline.

H

Harris v. *McRae*

448 U.S. 297 (1980)

This case dealt with a congressional regulation over abortion. Abortion is generally seen as something to be regulated on the state level, so the question arises as to the federal involvement here. However, Congress was not prohibiting abortions, just refusing to pay for them under Medicaid, a medical aid program for the poor. This regulation was passed by those opposed to abortion, often on religious grounds, and the question was whether Congress could pass funding regulations that had religious elements.

In 1976, Congress passed the Hyde Amendment, named after Representative Henry Hyde of Illinois, which prohibited federal funding for abortions under Medicaid. The 1980 legislation allowed an exception in the case of incest, rape, or significant threats to the mother's life. The Court first held that the U.S. Congress by passing the Hyde Amendment did not intend to make states pay for the abortions but wholly intended to leave them unfunded. As Medicaid was a shared program, Congress intended to help fund the allowed programs and to leave the others without any support. The Court then considered *Roe* again, and held that the liberty recognized in *Roe* still existed for a woman to have some control over her pregnancy, but also noted that the states had a role and states were allowed to favor childbirth. In general, even though *Roe* was (and is) still a controlling precedent, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices" (448 U.S. 297: 316).

Concerning the religion issue, "we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause" (448 U.S. 297: 319–320). The Court also rejected the free exercise of religion claims on standing grounds, as none of the plaintiffs had a religious reason to seek an abortion, and the Court rejected the equal protection grounds as equal protection was not in itself a right, but just the right to not suffer discrimination. The Court finally held that the law had a legitimate government objective of protecting life and should be allowed. White concurred and argued that just because one had a right to be free from interference with an abortion under certain circumstances, that did not mean that the government could not choose to favor childbirth over abortion.

Justices Brennan, Marshall, and Blackmun dissented, in an opinion by Brennan, arguing that *Roe* meant that the state should not use its power in the area of abortion, and through the Hyde Amendment it clearly was doing so. He argued that the policy was a moral judgment, not a legitimate government goal, and that it effectively destroyed the liberty of *Roe* by giving only one financially feasible choice. Marshall also dissented, noting the deaths and other problems created by this policy and that the Constitution should restrain government spending, and that equal protection of the laws should overturn the policy. Justice Blackmun dissented, holding that the decision of the majority ignored reality. Justice Stevens dissented as well, holding that the majority did not properly consider the real ramifications of

Roe, and that *Roe* required all threats to a woman's life from pregnancy to be fully respected, which this decision did not do. He also stated that the government was not allowed to "punish women who want abortions" and so the restriction was not allowable (448 U.S. 297: 354).

This decision today is still binding, and Medicaid currently does not fund most abortions. Some private insurance companies have adopted similar controls in not paying for certain medications and some pharmacies and some pharmacists refuse to fill certain prescriptions, even though they are legally written. The rationale of the Court here is that those who control the purse strings control the use, and that restrictions, even if based somewhat in religion, are allowable. Probably if Congress had cited religion as the sole reason for the regulation, it would not have been allowed, but Congress did not, and the Court here did not overly pry into what level of motivation religion played in the denial of funding. Thus, poor women were allowed abortions, but at their own expense, which means that fewer had them, and this decision is still good law today. Each state has its own restrictions on who can have abortions funded by Medicaid, and a few states require that a woman's life be endangered to have Medicaid pay for it, with more requiring that there be a case of rape or incest or a threat to the mother's life, and a small number add other health considerations. A minority (fewer than twenty) of the states have no restrictions. Thus, the decision in *Harris* continues to shape abortion availability today.

See also Abstinence, government grants to force teaching of; Banning of suicide in law and its interaction with religion; Capital punishment and religious-based opposition to it; Religion and opposition to women's rights; *Roe* v. *Wade*

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Heffron v. *International Society for Krishna Consciousness, Inc.*

452 U.S. 640 (1981)

Regulations that control movement at a public gathering like a state fair might seem neutral in the area of religion. However, for those whose religion requires them to sell pamphlets, such a control could be seen as interfering with their religion. This exact conflict between one's freedom and the government's right to regulate movement was the crux of this case.

At issue was a rule at the Minnesota State Fair that required all who were selling or distributing things to stay in one fixed location. The groups could still walk around, but they could sell and distribute literature only in the fixed location. The Supreme Court opinion was written by Justice White. The opinion first looked at the rules as they applied in the 1976 fair, the first one after their promulgation, and noted that the society protested the rule because their religion required them to go around and sell things to people. The Court then noted that the rights of the Hare Krishnas, or the International Society for Krishna Consciousness (ISKCON in the Court's abbreviation), to further their views and to sell things are protected under the First Amendment. The opinion also held that "it is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all

times and places or in any manner that may be desired" (452 U.S. 640: 647).

The Court reminded the parties that "the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions" (452 U.S. 640: 647). The first criterion for such restrictions was that they must not be based on the subject matter of the speech, and White noted that the regulations here were content neutral and applied in a first-come, first-served manner, which prevented many of the kinds of discrimination struck down in past cases. The second criterion was that a "significant governmental interest" was served, and the interest here was crowd control. The Court examined the objective and pronounced it to be legitimate and significant. Thus, the regulation was upheld, as the group still had a chance to sell their literature, albeit at a fixed location, and the Court held that the government interest justified the First Amendment restrictions.

Justices Brennan, Marshall, and Stevens dissented in part and concurred in part, with Justice Brennan writing the opinion. Their opinion noted that three activities were restricted: sale and distribution of literature and requests for funds. The opinion agreed with the restriction on sales of literature and requests for funds, as there were concerns about fraud, but held that distribution of literature should have been allowed throughout the fairgrounds. The state had argued that congestion could occur, but Brennan did not believe this as the state had offered no examples of past congestion. Justice Blackmun also concurred in part and dissented in part, agreeing with Brennan, Marshall, and Stevens in holding that the distribution of literature should have been allowed throughout the fairgrounds and the other two activities restricted. The reason Blackmun gave, however, was not fraud, but that the concern over crowd control (which Minnesota and the majority had both cited) was enough to justify restrictions in those areas.

Thus, a state fair is allowed to put forth restrictions on the movements of groups, and to require those selling things to stay in one place. While this is a restriction of some religions, such as that of the Hare Krishnas, the regulation must be (as it was in this place) content neutral and must advance a significant governmental interest (which in this case was crowd control). As the majority concludes, and this case reminds us, one's freedom of religion is not absolute and can be controlled, but only if another significant governmental cause is being promoted.

See also *Airport Commissioners* v. *Jews for Jesus; Cantwell* v. *Connecticut; International Society for Krishna Consciousness* v. *Lee; Jones* v. *Opelika;* Charles Taze Russell and Judge Rutherford; *Tudor* v. *Board of Education of Borough of Rutherford; Watchtower Bible and Tract Society of New York* v. *Village of Stratton*

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Hibbs v. *Winn*

542 U.S. 88 (2004)

This case dealt with whether taxpayers can challenge tax provisions that give benefits to parochial schools and thus may cause an interference with the First Amendment. While previous suits had been allowed, here the Arizona government argued that the Tax Injunction Act (TIA, passed in 1937 originally) banned interference with state taxes and so banned this lawsuit. This case resolved whether lawsuits against tax provisions that benefited religious organizations were allowable after that legislation.

In this case, filed in Arizona, taxpayers challenged a state law giving "income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools" (542 U.S. 88: 180). Justice Ginsburg wrote the opinion for the Court. The first question she considered was whether the TIA blocked this suit. Ginsburg noted that past educational efforts aimed at circumventing the Court's ruling in *Brown* used tax credits, and she argued that these actions fell legally under the Court's jurisdiction, as did the one in the current case. She then examined the TIA again. As the goal of the taxpayers' suit was to prevent future use of the credits, the TIA did not apply, as that act was aimed at allowing the continual collection of taxes without injunctions stopping them. On the whole, she concluded, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration'" (542 U.S. 88: 188). In addition, past cases have ruled on the validity of the purpose of taxes without bringing in the TIA. Thus, taxpayer suits were still allowed and this case was returned for trial. Justice Stevens concurred, writing that if the statute had been previously misinterpreted by the courts, as the dissent claimed, Congress should have acted. As it did not, argued Stevens, the rulings must have been correct.

Kennedy, along with Rehnquist, Scalia, and Thomas, dissented. Kennedy argued that the TIA had been intended to bar suits such as these, that the TIA as written banned such suits, and that the states, rather than solely the federal courts, should also be trusted to protect the Constitution. The dissent argued that the state courts would be the only proper place to hear cases similar to this one, and the state courts were allowed as a remedy by the TIA. Finally, the dissent said that just because past courts have misinterpreted the statute was no reason for this Court to continue to do so.

Thus, even though the Tax Injunction Act has been widely used to decrease challenges to state taxes, a bare majority of the Court here held that challenges under the First Amendment, at least in the area of religion, were allowed and implied that larger challenges were also allowed.

See also *Mueller* v. *Allen; Walz* v. *Tax Commission of the City of New York*

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The Holocaust and lawsuits by survivors

Holocaust survivor lawsuits have appeared in the wake of World War II, mostly in European courts. Indeed, the subject of the Holocaust is not one generally addressed by U.S. laws and lawsuits. The U.S. government was not involved in the actions (although it probably should have been to prevent them) that brought about the lawsuits, and its actions during World War II were not publicly predicated on the issue of religion. However, this area still sees the direct interaction of religion and U.S. law.

To move the scope back nearly eighty years, Adolf Hitler came to power in Germany in 1933. Well before taking power, Hitler articulated a worldview that blamed the Jewish peo-

ple for all of the problems in history, particularly Germany's loss in World War I and its subsequent poverty. While these views had no validity, Hitler still gained power, and once in power, he moved to eliminate Jews in Germany and the nations he had conquered.

The reaction of most nations both before and during the Holocaust was weak at best. Many Jews wished to leave Germany, as they saw their conditions worsening, and other nations would not let them in. The United States was no exception. Once World War II started, countries remaining outside the battle zone did not change their policy. Even after the United States formally joined the war and learned through intelligence of the death camps, it did little to stop them, neither bombing the camps nor the railroads approaching them. However, few, if any, successful lawsuits have been launched against these countries for their immoral conduct, as it was, under international or even national law, completely legal. For instance, the United States did not create lower immigration quotas in the 1930s to keep out Jews (and other European refugees) but merely strictly enforced the ones that were already on the books.

The Swiss government, while allowing political refugees to come into the country, refused the Jewish refugees and even had Germany mark Jewish passports so that the Swiss government could easily refuse them. The special mark came to be called the "J stamp." Jews who survived have sued Switzerland for the exclusion but have not been able to recover any damages, as Swiss courts have consistently ruled that the government's actions were legal at the time. As well as can be determined, the United States has never been successfully sued in this area.

The United States, though, unlike some other countries, has put its force behind the lawsuits; it has passed legislation to help recovery and helped in the push to force the Swiss banks to settle with survivors and their families. U.S. politicians, like former Senator Alphonse D'Amato of New York, have placed their considerable political muscle into supporting the lawsuits.

Those suing companies that benefited from the Holocaust have had limited success. Those companies that indirectly profited have generally escaped; those that directly profited, or who received assets from the Jews, have been successfully sued. The largest examples of these lawsuits are the ones filed in the United States against several Swiss banks. During World War II the banks had a large number of deposits from Jews; some Jews deposited their money into Swiss banks hoping it would be safer there than in Nazi-occupied territory. However, after the war the banks refused to release the deposits as the survivors did not have death certificates proving that the Holocaust victims had really died. (Not surprisingly, the Nazis did not provide verification of their actions to living family members.) The Swiss banks were eventually sued in the late 1990s for their failure to repay the deposits. The Swiss banks also took advantage of their own banking laws and of the circumstances. Very often, money would be deposited into accounts in Switzerland and the accounts were then never used as the persons establishing them died in the Holocaust. When asked about an account, the Swiss authorities would demand to be given the account number, which very often was known only by the person who had established the account. Thus, the accounts sat unused. The bank, in turn, would charge a fee on the account, as it was dormant. Slowly, the whole account would vanish, in the banker's version of Dickens's *Bleak House* fortune. Once the account vanished, of course, banking authorities would reply that no such account currently existed, even if a family member held an account number. The Swiss banks fought hard against taking responsibility, both pointing out what other countries had failed to do and fighting hard legally against each step of the process. However, in time they relented. In 1998, they agreed to pay over $1 billion to

surviving family members and for educational efforts.

Similar lawsuits against French banks ran into other issues. France in 1999 claimed that there was a panel in France trying to solve the issue and thus argued that lawsuits against it in the United States just unnecessarily complicated the situation. After the commission completed its work, French banks, along with the French government, set up a $50 million fund to compensate those who had lost funds in French banks. The French government, as a whole, has set up a charity with an endowment of over $300 million to educate and to raise awareness about the Holocaust and its effects on French Jews and the general issue of barbarous crimes against humanity.

Also in 1999, lawsuits were filed in the United States against people who benefited financially from the work of those who suffered under the Holocaust. One such suing group included the governor of California at that time, whose presence in the lawsuit lent it political weight. The groups sued in that particular suit included Lufthansa, Deutsche Bank, General Motors (GM), and Ford, and the suits claimed the companies profited directly from Nazi slave labor. Ford and GM argued that they had lost control of their German subsidiaries before World War II started and so were not responsible; also, they claimed that they did not profit from the German companies. These lawsuits in U.S. courts have generally been thrown out. The German companies joined with the German government to set up a fund to help those still surviving and those who suffered financial losses from the Holocaust. Slave laborers under the Nazis, some of whom were Jewish, also sued major companies, including Volkswagen (VW). VW acted before the lawsuits came to court, setting up a fund, but this did not end the lawsuits. VW later joined the general German fund discussed above. In an interesting footnote, these suits have spawned imitators, as the descendants of American slaves have also sued companies that, in their claim, profited from slavery.

Besides lawsuits against companies, there have also been lawsuits seeking the return of personal property wrongfully taken in the Holocaust. Nazi looters often laid claim to all the possessions in a household. During the war, these valuables were housed in treasure troves, and then slowly dispersed. Family members attempting to reclaim their lives after the war returned to empty houses, when they returned to houses at all. When a family's stolen goods can even be located, the family must often sue for the goods' return. There is a Monet painting among the items identified as a Holocaust theft. It has been estimated that millions of dollars in art were seized from Holocaust victims in Europe and that the art went throughout Europe and wound up in private collections and museums. Some governments worked with the survivors to help recovery and the lawsuits helped in others.

Survivors have now generally moved beyond companies who were directly involved and are now suing companies who made large profits from sales of stolen items. One of the latest lawsuits was filed against Sotheby's in 2004. This lawsuit claims that the auction house has sold many masterpieces lost during World War II and also helped to draw up misleading ownership documents for the items.

The U.S. government has helped in the return of stolen art, in one situation filing a lawsuit in U.S. district court in New York. The suit sought return of a painting owned by a Jewish family that had reappeared in an Austrian museum and was on loan to the Metropolitan Museum of Art. The government used this connection to seek its return to the original owner. The case is still pending as of this writing.

Another factor to consider outside of the law is the purpose of these lawsuits. Are they merely a way to make money or are they a way to bring about justice? Holocaust survivors and their families are themselves split on this.

Some view it as excusing the Holocaust; some oppose such lawsuits because they focus on the assets seized and lost, rather than on the underlying crimes. Some also oppose the lawsuits because the people who profit most, in terms of overall dollar amounts, are lawyers, not individual victims (as is true in most large class action lawsuits). They fear that with minimal compensation for the suing family members, the lawsuits trivialize the Holocaust and shift people's focus away from the genocide. They fear a public perception that the Jews who died and were imprisoned in the Holocaust suffered not for their religious beliefs, but because they owned valuables.

Those in favor of the lawsuits, however, hold that those who profited should be stripped of their ill-gotten wealth. They cite historical precedents suggesting that such lawsuits are utterly appropriate and that they strive to bring some justice to Holocaust survivors and their families.

The relationship between religion and the law is both clear and frightening here. It was the Jewish religion that was the subject of Hitler's hatred and the reason so few countries acted to help the Jews during the 1930s and 1940s. It also was part of the reason that efforts to sue those who profited from the war had little success until attitudes changed and time passed. Not until the 1990s did attention return to the issues and the first lawsuits were filed seeking compensation. Some of these lawsuits have had noted success, but others have not. Even for those who have had success, financial compensation is, of course, a hollow victory, as money does not restore a loved one lost in the Holocaust, nor does it prevent a future government or company from repeating the horrors of the past. Nevertheless, it does recover property that was wrongfully taken or detained. There are certainly moral complications to what one might call allowing a company or country to buy its way out of guilt with money. However, for many, a successful lawsuit to recover property lost in the Holocaust is better than no attempt at all to achieve justice.

See also Brandeis nomination and service on the Supreme Court; Jewish seat on Supreme Court; Treatment of Jews, both in colonial times and after the American Revolution

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Anne Hutchinson

Religious Dissenter
Born: 1591
Died: 1643

Anne Hutchinson traveled from England to the Massachusetts Bay Colony in 1634 searching for the religious freedom denied to her in England, as she was a Puritan, and the official church of England was the Anglican Church. Anne's father was an Anglican minister, and she married William Hutchinson in 1612. Anne came to be a devotee of the preacher John Cotton, a Puritan who had been banished to Massachusetts in 1633. The next year,

Anne Hutchinson led the first organized attack on the male-dominated Puritan religious establishment. Banished from the Massachusetts Bay Colony for her independent views, she has been hailed as one of America's earliest feminists. (Library of Congress)

Anne and her family followed him. While in the colony, she served as a midwife.

When she arrived, Massachusetts believed itself to be the model civilization for God-fearing people. In 1630, John Winthrop, while still on the Atlantic Ocean, had called Massachusetts "a city on a hill" and publicly noted that it should be a beacon for the rest of the world to follow. However, in order to be the model for the rest of the world, the colony forced all residents to strictly follow Puritan beliefs. Church attendance, in Puritan churches, was mandatory, and God and the state were heavily intertwined, as John Winthrop was the first governor of Massachusetts and a leading member of the clergy in Boston. The society was also heavily patriarchal, as only men were allowed to be ministers, and women were supposed to be, like children, seen but not heard. Anne had studied the Bible in England, and after following John Cotton to the colonies, she continued her religious interest. She was a more than competent midwife, and her services were desired by many. She was also admired for her intelligence, and she began holding meetings in her home for women to discuss religion.

Anne desired to discuss ministers' sermons, as men were allowed to do in male-only meetings. The first women who came to her meetings were those whose children she had delivered. Soon, her topics began to branch beyond the sermons and to tell her own beliefs. She believed that God offered a covenant of grace, in which people intuited God's love. Massachusetts Bay's religious leaders were appalled, as they believed in a covenant of works, in which God's will was demonstrated through the good works of his believers. She gathered quite a following, and her divergent views came to the attention of Governor Winthrop. One of her first areas of disagreement was in what was required to be a person of God. The Puritan Church claimed that salvation came through following the church. Hutchinson, however, believed it came by having the Holy Spirit inside oneself. Men soon started attending the meetings, and Hutchinson started announcing which ministers were proper and which were not, ending up with only two proper ministers—her favorite, John Cotton, and her brother-in-law, John Wheelright. She tried to have Wheelright made minister of an important Boston church, but Winthrop resisted, as did the minister in charge of that church, John Wilson. This directly led to the stringent restrictions they would place on Anne and her followers.

Winthrop, as one of the founders of the settlement, took these attacks personally, and believed that challenging the church was challenging both God and the state. He labeled Hutchinson an antinomian, meaning that she believed she was not bound by the moral laws

of God and man, even though this was not true. To control the situation, Winthrop moved himself back into the governorship and banned most public meetings. Hutchinson and her followers continued to meet, and so Winthrop charged her at a public meeting with violating the laws of man and nature. Specifically, he charged her with holding the meetings, which were "a thing not tolerable nor comely in the sight of God, nor fitting for your sex" (1637) and with violating the Fifth Commandment, "honor thy father and mother" (1637). Winthrop here was equating the church and state with being parents to everyone in a Puritan society, and opposition to the church was tantamount to opposing one's parent.

Hutchinson ably answered the charges in a public hearing, and then noted that she had been having visions sent by God. She commented that "upon a Throne of Justice, and all the world appearing before him, and though I must come to New England, yet I must not fear nor be dismaied, Therefore, take heed. For I know that for this that you goe about to doe unto me." She threatened, "God will ruin you and your posterity, and this whole State" (1637). Wheelright, the preacher whom Hutchinson had championed, and who had stood by her, was immediately banished, and Hutchinson probably would have been had she not been pregnant with her sixteenth child. She was banished in 1638, and by the end, Cotton, the man she had followed to the New World, turned on her, accusing her of being in favor of free love. Nearly eighty people followed her when she left for Rhode Island.

In Rhode Island, Anne purchased land from the Narragansetts and founded what is now Portsmouth. In 1642 she moved to New York, to Long Island in what is now New York City, after her husband died. In 1643, she, along with much of her family, was killed in a Mohican raid. The person who boasted that he killed her was known, after the attack, as Anhooke and before that was known as Wampage. A history of Pelham notes that "it was customary among the Indians when they murdered some important personage, to add the name of their victim to their own name—and so Wampage took the name of Anne Hutchinson, which became Anhooke. The territory where he had his village became known in the archives as the Land of Ann Hook, spelled in various ways" (Barr).

Her death was taken as a sign of God's displeasure by her detractors at the time, but because of her faith and courageous leadership, her dissent is remembered for its tolerance of other faiths. She is considered one of the first victims of intolerance in the American colonies and as a symbol of what happened in the colonies to women who opposed the patriarchy.

See also Established churches in colonial America; Religion and opposition to women's rights; Roger Williams

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I

Influence of religion on Eighteenth Amendment

Religion took a back seat in the public approach to Prohibition in the period leading to the Eighteenth Amendment, despite being a leading force early on. In this later era, the war economy and anti-German sentiment were the driving emotions. Prohibition had been a goal of many forces, including that of Progressivism, in the first decade of the twentieth century. The Progressives believed that eliminating alcohol would increase the amount of order in society and they were deeply concerned with maintaining an organized society. Many Progressives saw the correlations between alcohol and violence, wages wasted in saloons, and continued poverty. Women's rights advocates saw the link between alcohol and abuse of women, employers saw alcohol as causing lost productivity, and reformers thought that banning alcohol would eliminate city bosses. None of these were directly linked to religion, although the reformers, generally Protestants, often lacked religious understanding of immigrants, who tended to be Catholic by the late nineteenth century, and this frequently caused a distrust of the immigrants. The reformers generally saw the immigrants as immoral and heavy drinkers, and wanted to reform their drinking along with their morality.

A founder of the national Women's Christian Temperance Union and president of the organization until her death, Frances Willard was a dynamic and influential figure in late nineteenth-century American reform. (Library of Congress)

Prohibition would not have succeeded, however, without the generally Protestant-supported and -led temperance movement of the mid- and late nineteenth century. The Women's Christian Temperance Union (WCTU) by its very name indicated its religious backing. The WCTU had been founded in the early 1870s and was led for nineteen years by Frances Willard, a leading socialist, and then by Anna Howard Shaw. By the early 1900s, the WCTU had nearly a quarter of a million members. The WCTU argued that abuse of alcohol led to poverty, family problems, and battered spouses. Another organization involved in the fight was the Anti-Saloon league who wished to close down the saloons. These organizations moved beyond their original aims of restricting the use of alcohol to the goal of banning all alcoholic beverages.

These groups joined with Progressives and others interested in improving society, and they pushed for controls on drinking. Their forces received a boost from World War I, as

many companies that manufactured alcohol were German, and the United States was fighting Germany. Many anti-alcohol crusaders argued that banning the sale of alcoholic beverages would help to defeat Germany. The exact economic linkage was not as sure as it was often presented, but some who had been unswayed before wavered now, and others argued that it was wasteful to convert grains into alcohol in the middle of a war. These two arguments seemed to be enough, when combined with the religious and moral arguments, to push the Eighteenth Amendment through Congress in 1917. The amendment was ratified by the states by 1919, and Prohibition became law.

Prohibition had a large number of failures throughout its implementation. One of the largest was a lack of funding. The Volstead Act was the legislation passed to enforce Prohibition and it was always underfunded. By some estimates, at the height of the 1920s, the Volstead Act received only a small percentage of what it needed, and only 1,500 agents were hired nationwide to enforce the act. The federal government had hoped for the support of local law officials, but in many areas where evasion of Prohibition was most common, local law enforcement was opposed to it, too. In addition to the officers who were personally opposed to the law, some heads of local police had to consider whether they could get reelected by an anti-Prohibition population if they strongly enforced the act. The local constabularies were also quite open to bribery to look the other way where alcohol was concerned. Gangs and organized crime profited from providing alcohol, and the rise in murders and crime turned into opponents many who had favored Prohibition or were unsure about its merits.

Prohibition and religion also had connections in politics. Much of the support for Prohibition came from rural Protestants, particularly in the South, and many of these voted for the Democratic Party. The main reason for this was that the Republicans had been the party in power in the North during the Civil War, and many Southerners had vowed to remain Democrats forever. On the other hand, some of those most vocally opposed to Prohibition were also Democrats, as the Northern Democratic Party had attracted the loyalty of many immigrants who were Catholic. While not all Catholics favored a repeal of Prohibition, many did, seeing it as an attempt by Protestants to control them, and there also was a connection between drinking alcohol in church ceremonies and celebrations and favoring looser controls on alcohol, even though the Volstead Act did not ban alcohol for religious purposes. (The Volstead Act did not ban alcohol for medicinal purposes either.)

The repeal of Prohibition was based on a combination of economics and politics. In 1929, the Great Depression started, and people began to believe that the money spent enforcing the Volstead Act (as little as it was) could be put to better use; they also thought that legalizing alcohol would give the government a good source of tax revenue. The public, or at least large parts of it, also wanted to heal the rift that Prohibition made in the nation, as the country was already divided enough by the Great Depression.

See also Battle against pornography—religious elements; Divorce, marriage, and religion; Religion and nineteenth-century reform

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"In God We Trust" on U.S. currency

The appearance of the phrase "In God We Trust" on U.S. currency would seem to be a clear example of religion influencing the public sphere, as little is more directly connected with the federal government than paper money. The federal government, constitutionally, is the only U.S. entity allowed to print money (even though banks and credit card companies today grant us use of financial resources that many people use more than paper money). The phrase "In God We Trust" has long been on our money and one reason that people assume this to be acceptable is that "In God We Trust" is now the U.S. motto. However, this motto was not adopted until 1956. Nonetheless, use of the phrase has been connected to other, not directly religious, national events.

The phrase was first used in 1864, on the two-cent coin (which is no longer minted). The words were included because the United States was involved in the Civil War and some feared that if the North lost the Civil War, it might appear that the United States was not blessed by God. To avoid this appearance in the event of a total defeat, a campaign was begun by letter writers to the U.S. Treasury and others urging that the nation put a religious saying on its coins. This would prove to the world how religious the United States was and show that it was still blessed by God (even if it lost the war against the southern states).

The Union, of course, did not lose the Civil War, but the phrase has generally continued to appear on many coins for the last 149 years. Not until 1938, though, was its use adopted for all coins. On paper money, it occurred even later, and again connected to war. But in this case, the war in question was the Cold War, which was political rather than military in nature. In 1956, the United States changed its motto to "In God We Trust," in large part to differentiate itself from the Soviet Union, its Cold War enemy that was widely seen as promoting atheism. The phrase "godless communists" was often used in describing the U.S.S.R. In 1957, "In God We Trust" first appeared on paper money, and gradually its use on both currency and federal reserve notes was phased in. By 1966, it was on all our currency, and it remains so today.

The previous motto of the United States also remains on all our paper money. The original one was "E Pluribus Unum" or "One from Many," and whether it was more important to be blessed by God than to be united, or whether people did not know what the motto meant as it was in Latin, is unclear. Lawsuits to remove "In God We Trust" have been unsuccessful; cases have progressed as high as the Ninth and Fifth Circuits, in which the courts ruled that the phrase is ceremonial, not religious. These courts, in 1970 and 1979, respectively, appeared to foreshadow Justice O'Connor's use of the idea of ceremonial religion. O'Connor has argued that certain things in public life, like chaplains in Congress and the motto, have been used in public so long that they have lost their religious significance, having more of a public significance. She describes those items as part of a ceremonial religion; thus they are not an endorsement of religion, but more an endorsement of public commonality. This is one of the ideas she used on the Supreme Court to support some allowance of the interaction between church and state.

See also Addition of "under God" to Pledge of Allegiance; *Elk Grove Unified School District* v. *Newdow; Engel* v. *Vitale; Lee* v. *Weisman;* Saluting the flag

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Incorporation

The First Amendment only limits, in its wording, the actions of Congress. However, many Supreme Court cases have held that the states, because of the First Amendment, cannot restrict the freedoms of speech, religion, the press, or assembly. One wonders, therefore, how the amendment can be applied to both Congress and the states, when only the states are specifically addressed in its wording, and the answer is this: incorporation.

The Bill of Rights, actually, was originally held to apply only against the federal government. In *Barron* v. *Baltimore* (1833), the Supreme Court held that the Fifth Amendment was to affect only the federal government. Thus the entire Bill of Rights was applied only at the federal level, and individual states did not have to respect any part of it. This situation held until the early twentieth century, but a very important event happened in 1870 when the Fourteenth Amendment was ratified. That amendment was passed after the Civil War to give rights to former slaves, but the language of the amendment was very broad, sometimes addressing itself to all citizens and at others to all people. The important section, for history's sake, was Section 1, which held "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The significance of this wording to states' rights regarding the rest of the Constitution was not immediately evident. The twentieth century opened with no appreciable change in the treatment of the Bill of Rights. However, in 1925, the Supreme Court took the direct first step toward increasing its overall scope. In *Gitlow* v. *New York,* the Court upheld a New York law regulating criminal anarchy, but remarked that "for present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" (268 U.S. 652: 666). Before this point, the Fourteenth Amendment had been used to strike down specific legislation by the states because it violated the liberty of individuals, including legislation banning the teaching of foreign languages, which was declared unconstitutional in 1923. The Supreme Court used the language of the Fourteenth Amendment and the *Gitlow* case to begin striking down state attempts to regulate religion, starting in the 1940s. Among the first pieces of legislation disallowed by the Court were regulations against passing out handbills on the streets, which were being used against the Jehovah's Witnesses, in *Schneider* v. *Irvington,* and a conviction of a breach of the peace statute, in *Cantwell* v. *Connecticut* (1940). In the latter case, the Supreme Court stated that the Fourteenth Amendment wholly incorporated the First Amendment in the word "liberty" that the Fourteenth used.

After the 1940s, the issue of the First Amendment and how much of it was incorporated against the states had been settled. Still in question, however, was whether the other amendments applied to the states. Justice Black, among others, argued that the word "liberty" in the Fourteenth Amendment incorporated all of the Bill of Rights. However, this view never carried the day. Other justices argued that only those rights that were "fundamental" were incorporated, as that was the term Justice Sanford had used in *Gitlow* when first noting that the Fourteenth Amendment incorporated part of the Bill of Rights. In 1937, in *Palko* v. *Connecticut,* Justice Cardozo held that those rights that were "of the very essence of a scheme of ordered liberty," or were "fundamental," were incorporated by the Bill of Rights (302 U.S. 319: 325). This whole process was conceptualized in 1938, in a very famous footnote—footnote four of *United States* v. *Carolene Products Com-*

pany, which held, in part: "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth" (304 U.S. 144: 152). The Court has generally agreed since that only certain rights are protected, along with some areas. Among the areas protected is that of privacy, even though privacy is not a right spelled out in the Bill of Rights. That area has been very controversial as, of course, it has led to cases like *Roe* v. *Wade.*

The rights generally incorporated include most of those in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments, including the right to require states to have a search warrant in most instances before searching homes or possessions, the protection against double jeopardy, the protection against unreasonable search and seizures, the right to a public trial, the right to counsel, the protection against cruel and unusual punishment, and a person's right to confront witnesses against him or her.

Thus, many of the rights in the Bill of Rights have been applied against the states. At the time the Bill of Rights was written, federal power was considered more of a threat than state power, and Congress was the only branch of government limited for the first 130 years after the Constitution was written. For the last four score years, though, much of the Bill of Rights, particularly the parts of the First Amendment dealing with freedom of religion and speech, have applied against both state and federal encroachment through the Fourteenth Amendment.

See also First Amendment; *Gitlow* v. *New York; Palko* v. *Connecticut; Roe* v. *Wade*

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Institute for Creation Research

A wide number of different organizations are active in the battle over teaching evolution in the schools. Even among those groups opposed to its teaching, a variety exists. Some of those opposed argue their cases on biblical grounds alone, others favor "intelligent design," and a third camp argues for creation science or scientific evidence backing the creation story as told in the Bible. The Institute for Creation Research (ICR) falls into this third group. Some groups in the third category, it should be noted, seek to muddy the waters enough that those who believe in the Bible on faith alone do not have to confront the whole issue of evolution.

The ICR is headquartered in Santee, California, and believes it uses its ministry to fully integrate science and the Bible. Their aim is to prove how the Bible and science support one another, and they argue for reshaping the public school curriculum. To that end, they support public schools teaching what they consider the scientific aspects of evolution and state that they distinguish between biblical and scientific creationism, though they find the two compatible. The Institute sponsors a graduate school, which they believe provides an education similar to that of any other graduate school in biology, with Christianity sprinkled in where applicable. Their tenets for scientific creationism explain that the human mind can explore the Creator and humanity's place in the Creator's greater plan. They believe that if one allows the possibility of creationism, and then examines the available evidence, he or she will find creationism.

One might wonder if this philosophy, especially if taught in the public schools, would encourage violation of the separation of church and state. Arguments suggest the group believes

that if creationism is taught only from a scientific perspective, by well-prepared teachers, it does not violate the separation of church and state. This, of course, assumes that there is evidence for scientific creationism apart from belief. As noted above, the group fully admits the human mind must be open to the possibility of creation before believing in creationism, and it is unclear how one is supposed to become open to that possibility if one is not a believer in a god. This in turn suggests that religion plays a role even in scientific creationism.

The group reports that even a few creationist students can have a large impact on their classes by using Christian testimony to discuss creation science. This certainly introduces questions about the sincerity of the group's belief that scientific creationism is nonreligious. If the science is convincing, why must these students give Christian testimony?

The Institute subscribes to the young earth theory, which argues that the earth was created close to 6,000 years ago. It subscribes to Bishop Ussher's chronology, which states that the creation of the world started in 4004 B.C. Ussher arrived at this date by taking the dates in the Bible and adding them up. The scientists at the ICR allow for micro-evolution (although that term is seldom used) by which one type of animal evolves into another related type (one example given is dogs evolving into coyotes), but not for macro-evolution (the example the group gives is ape to man). The ICR, besides attempting to educate the public, does have an active research agenda. The purpose of the research is, of course, to build scientific support for creationism. The Institute has a number of scientists in fields ranging from biology to neuroscience to geological engineering.

Groups like the Institute for Creation Research aim to provide scientific proof or backing for scientific creationism. With that proof, they argue, there is as much (or enough, depending on person and argument) support in science for creationism as there is for evolution, and therefore both should be taught in the public schools. Allowing creation science to be taught alongside evolution would, they argue, increase the amount of creationism in the schools, which is what the group desires. Thus, the Institute for Creation Research is one of the primary groups fighting to get creationism into school curriculums.

See also *Edwards* v. *Aguillard;* Equal time laws; *Scopes* v. *Tennessee*/Scopes Monkey Trial

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Intelligent Design

Supporters of Intelligent Design (ID) argue that for a variety of reasons, there must be some intelligence directing part of the process by which the earth develops. Chance, which some see as the driving force behind evolution, is not enough, in their minds, to explain how some very complex things have come about. The proponents of intelligent design then look at the unexplainable things and suggest that they are so well designed that there must be intelligence behind them. This argument, not surprisingly, touches off a large amount of controversy in the areas of education, religion, and science (areas listed alphabetically).

The ID concept initially derived from the old creation science argument, which attempted to justify the biblical account of the world's founding in Genesis on scientific grounds. However, now ID proponents are motivated by a number of different factors, with the two leading ones being religion and science. Some feel that, scientifically, evolution theory either has too many gaps, or does not fully explain some things. One argument often

used is that very complex systems cannot be broken down into smaller systems that could have been part of the evolutionary process, and since they cannot be broken down, they could not have evolved. Two examples often used are biological proteins and blood clotting. Others feel that evolution does not fit well with their religious beliefs, but they desire a scientific-based explanation that does integrate with religion. The level of science and religion in intelligent design is a hotly contested issue, with many scientists among the ID supporters who argue that intelligent design has a sound scientific basis and religious figures on the opposite side who feel that ID is an unscientific attempt to integrate religion into public schools.

Those opposed to intelligent design argue that the idea is not testable, which scientific ideas or hypotheses are supposed to be. Obviously, if proteins originated from an intelligent designer, then that phenomenon cannot be reproduced, as designers are not at the beck and call of scientists to perform their designs then do the writeup in a scientific journal. Without that testability, most scientists argue, these beliefs are not supported by science. Other scientists opposed to the idea of ID as a scientific theory point out that merely observing things that evolution cannot yet explain, or cannot yet provide a full explanation for, is not the same as proving that intelligent design has a scientific basis. Still other scientists have proven evolutionary connections between humans and other animals in some of the areas cited in the complexity argument, most notably blood clotting. The National Academy of Sciences, among many other groups, have gone on record against intelligent design.

Those favoring intelligent design describe evolution's defenders as a self-fulfilling society. The evolutionists, in the eyes of ID proponents, control the journals, meaning no articles get published in scientific publications defending intelligent design. This lack of publication in scientific journals is, in turn, used by the evolutionists to argue against intelligent design. Thus, even on the scientific side of things, the debate will not end soon.

The religious side is no less murky. Many supporters of intelligent design publicly claim that its supporters do not need to be Christians to support ID. However, most of the well-known proponents of intelligent design are Protestants. The funding for the Discovery Institute, the main, but far from only, supporter of intelligent design, generally comes from conservative Christians, many of whom aim to increase the level of biblical content in public schools and to fight against evolution. Some of those who claim that ID supporters do not need to be a Christian have, at other times, quietly noted that intelligent design presupposes a Christian God, and some people's answers have varied depending on who their intended audience is. The public position of many intelligent design proponents, as noted, is that there does not need to be God, but it has also been suggested that this position may have been taken in order to get intelligent design into public school classrooms, as the alternative position leads to an automatic ban on intelligent design as being religious. It should be noted that intelligent design proponents, unlike the fundamentalists who opposed evolution in the *Scopes* trial, do not specify an age for the earth, or an origin of the earth, at least generally.

The goals of intelligent design also vary depending on who is consulted. Some argue that intelligent design merely aims to produce a holistic view of the universe, explaining what Darwin cannot. Others suggest that it integrates religion and science. Still other supporters of intelligent design either say that they want the controversies over evolution discussed or that introducing ID to public school classrooms would increase debate and promote education. Most ID supporters want the theory included in public school classrooms. Some favor its inclusion alongside evolution discussions, arguing that they want all theories of humanity's possible origins discussed. Others at least want disclaimers put into books noting the problems

with evolution. And finally, some ID supporters hope to ultimately drive evolution out of public school biology classrooms. Many among this third group come from the conservative Christian groups that supported efforts to force creation science into public school classrooms. Thus, as with other areas, the movement's goals depend on who is speaking and when, as the stated goals vary by the audience addressed, just as the intelligent designer's identity varies.

Intelligent design thus posits that things too complex, too intricate, or too improbable to have arisen as currently explained by evolution must have happened due to the intervention of an intelligent designer. As this cannot be proved or disproved, ID supporters generally either ask acceptance of the idea or point out the difficulties with the current explanation. Most scientists, including nearly all (if not all) national-level groups, argue against intelligent design, particularly its use in the public schools. The courts have weighed in on the intelligent design issue, most notably in 2005 in *Kitzmiller* v. *Dover,* where a federal district judge ruled that a school board's requirement of an ID favorable disclaimer was unconstitutional. The disclaimer had pointed out problems with evolution and suggested that intelligent design was another answer, a policy the judge found to be motivated by religion and thus unconstitutional.

There are also Christians and people of other religions who favor evolution, and who believe evolution can be part of God's plan. Generally, these people argue that evolution is about how life develops and changes, and that evolution has been scientifically tested and demonstrated in some areas. Some of those who oppose evolution on religious grounds see evolution as attempting to topple God by finding a secular origin for human life. However, religious supporters of evolution generally find this solution to be oversimplified. They usually prefer to concentrate on evolution as a scientific theory and the origin of humanity as a complex issue requiring more than a simple answer.

See also Avoidance of the issue of evolution in many teaching standards; *Edwards* v. *Aguillard; Kitzmiller* v. *Dover Area School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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International Society for Krishna Consciousness v. *Lee;* *Lee* v. *International Society for Krishna Consciousness*

505 U.S. 672 (1992)
505 U.S. 830 (1992)

The U.S. Supreme Court generally has held that freedom of religion does not grant worshipers the right to interfere with others. The government, conversely, can generally legitimately regulate religion, but only when its free exercise interferes with secular or other religious activities, and only rarely. The relationship between the government's right to regulate and freedom of religion becomes more complex when dealing with religions that require regular interaction between believers and nonbelievers. Religions that require proselytizing as part of belief have often entered the court system, and the International Society for Krishna Consciousness was one of the best-known groups to do so. The Krishnas, as

they are sometimes called, required their members to solicit contributions and distribute literature, and occasionally to worship in public while doing this. Additionally, the Krishnas also often ply their religion in airports.

Two related Supreme Court cases arose from the Krishnas' attempts to solicit funds and distribute literature in New York City airports. The New York Port Authority, in charge of all the large airports in the area, passed a rule banning solicitation and literature distribution in airport terminals. Lower courts upheld part of the Port Authority's order, the part banning solicitation, but overruled the part banning distribution of literature. For legal reasons, this resulted in two directly related cases appearing before the Supreme Court.

In *International Society for Krishna Consciousness* v. *Lee,* the Krishnas sued the Port Authority for the right to solicit contributions in airports, insisting that the ban was an imposition on the group's freedom of religion, as the religion directly required its believers to solicit contributions from nonmembers. In *Lee* v. *International Society for Krishna Consciousness,* the Port Authority sued for the right to ban the Krishnas from distributing their literature in airports because, the Port Authority argued, the Krishnas were interfering with the right of citizens in the airports to be free to hold religious views contradictory to those held by the Krishnas. The Supreme Court agreed with both parts of the lower court's ruling, holding that the Port Authority could ban the Krishnas from soliciting contributions in airports, but that the Port Authority could *not* ban the Krishnas from distributing literature about their religion in airports.

Chief Justice Rehnquist wrote the opinion for the Court dealing with the issue of solicitation. The opinion noted that solicitation by the International Society for Krishna Consciousness was protected under the First Amendment. However, the Court then considered what type of a forum existed in the airport, explaining that would determine what level of control was allowed. A public forum was "property that has as 'a principal purpose [allowed] . . . the free exchange of ideas'" (505 U.S. 672: 679). A nonpublic forum, on the other hand, was not designed primarily to promote the free exchange of ideas. The Court held airports were a nonpublic forum. Compared to other types of transportation and other types of places where open discussion occurred, airports were in the eyes of the Court, even as late as 1992, relatively new. Thus, the Court argued, the airports could not have had a traditional purpose of allowing the "free exchange of ideas" (505 U.S. 672: 679).

The Krishnas argued that transportation bases have traditionally allowed such an exchange, but the Court held that airports and traditional transportation were not comparable in terms of the access they allowed. Thus, airports were not traditional public forums, which means that they were nonpublic forums and so rules governing speech "need only satisfy a requirement of reasonableness" (505 U.S. 672: 682). The Court pointed out that the ban on solicitation was reasonable, as such solicitation could hinder the airport's business, and as such solicitation could contain elements of fraud. The Krishnas were still permitted to solicit in the terminals outside the airports, and the Court concluded that this would allow the group to still reach most people without hindering airport business, making the Port Authority's regulation reasonable in relationship to the Krishnas' right to exercise their religion.

The Supreme Court decision upheld the lower court decision allowing the Krishnas to distribute their literature in airports. Justices O'Connor, Kennedy, Blackmun, Stevens, and Souter all voted to uphold the lower court, and the Court issued a per curiam order (order of the court without an opinion by any named justice) citing that distribution was allowed.

Justice O'Connor also wrote a partial concurrence. She voted to allow the distribution of information, even while banning the solicitation of funds. Her vote was one of the swing votes, as she was in the majority both times.

(Kennedy was also in the majority both times, but he agreed with only the Court's judgment, not the reasoning in the solicitation part.) O'Connor agreed that the nature of the forum was a nonpublic one, but she thought that more analysis was needed than what the majority provided. She stated that even though the forum was a nonpublic one, it was not just one that served as an airport but rather "in my view, the Port Authority is operating a shopping mall as well as an airport" (505 U.S. 672: 689). However, she did not strike down the distribution of literature as "it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here" (505 U.S. 672: 690). She argued that the Port Authority had presented no evidence that the distribution of literature would hinder the use of the airport for air travel or for its use as a shopping mall.

Justice Kennedy also wrote a concurrence, expressing the same judgment in the area of solicitation as the Court, but one reached by a different method. Kennedy believed the airport was, in fact, a traditional public forum, in those areas outside the secured zones. Kennedy had a much different test for determining whether an area represented a public forum. Where the majority of the Court was concerned with the forum's designated use, Kennedy was concerned with its actual use. He believed the purpose test allowed the government to shut off any area by simply announcing a limited purpose for it. Kennedy had a much broader view of the definition of a public forum, arguing "the Court ignores the fact that the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. . . . In my view the policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property" (505 U.S. 672: 697). Through this reasoning, he believed the airport was a public forum. Even though the airport needed to be secured, the existence of the designated secured areas allow for this, leaving the rest of the airport as a public forum. Because this was a public forum, Kennedy concurred that the Port Authority could not ban the distribution and sale of literature. However, he also concurred on the subject of the general solicitation of funds, believing the Port Authority's ban on such activity only covered "in-person solicitation of funds, when combined with immediate receipt of that money," and was allowable due to concerns about fraud and coercion.

Justices Blackmun, Stevens, and Souter disagreed with both bans, believing the Krishnas should be allowed both to solicit funds and to distribute literature. They, along with O'Connor and Kennedy, made up the majority necessary to allow the Krishnas to distribute material. In general, laws regulating religion must be extremely narrow in their application. They must also advance a fundamental governmental need. In other words, the laws must usually infringe on the religion only as much as is absolutely necessary for the government to maintain some basic function. Blackmun, Stevens, and Souter felt the Port Authority's generic ban on solicitation was too broad and advanced no specific important government need. They said, "the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest" (505 U.S. 672: 711). However, they were in the minority. Blackmun addressed the issue of fraud, brought up by Rehnquist, by noting that very few fraud complaints had been filed against the Krishnas in the decade before the ban was adopted, which suggested to him that it was not a significant issue.

Rehnquist, Scalia, Thomas, and White dissented in the area of distribution. They suggested that literature distribution had many of the same problems as soliciting and added the issue of litter. For these reasons, they wanted to

uphold the original actions of the Port Authority, banning both solicitation and literature distribution.

Thus the Court as a whole allowed the distribution of literature, on a 6–3 vote, and disallowed solicitation, on a 5–4 vote, but O'Connor and Kennedy were the only two in the majority both times. These decisions have been used by airports to generally restrict the movements of religious groups, especially those soliciting funds. Issues surrounding minority rights are also raised in these cases, as the Krishnas' worship methods differ from those used by the majority of religions in the United States. Moreover, their worship practices collide with others' desire to travel. Not being a large group, their voices were not being heard through any venue but the courts. However, they have yet to win a Supreme Court case allowing them unfettered access to airport terminals to practice their religion.

See also *Airport Commissioners* v. *Jews for Jesus; Cantwell* v. *Connecticut; Heffron* v. *International Society for Krishna Consciousness, Inc.; Jones* v. *Opelika;* Charles Taze Russell and Judge Rutherford; *Tudor* v. *Board of Education of Borough of Rutherford; Watchtower Bible and Tract Society of New York* v. *Village of Stratton*

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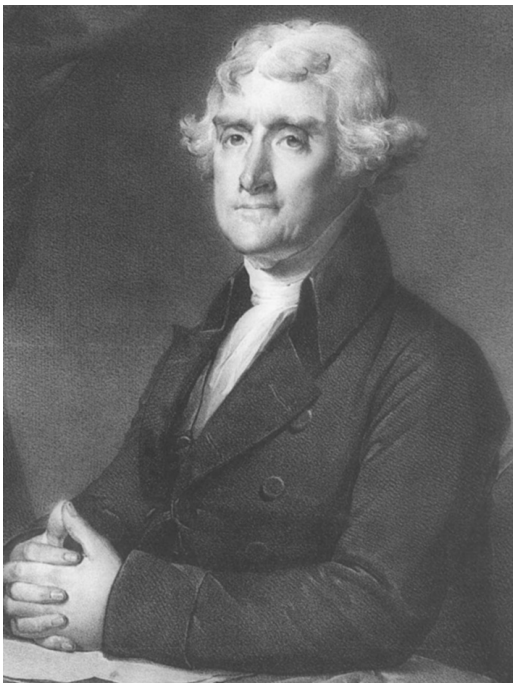
Thomas Jefferson

Born: 1743
Died: 1826

Thomas Jefferson led a contradictory life, but his ideas remain some of the cornerstones of our nation. In the area of the interaction of religion and the government, Jefferson was less of a contradiction, but some quandaries still remain. Jefferson was an important contributor to the whole idea of the separation of church and state, and his views on religion emphasize the difficulty of using the "framer's intent" to determine what the separation of church and state should mean today.



Thomas Jefferson, third president of the United States and principal author of the Declaration of Independence. (Library of Congress)

Thomas Jefferson was born April 13, 1743, in the colony of Virginia. At twenty-six, he was elected to the legislature, where he became a leader. In 1774, he served on the Continental Congress and wrote much of the Declaration of Independence. During the American Revolution, he served as governor of Virginia, among other roles. It was at this time that he drafted the Virginia Bill for Establishing Religious Liberty. This bill was in response to the wishes of Patrick Henry, who wanted the new state to fund (as it had while it was a colony) the official church. (It had been the Anglican Church while Virginia was a colony and became the Episcopal Church after the American Revolution.) Though Jefferson's bill opposing this sponsorship was not passed until 1783, he actually proposed it while he was governor.

The Virginia Statute for Religious Freedom holds "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no ways diminish, enlarge, or affect their civil capacities." The statue opens with a long list of the reasons to have religious freedom, including the "false religions" that existed (Jefferson did not give any examples of such religions) and that "Almighty God hath created the mind free." The statute closes with a comment to future legislatures that although they could revoke the statute, "we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act shall be an infringement of natural right."

A few notes need to be made here on Jefferson's own religion. While he did believe in God, his beliefs did not match the angry god or the active god of many other people's religions. He, along with Benjamin Franklin (among others), was a Deist, who believed that God had created the world and then left it to its own devices. The shorthand for this, at the time, was to refer to a clockmaker God. Jefferson also, later in life, argued for the publication of a New Testament that would only have Jesus' words and omit the miracles and interpretations. He believed that those things in the Bible that contradicted nature should be examined carefully and that the Bible should not be taken as infallible, but only studied the same way the works of a great Roman writer would be studied. Thus, while Jefferson mentioned a God in the Declaration of Independence, his own words throughout his life make him an ally neither of those who would, to give modern day examples, wish to put the Ten Commandments in public places, nor those who would wish to eliminate all religion from public life.

It is also significant that Jefferson was in Paris while the Constitution was written, so interpreting his views as what the Constitution means has a number of difficulties. First, he only indirectly shaped the Constitution. Second, many people had input into that document, meaning that his beliefs are only partially reflected in its text.

In 1783, he served in Congress under the Articles of Confederation, and from 1784 to 1789, he was the U.S. ambassador to France. After returning to the United States, Jefferson served as secretary of state in Washington's cabinet from 1789 to 1793. After his contributions in this office, he served as vice-president to John Adams. Jefferson did not have much power in Adams's administration but did manage to serve his party well.

Jefferson then won the election of 1800 and served as president from 1801 to 1809. While president, he presided over the Louisiana Purchase and started the successful Lewis and Clark expedition, but he also had the unsuccessful embargo policy, which failed to prevent a war or to help America. Jefferson was an advocate of limited government and of using only those powers specifically allotted to the government by the Constitution; however, he made the Louisiana Purchase, even though nowhere does the Constitution give the president (or anyone else) the specific right to buy territory.

Jefferson retired to Monticello, his country estate, and collected a great library, and eventually that library became the start of the Library of Congress. He also crafted many inventions and founded the University of Virginia. He died on July 4, 1826, fifty years to the day after the signing of the Declaration of Independence.

See also American Revolution's effect on religion; Established churches in colonial America; First Amendment; James Madison

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Jewish seat on the Supreme Court

Beginning in 1916, with the appointment of Louis Brandeis, most U.S. presidents have made an effort to ensure that one of the nine Supreme Court justices was Jewish. There was a fair amount of prejudice against Brandeis's appoint-

ment, in large part because of his religion (most of the rest of the opposition stemmed from his being a Progressive who had fought for Progressive causes, including litigating the *Muller* v. *Oregon* case in front of the Supreme Court). While Brandeis was on the Supreme Court, he was subject to anti-Jewish bias even by his fellow Supreme Court members. For instance, Justice McReynolds (who was the most anti-Semitic of the Court) was reported to have left the Supreme Court's conferences when Brandeis began to speak, and McReynolds responded to Chief Justice Taft, when Taft was trying to arrange a common time for the Supreme Court to have dinner with the attorney general, "Anytime, my dear Chief Justice. I do not expect to attend, as I find it hard to dine with the Orient [by which he was referring to Brandeis]" (quoted in Polenberg, 1987: 205). After Brandeis, a Jewish justice was generally appointed to the Court when another Jewish justice retired. Before Brandeis had resigned, Benjamin Cardozo was appointed. When Cardozo died, Felix Frankfurter was appointed, and after Frankfurter retired, Arthur Goldberg was appointed, and after Goldberg came Abe Fortas. All of these men were Jewish and all (from Cardozo to Fortas) occupied the same seat on the Supreme Court, replacing each other. After Fortas resigned in 1969, Harry Blackmun, who was not Jewish, was appointed to the court, and a Jewish justice was not appointed again until Ruth Bader Ginsburg in 1993. It is noteworthy that for two-thirds of the twentieth century, a Jewish justice was seated on the Supreme Court.

This practice has been publicly discussed at times. For instance, when both Frankfurter and Brandeis were nominated, their religion was noted. One of the stated objectives of Lyndon Johnson when he nominated Fortas was that he wanted to continue the tradition of having a Jewish justice on the Supreme Court. Perhaps as a sign of how American public life is changing, some biographies of Ginsburg do not even note her religion, and most do not note that she was the first Jewish justice in twenty-four years. Thus, while the practice continues, public notice of it has decreased.

See also Brandeis nomination and service on the Supreme Court; Felix Frankfurter

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Jones v. *Opelika*

316 U.S. 584 (1942)
319 U.S. 103 (1943)

These cases dealt with the conviction of Jehovah's Witnesses for failure to obtain a license and pay a license tax before going door to door. The U.S. Supreme Court initially held that the Jehovah's Witnesses had to pay the license tax and apply for a license before going door to door. However, the next year, the Court reversed itself and decided that the license tax was illegal.

Three different sets of convictions were grouped together in the first Jones case, where Justice Reed delivered the opinion. He surveyed the cases and then noted that the government was not allowed to control opinions. Even though no such control was allowed, the government could control the time, place, and manner of public discussions. Reed held that "when proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing" (316 U.S. 584: 598). The Court noted that discretionary licensing power would be more questionable, but that

two of the challenged license ordinances were nondiscretionary and that under the third, no license had been applied for.

Chief Justice Stone, dissenting, argued for overturning the ordinance in all three cases, as, among other things, there was too much discretion granted. The majority compared the activities of the Witnesses to business, but Stone did not believe that businesses and religions should be classed together, as "here the only activities involved are the dissemination of ideas, educational and religious, and the collection of funds for the propagation of those ideas, which we have said is likewise the subject of constitutional protection" (316 U.S. 584: 608). Stone's dissent was joined by Black, Douglas, and Murphy. Murphy also issued his own dissent, joined in by the three other dissenters. "But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit. As such they place a burden on freedom of speech, freedom of the press, and the exercise of religion even if the question of amount is laid aside" (316 U.S. 584: 616). Murphy also noted that unless First Amendment activities had a profit motive, they could not be taxed for the purpose of revenue. Murphy even perhaps raised freedom of religion above that of the other First Amendment freedoms. "Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature" (316 U.S. 584: 621). Black, Douglas, and Murphy also dissented in an opinion by Black. There they held that *Gobitis,* the flag salute decision, had been wrongly decided. "Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. . . . The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that" (316 U.S. 483: 623–624).

This case returned to the U.S. Supreme Court in 1943. The reason was that similar cases had come up and were going to be heard, as they were in *Murdock* v. *Pennsylvania*. There, the Court held that license taxes were not allowed. Income taxes and perhaps sales taxes were allowed, but not these. Justice Douglas, writing the opinion, compared the taxes here to those opposed at the time of the American Revolution. "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed" (319 U.S. 105: 114–115). Douglas went on to say, "plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights" (319 U.S. 103: 116).

Justice Reed dissented. He wrote, "the available evidence of Congressional action shows clearly that the draftsmen of the amendments had in mind the practice of religion and the right to be heard, rather than any abridgment or interference with either by taxation in any form" (319 U.S. 105: 123–124). Justice Frankfurter also dissented. He wrote, "A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the

community" (319 U.S. 105: 135). He also, like Reed had in his opinion, held that the possible abuse of a tax was not enough to invalidate it.

Thus, the Supreme Court first allowed, and then the next year disallowed, licensing taxes charged upon the Jehovah's Witnesses. The first decision is doubly important as it was the first sign that some of the justices believed that the *Gobitis* decision had been wrongly decided. It also was one of the early decisions, along with *Cantwell,* that created protections for religious actions, not just religious beliefs.

See also *Bob Jones University* v. *United States; Cantwell* v. *Connecticut;* Saluting the flag

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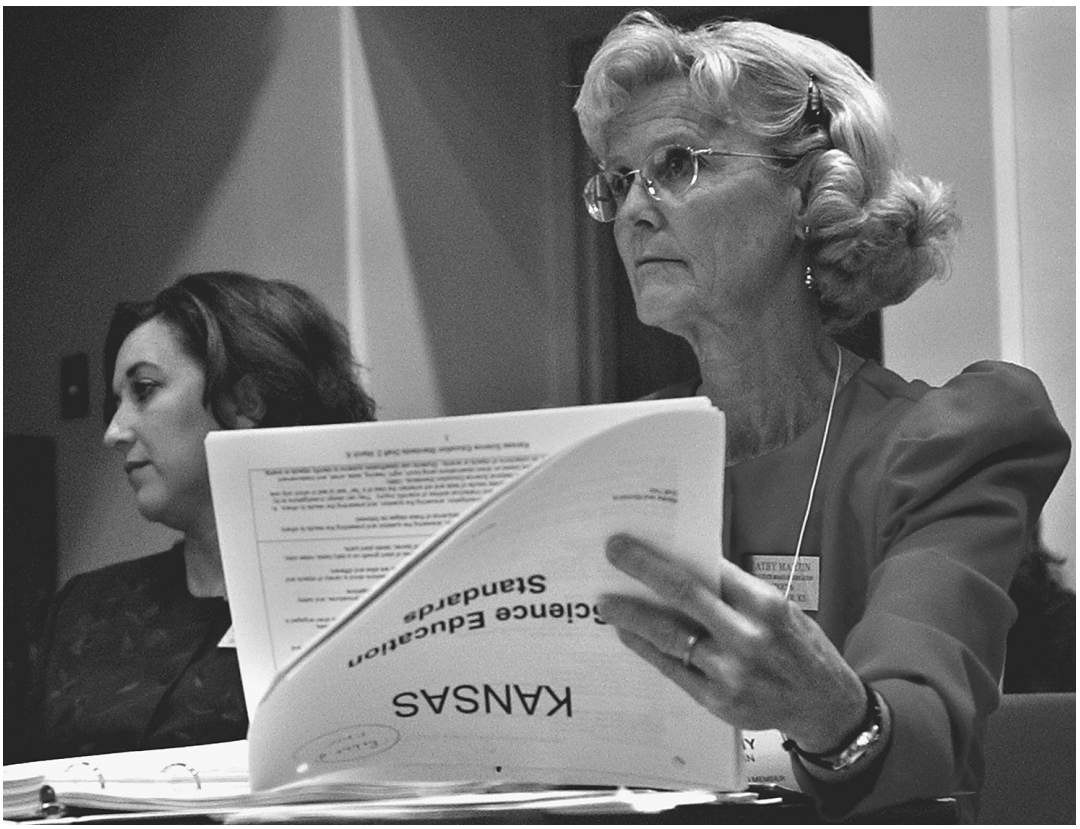
K

Kansas battle over evolution

In the film version of *The Wizard of Oz,* Kansas is portrayed as unchanging and stark, symbolized in its black-and-white depiction. Dorothy knows she has left Kansas when she arrives in color-filled Oz. In the past decade, the evolution debate in Kansas has led some people to depict the state once more as the stark and unchanging land whose rainbow Dorothy longed to get over. In fact, both sides of the evolution struggle have supporters in the state board of education, and, with voters shifting the balance in at least three recent elections, the state's policies on teaching evolution in the public schools have depended largely on which group has the upper hand when the issue comes to the floor. As neither the supporters nor detractors are willing to give much ground, the emphasis on evolution in state teaching standards has changed several times.

The controversy erupted in 1999 and focused on the state board of education, which



*Kansas State Board of Education member Kathy Martin listens to testimony while flipping through a copy of the Kansas Science Education Standards during hearings on the state's science curriculum in Topeka on May 6, 2005. (AP Photo/*Topeka Capital-Journal, *Anthony S. Bush)*

had changed the state list of tested subjects, a fairly common practice. However, this board had eliminated evolution from the biology tests. Their action told students they did not need to study the subject in order to pass the state standardized tests, and told districts that it was acceptable to skip it as well. With long lists of subjects in each area, few subjects not tested at the state level are included in most curriculums, as there is often only enough time (if that) to cover the required list, then review for and take the tests. Thus, those who favored the teaching of evolution criticized the Kansas Board of Education's move, which the board defended as part of its right to decide what was on the state tests rather than as a decision on the merits of evolution. Those favoring the removal of evolution from the classroom celebrated.

The next year, the battle turned to the electorate, and voters put in a board more favorable to evolution, who then returned evolution to the state tests. By 2004, the issue had shifted slightly, with a new group opposed to evolution holding the upper hand. This group now suggested classroom discussions of intelligent design. Opponents of religious teaching in the classroom objected, saying that the school board was trying to slip in through the back door what it had been unable to bring in through the side door by removing evolution from the standards. The state held hearings on the new standards, which included a reminder that evolution was a theory, not a fact, and that evolution did not eliminate the potential for supernatural elements as well as the proposal that intelligent design discussions should also be permitted. The standards did not, however, outright endorse intelligent design. This is important in that an endorsement might have been viewed as a religious statement, while the board felt an allowance merely expanded education. Those opposed, of course, argued that this was merely a subversive way to get around Supreme Court (and lower court) decisions prohibiting religious teaching in the classroom by restricting the teaching of evolution.

The battle did not end there either, as in August 2006, two years later, new elections returned the evolution supporters to control of the state school board. While no changes have been made as of late 2006, it is likely that these are not far in the future.

The Kansas battle is notable for three main reasons. First, this statewide decision reaches a broader group than the local school board battles over the amount of evolution allowed or mandated in the classroom. Second, the Kansas decisions are indicative of the new methods used to shape curriculum. Unlike the old efforts of evolution's opponents, which focused either on banning the subject or requiring it to be taught in conjunction with an alternative perspective, Kansas's evolution opponents and supporters are fighting to control state test content, which has a heavy impact on state curriculums, regardless of local perspectives. While not as direct as the old bans on evolution were, the Kansas state test content battles are not as subtle as the local discussions, which often begin when an evolution detractor chooses a text with little emphasis on evolution and allows teachers the freedom to set their own curriculum, that is, to remove evolution. School boards can then tell complainants that they have selected a textbook and decided to allow teachers to set the curriculum, and end the matter without addressing the evolution concerns. Finally, the debate is noteworthy because Kansas is seen by many as a prototype for America and often subconsciously considered to be what true America is like. Thus, the debate in Kansas is often perceived as emblematic of the debate in the entire country, giving the entire nation a stake in one state's battle. Thus, while Dorothy might have thought Kansas bland and unchanging, in truth, it has been a center for controversy in the area of evolution in the past decade and will likely continue to be one as the electorate changes the state school board's makeup.

See also Avoidance of the issue of evolution in many teaching standards; *Kitzmiller* v. *Dover*

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Martin Luther King, Jr., president of the Southern Christian Leadership Conference, in the Civil Rights March on Washington, in Washington, D.C. on August 28, 1963. (National Archives)

Martin Luther King, Jr.

Religious Civil Rights Leader
Born: 1929, Atlanta, Georgia
Died: 1968, Memphis, Tennessee

The Reverend Martin Luther King, Jr., demonstrates how religion can influence public policy. Through using religious rhetoric, and through appealing to the religious background of many Americans, King was able to motivate numbers of them to protest nonviolently, and this in turn helped spur the civil rights movement to great achievements.

Dr. Martin Luther King was born in 1929 in Atlanta, Georgia, into a family of ministers. King was raised in the middle class but still suffered from the effects of racism, even if less than those who did not have the economic advantages he had. From an early age, King wanted to fight against racism. King entered college at the age of fifteen, ultimately gaining a doctorate by the age of twenty-six. In 1954 he became pastor of a church in Montgomery, Alabama. Montgomery already had an active chapter of the National Association for the Advancement of Colored People (NAACP), whose secretary was Rosa Parks. Many of the local leaders decided that 1955 was a good time to lead a civil rights protest. The Montgomery bus boycott brought King to the attention of the nation, even though King himself was not, by far, the most important civil rights leader in Montgomery.

King used this newfound attention to help organize and lead a movement for social change. He was one of the founding members of the Southern Christian Leadership Conference (SCLC) which was started in 1957. King also began to reveal his social philosophy, in which he mixed elements of Christian philosophy with the ideas of Mohandas Gandhi, Reinhold Niebuhr, and Henry David Thoreau. He argued that no matter what occurred to you, you should not respond to violence with violence. He also understood, as a

practical matter, that nonviolence would create pressure for change throughout the nation. Being abused for protesting nonviolently would cause people, particularly northern moderate whites, to change their minds and push for an end to discrimination. King understood that the conscience of the nation needed to be aroused, and he used Christian philosophy as one of the elements of his overall nonviolent message.

Throughout his life, King used his nonviolent philosophy to push for change. In the late 1950s and early 1960s, the SCLC attempted several unsuccessful campaigns, but they were learning tactics and improving their strategy. In 1962, they turned their efforts to Birmingham, Alabama, and were successful, in part due to the massive and violent reaction by the local police chief. While there, King was arrested, and in jail he wrote his famous Letter from a Birmingham Jail, in which he stated, "I would agree with St. Augustine that 'an unjust law is no law at all'" and "a just law is a man made code that squares with the moral law or the law of God." After success in Birmingham, King organized the March on Washington, where he gave his famous "I Have a Dream" speech. There, he argued, "No, no we are not satisfied and we will not be satisfied until 'justice rolls down like waters and righteousness like a mighty stream.'" (There King was quoting the book of Amos in the Bible [specifically Amos 5:24].) King closed that speech by saying, "and when this happens, when we allow freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics will be able to join hands and sing in the words of the old Negro spiritual: 'Free at last! Free at last! Thank God Almighty, we are free at last!'" (Both quotations from *http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf.*) The pressure brought by this march helped to pass the 1964 Civil Rights Act.

King organized protests in the South, which helped to pass the 1965 Voting Rights Act, and then moved north, but had little success there. In 1968, he went to Memphis to speak at a sanitation workers' strike, and was assassinated on April 4. In a speech the night before he was killed, he stated "I've been to the mountaintop. . . I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over, and I've seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the Promised Land. And I'm so happy tonight; I'm not worried about anything; I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord" (*http://www.stanford.edu/group/King/publications/speeches/I've_been_to_the_mountaintop.pdf*). The use of religion here was similar to his other uses of religion and demonstrates the importance of religion to his efforts.

King continually used religion in his speeches, and this allowed him to reach out to many Americans. It also contributed to his ability to convince people to protest nonviolently. Both of these effects clearly demonstrate the influence of religion upon the civil rights struggle during the time of Martin Luther King, Jr.

See also African American religious conscientious objectors in World War II; Religious elements of the civil rights movement; *Walker* v. *Birmingham*

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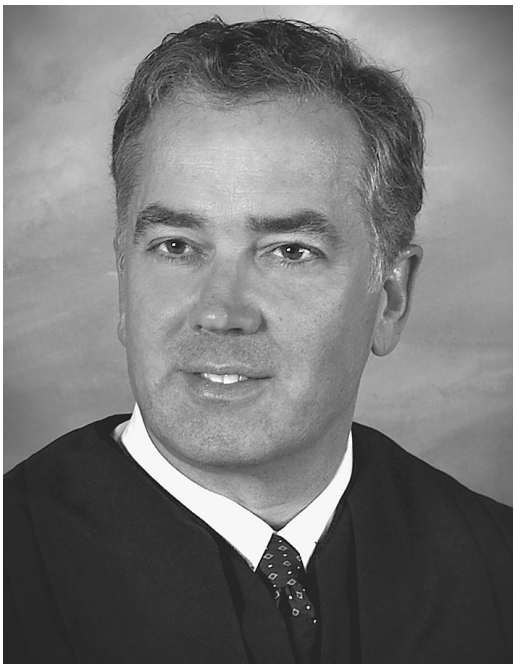
Kitzmiller v. *Dover Area School District*

In the U.S. District Court for the Middle District of Pennsylvania
400 F. Supp. 2d 707 (2005)

The concept of evolution had been around before Darwin's *Origin of Species* (1859), but that book brought evolution into the public sphere. Nearly 150 years later, America is still debating the exact level to which evolution is accurate and whether it needs to be taught to children in public schools. Perhaps 152 years from now, in 2159, or 300 years after Darwin's original publication, the controversy will be resolved, but a study of the evolution controversy so far suggests otherwise.

Those who do not agree with evolution have attempted a number of strategies to prevent its entrance into the public schools in the twentieth century. At first, school boards and states tried to ban evolution, but that concept met with hostility and outright ridicule from America's urban areas, as seen in the 1925 Scopes Monkey Trial. After that, particularly in those areas where organized religion was hostile to evolution, many school boards marginalized evolution, but few official efforts were undertaken between 1925 and the 1980s. In the 1980s, the controversy was reawakened, and science itself was used against the idea of evolution. From the 1960s to the 1980s, a group of scientists collected evidence that they believed defended the biblical flood, thus demonstrating the Bible's literal truth and showing that the earth was only 6,000 years old. They felt their findings disproved evolution, which suggested a much older age to the planet. However, rather than attempting to ban evolution, these groups wanted both evolution and the new "creation science" to be taught side by side in classrooms.



Judge John E. Jones III presided over Kitzmiller *v.* Dover Area School District *(2005). The case was the first direct challenge brought in the federal courts against a school district that mandated the teaching of intelligent design. On December 20, 2005, Jones ruled that the mandate was unconstitutional. (U.S. District Court for the Middle of Pennsylvania)*

Louisiana passed a law mandating that the two be taught together, if evolution were to be taught at all. The Supreme Court declared this an unconstitutional promotion of religion in 1987 in *Edwards* v. *Aguillard*. Those who believed in creation science were not to be deterred, however, and some continued their research in this vein. Some others continued an ongoing effort to move schools away from evolution, either by textbook and teacher selection or by curriculum efforts, figuring that if schools did not teach evolution, even though they legally could do so, they would achieve the same effect as a ban on evolution, or the dual teaching of creation science and evolution.

Others looked at the evidence again or reconsidered how to get evolution removed and, with the help of other researchers, came up with the idea of intelligent design. This concept argued that there are some things in the world that are so complex, that mere chance, which is how they view evolution, cannot explain everything, and so there must be some intelligent designer. Many of those supporting intelligent design, similar to evolutionists, agree that the earth could very well be billions of years old, and some supporters feel that evolution plays a role but is not enough for a full explanation. It should also be noted that the idea of intelligent design leaves open the question of how the universe started. Similar to what the creation scientists had done, the intelligent design supporters pushed school districts to consider intelligent design and hoped either to have both intelligent design and evolution taught, or to have disclaimers inserted before discussions of evolution or in biology books, among other efforts.

One of the more recent, and one of the best-known intelligent design–evolution controversies came in Dover, Pennsylvania. Even though it is a small town, it is part of an amalgamated school district, where students from surrounding areas are bussed in, creating a district with about 1,000 students in the high school. In 2004, the Dover School Board required teachers, starting in January 2005, to read a disclaimer before teaching evolution. The statement, in full, read:

> "The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part. Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People,* is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments" (400 F. Supp. 2d 707: 708–709).

A lawsuit was filed resulting in the case *Kitzmiller* v. *Dover Area School District,* heard by Judge John E. Jones III. The suit claimed that the policy violated the First Amendment of the U.S. Constitution as well as the Pennsylvania constitution, as it established a religion. The district court opinion first summarized the background of the legislation, of the parties, and the legal background of the evolution controversy. The court noted that both sides had agreed to use the *Lemon* v. *Kurtzman* criteria, which required a secular purpose, an effect of neither advancing nor retarding religion, and an avoidance of excessive entanglement. The court also held that the policy needed to avoid endorsing religion, a holding opposed by the school board, and held that the endorsement issue should be considered first.

The court then considered the policy and whether it endorsed a religion. The judge commented, "The test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose" (400 F. Supp. 2d 707: 714–715). The court held that this objective observer would be familiar with the background of intelligent design and that intelligent design arose as a *religious movement* to answer evolution. While most who publicly advocate intelligent design (ID) do not directly state that the designer is the God of Christianity and other Western religions, the judge held that any reasonable observer would make that leap.

Judge Jones also noted that many ID supporters want to use intelligent design to create a "wedge" and to clear the ground to allow Christianity into the schools, particularly into biology classrooms to replace evolution. He concluded, "As no evidence in the record indicates that any other scientific proposition's validity rests on belief in God, nor is the Court aware of any such scientific propositions, Professor Behe's assertion constitutes substantial evidence that in his view, as is commensurate with other prominent ID leaders, ID is a religious and not a scientific proposition" (400 F. Supp. 2d 707: 720).

Jones then turned and discussed what the average student would think about the disclaimer. He stated that courts were, and rightfully so, very conscious of the image presented to students for two reasons: first, that parents entrusted their children to the schools, and second, that students at the high school age (and younger) were very impressionable. Jones found that students would see this policy as an endorsement of religion, because first, the school board had highlighted evolution (and only evolution) for the disclaimer that this subject was taught because it was required. The average student would wonder why evolution was so chosen. This in turn sent the message that evolution was not something the board wants to teach, but only did so because it had to. Jones also held that the disclaimer was misleading in labeling evolution as a theory, as it hinted that evolution was unproven (the average person's definition of "theory") not a working scientific explanation (the scientific definition of "theory"). Intelligent design was presented as a "view," which raised it above Darwin's mere "theory." He also noted that school administrators appeared in the classrooms to read the disclaimer, which added to the promotion of religion. Jones concluded that "in summary, the disclaimer singles out the theory of evolution for special treatment, misrepresents its status in the scientific community, causes students to doubt its validity without scientific justification, presents students with a religious alternative masquerading as a scientific theory, directs them to consult a creationist text as though it were a science resource, and instructs students to forego scientific inquiry in the public school classroom and instead to seek out religious instruction elsewhere" (400 F. Supp. 2d 707: 729–730).

The judge next considered what a reasonable adult observer would think of the plan. Unlike other decisions, rather than just considering the effect on the student, he also considered the view from adults as to whether they would consider it a promotion of religion. Jones first defended this tactic, noting that the board had tried to sell the policy to the public, meaning the public needed to be considered. Jones also noted that the opt-out provision sent out to parents, whereby students could be excused from hearing the disclaimer, made the parents part of the audience. He then turned and held that the board's actions did constitute an endorsement of religion, as the board's description of evolution as a theory, the sole focus on evolution, both for the disclaimer and for a public description, meant that the board had advanced religion by supporting intelligent design, and the large numbers of letters to the editor in the local papers showed that the public considered the issue to be about religion. The judge then ruled that intelligent design was not science. He wrote, "We find that while ID arguments may be true, a proposition on which the Court takes no position, ID is not science. We find that ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science. They are: (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the 1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community" (400 F. Supp. 2d 707: 735). Jones directly addressed one of intelligent

design (ID)'s main arguments—that if evolution fails to fully explain, intelligent design is needed to explain, and he held "we believe that arguments against evolution are not arguments for design" (400 F. Supp. 2d 707: 738). Clearly then, for both adult and child observers, the school board had endorsed religion. However, the court then turned to the *Lemon* test to see if that test was also violated.

The first part of the *Lemon* test was the purpose of the board's policy, and to see this the court looked at both the actual stated words and the context in which the policy was passed. The court looked at what the board members had said, especially one board member particularly in favor of the disclaimer and ID in general, and what that member had testified about his goals in court. About that testimony, the court concluded "simply put, Bonsell repeatedly failed to testify in a truthful manner about this and other subjects" (400 F. Supp. 2d 707: 749). The court also reviewed the effect of the controversy on teaching in the schools and found that the school board as a whole, in pursuing the intelligent design idea, had decreased educational and critical thinking. Jones then detailed the history of the controversy and concluded that not only should the board have known that they were promoting religion, but that the board, or at least parts of it, *did* know this. Among the things disclosed was that the main supporter of the ID movement on the board had collected funds at his church to buy copies of the *Pandas* text mentioned by the disclaimer and then hid that fact.

The court, while reviewing this chronology, noted that no effort was ever made by the board to justify the policy on the basis that it advanced education, that some of the school board did not understand intelligent design and that no scientific information from science organizations was used while considering the change. The opinion also reveals the division in the community and the hatred generated due to it, and it notes that one school board member "testified that following her opposition to the curriculum change on October 18, 2004, Buckingham called her an atheist and Bonsell told her that she would go to hell" (400 F. Supp. 2d 707: 762). Another "was coerced into voting for the curriculum change by Board members accusing her of being an atheist and un-Christian" (400 F. Supp. 2d 707: 762). On the whole, the court concluded that no secular purpose, other than one advanced to cover up the religious motives, was ever articulated for the policy.

Concerning the effect of the policy, the second part of the *Lemon* test, the court concluded simply that "the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion" (400 F. Supp. 2d 707: 764). The court also concluded that the actions of the board, as they violated the establishment clause of the federal Constitution, also violated the state constitution. Jones had one final comment toward those who might view him as an "activist" judge, something that some have charged courts with being when they rule that legislation is unconstitutional. "Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy. The breathtaking inanity of the Board's decision is evident when considered against the factual backdrop which has now been fully revealed through this trial. The students, parents, and teachers of the Dover Area School District deserved better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources" (400 F. Supp. 2d 707: 765).

This case demonstrates an attempt by a minority of a school board to railroad a religious policy through the school system. This is not to state that no school board could adopt in-

telligent design in good faith while believing in its scientific validity. However, here it is clear that the school board over two years had a few members driven to remove evolution and focused on doing so through intelligent design, and then trying to cover up their tracks, which was impossible. Their lack of candor at the trial rightly brought the condemnation of the judge and contributed to his finding that this policy was aimed at an endorsement of religion. Whether the endorsement test was used, or the *Lemon* test, or whether the Pennsylvania or federal constitutions were at stake, it did not matter, as the policy failed to meet the criteria set by all. Judge Jones stated that this policy was unconstitutional as it aimed to paint evolution in a bad light and promote intelligent design, whose scientific merits, at the school board stage, were unplumbed, and whose religious merits only were considered. At the trial, the board's hidden religious motivations were revealed, and for all of these reasons, the policy was declared unconstitutional. Thus, the *Kitzmiller* case ultimately shows that direct disclaimers and appeals to read intelligent design books, particularly when combined with direct slights of evolution, are not to be held as constitutional.

See also Avoidance of the issue of evolution in many teaching standards; *Crowley* v. *Smithsonian Institution; Edwards* v. *Aguillard; Peloza* v. *Capistrano Unified School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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L

Lamb's Chapel v. *Center Moriches School District*

508 U.S. 384 (1993)

School districts are presented with a perplexing question where their facilities are concerned: what use should they allow by outside groups? Many school districts want to allow groups to use their facilities without promoting religion, both for public policy reasons and to avoid controversy and possible antagonism of the voters, and also to avoid running afoul of the First Amendment.

In this case, a school board forbade a religious group to use its facilities to show films, based on the religious nature of the films. The Supreme Court unanimously held that the board's decision was unconstitutional, in a decision written by Justice White. White first examined the New York school board's regulations, noting that religious purposes were not among the allowed uses and that a prior state court decision, accepted by the Second Circuit Court of Appeals, forbade the use of school property by Bible clubs. The local school board had allowed use of the property for only two purposes: "social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with" general state law on the use of school board property (508 U.S. 384: 387).

Lamb's Chapel had wanted to show a film series that had a religious basis, and the school board denied them. White examined the school board's policy, holding that the board did have the right to control the use of its property, but that this property still had to be regulated in a constitutional manner. Thus, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral" (508 U.S. 384: 392–393). The court then argued that other films on the same topics as Lamb Chapel's films ("childrearing and family values") would have been allowed if from perspectives other than religious ones, and stated that in the case of these films, "exhibition was denied solely because the film series dealt with the subject from a religious standpoint" (508 U.S. 384: 394). Allowing the film series was held to not advance religion, and it was seen as surviving the *Lemon* test as giving the permission had a secular purpose, did not advance or retard religion, and did not excessively entangle the school board with religion. Thus, the judgment of the school board was held to be unconstitutional as it constituted viewpoint discrimination.

Justice Kennedy concurred, agreeing that the decision of the school board was discrimination against a certain viewpoint and so should not be allowed. He, however, did not agree with the use of the *Lemon* test, and wrote to protest its use. Justice Scalia concurred in the judgment alone and was joined by Justice Thomas. He agreed with the Court that what the school board did violated the First Amendment and that the school board, if it had allowed the films to be shown, would have had no risk of violating the establishment clause of the First Amendment. However, Scalia called for a total "burial" of the *Lemon* test, describing it as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried" (508 U.S. 384: 398). Scalia argued that *Lemon* was used only when the Court wished to use it and ignored in other instances. Continuing the monster theme, he noted, "Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never

knows when one might need him" (508 U.S. 384: 399). Scalia disliked *Lemon* and did not hold it useful here. Scalia also argued that governments in general were allowed to endorse religion, as previous governments had, and that governments should not be indifferent to religion as religion was a good thing. He cited the Northwest Ordinance's promotion of education, in part to promote "religion, morality and knowledge," in support of this (508 U.S. 384: 400). Thus, Scalia would have struck down the regulations as they violated the free speech clause of the First Amendment without ever considering religion. As far as the whole issue of establishment was concerned, Scalia suggested that "as for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect" (508 U.S. 384: 401).

School districts thus can, and this decision agrees with several other cases on the general topic, control access to their school district's facilities. However, they cannot discriminate on the basis of viewpoint. If they allow films or discussions of a topic from one point of view, they must allow it from all points of view. It should be noted here, though, that the film in question did not promote religion, but instead tackled family questions from a religious perspective, and that if it had, it might have been a different question, as only Scalia and Thomas clearly stated that the government was allowed to promote religion.

See also Equal Access Act of 1984; *Good News Club* v. *Milford Central School; Good News/Good Sports Club* v. *School District of the City of Ladue; McCollum* v. *Board of Education; Rosenberger* v. *Rector and Visitors of the University of Virginia*

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Lanner v. *Wimmer*

662 F.2d 1349 (10th Cir. 1981)

The whole issue of "released time" courses has given rise to a great deal of controversy. Released time refers to how some schools allow students to attend classes taught by religious personnel (whether on or off school grounds) during school time. The program at question in *Lanner* was a released time program that gave both academic and attendance credit.

The Tenth Circuit reviewed previous Supreme Court decisions and the administration of this program, and then turned to the issue of constitutionality. The court first noted that released time programs were constitutional, citing *Zorach*. However, the Tenth Circuit noted that the attendance recording mechanism was not the least possible entangling system, and held it to be unconstitutional. The court then examined the various ways that the school system had adapted to make the released time system work with the overall school system, and held these to be acceptable. Regarding the issue of credit for released time courses, the court held that "if the school officials desire to recognize released-time classes generally as satisfying some elective hours, they are at liberty to do so if their policy is neutrally stated and administered" (662 F.2d 1349: 1361). The credits, though, were allowed only in the area of "elective" credits and were not allowed to count toward the total amount of required credits, which included a certain amount of English, history, and other traditionally aca-

demic courses. The state, however, was not allowed to give credit for courses that were "mainly denominational," as then the state would be judging religion, which was not allowed. The state, on the other hand, was allowed to count the hours (as in the number of hours in a day) that a student attended a released time school toward the total number of hours a student must attend in a week or year. The hours could also be counted toward the total number of hours a student was enrolled in overall courses (which differs from the total number of hours attended as it would skip lunch, etc.), and in the total number of hours students must be enrolled, on average, for a school to receive state funding.

Thus, released time courses were allowed to be given credit, as long as those credits were granted as elective credits toward graduation, and the state did not judge the courses taken as either religious in nature or not. The parallel the court gave throughout is that if one can get credit and graduate wholly at a religious school, why not allow the student some credits for some courses taken at a similar religious institution? The overall idea of giving credit for released time courses was upheld in *Lanner,* but the way the program was administered needed to avoid judging religion, and needed to be the least entangling method possible.

See also *Board of Education Kiryas Joel Village School* v. *Grumet; McCollum* v. *Board of Education; Wiley* v. *Franklin; Zorach* v. *Clauson*

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Law's treatment of priests who are child molesters

The issue of priests who were molesters burst onto the national scene in the 1980s and 1990s. The topic had often been hinted at and whispered about, and individual priests were occasionally tried, but the trickle of stories became a torrent in those decades.

It should first be noted that the Catholic Church is not the only group by far that has recently had to deal, or should have dealt, with the issue of pedophilia. *Sports Illustrated* discussed a number of youth coaches who were arrested, tried, and convicted for child abuse, and analyzed the ways youth leagues fail to prevent pedophiles from gaining access to children. Even though the allegations were eventually disproved, the driving interest in the McMartin PreSchool trials in the late 1980s and early 1990s was the sexual abuse of children on a massive scale alleged in the lawsuits. Thus, there are many areas in society that have not fully acted to deal with and prevent the sexual abuse of children, even though it is a serious and fully justified concern.

However, religion does not generally enter the picture with sexual abuse in preschools or youth leagues, and hardly ever enters when the justice system is trying to deal with confronting abusers. It did (and does), though, when priests and other religious figures are at issue.

First, note the overall scope of the situation. Estimates have ranged widely as to the number of priests involved, but a recent study suggested that over 10,000 cases of abuses were reported, and over 4,000 priests accused. This is a little more than 4 percent of all priests in the United States. Also, the abuse occurred over a fifty-year period, and most priests were accused of one or just a few incidents, with relatively few abusers (roughly 3 percent, or about 120 priests) being accused of more than ten incidents. This may have been because victims did not come forward, but probably, on the whole, reflects the overall pattern of abuse. Those accused of multiple incidents account for a huge percent of the abuse, with that 3 percent, or 120, accounting for more than one-quarter of the overall allegations, or over

2,500 incidents. Most of the reported abuse occurred between 1950 and 1984, as efforts to deal with the problem more seriously began in the mid- and late 1980s, and the level of abuse decreased after that.

However, the number of allegations actually increased in the 1980s and 1990s, in part because of the widespread coverage. Before the crisis became known nationally, many abuse victims were reluctant to come forward, especially in the media, so even as the first serious efforts were being initiated to deal with abuse in the Catholic Church, reports mounted. Some of those abused in the last twenty years may not have come forward yet, as it often takes years for those abused to come to terms with the abuse, in any situation, and to report it. Thus, the full level of abuse in the last twenty years probably is not completely recorded, even while the best indications are that the abuse of children by priests is decreasing.

In the past, the Catholic Church was largely left to its own devices in dealing with priests who were child molesters. It is estimated, by the recent study just noted, that only about 6 percent of those accused were convicted, and only about 2 percent were given prison sentences. Thus, most were dealt with internally by the church. Some priests were quietly shuffled to other parishes in the hope that their behavior would change. Indeed, families in the receiving church were often not even notified of the allegations against the priest. Others were sent for medical evaluation and treatment. Most were not permanently removed from dealing with children, although some were suspended for a time or placed on leave.

The Catholic Church has largely changed its policy, for a time having a zero tolerance policy, which asked any priest against whom credible abuse allegations were filed to leave the church. This policy was still somewhat voluntary, as it asked the priest to resign rather than forcing him to. The church then moved to having a policy forcing the report of allegations to central church officials and then removing any priest against whom a credible allegation had been made. The church has also developed a policy of reporting abusers to the local secular authorities.

Allegations of abuse against priests left out the legal system until recently, and that has always been a contentious point. The U.S. court system has decided not to interfere in the governing process of any church, and thus leaves the selection and removal process of church employees to the churches themselves. This is an understandable policy given the religious freedom in America: if the secular (state-run) courts had review power, a minister dismissed for violating church doctrine, in any area, would be asking the state-run courts to determine who was right in the area of church theology—the minister or the church. For these reasons, ever since *Watson* v. *Jones* (1871), the U.S. court system has refused to delve into the truth or falsity of religious beliefs or to challenge the decision of church governing bodies, except when fraud or collusion is proven, or if the decision is wholly arbitrary. Child-molesting priests were treated as if they had violated the church's internal laws, and their discipline was generally left up to the individual churches.

The Catholic Church has recently spent a large amount of time, effort, and money both confronting this problem and trying to bring some element of closure to the victims. No good estimates exist on how much money the church has been spent trying to remove priests who are molesters, but possibly over $500 million has been expended to settle lawsuits against dioceses who failed to handle the problem adequately. Legally, an organization is generally responsible for its employees, and some dioceses have admitted they failed in this duty and settled lawsuits from those who were abused. While payment does not repair the damage, money and convictions are the only remedies available in the legal system. In terms of legal re-

sults, a number of high-profile convictions have occurred across the nation. There are no comprehensive overall figures for the total number of priests convicted over the years, but the best available state that about 1,000 priests were reported to the courts, mostly by their victims, 400 were charged, about 250 were convicted, 100 were sentenced to prison (meaning a jail sentence of over one year), and 60 were sentenced to jail. (Some may have been sentenced to both prison and jail.) Having multiple victims did not mean that a priest was necessarily charged, as this survey found that among those with ten or more victims, the priest still had only a one in six chance of being convicted. While convictions and prosecutions of priests have been reported heavily in the media, the percentage of priests who are molesters is low. However, the percentage of molesters who are sentenced to more than one year in prison is also very low—about 3 percent of the overall number of priests accused and reported (either to the courts or the church).

Thus, those abused by priests have generally been let down by the criminal justice system and by the Catholic Church. While the Catholic Church had made significant efforts to eliminate child molesters from its organization, the whole extent of the abuse has probably yet to surface. How those wounds will be healed in the victims and in the Catholic Church has also yet to be discovered, and those hurts probably will never be fully closed.

See also *Corporation of Presiding Bishop* v. *Amos; Fike* v. *United Methodist Children's Home of Virginia, Inc.; Little* v. *Wuerl; Maguire* v. *Marquette University*

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Law's treatment of religious charities

The law's treatment of religious charities is little different, especially in the area of tax law, from its treatment of other nonprofit organizations, especially other charities. First, the history of legal treatment of charities is relatively short chronologically, as charities in general did little reporting to the federal government until the middle of the twentieth century. Reporting to the government was initiated in the 1940s and then increased dramatically in the 1950s and 1960s.

The biggest question for all charities and other nonprofit organizations (such as colleges) is their tax-exempt status. This status both exempts them from paying taxes and allows their donors to take a tax deduction. Of course, the first question historically was whether there should be any sort of a tax exemption or deduction for donations. The answer in the United States is yes, but, with the sole exception of England, that is not the European answer. When the United States agreed to give tax exemptions in the federal Internal Revenue Service (IRS) code, such exemptions were challenged eventually in the courts.

In 1971, the Supreme Court decided a case filed the year before, *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), holding that a tax exemption did not create an establishment of religion and did not interfere with the free exercise clause, as allowing the exemption required none of the extensive scrutiny of the organization that would create any government interference with religion, which is forbidden. The Court also stated that the tax exemption presumed that organizations promoting religion

were doing good things, and for the government to grant such groups tax exemptions, whether federal or state, represented a type of "benevolent neutrality" (397 U.S. 664: 14).

A church is generally given more leeway in the area of its activities and beliefs than other religiously affiliated charities. For instance, Bob Jones University, which had clear religious ties, lost its tax-exempt status when the Supreme Court upheld an IRS rule stating that universities that racially discriminate are not tax exempt. However, even for churches, the Court has set limits on tax-exempt activities. Exempted activities must be reasonably related to religion and good religious works. For instance, gifts to support a day care center or a church banquet will probably be exempted. However, tax exempt status was denied to the profits from a ranch owned by one church group, as there was not enough of a connection between the cattle and the religion. Churches, to be tax exempt, also have to serve the public good and avoid lobbying (though some limited political activity is permitted).

The prohibition against lobbying is especially significant as many churches favor public works that have a religious origin but a political outcome. There are, in fact, legitimate religious charities that are politically active and tax exempt. However, when these groups are engaged in political activity, the churches supporting them must be careful. For example, one widespread Christian charity is the Bread for the World Campaign, which fights poverty at a number of levels, including seeking political action. Churches that favor the Bread for the World Campaign can allow the group to set up tables in the church where individuals can, should they choose to do so, write letters to Congress, asking for specific legislative action. But the church must be careful to distance itself from the political lobbying and to notify its members that the *church* is not asking its members to write to Congress. The difference is subtle, but significant, and failure to make the distinction could result in a loss of tax-exempt status for the church.

The government has set rules regulating when a donor can validly claim tax-exempt status for a donation. Gifts to support atheism, or the Masons, however, are not allowed to be exempt as gifts to religious entities. Most general gifts in support of a church will be allowed to be tax exempt. From the government's perspective, as long as the religion is not immoral and does not promote illegal activities, gifts to advance that religion will be allowed. Gifts have also been allowed to support special services, such as endowments for a service on religious holidays. For a gift to be tax deductible, the church to which it is given must be open to all, and a gift given to a friend to support his or her personal church will not be considered tax exempt. In addition, the person giving the gift must not expect to receive any specific items in return unless these are intangible benefits. So a donor can expect to receive the personal peace created by a service in honor of a dead relative and still deduct the gift given to sponsor that service, but cannot deduct the fees paid for training in a certain religion, where fees for a certain amount of training are specified, such as in some Scientology situations, nor can one deduct monies given to family members who are missionaries.

There are also established rules, coming from particular cases of claimed exemptions, dealing with what a religion is, for the purposes of tax exemptions. Among these, the church must investigate fundamental questions, not advance a purely secular doctrine; it must have a form of worship, a history, literature, physical churches, and regular services—or at least most of the conditions listed. A number of cases have come from individuals who claimed to be personal churches, or from individuals who claimed to be promoting specific ideas as religion, which in turn might have given them First Amendment protections. Others have

claimed to have donated all of their possessions to an established church even while retaining them, or to have donated them all to that church and to have set up a very small branch of the church in their houses or areas. Almost all of these have been disallowed, even if the affiliated church was, and continued to be, tax exempt. This does not mean that a state or the federal government cannot tax charities in general, if it chose to take that politically unpopular step. When a tax is imposed in a religiously neutral manner, it is allowed, if the tax serves a "significant public interest."

This is a tricky intersection between religion and the law. Some groups, such as the American Atheists, feel the tax-exempt status granted to churches is a violation of the separation of church and state that unfairly distributes the tax burden onto the general public. However, other groups argue that churches are charities and that taxing them would place an unfair burden upon charitable organizations that greatly benefit the general public. In general, the law has sided with this second group, arguing in favor of benevolent neutrality. Moreover, there are legitimate religious charities outside of churches, and these are generally, though not always, granted tax-exempt status. Thus, taxes that burden religion and exemptions that help religious charities are allowed, but not mandated, if generally neutral with respect to religion. However, there are situations that must be decided on a case-by-case basis because of the nature of the charity involved. Therefore, this issue will continue to appear in the courts, and will likely generate controversy for years to come.

See also *Bob Jones University* v. *United States;* Established churches in colonial America; *Walz* v. *Tax Commission of the City of New York*

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Lawrence and Garner v. *Texas*

539 U.S. 558 (2003)

This case dealt with a Texas law that penalized homosexual sodomy, and only penalized homosexual sodomy. One might wonder how this case came about. A police officer was responding to a disturbance call that indicated someone who was armed might be involved; upon entering the residence, the officer found Lawrence and Garner engaged in consensual sodomy. They were then arrested. The two men were fined $200 and court costs. Justice Kennedy wrote the opinion for the Court, which five justices joined, and Justice O'Connor also concurred in the judgment, writing separately, making it a 6–3 decision striking down the Texas law.

Kennedy first described liberty, remarking "liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions" (539 U.S. 558: 562). Kennedy noted that the lower courts had held that the decision in *Bowers* controlled. *Bowers* v. *Hardwick* was a

John Lawrence (left) and Tyron Garner arrive at the state courthouse in Houston to face charges of homosexual conduct under Texas's sodomy law in November 1998. The case eventually went to the U.S. Supreme Court, which ruled in June 2003 that sodomy laws in Texas and other states were unconstitutional. (AP/Wide World Photos)

1986 Supreme Court decision upholding a Georgia law criminalizing both heterosexual and homosexual sodomy. Kennedy then stated that the decision in *Bowers* needed to be reconsidered. The Court surveyed past decisions upholding a right to privacy, adding that part of the due process clause of the Fourteenth Amendment included the requirement that the government protect the right to privacy. The Court noted that the case of *Bowers* was similar to this one, and that *Bowers* had been a narrow decision.

The Court in 2003, however, viewed the rights at stake as being those of the right to choose one's sexual conduct within the home, which is different from the *Bowers* Court, which viewed the question as whether the "Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time" (539 U.S. 558: 566–567, quoting *Bowers*). The *Lawrence* Court then went back and examined the history behind the anti-homosexual sodomy statutes, holding that the original laws, applied against both men and women, were rarely applied to private acts (such as the ones under consideration in both *Bowers* and *Lawrence*) and may have been more reflective of a general dislike for any "nonprocreative sex as it is with an established tradition of prosecuting acts be-

cause of their homosexual character" (539 U.S. 558: 570). On the whole, the Court concluded that "but far from possessing 'ancient roots,' [as claimed in] *Bowers,* . . . American laws targeting same-sex couples did not develop until the last third of the 20th century" (539 U.S. 558: 570). Thus, history could not properly be used, as was done in *Bowers,* to defend sodomy laws against consenting adults in private.

The Court acknowledged that there were religious components to the arguments of those who had condemned homosexual sodomy over the ages. However, as the concern for the Court was the current law, it chose to ignore the religious elements of the prohibition against sodomy. The Court pointed out that many other countries no longer criminalized homosexual conduct, that only thirteen states now prohibited private consensual sodomy in their statutes, and that of those, only four apply those laws solely against homosexuals. The Court also pointed out that there were equal protection problems with the Texas statute, as it applied only against homosexuals. Rather than choosing to merely overrule the Texas statute, they chose to take on *Bowers* directly, and noted that stare decisis (a legal doctrine stating that past decisions should be upheld unless there is a compelling reason to overturn them) did not prevent the overturning of a wrongly decided case. For all the reasons stated, the Court held "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled" (539 U.S. 558: 578). The Court also noted that the *Lawrence* case did not reach many of the areas that some, including the dissent, suggested it had to, such as the right of homosexuals to marry, conduct in public, or conduct involving minors. Thus both the precedent of *Bowers* and the law under challenge in *Lawrence* were struck down.

Justice O'Connor agreed with the judgment but based her decision in the equal protection clause, not the due process clause. O'Connor held that "the Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction" (539 U.S. 558: 581). O'Connor read *Bowers* as holding that a "state law criminalizing sodomy as applied to homosexual couples did not violate substantive due process. We rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality" (539 U.S. 558: 582). Concerning overall, neutrally applied sodomy laws, O'Connor wrote that this "is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society" (539 U.S. 558: 584–585). She thus voted to overturn the Texas law, but under the equal protection clause, and, as she did not see *Bowers* as directly challenged (as long as the sodomy laws were applied equally), she did not vote to overturn *Bowers.*

Justices Scalia and Thomas, along with Chief Justice Rehnquist, dissented, in an opinion written by Justice Scalia. Justice Scalia first accused the majority of writing an opinion that said little about its decision to overturn the law, holding that the majority had not created a fundamental right to engage in sodomy, even though they needed to in order to overturn *Bowers,* and that they had created a new standard of review to overturn *Bowers.* Scalia pointed out that the same rationale used to overturn *Bowers,* in terms of stare decisis, should overturn *Roe:* "today's approach to *stare decisis* invites us to overrule an erroneously decided precedent . . . *if:* (1) its foundations have been "eroded" by subsequent decisions, . . . (2) it has been subject to "substantial and continuing" criticism, . . . and (3) it has not induced "individual or societal reliance" that counsels against overturning. . . . The problem is that *Roe* itself—which today's majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*" (539 U.S. 558: 588).

Scalia also invoked a whole host of state laws that he claimed could be overturned by the majority, including those "against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" (539 U.S. 558: 590). Scalia concludes his discussion comparing *Roe* and *Bowers* by saying "what a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*" (539 U.S. 558: 591).

Scalia grants that the law here restricts liberty, but he holds that all laws restrict liberty. He states that this law "undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery" (539 U.S. 558: 592). The last reference is to *Lochner* v. *New York,* a 1905 case in which the Court used substantive due process to strike down an hours law, and Scalia is, not overly subtly, accusing the majority of doing the same, an approach that many legal scholars have thought was discredited by the past century of Supreme Court doctrine. He argues that only fundamental rights cannot be removed under current law, and the Court is in an unacknowledged quandary as it has not stated that sodomy is a fundamental right. Finally, he then examines the historical basis in *Bowers,* and the majority's criticism of it, and attempts to refute it on a point-by-point basis.

Scalia turns to O'Connor's argument on the issue of equal protection and holds the Texas law "on its face applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex" (539 U.S. 558: 599), and this is enough for him to hold that it does not violate the equal protection argument. That heterosexuals do not generally, by their very nature, have sex with people of the same sex appears not to have mattered to him. Scalia closes by arguing that "today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct" and that soon the Court will act to approve homosexual marriage (539 U.S. 558: 602).

Justice Thomas wrote a separate dissent, apparently wanting the best of both worlds. He described the law as "uncommonly silly," but he did not find in the Constitution a right to liberty, and so (instead of writing an opinion noting that) he also joined Scalia's dissent.

The Court, therefore, moved to strike down both *Bowers* and the law here, outlawing prohibitions against sodomy between consenting adults in privacy. State laws against nonconsensual sodomy, or sodomy in public, were not reached, nor, according to the majority, were laws against gay marriage. This clear delineation of the latter point suggests that the Supreme Court is not ready to approve of gay marriage, despite what Justice Scalia suggested. Thus, the religious disapproval of homosexual conduct, reflected (among other motives) in the laws challenged in both *Bowers* and this case, was not acceptable justification for a law, the Court here says, even though the Court looks more at nonreligious justifications. The fact that the Court here gives short shrift to any religious justification for the law, and the fact that the attorneys for Texas did not try to defend the law as religiously based, suggests, by this absence, that religious disapproval of homosexuals, in this area, is not nearly enough to prompt constitutionally acceptable legislation. In the area of gay marriage, however, it appears that the verdict is still out, or, as best can be told, that gay marriage is not acceptable, and religion appears to be only one reason for these views (at least according to the Supreme Court).

See also *Baehr* v. *Lewin; Bowers* v. *Hardwick; Employment Division* v. *Smith;* Gay marriage; *Reynolds* v. *United States; Roe* v. *Wade*

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Lee v. *Weisman*

505 U.S. 577 (1992)

Prayer at public school graduations is one of the more controversial parts of the whole school prayer debate. Those who favor it argue that on an important day like a graduation, students should be allowed to pray and those opposed argue that the more important the day, the more important it is to respect those of different religious traditions. Increasing the focus on this issue is, of course, the fact that relatives and official figures attend graduation, making it a day of extreme solemnity and significance in public school life for many. This explains, in part, the focus on the issue, and the hue and cry that resulted when the Supreme Court decided *Lee,* which held that school officials cannot ask religious figures to deliver prayers at graduations.

Justice Kennedy delivered the opinion of the Court, which was a 5–4 decision. This case dealt with a graduation ceremony from a middle school, at which a rabbi was asked to deliver a "nonsectarian prayer." Justice Kennedy noted that the district court had correctly used the *Lemon* test. The majority on the Supreme Court saw the question to be a simple one that did not require a reexamination of *Lemon*. The Court held that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute 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'" (505 U.S. 577: 587).

The Supreme Court held that the school board was directly involved, as it picked the person to deliver the prayer and also gave instructions on what the prayer should contain. The fact that the prayer was supposed to be nonsectarian did not remove the school's obligations under the First Amendment. "The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes are obliged to attend" (505 U.S. 577: 588–589). The school district claimed that previously fighting faiths had come to a common peace, which allowed a "civic religion," but the Court held that "if common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcends human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for

itself" (505 U.S. 577: 589). Some, including the dissenters, argued that freedom required that the majority be allowed to choose whether religion was used, and that tolerance required the minority to allow the majority to speak. The Court disagreed, arguing that government never should have a role in religion. "One timeless lesson is that, if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people" (505 U.S. 577: 592).

While some might say that the only restriction on nonbelievers here was that they were asked to be quiet during the prayer, the Court held that this was still too much. "The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion" (505 U.S. 577: 593). Some might say that this was only a small violation, but the Court believed that any violation was unacceptable. "It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority" (505 U.S. 577: 594). The Court concluded, "While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency, and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands" (505 U.S. 577: 595–596). In the end, the majority opinion concluded that "no holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment" (505 U.S. 577: 599).

Justice Blackmun concurred in the opinion and in the result, writing separately to emphasize the history. Blackmun noted that even if no one had been coerced, it would still have been wrong and was a threat to equality under the law. "When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some" (505 U.S. 577: 606–607). Government should have nothing to do with religion, Blackmun concluded.

Justice Souter also concurred in the judgment. He wrote to emphasize that past cases had held that government endorsement of religion in general, even when no one particular religion was favored, was still banned. Souter examined the history behind the First Amendment. He expressed his belief that Jefferson and Madison disliked any state pronouncements regarding religion or even "days of thanksgiving" and that Jefferson refused to announce such days. He noted that some presidents did provide proclamations, but since all did not, there was no clear framer's intent as to what the First Amendment held on these issues. Religion was not meant to be a nonfactor, says Souter, as the fact "that government must remain neutral in matters of religion does not foreclose it from ever taking religion into account" (505 U.S. 577: 627). Such accommodation did not, however, extend as far as allowing a prayer at graduation.

Justice Scalia, along with Chief Justice Rehnquist, Justice White, and Justice Thomas,

dissented. Justice Scalia claimed that "today's opinion . . . is conspicuously bereft of any reference to history" (505 U.S. 577: 631). Scalia then turned and provided his own recitation of history, expressing his opinion that Jefferson and Madison both favored days of thanksgiving, and prayers. He painted the majority's decision as being based on "psychology practiced by amateurs" (505 U.S. 577: 636). Scalia went on to argue that silence during the prayers did not mean coercion into assent.

He then argued that even if standing was seen as assent, people should be expected to remain silent to show respect for others' religion, which is what he claimed the state was doing here. As there was no real coercion here, Scalia did not believe in expanding the First Amendment to ban such activities. He noted that he saw "no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone, rather than of Freud" (505 U.S. 577: 642). He went on to imply that the majority was denigrating religion and was treating it like pornography. "Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers, it is not that, and has never been" (505 U.S. 577: 645). Scalia even argued that allowing prayer was the best way to create toleration. "I must add one final observation: the Founders of our Republic . . . knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. . . . To deprive our society of that important unifying mechanism in order to spare the nonbeliever what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law" (505 U.S. 577: 646).

Since *Lee,* several cases have also dealt with prayer at graduation, including *Ingebretsen* v. *Jackson Public School District* (1994) decided by the Fifth Circuit Court of Appeals. There a law had been passed by Mississippi to allow prayer at school events as long as the prayer was student initiated and voluntary. A judge had issued an injunction against that law, and Mississippi had appealed. Ingebretsen wanted to protest against graduations being exempted from the injunction. The Fifth Circuit upheld the injunction and the exemption. As far as the graduation prayers went, "to the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound" (88 F.3d 274: 280). Thus, prayer at graduation is allowed as long as it is student initiated.

Lee held that school districts cannot invite religious figures to perform prayers at graduation. However, students can still initiate prayers, and the exact level of official cooperation and support that is allowable would have to be decided on a case-by-case basis. The rationale for allowing student-initiated prayers, but denying prayers if they are at the school administration's behest, is that the state is acting through the school, and such action is prohibited through the First Amendment, as applied through the Fourteenth Amendment, but private action is much less limited by the Fourteenth Amendment. At what point a school policy allowing students to initiate prayers moves beyond merely allowing free exercise and infringes others' right to freedom of religion must, of course, be determined one slow case at a time. This is an area where the United States is still defining the parameters of the freedom of religion.

See also *Engel* v. *Vitale; Good News Club* v. *Milford Central School; Lemon* v. *Kurtzman; Santa Fe Independent School District* v. *Doe; Sherman* v. *Community School District 21; Wallace* v. *Jaffree*

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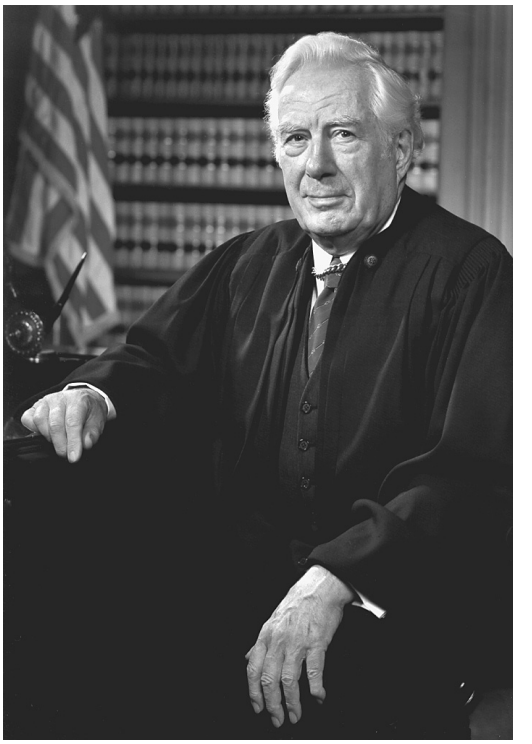

Warren Burger's tenure as chief justice of the U.S. Supreme Court is remembered for its sometimes continuing, but more often countering, of the Warren Court's expansion of individual rights. (Collection of the Supreme Court of the United States)

Lemon v. *Kurtzman*

403 U.S. 602 (1971)

One of the most frequently cited cases regarding the separation of church and state in relationship to private schools is *Lemon* v. *Kurtzman*. Once it was determined that states could not ban private schools, and *Everson* v. *Board of Education* determined that a state could constitutionally give such aid, the main question became the allowable (and required) levels and areas of the aid. *Lemon* v. *Kurtzman* involved the allowable permitted amount of assistance to a private, religious institution, and the Supreme Court devised a test courts should use in analyzing whether that aid was constitutional. *Lemon* in 1971 thus created a test, which is still given substantial lip service and sometimes is still followed today.

In *Lemon* v. *Kurtzman,* the state of Pennsylvania paid the salaries of teachers at private schools who taught secular subjects. In the program addressed in *Lemon,* the state directly reimbursed private schools for teaching in such subjects. In a case grouped with *Lemon, Earley* v. *DiCenso,* Rhode Island provided a salary supplement to certain private school teachers. The Supreme Court struck down the program in *Lemo*n by a 9–0 vote and the program in *Earley* by an 8–1 vote.

Chief Justice Burger delivered the opinion of the Court. He first surveyed what both programs did and the litigation up to the Supreme Court level and then turned to previous cases decided by the Court on the issue of state aid to religious education. Burger first argued that it was difficult to determine what level of aid was allowable. "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordi-

narily sensitive area of constitutional law" (403 U.S. 602: 612). Citing *Walz,* Burger argued that the three main areas to worry about were "sponsorship, financial support, and active involvement of the sovereign in religious activity" (403 U.S. 602: 612). Burger then combined the previous cases to create what has become known as the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion' " (403 U.S. 602: 612–613).

With that test in mind, Burger turned to the statutes in question. He first held that their goal was to advance secular education, and so they passed that part of the test. He then noted the states' attempts to restrict the aid to nonreligious things and left open the question of whether their primary effect was to advance religion, holding that the real issue was that the statutes failed on the third part of the test, that of entanglement. Burger admitted that some entanglement of church and state was necessary and gave several examples of such necessary entanglement, including enforcement of mandatory attendance laws. However, he believed the programs should still be analyzed. In both cases, there was excessive entanglement.

In the Rhode Island case, the Court found that schools were an important part of education and that in the area of teachers, which is what the program paid for, "we cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation" (403 U.S. 602: 617). The school wanted its teachers to be religious, which conflicted with the state's goal of keeping the subjects it funded wholly secular. The Court felt that to keep those subjects wholly secular "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected" (403 U.S. 602: 619). This was considered, by its very nature, "excessive entanglement." The Pennsylvania program fell afoul of the same issue.

The Court then also turned to another issue of entanglement, that of the "divisive political potential of these state programs" (403 U.S. 602: 622). The Court noted that the aid to religious schools would cause political candidates to take a stand on the issue of whether the aid was a good thing, causing division. As to why one should worry about such divisiveness, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect" (403 U.S. 602: 622). The Court added that "the potential divisiveness of such conflict is a threat to the normal political process" (403 U.S. 602: 622). Thus, this was another strike against these programs. The Court also noted the annual need for the funds and the fact that the programs were relatively new—both factors working against them. For all of these reasons, but particularly because there was excessive entanglement, the Court declared the two programs unconstitutional. The larger significance of the case, however, was in the test it created to be applied in other cases relating to state support of private, religious schools.

Justices Douglas and Black wrote a concurrence. They noted the past conflicts over schooling and that many other nations injected religion into their schools. They argued that America had taken a different path, stating that if the state aided religious schools, in order to comply with previous cases, those religious schools must eliminate school prayers, and teachers must not "indoctrinate" in any secular class. They went through a religious school's handbook and pointed out the areas of difficulty and the places where religious shading of secular subjects could occur.

Justice Brennan also concurred. He noted that the states, throughout the nineteenth century, moved to end aid to religious schools. He

concluded that "thus for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions" (403 U.S. 602: 648–649). Brennan basically held that any direct government subsidy, state or federal, would be invalid. He differentiated this from loans of textbooks, as he held that those were "neutral" in the area of religion, versus this promotion of religion.

Justice White dissented in the Rhode Island case but concurred in *Lemon*. He first argued that no establishment of religion was created in either case, as religious schools had two functions: one secular, to educate, and the other religious, to advance the faith. He held, "It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion" (403 U.S. 602: 664). He dissented in the Rhode Island case because he felt that the teachers could separate religion and secular education, and had not, at any proven time, violated this separation while the program had been in effect. He did not believe that religion would invade secular classes in Pennsylvania either but would have allowed a trial in Pennsylvania (in that case the district court had dismissed the complaint for failure to state enough of a claim for the Court to consider it a case), and thus agreed with the Court's holding in that case, although not its rationale. *Lemon,* in the nearly thirty-five years since its decision, has provoked a firestorm of criticism and a tremendous amount of litigation. One area often litigated is the acceptable level of state aid for disabled children who attend religious school. If the state does not provide such aid, it may be attacked as hindering the free exercise of religion on the part of those who wish their children to attend private school, as it would be aiding them less. If the state does provide such aid, it may be criticized for aiding religion, similar to the *Lemon* case. One program, that of providing aid to religious schools in those religious schools' buildings, was struck down by the Court in 1985 in *Aguilar* v. *Felton*. However, twelve years later, the same program was held to be allowable in religious school buildings, in *Agostini* v. *Felton,* and the shift was more in terms of who was on the Court and their beliefs than in any change in the program. The test itself has been criticized as well. Many court cases have given a quick mention of it and then moved on to decide the case at hand without really using the whole test.

Another issue here, of course, is the true meaning of the establishment clause of the First Amendment. Did it mean to ban only a state church, did it mean to ban all direct aid to religious education, or something in between? Some justices have concluded the first, some the second, and most somewhere in between. Was it really intended to apply against the states when the Fourteenth Amendment was passed? Most justices have stated yes, but Justice Thomas since at least 2002 has suggested that it did not. Some have argued for reworking the entire *Lemon* test. They suggest dropping the first prong of the test, as it is impossible to tell what the true purpose of a legislature is, and the job of the Court is not to pry too strongly into the legislature's stated purpose, and criticize the entanglement test as unworkable. In truth, few cases have been struck down as violating the entanglement prong since *Lemon*. Those that take this approach argue for tests of "neutrality," and "choice," when dealing with school aid, in that as long as the government is neutral, and as long as the people involved in the program are making the choice to aid religious education, even a promotion of religious education is acceptable. It was this stance that allowed a voucher program to be approved in 2002, as the state made money available to a variety of schools, and in-

dividual parents chose to send their children to the religious schools. Of course, if school aid is not involved, but merely a regulation, the issue of choice would be moot.

This is not to suggest that the Supreme Court has avoided striking down any public school regulation for violating the First Amendment on religious grounds. In 1987, it struck down a Louisiana law mandating the equal teaching of evolution and "creation science," if either were taught, and the grounds used were the lack of a secular purpose in the law.

A final issue of debate is the amount of stock that the Supreme Court should put into the whole issue of "divisiveness" that a program might create. Those objecting to programs very often give attention to the issue of the amount of political division, conflict, and so on, that the given program might create, but those defending it pay less attention to the potential or actual division, sometimes for obvious reasons. Some have also argued that it is not the place of a court to decide what level of political division a program might create, stating that this is a question better left to the legislature.

Thus, *Lemon* collected the tests of the past and set them out as a three-part standard that has survived until today. It is questionable, though, how much longer the *Lemon* test will last before its life is squeezed out of it.

See also *Agostini* v. *Felton; Board of Regents of the University of Wisconsin System* v. *Southworth et al.; Edwards* v. *Aguillard; Everson* v. *Board of Education;* Paying for tests and other aid for private schools; *Walz* v. *Tax Commission of the City of New York; Zelman* v. *Simmons-Harris*

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Little v. *Wuerl*

929 F.2d 944 (3d Cir. 1991)

This particular case addressed whether a Catholic school could fire a teacher when she divorced and then remarried. The case balanced the rights of an employee against the rights of a religious employer in the area of divorce, and found in favor of the employer. On the one hand, divorce has generally been considered to be a private matter, particularly recently, and the whole idea of putting marital qualifications on employees has been frowned upon. On the other hand, religious institutions have generally been exempted from requirements prohibiting religious discrimination.

The basic question, in the eyes of the Third Circuit Court of Appeals, was whether a Catholic school could fire Susan Little, a Protestant, for conduct that was not appropriate in the Catholic religion. The court concluded that it could. Title VII of the 1964 Civil Rights Act generally prohibits religious discrimination, but it also excludes religious organizations in the area of work-related activities. Schools have generally been allowed to favor the hiring of their own religious followers, and the Third Circuit here lumped firing for non-Catholic behaviors in this same category. Congress could have, in the eyes of the court, forbidden such actions, but as Congress did not specifically do so, the firing was legal.

The court first examined the facts of the case. Little had worked as a teacher at St.

Mary's for some nine years. She had tenure and was a fine teacher, and so had a reasonable expectation that her contract would be renewed. However, Little received a handbook about her employment, and part of the handbook allowed that the teacher "agrees that Employer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church" (929 F.2d 944: 945, quoting the handbook). The handbook defined the reasons for which one might be terminated, stating, "One example of termination for just cause is a violation of what is understood to be the Cardinal's Clause. . . . *Examples of the violation of this clause would be the entry by a teacher into a marriage which is not recognized by the Catholic Church*" (929 F.2d 944: 946, emphasis in original, quoting the handbook).

The court then considered what Little had done. She had been married at the time when she was hired, but then divorced. Little then married someone who had been baptized a Catholic but did not attend church. Her main error, in the school's eyes, was that she did not seek an annulment of her first marriage before remarriage. The court then considered whether the Constitution was at issue here. In constitutional law, one doctrine is that constitutional questions should be considered only when absolutely necessary. The reasons for this are that doing so keeps the Constitution as clear as possible, and that courts since the days of John Marshall in the early 1800s have followed this policy.

The court first found that if Title VII was applied to the actions of the school board it would, not surprisingly, raise issues of religion as the court would have to balance Congress's interest in the matter versus the school's freedom of religion. The court then turned and examined Congress's intent in passing Title VII to see if Congress intended that act to apply. It held that Congress did not, as it had broadened, after original passage of the bill, the exemption for religious organizations to be able to discriminate on religious terms about its employees' acts in all activities, rather than just religious ones. The court also noted that had the school not explicitly warned Little that improper behavior in the eyes of the Catholic Church could be the warrant for firing, then it might have resulted in a different decision. However, the school followed its own guidelines, and Congress had not extended protection against religious-based discrimination to teachers like Little, and so Little was not protected.

Balancing conflicting rights is always a difficult decision, but in this case the court decided not to reach the religious issue. Congress had not acted to extend protection against religious discrimination to Little, and so the court did not have to decide whether the school's rule would be constitutional, or whether revoking it would have violated the school's right to freedom of religion. The Supreme Court had also recognized in the past the validity of Congress's decision—that the right to freedom of religion of religious organizations outweighs the individual's right to freedom of religion. One might think that Little's freedom of religion was violated, but it was not, in the eyes of the court, as, first, religious practices are not necessarily protected by the freedom of religion clause. For instance, states can regulate religious parades the same way they regulate other parades. Second, religious organizations, to promote their own religion, as one could expect they would want to, must be able to control their own practices at least to some extent. For these reasons, and for the reason that Congress did not extend the protection, Little's firing after remarriage without seeking an annulment was held to be allowable.

See also *Bob Jones University* v. *United States; EEOC* v. *Kamehameha Schools/Bishop's Estate; Farrington* v. *Tokushige; Fike* v. *United Methodist Children's Home of Virginia, Inc.; International Society for Krishna Consciousness* v. *Lee; Maguire* v. *Marquette University; United States* v. *Board of Education for the School District of Philadelphia*

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Locke v. *Davey*

540 U.S. 712 (2004)

This case dealt with whether a state could deny scholarships if the recipients pursued certain religiously oriented degrees. In this case, the state of Washington awarded scholarships, but the scholarships were not allowed to be used for theology degrees. The decision of the Court was a 7–2 decision upholding Washington, with Rehnquist writing the opinion. The scholarship was worth around $1,500 for the year 2000–2001, and in order to be eligible the recipient had to be a half-time student and be in the top 15 percent of his or her class or meet SAT or ACT score requirements. There were also income requirements, as one could not make more than 135 percent of the state's median income. (Thus one had to be in the lower class, middle class, or upper-middle class.) The case against the system was brought by Davey, who had pursued a theology degree, been denied his scholarship, and then sued.

Rehnquist, in his opinion, saw this program as being "in the joints" between the establishment clause and the free exercise clause of the First Amendment. This was one of the "state actions permitted by the Establishment Clause but not required by the Free Exercise Clause" (540 U.S. 712: 719). The Court first noted that there was little direct governmental involvement with religion in this program, as the individual recipients were choosing their major, and thus, there was no establishment of religion. It was clear, then, that the government could have chosen to allow the students to choose theology and other religious pursuits. The question was whether governments were obligated to fund religion. The Court answered in the negative and found a distinct difference between religious and secular training, holding that "training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit" (540 U.S. 712: 720). The Court held that the desire of Washington, and the state's constitution, to be neutral in the area of religion, being "in favor of free exercise, but opposed to establishment," was a common view among states (540 U.S. 712: 720). The reason for this is that many in the early years of America opposed state taxes to pay for established churches, and the state constitutions agreed with this. Rehnquist even suggested that the scholarship program was generally beneficial to religion as students can still attend religious colleges, just not major in theology.

Thus, finding no bar in the state constitution to this policy, and finding that the denial of funds to theology majors did not discriminate against religion, the majority upheld the program.

Justice Scalia, however, dissented. He held that "today's decision . . . sustains a public benefits program that facially discriminates against religion" (540 U.S. 712: 726). Scalia did not base his decision on whether the Constitution allowed the government not to be neutral in the area of religion, but whether the effect of the program was to discriminate against religion. He argued that the total amount of funds spent created a "baseline" and that withheld benefits created discrimination. Scalia suggests that "one can concede the Framers' hostility to funding the clergy *specifically,* but that says nothing about whether the clergy had to be excluded from benefits the State made available to all" (540 U.S. 712: 727, emphasis in

original). He contended that while this program is unacceptable, there are many ways in which the state could not promote religion. He listed two of these: the state "could make the scholarships redeemable only at public universities (where it sets the curriculum), or only for select courses of study" (540 U.S. 712: 729, parentheses in original). Why this would be acceptable, while the program here is not, is unstated.

Scalia held that the only state interest is one of "a pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of 'freedom of conscience' has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not" (540 U.S. 712: 730, parentheses in original). Scalia then stated that just because the effect of the discrimination is light does not make it acceptable, that the discrimination is heavy on Davey, and that Washington's purpose in adopting this program was irrelevant, as discrimination should be judged by effect, not purpose. Scalia claimed that the Court is reflecting the antireligion bias in society. "One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, e.g., *Romer* v. *Evans,* . . . its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional" (540 U.S. 712: 733). He was thus accusing the Court of favoring homosexuals while discriminating against people who were religious. Scalia closed by predicting dire consequences from this acceptance of religious discrimination. "When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future" (540 U.S. 712: 734).

Justice Thomas also dissented with a short opinion. He mostly wrote to note that one was banned from studying theology from a secular perspective as well as from a religious one. He noted that "the study of theology does not necessarily implicate religious devotion or faith" (540 U.S. 712: 734). Thus, argued Thomas, the ban went beyond just religious things.

A state, or a nation by extension, was able to offer scholarships based on nonreligious criteria. However, that state could also, the Court found here, deny those scholarships to anyone who majored in theology, and this denial was permissible. It should be noted, however, that states were prohibited in the past from denying generally available educational assistance to people at religious colleges (in the specific case ruled on by the Supreme Court in 1986, it was assistance for a blind person). Thus, while allowing a state some choice in who received its scholarships, states were not given total freedom, nor was a clear guideline created in what could and could not be denied to those in religious majors.

See also Established churches in colonial America; *Hibbs* v. *Winn; Members of Jamestown School Committee* v. *Schmidt; Mitchell* v. *Helms; Mueller* v. *Allen; Rosenberger* v. *Rector and Visitors of the University of Virginia; Witters* v. *Washington Department of Service for Blind; Zobrest* v. *Catalina Foothills School District*

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Loving v. *United States*

388 U.S. 1 (1967)

Marriage has long been an area administered by both the state and the church (or churches). Even today, many marriages are performed in churches. However, states are the ones who issue the marriage licenses and set the requirements to marry. Doctrines requiring marriages to take place in churches were partially carried over to the United States. More importantly, the attitudes suggested by these doctrines were also carried over, and the attitudes have had a lasting impact on marriage laws in this country.

This intertwining of state and church had another complication in the area of race. Many early churches were steeped in the social and cultural understandings of the day, as, for instance, early Puritan churches allowed only men to be ministers and believed that men should hold all the power. Ideas of race were also reflected in church policy, and many churches used to have segregated seating. This idea of racial separation carried over into marriage law, as states and churches both had rules prohibiting interracial marriage. With the end of the Civil War, steps were taken toward racial equality, and some states and churches removed their bans on interracial marriage. This process accelerated in the middle of the twentieth century with the civil rights movement, and some fourteen states removed their bans between 1950 and 1967. However, sixteen states, mostly in the South, kept their bans, and, as each state had its own requirements for marriage, simply going to another state to be wed did not help, as the couple's marriage would be invalid when they returned to their home state. In 1967, the Supreme Court heard the case of *Loving* v.

Mildred and Richard Loving, an interracial couple, fought Virginia's law against interracial marriages in 1967. This landmark U.S. Supreme Court case established that state bans on interracial marriages are unconstitutional. (Bettmann/Corbis)

United States, which concerned the case of Mildred and Richard Loving, who were of different races. The Lovings had gone to Washington, D.C., to be married and had then come back to Virginia, where they were arrested. Their marriage was ultimately held to be legal by the Supreme Court, and the state of Virginia was required to recognize it.

Unlike some Warren Court decisions (most famously *Brown*), Earl Warren did not leave the listener guessing as to what the Court's holding was, but announced it straight off. After the holding, Warren reviewed the facts of the case, noting that the district court decision, which went against the Lovings, clearly reflected a belief in white supremacy and a religious basis for a separation of the races. Warren quoted the trial court judge as saying that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix" (388 U.S. 1: 3).

Warren next noted the state laws governing this, which set a penalty of up to five years for intermarriage, and which held all interracial marriages, whether consummated inside the state or outside, were illegal. The chief justice reviewed the history of such laws, noting that some sixteen states still had applicable laws on the books (even though only North Carolina and Virginia appeared to defend the law). He discussed how the *Loving* law was administered, including the fact that local registrars were required to file "certificates of 'racial composition'" (388 U.S. 1: 7).

Warren then examined the justifications cited by the supreme court of Virginia in upholding the law. The U.S. Supreme Court granted that the area of marriage was one generally controlled by the states, but that the states did not have absolute authority here. Virginia defended its law on equal protection grounds stating that the law was equal as it "punish[ed] equally both the white and the Negro participants in an interracial marriage" (388 U.S. 1: 8). The state argued that since the law, did not violate the equal protection clause, it only needed a rational basis for the law, and the U.S. Supreme Court should defer to the judgment of the state of Virginia in this manner, and allow the law. The U.S. Supreme Court, however, did not accept this logic, holding that when race was concerned, "equal application" was not enough. The Court also disagreed with Virginia's argument that the Fourteenth Amendment was not intended to reach the issue of interracial marriage. On the whole, the Court held that "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States" (388 U.S. 1: 10). As the Court held that race was the sole reason for this law and that the Fourteenth Amendment prohibited racial classifications, Warren then ruled that "there can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" (388 U.S. 1: 12). The Court also quickly looked at the issue of due process and held that the Lovings' due process rights had been violated. For all these reasons, the law was struck down.

While this decision today would seem to have few opponents (and only North Carolina appeared with Virginia to defend the law), it did stir considerable controversy at the time. Many white people in the South viewed it as another decision by the "Un-American" Warren Court. Not surprisingly, it was praised by the civil rights movement. As America moved away from any level of support for discrimination based in law (at least publicly by most people and nearly all elected state officials), this decision moved into the background. It has worked in with the comity doctrine, which holds that one state generally has to respect an-

other state's rulings in the areas of marriage and divorce, meaning a man and woman married in one state are considered married in all of them. As states began to reduce official involvement in decisions of who should and should not be married, it provoked little controversy, except in the area of race, which had to be resolved legally, by *Loving.*

This decision, however, did come back into public view in the mid-1990s with the controversy over gay marriage. Those favoring the rights of individuals to pick their marriage partners without interference by the state pointed to this decision as stating that the federal courts had a right to rule on such cases and that people's liberty should include the area of marriage. Those opposed to gay marriage argued that race is not the same as sexual orientation, and that opposition to same-sex marriage is much more universal (in all fifty states as recently as the early 1990s) than opposition to different race marriage was fifty years before *Loving.* Those opposed to gay marriage also often just ignore *Loving,* not seeing a parallel between one's race, which is not chosen, and one's sexuality, which those opposed to gay marriage often see as chosen. The latter view received a boost in 1996 when Congress passed the Defense of Marriage Act (DOMA), which held that no state had to recognize a marriage from another state if it was not between one man and one woman. The controversy increased in intensity when Canada legalized gay marriage in 2003, the Massachusetts Supreme Court ruled that gay marriage could not be outlawed in 2004, and, then, after much debate, Massachusetts legalized gay marriages. President George W. Bush, as a result, pushed for a constitutional amendment banning gay marriages nationwide, and many states had referendums concerning or passed state constitutional amendments banning same-sex marriages. Bush also used gay marriages as a straw man in the 2004 election. Canada, on the other hand, ruled that same-sex marriages were constitutional, and some five provinces so far have ratified such marriages. Canadian churches were not required to perform these marriages unless they desired to. While the issue has moved off the front pages, the issue of possible recognition of a Canadian same-sex marriage or a federal constitutional amendment still lingers, and so the issue will surely linger also, demonstrating that the issues debated in *Loving* are still of interest today.

See also *Baehr* v. *Lewin;* Comity doctrine between states in the area of marriage and divorce; Divorce, marriage and religion; Gay Marriage; *Pace* v. *Alabama;* Religion and attitudes toward marriage historically in the United States; Slaves, rights, and religion

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Lyng v. *Northwest Indian CPA*

485 U.S. 439 (1988)

The U.S. record of treatment of Native Americans has been poor, to put it mildly. After capturing the Native American land between the landing of the first Europeans and the end of the nineteenth century, U.S. government policy

for years was to attempt to eliminate Native American culture and force the Native Americans to assimilate. Such practices are now viewed as ethnocentric, but they had the whole force of the U.S. government behind them for much of two centuries. Thus, it is not surprising that when a case dealing with Native Americans comes before the Supreme Court, ethnocentrism is frequently charged when the Native Americans do not win their case. The situation was no different in the case of *Lyng* v. *Northwest Indian CPA*.

This case dealt with whether the federal government was able to build a road through an area that contained an ancient Native American burial ground still used for ceremonies. The Supreme Court held that it could, on a 5–3 decision. Justice O'Connor wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Scalia, and Stevens. Dissenting were Justices Brennan, Marshall, and Blackmun.

O'Connor first considered the history of the case, noting that Native Americans had celebrated their dead in the area that was to be traversed, and they claimed, with unquestioned validity, that they needed the whole area to be preserved, in order to carry out their religion. At the same time the road building was approved (on a route that stayed farthest away from the Native American sites where there were burials), a plan to harvest timber from the areas somewhat away from the burial sites was also approved. O'Connor critiqued the courts below in arguing that they probably reached constitutional issues unnecessarily.

She then turned to the First Amendment. First the decision held that "it is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion" (485 U.S. 439: 447). However, the government's effect upon the religion was not held to be the key issue. O'Connor held that "even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the . . . Indians' ability to practice their religion,' . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires" (485 U.S. 439: 452–453). The key test, O'Connor held, was whether the government action prohibited one's religion, not whether one felt or could prove that a government's action harmed one's religion. O'Connor held that the government should still try to accommodate the religion of the affected people and noted the attempts of the government to do so.

In one important way, O'Connor implied, the Native Americans lost the case when they were conquered in the nineteenth century, writing "whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land" (485 U.S. 439: 453). Since the U.S. government owned the land, they had first priority in using it, and possession was, O'Connor suggested, nine-tenths of the law, to cite an old maxim. The majority opinion closed by noting that the test proposed by the dissent, which would have the courts testing the laws by seeing how severe their effects were, would have the Court deciding on the truth or falsity of religious beliefs, as part of determining the effects would be judging those beliefs.

The dissent, written by Brennan, argued that since the Native Americans would be unable to practice their religion after this decision, the First Amendment did come into play here. "The land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive" (485 U.S. 439: 465–466).

The majority had claimed that coercion caused by a government action was necessary to violate the First Amendment, but the dissent argued that, based on past decisions, "in sustaining the challenges to these laws, however, we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause" (485 U.S. 439: 466). The dissent also found the coercion test, as the majority framed it, to be unworkable. "Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance" (485 U.S. 439: 468).

The majority had claimed that all practices affect some religion, and this would create too much litigation, but the dissent argued that "the Court's fear that an 'effects' test will permit religious adherents to challenge governmental actions they merely find 'offensive' in no way justifies its refusal to recognize the constitutional injury citizens suffer when governmental action not only offends but actually restrains their religious practices" (485 U.S. 439: 469). The dissent also found as insufficient the answer that this was the federal government's land and so the government could do what it would like to, but should be sensitive. "These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures—the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as 'nonconstitutional,' the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions. In my view, however, Native Americans deserve—and the Constitution demands—more than this" (485 U.S. 439: 473).

The dissent suggested that the party suing needed to show that a central belief was challenged before being allowed to exercise a First Amendment claim, and that the truth of a religious belief would not be at issue, but just whether that centrality had been proven. The dissent concluded by noting that "I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible" (485 U.S. 439: 477).

Two very different opinions existed in this case, the majority's holding that the government could do what it wished with its land as long as it was "sensitive" and did not coerce the Native Americans to cease their religion, and the dissent noting that coercion was not needed when the practice was made impossible, and that past history should be taken into account. The road was built and the timber was logged, but the relationship is still very contentious between Western ideas of land, Western ideas of religion as being mobile, a general disregard for practices not the ones of the dominant culture, the battle between economy and religion, Native American religious beliefs, and the whole tension between Native American culture and the larger white one.

See also *Church of the Lukumi Babalu Aye* v. *City of Hialeah;* Dawes Severalty Act and the banning of Native American religions; *Duro* v. *District Attorney, Second Judicial District of North Carolina; Employment Division* v. *Smith;* Ghost Dance Massacre

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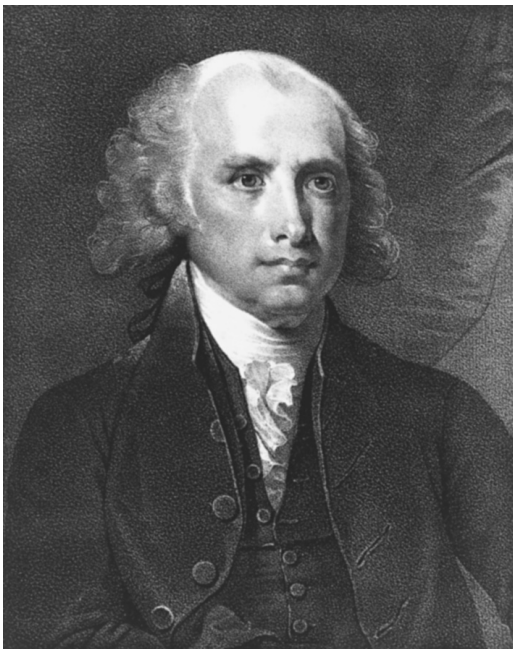
M

James Madison

Born: 1751
Died: 1836

Born in 1751 in Virginia, Madison graduated from Princeton, where he had some training in religious matters. From an early age, he believed in religious toleration, and he was elected to the Virginia convention to draft a new constitution during the American Revolution. There, he was involved in passing the resolution creating a right to the free exercise of religion. After the American Revolution, he served in the Virginia House of Delegates and was involved in the question of religion again, helping to defeat Patrick Henry's proposal that would have created a tax to support the Anglican Church. He was involved in the Constitutional Convention, which drafted the Constitution. There he advanced the Virginia Plan, which gave large amounts of power to the federal government and gave representation to each state on the basis of population only. Madison was highly influential in the Constitutional Convention, and his notes serve as the best basis we have today for understanding that document. After the Constitution was written, he joined with John Jay and Alexander Hamilton to write *The Federalist Papers,* aimed at convincing states to ratify the Constitution, and these papers, along with Madison's work in Virginia, were influential in convincing Virginia and New York toward ratification. Madison was then elected to the House of Representatives and helped to write the Bill of Rights.



James Madison, fourth president of the United States, dedicated his life to public service. Often called the "Father of the Constitution" for his critical role in drafting the document, he also served as secretary of state for eight years and was elected to four terms in the House of Representatives. (Library of Congress)

Several states had criticized the U.S. Constitution for the absence of a Bill of Rights. Many had previously opposed a strong central government, and this sentiment was a strong factor in why the Articles of Confederation, which preceded the Constitution, were so weak. These concerns prompted several states to call for a Bill of Rights to be added to the Constitution. Madison had originally opposed a Bill of Rights, fearing that listing the rights that the people had would be construed as meaning that the people had only those rights, giving a Bill of Rights the actual effect of limiting, rather than enhancing, the rights of the people. However, in time Madison changed his opinion and helped to draft the Bill of Rights in the first Congress.

Indeed, Madison ultimately took the lead in suggesting a Bill of Rights. On June 8,

1789, he proposed a list for such a bill. They vary quite a bit from what was finally adopted, but most of the best-known freedoms today are in that list, including the rights to freedom of speech, freedom of religion, freedom of the press, and freedom to retain counsel. One of the most notable differences is that Madison wished to actually amend the Constitution, editing it bit by bit, producing a whole new document. The final list, however, was simply a list of amendments, appended to the end of the Constitution today. It is interesting that his statement of the freedom of religion was a bit different from the one finally adopted. Madison suggested, "the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" (U.S. Constitution Online).

After his suggestions, the list was referred to a committee, and it was combined with lists suggested from the states. Twelve amendments were suggested and ten gained passage. These rights in the first ten amendments have now become known as the Bill of Rights.

Madison was highly involved in American history after his writing of the Bill of Rights. He served first in the U.S. House of Representatives until 1797, and then was elected to the Virginia House of Delegates. Upon Jefferson's election in 1800, he became secretary of state, accomplishing little, while trying to keep the United States out of war with Great Britain. Madison became president in 1809 and the country moved toward the War of 1812. The war accomplished little, other than proving that the United States could survive a conflict against a distracted Great Britain.

After leaving the presidency, Madison lived another twenty years and died at the age of eighty-five. In retirement, he entertained, wrote, and was occasionally consulted by James Monroe, his successor. Madison had a great influence on the U.S. Constitution and the Bill of Rights, and deserves to be remembered for such, as his influence helped to establish the country and enshrine its rights.

See also American Revolution's effect on religion; Established churches in colonial America; First Amendment; Thomas Jefferson

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Magna Carta

The Magna Carta is the first written document aimed, at least in part, at guaranteeing the rights of the people. It was issued in 1215 by King John of England to satisfy his lords. The lords rebelled against high taxes coming out of the battlefield losses in a continuing war with France because of John's battles with Pope Innocent. King John had been stringently exercising his feudal rights, greatly angering the clergy. Of course, because it was written mostly to give rights to the lords, the document was not that interested in the rights of the peasants. It also said little on the whole question of freedom of religion for the people, even though it did, somewhat, give the English church more free rein, and increased what we might today call the separation of church and state in the area of state interference in the church.

A few notes should be made about the Magna Carta, or translated from the Latin, the great charter. First, the name "great charter" refers not to any authorial belief that this would be a great document for years to come but to the size of the document, as it had sixty-three sections. Second, it was not created for freedom but was the result of negotiations between King John and his lords, designed to rein in the king and prevent him from wholly abusing his power. Before 1215, King John had used all of the money in the royal treasury to pay for several wars and to ransom his brother King Richard the Lion Hearted who had been kidnapped while returning from the Crusades. Of course, that money left the royal treasury empty, and extra taxes were exacted from the church and people, which added to their anger when John repeated this effort during his reign. John also had battles with the clergy, whom he wished to control, and with the people, who desired to remain free of royal control. All these groups had forced the Magna Carta, but it gave most rights to the nobility and the clergy.

A few of the provisions of the Magna Carta bear closer examination. The first provision declared "in the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate." This clause just gave the English church the right to rule its own affairs and did not prevent the state from prohibiting religions other than the English church, which in this era, still meant what is today the Catholic Church. The king also still had substantial power in terms of what type of church existed, as was shown in 1534, when King Henry VIII banned the Roman Catholic Church and set up the Anglican Church. Thus, though the Magna Carta was the first explicit statement that the government should be separated from the church, it was not a full and effective ban. It also did not establish the freedom of religion that we know today, as we expect to be able to choose our own religion, and only somewhat established the freedom from religion, as the government was restricted to a degree in how it could promote religion.

The Magna Carta also stated in writing several important ideas that have come down to us today. Article 39 noted, "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." That idea has come down to our present Constitution in that no person can be imprisoned without a warrant and the companion idea of habeas corpus—that no person can be held indefinitely without a trial, generally. The original Magna Carta stated specifically that the king ruled at the pleasure of his barons, but a version of the Magna Carta issued by the king soon afterward omitted this section, even though the idea stayed in place.

The Magna Carta is the foundation of many of the rights we expect today outside of religion, as it establishes the need for a grand jury to bring charges, as the sheriff could not bring them by himself, and establishes the right to trial by jury. The idea of a legislature having input—or in the case of England, Parliament—also was created by the Magna Carta. Parliament itself did not grow up until 1295, but the term was used as early as 1236, twenty years after the Magna Carta, and the idea behind Parliament is clearly in the Magna Carta, that the king must listen to his barons. Parliament gained in power slowly until the 1600s, when King Charles I dissolved Parliament and the English civil war broke out, leading to the execution of Charles I at the hands of Parliament in 1649. The monarchy was restored in 1660, but relations were still strained; the English Parliament ousted James II in 1689 and issued the English Bill of Rights, which created a right to freedom of speech, established Parliament's supremacy, and required the monarch to be Protestant. Of course, in America, the Magna Carta is one of the documents that led to our Constitution and Bill of Rights.

See also Established churches in colonial America; First Amendment; Anne Hutchinson; Roger Williams

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Maguire v. *Marquette University*

814 F.2d 1213 (7th Cir. 1987)

Title VII of the 1964 Civil Rights Act generally prohibits discrimination based on sex, even while allowing it, in some selected circumstances, based on religious viewpoints. One question that arises in Title VII lawsuits is: when such discrimination, based on either sex or religion, is allowable, what entities are allowed to discriminate and how they are allowed to discriminate? Several cases have set significant precedents for litigants in future discussions of the question.

The *Maguire* case addressed the question of when a university would be allowed to discriminate. A woman who had applied for an associate professor position at Marquette University several times without being hired, sued, stating she was being discriminated against because she was a woman. The court noted Marquette's Jesuit tradition and that the Jesuits still had a strong hand in its running. It also noted that Marquette had a stated policy of preferring Jesuits for its faculty, which Marquette argued was an allowable "bona fide occupational qualification" under Title VII. The court found that the main reason the woman was not hired was her views on abortion, which went against the beliefs of the Catholic Church. This meant her religious viewpoints, not gender, were the reason she was not hired, and it was allowable for Marquette not to hire on this basis.

Besides universities, there also is the question of whether private groups are allowed to discriminate on the basis of sex. The case of *McClure* v. *Salvation Army* in 1972 in the Fifth Circuit Court of Appeals addressed this issue. A woman sued the Salvation Army, her employer, stating she received unequal pay because of her gender. The Salvation Army was held to be a church, the person suing was held to be a minister, and the treatment of a minister by a church was given more leeway than the treatment of other employees. The court did hold that churches were employers and so were still covered by the general provisions of Title VII, except in the area of ministers. The court found, in terms of churches and ministers, "the relationship between an organized church and its ministers is its lifeblood" (460 F.2d 553: 558). After reviewing court decisions, the appeals court held that "an application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government" (460 F.2d 553: 560). Thus, churches are exempt from Title VII concerns with regard to their ministers.

This case left open the question of how sizable the exemption was in allowing a religious group to discriminate on the basis of gender. This question was addressed in *EEOC* v. *Mississippi College,* also decided by the Fifth Circuit, but this time in 1980. The court first held that Mississippi College was a religious college, as evidenced by its required Bible courses and ownership by the Mississippi Baptist Convention. The school refused to hire women, as all preachers in the Southern Baptist faith were men. The court differentiated this case from *McClure,* as the college was not itself a church and the employees were not ministers. The court concluded that if religion had been the basis for discrimination (this issue had not

been decided by the lower court, which had simply dismissed the suit), it would have been allowable, but sex-based discrimination was not. The court also determined that the First Amendment rights of the college were not restricted by the investigation, nor would they be if the issue was sex discrimination, not religious discrimination.

Thus, only churches were allowed to discriminate on the basis of gender, and only in terms of their ministers. Religious corporations, as a whole, were allowed to discriminate on the basis of religion when that was a "bona fide occupational qualification," or, to put it more straightforwardly, an actual and related job qualification. The fact that churches were allowed to discriminate on the basis of sex in terms of their ministers was reaffirmed by the Fourth Circuit in 1985 in *Rayburn* v. *General Conference of Seventh-Day Adventists.* There, a woman was denied a position as "associate in pastoral care," even though women could be given that position in the Seventh-Day Adventist Church. She sued. Women could not be ordained, so even though a minister could have done the same work, a woman would never have been hired as a minister to do that work. However, the court held that even though she was not applying for a position as a minister (because the church banned appointing women as such), "the role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty" (772 F.2d 1164: 1168). Thus, churches were exempted from government scrutiny in their hiring practices over this type of staff as well.

For ministers and those whose actions in a church are similar to the duties of ministers, government hiring laws do not apply. However, colleges and other religious institutions are not allowed to discriminate on the basis of sex or race, as they are not churches, and this is especially true when the people they are hiring are not ministers. However, they are allowed to discriminate on the basis of religion when that is a "bona fide occupational qualification."

See also *Corporation of Presiding Bishop* v. *Amos; EEOC* v. *Kamehameha Schools/Bishop's Estate; Fike* v. *United Methodist Children's Home of Virginia, Inc.; Ohio Civil Rights Commission* v. *Dayton Schools*

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Mandatory education in the American colonies and its relationship to religion

Formal education in America had many origins, one of the strongest of which was the belief that everyone needed to know how to read the Bible and needed to be able to find God. This can clearly be seen in the first colleges and schools that were founded.

The first colleges were generally in the Northeast. Harvard was established in 1636, or only six years after the landing of the Puritans, and its initial goal was to train ministers. Religious revivals also sponsored new colleges, as seen in the First Great Awakening. The Presbyterians founded what is now Princeton in 1746, while the Baptists started what is now Brown in 1764, and the Congregationalists established Dartmouth in 1769, just to give a few examples. New England, especially, relied on trained ministers, and as its settlements were in close geographic proximity to one another, this region could support more churches. The need

for trained ministers in turn led to the creation of colleges to produce them. Not everyone who went to college became a minister, but many did, and it is estimated that over one-half of Harvard's graduates over the first thirty years became ministers.

Religion also affected education at the lower levels. In 1647, Massachusetts passed a law requiring most towns to establish schools and pay schoolteachers, with the reasoning that students needed to be able to read their Bibles, which they could not do without education. Even though schools had to be established, attendance was not mandatory. Families were patriarchal, and fathers were supposed to be literate. Thus, more boys were educated than girls. In the South, most people who learned to read were wealthy and were taught by tutors, and the burden fell more on the parent than on the collective. Slaves were prohibited from learning to read, in the belief that this ability would give them the power to escape or would encourage them to rebel. Even with this emphasis on education, more so than in other parts of the world, the school curriculum was very unlike what our ancestors saw even in the late nineteenth century. School terms in the colonies were very often only a few months long, and all children were grouped together rather than separated by grades. Once a child knew how to read, education very often went no further. Reading and writing were enough to fight the devil and maintain connections, unless a boy was planning to go on to college.

See also *Aguilar* v. *Felton; Engel* v. *Vitale; Mitchell* v. *Helms;* 1995 statement on "Religious Expression in Public Schools"

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Marriage—right to conduct

Religion and marriage are often considered to be interconnected, but in America they are not as legally intertwined as most people think. As soon as the earliest colonies were established, there began to be a move away from connecting religion and marriage. For instance, in New England, marriages were performed early not by ministers, the church officials, but by justices of the peace, the state officials. Churches still played a large role policing marriages and family conduct, as New England histories clearly show, but marriage was in the state system from the outset. Also, marriage was viewed as a contract between man and woman, not a commitment that included God, and so the state courts regulated divorce.

These facts are still of interest to us today because if the church had had total control over marriage early in the country's history, there would be greater relevance to arguments that people should pay more attention to what religions approve of and disapprove of in the area of marriage. However, as the state has played a significant role almost from the beginning, the perspective a religion has on marriage is generally limited to the followers of that particular faith. Indeed, different branches within the same religion often hold opposing viewpoints on some of the most controversial issues, such as divorce and same-gender marriage.

By the twentieth century, most states allowed people other than ministers to perform wedding ceremonies. In the 1940s, only three states required clergy to perform marriages, and one of those had an exception allowing the largest city's mayor to marry couples. This had not changed by the 1970s. Some states do require ministers who perform marriages to be licensed; others are more liberal. Still other states do not require a registered member of the clergy of any kind to perform the ceremony. For instance, Maryland allows any adult to perform a marriage, as long as both spouses consider the individual a clergy person. Generally, in the area of non-clergy, clerks or jus-

tices of the peace are allowed to perform marriages, but some states even allow this duty to be performed by lawyers and notary publics. Thus, even though marriages are often conducted by clergy of the couple's religion in their place of worship, this does not have to be the case, and marriages need not be solemnized by a religious official.

See also Divorce, marriage, and religion; Gay marriage; *Loving* v. *United States*

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Marsh v. *Chambers*

463 U.S. 783 (1983)

In the debate over church and state, those who favor allowing some interaction between the two often cite a number of things. One is the slogan "In God We Trust" on our money and a second is the use of chaplains by the military and by state (and national) legislatures. *Marsh* v. *Chambers* dealt with this second element, addressing the question of whether a state was allowed to have a chaplain.

The result was a 6–3 decision of the Court. The majority opinion was written by Chief Justice Burger and joined by White, Blackmun, Powell, Rehnquist, and O'Connor. Burger first surveyed the practice and noted that the First Congress, which had passed the Bill of Rights, also appointed a paid chaplain, and that Nebraska (the state at question here) had a long history of appointing chaplains without opposition. The opinion also noted that the purpose of the prayer was not to proselytize, that the person affected was an adult, and that "the practice of opening legislative sessions with prayer has become part of the fabric of our society" (463 U.S. 783: 792). For all these reasons, they deemed having a chaplain acceptable. Burger then turned to the various objections, holding that the continual choice of one chaplain did not indicate preference for that religion, but just for that clergyman; that the chaplain was paid was acceptable, as the chaplains for Congress and most legislatures were paid; and that the content of the prayer was held to be irrelevant as the prayer was not for proselytizing. For all of these reasons, the practice was upheld.

The first dissent, written by Brennan for himself and Justice Marshall, disagreed. Brennan noted that he had, in a past decision, appeared to approve this very practice. However, "I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional" (463 U.S. 783: 796). Brennan then turned to the *Lemon* test, which the majority had avoided. He pointed out that the "primary effect" of the practice was religious, that the purpose was religious, and that there was a fair amount of entanglement, as the legislature had to choose the chaplain. Thus, the practice violated all three prongs of the test and violating one was enough to cause a practice to be stricken.

The dissent then turned to the "underlying function of the Establishment Clause" (463 U.S. 783: 802). The dissenters pointed out four functions of the establishment clause: "guarantee the individual right to conscience," "keep the state from interfering in the essential autonomy of religious life," "prevent the trivialization and degradation of religion by too close an attachment to the organs of government," and "help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena" (463 U.S. 783: 803–805). The dissent also noted that the whole idea of neutrality and separation in the area of religion has been around since the first Congress, and that the practice of appointing chaplains violates this. The dissent argued that

the actions of the first Congress do not control, as the Framer's Intent did not always define the meaning and that the views of all those individuals at the state level voting in favor of the amendments should be considered, not just the Congress. Thus, unless one could determine what the average person in 1789 thought freedom of religion meant, the Framer's Intent could not be determined.

Justice Stevens also dissented, noting that "in a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents" (463 U.S. 783: 822–823), and this fact tended to favor the majority faith of an area over the minority, hence promoting one religion and violating the First Amendment.

Some might argue that the continued practice of having a chaplain increased its chances for being constitutional, and this was indeed one of the reasons used by the majority. The dissent, however, was not convinced. Beyond those who are offended by attending official functions and hearing a prayer, much more is at stake. An old religious song said, "if it's good enough for Jesus, it's good enough for me," and many today who argue in favor of allowing religion in the public sphere point to the legislature and argue that if it is good enough for the legislature, then it should be good enough for any other public group. For this reason, in addition to the general opposition of many to prayers in the legislature, many opposed to an increased role of religion in the public sphere especially oppose prayer (or a chaplain) in the legislature. The practice, though, has been generally allowed, even though legal arguments using this as precedent for more religion have not been very successful.

See also *Engel* v. *Vitale;* "In God We Trust" on U.S. currency; Madalyn Murray O'Hair; Prayer before school board meetings and other meetings

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Maryland Charter and 1654 law disestablishing religious freedom

Maryland is frequently cited as an example of an early failed attempt at religious freedom for Catholics in America, and it was the only colony specifically set up as a Catholic haven. For these reasons, it is important to analyze Maryland and to see why it did not succeed as that haven in the seventeenth century. In the end, Maryland was neither a sanctuary for Catholics nor the most repressive of the colonies, and it was greatly affected by events occurring in England during the colonial period.

Maryland was initially given to Lord Baltimore as a sanctuary for Catholics. Even though England was set up as an Anglican nation, all of the rich did not convert and some significant wealthy lords remained Catholic. Some Catholics favored a direct confrontation with the monarchy while others wished to remain Catholic and provide opportunities for Catholics without controlling the national faith. Lord Baltimore was of the latter group, and he wanted a place in the New World for wealthy Catholics. Baltimore's system for the state placed Catholics on the top as large landowners and assumed Protestants would become tenant farmers. Lord Baltimore in many ways wanted to reproduce the medieval feudal manor in the United States, with the Catholics owning large land grants where they could set up their own churches and manors and with the Protestants working the land. Under British law of the period, even if Catholics were disfavored, a manor owner could legally set up his own church, hire his

own priest, and even establish his own legal system. Anyone who was Catholic and did not own a manor could visit his neighbor and legally worship at the church on the manor.

Lord Baltimore did not experience heavy persecution himself in England. His wealth insulated him from harassment, but he wished to help other Catholics who received worse treatment. His goal in Maryland was never to create either a Protestant-free zone or a zone where Catholics ruled. Protestants were allowed equal rights, and the Anglican Church was still in power, but the system Baltimore envisioned was a place where Catholics could worship on their manors while Protestants had large-scale formal control. Catholics, he hoped, would gain wealth from their land and from collecting rents from their Protestant tenants.

Baltimore also worked to help rich Catholics in England acquire large land grants in Maryland. He used the head right system, similar to what was used in Virginia. Under this system, if a person sponsored another individual coming to the American colonies, the sponsoring party received a certain amount of land. In Virginia, it was 50 acres a person, while in Maryland, sponsors had to bring over five and later twenty people before receiving 2,000 acres as a reward.

Baltimore's desire to have Protestants in the area in addition to Catholics was driven by a combination of factors. First, he wanted to please the king of England and so could not exclude Protestants. Second, however, he also wanted to bring in non-Catholics as he thought that there would not be enough Catholics to support the colony. Third, and finally, he wanted to try to avoid the divisive issue of religion as much as possible in setting up the colony.

Early progress in Maryland's colonial history was good for both its Catholic and its Protestant citizens. Maryland was actually the first colony to avoid massive amounts of starvation, as the colonial founders had studied Virginia and other colonies and decided to learn from their mistakes. In 1638, the colony passed a law giving rights to people of all religions and actually prosecuted some Catholics for trying to cancel Protestant rights. As the masses, in Baltimore's model, occurred on local manors, there is limited mention of Catholic services in the official record. The Jesuits, a Catholic order, did cause some controversy after obtaining land from Native Americans without first receiving official governmental approval.

In 1649, the Maryland legislature passed the Act for Religious Toleration. Part of the impetus for this act, which granted tolerance for Protestants and Catholics (but only those two groups) was a battle between Protestants and Catholics over use of the state capital's chapel, which was shared. The act also allowed the government to both protect and interfere with religion. Religious speech was controlled, using religion in a derogatory manner was forbidden, and blasphemy was still a crime. Maryland was the second state (after Roger Williams's Rhode Island) to grant religious tolerance, in even a limited form.

However, the act did nothing to resolve tensions in England over the power of the monarchy nor did it do anything to resolve broader issues of religion there or in the colony. In 1654, the largely Protestant legislature first revoked the Act for Religious Toleration, then denied Catholics the right to vote, and finally ousted the governor, a Protestant they considered too tolerant. Governor Stone raised his own army against that of the legislature but was defeated and imprisoned. The anti-Catholicism throughout most of the colonial period was tied to other fears. There were rumors that the English Catholics in the area would combine with the French Catholics and the Native Americans to cause a general anti-Protestant insurrection.

With the decreased toleration for Catholics, other religious groups began to move into the area, including Quakers and Presbyterians, and the reaction to these groups varied over time. In the late seventeenth century, in direct opposition to Lord Baltimore's original elitist vision,

Catholics were given increasing penalties and priests were no longer able to say mass. In 1740, Catholics were required to pay higher taxes than their Protestant neighbors.

Maryland also moved away from toleration and toward an established church. Marriages by anyone who was not a minister of an approved church were prohibited, a state of affairs that remained true into the twentieth century. There were some Jews in Maryland, but they were not given religious tolerance by the law. It was well after the American Revolution, in 1825, that Jews were given the right to vote in Maryland. Voting in that state generally was limited by economic considerations, as one had to have forty pounds' worth of property or fifty acres of land to be a voter.

With the Glorious Revolution in England, Maryland also hoped for even more change. James II in England had been a Catholic, but his two daughters were both Anglican, and he had only daughters. Thus, when he died his heir was going to be an Anglican. However, in early 1688, James II had a son, who he was planning to raise Catholic, which would have placed a Catholic on England's throne after James's death. Many of England's political leaders did not want this and so asked Princess Mary and her husband William, who was the ruler of Orange in the Netherlands, to invade. After the royal army favored William and Mary, James II fled. This set the scene for the Glorious Revolution in England, when Parliament forced William and Mary to accept the English Bill of Rights and established parliamentary rule in England for once and for all. Many in Maryland at the time, hearing about all the turmoil, feared that Lord Baltimore (a descendant of the colony's founder) favored James II in the dispute. He did not, but miscommunication and distance furthered that distrust. Some of the leading citizens in Maryland organized a revolt and removed those in power, handing the colony back to the government of William and Mary in England. Most of the ousted politicians were Catholic, but religion was not the only factor, as several of those organizing the revolt had Catholic wives. With this takeover of power from Lord Baltimore and the establishment of a royal (state-run) colony in Maryland, it is not surprising that the Church of England was made the official state church in 1692. It should be noted that this revolution did not change the status of economic power in the colony. A future Lord Baltimore did eventually regain political control of the colony, but that was not until 1715, when he converted to the Anglican Church.

Catholics were not able to protest effectively, in part because they were limited by the same factor that had plagued them throughout Maryland's development—numbers. Less than 25 percent of Maryland's population was Catholic. Even though Maryland was generally not very tolerant of Catholics, it was still seen as the seat of Catholic presence in America, and when the pope wished to establish an archbishop in America to facilitate Catholicism there, he placed that archbishop in Baltimore. Even today, the archbishop of Baltimore is one of the most important Catholic figures in the United States.

Catholics and Quakers, along with Jews, were generally not allowed to hold office. Maryland required an oath whose wording removed the Jews from consideration for office and whose mere existence eliminated the Quakers. Quakers were generally not treated as badly as other groups; rather, it was the Quakers' refusal on religious grounds to swear oaths (their doctrine held that the commandment in the Bible against swearing also prohibited taking oaths) that kept them out of office.

After 1715, when the colony reverted back to its proprietary status, the Church of England was not disturbed until the American Revolution. In the Revolution, of course, all ties to the Church of England were severed, and the Anglican Church was not reestablished as the state church after the Revolution ended. The state maintained a tax to support religion, but each taxpayer could choose which approved church

he wanted his tax to support. Although taxpayers could not withhold the tax, they could choose to give it to the poor, a rather unique option in the post-revolutionary United States. The property of the official church was not seized either. The test oath from the colonial days remained largely intact, and officeholders under the Maryland constitution had to swear that they believed in God. This requirement persisted until the twentieth century, when in 1961 the U.S. Supreme Court struck down the provision as violating the First Amendment to the Constitution, as states are not supposed to take stands on religion.

Maryland's early history represented both an attempt by Catholics to find a place in the new world and a snapshot of American religious tolerance and intolerance. In many ways, it represented the two poles of American colonial religious history. Though the colony was originally set up so that religious freedom could have existed for both Catholics and Protestants (but not any other religions), the practice soon devolved into intolerance. It was fifty years after the American Revolution and nearly a full 200 years after Maryland's founding before Jews were allowed to vote. And officials were required to avow a belief in God until the latter half of the twentieth century. Thus, the state set up as a haven of religious toleration ultimately wound up demonstrating the religious intolerance so predominant in the colonial period.

See also American Revolution's effect on religion; Bible controversy and riots; 1960 election and role of anti-Catholic sentiment; Religion in presidential elections before 1960; Religious freedom in Rhode Island in colonial times; *Torcaso* v. *Watkins*

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McCollum v. *Board of Education*

333 U.S. 203 (1948)

This case dealt with the level of involvement allowed between public schools and religion. During the 1940s, when this case occurred, many states allowed substantial involvement between those two forces. In the case at hand, religious figures would come onto school grounds and teach during the day, and protest occurred.

The main opinion was written by Justice Hugo Black. He first outlined the complaint—that schools allowed religious teachers to come into the schools and teach during the normal school day. Parents could give permission for students to be dismissed from their regular classes to attend religious classes lasting from thirty minutes to forty-five minutes; the classes were offered in grades four through nine. The religious instruction was conducted in the regular classrooms, and students who did not participate went elsewhere to study. Thus, the Court concluded that "the foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education" (333 U.S. 203: 209). Those supporting the program, though, argued that the First Amendment only banned government preference for one religion over another, and not programs like these. The Court, however, did not agree and called for a "wall [of separation] between Church and State which must be kept high and impregnable" (333 U.S. 203: 212). The Court concluded by saying that "here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an

invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State" (333 U.S. 203: 212). As the "wall" had been breached, the program should be struck down.

Justice Frankfurter delivered a concurrence that Justices Jackson, Rutledge, and Burton agreed with. The concurrence started by noting that all of these justices had disagreed with *Everson* v. *Board of Education,* decided just the year before, in which the Supreme Court had allowed transportation of private and parochial school students to and from school. Frankfurter first noted that the idea of a "wall of separation" did not answer all of the questions. He then discussed the history of education, noting that most early education was church education, and that by the early nineteenth century nearly all states had moved away from supporting sectarian education with taxes. Thus the Fourteenth Amendment, by banning state involvement in religious education, as this decision held, was only reflecting the opinion of the early nineteenth century. This was not due to hatred of religion, Frankfurter said, but the belief that "the non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom" (333 U.S. 203: 216).

Frankfurter concluded that "the preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice" (333 U.S. 203: 217). Frankfurter then discussed the history of released time programs, noting how they came about and how they varied across the country. The opinion did not make any general conclusions about "released time" programs in general, in which students were released from school to attend services in a variety of settings, but claimed that "it is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court" (333 U.S. 203: 225). After discussing the system here, Frankfurter concluded that "religious education so conducted on school time and property is patently woven into the working scheme of the school" (333 U.S. 203: 227). Considering the systems across the nation, Frankfurter held that they were discussing only the system before them, and that system was invalid, as it too closely involved the state and religion. Frankfurter did not agree with the broad rule advanced by Black, though, that since the "wall of separation" existed, all such involvements between religion and public education must be ruled unconstitutional.

Justice Jackson also concurred, noting first that he was not sure that the Supreme Court had jurisdiction, but still announced principles that should guide other school districts. He claimed that there were only two grounds upon which a case like this one could come in front of the Court, with the first being that one is harmed by a program that violates the Constitution. He noted that the only real harm here was that those who did not participate might be embarrassed, but he did not think that the Constitution was intended to prevent embarrassment. The only other constitutionally protected harm was the use of public funds to support education, which Jackson did not see as being an issue here. Jackson wanted these notes so that other people would not be able to sue in similar cases, as Jackson did not want every controversy involving the schools and religion to come before the Supreme Court. Religion cannot be wholly excluded, argued Jackson, and so he would leave up to the school board the general question of how to deal with religion; he suggested that the majority opinion should have defined more thoroughly what was and was not al-

lowed in the area of interaction between religion and public education.

Justice Reed was the sole dissenter. He thought that a "close association of church and state" did not necessarily mean that that association was illegal. He noted that "by directing attention to the many instances of close association of church and state in American society and by recalling that many of these relations are so much a part of our tradition and culture that they are accepted without more, this dissent may help in an appraisal of the meaning of the clause of the First Amendment concerning the establishment of religion and of the reasons which lead to the approval or disapproval of the judgment below" (333 U.S. 203: 239). Reed also noted that it was unclear, in his mind, what made the program here unacceptable. He argued that the program clearly did not interfere with the free exercise of religion, and so must have, to be unconstitutional, created an establishment of religion. Reed suggested that the establishment clause was intended to be quite limited. "The phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church" (333 U.S. 203: 243).

Reed also argued that Thomas Jefferson would have allowed such a program, and that the program of Illinois did not push anyone toward religion nor punish anyone for not participating, and so was legal. Reed contended that many states had similar programs and that most state courts had allowed such programs. He also noted that the U.S. Congress used prayer and that chaplains existed at the service academies, and those were allowable, and so should this one have been. On the whole, Reed commented that "the prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than the other provisions of the First Amendment—free speech, free press—are absolutes" (333 U.S. 203: 255–256). Reed also thought that what had worked in the past should be left alone. "The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause not a decorous introduction to the study of its text" (333 U.S. 203: 256). However, Reed was the only dissenter, and his idea of letting history be a guide, meaning that what was allowed in the past should be allowed now, was generally not adopted, at least not at this time, in most cases.

The interaction between church and state has hardly become more settled since 1948. Religious figures have generally been kept out of the public classroom, but public school teachers have been allowed, from time to time, to go into parochial school classrooms and teach some subjects or to deliver some aid, such as aid to the learning disabled for secular subjects. The most recent Supreme Court ruling on the subject, *Agostini* v. *Felton* (1997), reversed a decade-old restriction requiring that such teaching not be on parochial school grounds. Most recently, the main battle has been over school vouchers, which allow public school children in poor-performing schools to select their new school with the school district then paying a certain amount to that school, whether it be public or private, secular or religious. The Supreme Court in 2002 upheld that practice. Thus, while the area of battle has shifted, the whole topic of public aid to religion and religious interaction with the public schools remains contentious.

See also *Agostini* v. *Felton; Aguilar* v. *Felton; Everson* v. *Board of Education; Zelman* v. *Simmons-Harris*

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Texas attorney general Greg Abbott holds a news conference at the capitol grounds in Austin, Texas. He hailed the U.S. Supreme Court's June 27, 2005, decision upholding that state's right to continue displaying the Ten Commandments on government land. (AP/Wide World Photos)

McCreary County v. *ACLU*

125 S. Ct. 2722 (2005)
Van Orden v. *Perry*
125 S. Ct. 2854 (2005)

These two cases together decided the constitutionality of three displays of the Ten Commandments on public property. Two displays were in Kentucky and one was in Texas. They had been established at different times, with the ones in Texas established in 1961 and the ones in Kentucky erected in 1999. The Kentucky displays were immediately challenged, but those in Texas were not challenged until 2001. The two cases were heard at the same time in the Supreme Court, but two separate decisions were rendered, with the *McCreary County* decision covering the two Kentucky displays and the *Van Orden* decision covering the Texas display. The Supreme Court allowed the Texas display to continue but overruled the Kentucky displays.

In Kentucky in 1999, two counties, McCreary and Pulaski, erected displays of the Ten Commandments, by themselves, at the order of their executives. In Pulaski County, the presentation was much more religious, with a local pastor attending the ceremony and the judge-executive stating outright that there was a God when he was hanging the document. The ACLU sued in both cases and the counties then reaffirmed their decision to put up the documents, claiming that the Ten Commandments are "the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," among other arguments (125 S. Ct. 2722: 2729). The counties also added additional documents, all with references to God, including documents from President Reagan proclaiming 1983 the Year of the Bible and a declaration by President Lincoln declaring a national day of prayer. The district court found for the ACLU and ordered removal of the displays. The court used the *Lemon* test, which required a secular purpose, that the ordinance in question neither advance nor retard religion, and that the law in question not create excessive entanglement of the government and religion. The district court held that the displays utterly lacked a secular purpose, as they failed to be educational, which was their claimed purpose.

The counties, rather than appealing that ruling, then put up the Ten Commandments

along with eight other documents, each with explanatory text. The other documents included the Bill of Rights and the Declaration of Independence; the Ten Commandments was linked to these documents, in the view of those creating the exhibit, by the Declaration's statement that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . " (125 S. Ct. 2722: 2731). The district court, however, still found the purpose behind the single religious document integrated with the eight historical documents to be a religious one, and so issued an injunction. The Sixth Circuit Court of Appeals upheld that injunction, with the majority holding that the purpose of the displays was religious and that there was no proof offered for how the Ten Commandments had influenced the Declaration of Independence. The minority said that religion had played a role in government and this should be acknowledged.

The Supreme Court upheld the Sixth Circuit and the district court. The counties had argued that the purpose of any official act was unknowable, and that one had to examine merely the official rationale for the act. The Supreme Court did not agree. It first looked at the past cases, noting that while the purpose of an act is seldom enough to cause it to be illegal, it is still important and that government neutrality is the overall goal. It also noted that the test was relatively straightforward and in the past, when the purpose had been declared to be unconstitutional, the evidence was clear. On the whole, the Court concluded that "*Lemon* said that government action must have 'a secular . . . purpose,' . . . and after a host of cases it is fair to add that although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective" (125 S. Ct. 2722: 2735). The Court also noted that there needs to be an adequate secular purpose, not just an incidental one. The counties had also wanted the Court to examine only the last set of monuments and to ignore the first two sets, which the Court was unwilling to do.

The Supreme Court then turned to whether this display was constitutional under this logic. The Court used *Stone* v. *Graham* as the benchmark, the only other case in which the Court had ruled on the constitutionality of a display of the Ten Commandments on public property. The current Court agreed with the *Stone* Court that when the text of the commandments is set out, there is clearly a religious message. The current Court also stressed that the commandments originally had been displayed on their own, and that the history of the displays could not be overlooked. Throughout the Court referred to what a reasonable observer would believe, holding that anyone observing the development of the displays would remember the original display and believe that religion was the purpose. The Court also noted that the documents chosen for the final display were puzzling and did not highlight the important changes in American history and so were probably chosen to emphasize religion.

The Court noted that because the purpose here was religious did not mean the commandments could never be displayed. However, in terms of the displays in question, not enough had been changed, nor was the Court convinced that the purpose had changed, and the Court held that "an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense" (125 S. Ct. 2722: 2741). The Court also noted that there was a painting of Moses in the Supreme Court building but commented that there were a large number of other figures there as well, so that the overall effect was not religious.

After concluding that the displays were not allowable, the Court announced some overall guiding principles for the First Amendment's establishment clause. It commented that the First Amendment was not self-defining but needed the actions of the Court. The Court

held that governmental neutrality in the area of religion is important for maintaining a civil society. "The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, . . . but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate" (125 S. Ct. 2722: 2742).

In opposition to this opinion, the dissent had argued that neutrality was not needed when principles common to the majority religions (as Judaism, Christianity, and Islam all believe in the Ten Commandments) were upheld and that the government should be allowed to promote religion. Continuing its defense of this view, the dissent cited historical remarks and proclamations by Washington and others. The majority disagreed with the dissent, noting the actions of Thomas Jefferson and James Madison. Regardless, the majority also argued, the historical record was too muddied to reverse sixty years of requiring neutrality. On the whole, the majority concluded that "we are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual" (125 S. Ct. 2722: 2745).

Justice O'Connor wrote a concurrence, aiming to argue against the dissent's claim that religion in general can be promoted. O'Connor first noted that religion was strong in America and that religious freedom had worked well here, both for peace and, ironically, to promote religion. She commented, "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" (125 S. Ct. 2722: 2746). She noted that religion had a "special role" but that the Founding Fathers knew that and established religious freedom, realizing that "allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both" (125 S. Ct. 2722: 2746). O'Connor further argued that the Founding Fathers would not have wanted the government to take a stand favoring some religions (the monotheistic Ten Commandments–based ones were allowable to be favored in the eyes of the dissent) and held that the founders "did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point" (125 S. Ct. 2722: 2746).

The main dissent was written by Justice Scalia, and it was joined in full by Justice Thomas and Chief Justice Rehnquist, and in part by Justice Kennedy. Scalia first noted that America was different from Europe in that, one can say, and presidents always have said, "God bless America." Scalia detailed some of the history of religious references and concluded that "those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality" (125 S. Ct. 2722: 2750). He surveyed the early presidents, noting that James Madison and Thomas Jefferson both cited religion, which argued against the majority's claim that these two men wanted a separation of church and state.

Scalia also noted that only the Supreme Court (and only part of it) had affirmed the principle of neutrality, and argued that the *Lemon* test needed to be abandoned. He also contended that the Court had not used the neutrality principle consistently. On the whole, Scalia argued, "what distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling

now this way, now that—thumbs up or thumbs down—as their personal preferences dictate. Today's opinion forthrightly (or actually, somewhat less than forthrightly) admits that it does not rest upon consistently applied principle" (125 S. Ct. 2722: 2750). Thus, Scalia accused the majority of suborning law to its own personal preferences. Scalia argued that the Court had before allowed support of religion and cataloged the other times that the Court had struck down age-old practices, including the execution of those under eighteen and the shackling of prisoners, each a decision Scalia had dissented from. He argued that, on the whole, "what, then, could be the genuine 'good reason' for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which 'has no influence over either the sword or the purse,' cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches" (125 S. Ct. 2722: 2752).

Scalia then turned to what he thought was allowed. He commented "with respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists" (125 S. Ct. 2722: 2753). Scalia concluded that "historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. . . . Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God" (125 S. Ct. 2722: 2753).

Scalia then responded to the majority and the dissent of Justice Stevens in *Van Orden,* the Texas case. He argued that he used more than mere proclamations of the founders, which the majority, in his view, accused him of doing, but also used official acts, and that these documents showed what the establishment clause meant in the eyes of the founders. Scalia quoted Washington as favoring toleration and God, arguing that all should tolerate the public majority's invocation of God and the Ten Commandments. Scalia held that the "invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment" (125 S. Ct. 2722: 2756). It should be noted that Justice Kennedy did not concur with all this part of the dissent, although the reason for his disagreement is never noted.

Scalia then turned to what should happen even if the *Lemon* test was correct, and Kennedy joined this part and the rest of his opinion. Scalia stated that the *Lemon* test, especially here, had "been manipulated to fit whatever result the Court aimed to achieve" (125 S. Ct. 2722: 2757). Scalia summarized the part of the test requiring a government action to be secular in purpose as claiming that "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion" (125 S. Ct. 2722: 2757). He also saw the Court as adding the requirement that a government action have an important secular purpose rather than having no secular purpose. Scalia also added that the results of this test were misanalyzed. He first noted that the nine documents McCreary County set up in the final attempt to post the documents probably would have been ignored by the public and that these documents served the proposed purpose of educating the public. He also noted that allowing some displays of the Ten Commandments, but not allowing others, made the First Amendment weak. "Reduction of the Establishment Clause

to such minutiae trivializes the Clause's protection against religious establishment; indeed, it may inflame religious passions by making the passing comments of every government official the subject of endless litigation" (125 S. Ct. 2722: 2761). On the whole, Scalia concluded, "The first displays did not necessarily evidence an intent to further religious practice; nor did the second displays, or the resolutions authorizing them; and there is in any event no basis for attributing whatever intent motivated the first and second displays to the third" (125 S. Ct. 2722: 2763–2764). Thus, Scalia wished to abandon the *Lemon* test and allow government promotion of religion, so long as it did not favor any one specific monotheistic religion over another.

Scalia was more successful in the *Van Orden* case, which concerned a display in Texas. There, the display of the Ten Commandments was allowed, in part because it had been there some forty years without complaint. In 1961, the Fraternal Order of Eagles in Texas offered to the state of Texas a set of monuments commemorating, among other things, the Heroes of the Alamo, the Confederate Soldiers, and Pearl Harbor Veterans. Among the nearly twenty monuments was one to the Ten Commandments. The Supreme Court upheld this display by a 5–4 vote. The plurality opinion, joined in by four justices, was written by Chief Justice Rehnquist, and the judgment was joined in by Justice Breyer, who provided the fifth vote upholding the display. Thus, five justices upheld the display, even though a majority did not agree on the reasoning.

Rehnquist, in his plurality opinion, first surveyed the history of the case, noting that both the district court and the appeals court had upheld the displays. He then surveyed the history of the First Amendment establishment clause cases. Rehnquist described the two sides of the establishment clause as: "Our cases, Janus-like, point in two directions in applying the Establishment clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom" (125 S. Ct. 2854: 2859). He describes the first as a role but the second as a principle, which hints that government intervention might never have been proven to be a danger, unlike the proven factor of religion in national life. He holds that "reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage" (125 S. Ct. 2854: 2859).

Rehnquist then turned to the question of what test to use to determine whether a government action violated the establishment clause. He stated that the *Lemon* test was not useful, but that the court should turn instead to "the nature of the monument and . . . our Nation's history" (125 S. Ct. 2854: 2861). Rehnquist first argued that the government had always acknowledged the effect of religion on American life. He then held that Moses and the Ten Commandments had long been noted as affecting American law, citing many different depictions, and concluded that "these displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments" (125 S. Ct. 2854: 2863). Rehnquist agreed that the *Stone* case still held that the Ten Commandments could not be posted in public school classrooms, but that this was different, and that Texas's purpose was not primarily religious. Rehnquist also noted that the nonpublicized nature of the displays (as they did not seek to bring the text to the attention of people), along with the long-term lack of complaint and the historical significance of the displays, was enough to help make them constitutional. "The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone,* where the text confronted elementary school students

every day. Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit. . . . Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history" (125 S. Ct. 2854: 2864). Rehnquist ended his opinion by upholding the display.

Justice Scalia concurred, writing a short opinion. He mainly wrote to note his goals in establishment clause jurisprudence, writing, "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments" (125 S. Ct. 2854: 2864).

Justice Thomas also concurred in a longer opinion. He first noted that he thought the establishment clause did not limit the states at all but only prevented the federal government from establishing a religion. Even if it did, he said, the clause was violated only when the government used coercion, which Thomas did not find here. He argued against the current state of the First Amendment, suggesting that the federal government should be able to recognize religion, and that religious items should be recognized as religious in order to respect belief. He argued that the Court, in its present state of affairs, allowed judges, based on their own opinions rather than a fixed law, to determine cases, and this was not acceptable to Thomas. Thomas concluded that "much, if not all, of this would be avoided if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry. Every acknowledgment of religion would not give rise to an Establishment Clause claim. Courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application. While the Court correctly rejects the challenge to the Ten Commandments monument on the Texas Capitol grounds, a more fundamental rethinking of our Establishment Clause jurisprudence remains in order" (125 S. Ct. 2854: 2867–2868). Like most other alternatives proposed throughout the history of the Supreme Court, Thomas did not analyze his alternative to prove why, in his estimation, it would be clearer than current ideas, but just suggested the problems with the current one and noted an alternative.

Justice Breyer concurred only in the judgment, and his concurrence is important as it both provided the fifth vote to uphold the Texas display and provided a result making the Kentucky displays not allowable, whereas the Texas ones were. He first stated that the proper course of action was to look at the purposes of the First Amendment religion clauses rather than to use any simple test, and he held that those purposes were to "assure the fullest possible scope of religious liberty and tolerance for all" (125 S. Ct. 2854: 2868). He stated that no test really worked, and what he suggested was the use of legal judgment, that is, exactly what was so condemned by Thomas here and by Scalia in his dissent in the *McCreary County* case. Breyer argued for the acceptability of both a secular and a religious message and stated that the secular message predominated in the Texas displays, and that Texas intended for it to be so. Breyer first looked at the Eagles' goal in donating the monument and held that "the group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency" (125 S. Ct. 2854: 2870). Breyer also noted that the Ten Commandments were mixed in with the other monuments, all to the ideals of Texas, and that

no one had complained until Van Orden, the plaintiff suing here, did so. Breyer concluded that "those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practice,' to 'compel' any 'religious practice,' or to 'work deterrence' of any 'religious belief' " (125 S. Ct. 2854: 2870). He differentiated this from McCreary County's effort, as there "the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them" (125 S. Ct. 2854: 2871). Thus, Breyer's was the swing vote allowing the Texas display but striking down the displays in Kentucky.

Justice Stevens wrote a stinging dissent. He argued first that the only reason the Ten Commandments were displayed was religion. "Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the 'Judeo-Christian' God" (125 S. Ct. 2854: 2874). The question, in Stevens's mind, was not whether one liked the display but whether the wall of separation could exist with the Ten Commandments in place, and he answered no. Stevens argued that Americans should avoid divisiveness, and public displays of religion just increased divisions. Stevens turned to the history of the display, noting that membership in the Eagles required belief in a Supreme Being and that the whole program of fighting juvenile delinquency through the Ten Commandments was premised on the idea that God would do it. He argued that the Ten Commandments were religious, holding "attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith" (125 S. Ct. 2854: 2874). He also noted that different religions, different translations, and different interpretations state and understand the commandments differently, and thus, when the commandments are quoted verbatim, as they were here, not just summarized, they clearly take the position that one religion's translation of them may be right. He pointed out, ironically, that those most informed about the commandments may be the most offended, contrary to the idea commonly held that the more religious would be the least offended by such displays. In this way, Stevens observed, the state favored one sect over another, something nearly all establishment clause cases view as unconstitutional.

He also argued that the state should not favor one religion over another, or monotheistic religions of Middle Eastern origin (which Judaism, Christianity, and Islam all are) over other religions, or religion over nonreligion, all three of which were done here. He challenged the idea that this display's standing without challenge for forty years mattered, noting the large number of challenges to other similar displays in that time period. Stevens then turned to the whole idea that America was founded as a "Christian" nation. He first noted that many religious references were benign, unlike this one. He also pointed out that speeches and proclamations are much more the acts of one person, unlike this, which could be easily interpreted as the word of a government. He also noted that Jefferson and Madison were mostly ignored in the plurality's analysis, as both of them favored a more separationist approach. Stevens also argued that many people at the time thought that the Constitution had abandoned God and that the mere fact that some of the founders had passed legislation in Congress did not make that legislation constitutional. He also argued that some of the founders wanted an even narrower

view of the First Amendment, and on the whole concluded that "as the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star" (125 S. Ct. 2854: 2888). Stevens argued that the government should be neutral, and that this was the idea in the First Amendment, and the idea that should exist today, and that this principle struck down the Ten Commandments. He also argued against the idea, advanced by Thomas, that only coercion was banned, pointing out that it did not produce consistent law either and that little would be banned by this principle. On the whole, Stevens concluded that "the judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to 'have no other gods before me,' it is difficult to conceive of any textual display that would run afoul of the Establishment Clause" (125 S. Ct. 2854: 2890).

O'Connor wrote a short concurrence to the dissent basically agreeing with Souter and with her own opinion in *McCreary County.* Souter's dissent was much shorter than the dissent of Stevens and noted that the Ten Commandments were not neutral. He argued that the purpose of the Eagles in donating the materials was religious, to show God to youth (among others), and that the monument was clearly religious, even putting the First Commandment ("I am the Lord thy God") in bigger letters than the rest and centering that commandment. Souter contrasted this with the figure of Moses and the commandments on the Supreme Court building, noting the number of different figures there and the fact that the commandments shown (in Hebrew) are the nonreligious ones. It appears to have escaped the notice of all that most do not read Hebrew, the language of the commandments in the depiction in the Supreme Court building, while most do read English, the language of the commandments in Texas's display. While the plurality argued that all of the monuments in Texas should be taken into account, Souter noted that seventeen monuments over twenty-two acres did not promote themes being taken together, but items being considered separately, and that "the themes are individual grit, patriotic courage, and God as the source of Jewish and Christian morality; there is no common denominator" (125 S. Ct. 2854: 2895).

Souter also disagreed that the previous case of the Ten Commandments, *Stone,* had meant to apply only to schools. As far as the state capitol went, he argued, "there is something significant in the common term 'statehouse' to refer to a state capitol building: it is the civic home of every one of the State's citizens. If neutrality in religion means something, any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion" (125 S. Ct. 2854: 2897). Souter was not convinced by the argument that the forty years without litigation proved the display's social acceptance. He held that "suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause" (125 S. Ct. 2854: 2897).

Souter's argument did not carry the day, however, and the Texas display was allowed. With O'Connor's retirement and Rehnquist's death, the two new justices may play a significant role in any future Ten Commandments cases, as the two of them together favoring either side would upset the narrow 5–4 balances in both cases.

Some might think that this is much ado about nothing, but really much of the current debate over religion is reflected here. Those in favor of Ten Commandments displays believe the displays note the religious parts of America's past and the common religious orientation of many Americans, as, after all, the Ten Commandments are common to Christianity, Islam, and Judaism (to list the three alphabetically). They believe a denial of the state's right to acknowledge the influence of religion favors atheism (or secular humanism) over religion, itself violating the First Amendment. Similar arguments can be made in favor of prayer at graduations, prayer in public schools, and the presence of the phrase "under God" in the Pledge of Allegiance.

Those opposed to the displays believe the displays violate the separation of church and state. They believe that such displays create state endorsement of specific religions and state rejection of other religions and of atheism. Similar arguments may be made defending the lack of an established church in any state, equal treatment of all churches by the government, and the allowance of church schools. Thus, while it may seem simple—whether to have a monument with the Ten Commandments on it on public grounds—the arguments, rationales, and results run much deeper and will probably shape First Amendment establishment clause jurisprudence and thought for a long time to come.

See also *ACLU of Kentucky* v. *McCreary County; Braunfeld* v. *Brown; County of Allegheny* v. *Greater Pittsburgh ACLU; Elk Grove Unified School District* v. *Newdow; Lee* v. *Weisman; Lemon* v. *Kurtzman;* Saluting the flag; *School District of Abington Township* v. *Schempp; Stone* v. *Graham; Zorach* v. *Clauson*

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McGowan v. *Maryland*

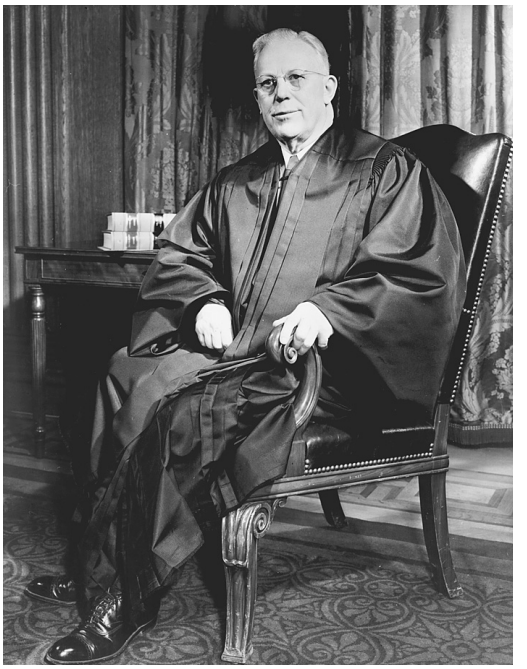
366 U.S. 420 (1961)

This case dealt with a Sunday closing, or "blue" law. Such laws required the closing of businesses on Sunday, and the idea of a Sunday closing had its origin in the Bible, specifically the Fourth Commandment. This commandment ordered one to honor the Sabbath, which in Christian countries was generally defined as Sunday. (It should be noted that Jewish countries and worshipers generally have held the Sabbath to be from sundown on Friday to sundown on Saturday.) The laws were placed in America during the colonial period and have generally remained, although often altered in terms of what one was and was not allowed to do or buy and what businesses were and were not allowed to operate. This case dealt with the issue of whether such a law was an establish-

ment of religion, which is prohibited by the First Amendment.

Chief Justice Warren wrote the opinion and he first examined the facts of the case, noting that the employees had been arrested for operating a store in violation of a Sunday closing law. This Sunday closing law was not absolute, as it exempted some businesses, including those that sold gasoline, milk, and bread, and other things generally found in gas stations. In addition to considering this one Sunday closing law, Warren considered the constitutionality of Sunday closing laws in general. The main challenge to the laws was under the equal protection clause of the Fourteenth Amendment, as those opposing the laws claimed that the laws were arbitrary in terms of what was allowed to be sold and what was prohibited, and that they were capricious in allowing various amusements to continue on Sundays. The Supreme Court in the past had held that arbitrary and capricious laws were illegal as equal protection of the laws required that laws be applied equally—that is, noncapriciously. The Court held the general standard to be that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective" (366 U.S. 420: 425).

After examining the things sold and not sold, the Court concluded that "the record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment" (366 U.S. 420: 426). The next complaints were that the allowed products were mostly around the beach areas and so discriminated against those away from the beach and discriminated against certain merchants. The Court held that both of these were areas that the legislature should have



Appointed by President Dwight D. Eisenhower in 1953, Earl Warren was one of the great modern chief justices, and his name became synonymous with the fight for civil rights and the preservation of individual freedoms. (Library of Congress)

choice in, and could have options in, constitutionally. A question of vagueness was dismissed because it had not been discussed in the lower courts. Thus, the Court generally deferred to the legislature on the specifics of this law, holding that deference to the legislature allowed this law, if Sunday closing laws in general were acceptable. The final question was the First Amendment question of whether a state could force a business to close on Sunday. The employees did not discuss their own religion, and so they could not raise a question of their own religion being harmed. Next, the Court considered whether the state was establishing a religion by forcing the closing of some stores on Sunday.

The Court first considered the historic roots of Sunday closing laws, noting that they had been around for over 700 years (even by the

1940s) and that these laws had religious origins. The Court held, though, that "despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor" (366 U.S. 420: 433–434). The Court added that the laws were frequently modified, showing that they still had support, and also that they had nonreligious proponents currently as well. The Supreme Court noted that most courts had upheld the laws, and that these courts had noted secular justifications for them, at least in part. The Court considered what had happened in Virginia around the time Madison and Jefferson had been active in writing the Bill of Rights and the Virginia Statute of Religious Freedom, noting that Sunday closing laws continued. The Court found all these to support the bill and then turned to the Maryland Act.

While the Court held that the First Amendment went far beyond merely banning an established church, it also held that "it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions" (366 U.S. 420: 442). The Court also concluded that "throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens" (366 U.S. 420: 444). The Court examined the law's particulars and found that parts of it did not agree with religion, that exceptions were allowed that did not harmonize with religion, and that just because there were other ways for the state to promote its goals did not mean that their choice of this one was religiously based. The Court held that "Sunday is a day apart from all others. The cause is irrelevant; the fact exists" (366 U.S. 420: 452). Thus, even with a religious cause for its origination, and perhaps a religious reason for it continuing, the Court held that a law forcing Sunday as a day of rest was not a religious event. The Court though did say that if a Sunday closing system was held to aid religion, it might be illegal. Since that was not the case here and since there were secular reasons to have the closing laws, and the closing system had become more secular over time, it was allowed.

Justice Frankfurter wrote a concurrence, noting that he agreed with the result, although he did not find *Everson* v. *Board* relevant; in *Everson* the Court had allowed transportation aid to private religious schools. Frankfurter gave a long discussion of the historical origins of Sunday closing laws, noting that they had started in religion but now served greatly to give workers a day off. He also stated that allowing an individual a choice would not shut down society, as was the goal, and the fact that the community liked Sunday for religious reasons did not mean that the restriction should be struck down. He then turned to the *Braunfeld* case, decided the same day, in which Orthodox Jews had complained that the choice of Sunday discriminated against them and held that even though an exception might have been allowed, the restriction could not be said to be unconstitutional. In terms of arbitrariness, Frankfurter, as in other cases, just granted large discretion to the legislature.

Justice Douglas dissented, holding that the question asked by the majority of whether Sunday can be retained as a day off was the wrong one. He suggested that "the question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority" (366 U.S. 420: 561). The government was not supposed to be coercive at all in the area of religion, Douglas held. He examined many of the same cases cited by the majority and argued that they showed that the closings still had a religious base. Douglas stated, "It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's reli-

gious views about that day" (366 U.S. 420: 573). Douglas suggested that forcing a day of rest for one day out of seven would be acceptable, but that these laws should not be.

This was one of the first times that the Supreme Court considered Sunday closing laws, and the principles set forth here continue in large part until today. As noted in *Braunfeld,* even a closing law that impacts one religion more than another was allowed, and the laws that forbid sales of alcohol on Sunday, and which clearly have a religious element, have been allowed. Sunday closing laws, while based in religion, have been held to have enough of a secular justification (that of forcing a day of rest, among other justifications) to be allowed.

See also *Braunfeld* v. *Brown; Estate of Thornton* v. *Caldor;* Influence of religion on Eighteenth Amendment; *Metzl* v. *Leininger; Sherbert* v. *Verner; Trans World Airlines* v. *Hardison*

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Members of Jamestown School Committee v. *Schmidt*

699 F.2d 1 (1st Cir. 1983)

It has been clear, ever since *Everson* (1947), that schools can provide transportation to parochial schoolchildren. The case of *Members of Jamestown School Committee* v. *Schmidt* goes one step beyond *Everson* and asks if a school board can provide transportation to students who attend religious schools outside the district when that transportation to schools outside the district is not given to public schoolchildren. Ultimately, courts determined that, within appropriate restrictions, such transportation was, in fact, legal.

In this case, the Jamestown School Committee (similar to many district school boards) and several parents in Rhode Island sued against a state law that required schools to bus private schoolchildren to any school within a fifteen-mile radius, while districts were required to bus public schoolchildren, in general, only to their local schools. The people suing claimed that this was a violation of the First Amendment as it gave students of religious institutions a benefit not available to children attending public school. The statute was challenged before it was implemented, and the court reviewed what the statute would have done. After a lower federal court decision, the statute was struck down in 1978, and then rewritten. The case soon returned to the federal courts and was decided in 1983.

The First Circuit Court of Appeals used the *Lemon* test here. It held that the statute did have a secular purpose, that of protecting the schoolchildren's health. It then examined the effect of the busing. The district court had held that any interdistrict busing, beyond what the district did for public schoolchildren, was illegal. The appeals court disagreed, ruling that interdistrict busing was legal, but that "the relative costs per-student of sectarian and public student bussing must remain roughly proportional" (699 F.2d 1: 9). The court did not set a particular point at which overspending on sectarian busing became illegal, but left that up to lower courts. The court also concluded that "applying these principles to the instant case, we cannot say, at least on the present record, that Rhode Island has yet crossed that line" (699 F.2d 1: 10). The court did, however, hold illegal a provision

that allowed a school official to grant a "variance" from the statute, if a student wanted to attend a private school program that was not offered within the fifteen-mile area. As the school official would scrutinize the private schools to determine this, the court held that it was an illegal entanglement between church and state.

Thus, until the cost of busing private students outside the district became substantially higher than busing children inside the district, the provision allowing students to be bused to private schools outside the district was held constitutional.

See also *Agostini* v. *Felton; Everson* v. *Board of Education; Lemon* v. *Kurtzman*

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Metzl v. *Leininger*

850 F. Supp 740 (Ill. 1994)

One question that is dealt with in the separation of church and state is which holidays a state may still observe. It is more a question for a state, of course, than a private business, as a state's observance of a religious holiday creates "state action," which is limited by the Constitution, whereas most business action is not. Thus, a private business has a much better chance of observing a religious holiday legally than a state.

The one holiday most questioned is some states' observance of Good Friday. This practice was challenged in Illinois in *Metzl,* which was decided by the U.S. District Court for the Northern District of Illinois. A Chicago public school teacher sued the Illinois school system for observing Good Friday as one of its mandated holidays. The court first discussed Good Friday and noted that "unlike Christmas, Good Friday is generally seen as having no secular components" and that the state of Illinois opened its offices and most universities held school on that day (850 F. Supp 740: 741). The court then reviewed past decisions of other courts. The Ninth Circuit had, in 1991, held Hawaii's practice of observing Good Friday to be constitutional, finding that the purpose of the closing was mostly to give another legal holiday rather than to promote religion. Two other courts, however, had found that closing state offices and banning liquor sales on Good Friday did violate all three prongs of the *Lemon* test.

The northern district court here then applied the three-prong *Lemon* test to the Illinois statute, that programs must "(1) have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion" (850 F. Supp 740: 743). The court found little official record regarding the purpose of the statute, but held, based on the religious nature of the holiday, that the legislature "was motivated at least in part by a desire to officially endorse the holiday's religious message" (850 F. Supp 740: 746). The state claimed that the closing was merely an allowable accommodation to avoid the massive absenteeism that would occur if school was in session on that day, but the court was not persuaded by the evidence the state cited. In terms of the statute's primary effect, "the court finds that Illinois' designation of Good Friday as a legal school holiday conveys the impermissible message that the government endorses 'the individual religious choice' of Christians throughout the state" (850 F. Supp 740: 748). The court found that Christians were given special treatment by the designation of Good Friday as a mandatory holiday. Though the statute did survive the entanglement prong, its failure on the other two points made it illegal.

Thus, Illinois was not allowed to have a school holiday on Good Friday. It is interesting that the holiday was only for schools and not for the state's government offices as a whole,

and the court used this fact to argue against the state's contention that having school open on that day would lead to massive absenteeism. This decision also points out the fragmented nature of American law in decisions below the Supreme Court level. Illinois here is not allowed to have Good Friday as a holiday for its schools because a district court said it was illegal, while Hawaii is because the circuit court of appeals that covers Hawaii said that it was not illegal. The next question asked, obviously, would be whether other religious holidays are allowed. The answer, generally, is maybe. If a holiday has both religious and secular significance, such as Christmas and Thanksgiving, then it is usually allowed, especially if proclamations naming these days as holidays do not discuss their religious significance. The Illinois court here even took pains to differentiate Good Friday, which is solely religious, from Christmas, which has developed secular significance. Though many decry the commercial nature of Christmas, it is that very commercial nature that allows it to be declared a holiday legally in the United States without fostering a governmental endorsement of religion. This issue is also less of a concern in the United States than it might be, as many of the holidays the country celebrates, like New Year's Day, the Fourth of July, and Labor Day, are wholly secular. Thanksgiving is grouped with Christmas as being both secular and religious. Easter, which experiences a smaller commercial draw than Christmas, is generally not an issue as it occurs on a Sunday, when state offices and schools are already closed. Thus, Good Friday is generally really the only time a wholly religious holiday has been given a stamp of approval by being declared an official holiday by some states, and still can be an official holiday, depending on what court controls your state.

See also Addition of "under God" to Pledge of Allegiance; *Braunfeld* v. *Brown; County of Allegheny* v. *Greater Pittsburgh ACLU; Lemon* v. *Kurtzman; Marsh* v. *Chambers; McGowan* v. *Maryland*

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Mitchell v. *Helms*

530 U.S. 793 (2000)

This case dealt with federal aid to the public and private schools in Louisiana (at least that was where the aid was challenged, even though the aid in question was federal money). In Louisiana, about 30 percent of the money went to private schools. The aid provided had a number of caveats: it must supplement, not replace, the money the schools would have already spent; it was based on the number of students; and the schools must be nonprofits and "the 'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological'" (530 U.S. 793: 802). The majority of the aid here was in the form of things like "library books, computers, and computer software" (530 U.S. 793: 803).

The Court, in an opinion written by Justice Thomas and joined by Justices Scalia and Kennedy and Chief Justice Rehnquist, first outlined the program and the objections and then discussed the long history of the Court battle that had been going on for fifteen years. Thomas first criticized, implicitly, past decisions, and then praised the *Agostini* decision. That decision had basically, for aid cases, thrown out the entanglement prong of the *Lemon* test, and

Thomas then noted that the whole question of secular effect had not been at issue here. Thomas then overruled *Meek* v. *Pittinger* and *Wolman* v. *Walter.*

The main idea announced by Thomas is that "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" (530 U.S. 793: 809). The other decision-making issue was "whether the criteria for allocating the aid 'creat[e] a financial incentive to undertake religious indoctrination'" (530 U.S. 793: 813). The Court argued that as long as the choice to attend private school is made by the individual, even direct aid to the school is allowable. This aid only must be "neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere" (530 U.S. 793: 816). Even though the aid could help religion, this was not directly an issue. The Court held that "so long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content,' . . . and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern" (530 U.S. 793: 820).

The plurality also criticized the dissent and held that the issue of political divisiveness the dissent cited should not be relevant, as it had not been held to be relevant in recent cases, and that the issue of whether the school given aid was "pervasively sectarian" should not be relevant. The Court held that "in short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now" (530 U.S. 793: 829). The plurality then reviewed the program and announced that it was acceptable.

Justice O'Connor, joined by Justice Breyer, filed a concurrence. This concurrence is more important than many, as O'Connor (or Breyer) provided the fifth vote to uphold the program. O'Connor first held that the decision in *Agostini* did control the program here, and thus the program was constitutional. However, she disagreed with the sweeping nature of the plurality, as it, in her opinion, held "that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible" (530 U.S. 793: 837). This was unsettling to her as "the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case" (530 U.S. 793: 837–838). She thought that neutrality was important but was not the only factor.

O'Connor also stated that if the aid from the government was diverted and used to help religion, then the program would be unacceptable. She thought a program that gave aid to a student who then could choose where to use it was quite different from the program here. She believed that the plurality had wrongly interpreted *Agostini* and ignored some of its criteria, but even if its criteria were applied correctly, the program challenged in this case would still be acceptable. The prime considerations here, she stated, were whether there was indoctrination and whether there was exclusion (or inclusion) due to religion. She answered no in both areas. She also held that whether the aid can be diverted is not relevant, as the important factor is whether the aid *is* diverted, and here she strongly disagreed with the dissent.

O'Connor also said that monitoring requirements are good enough to prove that no diversion has happened or will happen, and that these are necessary because actual diversion of a significant amount would tend to make the program unconstitutional. Thus, this program could be declared unconstitutional, but should not be based on the evidence here.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented. Souter first surveyed the history of government aid to religion, arguing that government aid was bad for religion, that you could not force one to support religion, and that government aid causes friction. From there, Souter argued that "neutrality" had never been a test before now and should not be. He stated that the overall considerations included the directness of the aid, individual choice, what type of schools were being helped, and the type of aid. The biggest question, according to Souter, was whether "the benefit [is] intended to aid in providing the religious element of the education and is it likely to do so?" (530 U.S. 793: 899) He held that the issue of neutrality was converted into a sole test, and wrongly so by the plurality, as it ignored the important issue of individual choice that was important in prior cases, and then the majority ignored the fact that aid had been diverted in this program and very easily could be again. He also held that the oversight was lacking and insufficient. The dissent closed by noting that the plurality was itself not neutral with respect to religion.

The Supreme Court here upheld a neutral government program that aids religious schools. The Court used as a deciding factor, as in other decisions, the issue of choice—that is, did individuals choose where the aid went, or did the government? If individuals directed the aid, as they did here by their choice of schools, then the program is allowable. The main criterion cited by the plurality was that of neutrality: is the program neutral with respect to religion? As the program allows all schools to participate, regardless of religion, it was neutral in the view of the plurality. The dissent held that the program helps religion, even if indirectly, and does not have enough oversight, and so would strike it down. The program, however, was found to be constitutional and so was allowed to continue.

See also *Agostini* v. *Felton;* Established churches in colonial America; *Hibbs* v. *Winn; Mueller* v. *Allen; Witters* v. *Washington Department of Service for Blind; Zelman* v. *Simmons-Harris; Zobrest* v. *Catalina Foothills School District*

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Mueller v. *Allen*

463 U.S. 388 (1983)

One of the most debated areas of the interaction between religion and the state is parochial education. Parochial schools and parents generally want the aid, as it makes the cost of private schooling cheaper; those who oppose a close association between states and religion (whether it be the federal government or the state government doing the association) and those who do not benefit generally oppose such aid. Direct payments from the state to the schools were generally seen as illegal, and in the *Lemon* case (1971), the Supreme Court struck down a program paying for some schoolteachers and other direct aid in 1975 in *Meek* v. *Pittinger.* States often still wanted to aid schools and turned to the tax code as a way to help. Tax deductions were tried in Minnesota and those deductions are the crux of *Mueller* v. *Allen.*

Mueller v. *Allen* was a close 5–4 decision dealing with deductions for "textbooks, tuition

and transportation" (463 U.S. 388: 391) for parents of students going to all primary and secondary schools. The majority opinion was written by Justice Rehnquist and joined by Justices White, Powell, O'Connor, and Chief Justice Burger. Rehnquist first noted the history of the case and some general principles from past decisions, stating that "one fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause" (463 U.S. 388: 393). Even though the *Lemon* test was not perfect, it was to the *Lemon* test that Rehnquist turned. In terms of the secular purpose, which was required under *Lemon,* the Court held that promoting education by removing the burden, or part of it, of paying for educational materials, was an acceptable secular purpose, even if those payments went to religious schools.

The Court then turned to the question of whether the program had "the primary effect of advancing the sectarian aims of the nonpublic schools" (463 U.S. 388: 396). As the tax deduction was available for all primary and secondary schools, as the Court had granted legislatures "wide discretion" in creating a tax code, and the element of individual choice on the part of the parents in funneling the monies spent all helped the constitutionality. Those opposing the law argued that most who were helped were attending private school as few in public school paid tuition, but the Court refused to decide constitutionality based on who used the deductions. At several points, the decision made special note of the unique "benefits" provided by private schools to certain areas. The Court then stated that "turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the State in religion" (463 U.S. 388: 403). The only real involvement was whether the textbooks for which a deduction was taken were religious or secular (deductions for religious textbooks were not allowed), and the Court held that similar types of scrutiny had been allowed in the past, and so the program was acceptable.

The dissent, however, disagreed. Justice Marshall wrote the opinion and was joined by Justices Brennan, Blackmun, and Stevens. Marshall held that "in my view, this principle of neutrality forbids . . . any tax benefit, including the tax deduction at issue here, which subsidizes tuition payments to sectarian schools" (463 U.S. 388: 404). Marshall's biggest concern with this deduction was that he viewed it as advancing religion. He cited previous cases to argue that "even if one ' "primary" effect [is] to promote some legitimate end under the State's police power,' the legislation is not 'immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion' " (463 U.S. 388: 406). Thus, the legitimate secular purpose of these deductions did not save them.

Direct subsidies to religious schools had been held improper in past cases, Marshall noted, and this program was an indirect subsidy. "By ensuring that parents will be reimbursed for tuition payments they make, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education" (463 U.S. 388: 407). He also did not think that the difference between a direct and an indirect subsidy was enough to make the program acceptable. Marshall saw this case as being very similar to one struck down in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973). The majority's attempt to differentiate *Nyquist* from this case on the grounds that this benefit was available to all, Marshall held, was unworkable, as most of those who received sizable benefits under it were in private schools because most of the expenses claimed were tuition, and generally only private schools charged tuition. While some benefit might be claimed by any who spent money on education, the full benefit would generally be available only to those who paid tuition, and most of those attended religious schools. The majority had also tried to

make a difference between the tax credits not allowed in *Nyquist* and the tax deductions here, but Marshall stated that this was "a distinction without a difference" (463 U.S. 388: 411).

Marshall also argued that the tax deduction for education materials also advanced religion as "the instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief" (463 U.S. 388: 414). The opinion noted a difference between this and previous programs that allowed textbooks as those programs had allowed state officials to choose which textbooks were to be loaned, whereas here the religious schools were choosing the textbooks for which the parents were getting the deductions. Thus, Marshall wanted to hold the program unconstitutional.

On the whole, the dissent held that "for the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion" (463 U.S. 388: 416–417).

Mueller was clearly a victory for those who wanted the state's policies to help parochial schools and a loss for those who did not and for those who saw it as an unacceptable interference between church and state. There were winners and losers on that score, but there were no clear winners in the whole battle over what level of aid was acceptable. By the end of *Mueller,* tax credits were not allowable but deductions were, and paying teachers was not acceptable, nor was the purchase of some equipment, but a loan of textbooks was permissible, as might be providing supplementary services such as instruction in English as a Second Language (ESL) or tutoring for the learning disabled. These are only a few examples, but they show what a tangled web was being woven. With the rise of the Rehnquist Court in the late 1980s and into the 1990s, it became more clear that greater aid to private schools was legal as more and more aid was allowed, and ultimately a voucher plan to allow public school students to attend private schools, parochial or otherwise, at partial state expense, was approved. That, right now, is how the situation stands.

See also *Agostini* v. *Felton; Aguilar* v. *Felton; Board of Education Kiryas Joel Village School* v. *Grumet; Everson* v. *Board of Education;* Paying for tests and other aid for private schools; *Zelman* v. *Simmons-Harris; Zobrest* v. *Catalina Foothills School District*

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Nally v. *Grace Community Church of the Valley*

763 P.2d 948 (Cal. 1988)

This case, decided by the supreme court of California, dealt with the standard that would be applied to determine whether there was clergy malpractice. In this case, a young man, Kenneth Nally, had committed suicide, and the question was whether the defendants, a group of ministers, were under a duty to prevent that suicide (as mental counselors were) and if they had failed that duty. (His parents had sued the ministers for failure to act.)

The court first reviewed the facts of the case, noting that the church offered spiritual counseling but did not present its staff as professional counselors, and so were not analogous to professional mental counselors. The court then tried to determine whether ministers and other nonprofessional counselors had a "duty to care," as the argument here was that the ministers had been negligent in not forcing Nally to go to professional mental health counseling. It also noted that this duty to care had been applied only when a "special relationship" existed, such as that between a mental counselor and a patient. Here, the court found that no such relationship existed, as there was not long-term counseling nor was Nally in a facility. The court also looked at the issue of whether the suicide was foreseeable, holding that the suicide was not definite, and that even though it may have been foreseeable, "mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm" (763 P.2d 948: 959).

The court also considered other issues, such as the effect on those seeking help. It decided that imposing a "duty to care" might discourage those in need and also those currently offering help. The opinion also noted that the California legislature had not acted to create such a duty, and that if such a duty existed, it would be difficult to say where the line ending that duty would be drawn. While constitutional issues such as the separation of church and state were not generally considered in this opinion, the court did note that imposing a formal, legal, duty to care on clergy probably would violate this separation. A concurrence argued that the decision should have been more narrow and as the defendants presented themselves as competent spiritual counselors, they did have a legal duty to care. That duty, though, ended at the defendants' proper suggestion that Nally seek mental counseling, and the concurrence held that the defendants had met their duty and so were not liable even under its standard.

See also *Church of the Lukumi Babalu Aye* v. *City of Hialeah; Employment Division* v. *Smith; Fike* v. *United Methodist Children's Home of Virginia, Inc.*

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National Academy of Sciences

The National Academy of Sciences (NAS) is one of the leading academic groups in America. The group has been in existence since the 1860s and aims to advance science. The academy covers all areas of the sciences, but it has developed a number of associated groups to better serve its public. Among those are the

National Academy of Engineering, the Institute of Medicine, and the National Research Council (NRC). The last group covers all those in the science and technology sector who are not served by the more focused groups. Membership in the NAS is relatively limited; there are roughly 2,000 members, of whom about 200 have won Nobel prizes. To be elected into the organization, a scientist must first be nominated and then voted in by his or her peers in the NAS.

Among its wide variety of activities the NAS sponsors a science museum and participates in conferences and discussions about current scientific issues. However, it does not limit its research or advocacy to areas understood only by those advanced in the various scientific fields but also is involved in current scientific controversies. Among these controversies is the debate over teaching evolution in public schools.

The organization's principal aim with regard to evolution is the provision of resources. Its web page on the subject links to books produced by a variety of sources, including the NAS itself. Other resources linked there include research materials about evolution as well as articles, and statements by a wide variety of academic organizations. The NAS has also produced a number of position statements on evolution and taken several stands promoting evolution and opposing efforts to limit its teaching in the public schools. The Kansas State Board of Education in 1999 produced teaching standards that limited instruction in evolution in the state's public schools. In direct response, the National Research Council arm of the NAS refused Kansas the right to reproduce material from the National Science Education Standards. Rather than rewriting all of the standards and redoing all the work, Kansas, like many other states, simply borrowed and adapted the national standards and then asked for permission to reprint them. Because of the state's stance on evolution, the NRC denied the request. As Kansas violated what the National Research Council saw as good science, it was not allowed to use the material.

Kansas eventually reversed its position, and the National Academy of Sciences supported its change in position. However, in 2004, after another election in Kansas for the State Board of Education, the board again decided to change its standards, and they reverted to a version that was closer to the 1999 standards. This time, the NAS, not its NRC arm, decided to deny the state permission to reproduce its copyrighted material. Chief among the academy's concerns were the ways the new Kansas standards focused on the evolution controversy and the way they used the public, rather than the scientific, definition of a theory. The public definition of a theory is something that has not yet been proven. However, in science, a theory is a working understanding of a concept, and theories are constantly tested and examined in science. Thus, to scientists, a theory is something that is becoming better understood rather than something not yet proven. The NAS also noted that the standards singled out evolution as a controversial theory without any scientific justification for doing so. The NAS thus forced Kansas either to rewrite the standards to make them more acceptable to the NAS or to write their own standards, and criticized Kansas for their choice. The dispute is still ongoing.

Thus, the National Academy of Sciences, as part of its effort to promote science, takes a strong stand against those who would restrict the teaching of evolution. The NAS is using all the weapons at its disposal, including its copyrights, to influence Kansas, most prominently, and others to reconsider their policies. The organization has had some success, but the issue will continue to be visited in the coming years.

See also *Edwards* v. *Aguillard; Kitzmiller* v. *Dover Area School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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National Center for Science Education

The National Center for Science Education (NCSE) aims to improve science education throughout America. Its main focus is to support the teaching of evolution in the public schools. It notes that it is the only organization specifically founded to fight for the teaching of evolution and to oppose efforts to eliminate or marginalize evolution. The NCSE has taken a strong stand against the teaching of creationism and intelligent design (ID) in the public schools, and so has entered into the religion and law debate.

The NCSE is headquartered in Oakland, California, and was founded in 1981. It views itself as being a religiously neutral, scientifically grounded organization that cooperates with religious, scientific, and educational organizations. Among the groups with which it works are the National Academy of Sciences, the National Association of Biology Teachers, and the National Science Teachers Association. It is certain that those who feel evolution conflicts with their religious viewpoints would stay away from NCSE.

The NCSE counts among its supporters several prominent scientists. These include the late Stephen Jay Gould, who taught at Harvard and wrote a number of well-known books; Donald Johanson, discoverer of the Lucy fossil; and Bruce Alberts, president of the National Academy of Sciences. Not all of its supporters are academics—the list includes James Randi, a debunker of magical claims, and Bill Nye, the Science Guy from PBS.

Eugenie Scott, executive director of the National Center for Science Education, enters federal court in Harrisburg, Pennsylvania, on September 27, 2005. At issue was the clash over whether intelligent design had to be mentioned alongside evolution in public school science classrooms. (AP Photo/Carolyn Kaster)

The NCSE recently gained attention when it argued against an anti-evolution disclaimer in a Georgia school. The group's efforts focus on more than just legal areas, however, and the organization does not provide legal assistance. However, for school boards and others interested in supporting evolution, the NCSE will help them find legal counsel when policies promoting evolution are challenged. The group also publishes a journal, *Reports of the*

National Center for Science Education, which includes discussions about its own evolution efforts and the efforts of opponents of evolution as well as articles and book reviews on various facets of the controversy. The books reviewed are not only recently published works but often represent the early writers on the issues, including Charles Darwin and Alfred Russel Wallace.

The group's main goals are working at the local level, providing publications, and educating the public at large. Among the efforts that it will undertake at a local level are helping school boards who want to fight against anti-evolution efforts and providing information so that interested groups do not have to research everything alone. NCSE officials often appear on national radio and television shows and write in national publications. NCSA executive director Eugenie C. Scott and deputy director Glenn Branch have written pieces in *USA Toda*y and appeared on national talk shows like *Hardball with Chris Matthews.* NCSE speakers and writers are often paired with opponents from the other side of the evolution-creation/evolution–intelligent design debate such as those from the Discovery Institute.

The NCSE also gathers information from across the nation and archives it. A variety of reports are available, including one on the anti-evolution efforts publicized over the last sixty days and a state-by-state breakdown of anti-evolution efforts. (The term "anti-evolution" is used here as that is the term used by the NCSE.) The NCSE has gathered links to a wide variety of organizations and websites, including links to creationist websites and to organizations all over the world. The group's website also provides links where shoppers can buy books recently mentioned or reviewed in its journal or requested by its members as well as videos and DVDs on the topic and products that the NCSE has produced. Among the items in the last category are audiotapes of conference sessions on the evolution controversy, audiotapes of debates on the topic of evolution, and videotapes of various things, including spoofs. Fiction and humor books are also linked, including a parody of the *Canterbury Tales.* For those interested in the larger topic of civil liberties, the links page includes a list of organizations (all of them linked) interested in fighting for civil liberties.

The National Center for Science Education attempts to provide, at a single location, an exhaustive amount of information about the evolution controversy, from, of course, the standpoint of those who wish to keep evolution in the schools.

See also *Edwards* v. *Aguillard; Kitzmiller* v. *Dover Area School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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Native American combination of religion and law

Many Native American tribes combine religion and the law as a natural part of their culture. However, conglomerating together all Native Americans into one group produces improper generalizations, as there were and still are a number of different religions and governing systems among the Native American people of the United States. The policy of white Americans toward Native Americans, particularly their religion, has generally not been benevolent or beneficial. An important goal of the government was to "save" the Native Americans by converting them to Christianity;

although this policy was conceived as one of kindness, a second and equally important purpose was to drive Native Americans away from white settlements, considering only white rights. A large part of the 1887 Dawes Act was aimed at converting Native Americans to white religions, particularly Protestant ones.

After the 1930s, American government policy became more benign, returning the reservations to greater tribal control; and since the 1960s, from the federal government's perspective, the Bill of Rights has been extended to cover all Native Americans. The Indian Civil Rights Act of 1968 applied most of the Bill of Rights to Native Americans, but it did not extend the establishment clause, and thus Native American tribal governments are free to establish religions, which is quite common. In several tribes, religious leaders are also involved with tribal government, and so the establishment clause would deny their right to govern themselves according to tribal custom, if it were applied. One sign of this is the case *Native American Church* v. *Navajo Tribal Council* (Tenth Circuit Court of Appeals 1959). There the Navajo Tribal Council had banned use of peyote, used by the Native American Church. It should be noted that not all Native American religions use peyote. However, the Native American Church did so, and it attempted to use the establishment clause of the U.S. Constitution to prevent the Navajo Tribal Council from banning its use in religious ceremonies. This clause was not held to apply to Indian tribes, even though it applied to state governments and the federal government. Thus, the Navajo Tribal Council was upheld in its ban.

As far as criminal law goes, in general the federal government has the right to try Native American defendants for felonies. In those areas where established tribes exist and where the American government has given those tribes jurisdiction, the tribes can impose punishment on their members, but only for acts specifically banned in Native American laws. Originally the federal government gave all power to the tribes, but the 1885 Major Crimes Act reversed this. The 1968 Indian Civil Rights Act went even further to limit tribal jurisdiction, holding that the greatest penalty a tribal court could impose was a penalty of a year and a day; any crime with a longer sentence would automatically be tried in federal court, and this restriction limits the tribal jurisdiction to mostly misdemeanors. In general, the law has moved to take criminal jurisdiction away from the tribes, curtailing the idea of natural rights and looking instead at what powers the federal government has allowed tribes to use. The difference here is that if natural rights control, then the tribes have all rights a group has naturally, unless the federal government has acted specifically to remove them. However, when the federal government must grant rights, then lacking a specific pronouncement conferring a right, that right remains with the federal government.

Interaction with the larger American legal system has shaped Native American law as well. Native American law originally operated very much at the level of the band, but the law has become more centralized, and now law is mostly decided at the tribal/national level. The reason for this is that the need for resistance to U.S. government policies forced more collectivization. Native American laws and traditions have been greatly shaped by their religious views. In both religion and culture, in most tribes, the emphasis is not on the individual, as it is in most Western systems, but on the value of the group. Most Native American tribes have been more interested in the good of the whole tribe rather than in the rights of the individual. Native American views of warfare are also quite different from white views. In most Native American wars, only a few were killed, as once the damage or insult that started the war was over, the war could cease; such is not the case in most European wars.

One specific area in which tribal law, religion, and U.S. laws interact today is in peyote ceremonies. Peyote is illegal under U.S. government law, but it is used in sacraments in

several, but not all, Native American religions. In the 1960s, some convictions under state law were reversed in California as the California Supreme Court held that the state law did not define enough of a state interest to justify the infringement on the Native Americans' religion. At that point, a compelling state interest was required, according to the U.S. Supreme Court. By 1990, however, this view had changed. In *Employment Division* v. *Smith,* the U.S. Supreme Court held that as long as the law was neutral, the government needed only a rational basis for a law that infringed on religion, such as a law banning peyote use, the same as any other law.

Thus, Native Americans have long mixed religion and the law, and religion has had a strong influence on Native American law. The federal government does not necessarily allow Native Americans to emphasize tribal laws and has recently given the state more power to regulate Native American religion, particularly in the area of peyote use.

See also American Indian Religious Freedom Act; *Employment Division* v. *Smith;* Religion and prisons

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New Jersey v. *Massa*

231 A.2d 252 (N.J. Sup. Ct. 1967)

This case, decided by the supreme court of New Jersey in 1967, dealt with the standards that a state can impose upon home schools. Obviously, states wish for students to have qualified teachers. Home schools, however, exist outside most of the state-controlled structure, making it difficult for states to regulate teacher qualifications. This case is important to the interaction of religion and the law, as many people home school for religious reasons (although religious reasons are not the only ones), and so regulation of home schools is an important part of the interaction of religion and the law even when the regulations have no direct relation to religion.

In this case, two high school graduates with no college degrees were teaching their daughter at home. The school board protested, and the local judge imposed a large fine. The supreme court held that in this case "the sole issue . . . is one of equivalency," that is, whether the education received at home was equivalent to the education that would have been achieved at school (231 A.2d 252: 253). The court noted the teaching efforts undertaken by the mother and the good scores and other evidence that the daughter received on standardized tests. The state argued that without certification, it was difficult to have equivalency and that students educated alone missed out on social elements available to students at public schools.

The court stated that there were two legal issues here: first, what the state meant in its statutes when it required equivalent education, and second, whether the state had proven, beyond the reasonable doubt required to convict here, that the education was not equivalent. The court looked at home-school practices in other states and held that other states had required certification of its teachers, even in home schools, and that New Jersey's failure to require this meant home-schooling parents did not need certification. Instead, they were required by the statute to teach equivalent amounts. It also held that since home schools had been considered in the past, in New Jersey, to constitute private schools, schooling in home schools was permissible so long as it was equal to what was available privately. As a whole, the court held that "the object of the

statute was stated to be that all children shall be educated, not that they shall be educated in a particular way" (231 A.2d 252: 256). The court then turned to the issue of equivalency. It held that, though one area might be deficient, an equivalent education was being provided (there were questions of the daughter's success in mathematics).

Another case dealing with a similar issue was *Grigg* v. *Virginia,* which was decided by the supreme court of Virginia in 1982. There, the question was whether a home-schooling parent had to be a qualified tutor or teacher when this was not required of private schools. The parents asked whether they could be covered by the private school exemption. The court held that they could not. It ruled that since the statute in question specified that home schools had to have certified teachers, the state did not intend to lump home schools and private schools together, meaning the home school could not achieve an exemption under the private school provision. The court also held that the statute's creation of the two separate categories was more important than the fact that the state failed to regulate the quality of the private school instructors. The court also found that this was generally a civil matter and so should be decided on a standard requiring the state to prove its case by a "preponderance of the evidence," not "beyond a reasonable doubt," and held that since the lower court had required that the reasonable doubt standard be used, the parents had no reason to complain, as this gave them more protection than they probably deserved.

The court considered the issue of vagueness, as the statute did not discuss private schools to any great extent. It held, however, that "we think it beyond question that average parents reading [the statute] would know they could not instruct their children at home as an alternative to public instruction unless they were qualified as tutors or teachers according to the statute's requirements" (297 S.E. 2d 799: 805). Thus, the parents should have known that they were covered by the home-school provision rather than the private school provision, and that part was specific enough. In other words, the parents could not complain about the vagueness of a portion of the statute that did not affect them.

On the whole, the Virginia Supreme Court held that regardless of whether the parents had a good reason for objecting, the state had the right to require that the teachers be certified in home schools, even while skipping that provision for private schools. Though the issue of religion was never specifically mentioned, one of the parents' objections to public schools was that they "did not believe [their children] were receiving an adequate education, because he [the father] did not approve of the language and violence present in the schools, and because he deplored the lack of morality in the public school setting" (297 S.E. 2d 799: 801). The parents' attorney chose not to connect morality to religion, though the relationship could easily have been present and though many home schools exist for religious reasons.

Thus, states can require that home-school teachers be certified and can therefore restrict who can home school. This plays a factor in the interaction of religion and the law. If a parent is home schooling for religious reasons and does not meet the state's requirements for the home school, in teacher qualifications or otherwise, the parent's religion is restricted; however, the state would be allowed to impose this restriction as long as the regulations were enforced on a religion-neutral basis.

See also Curriculum of home schools and reporting; *Null* v. *Board of Education; Swanson* v. *Guthrie Independent School District No. I-1; Snyder* v. *Charlotte Public Schools*

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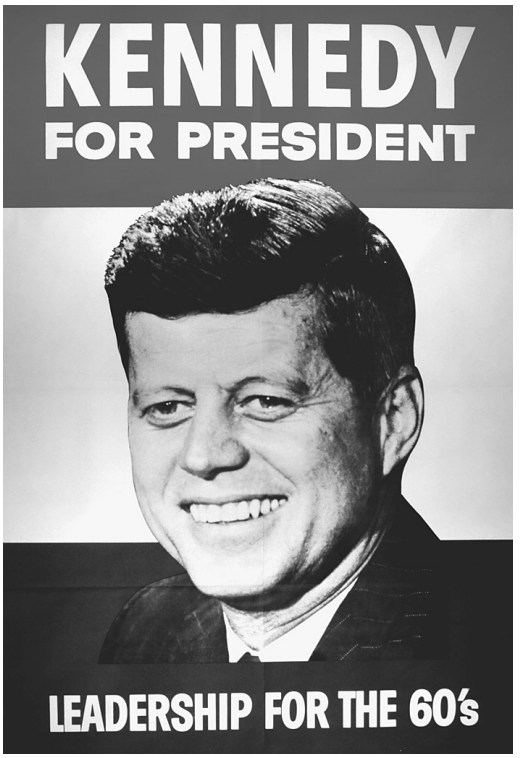
1960 election and role of anti-Catholic sentiment

American views of Catholicism have played a role in many American elections, particularly those of 1884, 1928, and 1960. Freedom of religion had to be included in the U.S. Constitution for good reason: sectarianism and fear of others' religions have long controlled public perceptions. Particularly, politicians long played up public fears that a Catholic president would take his political orders from the pope. In the twentieth century, this was particularly true in the 1928 and 1960 elections. However, John Fitzgerald Kennedy's 1960 win began a shift in public attitude that would be reflected in the 2004 presidential election.

In the election of 1884, Grover Cleveland was running for the Democrats, while James G. Blaine was running for the Republicans. A clergyman, Dr. Samuel D. Burchard, who supported Blaine, called the Democrats the party of "rum, Romanism, and rebellion," referring to the party's stances in favor of allowing people to drink (rum), its large Catholic contingent (Romanism), and its support of the South in the Civil War (rebellion). While Blaine in no way supported this statement, he was unable to distance himself from it, and it may have played a role in his defeat. Lately, though, historians have pointed to other issues that swayed the election, including Blaine's participation in questionable investment schemes.

In 1928, Alfred Smith ran for the Democratic Party, while Herbert Hoover ran for the Republicans. Smith was a Catholic from New York, and this generated opposition from many Southerners. He lost convincingly to Hoover, and at first blush, Catholicism might have seemed the reason. However, Catholicism was only one reason of several. Smith also had to battle against public perceptions of his support for the legalization of alcohol. (Prohibition was still the law of the land in 1928.) His urban roots lost him still more votes. (Many Democrats, particularly those in the South, were from rural areas.) Finally, the economy had been stable under the Republican Party since 1921. (Historically, parties in power tend to stay in power when the economy is doing well.) These three factors did not necessarily cause Democrats to vote for Hoover over Smith, as few Democrats at this time would have switched parties, but it did lose him votes from the independents and did cause Democrats not to come out to the polls. The last issue, the economy, is probably the one that lost him the most votes. A more detailed analysis also indicates that Smith did better than many people thought at



Campaign poster for John F. Kennedy's successful presidential bid in 1960. (John F. Kennedy Library)

the time. Smith won all twelve of the largest cities in America, and in 1924 the Republicans had won all twelve. In 1924, Smith had also been a candidate for the Democratic nomination, however anti-Catholic sentiment led the party to choose a weaker candidate, John W. Davis, who won only 28 percent of the vote. Thus, anti-Catholicism led to the Democrats losing two presidential elections in the 1920s. Following the 1928 election, rumors and jokes suggested that Smith had telegrammed Pope Pius XI a one-word telegram, "unpack."

The 1960 election also bore the imprint of religion. John F. Kennedy, a Catholic, was the Democratic nominee. He was able to win the nomination in spite of anti-Catholic opinions because of his father's massive financial backing and the late start of Lyndon B. Johnson. In the national election, Kennedy's Catholicism again was an issue. Kennedy managed to answer that issue in a speech to the Houston Ministerial Association. He explained that he supported absolute separation of church and state, that he did not believe any religious organization should influence the president, and that he did not speak for the Catholic Church on public matters, nor it for him. Kennedy also appeared to convincingly win the first televised TV debates, as he was more photogenic than his opponent, Richard Nixon. Once Kennedy was elected, his Catholicism played little role in his three years in the White House. His foreign policy of containment was an anti-communist move, not one prompted by his Catholicism, and in domestic affairs, Kennedy did little that directly reflected his religion.

In the 2004 election, another JFK (Senator John Forbes Kerry) ran for the Democrats and Catholicism was again an issue. However, by this time, the question wasn't whether Kerry's religion would influence him in political matters, but whether he was a "good Catholic." The question arose because he was pro-choice, distancing him from the official Catholic Church and leaving some bishops unhappy with his views. The archbishop of Boston, Sean O'Malley, proclaimed that pro-choice Catholics could not take communion properly, and St. Louis archbishop Raymond Burke refused Kerry communion on that basis. Republicans attempted to play the issue up in order to gain votes, but Kerry himself deflected the issue by noting that people of a religion were allowed to differ. Kerry lost, but it was probably due more to the issue of gay marriage than to issues surrounding his Catholicism.

The issue of religion has never again influenced the American presidential election as it did prior to 1960. Kennedy's popular presidency followed by the sweeping changes that Vatican II brought to Catholicism have shifted America's perceptions about having a Catholic in the White House. Anti-Catholic political sentiment diminished in the forty-four years between Kennedy's election and Kerry's candidacy, and while Kerry certainly lost some conservative Catholic votes because of his stances, it is generally agreed that fear of the pope did not cause him to lose the election.

See also Bible controversy and riots; Maryland charter and 1654 law disestablishing religious freedom; Religion in presidential elections before 1960; Religion in presidential elections since 1960

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1995 statement on "Religious Expression in Public Schools"

This statement sets forth standards for addressing religious expression in public schools. The

standards' supporters believe its criteria are evenhanded. However, some feel that the statement contains too much support for prayer in public schools without enough definition of voluntary prayer, while others fear the statement will limit religious freedoms they consider to have been already heavily impinged upon. The statement itself (pp. 376–377, in full) is pretty straightforward, so it is important to understand the legal background of each part.

Most of the statement is grounded in Supreme Court decisions. The first area addressed is school prayer. The statements about prayer are based on several cases, including *Engel* v. *Vitale* (1962), which banned state-mandated prayer, and *Lemon* v. *Kurtzman* (1971), which created the three-pronged *Lemon* test and forbade schools from either promoting or inhibiting religion. The Supreme Court has noted on several occasions that its past decisions have not banned voluntary prayer. The general language on the school's authority comes from a variety of decisions, from *Tinker* v. *Des Moines* (1969) to the present.

The statement on prayer at graduations comes in large part from *Lee* v. *Wiseman* (1992), which held that a nondenominational prayer at a middle school graduation was not allowable.

The section noting that schools are required to provide equal access to religious and nonreligious groups comes from the 1984 Equal Access Act, which states that schools must give equal access to all "non-curriculum related groups" and also comes from *Lemon*. The idea means, in practice, that if a school allows access to its facilities for one non-school group, it must open it to all, and it must allow religious groups to be able to use it for (for example) baccalaureates, as long as these are privately sponsored. This comes in part from decisions that were most recently reaffirmed (although after the 1995 statement) including *Good News Club v. Milford Central School* (2001). Decisions before the 1995 statement included *Police Department of City of Chicago* v. *Mosley* (1972) and *Westside Community Board of Education* v. *Mergens* (1990).

The conclusion about the importance of official neutrality comes from a variety of decisions, most notably the *Lemon* decision. Decisions have noted that a teacher may be ordered to put away the Bible during class time, and that teacher participation in after-school religious clubs can be restricted, both in order not to promote religion.

The statements noting that it is acceptable to teach about religion come from the school prayer cases and from cases such as *Wiley* v. *Franklin,* from Tennessee in 1979, which held both that Bible study classes could be held only in rare instances when the Bible was studied solely as literature, and that the history of the courses in question needs to be carefully considered. Halloween and Thanksgiving have been allowed as secular holidays in the schools, but Christmas is a more controlled one, and sometimes a Christmas carol is allowed only if it has cultural significance. While some states have been banned from having Good Friday as a holiday, this holiday is permitted in other states (in different federal districts). Thus, the federal circuit in which a state is located controls its ability to offer Good Friday as a holiday. The *Metzl* decision (1994) notes that the school cannot observe a holiday as a religious event. This is less restrictive than forbidding the holiday. A school board, for instance, might elect to take the holiday as the start of spring break, or as a simple day off or maintenance day, without including religious notation.

The rules permitting students to make a religious response to an assignment in homework or artwork come in part from the whole idea of neutrality most notably advanced in the *Lemon* test and reaffirmed by nearly all decisions on religion in the public schools since, including those cases that favored allowing government money to flow to religious schools.

The section permitting students and outside groups to circulate religious literature comes from religious groups wishing to access students by passing out literature in the schools. The courts have held, and circuit courts of appeal decisions have recently reaffirmed, that religious groups must be given equal access with other groups who wish to pass out materials advertising themselves to the students. A school could end distribution of all handouts from out-of-school groups, but few schools would want to be so restrictive.

The language explaining that no federal law guarantees students' excusal from religiously objectionable lessons is grounded in part on the whole idea of equal treatment, leading from the First Amendment. For a time in the 1990s, the Religious Freedom Restoration Act might have required this, but that act has since been overruled, as it applies to the states, in *Boerne* v. *Flores* (1997). The statements allowing off-grounds released time for religious activities are based on *McCollum* v. *Board of Education* (1948) and *Zorach* v. *Clauson* (1952), which struck down released time programs on school grounds but allowed them if they were off school grounds. The released time programs have become less of an issue now, as fewer students pursue religious education during schooltime.

Schools are allowed to advocate a core of values, but those values, and especially the discussion of those values, need to steer clear of religion. Schools have had difficulty holding to this course but have continued to try. Another difficulty is, of course, that standardized tests, which have become increasingly important, do not test anything about values (which may be a statement about values in and of itself).

The student clothing rules are based on the absence of a federal law that protects students' clothing, but students do not give up all their rights in school. However, all religious clothing cannot be banned when no restrictions are put on other messages, as that would be a regulation based on content, and content-based restrictions are viewed with great suspicion by the courts. A dress code requiring a school uniform might be upheld, but it would very likely depend on what judicial circuit the school was in, as the Supreme Court has never ruled on the issue. Some circuit courts have upheld uniforms, while others have struck down bans on particular types of messages carried on shirts. A ban on all messages on clothing would not be upheld, though, which would be the same result as a ban on all jewelry or symbols, as it would be a total censorship of speech. Students do not leave all their rights concerning clothing at the school door, a rule that was first announced in 1969 in *Tinker* v. *Des Moines* by the U.S. Supreme Court and is still largely true today. Schools can ban clothing with disruptive messages, and courts have differed on how disruptive the message must be before it can be banned as well as what messages can be banned. School policies in general need to aim to be fair, need to give students a chance to fix the problem, and need to allow school officials a chance to review the offense before acting.

The statement was written by U.S. Secretary of Education Richard W. Riley with the hope of providing each school with specific guidelines about religious conduct that laid out in plain English the practical impact of a variety of Supreme Court decisions for public schools. Of course, its supporters believe it demonstrates that the First Amendment protects students' religious freedoms adequately and that it allows students both room for freedom of religious expression and freedom from the imposition of another's religion. However, some of its detractors fear that it gives too much ground to the religious right, allowing too wide a latitude in the permissions it grants regarding prayers. Others, by contrast, feel the document overly limits freedom of religious expression by students in schools. The statement was revised once, when the Religious Freedom Restoration Act was declared unconstitutional but has since remained

Religious Expression in Public Schools

Student prayer and religious discussion The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent that they may engage in comparable nondisruptive activities. Local school authorities have substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before- or after-school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity Teachers and school administrators, when acting in those capacities, are representatives of the state, prohibited by the establishment clause from soliciting or encouraging religious activity and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content and from soliciting or encouraging antireligious activity.

Teaching about religion Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative

religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals Subject to applicable state laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time Subject to applicable state laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. Because some of these values are held also by religions does not make teaching them in school unlawful.

Student garb Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no federal right to be exempted from religiously neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general or attire of a particular religion for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression but rather are subject to the same rules as generally apply to comparable messages.

unchanged. It will likely be modified by future Supreme Court decisions as the government attempts to find middle ground on a heated issue.

See also *Engel* v. *Vitale; Good News Club* v. *Milford Central School; Lee* v. *Weisman; McCreary County* v. *ACLU;* Right to distribute religious materials in schools; *Zorach* v. *Clauson*

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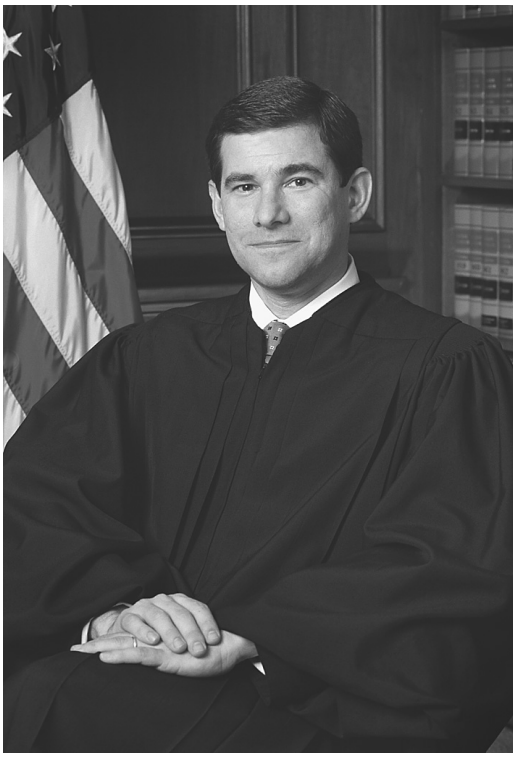

Judge William Pryor was appointed to the Eleventh Circuit Court of Appeals in 2004. A conservative Catholic, Pryor's nomination in 2003 was filibustered by Democrats who objected to his outspoken opposition to abortion rights and homosexual rights. (U.S. Court of Appeals)

Nomination of William Pryor to the Eleventh Circuit Court of Appeals

In 2003, William Pryor (1962–) was nominated to the Eleventh Circuit Court of Appeals. His nomination was filibustered because of Democratic opposition. Though his supporters claimed that this opposition stemmed from Pryor's Catholicism, his opponents insisted it was based on his political views.

Pryor attended Northeast Louisiana State University and then Tulane, graduating from Tulane magna cum laude. He spent a year clerking for a Fifth Circuit Court of Appeals judge and then moved into private practice. He spent seven years there and then served as deputy attorney general in Alabama. When the attorney general moved to higher office, Pryor was appointed and twice won the office in elections. He also was prominent in Republican circles.

He was nominated in 2003 for the Eleventh Circuit Court of Appeals, which was, as are all federal judgeships, a lifetime appointment. Democrats opposed him for his strong anti-abortion views and his desire to limit the Miranda warning, which is supposed to be read to all suspects after arrest. Democrats also pointed to his critical comments about homosexuals. Pryor, for his part, claimed that he had served as attorney general evenhandedly and would do the same as judge. Of course, the attorney general position is an elected post and the judgeship of the Eleventh Circuit is a lifetime

post. The Democrats managed to filibuster the nomination successfully, causing its failure.

His supporters, including Utah's Republican senator Orrin Hatch (1934–), claimed that the filibuster came about because of Pryor's Catholic religion. Democrats, on the other hand, noted the aforementioned political reasons for their opposition and pointed out that they were not consulted on this or many other nominations. This situation highlights the difficulty for judges, as religion is often a formative influence in personal views; if those religiously formed views are opposed by the Senate, it can be difficult to distinguish between political and religious opposition. As he was unable to appoint Pryor during the congressional session, President George W. Bush (1946–) instead used his presidential authority to appoint Pryor to the Eleventh Circuit when Congress was in recess, and Pryor began serving in 2004.

Pryor was stopped by one of the Democratic filibusters that Republicans claimed was unfair. Republicans, over this controversy, threatened to end the Democratic right to filibuster judicial nominations. In 2005, moderate Democrats and Republicans worked together to preserve the right to filibuster and agreed to have a vote on some of the blocked nominees including Pryor, whom Bush had renominated in 2004. In 2005, Pryor was approved and became a regular (non-recess) member of the Eleventh Circuit. Thus, Pryor was eventually confirmed, but not without controversy, whether due to his religion or his political views.

See also William H. Rehnquist; Antonin Scalia

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Null v. *Board of Education*

815 F. Supp. 937 (W.Va. 1993)

This case, decided by the U.S. District Court for the Southern District of West Virginia in 1993, examined whether a state could restrict the availability of home schooling. In West Virginia, children could be home schooled but had to take a standardized test every year. If a student scored below a certain percentage, remedial education had to be inserted into the home-schooling curriculum. If the student's subsequent test score failed to meet the required level after the end of the first year of remedial work, the student had to cease home schooling. In this case, the level was at the fortieth percentile, or a score above that of 40 percent of the children nationwide who took the test.

The parents of a home-schooled child who twice failed the test sued, claiming, among other things, that the order forcing them to cease their child's home schooling violated their liberty. They asked for a preliminary injunction while the local board of education moved for a summary judgment. The school board's argument was that the case was so clearly in their favor that it did not need to go to trial. The court denied the preliminary injunction, holding that the child would meet minimal, if any, harm in returning to school, and that the parents had little chance of success. The parents claimed no specific interest other than the general interest of "liberty," and the court held that in this case the regulation forcing school attendance (when students had twice scored poorly on a test they had to return to regular school) was reasonable. The parents here did not argue that they were being discriminated against because of their religion, but this case is still of interest to the intersection of religion and the law, as many people who home school do so for religious reasons. Those who sue claiming discrimination against their religion would have a specific claim, but they would likely still need to

prove discrimination against their religion rather than low test scores by their child as the reason for the student's being forced to attend public school.

The court then turned to the issue of summary judgment. It held for the school board, stating "the likelihood of harm does not weigh in Plaintiffs' favor, Plaintiffs have not demonstrated likelihood of success on the merits, and the public interest in thoroughly educating its citizens is substantial. Based on the Defendants' right to judgment on the Constitutional claims . . . the Court GRANTS the Defendants' motion for summary judgment" (815 F. Supp. 937: 940). Thus, the court ended the case with a summary judgment for the school board.

See also Curriculum of home schools and reporting; *New Jersey* v. *Massa; Swanson* v. *Guthrie Independent School District No. I-1; Snyder* v. *Charlotte Public Schools*

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O

Sandra Day O'Connor

First Female Supreme Court Justice
Born: 1930

Sandra Day O'Connor, the first woman on the U.S. Supreme Court, had a profound influence on the legal relationship between the U.S. Constitution and religion. She was appointed to serve both as the first woman and as a conservative. President Reagan hoped she would either remake or reclaim the Constitution, but she was a more centrist judge than her original supporters expected her to be.

She grew up in Texas and Arizona, graduating from high school at the age of sixteen, and attended Stanford for her undergraduate degree. She progressed to Stanford Law School, graduating third in her class in 1952. After law school, prejudice against women limited her choice of jobs and she eventually started work as a deputy county attorney. She was active in politics and raised a family, returning to full-time legal work in 1965. She then served as an assistant attorney general and was elected to the Arizona Senate, becoming majority leader there by 1972. She gained attention nationally, being viewed as a conservative on many issues but a moderate on some feminist issues, such as abortion.

Sandra Day O'Connor was the first woman to serve as an associate justice of the U.S. Supreme Court. (Collection of the Supreme Court of the United States)

In 1980, Ronald Reagan was elected president. He had promised to appoint a woman to the Supreme Court. In 1981, he picked O'Connor, and in her early years on the Court O'Connor stayed strongly with the conservative wing, generally voting with Rehnquist and then Chief Justice Burger. In time, however, her decisions reflected more of a centrist role on the Court. One area in which this is the clearest is that of abortion. Many conservatives had hoped that after Reagan and George H. W. Bush had appointed five justices to the Court there would be a majority that would overturn *Roe* v. *Wade.* At first, O'Connor seemed to fit into this mold, as she voted with the majority in the 1980s to allow states to limit abortions. However, in 1992, in *Planned Parenthood* v. *Casey,* O'Connor, along with Kennedy and Souter, created a more central position. O'Connor, in that case, held that if a law created an "undue burden" in the way of women seeking an abortion, it could be struck down. While still allowing restrictions on *Roe,* this case did not overturn it.

In the area of religion, O'Connor created the concept of "ceremonial deism," or the idea that some religious ideas and ceremonies have become so ingrained over time that they are

part of our national culture rather than an endorsement of religion. O'Connor voted in 2004 to allow the words "under God" to remain in the national Pledge of Allegiance, as those words were, in her mind, part of "ceremonial deism." The Court ruled that the person bringing the suit lacked standing to do so, and O'Connor was one of three justices agreeing with this, but she also stated that the pledge should be allowed to remain unchanged. O'Connor's view was that there are "nonreligious" times when such deism enters our country's heritage; however, she specified that such occasions should not have prayers, should not mention any particular religion, and should maintain a low level of overall religious content. She stated, "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it" (542 U.S. 1: 72).

In general, in dealing with religion, O'Connor, stood mostly in the center of most decisions but with definitely conservative leanings. She was in the minority when the Court overturned the Religious Freedom Restoration Act, believing the government should not be able to substantially burden the freedom of religion without proving it to be needed to achieve an important government need. Additionally, she voted in favor of allowing public school teachers to teach secular subjects on private school grounds, holding that this did not endorse religion. However, she also voted against the display of the Ten Commandments in public places, as she believed it showed that the government was endorsing a religion. Finally, she voted against allowing officially requested prayers at graduations, holding that for a school principal to invite a religious figure to give a benediction did represent state endorsement of religion.

O'Connor, along with Kennedy and Souter, in the 1990s and early 2000s, had a very important position on the Court. After 1994, the liberal wing of the Court consisted of John Paul Stevens, Stephen Breyer, and Ruth Bader Ginsburg. (These wings are by no means fixed, particularly in religion, as it was Breyer who cast the fifth vote to allow the display of the Ten Commandments in Texas in 2005.) The conservative wing consisted of Antonin Scalia, Clarence Thomas, and William Rehnquist. For either side of the court to create a majority in the truly contested cases (note that even at the Supreme Court level, a fair percentage of cases are decided by an 8–1 or 9–0 vote), the votes of two of the three centrists were needed. This gave O'Connor a fair amount of power in this period.

On July 1, 2005, O'Connor announced her retirement at the relatively young age of seventy-five. At that age, she is the youngest justice to retire since Abe Fortas left the Court in 1969, and he departed under a cloud of allegations about financial misdealings. However, O'Connor leaves under no such cloud. She was a well-respected member of the Court and had always maintained that she would retire when she was ready to do so. After the death of Chief Justice Rehnquist, she announced that she would stay on the Court until the new chief justice was confirmed and her replacement was selected, and she did so, retiring in 2006.

See also *Agostini* v. *Felton; Boerne* v. *Flores; Elk Grove Unified School District* v. *Newdow; Lee* v. *Weisman; McCreary County* v. *ACLU; Roe* v. *Wade*

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Madalyn Murray O'Hair

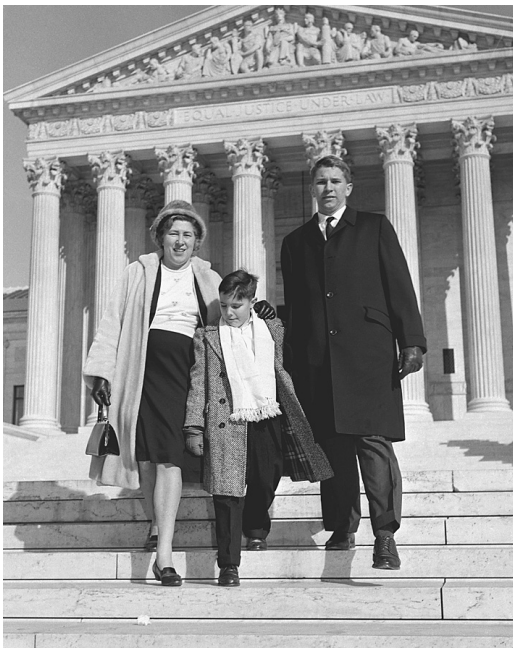
American Atheist and Activist
Born: 1919
Died: 1995

Madalyn Murray O'Hair was probably the best known (and best hated) of all American atheists in the twentieth century. Indeed, she described herself as the most hated woman in America.

She was born in Pittsburgh, Pennsylvania. She attended both the University of Toledo and the University of Pittsburgh, but eloped with J. Roths. She had a child with William J. Murray and eventually married him after divorcing Roths. In 1948, she finally graduated from Ashland University and then attended the South Texas College of Law, being awarded a Juris Doctor degree in 1953.

She first gained wide-scale notoriety in 1963 when the Supreme Court ruled in her favor after she sued the Baltimore public schools for their practice of beginning each day with Bible readings or a prayer. Madalyn sued on behalf of her son, William Murray. She had, before that, organized the American Atheist Center in 1959 and American Atheists, Inc., in 1963. The notoriety she gained through these societies and her winning case led her to flee to Austin, Texas, where she founded the Society of Separationists in 1965. While in Texas she also met and married Richard O'Hair, her marriage to Murray having also ended in divorce, and she had a radio series that was broadcast on over 4,000 radio stations.

Her goals included focusing nationwide attention on the atheist issue. She did this in a number of ways. First, she filed lawsuits that combined the goal of bringing publicity and fighting for what she believed in. For instance, she filed a lawsuit seeking to remove "In God We Trust" from U.S. currency. She also had public forums arguing against clergymen on whether there was a God. After a time, she ran into controversy within both her family and American Atheists, Inc. Her son William converted to Christianity and formed a foundation to fight against his mother's causes. Some of her followers, believing that she was not being democratic in her leadership of American Atheists and that she was too attention seeking, founded their own foundation, the Freedom From Religion Foundation.



Madalyn Murray leaves the U.S. Supreme Court in Washington with her two sons on February 27, 1963. The high court heard opening arguments on Mrs. Murray's attempt to get a court order discontinuing the use of the Lord's Prayer and the reading of the Bible in Baltimore schools. (Bettmann/Corbis)

In the mid-1980s, she stepped down from running American Atheists and allowed her son Jon to run it. She attempted to take over another atheist organization in the late 1980s but wound up bankrupt with little remaining influence in atheist circles.

Her death was, in many ways, as attention getting as her life. She disappeared in 1995 from her home in Texas, along with her son, Jon, and her granddaughter. It was found later that the IRS wanted back taxes from the son and that the organization, American Atheists, Inc., was

missing funds. American Atheists claimed that nothing was wrong for quite a long time, and no one really launched a search for the missing O'Hairs until 1998. There were suspicions about her disappearance, though, and a former employee of American Atheists, David Waters, was suspected. A reporter, along with a private investigator, acquired Waters's cell phone records and discovered that he had been regularly communicating with a small-time criminal, David Fry, who had also disappeared. DNA was obtained from Fry's family, and it was tested against a body that had been found. The body's DNA matched Fry's, in 1998, and that finally started the sincere investigation of the O'Hairs' disappearance.

When Waters was an employee of American Atheists, he had stolen $50,000, leading to his public condemnation by O'Hair in her newsletter. Waters did not like this and kidnapped O'Hair, her son, and her grandaughter, with the help of Fry and another criminal, Gary Karr. Waters manipulated Jon to use $600,000 of the agency's money to buy gold coins, and then Waters murdered the three, cut up their bodies, and buried the remains to hide them. This grave was only discovered in 2001 after Waters revealed it as part of a plea bargain. Fry had helped to keep the three hostage and then was killed probably a few days later. Both Waters and Karr were given long sentences for extortion and money laundering. Without the bodies, neither was convicted of any murder. In an interesting twist, Waters had hidden the gold coins in a locker, and when he came back for the coins, they were all gone. The coin thief was eventually found, but no coins were ever recovered, and the theft appears to have been a "lucky" find for the burglar who was randomly breaking into storage lockers. Waters did profit somewhat, in spite of the coin loss; in addition to the $600,000 he had stolen from American Atheists, he had forced Robin and Jon, before they were killed, to also max out their credit cards.

American Atheists survived the deaths of the O'Hairs and is still alive as an organization. However, the group no longer attracts as much attention as when Madalyn Murray O'Hair led the organization. O'Hair was a significant force in the separation of church from state, as she brought legal challenges to several aspects of the interaction between church and state, including Bible reading in public schools. (Note that the Supreme Court case holding Bible reading in public schools unconstitutional is named for the other litigant with whose case Murray's was combined, *School District of Abington Township* v. *Schempp.*) O'Hair also brought the issue to the attention of many people, not all of whom approved, but controversy and notice were important ways for her to attract supporters and further her cause.

See also *Engel* v. *Vitale; Lee* v. *Weisman; Marsh* v. *Chambers; School District of Abington Township* v. *Schempp*

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Ohio Civil Rights Commission v. *Dayton Schools*

477 U.S. 619 (1986)

One question regarding religious institutions is whether the courts can interfere in their internal affairs. This question has been answered in a number of different ways in various cases, but the general answer is yes, if the employees are not ministers and if the challenged action was not required by church doctrine. Four cases, including *Ohio Civil Rights Commission* v. *Dayton Schools,* show some of the boundaries the courts have drawn.

The decision in the *Ohio Civil Rights Commission* was written by Justice Rehnquist and joined by four other justices. The remaining four justices filed a concurrence written by Justice Stevens. This case, which was full of unusual circumstances, dealt with a dispute in a Christian school in Dayton, Ohio, which resulted in an investigation by the Ohio Civil Rights Commission. The school sued, claiming that its rights to free exercise of religion were violated and that the commission did not have jurisdiction. Perhaps the most surprising factor in the case is that the Supreme Court did not actually rule on the dispute that brought about the commission's involvement, but instead ruled on the constitutionality of that involvement and whether the commission could use constitutional issues in its judgment. The school required all attending or employed by it to be "born-again Christians" and to agree "to the internal resolution of disputes through the 'Biblical chain of command'" (477 U.S. 619: 622–623). Specifically, this required "that one Christian should not take another Christian into courts of the State," and this statement was included in the contract of employment (477 U.S. 619: 622–623). The dispute began when a preschool teacher, Linda Hoskinson, became pregnant in 1979 and the school board told her that they would not rehire her because their beliefs required mothers of young children to stay home with their families. The teacher involved an attorney and was immediately suspended, an action that brought in the Ohio Civil Rights Commission. The commission ultimately found in the teacher's favor, recommending that the school re-hire the teacher with back pay and no penalties. The school argued that "the First Amendment prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs" (477 U.S. 619: 624). The school asked the district court for an injunction preventing the commission from acting, and the district court refused. The Sixth Circuit Court of Appeals reversed the lower court's decision. However, the Supreme Court held that the district court should have abstained from adjudicating the case as "a federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury" (477 U.S. 619: 626). Sometimes an "important state interest" is needed for legal involvement with a religious organization, and the Supreme Court held that preventing sex discrimination qualified. The school also claimed that the commission could not consider constitutional issues, but the Supreme Court held that the commission could use constitutional issues while resolving its cases, and that if it failed to do so, or failed to allow the school enough opportunity to assert its claims, it was clear that the ability for a court to review the matter, or judicial review, existed.

The concurrence emphasized the issue of "ripeness," and as the commission had not issued findings, claims related to the First Amendment were premature. The Court's concurrence and the majority both held that the commission did have jurisdiction. The main point of contention between the majority and the concurrence was whether the district court should abstain until the end of the administrative process. Thus, the district court did have jurisdiction and could rule on the proceedings, but should have, in the eyes of the majority, waited until the proceeding ended. However, it was 1986 before the Supreme Court decided the case, which essentially returned the initial matter to the Ohio Civil Rights Commission. In that long time period, the teacher had a total of three children, and she ultimately dropped her suit.

Other cases have also dealt with federal laws covering religious institutions. *EEOC* v. *Southwestern Baptist Theological Seminary* addressed what information the EEOC could require groups to file. The EEOC wished to have reports of the statistical data of the seminary's faculty, staff, and administrators, but the seminary

claimed that all these were ministers. The Fifth Circuit Court of Appeals found that the faculty and the administrators who supervised the faculty were chosen on religious grounds, excluding their data from statistical reporting, as the government should not interfere in a church's dealing with its ministers. The rest of the administrators though, and the staff, were not ministers, and the Fifth Circuit stated their statistical data had to be reported.

A third case, *DeMarco* v. *Holy Cross High School,* dealt with whether a fired teacher could sue a religious school for age discrimination. The school argued that the Age Discrimination in Employment Act (ADEA), if applied against the school, would create an "excessive entanglement" with religion. The Second Circuit Court of Appeals held that the ADEA did apply to the school, as the employee was not a minister, and that the issue of whether age played a deciding role in the firing could be decided without an excessive entanglement with religion. The Second Circut also held that even though religious employers were allowed to discriminate on the basis of religion, other types of discrimination were still unacceptable.

A final case, *Dole* v. *Shenandoah Baptist Church,* considered whether the Fair Labor Standards Act (FLSA) covered a church school. The church school had paid men more than women and paid some staff less than the minimum wage; the school claimed that applying the FLSA to itself would violate the First Amendment. The Fourth Circuit Court of Appeals, however, held that the employees here were not ministers and so were not covered by the minister exemption, that Congress had a significant objective in enacting the provisions, and that the provisions were thus justified and acceptable. No religious provision required sex or wage discrimination, and thus no religious provision was directly at risk; therefore, the Fourth Circuit upheld the application of the FLSA to the school.

Most actions taken by religiously affiliated institutions, such as schools and seminaries, are still covered by federal laws, and those federal laws still apply, as long as the employees are not ministers. If the employees are ministers, however, courts have much more often held that the laws do not apply, and the employee of a minister by a religious institution falls under constitutional protection from government involvement.

See also *Bob Jones University* v. *United States; Corporation of Presiding Bishop* v. *Amos; EEOC* v. *Kamehameha Schools/Bishop's Estate; Maguire* v. *Marquette University*

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Pace v. *Alabama*

106 U.S. 583 (1883)

This case dealt with two provisions of the Alabama Code, one of which addressed adultery and the other interracial sexual relations. The adultery provision provided for a six-month sentence and a $100 fine for the first offense, a $300 fine and a one-year sentence for the second offense, and a two-year sentence at hard labor for the third offense. The interracial sexual relations portion applied to all and presented a two- to seven-year jail sentence to all who married, or lived in adultery, or who fornicated with someone of a different race. It is interesting to note that one's parents did not necessarily define what race you were in. A person was classified as "negro" if he or she was "the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person," for the purposes of this statute (106 U.S. 583). Thus, having one great-grandparent who was African American, while all the others were white, would be enough to be considered African American for this statute.

The law was opposed on the grounds of equal protection as those arrested under it—in this case a black man and a white woman—were punished more for interracial marriage then they would have been for committing adultery. The state held that there was no violation, as "the defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person" (106 U.S. 583: 585). The Court held that "the two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same" (106 U.S. 583: 585). Thus, the Court held that no violation of equal protection existed and upheld the antimiscegenation laws as well.

The Supreme Court overlooked the racial issue, in that individuals are prevented from marrying or having sex with whom they desire simply because they are not of the same race. The Court focused on the similar penalty handed to people of each race, but ignored the fact that the only reason one is indicted is because one is black and wants to have sex with a white person, and if one were white and wanted to have sex with the same person, no indictment would result. Given the overall attitude of the time period, it is sad but not surprising that this point was never addressed.

This decision, and others like it, allowed the upholding of the antimiscegenation laws across the country until 1967. It was then, in *Loving*

v. *United States,* that the Supreme Court struck down the miscegenation laws. Recently, marriage has entered the public debate again as laws against gay marriage were pushed in recent elections.

See also *Baehr* v. *Lewin;* Comity doctrine between states in the areas of marriage and divorce; Gay marriage; *Loving* v. *United States;* Religion and attitudes toward marriage historically in the United States; Slaves, rights, and religion

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Palko v. *Connecticut*

302 U.S. 319 (1937)

One question often asked about the Bill of Rights is why all of it is not currently applied against (and has not historically been applied against) the states. The second part is perhaps easier to answer than the first, as *Barron* v. *Baltimore* in 1833 held that the Bill of Rights applied only against the federal government. After the Civil War, the North wanted the exslaves to be permanently guaranteed some rights and so passed, among other things, the Fourteenth Amendment. This amendment held, in section 1, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment, section 1). Even though the amendment was aimed at exslaves, it applied equally to all persons.

In 1925, in *Gitlow* v. *New York,* the Supreme Court held that the Fourteenth Amendment had, as part of the liberty guaranteed by it, prohibited the states from abridging certain parts of the Bill of Rights, including much of the First Amendment. However, the Court in that case did not state categorically what parts, besides most of the First Amendment, of the Bill of Rights were protected, and thus the issue remains unclear until today, although it was answered in part by cases such as *Palko.*

This case as a whole dealt with murder and thus is not directly related to the whole question of freedom under the First Amendment. However, the question of how the Fourteenth Amendment was to be interpreted did come up in this case and so is relevant in that respect. In the case, a man was tried and convicted of murder in the second degree and sentenced to life in prison. The state took an appeal and got the conviction reversed and a new trial was ordered. The man was tried again and sentenced to death. Before trial, the man had made the argument "that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States" (302 U.S. 319: 321). The defendant first argued that "whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also" (302 U.S. 319: 322). However, the Court held that, as far as the general idea of incorporation went, the defendant's argument was "whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." The Court answered that by saying, "There is no such general rule" (302 U.S. 319: 323).

This did not end the question of how the Constitution was to be interpreted, though. The Court went on to say, "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion" (302 U.S. 319: 324). The reason for

these to be included, but not all of the Bill of Rights, was because "in these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty" (302 U.S. 319: 324–325). How did one determine if something was "implicit in the concept of ordered liberty"? The Court was then to ask if the right, when dealing with a criminal trial, was a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (302 U.S. 319: 325). For rights in general, another point was that "the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed" (302 U.S. 319: 326). Double jeopardy was not held to be one of these, in the *Palko* case, and so was not upheld, but the case did provide one of the first comprehensive statements on why some rights are applied against the states and others not.

Thus, *Palko* did not provide a clear answer, as it might have had the Court held that all of the Bill of Rights, or none of it, or only specifically listed amendments, applied against the states. It did, however, further reaffirm the idea first noted in *Gitlow* that some of the Bill of Rights does apply against the states and moved toward creating a standard for understanding which parts of the Bill of Rights apply, or are incorporated (to use another term often used in this discussion). It also created the concept that this determination of what to incorporate would be made on a right-by-right basis rather than amendment by amendment. It would not be until 1940 that another right, in addition to that of speech and the press, listed in *Gitlow,* would be applied against the states. The Supreme Court has generally continued on this path, although some have argued, without much success, for incorporation of all of the Bill of Rights against the states.

See also *Cantwell* v. *Connecticut;* First Amendment; *Gitlow* v. *New York*

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Paying for tests and other aid for private schools

The whole issue of state aid for private schools is a very sticky one. On the one hand, states should not be promoting religion by aiding private schools, which are very often religious. On the other hand, states should also not be disfavoring private schools by burdening them with tests and other things that the state mandates but does not pay for. The Supreme Court has, in recent years, been allowing more state aid for private education, particularly when the parents chose whether their children attended private school.

One of the earliest cases on the issue was *Levitt* v. *Committee for Public Education and Religious Liberty* in 1973. There, New York wanted to pay private schools for the costs of tests, pupil records with the most expensive of these being the tests. The schools did not have to account for the money, even though the state required that the funds not be spent for "religious worship or instruction," and religious schools were allowed to receive the funds. The Court noted that there was no tracking of the money for tests and that there were no safeguards against allowing funded tests to be full of religious instruction. The Court held that "we cannot ignore the substantial risk that these examinations . . . will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious

precepts of the sponsoring church" (413 U.S. 472: 480). Previous decisions had allowed transportation to the schools and the lending of textbooks. However, the Court differentiated those rulings, holding that tests were "essential" to the religious mission of the school, whereas textbooks were not. The Court also held that the required nature of these items was irrelevant, as if the state could pay for all required items, it would definitely be advancing religion, which was not allowed.

The same day, the Court decided *Committee for Public Education and Religious Liberty* v. *Nyquist*. There, New York had announced a program of paying monies to private schools for repairs (if those private schools served a large number of underprivileged youth), tuition reimbursement for the poor who attended private schools, and tax relief for people who did not qualify for the tuition reimbursement, with the tax relief decreasing as family income increased. The Court held that this aid was unacceptable, as it advanced religion. On the issue of tuition reimbursement, the Court held that similar aid could not be given directly to private schools, and that the aid would help parents to continue to enroll their children in private schools, which in turn aided private education. The Court here rejected the argument that the parents were choosing how to spend the money, thus eliminating any endorsement of religion. In 1973 as well, the Supreme Court held that states could not reimburse for tuition in *Sloan* v. *Lemon*. The *Sloan* case also established the important precedent that state or federal aid to religious-based educational institutions had to meet specific requirements before it would be considered appropriate.

In 1975, the Supreme Court continued this trend when it decided *Meek* v. *Pittenger.* In this case, Pennsylvania was lending textbooks and providing "auxiliary services" to private schools. The auxiliary services included "counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, 'and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth'" (421 U.S. 349: 352). The Court there used the *Lemon* test as a guide and struck down this practice, except for the textbook loans. Those loans were allowed because the textbook program helped the students, not the religious schools and so did not advance religion. The majority held that the private schools that borrowed materials were mostly religious schools and had a religious mission. "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief" (421 U.S. 349: 366). Aid to these schools helped their religious mission, and the Court concluded that "for this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, . . . and thus constitutes an impermissible establishment of religion" (421 U.S. 349: 366). The Court also struck down the program providing auxiliary services such as remedial help (but only for nonideological, i.e., secular, classes) as the required level of supervision to make sure that only nonreligious classes were helped would create far too much entanglement.

In 1977, the Supreme Court took the first step away from these cases in its *Wolman* v. *Walter* decision. It there decided that more aid than just textbooks was acceptable. In that case, an Ohio statute provided help to private schools in a variety of ways. As with the other states that had been considered, most of the private schools concerned were religious. The law in question allowed "the State to provide nonpublic school pupils with books, instruc-

tional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation" (433 U.S. 229: 233). The Court was greatly divided over this case but allowed the diagnostic services and therapeutic services as they had no identification with the religious institutions and could not be diverted to aid religion. The textbook loan program, not surprisingly, was upheld, as previous ones had been. However, the Court stated that the loans of material were unacceptable; "in view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools" (433 U.S. 229: 250).

In 1980, the U.S. Supreme Court continued the trend of *Wolman* and allowed states to pay for tests given in private schools. In *Committee* v. *Regan,* paying for state tests was allowed as long as there was auditing of the expenses and the tests were state mandated. The Court answered its own previous objection about the possibility that the school could use the tests to endorse religion by holding that there "was no substantial risk that the examinations could be used for religious educational purposes" (444 U.S. 646: 656). The state here also paid for record keeping, a practice that was allowed. Three justices, Blackmun, Brennan, and Marshall, dissented, stating that "the Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools" (444 U.S. 646: 662). The dissent held that "I am compelled to conclude that Chapter 507, by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion" (444 U.S. 646: 668). Stevens also dissented, arguing that the decision here would allow repayment of costs for any state mandate, which would allow a state to greatly subsidize a private school. Stevens's view was "that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman,* I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment" (444 U.S. 646: 671).

The Court took a further step away from its earlier doctrine in *Mueller* v. *Allen* (1983). In that case, Minnesota had passed a law allowing any person who paid for "tuition, textbooks and transportation" to deduct up to a certain amount for those expenses from their taxes (463 U.S. 388: 391). The Supreme Court upheld this statute, even though most who used it were private school parents. The Court held that as it was available to all, had a secular purpose, and was available only due to the choice of the parents to spend the money, it was allowable. This introduced the whole idea of parental choice, which grew in importance over the years. There was a vigorous dissent by four members of the Court, who pointed out that the tax deductions "subsidize tuition payments to sectarian schools" and so were not allowable as the Constitution required neutrality (463 U.S. 388: 404).

The Court allowed the states to finance remedial help in secular subjects on private school campuses in *Agostini* v. *Felton* in 1997. There, the Court held that the schoolteachers paid to help the students could be trusted not to indoctrinate the students (a concern in earlier cases), and that all students were eligible to be helped, whether they went to private or public school, and so the test used for aid was neutral in the area of religion. Finally, since the teachers could be trusted, they would not have to be excessively monitored and so there was not the concern over entanglement either. Neutrality was held to be enough, as the program was not seen as subsidizing religion.

The most important change came in *Mitchell* v. *Helms* (2000), which overruled *Meek* and *Nyquist*. In *Mitchell* v. *Helms,* aid was given to schools based on the number of students

there, and aid was available to both private and public schools to be spent for secular equipment. The Court upheld the practice, and ruled that "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" (530 U.S. 793: 809). Thus, with no indoctrination sponsored by the government, the program can be upheld. Justice Thomas, writing for the Court in *Mitchell,* also held that another important issue was "whether the criteria for allocating the aid 'creat[e] a financial incentive to undertake religious indoctrination.'" (530 U.S. 793: 813). As the students here chose to go to private school, no financial incentive was created. As long as the aid was available to all, and the choice was made by the parents of their own free will, the program aiding public and private schools was allowable.

The final step in the aid line, so far, was *Zelman* v. *Simmons-Harris* in 2002. There, the Supreme Court upheld a program of vouchers in which the students chose what school to transfer to, if their own school was underperforming. Once the student transferred, the state would pay a voucher payment of some amount to the receiving school; if the school was private and the voucher payment was not sufficient to cover all the expenses, the student was responsible for the remainder of the tuition. As the choice was voluntary and the aid was available to all, the program was upheld.

Thus, in thirty years, the Supreme Court has moved from allowing only textbook loans to religious schools to allowing voucher payments, as long as the programs meet the requirements that the aid is available to both public and private schools and the choice of what schools children attend are made by the parents.

See also *Board of Education Kiryas Joel Village School* v. *Grumet; Everson* v. *Board of Education; Lemon* v. *Kurtzman; Locke* v. *Davey; Public Funds for Public Schools of New Jersey* v. *Byrne; Zelman* v. *Simmons-Harris; Zobrest* v. *Catalina Foothills School District*

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Peloza v. *Capistrano Unified School District*

37 F.3d 517 (9th Cir. 1994)

Here, a teacher sued his school district, claiming that forcing him to teach evolution violated his First Amendment rights of freedom of religion and freedom of speech, among other things. The court ruled that evolution was not a religion and that by requiring him to teach the theory of evolution, the school board was not interfering with his freedom of religion. The only way the teaching of evolution would interfere with his freedom of religion, in the court's opinion, was if evolution was a religion. Note that it was unclear whether the school district was ordering him to teach evolution as fact or as the most scientifically accepted theory. Peloza had argued both things. The court held "only if we define 'evolution' and 'evolutionism' as does Peloza as a concept that embraces the belief that the universe came into existence without a Creator," would it hinder

his freedom of religion, and the court refused to do this (37 F. 3d 517: 521). As far as free speech goes, the court held that school districts are allowed to restrict the free speech of employees because if the district allowed him to advance religion, it would be violating the First Amendment by promoting religion. Peloza's due process claims were denied, as the court held that the only injury he had suffered might have been to his reputation, and in order for a due process claim to be upheld, one had to prove injury to one's "life, liberty or property," which were the only things protected under the due process clause of the Constitution.

The lower court had also ordered Peloza to pay the attorney's fees of those whom he had sued, as they held that his claim was frivolous. However, the Ninth Circuit Court of Appeals disagreed. They held "Peloza's complaint is not entirely frivolous. Some of the issues he raises present important questions of first impression in this circuit. His free speech claim involves substantial questions and requires the balancing of rights of free speech against the Establishment Clause, a matter upon which the Supreme Court recently commented in *Lamb's Chapel*. Accordingly, we reverse the district court's award of attorney fees and costs to the defendants" (37 F.3d 517: 524). Thus, while a teacher was unable to force a district to allow him not to teach evolution, his claim was not wholly devoid of constitutionally related issues, and so he was not penalized for bringing it other than having to pay his own attorney's costs.

See also *Crowley* v. *Smithsonian Institution; Edwards* v. *Aguillard; Scopes* v. *Tennessee*/Scopes Monkey Trial

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Pierce v. *Society of Sisters*

268 U.S. 510 (1925)

Even though religious freedom is protected under the First Amendment, issues of religion in the past have been sometimes ignored by the Supreme Court, which chose to look at the business issue instead. A prime example of that approach is the *Pierce* case.

This case dealt with the Compulsory Education Act of Oregon. That 1922 act forbade students from attending private schools and it was challenged as a deprivation of property. The aim of the law was to force the closing of parochial schools, thus limiting the power of the Catholic Church. The law was held, in the lower courts, to violate the liberty of parents and the property of the private schools, and the right of the schools to conduct a business.

The Supreme Court first agreed that the state could regulate schools within its borders: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare" (268 U.S. 510: 534).

The Court then examined the history of such schools to determine whether the prohibition of private schools was justified. They held that it was not, as there was no evidence that the schools had failed to meet their duty of educating pupils, there was no "emergency," and the teaching of the schools was not "harmful." The Court addressed the questions of both liberty and state power in stating "as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its

children by forcing them to accept instruction from public teachers only" (268 U.S. 510: 535). The Court held that since the law tried to change all corporations rather than just selective ones, it would not be allowed. No mention was ever made of religious liberty, only the right of corporations to protest against wrongful legislation, which at one point in this opinion is described as "arbitrary, unreasonable, and unlawful interference" with their businesses.

Thus, this case demonstrates how regulations of this type were sometimes dealt with and struck down (or upheld) in the early part of the twentieth century, by looking at the church schools as businesses rather than as arms of a church or as part of religious freedom. Religious freedom was not considered, in part because the First Amendment did not yet apply against the states. Ironically, the next week, the Supreme Court ruled in *Gitlow* v. *New York* that the First Amendment, in the area of speech and the press, did apply against the states and started the process by which the freedom of religion would be so applied.

See also *Cantwell* v. *Connecticut;* Curriculum of home schools and reporting; *EEOC* v. *Kamehameha Schools/Bishop's Estate; Farrington* v. *Tokushige; Gitlow* v. *New York; Little* v. *Wuerl*

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Police Department of City of Chicago v. *Mosley*

408 U.S. 92 (1972)

In the whole area of freedom of religion, one question that often arises is what regulations are allowable. One attempted regulation is often to allow certain types of one activity but to deny others. This method of regulation was considered by the courts in both *Police Department of City of Chicago* v. *Mosley* (1972) and *Westside Community Board of Education* v. *Mergens* (1990).

Police Department v. *Mosley* dealt more with the whole idea of "viewpoint discrimination" rather than religion. The opinion of the Court was written by Justice Marshall and joined by Justices Douglas, Brennan, Stewart, White, and Powell. Chief Justice Burger joined the opinion and also wrote a concurrence. Justices Blackmun and Rehnquist concurred in the result without opinion. This case dealt with a Chicago ordinance that prohibited picketing within 150 feet of a school, but did not prohibit "peaceful picketing of any school involved in a labor dispute" (408 U.S. 92: 93).

The Supreme Court concluded, "We hold that the ordinance is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing" (408 U.S. 92: 94). The Court used both the First Amendment and the Fourteenth Amendment—the First because picketing was speech and the Fourteenth because peaceful picketing over labor issues was treated differently from other peaceful picketing. The Court first noted that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (408 U.S. 92: 95). The Court held that under the equal protection clause of the Fourteenth Amendment, and under the First Amendment, "government must afford all points of view an equal opportunity to be heard" (408 U.S. 92: 96). Justice Marshall reminded the Court that even those who held picketing to be conduct, and so subject to more regulation, required viewpoint-neutral laws.

The Court went on to note that "this is not to say that all picketing must always be allowed" (408 U.S. 92: 98). "Time, place, and manner" restrictions were allowed, as were

some exclusions, but on the whole, "discriminations among pickets must be tailored to serve a substantial governmental interest" (408 U.S. 92: 99). The Court held that these regulations did not do this. One interest might be preserving the peace during schooltime, but not all peaceful picketing was protested. The Court noted that "'peaceful' nonlabor picketing, however the term 'peaceful' is defined, is obviously no more disruptive than 'peaceful' labor picketing" (408 U.S. 92: 100), and so the one could not be banned while the other was allowed. The Court also reminded the country that "the Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives" (408 U.S. 92: 101). This statute was not held to be narrowly tailored.

Chief Justice Burger wrote a concurrence. His only point in the concurrence was to uphold the right of the government to censor in some circumstances. He wrote, "I join the Court's opinion but with the reservation that some of the language used in the discussion of the First Amendment could, if read out of context, be misleading. Numerous holdings of this Court attest to the fact that the First Amendment does not literally mean that we 'are guaranteed the right to express any thought, free from government censorship.' This statement is subject to some qualifications" (408 U.S. 92: 102–103). Thus, after *Police Department* v. *Mosley,* viewpoint discrimination in regulations was not supposed to be allowed.

A similar question came up in *Westside Community Board of Education* v. *Mergens* (1990). Here, a student asked to form a Christian group after school, and the board of education denied his request. He then sued under the Equal Access Act, "which prohibits public secondary schools that receive federal financial assistance and that maintain a 'limited open forum' from denying 'equal access' to students who wish to meet within the forum on the basis of the content of the speech at such meetings" (496 U.S. 226: 233). Thus, the question here was whether the viewpoint discrimination of the school was justified, as it seemed not to be under both *Mosley* and under the Equal Access Act. Justice O'Connor wrote the opinion of the Court and was joined by Justices White, Blackmun, Scalia, Kennedy, and Chief Justice Rehnquist. Kennedy also filed a concurrence that Scalia joined. Marshall and Brennan filed an opinion joining in the judgment, and Stevens filed a dissenting opinion.

O'Connor first outlined the history of the case and the school board's policy on clubs. The student, Mergens, had asked for permission to form a club, whose purpose would have been "to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation" (496 U.S. 226: 232). O'Connor then turned to the history of the Equal Access Act, noting that Congress had defined a "limited open forum" as one in which the public school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time" (496 U.S. 226: 235). The act further provided that the school "'shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum' if the school uniformly provides that the meetings are voluntary and student initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by 'nonschool persons'" (496 U.S. 226: 236).

The Court first had to decide what was meant by "noncurriculum related student groups." O'Connor held, after a long discussion, that this term should mean "any student group that does not directly relate to the body of courses offered by the school" (496 U.S. 226: 239). She disagreed with the dissent that suggested that these groups are only those that

"ha[ve] as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views" (496 U.S. 226: 241). The next question became whether all of the existing clubs were curriculum related. The school suggested that they were, but O'Connor held that this definition would make the Equal Access Act useless. O'Connor then looked at the specific clubs and held that at least some of them were "noncurriculum related." As these groups were noncurriculum related and the school denied this new club the right to form, the Equal Access Act was violated, and the opinion then moved on to examine the First Amendment. The Court turned to the *Lemon* test, holding that the Equal Access Act had, as a secular purpose, the prohibition of discrimination and does not endorse religion by merely allowing the club to meet. While the fact that the club exists might cause one to think that the school likes it, the Court held, "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" (496 U.S. 226: 250).

The Court also noted that the role of teachers was limited in religious groups, which prevented the problem of endorsement as well and that there was a wide variety of choices in groups. The Court also rejected the idea that a club would entangle the school in religion as the faculty role in these groups was quite limited.

Justices Scalia and Kennedy, in an opinion written by Justice Kennedy, concurred in part and in the judgment. They first pointed out that more controversial groups may be growing up in the schools as a result of the Equal Access Act but that the act is properly interpreted and also was within the scope of Congress's power. The opinion then looked at the issue of the establishment clause, and the justices said that the act does not violate the establishment clause as it does not directly give substantial benefits to religion or force any students into religious activities. They wrote mostly to disagree with the use of the word "endorsement" in the endorsement test. The two justices held that the word endorsement's "literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference" (496 U.S. 226: 261). The opinion explained that "I should think it inevitable that a public high school 'endorses' a religious club, in a commonsense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment. The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity" (496 U.S. 226: 261). Thus the two justices agreed in the result and most of the opinion, except for the issue of endorsement.

Justices Marshall and Brennan agreed with the result in an opinion written by Justice Marshall. Their primary concern was with what the school should do in order to avoid establishing religion by allowing the club. In Marshall's words, "I write separately to emphasize the steps Westside must take to avoid appearing to endorse the Christian club's goals. The plurality's Establishment Clause analysis pays inadequate attention to the differences between this case and *Widmar* and dismisses too lightly the distinctive pressures created by Westside's highly structured environment" (496 U.S. 226: 263). He argued that the courts must be as vigilant in watching the establishment issue here in a policy of equal access as they were in any other area of monitoring speech in the schools.

Marshall noted that the school here identified itself with the goals of its clubs and that this could present a problem. The justice argued that

schools with multiple clubs will probably not have difficulties, but "if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity" (496 U.S. 226: 266). He also suggested that the school's use of the clubs to help mold students into good citizens increased the dangers of endorsement, and that the issue of peer pressure should be considered. Marshall recommends that the school should "fully disassociate itself from the club's religious speech and avoid appearing to sponsor or endorse the club's goals" (496 U.S. 226: 270).

Justice Stevens dissented. He first suggested that the majority was misreading Congress. He commented, "Can Congress really have intended to issue an order to every public high school in the Nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not" (496 U.S. 226: 271). Stevens contended that the real test of the forum should be if the forum created is similar to the forum created in colleges, where contentious groups were allowed often. He held that this high school had not, as none of its groups were "controversial or partisan" (496 U.S. 226: 274). Only when a school allowed such a group that was controversial or partisan would the act be triggered in Stevens's estimation. The majority, in his mind, expands the act greatly and "the Act, as construed by the majority, comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies involved in *Widmar,* on school premises" (496 U.S. 226: 287). The act, as construed by the Court, Stevens points out, amounts to a massive federal intrusion into education.

The Court first, in *Police Department* v. *Mosley,* did not permit states to choose between different viewpoints they would allow. One could issue "time, place, and manner" restrictions, as one could order that only peaceful demonstrations were allowed, but one could not pass a law permitting only peaceful demonstrations of a certain belief or type. The Court, some eighteen years later, ruled in *Westside Community Board of Education* v. *Mergens* that school districts could not allow certain groups to form and deny that right to other similar groups, as that behavior constituted viewpoint discrimination. Thus, Christian groups were allowed to form if any other noncurricular groups were formed.

See also *Good News Club* v. *Milford Central School; Good News/Good Sports Club* v. *School District of the City of Ladue; Widmar* v. *Vincent*

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Prayer at graduations and other events

The Supreme Court has banned officially sanctioned prayer at graduation when that prayer is initiated by the principal or school board. When students initiate the prayer, the situation becomes more complicated. The main Supreme Court case dealing directly with the issue of

board-sanctioned prayer at school events is currently *Lee* v. *Weisman* in 1992, which held that principals cannot invite religious figures to offer prayers at graduations, even if the prayers are general and aim to be nondenominational. Of course, prayer during the school day, when mandated by the school or the teacher, had been banned since 1962 and *Engel* v. *Vitale.* As only one Supreme Court case, *Santa Fe* v. *Doe,* has ruled directly on student voluntary prayer, it is often decided on a circuit-by-circuit basis by the circuit courts of appeals.

The Fifth Circuit in 1992 held that a class could be allowed to lead prayers at graduation in *Jones* v. *Clear Creek Independent School District.* There, an "invocation and benediction" was allowed, if the senior class wanted it, if a volunteer led it, and if it was "nonsectarian and non-proselytizing in nature" (977 F.2d 963: 964). The Supreme Court had just decided *Lee,* and the Fifth Circuit took *Lee* into account. The Fifth Circuit put its thumb on the scale, noting its preference for prayer, writing "the [Supreme] Court has repeatedly held that the Establishment Clause forbids the imposition of religion through public education. That leads to difficulty because of public schools' responsibility to develop pupils' character and decision making skills, a responsibility more important in a society suffering from parental failure. If religion be the foundation, or at least relevant to these functions and to the education of the young, as is widely believed, it follows that religious thought should not be excluded as irrelevant to public education. There is a deep public concern that radical efforts to avoid pressuring children to be religious actually teach and enforce notions that pressure the young to avoid all that is religious" (977 F.2d 963: 965–966).

The court examined the facts in this case, comparing them to the five "tests" that the Supreme Court had established. The circuit court looked first at the purpose of the prayer and held that the prayer aimed to "solemnize" the occasion, and they held this to be a proper secular purpose. As far as the primary effect, the circuit court held that "if the students choose a nonproselytizing, nonsectarian prayer, the effect might well marshall attendees' extant religiosity for the secular purpose of solemnization; but no one would likely expect the advancement of religion by the initiation or increase of religious faith through these prayers. The Resolution's primary effect is secular" (977 F.2d 963: 967). The court then turned to the issue of entanglement, holding that the principal could, once a year, review the prayers to make sure that they are of a "nonproselytizing" and "nonsectarian" nature, without becoming entangled. The court next considered the issue of endorsement and held that there was none and students should understand this, as "a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice" (emphasis in original, 977 F.2d 963: 967).

The final test was that of coercion. The court held that the Supreme Court had defined coercion as occurring when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors" (977 F.2d 963: 970). The court here held that there was no direction as the use of prayer was entirely the decision of the senior class and that the prayers could be religious but were not required to be. Finally, the court held that "we think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given,* are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy" (977 F.2d 963: 970). As the students were close to adulthood, this was allowable. The court closed by noting that "community standards" should rule, and thus,

as the community wanted prayer, it should be allowed, and, unspoken but hinted, the circuit court grudgingly held that it must be led by student volunteers as the Supreme Court would not allow the more formal members of the community—that is, the school boards and principals—to lead it.

The same circuit, however, was not as accepting of Mississippi's School Prayer Statute, in *Ingebretsen* v. *Jackson Public School District*. This law would have allowed prayer at mandatory and nonmandatory school events. Mississippi had passed a statute allowing prayer at all events, as long as it was student initiated, and the district court had allowed the prayer to possibly occur only at graduation. The circuit court found that the district court had been correct. It held that the statute's purpose was to "return prayer to the schools," and thus it did not have a secular purpose (88 F.3d 274: 279). It also found that the statute advanced religion, had intolerable levels of entanglement as all prayers had to be approved, and also coerced students and endorsed religion. Thus, prayer is allowed at graduation, as it occurs only once and solemnizes the occasion, but it is not allowed at every function.

Circuits differ on this, however. The Ninth and Third Circuit Courts of Appeal did not allow prayer at graduation. The Ninth Circuit considered the issue in 1994 and held that a school board could not have student-initiated prayer at graduation, but later vacated that ruling as the case was moot. The Third Circuit considered the issue in 1996 in *ACLU of New Jersey* v. *Black Horse Pike Regional Board of Education*. There the students chose whether to have a prayer and its form, if it was to take place. The court also mandated that the system of choice must allow "pupils with an opportunity to choose prayer, a moment of reflection, or nothing at all" (quoting from the policy adopted, 84 F.3d 1471: 1475). The district court issued a permanent injunction against the practice, and the Circuit Court of Appeals upheld this ruling. The circuit court held that a vote, such as the one here, was not allowed to violate the freedom of religion. "An impermissible practice can not be transformed into a constitutionally acceptable one by putting a democratic process to an improper use" (84 F.3d 1471: 1477). Free speech was not an acceptable justification for the process, either. The court also noted that the school board generally retained control of the topics discussed at graduation and so did not create an open forum, or one that might be defended under the idea of promoting free speech. As the school board officials retained control, the *Lee* case controlled the decision, both in terms of the official endorsement of the policy and the coercion issue. The *Jones* decision of the Fifth Circuit held that the student body could not reasonably be allowed to make decisions that the school board would not be allowed to make.

However, in *ACLU of New Jersey* v. *Black Horse Pike Regional Board of Education,* the Third Circuit concluded, "Indeed, if the vitality of our fundamental liberties turned upon their ability to inspire the support of a majority, the longevity of our 'inalienable rights' would be controlled by the ebb and flow of political and social passion" (84 F.3d 1471: 1483). The court also considered the *Lemon* test and held that the practice violated all three prongs of that test. One dissent (the case was heard by the Third Circuit sitting as a whole, and four judges joined the dissent; thus there were four dissenting judges out of thirteen) would have followed the *Jones* ruling, holding that respecting the free exercise rights of the students who voted for prayer required allowing prayer when it was done under a neutral policy.

The Ninth Circuit also ruled in *Collins* v. *Chandler Unified School District* in 1981 that prayers are not allowed at assemblies. There, assemblies that opened with a prayer were held acceptable, as long as objecting students were allowed to be excused. However, the court held that there was no secular purpose for prayer and that the primary effect of such a policy was to encourage religion, which was

also banned under the *Lemon* test. Thus, under two prongs of the *Lemon* test, this policy was unconstitutional, and the court struck it down.

The Fifth Circuit considered a variety of prayers and religious-related items, including religious music in holiday programs, in 1995, in *Doe* v. *Duncanville Independent School District,* holding that employees of schools cannot participate in or lead prayers. The choir was allowed to use a religious song, "The Lord Bless You and Keep You," as its theme, however, as "most choral music is religious," and banning all religious music as themes was considered hostile to religion (70 F.3d 402: 408). As far as the distribution of Gideon's Bibles on school grounds, which was also challenged, the court held that the plaintiffs lacked standing, as no Bibles were ever distributed to any class the complaining student was a part of.

The Eleventh Circuit in 1989 considered the issue of pregame prayers at football games and held that they violated the First Amendment. Those suing had favored a "secular inspirational speech," whereas the school board had favored having all who wanted to speak apply with one randomly chosen speaker each week. The circuit court found that "the School District wanted to have invocations that publicly express support for Protestant Christianity" (*Jager* v. *Douglas County School District,* 862 F.2d 824: 830). This lack of a secular purpose doomed the practice under the *Lemon* test. As far as the primary effect, the court held "when a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation" (862 F.2d 824: 831). Thus, prayers were not allowed at football games. The Supreme Court, in *Santa Fe* v. *Doe,* agreed with this analysis concerning prayer at football games.

The Eighth Circuit dealt with prayer by a band teacher before concerts in 1988. It found that these prayers were a violation of the students' First Amendment rights and that the school board, by failing to act and by verbally (although not officially) encouraging the teacher to continue, had violated the students' rights as well.

Thus, other than prayers at graduation, prayers are generally forbidden at school functions. Religious music is a much stickier issue. Graduation prayers have been dealt with on a circuit-by-circuit basis. However, in general, the courts have upheld policies greatly limiting religion in the public schools, where those practices are formally challenged (it goes without saying that prayer can, and probably does, continue, even by teachers, in schools today even though officially banned by school policy).

See also *Engel* v. *Vitale; Lee* v. *Weisman; Lemon* v. *Kurtzman;* 1995 statement on "Religious Expression in Public Schools; Prayer before school board meetings and other meetings; *Santa Fe Independent School District* v. *Doe; School District of Abington Township* v. *Schempp*

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Prayer before school board meetings and other meetings

Prayer at public meetings is allowed at certain times but not at others. For instance, prayer is allowed before sessions of legislature and the legislature is allowed to have a chaplain. In

public schools, though, prayer is not allowed. The question of whether to allow prayer before public school board meetings, then, would seem to be one of whether the organization is more like a school or more like a legislature.

In 1999, the Sixth Circuit Court of Appeals considered whether prayer was acceptable at a school board meeting in *Coles* v. *Cleveland Board of Education*. Judge Gilman wrote the opinion for the court. He noted that students were required to attend school board meetings if they wanted certain concerns addressed and that these meetings took place on public property. The court also noted that students were invited to the meetings, that a student representative sat on the board, and that the practice of having a prayer had begun only in 1991. The court held "although meetings of the school board might be of a 'different variety' than other school-related activities, the fact remains that they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system" (171 F.3d 369: 377). The court noted that past rulings had advanced the mandatory nature of school along with the malleability of young students as reasons for disallowing school prayer. It also noted that although the meetings were not required for all, those who would want to attend them, but might skip due to the prayers would lose "intangible benefits" (171 F.3d 369: 379). The court noted that legislatures were allowed to pray but held that school board meetings were closer to the required part of school than they were like a legislative body. The court then used the *Lemon* test, noting there was a claimed secular purpose of "solemnizing" the meetings, but that the words of the speakers and one school board president's claim of "acknowledging Christians" denied this. The court also noted that the claim failed the second prong of the *Lemon* test, of its primary effect being to advance religion, and that the whole process created an excessive entanglement. One judge dissented and argued that a school board meeting was more like a legislature than a school classroom.

Thus, in the Sixth Circuit, prayer is not allowed before school board meetings. Some attorneys general in other districts have issued contrary opinions, stating that prayer is acceptable, in their eyes, and the Sixth Circuit controls only its own area. On the other hand, this decision shows that school boards should not universally consider themselves to be similar to legislatures, as opposed to school functions, or assume without question that it is acceptable to pray before meetings.

See also *Engel* v. *Vitale; Lee* v. *Weisman; Marsh* v. *Chambers*

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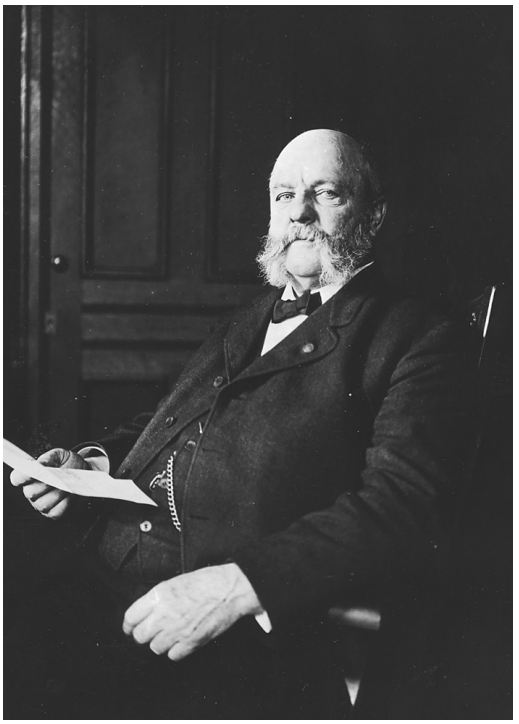
Privacy, religion, and the law

Privacy and religion interact with each other and the law in a number of ways. Some of the predictable intersection points include abortion and euthanasia/assisted suicide. The less expected ones include birth control, the right to marry, the right to control a child's education within bounds, and issues of paternity. As privacy covers this wide gamut of issues, all of them are pulled together here for a brief overview and discussion.

The first situation when the right to privacy was legally acknowledged and religion was involved is a relatively recent entry to U.S. history books. The issue at stake was the control of children's education. In the 1920s, several Supreme Court cases dealt with the amount of control a parent has over a child's education. In the anti-German and anti-Catholic sentiment of the 1910s and 1920s, some states passed laws forbidding German language classes at any private or parochial school. In 1923, the Supreme



Anthony Comstock was such a well-known crusader for government supervision of morality in the United States around the turn of the nineteenth century that his name became synonymous with moralistic censorship. (Library of Congress)

Court struck down a Nebraska law forbidding classes in German in *Meyer* v. *Nebraska,* holding that a parent should have control over a child's education. The same logic was used two years later, in *Pierce* v. *Society of Sisters* in which Oregon had required parents to send their children to public school. *Meyer* did not directly deal with religion (though it had clear implications for religious private schools), but *Pierce* did, as the parents involved in the suit wanted to send their children to a Catholic school. Religion, education, and parental control were also at issue in *Wisconsin* v. *Yoder* (1972), even though privacy was not stated as the main reason for the case. The state of Wisconsin required all children to attend school until age sixteen, but the Amish in Wisconsin wanted their children to leave school after eighth grade, as they believed that exposing their children to the high school environment threatened their religion. The Supreme Court found for the Amish on the basis of freedom of religion. Control of the Amish children's education was also at issue, but the case focused on religious freedom. Similarly, parents have generally been allowed to choose home schooling as long as the home school meets certain criteria. The objection to the public schools is often a religious one, and this demonstrates an area in which religion and privacy interact. In this case, religious ideals often favor protecting the legal right to privacy, but such is not always the case.

Sexual relationships, which clearly involve the right to privacy, have been the subject of both legal and religious doctrine in this country, with religion often opposing sexual rights and thus opposing the right to privacy, and with the law sometimes opposing privacy, too. In 1986, the Supreme Court held, in its now infamous *Bowers* v. *Hardwick* decision, that Georgia could criminalize homosexual sodomy with up to a twenty-year jail term, and ruled that homosexual relations were not a fundamental right, unlike the rights to marriage and procreation. However, *Bowers* was overruled in *Lawrence* v. *Texas* (2003). In *Lawrence,* the Court held that homosexual consensual sodomy could not be penalized any more than heterosexual consensual sodomy, but it limited that ruling as not including a right for homosexuals to marry.

In fact, the right to marry is another area in which religion, privacy, and the law interact. For a long time, states had significant control over whom one could marry. Many states had antimiscegenation statutes that made interracial marriages illegal. The basis for those laws was a combination of religious and racial doctrine, with the states arguing that God had made the races separate and so the state should continue this practice. These statutes were struck down by the Supreme Court in 1967 in *Loving* v. *United States.* States can still control whom one can marry, with most states banning same-gender marriages and all having limits on marriages be-

tween close relatives. However, the *Griswold* case held that marriage was a fundamental right, and the Supreme Court extended that right to general freedom of marriage in 1978, holding that a state could not ban a person from marrying just because he or she had not paid child support. No U.S. court has yet extended the fundamental protection of marriage to include same-gendered couples, even though that ban is largely based on religion. Courts that have struck down anti–gay marriage laws have instead used state laws or state constitutional provisions that banned discrimination based on sexual orientation. Thus, another area where religion and privacy touch—in fact, one of the most private decisions: whom to marry—interacts with both religion and the law.

Pregnancy and paternity issues, both bound up in privacy concerns, also are concerns of both religion and the law. Birth control interacts with religion and privacy in a number of ways. First, many people's ideas about birth control come in large part from religion. The Catholic Church, for instance, has taken a strong stand against any artificial forms of birth control, and this belief forms the law for some (but by no means all) American Catholics. (American Catholics are specified as this encyclopedia discusses religion and the law in America.) Although birth control pills are quite common now, in the mid-twentieth century, when they first became available, they were heavily criticized by religions fearing an upswing in promiscuity. In fact, they sparked a new brand of women's independence, as women were no longer dependent upon their male partners to provide adequate pregnancy prevention. Though it seems like such a personal decision now, the original right to privacy came out of a birth control decision. *Griswold* v. *Connecticut* held illegal a Connecticut law banning all sale or use of contraceptives, particularly for married couples, as it invaded the privacy inherent in marriage. A more general right to privacy has been acknowledged, and the right to use birth control has been expanded to include unmarried women and minors. The original ban on birth control devices stems from the 1873 Comstock Law, which banned mailing contraceptives or pornography or information about them, and was also related to religion. The leading crusader at the national level, Anthony Comstock, believed banning birth control devices and information from the national mails would fight immorality, and this belief originated in his Protestant ideology. However, the right to privacy was not considered, even when this portion of the law was overturned in 1936. Thus, religion and birth control have been linked for more than one hundred years in America, and the law has had to become involved to preserve the right to privacy.

In addition to cases that have established a right to use birth control, a series of cases have established a right to reproduction that still allowed the state to put limits on paternity. In 1943, the Supreme Court held that a state could not order the mandatory sterilization of certain criminals, establishing a right to reproduction. This was not treated as a straightforward privacy case, being viewed more as an equal protection issue, but the right was still established. On the other hand, the Supreme Court has not been as magnanimous in recent years in protecting the rights of a father to establish paternity, and for a time it somewhat limited reproduction and marriage rights to traditional families. In 1989, the Supreme Court upheld a law from California dealing with paternity, which said in effect that even individuals acting like fathers who *probably* fathered the children in question could still be prevented by state law from establishing their paternity. These areas interact with religion in that many religions establish standards for what they view as families and who should procreate. These religious limits, in turn, are sometimes established into law.

Abortion is largely discussed in other notes and will be discussed only briefly here. *Roe* v. *Wade* in 1973 held that a defined privacy interest embedded within the Bill of Rights meant a state could not ban abortions and that

the decision, in the first trimester, was up to the woman and her doctor. The privacy right invoked here also came from the due process clause of the Fourteenth Amendment, as the liberties protected from infringement without due process of law included a right to privacy. Later decisions have limited this right to abortion, particularly in certain states and for people without the means to pay for the procedure independently. Religion definitely plays a role in abortion, as one of the chief questions involved is the determination of when life begins. The question of life's starting point is largely constructed by religion, with some religions believing life begins at birth, some believing life begins at conception, and some leaving the question up to the individual believer. Unlike other areas, such as how the world began, science has not yet produced a complete answer—it can tell when pain begins, or when independent existence outside the womb is possible, but its main answer to when life begins is to ask how life is defined.

Two further areas combining religion and privacy are the right to die and the right to euthanasia. The right to die involves strict control of the level of care given to a dying person, and such cases would include consideration of living wills and other directives; euthanasia and assisted suicide involve active steps taken to end the life of someone who is suffering. One of the leading court cases on the right to die issue is the U.S. Supreme Court decision *Cruzan* v. *Missouri Department of Health* (1990). Nancy Cruzan had been in a vegetative coma for six years and her parents wanted to disconnect her feeding tube. However, Nancy had left no living will. The Supreme Court agreed with the Missouri Supreme Court that the state could set the level of evidence necessary to prove that the woman wanted the feeding tube removed and the lower court had held that the parents had not met the standard and so the feeding tube was initially maintained. Nancy's parents then provided more testimony and evidence, eventually convincing a lower court to allow the feeding tube's removal. Nancy died twelve days later. In a more recent case that did not reach the Supreme Court, Terry Schiavo was in a vegetative state. Her husband, Michael, wished to remove the feeding tube, but Terry had not left a living will. Her parents disagreed and the case became a political issue, as President Bush led a fight to retain the feeding tube. However, the courts ultimately agreed with Terry's husband, and the feeding tube was removed. Terry died thirteen days later. Religion was a key factor, especially in the Schiavo case. Groups who believed that Terry's breathing and involuntary movements indicated that she was still alive joined the fight to retain her feeding tube, and many of these argued on religious grounds. Her husband argued that she was brain dead, and his supporters believed that removing her feeding tube would simply complete the process nature had already begun. This second group also had religious supporters. Different religions answer the question of when (and where) life ends in a variety of ways, and their responses often dictate their positions on right-to-die and assisted suicide cases. As the ultimate question in both cases is one of who has control over a dying person's body, privacy is obviously also a factor.

Religion shapes many of our most intimate views, which in turn are closely related to privacy. When privacy interests clash with those of religion, the courts inevitably have to step in. The courts in the last half of the twentieth century have clearly established a demonstrated but limited right to privacy. In the areas of birth control and control over a child's education, the privacy rights are the widest, whereas in abortion and assisted suicide, the state is allowed to take a more involved role. Particularly in the last two, religion plays a definite role as it helps to establish, for many people, when life begins and ends. Privacy and religion also interact in areas that people often do not think of until they explode onto the evening news, like marriage, procreation, and paternity. Each of these areas is rich in com-

plexity, religious aspects, privacy concerns, and legal demarcations, but all of them demonstrate that religion, which by its very nature we consider private, has implications for both our private and our public lives.

See also *Baehr* v. *Lewin; Lawrence and Garner* v. *Texas; Loving* v. *United States; Roe* v. *Wade*

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Public Funds for Public Schools of New Jersey v. *Byrne*

590 F.2d 514 (1979)

This case dealt with the constitutionality of a $1,000 tax deduction given only to taxpayers who had children in nonpublic schools. A diverse set of groups sued the governor and others, claiming that the tax deduction was unconstitutional. The district court found it unconstitutional, and the state appealed to the Third Circuit Court of Appeals.

Judge Rosenn wrote the opinion. He first reviewed the history of the legislation and the litigation, noting that the district court had found that most of the nonpublic schools were religiously affiliated. The court, as a test for a law's constitutionality, noted the *Lemon* test, which held that a law "(1) 'must have a secular legislative purpose'; (2) must have, as its 'principal or primary effect,' neither the advancement nor inhibition of religion; and (3) must avoid excessive governmental entanglement with religion" (590 F.2d 514: 517). The opinion also noted that the Supreme Court had allowed tax exemptions for churches but had forbidden tax deductions for nonpublic school expenses. Turning to the *Lemon* criteria, Rosenn noted the secular purpose of helping education but held that the effect was advancing religion, as the state was, by the lost revenue, helping to pay for religious education. The court also found this plan to be closer to the forbidden tax deduction for nonpublic school expenses than the allowed tax exemption for churches.

Judge Weis concurred unwillingly, noting the Supreme Court's inconsistency. He noted that the tax exemptions allowed for churches also benefited education, just like the non-allowed tax deductions for expenses for nonpublic schoolchildren. He agreed that there was a secular benefit and disagreed with the whole idea of the "wall of separation" that the Supreme Court had argued for. On the whole, about that idea, he commented that it had been wielded "to justify a policy of judicial hostility towards state aid to nonpublic schools" (590 F.2d 514: 522). Weis clearly wanted to dissent, but as the position of the Supreme Court on the issue was clear, he was forced to go with the majority.

The policy of not allowing tax deductions for education in nonpublic schools when children in these schools were the only ones who qualified for the deductions continued up until *Mueller* v. *Allen* in 1983, which allowed deductions for any school expense, generally, for any student. Because it was not limited to private school students, it was allowed. That case has generally been followed up to the present.

See also *Everson* v. *Board of Education; Hibbs* v. *Winn; Mitchell* v. *Helms; Mueller* v. *Allen; Zelman* v. *Simmons-Harris*

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Punishment and religion

The goals and aims of the criminal justice system were greatly reformed in America, largely because of religion. Originally, the criminal justice system had one of two goals—torture or deterrence. In America, though, the goal changed to rehabilitation. This was due in part to the Quakers and in part to the influence of nineteenth-century religious developments.

The Quakers played an important role, acting because of their beliefs and their experiences. The Quakers believed that Jesus was in every person, even criminals. Thus, they felt the punishment system should give people time to find Christ, while the Quakers provided some pushes toward this goal. The Quakers themselves had been rather severely treated while they were in England, and many had been whipped, put into the stocks, or imprisoned. Their experience also caused them to want a more tolerant punishment. The Quakers wanted to preserve the public order and thought that whipping and other public punishments threatened that order.

The overall criminal justice system greatly differed between England and Pennsylvania. In England, the main punishments used were execution, banishment to the colonies, and corporal punishment. Remember that a fair number of people brought to America were criminals until after the time of American independence, when Australia became the dumping ground for British criminals. Originally in England over 200 crimes carried the death penalty, but in Pennsylvania, only murder carried that punishment. One similarity between England and all the colonies was that in all of the codes, private affairs and private speech were still penalized, and even Pennsylvania had laws against cursing.

The religious movement known as the Second Great Awakening occurred in the nineteenth century, after the American Revolution; at this time religion became more personal, leading to an interest in prison reform. People began to move away from the Calvinist doctrine of predestination—the belief that earthly behavior did not affect the afterlife, as decisions about who was going to heaven and hell had already been made. In the nineteenth century, most still believed in the afterlife, but they also began to believe that decisions they made on earth played a large role in their personal salvation. Christians believed individuals could find salvation by accepting Christ, and that everyone could be saved. This idea influenced both alcohol and prison reform. It was no longer just Quakers who wanted to rehabilitate criminals. With this change, more states began to adopt the Pennsylvania model, with its focus on rehabilitation, fewer public punishments, and fewer crimes carrying the death penalty.

There were also uniquely American elements in the developing criminal justice system, including the idea of liberty and some ideas that were more generally religious (as opposed to being held by only one religion). Some argued that the goal of all of America was to increase liberty, and the best way to do this with criminals was to deny them liberty in the present so they would learn from their mistakes and be reformed, which in turn would increase their liberty in the future. God in general was also seen as wanting criminals and sinners to reform. Sinfulness caused crime, and so reforming pleased God. Similarly, those involved in the criminal justice system were expected to demonstrate their love for their enemies by helping those enemies, the criminals, reform. At this time, penance played a heavy role in Christian ideas, and the time spent in prison was considered a part of this penance.

The whole prison system was shaped by religion and utilized religious concepts. The idea

of solitary confinement grew up in this period: a person was supposed to be left alone with his or her crimes or sins, having time to reflect and find God. The principal item given to those in solitary confinement was a Bible. Prison chaplains were also provided to help people find a way to God. Religious instruction was seen as a way for the system to help people reform and live moral lives.

Throughout American history, the criminal justice system has interacted with religion. At least some activities were made criminal just because they offended religion. Some things were banned (and are still banned today) on Sundays largely because Sunday is generally the Sabbath of Protestants, the original religious majority in this country. For instance, both in the past and now, alcohol sales are often banned on Sundays (it varies from state to state and sometimes county to county). The regulation of morality also used to be much stricter on Sundays. For instance, one man was fined for kissing his wife on a Sunday. Fines could be incurred for cursing a church when no fines existed for cursing other things, and in at least one case cursing a church led to a fine, a whipping, and banishment. Thus, laws were created with the specific aim of protecting religious institutions, and laws were heavily influenced by religion in the early years of this country. Indeed, changing ideas of religion greatly reshaped the law and led to a belief that the purpose of the criminal justice system was to rehabilitate rather than punish some criminals.

See also American Revolution's effect on religion; Established churches in colonial America; Establishment of Pennsylvania as religious colony for Quakers; Religion and nineteenth-century reform; *Reynolds* v. *United States*

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Puritans, Pilgrims, and the law

It is generally perceived that the first colonists came to America seeking religious freedom. However, this concept needs to be qualified in several ways. First, many of the original settlers came here for economic reasons also. Most of the early settlers to Jamestown, which was the first permanent settlement to survive, came to make money. (Indeed, many focused on this to the point that they did not grow any food and so starved to death.) To the north, in Massachusetts, more were motivated by religion, but a substantial minority still came for other reasons. Even on the *Mayflower,* only half of the passengers were Separatists, or Pilgrims, as those aiming to separate from society later came to be known. The majority of those who came to Massachusetts were, instead, Puritans, and while they came for freedom to worship in their own way, they also wanted to set an example for England. And their desire for religious freedom did not create in them the desire to offer this same freedom to others. With those caveats in mind, however, it is possible to examine the reasons the Pilgrims and the Puritans fled to the colonies.

First, the Puritans and the Pilgrims were not as similar as they are frequently painted to be. While the Puritans wanted to create an exemplary version of the existing Anglican Church, the Pilgrims felt the existing church structure was beyond salvation. The Pilgrims wanted to control their own destinies and not follow a monarch. They placed the state below the church in their legal hierarchy. It should be clear why England's government did not like this position. The Pilgrims' ideas came partly from Richard Cartwright, a sixteenth-century preacher who also argued that church courts should fully control public morals, including issues such as drunkenness or abandonment of

a family. Before the group began emigrating from England, many of the early Separatists were arrested for refusing to attend the state-supported churches. At the time, arguing for elimination of the church bishops was enough to earn a death sentence, and some Separatists were indeed executed for this offense.

These early Pilgrims also ran into difficulty because English preachers needed a license to preach, and meetings without licensed preachers were forbidden. Sometimes whole groups were arrested and fined. These difficulties initiated Pilgrim efforts to find a new homeland. Many moved to Amsterdam, one of the first cities to grant freedom of conscience, and a group of 300 had gathered there by 1609. The Dutch did not generally follow the Pilgrim ideas, but allowed them to co-exist. The Pilgrims, however, were not content in Holland for several reasons: they were able to make only a few converts, living in a foreign country was stressful, and influenced by the Dutch environment the Pilgrims' children did not want to continue the faith. This discontent ultimately led to the group's departure from Holland and its eventual well-known voyage on the *Mayflower* in 1620.

The Puritans, on the other hand, were not separated from the Anglican Church but were really a part of it. They often held relatively respected positions in society and originally wanted to work with bishops to change the church, not to leave it. Henry VIII had established the Anglican Church, but when his daughter Mary followed him on the English throne, she attempted to revert the country to Catholicism. Thus, when Elizabeth I reestablished the official Anglican Church after her sister's brief reign, she used the church and placed herself at the head of its strong and powerful structure. The Puritans, by contrast, wanted to see a decrease in clerical power and an increase in local power. They wanted people to read their own Bibles and search their own souls. Elizabeth I repressed these Puritans, though her nephew, James I, was kinder to them in his turn. James I's kindness stemmed largely from the influence of the archbishop of Canterbury, George Abbott, the most powerful person in the Church of England. The Puritans were not overly happy with James I, as he refused to change much of anything in the church structure, but they and he lived in relative harmony.

Relations worsened after the ascension of Charles I (James's son) in 1625. Charles encouraged the leaders of the Anglican Church who wanted to force the Puritans back into conformity. Anglican rituals were too similar to those of Catholicism for the Puritans' liking. The last straw, it seems, came when Charles I dissolved Parliament in 1629, as this seemed to move England closer to having Catholicism return. Most of the Puritans left legally in 1630, having obtained a charter to the Massachusetts area. Economics also motivated some to move, as many of the poor hoped to achieve some kind of prosperity in the new land. (Among the Puritans who stayed in the Old World was one Oliver Cromwell, who would become England's Lord Protector in 1653, temporarily overthrowing the English monarchy.)

John Winthrop, the leader of the early Puritans in the American colonies, came for a combination of religious and economic reasons; also, others convinced him that God wanted him to go. There was not a great deal of persecution in England before the Puritans left. Only a relative few were imprisoned, and persecution actually increased in England after 1630. When he reached the New World, Winthrop famously envisioned the newly founded city of Boston as a "City on a Hill" which was to demonstrate the correct version of Christianity to all others.

Thus, the early Pilgrims experienced much more persecution before leaving for the American colonies than did the Puritans who followed them ten years later. The Pilgrims also came with fewer provisions with which to survive; the Puritans, in addition to having better financial backing among their constituents, also learned from the Pilgrims' mistakes. Though both groups experienced religious intolerance

themselves, neither was willing to extend their newfound freedom of religion to others. Additionally, many who traveled with both groups had economic and other nonreligious motivations for leaving England, and so much of America's colonial period was spent in establishing various new religions, most of them equally intolerant of outsiders and convinced they alone had found the right way to worship God.

See also American Revolution's effect on religion; Established churches in colonial America; Anne Hutchinson; Religious freedom in Rhode Island in colonial times; Roger Williams

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R

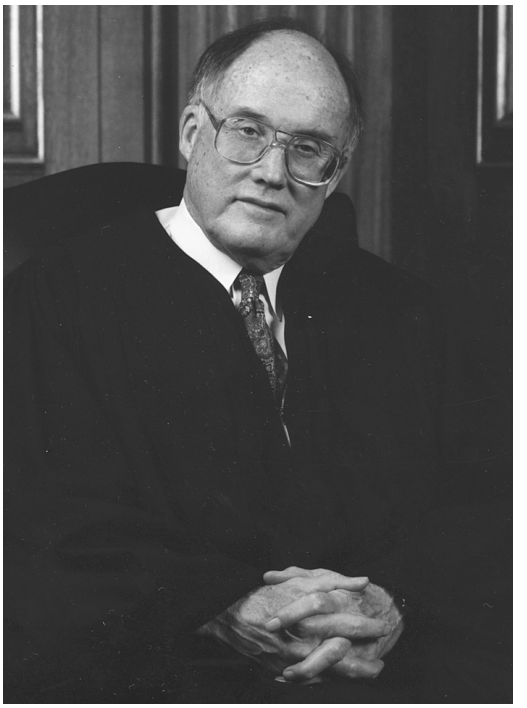
William H. Rehnquist

Supreme Court Chief Justice
Born: 1924
Died: 2005

William Hubbs Rehnquist was the U.S. Supreme Court's longest serving chief justice since Melville Fuller, whose term was around the turn of the twentieth century. Rehnquist had a shaping influence upon the Court. Whether this influence is for good or ill depends on one's political persuasion, but few can doubt his overall sway.

Born in 1924, Rehnquist served in the Army Air Corps (the forerunner of the U.S. Air Force) during World War II and then attended Stanford University. He earned one master's degree in political science from Stanford and a second from Harvard before returning to Stanford to attend law school. He graduated from there in 1952 at the head of his class. (Third in that same class was Sandra Day, who as Sandra Day O'Connor would become the first woman on the Supreme Court.) After law school, he clerked for Justice Jackson on the Supreme Court. This clerkship would become controversial when he was considered for appointment as a Supreme Court justice in 1972, as will be discussed later.

After law school and his clerkship, he moved to Arizona and practiced law. In 1969, he joined the Department of Justice, eventually serving as assistant attorney general of the Office of Legal Counsel. Many of Rehnquist's public views agreed with Nixon's and so Nixon picked him as an associate justice in 1972, hoping to remake the Supreme Court. His appointment became controversial during the confirmation hearings. While clerking for Justice Jackson, he was involved in the preparation of memos concerning the *Brown* v. *Board* decision. One of these memos presented favorably the idea that *Plessy,* which *Brown* would overturn, had been correctly decided and should stand. Of course, that idea was anathema by 1972, and Rehnquist stated that he was merely summarizing Jackson's views on the matter. Of course, Jackson was dead by 1972 and unable to explain his position. Many did not believe Rehnquist and thought that he had opposed the *Brown* decision, but there was



Chief Justice William Rehnquist encouraged the movement of the Supreme Court away from a broadly interpretative judicial philosophy favored by liberals toward the strict constructionist position preferred by conservatives. Rehnquist was an associate justice from 1972 until his appointment as chief justice by President Ronald Reagan in 1986. (Collection of the Supreme Court of the United States)

not enough of a paper trail to oppose his confirmation. Rehnquist was approved by a vote of 68 to 26.

Rehnquist's early years on the Court were spent often agreeing with Warren Burger while also often arguing in dissent. He dissented frequently by himself and was clearly the most conservative member of the Burger Court. Rehnquist dissented in *Board of Education* v. *Pico,* arguing that a school board should have the right to censor certain ideas as an educator, and that when acting as an educator, it was not an agent of the state. He authored the majority in *Valley Forge College* v. *Americans United,* which held that Americans United did not have standing to challenge the decision of the federal government to sell land to a private religious group, Valley Forge. In time, Rehnquist swayed some members of the Court to his way of thinking, but during Burger's time as chief justice, Rehnquist was a frequent dissenter. In *Goldman* v. *Weinberger* (1986), toward the end of the Burger Court, the Court, through his opinion, held that the secretary of defense could require an Orthodox Jew not to wear his yarmulke because he was a member of the U.S. Air Force.

In 1986, Warren Burger retired as chief justice, leaving William Rehnquist the obvious choice for Ronald Reagan to put in his place. (At that time, of the justices who had been appointed by Republicans, only Rehnquist was both a clear conservative and had served enough years on the Court to be clearly qualified.) During the confirmation hearings, the issue of the Jackson memo resurfaced, along with charges that Rehnquist had harassed minority voters while in Arizona, but again, not enough was conclusive to deny his appointment. He was confirmed by a vote of 65 to 33. As chief justice, particularly after three more justices were appointed to the Court by Reagan and George H. W. Bush, Rehnquist was more often in the majority than he had been as associate justice. Evidence of his shaping cases in the area of the freedom of religion was *International Society for Krishna Consciousness* v. *Lee* (1992), in which the Court held that administrators of an airport terminal could ban solicitation of a religious nature. He also led the Court to decide that school vouchers were acceptable, even if used in private schools, in *Zelman* v. *Simons-Harris* (2002). His reasoning there was that parents chose where to use the vouchers, eliminating any potential state endorsement of religion, even though religion directly benefited. He did not always triumph, however. In 2000, he dissented against the Court's decision in *Santa Fe Independent School District* v. *Doe* when the Court struck down student-initiated prayer at football games. Rehnquist accused the Court of trying to remove everything religious from public life.

Rehnquist, by the early 2000s, had served on the Court for over thirty years. It was rumored that he was thinking of retirement, and some of his own comments hinted at that, though he vigorously denied it even on his deathbed. In October 2004, he underwent surgery for throat cancer, and his recovery was rumored to be a rocky one, although most details were kept private. He died in 2005, after having served thirty-three years on the Court.

See also *Elk Grove Unified School District* v. *Newdow; International Society for Krishna Consciousness* v. *Lee;* Sandra Day O'Connor; *Valley Forge College* v. *Americans United; Zelman* v. *Simmons-Harris*

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Religion and attitudes toward marriage historically in the United States

The state has generally favored marriage over cohabitation and has promoted that situation in a number of ways. These include the whole idea of common law marriage and various tangential benefits given to married people.

England, from which America took most of its marriage law, generally preferred a formal marriage over a common law one, though it did allow common law marriages before 1753. Common law marriages were situations in which a man and a woman lived together as man and wife but never got a formal marriage license. Most U.S. states follow the early English rule, and the Supreme Court has held that without a statute banning common law marriages, they are permitted. However, any condition that banned a formal marriage, such as one or both partners being too young, would also ban a common law marriage. Common law marriages still exist in some places today, but there are many fewer than in the past.

The state also favors marriage, but not if marriage comes at great cost to the participants. For instance, fraud before marriage, such as misinformation about a person's identity or having a disease, would allow a marriage to be voided. However, misrepresentations about financial status or whether one wanted to have children would not be sufficient reason to void the marriage.

Not all things in society favor marriage either. Until recently, the tax system somewhat favored people being unmarried as the tax deduction for two single people was actually larger than the tax deduction for a married couple.

Marriage, and its benefits, has been generally held thus far to include only one man and one woman. People who live together unmarried, both contractually and in the common law status, do not have many rights. Gay and lesbian couples are given few, if any, rights in most states. However, Massachusetts has formally legalized gay marriage, and Vermont and New Jersey allow gay and lesbian couples to join in civil unions that provide access to all the same rights as marriage. These rights can include tax benefits, control of a partner's medical care, and adoption rights, among other things.

Many of these benefits are overlooked except when a couple is denied them or is not eligible for them. It is this argument that many gay rights activists use to support the need for a constitutional amendment in favor of gay marriages. However, opponents claim that gay marriage poses a threat to traditional marriages and in most states have blocked gay marriage at the state level through amendments to state constitutions or laws prohibiting such unions.

See also Divorce, marriage, and religion; Marriage—right to conduct

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Religion and the defense of slavery

Religion was a major influence on American history in the eighteenth and nineteenth centuries. It was one of the main reasons many people emigrated to America, and many of the colonies had established churches, which meant that religion was often a large factor in determining a colonist's ultimate destination. Economics actually played a larger role than religion in many people's travel to America, with some coming as indentured servants, leaving Europe only because there was little hope for them there. Of course, an extremely large group coming into the New World did not come voluntarily and brought with them no hope of new prosperity or religious freedom: African slaves. With religion playing such a factor in

early U.S. history, it is not surprising that religion also was a consideration in the biggest controversy in early American history—slavery.

People on both sides of the slavery debate used the Bible to defend their views. This should not be surprising as books were expensive and in many homes, the Bible was the only book. Thus, many people decided their views and actions based on scripture. There is no direct command in the Bible to oppose slavery, so abolitionists had to look to specific interpretations of the Bible for religious support. Specific passages used by abolitionists included words encouraging empathy with those who suffered. The Bible was also used in petitions to end slavery.

Those defending slavery had an easier time finding specific textual support for the position. The Bible states, in Ephesians 6:5, that slaves should obey their masters, and many proslavery advocates used this to justify the practice. It was also used in many sermons in the South to tell slaves not to revolt against their masters. Similar biblical passages also occur in the New Testament books of 1 Timothy, Colossians, Titus, and 1 Peter. However, at least some slave masters did not publicly note what *else* Ephesians 6:10 said, which was that masters should not threaten their slaves and should treat their slaves well.

Those favoring the continuation of slavery also used biblical interpretation to defend their position. Many southern slave owners cited the "curse of Ham" as an element in their defense of slavery. In the biblical book of Genesis, Noah becomes drunk and is seen naked by his son Ham, who encourages his brothers to cover his father. His brothers do this but manage not to see their father's nudity. Noah, angry at Ham for seeing him naked, curses Ham's descendants and orders, in his curse, that they be the servants of his other two brothers' descendants. Ham's oldest son is named Cush, a word meaning "black" in Hebrew. Thus, Noah's curse was interpreted by some white people as causing Ham's descendants to be black. Africans were, in the eyes of some slave owners in the South, the cursed descendants of Ham, destined to be the servants of all other Christians. By extension, all others were descended from Noah's other sons, allowing those who held this view to claim that God, through Noah, had ordered the enslavement of those with black skin.

This interpretation was certainly not accepted by all, even in the early nineteenth century. Historically the interpretation seems to have started in the sixth century C.E. and grown extensively during the late Middle Ages and after, especially once the enslavement of Africans began. The historical underpinnings, though, mattered little to southern whites, who used "Ham's curse" to argue that it was God's will to enslave Africans, and that it would, in fact, be in opposition to God's will to set them free.

The Southerners did not stop there, however. The also pointed out that in the Old Testament, the ancient Israelites were slaveholders, and Israel was told to enslave other nations. They believed that if God had disapproved of slavery, it would have been reflected in the exact words of the Bible. (There was little argument in this debate about which biblical translation was being used by whom.) In the New Testament, slavery's defenders noted that Jesus never censured the institution and that Paul, in the book of Philemon, tells a slave to return to his master and serve him, and does not elsewhere condemn the practice.

This whole debate tied in with the belief that the Bible held the literal true word of God. (Indeed, several groups today still hold to the Bible's literal truth.) Those in favor of slavery believed the Bible did not need questioning or interpreting. They felt that if slavery was good enough for the ancient Israelites or good enough not to be questioned by Jesus, it was good enough for the South in the nineteenth century. Christianity was also used in other ways as a reason to defend slavery. The idea of service has been a part of Christianity for a long time, and Christians are supposed to help their fellows upon the earth. Rather than free-

ing slaves, the Southerners argued that they should help them, by which they meant that they should civilize and Christianize them. The argument did not stop there, though, for some Christians. By turning his slaves into good Christians, some believed a white slave owner virtually guaranteed his welcome into heaven for having helped his fellow man.

Slavery's supporters also used the prestige of the Bible to defend the institution of slavery. Some abolitionists had raised the issue of slavery above the issue of the Bible, arguing that if they were forced to choose between the Bible and their abolitionist principles, they would abandon the Bible. The Southerners condensed this argument, claiming that abolitionists were interested in abandoning the Bible, and few in the nineteenth century wanted to be on the side of those who would abandon the Bible. Thus the Bible was used at multiple levels to defend slavery.

Most who defended slavery did not use only the Bible but combined it along with issues of nature, paternalism, and the overall benefits of slavery to the South. For example, some pointed to nature, claiming the Africans were being saved from their savage heathen ways, meaning that they were much better off as slaves in the United States than as free people in Africa. Thus religion was combined with "civilization" in this variant of the pro-slavery defense. The idea is somewhat similar to many of the pro-colonization arguments forwarded in the late nineteenth century and later throughout western Europe and the Americas. Perhaps the best known of these defenders is Rudyard Kipling, who argued that the "White Man's Burden" was that he had to, for the good of all humanity, bring civilization to the world. He wrote "Take up the White Man's burden, send forth the best ye breed, go bind your sons to exile, to serve your captives' need, To wait, in heavy harness, On fluttered folk and wild—Your new-caught sullen peoples, Half devil and half child." The poem directly brings in religion in that last phrase, but the whole idea of the savage needing civilization included religion as, of course, Christianity was part of civilization. Paternalism is also directly noted here in that the "children" of the conquered area are sullen in being dragged, kicking and screaming, for their own good, into the modern era. Thus, the supporters of colonization used arguments based in Christianity, just like those defending slavery.

Some defenders of slavery mixed Christianity with a rationalistic defense of slavery. They were not defending slavery as a good system to be established, but a good system to be continued. The argument said that slavery was not created by the current generation, but that the only available choices were to continue slavery or to return the slaves to Africa. Under this logic, returning the slaves to Africa would do more harm to everyone, slaves included, than continuing the system. The argument continued that the best overall thing was clearly slavery's continuance, meaning God clearly approved of slavery, as he wanted people to do what was best. Thus, some favoring slavery combined religion and an apparent cost-benefit analysis in its defense. A final type of defense of slavery emphasized the reasons that slavery had developed, and the benefits of the system of slavery over the previous system. Slavery was portrayed as a substitute for what had been done with prisoners of war previously, who had generally either been massacred or starved to death. Slavery, this argument continued, was thus beneficial. This whole use of religion was also, probably subconsciously, aimed at assuaging the fear and possible guilt of white southern slaveholders. Hell was a visceral concept for people in the nineteenth century, much more so than today, and no Christian wished to wind up there. Thus slaveholders needed to be reassured that their owning of slaves, which was vital to their continued economic success, at least in their own minds, and their continued societal position, was acceptable to God. This is not to suggest that slaveholders set out to find religious ideas that proved slavery acceptable, but that the religious temperament of the day, combined with

the Southerners' need to defend slavery, made this religious defense of slavery much more acceptable in their day than in ours, and much less questioned.

With the importance of religion throughout the first half of the nineteenth century, it is to be expected that it would be used in the debate over slavery. It was not just a weapon used by the abolitionists, who cited the idea of brotherly love in the New Testament and also used the whole idea of being able to reform people. It was equally, if not more importantly, a weapon of those who wanted to defend slavery. They needed to square slavery with the Bible for themselves, but they also needed to do it for the rest of the nation. Furthermore, they needed to convince many fence sitters that slavery was acceptable, and as religion was one of the more powerful weapons available, a religious defense was a strong one. Finally, they needed to counter the religious and other claims of the abolitionists, and religion was a great way to do both.

See also Dawes Severalty Act and the banning of Native American religions; Religion and opposition to women's rights; Religious elements of civil rights movement; Slaves, rights, and religion;

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Religion and nineteenth-century reform

Religion was a very important motivator in the nineteenth century, particularly in regard to reform. Just after the American Revolution, American religion began to change. Just as Americans wanted increased democratization (within limits) for its institutions, they began to want this for their religions as well. Great revivals swept across the United States, and camp meetings had huge throngs of people involved in a participatory religious revival. This was a great change from the cerebral religion of the Calvinists and Puritans. New religions, like Methodism, taught that people felt and experienced religion rather than soberly understanding it, and that all could be saved. Nor was religion limited to church services and Bible readings; it was supposed to be seen in all parts of life. This last area explains why religion tied into personal reform; a sinner's soul could be saved and every part of life rehabilitated. Those who had been saved could help to save and change others and the world. Religious-based ideals fueled reform in many areas during this time, including labor, temperance, and abolition.

Labor reform connected many key points of the general reform movement. Religious labor reformers wanted a decreased workday to allow people time for religious reflection and salvation. They also believed shorter workdays would lead to less exhaustion and better morals. Religious themes were used in campaigns for a shorter workday, and evangelical Christians added criticism of the working conditions into their sermons. The working class was active in religious reform, and they did not trust the middle-class reformers to have their interests in mind. Religious language was bor-

rowed by labor reformers to discuss reform in understandable ways. In many ways, religious concepts provided a common tongue with which these reformers could converse with various groups. A ten-hour workday was perceived as allowing time for leisure, something considered to be largely part of the man's world, which was an accompanying theme reformers promoted, so gender also played a role in the movement. Education also figured into labor reform. The lower class who wanted decreased work hours argued for this as a way to allow working-class people time to go to lyceums, which in turn would educate people.

Organized religion had an ambivalent relationship with the working class. Religion was important in the lives of the working people, but organized churches were not always receptive to them, as the churches were often controlled by the middle and upper classes. Factory owners promoted religion often and sometimes would even grant space inside a factory for a church to meet. However, owners did not always like religion as, for example, one revival might shut down a factory for weeks on end. There were divisions in the working class as well concerning the importance of religion, as not all of the workers wanted religion or moral reform (even though all probably would have welcomed shorter hours).

Religion played a role in the temperance movement, which aimed for liquor reform. One of the leading temperance groups of the time was the Washington Society, made up of reformed drunkards. A continuing theme was that these former inebriates had found God and because of this background, they knew how to appeal to those still enamored with drink. Some who were convulsed with religion, however, did not like the Washington Society, finding it too secular. Thus, there was debate even among religious reformers who promoted temperance as to how much God was enough.

Religion also played a role in the abolitionist movement. This role was larger in American abolitionism than in some other abolitionist movements, such as those on the European continent. The abolitionist movement, once it got fully under way, used the idea of justice, which was tied in with religion, to try to convince people to become interested in ending slavery. The abolitionists often self-identified their movement as a religious one. Social justice and abolition were particularly high on the agendas of Quakers, Methodists, and evangelicals because of their religious belief that all men were equal. The Quakers were active in the abolitionist movements of both England and the United States. The evangelical religions were very much interested in the idea of redemption, and they believed that everyone was physically redeemed, but slaves were physically bound, a violation of God's redeeming grace.

Thus, slavery, the labor system, and alcohol all were changed by the religious system of the period, which stressed the ability of the individual to change and find salvation. The old-line religions often held that individuals were already either condemned or saved; at the very least their belief was in the power of the minister more than the power of the individual, as they did not directly empower the individual. Thus the focus on individual salvation brought about by the new developments in religion directly encouraged these reform movements, all of which tried to save people from damnation as well as earthly evils.

See also American Revolution's effect on religion; Bible controversy and riots; Religion and prisons; The Shakers, the Oneida Community, and the law

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Religion and opposition to women's rights

This note examines the interaction between religion and sexism and between religion and the opposition to women's rights. Many religions have long had views that women were inferior. Some adherents believe that feminine inferiority is God's will, but those examining religion from a more neutral angle point out that historically, men have had control of the society and used religion to limit and marginalize women.

The Catholic Church has long kept women at its borders, including preventing them from becoming priests. Women are allowed to be nuns, who can teach and help the needy, similar to the work that monks do, but women have no opportunity to serve as priests and thus have limited opportunities to move up in the church hierarchy and influence formal church doctrine. Sisters in some orders, especially the teaching and healing orders, often say they feel empowered by their roles within the church, and believe that they are able to serve God and others in a unique environment because there are few men in their immediate surroundings. Others have argued for allowing women to be priests, but the Catholic Church, particularly under Pope John Paul II, has been unyielding on this point.

The Catholic Church is not the only one, by far, that moves toward keeping women out of the ministry. In Protestantism, one differentiating factor between some branches of certain faiths is whether they allow the ordination of women. For instance, the Presbyterian Church USA allows the ordination of women, whereas the Presbyterian Church of America does not. Similarly, the Southern Baptists do not ordain women any longer, while other Baptist groups do. Many fundamentalist Protestant groups also use religion to try to limit women's rights. Modern evangelicals often define themselves as "pro-family," a definition that often includes a traditional family where women stay at home and men work outside the home; the men earn the money and have the power. Fundamentalists who agree with this view (which is not held by all fundamentalists, by any stretch of the imagination), use scripture and interpretation to defend their view that power resides with the men.

Besides the religions themselves, there are also some religiously oriented movements that consider limited women's rights to be proper. Among those are the Promise Keepers, who argue that men need to take back control of the family, decreasing women's say in family matters. However, Promise Keepers also marginalize the issue of violence against women. In a final interesting twist, some elements of feminism have been used by those who would oppress women; they argue that as God gives equality, the state does not need to provide it as well.

Outside of Christianity, one differentiating factor among the branches of Judaism (including Orthodox, Conservative, and Reformed, three of the main branches in America) is whether they allow women to be rabbis. In the Orthodox tradition, only men can be rabbis, and rabbis make the religious laws, which was supposed to be the rabbis' only work. Women are supposed to run the household, make money, and take care of the children. With the exception of the wage-earning roles, these are clearly subordinate positions for women, and indeed, religious life often supersedes secular life in importance, meaning men have much higher standing in the household. In Orthodox congregations, women are even separated from men during the services by a barrier or divider called a *mechitza.* In the Conservative branch of Judaism, by contrast, women are allowed to be rabbis, even though some congregations are resistant to this practice. The Conservative branch of the faith believes that the rules of Judaism

come from God, but because they were written down by humans, they have human elements and can change; the Orthodox branch, on the other hand, holds that the rules came straight from God. Reformed Jews believe the rules were written down by and combined by human, generally male, hands and so can be fully interpreted by humans; they thus allow women to be rabbis and to have full equality outside of the temple as well.

A main justification, in Judeo-Christian thought, for marginalizing women, is the story of Adam and Eve. Eve is viewed as being responsible for Adam's eating the apple and thus knowing sin, earning God's wrath. Under some interpretations, Eve's role in Adam's fall caused her to be cursed with menstruation. Women were therefore supposed to be in only limited contact with men during their periods and for the week after in some religions. This, in addition to the language in Genesis that can be interpreted to make women subordinate to men from creation, is used as a religious argument against women's rights.

In most interpretations of current Islam, women are also given a lower place, although it should be noted that Islam, at its founding, gave more power to women than most Western religions. Islamic societies greatly varied throughout history in terms of how much power they gave women. Although many believe the practice of genital mutilation is linked with Islam, it is actually a cultural practice in many African nations and transcends a number of different religions. Just like the Christians and the Jews, modern Muslims come in many forms, and Islam has a number of branches, some of which are not linked with sexism.

By contrast to these three religions, the largest ones in the United States today, Native American religions generally gave women more power. This was one reason that some of the early travelers to America looked down on Native Americans. The Iroquois and the Cherokee gave a fair amount of power to women, and the Hopi had matrilineal lines of inheritance, meaning that inheritance and descendants were traced through the mother. Women could also be doctors in some Native American cultures, a practice that was entwined with religion. As Native American culture was largely wiped out by the growing white population, so too were their feminist religions. Modern adherents of Native American religions generally try to follow the ways of their ancestors, including respect and reverence for the female, when it was present in the religion historically, but these groups have been drastically reduced by cultural destruction.

Another widespread religion in the United States is the Hindu faith. There are numerous variations of the Hindu religion, and each takes a different perspective on feminism. Adherents of Brahmin Hinduism argue that the sexism associated with their religion, including female infanticide and dowry-related murders, are elements introduced by Christian and Islamic influence. However, feminist groups, especially those representing the perspective of the Untouchables, argue that Brahmin teachings justify intense misogyny and sexism. Traditionally, Hinduism is caste based, and women, even in the highest castes, were always ranked below men.

Buddhism has sexist roots as well. Historically, the religion was focused on men's contributions to society, and this strain can be seen in many Asian cultures still today. However, Western Buddhism has evolved to include more feminist thought and gives women greater respect. Western women who follow Buddhism generally argue that it is not Buddha's teachings that are sexist but the values imposed by the patriarchal misogynistic societies that added sexist elements to the religion.

Particularly historically, whether because of existing patriarchal structure or honest belief in divine condemnation of the sex, many cultures have used religion to promote sexism. Thus, most of these religions did suppress women. However, even the most repressive of these now has variants that, through the influence of

more modern perspectives, have adopted feminist perspectives and practices and, indeed, contribute to empowering women. There are also modern Goddess Earth–based religions in which women's strengths are nurtured through faith. Religion is now far less frequently a tool of sexism than it is an empowering force for women. However, the historical chauvinism of many of the world's strongest religions is still present in many places in our society.

See also *Fike* v. *United Methodist Children's Home of Virginia, Inc.; Little* v. *Wuerl; Maguire* v. *Marquette University; Roe* v. *Wade*

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Religion and prisons

Historically, religion has had a strong influence on the role of prisons in our society, transforming them from places of mere punishment to locales where criminals might be reformed. It is still an important factor in the way many prisoners interact with their prisons. However, most religious rights are strictly controlled in prisons. This interrelationship is obviously complex, and it has evolved with modern perspectives on crime and God. Most early societies had no prisons. Here, prisons do need to be differentiated from jails. Generally prisons hold long-term criminals who have already been convicted of crimes; jails hold short-term prisoners and those awaiting trial. Federal prisons are often used only for terms of more than a year, and a number of "other" prison facilities (halfway houses, home detention, detoxification facilities, etc.) do exist. However, the distinction between prisons and jails is a useful one when thinking about religion in prison.

Most early societies did not have prisons, in this sense, as they were too expensive. Criminals were generally fined, banished, mutilated, executed, or subjected to some combination of those punishments after conviction. Dungeons were popular for a time, and various forms of public humiliation were employed through the ages. For instance, the well-known—but actually little used—punishment in the early U.S. colonies of putting people in the stocks was intended to embarrass criminals into avoiding further offenses. All of these assumed that the point of punishment was deterrence and perhaps vengeance, not rehabilitation of the criminals. Even when it became apparent that prisons were needed to house long-term criminals who were either not to be executed or were awaiting execution, this focus on revenge and punishment remained in evidence for many years.

Attitudes began to shift in the eighteenth and nineteenth centuries, particularly in America. Because of religious influences, many people came to believe that criminal behavior could be avoided if criminals could be convinced of the evil of their ways. Thus, Bibles and part-time chaplains were provided to prisoners. One difficulty was that many prisoners were illiterate and could not read the Bible. This brought public concern about the need to educate criminals in the system. It was believed that if criminals could read the Bible, they would be less inclined to recidivism and would become better citizens. This belief in education remains strong today, and now the focus is more on breaking cycles of ignorance and poverty to help prisoners become useful members of society. Religious groups are no longer the only ones who want to help prisoners reform, and strong secular support for education now exists in the prison system.

Religion continues to play a large role in prisons, but the diversity of religion in this country has created an environment in which those incarcerated may find it difficult to practice their faiths behind bars. Many prisoners today have filed claims that the prison's treatment violates their religion. Some of these lawsuits stem from the increased litigiousness in American society, but some are brought by prisoners whose rights have truly been violated, and several Supreme Court decisions have granted certain religious rights to inmates.

During the 1960s, the Supreme Court began to have a more balanced approach about the rights of those accused and detained versus the power of the federal and state governments. For most of the country's history, the state was considered to have the power, while those accused had little. This view was revised under the Warren Court and the Miranda rights are only the best-known sign of that revision. Before this time, prisoners had very few rights and up to 10 percent of the inmates of some work prisons died every year from working on chain gangs and in convict labor systems. In 1972, the U.S. Supreme Court formally reexamined the rights of prisoners, in *Cruz* v. *Beto,* and held that prisoners did retain the right to freedom of religion. This right was not nearly as large as the freedom of religion enjoyed by those who were not incarcerated; however, prisons had to make reasonable accommodations for the rights of the incarcerated. Additionally, courts had to balance the interests of the prison (and society in having effective prisons) against the inmate's constitutional rights. From 1974 to 1987, no Supreme Court case decided issues of prisoner rights, so a prisoner's rights depended on what federal judicial circuit he or she was in, as the highest decisions in that time period were at the level of the circuit courts of appeal. Some circuits required the state to prove a "compelling state interest," basing their decisions on *Sherbert* v. *Verner,* which held that religion could be restricted only when such an interest was proven. Other circuits required an "important" interest. Obviously, prisoners won more cases under the first standard than the latter.

The Supreme Court reconsidered the issue in 1987 in *O'Lone* v. *Estate of Shabbaz*. *O'Lone* held that a Muslim inmate could be forced to work outside the prison building which in turn would prevent him from attending a service. The Court identified four issues to consider: the connection between the prison rule and the goal, alternative ways of accomplishing the goal, the impact on the guards and prison of not having the goal, and alternatives to that rule. Under the *O'Lone* rule, the prisons were allowed to infringe on inmate rights, and, indeed, it was determined that prisons did not have to provide a diet free of pork for Muslim prisoners. The Religious Freedom Restoration Act (RFRA) in 1993 restored the need for the compelling state interest test and many more suits ensued. However, in 1997, the Supreme Court struck down the RFRA and so the *O'Lone* rules were reestablished. Thus, after a period of significantly increased prisoner rights and a later era of indecision, a medium level of rights for prisoners in the area of religion has been established, but this level is still far higher than those existing for the nineteenth and most of the twentieth centuries.

The focus on religion in the prisons has shifted somewhat. In the eighteenth and nineteenth centuries, religious activity in prisons was considered a humanitarian effort to reform the criminals housed there. As diversity in religion grew throughout the country, however, the focus changed to asking what rights criminals held to be allowed to worship after their own fashion. This question is still under heavy debate today and will likely appear in the federal court system again in the not-too-distant future.

See also Capital punishment and religious-based opposition to it; Punishment and religion; Religion and nineteenth-century reform

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Religion in presidential elections before 1960

While President Kennedy's election in 1960 is fairly well known as the election of the first Catholic president, the issue of religion in elections before that date has been less heavily publicized. Religion was a significant factor in elections before 1960, stretching back into the early 1800s, and a survey of the influence of religion on those elections will demonstrate the importance of religion in American political history.

America's presidential elections have always been strongly contested races. Very often, and not just in recent history, they have turned ugly and personal. The first time that religion entered presidential politics was in the 1832 election, as the National Republican Party, soon to be known as the Whig Party, was greatly helped by anti-Masonic and anti-Catholic sentiment. Many people feared the Masons' power, believing them to be a secretive order with a hidden agenda that supported bans on Christianity and liberty. The Catholics were feared due to the growing number of immigrants, many of whom were Catholic. The Catholics, for their part, being disliked by the Whigs, gravitated to the Democratic Party, especially in the North. Other than an anti-Mason candidate (who did not do well), the election fronted no candidates with a direct religious agenda, and no accusations of such. However, religious sentiment did shape which political party voters favored.

The first election in which religion was a significant and direct factor was 1844. The Whigs, as noted, were an anti-Catholic force, and they selected Theodore Frelinghuysen, who was a leading Presbyterian reformer (although not a minister), as candidate for vice-president to run with Henry Clay, the perennial presidential candidate. This selection caused many Catholics to turn out for the Democratic Party and its candidate, James K. Polk. It may very well have been the deciding factor in New York, which the Democratic Party won by only about 10,000 votes, and New York would have held enough electoral votes to swing the election to Clay.

In the election of 1848, religious issues were almost wholly ignored, as both parties tried to dodge the important issue of slavery; thus anti-Catholicism did not play a large role. In the early 1850s, though, a party with a strong anti-Catholic branch emerged: the Know-Nothing Party, or, as it was called in the 1856 election, the American Party. The Know-Nothings were officially called the Order of the Star-Spangled Banner, a secret order, but they told their members, when asked if they knew anything about the order, to reply "I know nothing," and hence earned their more popular name. The party wanted only Protestants appointed to office and wanted to extend the period that new immigrants had to be in the country before being allowed to vote with the hope of decreasing Catholic power. The Know-Nothings got 20 percent of the vote in the 1856 election and were a contributing force in the death of the Whig Party, which was already splitting apart over slavery.

Religion, after the Civil War, remained a large force in politics. The Republican Party continued the Whig Party's tradition of personal reform, which for some Republicans included temperance. Catholic immigrants, who were stereotyped as drunken, were heavily targeted by the temperance campaigns, and in response many Catholics turned to the Democratic Party and against the Republicans. This

After establishing a reputation as a reform governor in New York, in 1928, Alfred E. Smith became the first Roman Catholic ever nominated for president by a major American political party. (Library of Congress)

was true mostly in the North as few Catholics lived in the South and most Protestants there were Democrats, as the Republican Party's backing of the North in the Civil War trumped all other issues.

The next presidential election in which religion played a significant role was in 1884. The Democrats had nominated Grover Cleveland, who seemed free from the corruption of the period. The Republicans nominated James Blaine, who was not nearly as free from the issue of corruption. One of Blaine's supporters, a New York minister, dismissed the Democrats as the party of "rum, Romanism, and rebellion," and the Democratic Party used this slur to rally Catholics and Southerners to the Democratic cause. This was not the only issue in the election, as Blaine was seen as corrupt by many voters, and a letter he wrote ending "burn this letter" surfaced to further harm his cause. Exactly how many voters turned out due to the insult and how many others voted against corruption with Cleveland is obviously impossible to tell, especially as polling in the 1880s was not nearly so sophisticated as it is today. Cleveland won by only about 29,000 votes out of over 8 million cast—a very slim victory. Thus, the insult probably did play a somewhat significant role. Politics clearly had an element of religion-based support and religious-based opposition in it as a fair number of people probably voted either for or against Blaine because of the religious comment; also, the influence of religion was apparent in that every candidate for a major party in the nineteenth century was

Protestant. Indeed, religion's silent role in political life is still evident as this country, with such diversity, has never had a non-Christian president (and only one non-Protestant).

The 1896 presidential election was the next one to be sizably shaped by religion. In that election, William Jennings Bryan was the Democratic (and Populist) candidate, while William McKinley ran for the Republicans. Bryan had a style similar to many modern-day fundamentalist preachers, with a booming voice and lots of moralism mixed in with his rhetoric. While this appealed to many of his southern and western Democratic and Populist supporters, it did little for many northern Catholics, who were repelled by the Protestant overtones. It also did not help that Bryan's economic message did not really appeal to the Democratic city dwellers (and industrial workers) who formed much of the Democratic base in the North. While Bryan did well, he lost most of the northern states, in part due to his inability to appeal to the Democratic Catholic workers. Bryan won no states that had fought for the Union in the Civil War, with the exception of Missouri, which had been a border state. He lost the election even though he received substantially more votes than Grover Cleveland did when he won the presidential race four years earlier. Bryan ran for president twice more, in 1900 and 1908, but did not ever win or even top his vote total from 1896.

Religion next played a major role in the 1924 election, and it was here that the religion of a particular candidate played a factor. However, unlike future races, it was not the religion of a nominated candidate that played a role, but that of a candidate who could not win the nomination. A few words, though, need to be said about the larger issues surrounding America in the 1920s as they also impacted this election. The 1920s (and late 1910s) saw a large wave of xenophobia. Part was due to religion, particularly the religion of many immigrants who were arriving in the late 1800s and early 1900s. Most people immigrating to the United States before 1860 had been Protestant and from northern Europe, with the noted exception of the Irish in the 1840s. Starting around 1860, though, this began to change; a larger percentage arrived from southern and eastern Europe, and most of these people were Catholic and Jewish. There also was a perceived rise in the radicalism of these immigrants. Influenced by these three changes (area of origin, religion, and level of radicalism), eventually the public began to desire to shut off America from immigrants. This was not a new call, but at this time, fear that the aftereffects of the Russian Revolution might possibly come to America through immigration, coupled with the changes noted earlier, convinced people that it was time to limit immigration. This call had succeeded by 1924, as the National Origins Act was passed in that year. That piece of legislation set ceilings on immigration based on the national origin of the immigrant (hence the title of the legislation), and it only allowed in each year 2 percent of the amount of Americans in 1890 from a given country. As most eastern Europeans had arrived after 1890, that legislation clearly limited the immigration from eastern Europe. The legislation also wholly prohibited immigration from Asia. The concern prompting the limits, however, still remained. Also in the 1920s the issue of Prohibition was important. Temperance and Prohibition advocates had pushed through the Eighteenth Amendment, but Prohibition was not working, and some, including most northern Catholics, who were mostly Democrats, wanted its repeal. Within the Democratic Party, there was a great split as the southern Protestants, who were also Democrats, wanted Prohibition to remain the law of the land.

At the 1924 convention (and it should be noted that at that time conventions, not primaries before the convention in the individual states, still nominated the candidates), there was a great split. The northern faction favored

Al Smith, a Catholic and anti-Prohibition, or "wet," candidate, who had been governor of New York. The South favored William McAdoo, who had been in Woodrow Wilson's cabinet. At that point a person needed two-thirds of the convention votes to become the candidate. Neither side would agree to the other's candidate, and the Democrats went through 102 ballots before deciding to agree to disagree. Neither McAdoo nor Smith was nominated, and the Democrats picked John Davis, a party figure and lawyer who was obscure, at least to the average voter. Davis was a corporate lawyer who had served one term in the House of Representatives and had been solicitor general under Wilson. He did poorly in the 1924 election, winning only 29 percent of the vote, or the smallest percentage by a Democratic candidate in the twentieth century. Opposition to Smith's Catholicism, along with the inability of the party to find someone else well known to run, crippled whatever small chance the Democrats had to do well in the 1924 election. Also, the national economy was going fairly well, especially in the public's perception of it, and so the Democratic candidate would have had an uphill battle even with the full support of the party.

In 1928, Smith ran again. The northern Democrats had increased in influence since 1924, so Smith managed to win the nomination this time. However, he lost the election handily to Herbert Hoover, winning only six southern states. He did better than Davis had done in the popular vote and won the vote in the largest cities, but he could not carry any entire northern state. Smith clearly appealed to city dwellers and to Catholics, but much of the nation was not ready for a Catholic president. Some even feared that the pope would run American foreign policy if Smith were elected.

After Smith's nomination, neither party turned to a Catholic candidate and neither party really used religion in the election process, either positively or negatively, until 1960. Religion was publicly proclaimed by presidents in the 1940s with days of prayer during World War II and then in the 1950s as the United States adopted "In God We Trust" as its national motto. However, those efforts were largely bipartisan rather than being of one party or one religion. The 1960 election and events since 1960 are discussed elsewhere, but religious fervor in presidential elections, especially anti-Catholicism, has significantly dropped since the 1928 election.

See also Bible controversy and riots; Maryland Charter and 1654 law disestablishing religious freedom; 1960 election and role of anti-Catholic sentiment; *People ex rel. Ring* v. *Board of Education;* Religion in presidential elections since 1960; Shift away from anti-Catholicism from 1960 to 2004

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Religion in presidential elections since 1960

Religion, especially in the guise of anti-Catholicism, has not been as much of a factor in elections since 1960 as it was before and in

Democratic presidential candidate John Kerry (center) and his wife Teresa Heinz Kerry talk to Reverend Robert Duch after services at a Catholic church in Fox Chapel, a suburb of Pittsburgh, Pennsylvania, on May 9, 2004. (Paula Bronstein/Getty Images)

1960. Of course, anti-Catholicism played a significant factor in the 1960 election as it was one of the main reasons some people did not vote for John F. Kennedy. Since 1960, though, it has been less of a factor. In 1964, 1968, and 1972, foreign policy was the largest issue, with personal appeal of the candidates also being important. Religion reentered the presidential race in 1976, with Jimmy Carter portraying himself as a trustworthy outsider who was a "born again" Christian to boot. Carter's image helped him win the election, although only by a narrow margin against Gerald Ford, who had very low popularity ratings.

Religion was used more successfully by Ronald Reagan in the 1980 and 1984 elections, as he rallied fundamentalist Christians to fund his campaigns and vote for him. He pledged to put God back into the schools and to reverse *Roe* v. *Wade*. While he was not successful in either endeavor during his presidency, his support by religious conservatives definitely helped vault him into office. Religion was still an issue in 1988, and religious conservatives continued to be quite vocal in the Republican Party, but George Bush was less strident about emphasizing his religious ties. The Reagan legacy, together with a fairly vicious personal campaign, were the main issues, and George H. W. Bush used these to his advantage, resulting in a victory. In 1992, religion was something of a background issue, with Republicans using religious undertones in their efforts to implicate Clinton in unfaithfulness to his wife. Clinton, however, deflected that issue and won the election, emphasizing the declining economy. In 1996, Clinton's unfaithfulness was again used in the Republican campaign, but the booming economy (along with a relatively unpopular Republican candidate, Bob Dole) allowed Clinton to win. In 2000, George W. Bush used his support from religious conservatives to win a narrow election marked by an avoidance of the issues. In 2004, Bush again used his support from religious conservatives to win, but also injected religious issues into the campaign. The main religious issue was gay marriage. Nearly all religious conservatives strongly opposed it, and Bush successfully linked John Kerry to it.

Religion also played a role with people claiming that Kerry was not Catholic enough as he took a pro-choice stand on the abortion issue, which of course put him at odds with the Catholic Church. Thus, religion, especially any strain of anti-Catholicism, has played a more muted role since the 1960 election, but it continues to be a factor in many people's votes.

See also 1960 election and role of anti-Catholic sentiment; Religion in presidential elections before 1960; Shift away from anti-Catholicism from 1960 to 2004

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Religious conscientious objectors in World War II

World War II is thought of as "the Good War," but it still produced some conscientious objectors (COs). Most agreed to perform alternative service for the army or to work stateside, so only a few were imprisoned. It is estimated that about 6,000 of those denied conscientious objector status during the war eventually went to jail. This is a very small number compared to the 34 million who were examined by the selective service system.

One must wonder about the relationship of the war's popularity to the number of conscientious objectors. It would seem that in both World War I and World War II, most of the conscientious objections came from people who were opposed to all war rather than to the particular war. The system functioned more smoothly in World War II; as procedures were more carefully defined, there was less war hysteria than there had been in World War I, and fewer boards seem to have been interested in punishing pacifists. Most objectors to the draft system were also dealt with by the justice department, rather than the army, and so were treated less harshly. The army, for its part, liked this system better as it did not have to deal with those who opposed any connection with the war. Also, a whole system of alternative service was better defined by the time of World War II. Those who did decide to resist the draft also had more help than those resisting in World War I—the ACLU was more organized, experienced, and active, and a whole group of protestors from World War I were available to help the resisters.

About 72,000 individuals requested CO status. Of those, 25,000 served in the army as noncombatants, often as stretcher bearers and medics, and another 11,950 were assigned to the civilian work camps. Of the remaining 29,000, most probably were not needed for the war. Recall that all males between the ages of eighteen and sixty-five were required to register, but not all were called, as the number registered was twice as large as the overall armed forces, and the armed forces also included volunteers as well as members who had been in the service before the war started. There were probably far more than 25,000 in the army who were conscientious objectors. For instance, the Seventh-Day Adventists, a generally pacifist church, urged their members to enroll in the military in a noncombatant role, and this method did not always cause them to become registered as COs. Those who served in a noncombatant role served quite well, with one winning the Congressional Medal of Honor for his heroism while rescuing men under fire. Those who were assigned to the civilian work camps performed a variety of roles, including working for the U.S. Department of Agriculture and the Forest Service. Many served as firefighters; others worked in mental hospitals or volunteered for medical experiments. These COs were not paid, while those who served in the army were, so there may have been a financial incentive for some to enroll in the army while still registering as COs.

Of the ones imprisoned, most were Jehovah's Witnesses. The direct reason for this was the army's refusal to grant all Jehovah's Witnesses minister's exemptions. Most Jehovah's Witnesses would not accept a conscientious objector status as they believed that all who followed their religion were ministers. The government disagreed and placed many in CO status, and then, when they failed to report, prosecuted them.

The justice department, while less harsh on the imprisoned COs than the army had been in the past, still viewed them with contempt. It broke them down into twelve categories, including that of "neurotic," which were those

people who were so horrified by war that they refused to serve. The COs were often sentenced to the full term of five years in jail and served on average thirty-five months or almost three years, no mere slap on the wrist. Many of those sent to prison protested against a wide variety of conditions. The segregation rampant throughout the prison system caused many protests, including actions in Connecticut, Michigan, and New York. Some of those who protested against segregation in the armed forces were also sentenced as COs during the war.

Mental hospitals were sometimes used as punishment. George Elder was arrested for refusal to notify the draft board of his changed address, and he announced his opposition to all war at his trial. Rather than being sent to prison, he was sent to a mental hospital for being insane and was not released until 1970. Some of those who protested the prison conditions went on hunger strikes, and they, too, were sent to mental hospitals.

Thus, while the system worked much more smoothly than in World War I, and there were many fewer who requested CO status than in Vietnam, there still were significant numbers who requested that status in World War II. Most were granted CO status, but some were imprisoned either for refusal to work within the system, such as the Jehovah's Witnesses, or for refusing to serve in the armed forces as soldiers when their request for CO status was denied.

See also Abuse of nonreligious conscientious objectors in World War I; Abuse of religious conscientious objectors in World War I; African-American draft resisters during the Vietnam War; *United States* v. *Seeger; Welsh* v. *United States*

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Religious elements of the civil rights movement

The civil rights movement was fueled by a number of religious individuals and groups, and as that movement changed the law, this demonstrates how religion and the law interacted in this area. The movement gained much of its shape from the structure of the African American community at that time. Even into the middle of the twentieth century, the white establishment prevented African Americans from having independent financial organizations or much power in politics. The church became the center of life for many African Americans, and for this reason, church leaders were often leaders of the civil rights movement. Church leaders were often more independent than some of the other figures in the African American community, existing independent of the white power structure that might otherwise have held them down. Therefore, religious rhetoric infused the movement, drawing on the language of Christian love to insist upon legal change.

Two of the movement's leaders were Martin Luther King, Jr., and Fred Shuttlesworth. Both were Baptist preachers and founding members of the Southern Christian Leadership Conference (SCLC). They influenced the whole tenor of the civil rights movement, especially in the early 1960s. King fused ideas of Christian love with Ghandian nonviolence and the ideas of Henry David Thoreau, creating the idea of redemptive suffering. He encouraged many to protest nonviolently, which in turn caused the American public to become interested in supporting the civil rights movement.

King's rhetoric used many religious themes. In his famous Letter from a Birmingham Jail, he wrote that he was "in Birmingham because injustice is here. . . . Like Paul, I must constantly

Martin Luther King, Jr., waves to the crowd as he delivers his famous "I Have a Dream" speech during the March on Washington in Washington, D.C., on August 28, 1963. King was awarded the Nobel Peace Prize in 1964 for his work in the area of human rights. (AFP/Getty Images)

respond to the Macedonian call for aid." In his even more famous "I Have a Dream" speech, he closed by saying that "we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual: Free at last! Free at last! Thank God Almighty, we are free at last!" Thus the civil rights movement's ideas and words relied heavily on religious themes, demonstrating one way in which religion has had an impact on our society's laws.

See also African American religious conscientious objectors in World War II; Martin Luther King, Jr.

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Religious freedom in Rhode Island in colonial times

Rhode Island was the first colony to allow religious freedom. It was quite different from nearly every other colony in early America, and it was, ironically enough, a by-product of the repression that existed in the nearby Massachusetts Bay Colony.

Massachusetts Bay was established in 1630 by the Massachusetts Bay Company, and one goal was to be an example to the rest of the world. As such, it melded church and state, trying to use both to produce a perfect world. Not all thought the state should be doing this, however. Some felt the world could not be perfected, as only certain people could achieve perfection, and these would be in the right church. As only some could be perfected, the imperfect people would always be a part of the state, in turn threatening religion if the state and religion were intertwined. This argument for freedom of religion is rarely advanced today, but it was the beginning of religious freedom in this country. As Massachusetts Bay believed in a quite different model, neither the state nor the church was interested in listening to this view.

One of the first to articulate this view and thus challenge the church was Roger Williams, who entered the colony in 1631, a year after its founding. (The Pilgrims had landed ten years before that but they were part of a different land grant, so they were not in Massachusetts Bay until Massachusetts Bay took them over later.) Williams, in addition to believing that the state and church should be separate, also wanted more power to be given to the average person and to local churches, and both of these ideas moved him far away from the Puritan leaders. By 1635, Williams was viewed as enough of a threat for the state (also meaning the church) to move against him. He was banished to what is now Rhode Island, which was then part of Massachusetts Bay, about sixty miles away, and he founded the town of Providence.

Williams, unlike the founders of most other colonies, did not steal the land outright from its Native American inhabitants; instead, he bought it and invited his followers to join him in Providence. Williams did not trust his good fortune to secure the colony; he went to England and received a charter in 1643. This was during the English civil war, and the charter served to protect Rhode Island for seventeen years. Rhode Island welcomed many more who were interested in coming to America than did the other colonies, and it also tried to maintain peace with the Native Americans. It actually had fewer difficulties on that score than many other colonies. Among the types of believers who were in Rhode Island in this period were, listed alphabetically, Baptists, Calvinists (then generally called French Huguenots), Jews, and Quakers. In 1660, England restored the Stuart monarchy and Rhode Island sent a representative to secure a royal charter. In keeping with the ideals of the colony, the charter allowed for full freedom of religion. Religiously, the rest of the seventeenth century was relatively peaceful in Rhode Island, even though the colony had to endure King Philip's war with the Native Americans, which resulted in the burning of Providence to the ground. The eighteenth century saw continued religious freedom in Rhode Island, even while the fires of religion burned a little less bright. The First Great Awakening did extend to Rhode Island, as it did for the rest of New England, but it was a somewhat unsystematic arousing. Unlike other places, battles did not break out over the legal status of churches, and there was less social tension. The eighteenth century also saw generally less interest in religion in Rhode Island. This was partially because Rhode Island did not have very strong second-generation ministers. As the founders of the religions in Rhode Island, such as Roger Williams, died, the replacements were less vibrant and less attractive.

There was not total religious freedom in Rhode Island, however, even though there was no established church. For instance, Catholics, according to the laws of the state, were not to be religiously tolerated, though there were no recorded Catholic prosecutions, either. This seeming contradiction could have had one of two causes. First, there were never many Catholics noted in the colony, and so their numbers probably were not that high. Second, the act could have been passed to placate England's intolerance of Catholicism rather than

rising from the colony's own desires. There were some Jews in Rhode Island, who relocated there from Brazil when all Brazilian Jews were forced to convert to Catholicism or leave, and these were generally accepted, if ignored. The only noted anti-Semitism came in the late 1700s when some Jews asked for citizenship and were denied it based on religion.

Religion also had an influence on the colony's educational posture. There was distrust of an educated clergy in Rhode Island, and so it was less supportive of colleges than other colonies, such as Massachusetts Bay, where Harvard was established only six years after the settlement's founding. The College of Rhode Island, which later became Brown University, did not begin until the 1760s.

Thus, Rhode Island was founded without an established church, and it never had one. It granted religious freedom to all Protestants and extended nominal acquiescence to Jews and unspoken tolerance of Catholics.

See also Established churches in colonial America; Anne Hutchinson; Roger Williams

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Religious Freedom Restoration Act of 1993

Congress cannot directly overturn a Supreme Court decision, but they can pass legislation supporting a position struck down by the Court or re-pass disallowed legislation, hoping to find a constitutional road to the same goal, and they can also instruct the Court as to the purposes of their legislative acts. A court sometimes will strike down an act as unconstitutional only to uphold it once they see the purpose claimed by Congress or by a state. Congress also sometimes acts symbolically, making political statements in support of a position, even if they think that the Supreme Court will not uphold the new legislation any more than the old. One such piece of legislation is the Religious Freedom Restoration Act (RFRA) .

The Religious Freedom Restoration Act of 1993 aimed to overturn *Employment Division* v. *Smith* (1990). That case held that a state could outlaw peyote use without violating the First Amendment's freedom of religion. Oregon, the state in question, had banned peyote, and two men had been fired from their jobs for using peyote in a Native American worship service. These men had then applied for unemployment benefits, which were refused because such benefits were not available to those who had been fired for misconduct. The case went to the Supreme Court, and the justices there upheld the statute. Before *Smith,* Court rulings had employed a balancing test: if a practice was "central" to one's religion, then the state had to prove a compelling government interest if the law substantially burdened the religion. The *Smith* decision provoked a firestorm of criticism, as religious officials realized that the ruling would make it easier for states to pass laws that limited their religion (as long as that was not the stated purpose of the law), and make it harder for religions to fight such laws in court.

Congress passed the RFRA to reverse *Smith*. What it did was to restore the "substantial burden" test that had existed before *Smith*. The RFRA held that "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."

Congress announced its goals in passing this legislation as "(1) to restore the compelling

interest test as set forth in *Sherbert v. Verner,* . . . and *Wisconsin v. Yoder,* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

The act declared, "Government shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest."

This act aimed to restore *Sherbert* v. *Verner.* It passed the House of Representatives by a unanimous vote and the Senate by a vote of 97 to 3, and it was the law of the land for four years. However, in *Boerne* v. *Flores* (1997), the Supreme Court struck down RFRA, by a 6 to 3 vote. The majority opinion was written by Justice Kennedy, and dissents were written by O'Connor, Breyer, and Souter. Kennedy held that the RFRA was unconstitutional. The justification given by Congress for the RFRA was not, not surprisingly, that they thought *Employment Division* v. *Smith* was wrong, but that the Congress wanted to guarantee the First Amendment rights of the people. This, Congress argued, they were allowed to do because of section 5 of the Fourteenth Amendment, which gives Congress the power to enforce section 1 of that amendment. Section 1, in turn, guarantees, among other things, that no state can "deprive any person of life, liberty, or property, without due process of law," and previous Supreme Court rulings had held that liberty included the First Amendment. In this roundabout way, Congress claimed the right to protect religious liberty by reinstating the *Sherbert* standard.

Kennedy, however, did not find this to be acceptable. He held that "legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" (521 U.S. 507: 519). Kennedy also said that Congress, if given the power to decide what constitutional violations were, would have no limits; it would destroy the balance of power and would overtake the role of the Court. Basically, he stated that Congress was doing the Supreme Court's job, and that the Supreme Court was quite able still to do its own job and would do so by upholding *Smith* and striking down the RFRA.

Thus, the RFRA was ruled unconstitutional. There have been other attempts to pass a new version of the RFRA, but they have been unsuccessful. One bill, the Religious Land Use and Institutionalized Persons Act, did pass, but it was aimed at zoning ordinances and people in prisons and mental hospitals and other institutions; it was limited to organizations and institutions involved with interstate commerce and those receiving federal funds. It was upheld as constitutional by the Supreme Court in 2001. Thus, even though *Smith* has been criticized, both by the dissenters in *Boerne,* and by Congress, it is still the law of the land, and attempts to overturn it have failed.

See also *Boerne* v. *Flores; Cheema* v. *Thompson; Employment Division* v. *Smith; Sherbert* v. *Verner*

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Reynolds v. *United States*

98 U.S. 145 (1879).

This case dealt with whether the federal government could ban polygamy in the Utah territory without infringing on First Amendment rights. The Mormon Church, which, at the time, favored polygamy, wanted to challenge the law. George Reynolds, the personal secretary of Mormon leader Brigham Young, brought the challenge. He was convicted and sentenced to two years' "hard labor" and a $500 fine.

In the U.S. Supreme Court, Chief Justice Waite delivered the opinion of the Court. He first reviewed the various procedural challenges to the conviction, upholding the practice of the Court in each. Reynolds had demonstrated that he was a Mormon and that practicing polygamy was a belief in the Mormon culture. Waite examined whether Congress was able to pass this restriction or if the First Amendment banned it. He turned and discussed the history of the religious controversy in America. Waite focused on the passage of the Virginia Statute for Religious Freedom, noting that it allowed restrictions on religion when religious "principles break out into overt acts against peace and freedom" (98 U.S. 145: 163). Waite also quoted a later statement of Jefferson that a person "has no natural right in opposition to his social duties" (98 U.S. 145: 164).

Waite then discussed why he thought polygamy could (and should) be banned, and reflected the ideas of the time in his writings. "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people" (98 U.S. 145: 164). He also noted that polygamy (as did many other crimes) carried the death penalty in England. After reviewing past laws, Waite held "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion" (98 U.S. 145: 166). He next held that religion would not excuse violating the law, and to allow this would create anarchy.

Thus, polygamy was allowed to be banned. This decision is still in effect, and it is often cited as proof that the government can ban religious practices that it does not like when belief turns into action. Similarly, in *Employment Division* v. *Smith,* where religiously neutral laws banning acts were held to be allowable, it was determined that the government can ban religious activities if the law creating the ban was not designed specifically against anything religious.

See also *Baehr* v. *Lewin; Employment Division* v. *Smith;* General legal treatment of Mormons; *Loving* v. *United States*

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Right to die and religion

The whole issue of the right to die is both explicitly and implicitly connected with religion. The "right to die," for the purposes of this encyclopedia, refers specifically to the ability of a dying individual to control the time and method of his or her own death. This term covers the right to withhold extraordinary care, also called death with dignity, and the idea of assisted suicide, when someone takes action to hasten a death. Religions take a variety of stands on these two issues, with some leaving the whole decision always up to the individual, some sanctioning a death with

dignity while opposing assisted suicide, and some opposing any effort by the individual to hasten death in any way.

The Bible, the basis of both Judaic and Christian faith, can be used to support both sides of the death with dignity debate. Most Christian religions allow treatment to be withheld if the dying person is of a sound mind. (Of course, here we are referencing the religions' views of those who decide to not have any extra treatment, not a legal concept.) Some groups hold that the soul, not the body, is what is important as the soul is made in God's image. Some of these in turn argue that if the soul has left the body, which is shown by the body's existence in a vegetative state, then the removal of treatment is not the extinguishing of a soul but the natural end of a life whose soul has already moved on. Dignity is another idea used by those who argue for allowing living wills (also called advanced directives), in which people specify that in the event of a circumstance that would incapacitate them from making life and death decisions, no extraordinary measures should be taken to save their lives. Some religions argue that being like God or being made in the image of God means that one is made with dignity, and dying in a vegetative state means that one does not have dignity. Some go so far as to argue that accepting one's death in turn allows one to conquer death. Other religions based in the Bible, however, disagree, saying that the individual does not have control over when life ends, but God does, and that when an individual takes an action to hasten death, even if that is by withholding treatment, he or she is moving into the realm of God.

In terms of what some individual religions believe, Catholic doctrine and Judaism generally allow one to withhold treatment at the end of life in order to die with dignity. Protestant groups vary in their positions on the issue. Most eastern religions also allow treatment to be withheld. However, Islam, along with the Mormons and many evangelical Christians, is opposed to allowing the withholding of treatment.

A factor complicating all of these beliefs is that there is little in the Bible that says when death occurs. There are quite a few passages stating that one is not supposed to cause death and giving those circumstances under which a taking of a life may be acceptable (just wars, etc.), but very few that state when those deaths actually take place. This is relevant because if death is when the soul leaves, not when the body ceases to function, then withdrawal of treatment from a vegetative state is not murder. Of course, when the Bible was written, there were no complicated treatments to keep one alive in a vegetative state, and so brain death and body death generally occurred at the same time for all practical purposes. Another complicating factor is the introduction of modern medicine, as some argue that when people accept the first medical treatment, which is not discussed in the Bible, then they also need to take the responsibility of saying when that treatment will end. A second complicating factor is the whole idea that suffering is redemptive. In several places in the Bible, including the book of Job, suffering is described as redemptive. If suffering is redemptive, then life should not be ended, either with a mercy killing or the withholding of treatment. But does redemptive suffering extend to needless suffering? The Bible is less clear on that, and, again, different biblical religions thus respond differently.

Most religions, on the other hand, clearly oppose mercy killing and euthanasia. Both of these terms mean active efforts taken to end the life of someone who is dying. This is not merely the cessation of feeding or treatment as in dying with dignity, but the taking of drugs or other efforts to end a life. Some Roman Catholic doctrine for a time allowed mercy killings at the end of one's life, but now Catholic doctrine, particularly that developed under John Paul II, prohibits the practice completely. One must realize that there is not that much in the Bible dealing with suicide either, just as there is not much dealing with when life

ends. It is generally accepted that the Bible prohibits it, though. St. Augustine was the first biblical scholar to develop the idea that suicide is immoral. Suicide is what a mercy killing often is in effect, if not in actuality (depending on who does the killing, it varies on whether it is suicide). Members of many different religions oppose suicide and mercy killings, including the Roman Catholics, most strains of Judaism, Muslims, Baptists, Lutherans, and Mormons. The Unitarians, the United Churches of Christ (UCC), and the Methodists generally leave the decision up to the individual. Reform Judaism is generally opposed to suicide but does allow it when there is no possibility of recovery. Thus, most faiths are opposed to mercy killings, even though many allow one the right to make a living will so as to choose when to have treatment cease.

See also Banning of suicide in law and its interaction with religion; Failure to treat due to religious beliefs; *Nally* v. *Grace Community Church of the Valley*

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Right to distribute religious materials in schools

CEF v. *Montgomery County Schools,* 373 F.3d 589 (4th Cir. 2004)

Hills v. *Scottsdale U.S.D.,* 329 F.3d 1044 (9th Cir. 2003)

Religious institutions have the right to distribute materials in the public schools. The schools are required to give all religions equal access, without exhibiting favoritism or discrimination. Quite a few cases over time have considered what regulations schools can place on the distribution of those materials. Equal access for all religions is the currently accepted paradigm, and that idea is reaffirmed in the two most recent cases in this area, *CEF* v. *Montgomery County Schools* and *Hills* v. *Scottsdale.*

School audiences have been given more scrutiny than many other audiences, largely for two reasons. The first is that schoolchildren are a captive audience, and the second is that they are generally considered young enough to be impressionable in nature while of school age. Thus, school districts have a right and a duty to be careful what impression they pass along to students. At the same time, school districts need to be neutral with respect to religion. They can neither promote nor retard religion as the prime effect of any policy, or as the prime effect of their overall policies.

In the *CEF* case, the Child Evangelical Fellowship wished to distribute flyers about its Good News Clubs meeting in some of the Montgomery County schools (Maryland). The schools allowed other groups to distribute information and permission slips, but denied the request of the CEF, citing concerns that allowing it to do so might establish a religion. The concern here was about the "evangelical" nature of the CEF, and the court held that the school thus created viewpoint discrimination, which was illegal under previous Supreme Court decisions. The leading Supreme Court case is *Good News Club* v. *Milford Central School* (2001), which holds that school administrators cannot prohibit a religious club from outside the school from meeting in the school building if it allows secular clubs who meet to discuss the same topics. The case still allowed for the restriction of teacher involvement in the process, though. The Fourth Circuit Court of Appeals followed along the same lines as the *Good News Club* case and ordered the Montgomery County School District to allow access to the CEF, noting that the flyers were to be placed in sealed envelopes. One dissenter argued that forcing students to

take home the flyers and presumably read them forced the students to participate in a religious activity.

The *Hills* case, decided a year earlier, dealt with the desire of a partially religious summer camp to distribute literature in the Scottsdale, Arizona, school district. The school district allowed noncurriculum-related materials to be distributed to students, so long as the materials were neither commercial nor political nor religious. The items were first to be checked and then given to teachers for distribution. Joseph Hills wanted to distribute a brochure about the camp that went into some detail about its classes (including two on the Bible) and extolled the camp's religious benefits. His brochure was originally permitted, permission was revoked after complaints, and it was later restored with a disclaimer that said that the district had nothing to do with the flyer. Finally, after much wavering, the brochure was revoked once more. The circuit court of appeals first noted that the school district had created a limited public forum for discussion of certain items. However, it maintained that the district's regulations must be viewpoint neutral, and the court found that the regulation was not. If other groups were allowed to distribute summer camp information, Hills should have been permitted to do so as well. However, language specifically promoting a religion would not be allowed. The court also noted that all the school's regulations needed to be applied in a neutral manner—that is, the same way to every religion. Thus, Hills was allowed to distribute and allowed to note the religious nature of the camp, but was not allowed to note the religious benefits of the camp in his promotion of it. The court concluded "the District cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language" (329 F.3d 1044: 1053). Students are impressionable, but the courts have consistently held that religious material does not need to be excluded, even while teachers can be restricted from promoting it. Restrictions can also be placed on the manner of the distribution, and proselytizing materials can be removed.

Schools pose a unique problem for the First Amendment. Part of this is due to their captive audiences and their ages, but the other problem is that the First Amendment is supposed to be neutral in the area of religion. Few schools want to ban all outside material, and few want to allow outright religious promotion, but the courts have repeatedly held that one cannot ban all religious material, while allowing other outside material, and so a fine line must be walked. The *Hills* and *CEF* cases both hold that religious materials need to be allowed, but that schools can ban materials that preach to students.

See also *Airport Commissioners* v. *Jews for Jesus; Board of Education* v. *Pico; Bronx Household of Faith* v. *Community School District No. 10;* Equal Access Act of 1984; *Lamb's Chapel* v. *Center Moriches School District; Police Department of City of Chicago* v. *Mosley; Rosenberger* v. *Rector and Visitors of the University of Virginia*

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Ring v. *Board of Education*

92 N.E. 251 (Ill. 1908)

Bible reading was a required exercise in many schools in the nineteenth century, and the

original purpose of many colleges was to train teachers who would in turn teach students to read so they could read the Bible. As early as 1684, prayers and Bible readings were required at schools, many of which were private at the time. As many states also had a mandated, state-supported church, these two practices went hand in hand, and the situation of religious minorities was given little consideration. Relatively soon after the American Revolution, state-supported churches were abandoned, but Bible reading in schools was continued. With the growth of public schools in the early nineteenth century, the practice was adopted there as well. Most states, though, left the issue up to the local school board rather than mandating prayer and Bible reading. One issue of consideration, even for states that had mostly Christian populations, was that different branches of Christianity used different bibles.

A very few states in the early twentieth century mandated that schools adopt prayer and Bible reading, but most still left it up to the local school board, in part to allow local school boards to adapt to the religious situation of the area. Several city school boards, particularly those with large numbers of Catholics, outlawed the reading of the King James Bible, or ruled that it could not be made mandatory. Rural school boards, which were most often dominated by Protestants, did not generally follow this practice.

In this case, the supreme court of Illinois in 1908 considered whether a school board could order the King James Bible to be read and hymns to be sung. The court first went through and succinctly stated the facts of the case, noting that these were public school districts, and that those suing were Roman Catholics, who held the King James Bible to be an inaccurate translation, and the opinion noted the hymns that were sung and the Lord's Prayer and the discussion of Bible verses. One complicating factor in the facts of the case is that there was "no parochial or private school in the county of Scott to which the relators [petitioners] could send their children for instruction" (92 N.E. 251: 251) and thus it was not by choice that the children were at this school. The court then noted that the First Amendment did not bind the states, but only the federal government. However, the Illinois constitution, in the words of the court, "guarantees 'the free exercise and enjoyment of religious profession and worship, without discrimination'" (92 N.E. 251: 252). The constitution also forbade public funds from going to pay for any school controlled by a church, or in general "for any sectarian purpose" (92 N.E. 251: 252). The court held that the prayer and Bible reading were worship.

The court then considered whether the Bible reading was "sectarian instruction," which would also violate the Illinois constitution. The court gave a history of state religions and then a history of the Bible, noting the different versions. The court concluded that "the reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it" (92 N.E. 251: 254). The court, on the whole, held that "all sects, religious or even anti-religious, stand on an equal footing" (92 N.E. 251: 256), so Bible reading could not be ordered, for both the reason that it was worship and that it was sectarian instruction.

There was a dissent by two justices, which held that no state court previously had held that the Bible as a whole was sectarian and that "there is no book that is so widely read or so highly respected as the Bible or that has had so great an influence upon the habits and lives of mankind" (92 N.E. 251: 260). Thus the dissent wanted the Bible allowed and suggested that if the Illinois constitution had wanted the Bible excluded, it would have directly said so. It also suggested that since Illinois "is a Christian state" and "its people, as a people, are a Bible-reading people," the school boards could decide to have the Bible read (92 N.E. 251: 260). It closed with the same prediction made in many such dissents

since, that removing the Bible from the schools would remove the Bible from people's lives, which would then have ruinous effects (and this is more implied than stated).

Ring was significant as it represented one of the first times a state supreme court stated that such activities as prayer and Bible reading required by the state were not allowable as they violated the separation of church and state. The U.S. Supreme Court would not take a similar step until *Engel* v. *Vitale* in 1962 (prayer) and *School District of Abington Township* v. *Schempp* in 1963 (Bible reading), and the decision provoked heavy criticism. Even though criticized, those decisions are generally still binding today. After the end of forced Bible reading and the end of forced school prayer, the battles turned to other issues, such as prayers at graduations and football games, and the level of state aid to religious institutions, as few think that the Supreme Court would seriously allow a return of mandatory Bible reading and prayer.

See also *Engel* v. *Vitale; Lee* v. *Weisman; Santa Fe Independent School District* v. *Doe; School District of Abington Township* v. *Schempp; Zelman* v. *Simmons-Harris*

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Roberts v. *Madigan*

921 F.2d 1047 (10th Cir. 1992)

This court case dealt with the restrictions a school could put on religious books and Bibles in school classrooms and school libraries, and among teachers' personal possessions. School districts have generally been allowed wide latitude in selecting their books but have not been permitted to ban all controversial books universally. Also, more restrictions have been allowed on books in individual classrooms than in school libraries, as libraries are seen as sources of information permitting students to access wider views than those available in many specific courses.

The decision in *Roberts* v. *Madigan* mirrored these ideas. Roberts was a schoolteacher who had a library of books in his classroom (he taught reading) and encouraged the students to read silently each day. He often read silently from the Bible while the students were reading silently. His principal had ordered him to cease and to remove from the library in the room two books that had predominantly Christian content. Roberts sued, claiming that this directive violated the establishment clause as it was hostile to Christianity. The principal also went into the school library and removed a Bible. The court found that the principal had the secular goal of preventing the teacher from violating the separation of church and state, and that the primary effect of her policy (other than the removal of the Bible from the school library) was to prevent this violation of the First Amendment. The court held that "school officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately" (921 F.2d 1047: 1055). It also ruled that the principal had not abused her discretion. Concerning Roberts's claim of academic freedom, the court held that there was a balancing test, and as the teacher was endorsing the Bible by reading it in front of his class, the school was allowed to restrict his academic freedom. The circuit court of appeals agreed with the district court that the Bible should not have been removed from the school library, and the principal had conceded

her error in this removal at the district court hearing.

One judge did dissent, though. Judge Barrett held that the principal had violated the teacher's religious rights by removing the Bible and actually was hostile toward Christianity. Both the majority and Barrett agreed the teacher had never discussed the Bible in class, a factor Barrett held to be extremely significant. He felt it meant there was no endorsement of religion, and so would have allowed the teacher to continue to read the Bible silently in the classroom.

See also *Board of Education* v. *Pico; Crowley* v. *Smithsonian Institution; Peloza* v. *Capistrano Unified School District; Smith* v. *Board of School Commissioners of Mobile County; Wiley* v. *Franklin*

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Norma McCorvey was the plaintiff known as Jane Roe in Roe *v.* Wade *(1973), the landmark Supreme Court case that established the constitutional right to privacy as grounds for legalized abortion. (Chris Kleponisa/AFP/ Getty Images)*

Roe v. *Wade*

410 U.S. 113 (1973)

The whole topic of religion is inextricably tied up with the issue of abortion. Most of those who favor banning abortion do so, at least in large part, because they believe that life begins at conception. This idea comes, for many, from their religion. (Author's note: this is often called the "pro-life" position, but I have chosen to avoid using labels as they tend to further polarize the issue.) Those in favor of allowing a woman (or a woman and her partner) the right to regulate the choice of abortion often believe that a life begins at birth, or at some point between conception and birth. This idea for many comes from their religion as well. Others believe that life begins at conception but that they do not have the right to regulate the choices of others in this very personal area. Thus, religion plays an important role in the battle over abortion, which helps to explain some of the polarity in the debate over the *Roe* v. *Wade* case. Historically, and well into the latter half of the twentieth century, many states outlawed abortion entirely prior to the *Roe* v. *Wade* decision, or limited its use to situations when the mother's health was at stake. Women wishing to abort a pregnancy who could afford to do so traveled to Europe or states like New York and California that permitted the procedure. However, many women seeking abortions could not afford the travel necessary to obtain them. Doctors and others regularly performed illegal abortions, often at the expense of the woman's health. Many women died from the consequences of an illegal or self-induced abortion. This set of circumstances changed in 1973 when the *Roe* v.

Wade decision established a federal right to abortion under certain circumstances.

The majority opinion was written by Justice Blackmun, who first looked at three different possible justifications for the statute in question in the case: morality, medical safety, and protecting "prenatal life" (410 U.S. 113: 130). He did not address either of the the first two potential reasons for justifying the statute: morality and medical safety. Instead, Blackmun addressed the third issue. Blackmun believed that the state's interest in prenatal life, as it was a potential life, needed to be considered against a woman's right to privacy. The right to privacy is not an absolute right, and so it needed to be weighed against the state's interest.

Blackmun first looked at the possible sources of the anti-abortion law. He noted that it was impossible to fully understand ancient attitudes toward abortion and that there were no clear origins of the procedure among the Greeks or the common law (410 U.S. 113: 130). Next, he considered the law in England and America, and he noted that abortion, after the point of "quickening" or when the fetus moves on its own, was considered a crime; however, abortion before that point was generally either not considered criminal or was treated as a misdemeanor. It was not until the late 1800s that all abortions were banned. The Court suggested that the ban on abortions might have been due to the risks inherent in surgery at the time, as this was before knowledge of the necessity of antiseptic conditions had fully permeated the medical field.

Near the end of his opinion, Blackmun surveyed the various views, both from religion and history, on when life began. He noted that the Stoics, most Jews, and many Protestants, particularly in terms of the formal statements of the various churches, held that life began at birth. On the other hand, Catholics since the nineteenth century had held that life began at conception. He did not consider the other faiths currently practiced in this country, including, to name a few, Eastern Orthodox, Buddhism, Hinduism, or Islam. Blackmun never mentioned, and therefore sidestepped, whether it would have been acceptable to input a religious view into the law if most of the major faiths had agreed.

Blackmun then divided pregnancy into three trimesters, one of the most famous and controversial elements of the ruling. The ruling allowed a woman relatively full choice of whether to continue a pregnancy in the first trimester. It allowed regulations related to her health from the end of the first trimester to what it termed viability (meaning the fetus could potentially survive outside the womb). From viability on, the decision allowed an abortion ban. One dissent dealt with how acceptable the right to an abortion had been in early American history, as the majority had suggested that privacy was a fundamental right and the right to an abortion was rooted in privacy. If the right to an abortion was not rooted in the whole idea of privacy, traditionally, then it would not be one of the fundamental rights and so could be regulated by the states.

A second dissent basically argued that life began at conception and that states should be allowed to protect it. Justice White wrote "in a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it" (410 U.S. 113: 222). White did not qualify his statement in any way. Thus, what is religious for many people, in White's mind, should be allowed to enter the law.

However, by a 7–2 decision, Blackmun carried the day and abortion became legal. The whole issue of religion was pretty much shunted off to one side, but it was destined to remain the core of many people's opinions on abortion. People on both sides of the issue were unable or unwilling to do what the

Court did and not consider religion. Later opinions would limit *Roe* v. *Wade,* by increasing the rights of states to include heavy restrictions in their abortion laws, but thus far no ruling has completely overturned the case.

See also Abstinence, government grants to force teaching of; Gay marriage; *Harris* v. *McRae;* Native American combination of religion and law

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Rosenberger v. *Rector and Visitors of the University of Virginia*

515 U.S. 819 (1995)

The issue of freedom of religion and freedom from religious establishment comes into particular focus when government funding of religious groups is under discussion. From early in American history, particularly after the writing of the Constitution, it became clear that Americans did not want a state-funded church. However, the extent to which a state could aid a religious group was less clear. There were also questions of whether a state had to fund religious groups equally with nonreligious ones.

This case, decided on a 5–4 decision, dealt with the University of Virginia's refusal to fund a Christian student group's magazine while funding other student publications. The majority opinion was written by Justice Kennedy and joined by Justices O'Connor, Scalia, Thomas, and Chief Justice Rehnquist. The dissent was written by Justice Souter and joined by Justices Stevens, Breyer, and Ginsburg. The university refused to fund the student magazine "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'" (515 U.S. 819: 823).

Kennedy first outlined the history of the University of Virginia's policy, explaining that the student groups the university refused to fund were those involved in "religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses" (515 U.S. 819: 825). A student group formed in order to publish a magazine, and the aim of the magazine was, in the words of the magazine, "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means" (515 U.S. 819: 826). The student group was not held to be involved in worship, and thus was allowed to form, but the question was whether the publication would be funded by the university.

Kennedy next looked at past regulation of speech and content. He noted that "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" (515 U.S. 819: 828). States were not supposed to practice viewpoint discrimination, "even when the limited public forum is one of its own creation" (515 U.S. 819: 829). The state was allowed to set limits on its forum, but once those limits were announced, the state had to follow them, and within a limited public forum, viewpoint discrimination was not allowed. The state tried to argue that content-based discrimination was allowed while viewpoint discrimination was not and that the issue at hand dealt with content; the majority of the Court, however, did not accept

this reasoning. The majority also answered the dissent's argument, commenting that "the dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech" (515 U.S. 819: 831). The majority agreed that a university may make content-related choices when it speaks or when it provides the speaker, but held that it may not discriminate on the content or viewpoint when it "expends funds to encourage a diversity of views from private speakers" (515 U.S. 819: 834).

The Court further granted that disbursal of funds may be limited, but held that this does not justify viewpoint discrimination. The decision said that viewpoint discrimination is especially bad in universities as universities are supposed to sponsor free speech. The Court held "the second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition" (515 U.S. 819: 835). The majority also pointed out that the restriction, were it carried to its full extent, would ban many philosophers. They wrote, "If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy" (515 U.S. 819: 837). The majority then turned to the question of the establishment clause. The Court first held that a government program needed to be neutral toward religion in order not to violate the establishment clause. A religious program could benefit, but the government must use "neutral criteria and evenhanded policies" when giving out those benefits, and the Court held that the university, had it paid for the publication, would have been following such guidelines. The Court questioned whether student fees were a tax, as taxes supporting religion were an influential factor in the creation of the First Amendment, but held that even if they were, the fact that all sorts of speech benefit means that neutrality is maintained. The Court added that since outsiders print the magazine and the university merely funds them, more than enough separation was maintained. Thus, the majority reversed the lower court and ordered that the school should have funded the publication.

Justice O'Connor wrote a concurrence, noting that hard rules should not be applied, but the details of each case needed to be examined when one is considering whether state funding of something creates "state funding of religious activities," which is banned. O'Connor identified three reasons indicating the state was not funding religious activities here: first, that "the student organizations, at the University's insistence, remain strictly independent of the University," "second, financial assistance is distributed in a manner that ensures its use only for permissible purposes," and "third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message" (515 U.S. 819: 849, 850 [last two quotations]). On the whole, O'Connor held "the Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence" (515 U.S. 819: 852). Justice Thomas also concurred, writing that the dissent misapplied history and that religious groups have always been allowed to participate just like nonreligious ones in "neutral government programs" (515 U.S. 819: 853).

Justice Souter dissented. He first examined the substance of the challenged periodical. He held that "the subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the

word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life" (515 U.S. 819: 868). Souter argued that publicly funding such a subject would violate the First Amendment. He then went back and analyzed writings of Madison and Jefferson and held that they directly opposed any state funding of religion, suggesting that the student fee did exactly this.

Souter also argued that this decision disagreed with past decisions. "The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake [the periodical in question] and, in fact, has categorically condemned state programs directly aiding religious activity" (515 U.S. 819: 874–875). He stated that the Court misrepresented what the magazine was actually doing, holding it to be a "Christian viewpoint" rather than a proclamation of religion, and that the Court gave too much power to the "neutrality" or "evenhandness" test. "Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny" (515 U.S. 819: 879). Souter also argued that even though indirect aid to religious groups was permissible, the Court had never before justified indirect aid to religion, which is what he saw occurring here. He also argued that giving economic benefits to a group was state funding of religion and was not analogous to simply granting all the same rights to use a forum. Souter also held that since all religious activity was banned, to deny funding was not viewpoint discrimination as it operated the same with regard to all religion. He argued that universities did not need to fund the publications of religious organizations just because they funded the publications of nonreligious ones.

The Court's holding here meant that schools now could not refuse to fund religious publications simply because they were religious. On the other hand, schools were permitted to avoid funding, or even allowing, religious ceremonies as that would perhaps seem to create an establishment of religion, and universities were allowed to ban funding of religious ceremonies as long as all were banned. The Court noted that the university banned "religious organizations" from becoming student organizations and possibly receiving funding and that ban was not challenged by the Court or by the student group. Thus, public universities were in a particularly tight situation. Some universities since have tried to solve this dilemma by banning all funding of religion, as did the University of Virginia, even while allowing funding of groups with a religious viewpoint, as the university was ordered to do in this case, and such a policy was allowed. The opinion also noted that in limited public forums, where the forum creator specifically limited the forum, content restrictions were allowed, if they conserved the goals of that venue, while "viewpoint discrimination" was not.

See also *Board of Education Kiryas Joel Village School* v. *Grumet; Board of Regents of the University of Wisconsin System* v. *Southworth et al.; Bronx Household of Faith* v. *Community School District No. 10; Chapman* v. *Thomas; Good News Club* v. *Milford Central School; Lamb's Chapel* v. *Center Moriches School District; Tipton* v. *University of Hawaii; Widmar* v. *Vincent*

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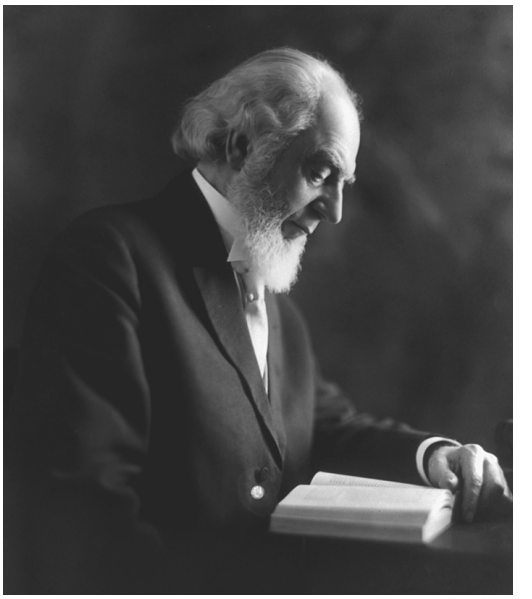
Charles Taze Russell and Judge Rutherford

Founder and Early Leader of the Jehovah's Witnesses
Russell born: 1852
Russell died: 1916
Rutherford born: 1869
Rutherford died: 1942

Charles Taze Russell and "Judge" Rutherford were important early leaders of the Jehovah's Witnesses. These leaders encouraged the group to worship publicly, and as this group frequently came into contact with the law, it is not surprising that many legal cases resulted. From these cases came long-lasting legal developments in the area of religion and the law.

Charles Taze Russell was the founder of what became the Jehovah's Witnesses, known early in their history as Russellites. He was originally a Congregationalist but left that religion when he came to doubt the whole nature of hell. At the age of twenty-six he became the minister at an independent church and began publishing *The Watchtower,* which is still produced today. He became convinced, and tried to convince others, that the end of the world was near and a revolution, with a final judgment, would soon follow. Russell worked to spread his ideas worldwide and attracted followers in a variety of countries. By his death in 1916, his *Watchtower* was estimated to have a circulation of over 10 million, when combined with his newspaper columns. He also combined new movie technology with sound and preaching, a successful method of gaining converts. Russell predicted that the world would end in 1914. When this did not happen, he lost some influence, but others saw the onset of World War I as confirmation of his prophecy. Russell had set a new date for the end of the world in 1918, but he died before this date arrived.



Charles Taze Russell, founder and early leader of the Jehovah's Witnesses movement, ca. 1900. (Library of Congress)

Judge Rutherford, as he was known to the Jehovah's Witnesses, was born Joseph Franklin Rutherford in 1869. He was the society's lawyer before Charles Russell died, and he became the group's leader upon Russell's death. He had refused the title Pastor from the church, preferring to be called Counselor, and many of his followers called him Judge. He initially had a number of difficulties after taking over the leadership, including a long jail sentence for his opposition to World War I. The Jehovah's Witnesses opposed war and government, particularly governmental symbols, and this caused them difficulty during the war. Rutherford and several others were convicted under the Espionage and Sedition Acts for opposing the draft.

Rutherford's sentence was eventually reversed, and he spent only a year in jail. After being released, he made a number of changes to the society and managed to keep himself in power. He changed the group's name from the Watchtower Bible and Tract Society to the Jehovah's Witnesses; started various periodicals, including *Awake;* wrote prodigiously; and began

the emphasis on the door-to-door witnessing for which Jehovah's Witnesses are best known today. He, like Russell, also used new technology. He handed out phonographs and told his followers to go door to door and request permission to play the recordings that promoted the Jehovah's Witnesses views, starting in the 1930s. He also began a radio station and used billboard advertising. Rutherford challenged the official prosecutions that involved the Witnesses. He fought against convictions for door-to-door solicitation and began the practice of having official representatives of the church help individual Witnesses who were arrested, which helped their chances of success. His efforts did eventually (generally after his death) result in increased legal protection for the Witnesses.

The Jehovah's Witnesses were opposed for their going door to door to proselytize and were also opposed during World War II for their refusal to salute the flag. The Witnesses refused because they considered the flag a "graven image," and the Bible specifically ordered followers not to salute any graven images. The Supreme Court ultimately upheld the Jehovah's Witnesses' position in both of these conflicts, stating that cities could not ban people from going door to door, nor could they force them to pay a fee to canvass, and that states could not force schoolchildren to salute the flag if they were religiously opposed to doing so. The Jehovah's Witnesses also had difficulties with the draft during World War II. Rutherford envisioned each Witness to be his or her own minister, as all of them were ministering to others in spreading the word. Thus, as all were ministers, he believed all should be exempted as ministers. This view did not carry much weight with the draft board, but the Jehovah's Witnesses were also a pacifist sect and so had mixed success in gaining exemption.

Rutherford died early in World War II, but the movement that Russell had started and Rutherford had continued has endured. Russell created many of the ideas that became the basis for the doctrine of the Witnesses, and Rutherford took the group and shaped it into the worldwide movement that has survived until today.

See also *Cantwell* v. *Connecticut; Jones* v. *Opelika;* Saluting the flag

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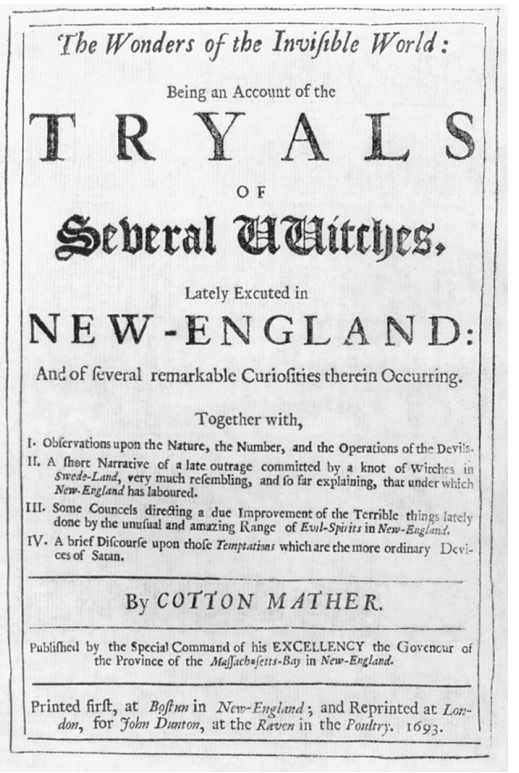
Salem Witch Trials

The Salem Witch Trials are probably the best-known early American outbreak of hysteria over witches. While the events are relatively well known, what is less considered is how the episode reflects an interaction of religion and the law.

The facts of the Salem Witch Trials are fairly straightforward. In 1692, accusations of witchcraft spread through Salem, Massachusetts, originating with the daughter of the town's minister and the daughter of one of the richest merchants. They accused two white women and a slave woman of being witches. The slave woman Tituba, from South America, confessed to being a witch and named the two women and others as accomplices. Her master had beaten her when he heard the accusations, and one probable reason for her confession was that it spared her being beaten again. Panic soon spread through the town. Fueling it was the knowledge that the accusers were from the best families of the town. Also, a leading minister in Massachusetts, Cotton Mather, had recently published a book describing witchcraft in Boston.



The Wonders of the Invisible World:

Being an Account of the

TRYALS

OF

Several Witches,

Lately Excuted in

NEW-ENGLAND:

And of several remarkable Curiosities therein Occurring.

Together with,

I. Observations upon the Nature, the Number, and the Operations of the Devils.

II. A short Narrative of a late outrage committed by a knot of Witches in *Swede-Land*, very much resembling, and so far explaining, that under which *New-England* has laboured.

III. Some Councels directing a due Improvement of the Terrible things lately done by the unusual and amazing Range of *Evil-Spirits* in *New-England*.

IV. A brief Discourse upon those *Temptations* which are the more ordinary Devices of Satan.

By COTTON MATHER.

Published by the Special Command of his EXCELLENCY the Governour of the Province of the *Massachusetts-Bay* in *New-England*.

Printed first, at *Boston* in *New-England*; and Reprinted at *London*, for *John Dunton*, at the *Raven* in the *Poultry*. 1693.

Publication by Cotton Mather from 1693 describing the Salem Witch Trials. (Library of Congress)

During the trials, in addition to traditional evidence the court was allowed to use spectral evidence, or testimony from those claiming to have been haunted by a witch's ghost, and this allowance was fairly unusual. It was difficult, if not impossible, for those accused to prove that they were not witches. Among them, one was an invalid and one a seventy-one-year-old woman; another was a four-year-old girl. In the end, some 19 people were executed for witchcraft, another was pressed to death by stones, another hundred spent time in prison (at least 4 died there), and roughly another 200, including the governor's wife, were accused. When the hysteria had passed, the leading ministers of the town suggested that the devil may have misled good citizens for his own purposes and the governor excluded spectral evidence from the remaining trials. Giles Corey was reportedly pressed to death when he refused to answer the questions of the tribunal. The purpose of the torture was to force him to answer, but he died instead. He refused to speak because his wife was already accused of witchcraft (and would later be executed) and he knew that if he was convicted along with his wife, the state would get his

property. His hope was that if he died by being pressed with stones—and not by execution after a conviction—his sons-in-law would get his property. (The actual disposition of his property is unknown.)

These are the facts of the trial, but their interaction with religion, which occurs in several ways, should also be considered. The first, and most obvious, is that without religion these charges would never have been filed, much less acted on. Without a belief in the devil as a genuine corrupting force, no one would have believed in witches. Religion also influenced the trials in that the judges looked to the ministers for guidance, since the judges had no previous experience with witchcraft. Finally, religion influenced this hysteria as the minister's daughter helped to start the hysteria, and the minister fueled the accusations, perhaps to serve his own ends; his religious position gave him credence.

One must also wonder why the trials took place in Salem. All the factors just listed help to explain why convictions occurred but not why they happened at this time and in this place. To begin with, throughout the colonies, everyday baffling events such as spoiled milk and illness were blamed on witchcraft. Then, in Salem itself, there were a number of contributing factors. A war with the Native Americans had just gone poorly; the people thought winning a war was a sign of God's favor and losing it was a sign of his disfavor. There was tension between Salem, an established community strongly tied to the sea, and Salem Town, newer and based more on agriculture. There were battles within congregations and there were smallpox outbreaks. All these events left people in Salem looking for answers. After the frenzy began, there also were accelerating factors; a potent one was that admitting to being a witch and accusing others would save the accused from being hanged, a decidedly powerful motive for lies, though at the time this was considered confirmation of the existence of witchcraft, further spurring the hysteria. Thus, the overall fuel added to the spark of Salem's troubles and then was fanned by the confessions, resulting in one of the largest outbreaks of religiously related legal prosecutions in American history, with nearly a score executed, five score jailed and another ten score accused.

See also Established churches in colonial America; Anne Hutchinson; Punishment and Religion; Puritans, Pilgrims, and the law; Religious freedom in Rhode Island in colonial times; Roger Williams; Witchcraft and the law—past and present

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Saluting the flag

Minersville School District v. *Gobitis*
310 U.S. 586 (1940)
West Virginia Board of Education v. *Barnette*
319 U.S. 624 (1943)

In the late nineteenth and early twentieth centuries, it was generally accepted and assumed that all good Americans would willingly salute their country's flag. With America under attack in World War II, public opinion swayed even further toward this belief and the corollary that those unwilling to do so were un-American. However, some Americans were forced in this

Children and their two teachers salute the American flag in a public school, ca. 1900. (Underwood & Underwood/Corbis)

period, in the court of public opinion, and indeed, by the Supreme Court of the nation, to choose between religion and patriotic symbolism. Among the groups so forced were the Jehovah's Witnesses.

Founded in 1879 by Charles Russell, this group's beliefs guide them to refuse to salute the flag, as they consider it a graven image, the worship of which is prohibited in the Bible in Exodus 20. The first half of the twentieth century saw many Jehovah's Witness schoolchildren ridiculed by their peers or expelled from school for their refusal to salute the flag. Two of the first students whose case received nationwide attention were a brother and sister, Lillian and William Gobitis. Lillian and William were both expelled from school for refusal to participate in the flag salute ceremony.

Flag salute ceremonies before World War II differed in a number of important particulars from the ceremony that later students experienced during their schools days. First, rather than putting their hands over their hearts, the students often stood and extended their right hands (and arms) straight out, with palm upward. Second, the pledge differed from the one used generally today, reading, "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all" (310 U.S. 586: 591). Today's Pledge of Allegiance states: "I Pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." The salute was changed during World War II when it became clear that it too closely resembled the Nazi salute. The wording of the pledge has changed several times in the twentieth century. Neither the modern salute nor the current one would have reconciled the Gobitis family to the flag salute ceremony, but it is important to understand the context of their refusal.

For a while, the children were put into private school, and after that, they were sent to a school for Jehovah's Witnesses in New York. During this time, their case wound through the legal system. The U.S. district court and the

Third Circuit Court of Appeals both ruled in favor of the Gobitises. The U.S. Supreme Court initially decided to hear the case because the Third Circuit ruling differed from some earlier lower court rulings on the subject, including *Leoles* v. *Landers* (1937), which generally upheld the side arguing in favor of enforced flag salutes. And, indeed, the Supreme Court ultimately reversed both rulings in an 8–1 decision.

Justice Felix Frankfurter wrote for the majority, holding that even though freedom of religion existed, the issue of "safeguard[ing] the nation's fellowship," which is what he saw the flag salute doing, held precedence (310 U.S. 586: 591). Frankfurter first granted that there was a sincere belief here by the Gobitises that a flag salute violated their beliefs. Then, he held that freedom of religion can only be infringed upon when the "necessities of society" demand it (310 U.S. 586: 593). Frankfurter then examined the background of religious freedom, holding that laws not aimed at restricting one sect were allowed when the purpose of those laws was important. The justice then stated that since freedom of speech, also in the First Amendment, had been allowed to be restricted in World War I, freedom of religion could also be restricted when national security was at stake. Frankfurter then argued that national security was involved here, as the pledge created national unity.

He said "the ultimate foundation of a free society is the binding tie of cohesive sentiment" and suggested as well that the whole area of creating national unity is one in which courts should defer to the legislature (310 U.S. 586: 596). "To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence" (310 U.S. 586: 597). In other words, he felt that if the Supreme Court ruled in favor of the Gobitis children, it would, in effect, be overruling legislative actions for other than constitutional reasons. Therefore Frankfurter was reluctant to act, and as he believed that the goal of national unity was important enough to encroach on both the right of parents to instruct their children and incidentally on religious beliefs. Thus, he, and the majority of the Court, upheld the forced flag salute and suggested that similar legislation would be allowable as long as it respected the freedom of religion (at least as much at the legislation here did).

Two external factors probably had an impact on Frankfurter's ruling. First was his judicial philosophy. Frankfurter had long held, and continued to hold throughout his judicial career, that the courts should defer to the judgment of the legislature except when there was a clear violation of the Constitution. This view produced a much more deferential approach toward legislation than the views of other justices. Hugo Black, though he concurred with Frankfurter in the *Gobitis* case, generally believed that injustices should be corrected generally when constitutional rights were somewhat involved rather than only in those cases where there was a clear violation of the Constitution. Frankfurter also probably was influenced by World War II, which, by this time, had started in Europe and in the Pacific. Though it had not yet reached the United States, its presence in the world was becoming increasingly impossible for the country to ignore. With war looming, and the United States likely to join in, Frankfurter probably saw a need for national unity. This is not to suggest that he unusually altered his ruling. Judicial philosophy and the events of the world often influence Court rulings, either directly or indirectly.

Only one dissent was registered. Justice Harlan Stone, a future chief justice, dissented strongly, arguing that the flag salute law destroyed both freedom of speech and freedom

of religion. He believed the law implied that the school board knew better than a child's parents what was right for that child. Finally, he felt the majority opinion bound the Court's hands from preventing such interference. Stone agreed with the majority that occasionally personal freedom needed to be abridged, particularly in times of war. However, he did not take the next large step, which the majority did, of equating these necessities with allowing school boards to force individuals to violate their own religious beliefs. His dissent also pointed out that the school board, if it could not force a flag salute, still had other methods of encouraging patriotism, meaning the forced flag salute was not the only way to accomplish the goal. Stone held "if these guaranties [of civil liberties] are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion" (310 U.S. 586: 604).

Stone argued that even if the forced salute was necessary, courts should still pass on the constitutionality of such measures, as such was the role of the courts. He reminded the Court of the standard needed for such inquiries, citing his own Footnote Four in *United States* v. *Carolene Products Company,* decided just two years earlier, which required "searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities" (304 U.S. 144: 152, note 4, as cited in 310 U.S. 586: 606). Frankfurter had argued that national unity was needed in times of crisis to save government, and Stone answered this by saying that free governments needed freedom to exist. He held that the Constitution "is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist" (310 U.S. 586: 606–607).

Indeed, in 1940, the United States did see a need for unity. War was raging in Europe, and many Americans felt the country would eventually get involved, even though public opinion was by no means united about the necessity of such involvement. One strongly held view was that the United States should let Europe suffer from its own mistakes, put America first, and only defend itself. The United States started the draft in the summer of 1940, the first peacetime draft in its history, but that was adopted by only a narrow vote. Even in the fall of 1940, when Franklin Delano Roosevelt ran for a third term, he promised that "your boys are not going to be sent into any foreign wars" (quoted by the White House Historical Association, available at Internet address on page 454).

Of course, the United States did get involved in World War II, through the Japanese attack on Pearl Harbor, and U.S. public opinion was relatively united behind the war effort. Not all agreed with it, but more people supported it than had supported any previous war. Propaganda efforts also reminded Americans of the need to fight World War II. This shift in public opinion toward the war may have diminished the perceived need for forced flag salutes in the eyes of some of the justices. Additionally, thousands of instances of vigilante violence, sometimes with the direct complicity of government officials, were carried out against Jehovah's Witnesses who refused to salute the flag. The Jehovah's Witnesses so abused felt they were choosing their souls above their states and held firm to their beliefs.

In 1942, three justices noted that the *Gobitis* decision was wrong, in their opinions, and that they felt it should be overturned. This was a large enough number to approach a majority, with the addition of Stone, who had already dissented in the decision. The national office of the Jehovah's Witnesses decided that it was time to challenge *Gobitis.*

It did not take long to find a family whose children were being required to salute the flag against their beliefs. In West Virginia, the state board of education, rather than any individual school district, had ordered the flag salute, and the Barnette children were expelled for refusing to participate along with the other children. This fact allowed the case to be heard first by a three-judge panel, and then directly by the Supreme Court. Walter Barnette, the children's father and a Jehovah's Witness, sued the state board and won at the district court level. The school board then appealed, and in 1943, the case of *West Virginia Board of Education* v. *Barnette* came in front of the Court. On July 14, 1943, Flag Day, the Supreme Court reversed the *Gobitis* ruling in the *Barnette* case.

Justice Robert Jackson wrote for the majority. Jackson first considered whose rights were at issue here. He stated that the only rights being threatened were those of the Witnesses, as those not saluting the flag were not disorderedly, nor did they deny any rights to others by their refusal. The Supreme Court justice then examined exactly what the Court was compelling, arguing that the flag salute was not merely instructive, which was allowed, but forced the adoption of a certain belief, which was much more forceful than instruction. Jackson argued that the flag salute was a form of free speech and that the framers of the Constitution had in mind the right to object to this forced type of salute when they made that document.

Jackson next went back to the First World War and the freedom of speech for the basis of his decision. He invoked Oliver Wendell Holmes's famous "clear and present danger" standard as the basis for the decision. In several free speech cases during World War I, Holmes's standard had been used to allow restricting the freedom of speech when those speaking (allegedly) presented a "clear and present danger" to America. Jackson thus asked if the students who were not saluting the flag presented a clear and present danger to the nation. Jackson held that they did not, writing "it is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression" (319 U.S. 624: 633–634). The justice found this idea anathema to the Bill of Rights. He held that "to sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind" (319 U.S. 624: 633–634). In other words, he said allowing compulsory flag salutes implied that the Bill of Rights left open, in the First Amendment, the government's right to compel citizens to speak things they disbelieved.

Jackson then turned to the general question of whether a government could order such a salute. He first stated that the usefulness of such a salute was irrelevant, and that the religion question was not paramount, but rather the question of whether such a forced salute was legal. The first question Jackson addressed was whether a denial by the courts of the power to force a flag salute meant that the government must be too weak to survive. The judgment in *Gobitis* implied that the answer to this question was yes. Jackson, however, answered it in the negative, holding that "assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification"

(319 U.S. 624: 636–637). In other words, he said the truth of the matter was exactly the opposite, and that the Bill of Rights was the only reason the Constitution had been ratified in the first place.

Jackson then asked if a decision in this case denying a flag salute would interfere too much with local power, but he held that the question of liberty was everywhere, stating "there are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution" (319 U.S. 624: 638). Jackson next asked if the Court should leave questions of civil liberties to the legislatures rather than only to the courts, and Jackson held no. Finally, Jackson turned to the question of whether the state can force national unity, and he answered with a resounding no. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us" (319 U.S. 624: 642).

Thus Jackson voted to uphold the lower court, supporting the Barnette children's right to refuse to participate in the flag salute. Five other justices of the Court voted with him, overturning *Gobitis* in a 6–3 vote. Among those supporting the *Barnette* decision were Justices Black and Douglas, whose strong words are still often quoted with regard to free speech. They held that even though the First Amendment is not absolute, it still protected the Jehovah's Witnesses in this case: "Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

"Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose" (319 U.S. 624: 644).

Justices Roberts and Reed were numbered among the dissenters who continued to support the *Gobitis* decision, but they did not file an opinion.

Frankfurter, however, dissented, arguing, as he had originally, that the government's right to encourage patriotism, within reason, was necessarily allowed by the First Amendment. He wrote, "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion" (319 U.S. 624: 646), but he did not agree with putting his own views into the Constitution. He held that "one may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs" (319 U.S. 624: 656). On the flag salute, he concluded, "We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether

it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours" (319 U.S. 624: 661–662).

This decision did not end the debate over the Pledge of Allegiance and this symbolic salute gained importance over the next sixty years. The addition of the phrase "under God" to the pledge in the next decade increased its controversial nature, as some felt this was an unjust combination of church and state. Nearly all Court cases have allowed any to be excused if their religion refuses to let them salute the flag, but it is still not popular to do so, and those who object to the combining of church and state are not always allowed that luxury. Pledge debates still center around the same issues debated in the *Gobitis* and *Barnette* cases: whether the government can enforce patriotism and whether it is possible (or even a good thing) to prevent religion and patriotism from meeting.

See also Addition of "under God" to Pledge of Allegiance; Hugo Black; *Elk Grove Unified School District* v. *Newdow; Engel* v. *Vitale;* Felix Frankfurter; *Lee* v. *Weisman*

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Santa Fe Independent School District v. *Doe*

530 U.S. 290 (2000)

The issue of prayer and the public school goes well beyond questions of in-class activities. Extracurricular situations can also be affected by laws dividing church and state. Depending on who organizes and operates an extracurricular activity, prayers may or may not be legally condoned. The Supreme Court has been gradually amassing landmarks to help distinguish between activities when prayers would be considered to be school sponsored and thus illegal, and when they would be considered independently organized and not sponsored by the school, and therefore legal. *Santa Fe Independent School District* v. *Doe* dealt with whether a school could allow students to lead prayers at football games. The Supreme Court held that it could not, in a 6–3 decision.

The Supreme Court opinion was written by Justice Stevens, and a dissent was filed by Chief Justice Rehnquist. Stevens's opinion was joined by the whole Court except for Justices Rehnquist, Thomas, and Scalia.

Santa Fe School District had, until 1995, allowed the student body to elect a student body chaplain (a student) who led the school in prayers that were broadcast over the loudspeakers before varsity football games. Two families, one Mormon and one Catholic, anonymously sued the school board, which then adopted a policy allowing the senior class to first vote to determine whether there would be a prayer and then, if prayer was chosen, vote again to determine who would lead that prayer. The Court reviewed the policies, noting that the prayers "are authorized by a government policy and take place on government property at government-sponsored school-

related events" (530 U.S. 290: 302). The Court also held that the election did not necessarily protect the minority, stating "similarly, while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense. Moreover, the District has failed to divorce itself from the religious content in the invocations" (530 U.S. 290: 305). The Court noted that the school board had chosen the election process to "solemnize" the football games and that by this choice of words, the school board encouraged prayer, as prayer was the best-known way to solemnize occasions.

The school board argued that attendance at football games was not mandatory, and therefore no religion was being forced upon anyone. The Court, however, read the question as one of government involvement with religion. It reminded the school that "one of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control" (530 U.S. 290: 310). The Court held that "even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship" (530 U.S. 290: 312). The Court also concluded that the policy did not need to be implemented to be tested, stating that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation" (530 U.S. 290: 316).

The chief justice and his two fellow dissenters reached a quite different conclusion. They held that the decision was hostile to religion and objected to the decision having struck down the policy before implementation. The dissenters first argued against the *Lemon* test, noting that it had been widely criticized, and objected to it here as the history that it was based on was, in Rehnquist's mind, faulty. The dissenters then looked at the actual policy. As the policy had not been implemented, the dissenters argued it was difficult to see what it would lead to, as it might lead to the seniors' rejection of prayer, and so would not involve religion.

The dissenters also disagreed with the purpose of the election. While the majority had found it to be an endorsement of religion, the dissent held "the policy itself has plausible secular purposes" (530 U.S. 290: 322). The dissent also read the history of the school district's policy differently. The majority had held that the school district was trying to re-inject prayer via the policy, while the dissent held that the school district was trying to follow a district court's injunction. The dissent also held that the prayers were private speech, as opposed to government-sponsored speech, as students were the speakers and electors choosing to have a religious message. The dissent finally held that the majority incorrectly required neutrality in the area of religion. "The Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion" (530 U.S. 290: 325). The dissent, by contrast, held that religion cases had never required complete neutrality, and that even free speech cases had allowed districts to restrict the subjects of students' speeches. The dissent did not explain how such limits would favor the district's policy. Thus, Rehnquist suggested that the policy should have been allowed, at least to the point of establishing a track record of what was discussed, so that the policy could be examined as to its relationship with religion.

The majority view, though, has held, especially at common events. The school board's attempt to allow the prayers as a method of solemnizing occasions has been used successfully in other cases. Some courts have elsewhere ruled that student-led prayers are allowed at graduations, due to the special and onetime nature of the occasion.

See also *Elk Grove Unified School District* v. *Newdow; Engel* v. *Vitale; Lee* v. *Weisman; McCreary*

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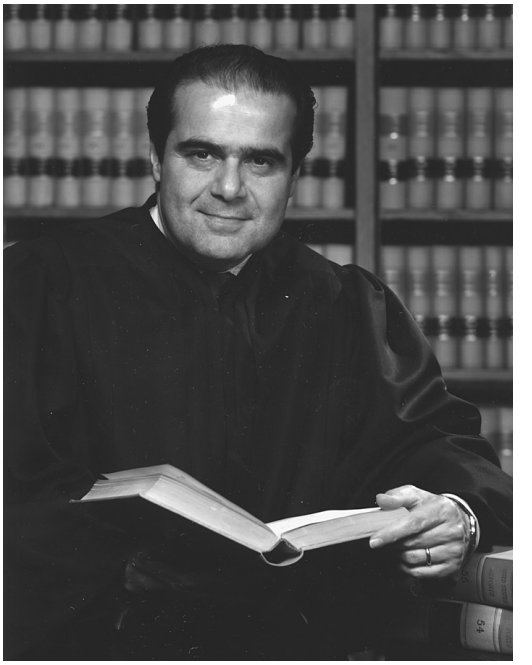
Antonin Scalia

Supreme Court Justice
Born: 1936

Atonin Scalia grew up in New Jersey and attended Georgetown University, graduating first in his class. He then attended Harvard University Law School. Ronald Reagan appointed him first in 1982 to the U.S. Court of Appeals for the D.C. Circuit, and then in 1986 to the Supreme Court to replace William Rehnquist, who became chief justice.



Antonin Scalia, the first Italian American ever to serve on the Supreme Court, has played an important role in moving the Court to the political right. (Collection of the Supreme Court of the United States)

On the Supreme Court, Scalia quickly became the most conservative justice, and his opinions were noted for pointed and witty writing, which was often combined with blistering fire toward his opponents, particularly when he was dissenting. In one case, he pointed out to his colleagues that if their logic of overturning cases that were widely criticized was extended to all cases, then *Roe* should be overturned much more readily than the case at hand. Of course, it helped his dissent that he disagreed both with *Roe*'s being upheld and the current decision. The case in which he was so vehemently opposing the majority was *Lawrence* v. *Texas,* which overturned a Texas law criminalizing homosexual sodomy; Scalia described the decision thus: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct" (539 U.S. 558: 602). Clearly, Scalia holds his opinions strongly and is willing to voice them. Of course, his critics observe that those opinions are informed, at least in part, by his conservative Catholic background.

Scalia's main contribution to the whole scope of constitutional law is textualism—that the words of the Constitution mean now what they meant at the time of the document's adoption and that the Court should not increase that meaning. The terms of the Constitution should also be taken as what they mean in general, not what they might have meant to a single Founding Father, and so Scalia would do away, somewhat, with the whole battle over the Constitution's original intent. He would, instead, take the terms of the Constitution as they would have been interpreted by the aver-

age person, whoever that might be, and limit the powers and rights granted to what that average person would have seen them to be.

In the area of religion, Scalia has written several decisions and more biting dissents. Scalia wrote the majority in *Employment Division* v. *Smith,* holding that the government did not need a "compelling interest" to substantially infringe upon someone's First Amendment rights in the application of a religion-neutral law. Scalia wrote, "We cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order" (494 U.S. 872: 888). Thus, when a law protects religious conduct, it probably would be acceptable to require the government to have a compelling interest before infringing on an individual's rights, but when neutral laws infringe on religious conduct, they are not struck down. Scalia dissented in *Lee* v. *Weisman,* which ruled unconstitutional a principal's decision to invite a rabbi to deliver a prayer at graduation. The majority had held it to be an endorsement of religion that infringed on the rights of the minority, but Scalia held that the minority, in the eyes of the Founding Fathers, should be tolerant, rather than complaining. He wrote "I must add one final observation: the Founders of our Republic . . . knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek" (505 U.S. 577: 646). Scalia also dissented in *Edwards* v. *Aguillard,* in which the majority had struck down a law requiring the equal teaching, if either were taught, of creation science and evolution. The majority had held that the legislature was promoting religion, in spite of their comments to the contrary. Scalia held that "the question of its constitutionality cannot rightly be disposed of on the gallop, by impugning the motives of its supporters" (482 U.S. 578: 611).

Scalia also desires to become chief justice. Many articles discussing Chief Justice Rehnquist's death also have noted that Scalia desires the position and was politicking for it, indirectly of course, at various official events. However, Chief Justice Roberts was chosen instead. As Scalia will be seventy before the end of the 2005–2006 term, this might have been a factor in the selection of Roberts. Rehnquist was sixty-one at the time of his appointment, as was Burger. Scalia would have been significantly older than the last two chief justice nominees, and for whatever reason was not chosen.

Scalia also has come under fire on a couple of occasions for his refusal to remove himself from cases in order to appear objective. In the early 1990s, even though there was a pending case on the right to die, he publicly commented that there was no constitutional right to die. In 2004, even though he had been a passenger on Vice-President Cheney's jet in recent times and had hunted with him, he refused to recuse himself from a case against Cheney. (Cheney, in the case, won an order from the Court for a district court to reconsider a government request to dismiss a case arguing for the release of documents generated by an advisory committee headed by Cheney.)

Thus, Scalia has generated a great deal of controversy, even while being respected for his well-written opinions, and has managed to move the Court significantly to the right.

See also *Edwards* v. *Aguillard; Employment Division* v. *Smith; Lawrence and Garner* v. *Texas; Lee* v. *Weisman*

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School District of Abington Township v. *Schempp*

374 U.S. 203 (1963)

This court case dealt with a school ordering the reading of Bible verses and the recitation of the Lord's Prayer. In many ways it was the follow-up to *Engel* v. *Vitale* (1962), which held that the state could not order schoolchildren to say a certain prayer to start the day. This case was decided on the same day as, and together with, *Murray* v. *Curlett,* a case started by Madalyn Murray (later Madalyn Murray O'Hair), a leading atheist advocate against prayer in public schools, and the two decisions were intertwined. *Murray* dealt with the saying of Bible verses or the Lord's Prayer and that program was also struck down.

Justice Clark wrote the opinion of the Court. He first stated the facts in each case, noting that in Pennsylvania, the location of Abington Township, the students read ten Bible verses over the loudspeaker each day and then the students joined in the Lord's Prayer and the salute to the flag. The school board provided King James Versions of the Bible, even though the Catholic Douay had been used in the past, along with the Jewish Torah. Students were allowed not to participate. In those schools without a public-address system, the teachers led the readings. In Baltimore, in the *Murray* case, either Bible verses were read or the Lord's Prayer was recited each day. The Schempps were Unitarian and the Murrays were Atheists and both complained. Clark, after summarizing these facts, first noted "it is true that religion has been closely identified with our history and government" (374 U.S. 203: 212). He then observed that many in America were religious and few were publicly without religion, but that was not enough to allow government to support religion, as "this is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life" (374 U.S. 203: 214). Clark then turned to the First Amendment, and noted it was clear that this amendment should apply against the states. He then stated, "Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another" (374 U.S. 203: 216).

Clark reviewed the history of the First Amendment, summarized many of the decisions the Court had made over the last twenty-three years (since *Cantwell* v. *Connecticut* in 1940), and quoted with approval a previous Court decision stating that "separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally" (374 U.S. 203: 219). Clark then turned to the question of how a court tested whether the establishment clause was violated, stating, "The test may be stated as follows: what are the purpose and the primary effect of the enactment?" (374 U.S. 203: 222). Thus, Clark created the "effect" test and the "purpose" test that have continued to exist in one form or another up to the present day, even though some courts have valued them more than others. These tests in many ways presage the *Lemon* test, which was to be created in *Lemon* v. *Kurtzman* (1971), which requires that laws must have a secular purpose, must neither retard nor promote religion, and must avoid "excessive entanglement."

The Court considered the facts in the case, holding that this ordering of prayer and Bible reading violated the First Amendment. They concluded that while the Bible might be studied as part of a comparative religion course or as literature, that was not what was going on here. "But the exercises here do not fall into those categories. 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" (374 U.S. 203: 225).

The Court then considered the argument that by banning Bible reading, the Court was interfering with the other part of the First

Mr. and Mrs. Edward and Sidney Schempp and their family stand on the steps of the U.S. Supreme Court on February 28, 1963. The Unitarian family challenged a Pennsylvania law requiring that Bible verses be read daily in school. The Supreme Court ruling in Abington *v.* Schempp *(1963) established that state-mandated Bible reading and recitation of the Lord's Prayer during schooltime violated the Constitution. (Library of Congress)*

Amendment, the free exercise clause. The Court denied this argument, concluding "finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs" (374 U.S. 203: 225–226). The Court, at the end, summarized what it thought the First Amendment meant in terms of questions similar to these. It held, "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality" (374 U.S. 203: 226).

Justice Douglass wrote a brief concurrence. He argued that the issue was not only the government's promotion of religion but also its use of public funds to help religion. He held

that no public funds—and schools are funded by the public—could be used to help religion. The amount was irrelevant. He wrote, "Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling" (374 U.S. 203: 230). Douglass's concurrence went further than most of the other justices wanted to go and so it did not reflect the view of the majority of the Court.

Justice Brennan also concurred. He wrote that the framers' intent on this issue was not clear and should not be controlling. He also stated that public education had changed, America had changed, and the whole record concerning the framers' intent was murky. He then reviewed the free exercise cases and pointed out that while school districts had generally required Bible readings for a long time, only in the twentieth century had most states required them. He also noted the long history of argument over whether Bible reading was permissible and that some areas had banned it as early as the 1860s. He also held that if secular benefits would come from Bible readings, that other, secular means, could be found. Brennan concluded by saying that "the history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices standing by themselves constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing" (374 U.S. 203: 293–294). Brennan thus used history to argue against this program while granting that historically Bible readings had been allowed sometimes in some places.

Brennan then disagreed with Douglass, holding that some interaction of church and state was allowed, as long as it was within permissible boundaries, and he identified those boundaries: generally, the bans of the establishment clause must not harm what the free exercise clause allowed, and that religious things that had become secular—such as "In God We Trust" on our money—and "incidental benefits" were allowed. He concluded by quoting chief justice of Pennsylvania Jeremiah S. Black, who had written "our [founding] fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate" (374 U.S. 203: 304). Brennan thus presented a more central view than did Douglass.

Justices Goldberg and Harlan concurred, with Goldberg writing. They argued that many in America were religious and that religious accommodation was allowed, as long as it was neutral. They argued against any total ban on activities connected somewhat with religion, which Douglass wanted, and held that "the First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow" (374 U.S. 203: 308). Goldberg and Harlan, like Brennan, were more in the middle of the road.

Justice Stewart dissented. He wrote first that the legal record in these cases was too small to

allow a decision. However, as the decision had been reached, he dissented, arguing that the establishment clause was not violated and that these cases should have been returned for another hearing. He also disputed the "mechanistic definitions" that he saw the Court using (374 U.S. 203: 310). Stewart argued that the two parts of the First Amendment were not equal, but that the free exercise portion should hold sway. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized" (374 U.S. 203: 312). Stewart held that the most important issue was that of "neutrality," stating "what seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase 'establishment of religion' as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase 'separation of church and state.' What these cases compel, rather, is an analysis of just what the 'neutrality' is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth" (374 U.S. 203: 313). He contended that teachers could opt out of the reading and that parents could change them, and so no government promotion of religion necessarily occurred.

He believed that no coercion existed; allowing Bible reading simply permitted the free exercise of religion, and without evidence of coercion, which would require more of a record, no violation could be found. Stewart suggested that a larger hearing was needed to fully decide the issue and that school boards should be given the opportunity to develop a way to have prayer without coercion. "What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable 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 completely to 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" (374 U.S. 203: 319–320).

Abington, along with *Murray,* thus struck down the programs of Bible reading and the Lord's Prayer (Pennsylvania) and Bible reading or the Lord's Prayer (Maryland) that some states had enacted, continuing the trend that *Engel* v. *Vitale* had started the year before by striking down a state-mandated prayer. The Court's decisions were vigorously opposed, with one author holding that a second scholar, Edward Keynes, "reports that fifty-six amendments dealing with prayer were introduced in 1962; 265 were offered in the wake of *Schempp*" (Lee, 2002: 258). Politicians for the last forty years have continued that trend, with school prayer amendments being introduced annually in the U.S. Senate and House, with actual votes being taken on the measure in the 1970s and 1980s. However, *Engel* and *Abington* have remained binding law, at least concerning school prayer or Bible readings on an everyday, mandated basis; and *Abington* also presaged *Lemon,* which is one of the most important decisions in the intersection of church and state.

See also *Engel* v. *Vitale; Lee* v. *Weisman; Lemon* v. *Kurtzman;* Madalyn Murray O'Hair; *People ex rel. Ring* v. *Board of Education*

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Scopes v. *Tennessee*/Scopes Monkey Trial

289 S.W. 363 (Tenn. 1925)

John Scopes was a Tennessee teacher charged in 1925 with violating state law by teaching evolution. The ruling was appealed to the Tennessee Supreme Court, which upheld the law but overturned Scopes's conviction on a technicality. (Library of Congress)

The town of Dayton, in southern Tennessee, was quiet and a bit economically depressed. After Tennessee passed an anti-evolution bill, largely because of its heavily fundamentalist population, a Dayton merchant, George Rappalyea, who hated fundamentalists, saw a newspaper ad noting that the ACLU was looking for someone to challenge the bill. Rappalyea mentioned the notice to other local merchants, who backed the idea as a way to draw people to Dayton and help the economy. John Scopes, a science teacher at the school, agreed to challenge the bill. Thus, the famous Scopes Monkey Trial was born out of a combination of economics and ideology.

Teaching evolution in public school science classrooms has been one of the most hotly debated topics of the twentieth and early twenty-first centuries. Evolution evolved as a concept in the nineteenth century and was widely accepted in the discipline of biology by the early twentieth century. It was not, however, widely discussed in the public schools. One reason for this was that school curriculums, particularly at the lower levels, change slowly; another reason is that public schools, for most children, ended at the eighth grade in the nineteenth century. Biology was not discussed, at least not in any great detail, before the ninth grade, meaning most people were not exposed to biology, never mind evolution. In the early twentieth century, however, this all began to change.

Child labor laws encouraged a much higher percentage of students to attend school, and to attend school through high school. Curriculums also began to include evolution as a biology topic. There also were changes in religion. Fundamentalist Christianity grew as a belief in the early 1900s in response to American urban-

ization and a perceived shift in American morals away from biblical instruction. That branch of religion holds that the Bible is infallible, is to be taken literally, and is not to be questioned. Thus, many fundamentalist Christians believe earth's creation took six days and no new species appeared after this time. These individuals believe all animals present today were created at the beginning, and all fossils are remnants of animals created at the beginning. (Whether it was six twenty-four-hour days, six days of unknown length, or six periods did not seem to be a big controversy to the first fundamentalists, though there is debate over that now in fundamentalist circles.) However, the idea of evolution says that species are continually changing and that new species evolve. For many Christians, indeed, for many fundamentalists, the idea that God created the earth can exist in perfect harmony with the idea of evolution. These individuals tend to feel God created the earth and that evolution is part of God's plan. However, some fundamentalists perceive the idea of evolution as a threat to the idea that God created the earth in six days, believing that if evolution theory were "proven" correct, the Bible would be contradicted.

Once evolution entered biology curriculums, controversy over its appropriateness there arose. Some fundamentalists, mostly in southern states, decided they wanted evolution removed from the high school curriculum. In Tennessee, John Washington Butler, a farmer and legislator, introduced the Butler Bill, which banned evolution teaching in that state. Butler was not a fundamentalist but still believed teaching evolution was destroying people's faith and should be banned. Butler had run for office in 1922 on an anti-evolution platform, and he wrote the bill in 1925. Though there was some controversy, the bill passed, with the support of evangelical preacher Billy Sunday, and was signed by the governor. It was at this point that John Scopes deliberately introduced evolution into his biology classroom, specifically to challenge the bill.

Clarence Darrow, one of the country's leading criminal defense lawyers and a renowned champion of free thought, as well as an agnostic, volunteered for the defense. William Jennings Bryan, a three-time Democratic presidential candidate and a leading populist, volunteered to serve as a prosecuting attorney. He had been speaking against evolution for much of the 1920s, and one of his speeches against evolution had helped pass the Butler Bill. Thus, besides the issues surrounding evolution in the classroom, Dayton also drew one of the age's best-known attorneys and possibly its best-known public speaker. Additionally, one of the most renowned columnists, H. L. Mencken, came to Tennessee to draw attention to the trial. Judge John T. Raulston, a local lawyer, heard the case and basked in the limelight.

The trial opened on July 10, 1925, to a packed courtroom. The population of the courthouse that day was more than half of the town's normal population, and great throngs came to see the trial and experience the atmosphere it created. People sold books, hawked souvenirs, and showed monkeys (who were, in the popular understanding of Darwin's work, the ancestors of man). The prosecutors described the trial as one between good (represented by the Butler Bill) and evil (represented by evolution). The defense, conversely, described the debate as being one between free thought (the right to teach evolution) and ignorance (preventing children from even being taught evolution to decide what they believed, as the Butler Bill did). The prosecution started by discussing the Bible, specifically Genesis and its creation account, and then introduced the school superintendent, who recounted Scopes's admission that he had violated the act by teaching evolution in his classroom. Then the prosecution called students who also recounted Scopes's teachings. The prosecution then rested.

The defense first wished to call scientists who would testify to the truth of evolution. The judge at first considered it, which brought

The famous Scopes Trial in 1925 pitted two of the best known lawyers in America against each other in a duel over the Bible that attracted worldwide attention. William Jennings Bryan, seated, left, cools himself with a fan during the trial in Dayton, Tennessee, while Clarence Darrow, standing with arms folded, watches the proceedings. (Library of Congress)

a long speech by Bryan. Defense attorney Dudley Malone (better known as a divorce attorney than as an advocate for free speech, but a very competent attorney in this trial) countered that speech with another that brought widespread applause from the crowd. The judge, ultimately, did not allow the testimony, although he did allow statements from the experts to be added to the record. After that, the defense called Bryan as an expert on the Bible. Bryan accepted, with the condition that he be allowed to question the defense team.

This examination is one of the most widely known parts of the Scopes trial. Darrow cynically and critically examined Bryan, prodding him on a variety of points in the Bible. Bryan first claimed that everything in the Bible should be taken as literally true, including whether the serpent in the Garden of Eden slithered before it had given Eve the apple. Darrow mocked these assertions and ultimately got Bryan to agree that there might be room for interpretation. Darrow, in the area most closely related to the trial, forced Bryan to admit that the six days of the creation account were periods. It should be noted that Bryan's admission, anathema to many of today's fundamentalists who take the Bible as literally true, was not out of line with the beliefs of many fundamentalists of the time. The significance of six twenty-four-hour days for the earth's creation is this: it means the time

creation began can be stated as a specific day, and the earth's precise age can be calculated.

Bryan in general did not do well in his testimony. The audience, who was probably mostly on his side on the issue of teaching evolution, by the end was laughing at him. Darrow succeeded in his goal, but also came off as a cynical agnostic.

In terms of the trial, Bryan's whole testimony was useless, as Judge Raulston the next day ordered the testimony ended and told the jury not to consider it. Darrow, who was more interested in having a higher court, perhaps even the Supreme Court, rule on the issue, asked for a guilty verdict. Bryan had been preparing what he saw as the finest speech of his life as a closing argument, but did not get a chance to give it, as once Darrow asked for a guilty verdict the result was a given and the trial was over. Scopes was found guilty, as all sides agreed he had violated the bill, and was fined $100 by Raulston.

Bryan died soon after the trial and was still in Dayton, Tennessee. Darrow appealed the case, and the Tennessee Supreme Court ended it. They held that the $100 fine was too much to have been given by a judge and should have been given by a jury. They also dismissed the case rather than having a retrial. Thus, clearly, the court wished the issue to end.

The Scopes trial was a mixed victory for both sides. For Darrow's side, it was a victory, as Bryan and his supporters appeared foolish in the eyes of the public and the press. With that portrait in the public sphere, few states wanted to follow Tennessee and have another Scopes Trial. At least fifteen states were considering bills similar to Butler's in 1925, but only two adopted them. Darrow lost, however, and Bryan won, in other ways. For another forty years no higher court ruled on the constitutional issue of whether the Butler Bill was allowable, and so it remained law in Tennessee and two other states (Arkansas and Mississippi) for two score more years. Darrow also did not convince many across the South of evolution's legitimacy, and even those who agreed with him and were present at the trial sometimes admitted this. Also, the Scopes trial did not cause evolution to universally enter high school curriculums across the country. Many teachers of the area did not agree with Scopes that evolution should be taught and so they just ignored that area of the textbook, or else school boards and states picked textbooks that either slighted or ignored the subject. As many high school classes (now and then) followed the textbook to the letter, that meant that evolution was not taught. The trial did not help Dayton's economy, either, and many people from around Dayton dislike having their town known only for the Scopes trial, so the definite losers in the case were those, like Rappalyea, who promoted the trial to help the town.

Today, the topic of evolution is still one of contention. Those who support its teaching argue, as did Darrow, for free speech and scientific responsibility, basing their belief in experts who state that Darwin's theories have more support than other contradictory theories. Fundamentalist perceptions, however, have changed significantly. Some still hold that the earth was created in six days of twenty-four hours each, and thus the world is right around 6,000 years old. Few of these, however, put their ideas into actual school policy, preferring to choose texts that limit the discussion of evolution and teachers who support these limitations. The more public version of the anti-evolution platform argues for creation science and intelligent design teaching to enter public school classrooms. The first of these perspectives argues that there is scientific evidence supporting an earth that is only 6,000 years old, created all at once. The second argues that there is evidence for, in addition to whatever else one believes, intelligence in the origin of the universe. Thus the dispute continues, and some school boards, indeed some states, have adopted teaching standards and regulations that

agree with either creation science or intelligent design. Consequently, eighty-one years after the Scopes battle, debate on the issue continues, and students are taught differing perspectives depending on where they go to school.

See also Avoidance of the issue of evolution in many teaching standards; *Crowley* v. *Smithsonian Institution; Edwards* v. *Aguillard; Epperson* v. *Arkansas; Kitzmiller* v. *Dover Area School District; Peloza* v. *Capistrano Unified School District*

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The Shakers, the Oneida community, and the law

Radical religious ideas challenge and affect the status quo. Radical religious communities go one step further and remove themselves from society. Many seek perfection here on earth. It should not be surprising then, with this challenge, that the larger society has often used the law to oppose them. The Shaker and Oneida communities, two of the longer-lasting religious Separatist groups that grew up in the nineteenth century, sometimes had to endure such treatment.

The nineteenth century was a period of intense religious fervor, as indicated by the Second Great Awakening. Many people were unhappy with the period's religious ideas, and revivals reawakened interest in gaining salvation, resulting in several new religions. Most of these religions aimed to set up new churches without taking their adherents away from society. Some also aimed for social reform within society, and it was the rare group that suggested complete withdrawal from the outside. Some few religions (and some nonreligious groups), however, believed that society was unredeemable and that a complete break was necessary to start over. The Shakers and the Oneida community both fell into this category.

"Shakers" is the common name given to the United Society of Believers in Christ's Second Coming, who believed that the Second Coming was near. The group was started by "Mother" Ann Lee, whose ideas formed in England before she came to America. The Shakers preached strongly against sex and strongly for the separation of men and women, and argued against materialism. Lee argued that God was both male and female, which was a revolutionary idea at the time, and said that she had visions from heaven. Shakers lived in communities that were set apart from the world and had separate housing for men and women. The only times both genders were allowed to be in the same room were during worship services and meals. Even then, they sat on opposite sides of the service or at separate tables. The religion went so far as to instruct men and women not to even be on the same staircase at the same time. They had regulations on how one should cut meat (always in squares), how the village should be laid out (in squares as well), and how to leave the village and go into the wider world (always in pairs of the same sex, walking closely together). The name of the group, it should be noted, came from the fervor of their religious dancing.

All possessions were owned in common and the group was largely self-sufficient, producing enough to meet all their own needs and goods to be sold. Their high standards put their goods in high demand, and this, along with their invention of a strong straight-backed chair (the Shaker chair) that proved

Meeting of the United Society of Believers in Christ's Second Coming, better known as the Shakers. Named for their vigorous dancing, the Shakers were founded by Ann Lee in 1747. The group favored communal work, and strict separation of the sexes. Because of the requirement for absolute chastity, the group's numbers declined from a high of over 5,000 to virtual extinction by 1988. (Library of Congress)

popular, allowed them to thrive economically. The Shakers recruited members from several sources. Many orphans were brought up in the Shaker religion, a fair number of women saw the Shakers as a way to escape unhappy marriages, and the Shakers also benefited from the general religious fervor of the nineteenth century. Their revivals would shake free people from their old religions. Numerically the Shakers were never very large, numbering fewer than 10,000, but they do show the public's reaction to a different community.

The law was, at turns, surprisingly receptive, and surprisingly hostile to the Shakers. One might think that a community would not want a group of religious separationists like the Shakers nearby (as they were quite different from the norm), but most communities did not try to ban Shakers directly from owning property collectively. Laws were passed, though, to deal with the common owning structure, and many of these laws were biased against the Shakers. One such law appeared in Kentucky in 1852, titled "An Act to Regulate Civil Proceedings against Certain Communities Having Property in Common." As the Shakers were the main group holding property in common, the law was clearly aimed against them. The law held that if a lawsuit of over $50 was brought against a Shaker, the group could be sued collectively, but the group collectively did not have any rights in return. The Shakers were also, in some such laws, formally removed from any protections that they might have enjoyed from being a religion. Society's view of the propriety of this group is probably best seen in the laws on divorce in this period. Some states passed laws allowing one to be divorced simply because of membership in a Shaker community. As the general divorce law in the period

was very restrictive, this lenience shows exactly how far removed the Shakers were from society. For some women particularly, this was a blessing, and some joined the Shakers partly because there was no other way to gain a divorce. Connecticut, Kentucky, Maine, Massachusetts, and New Hampshire—all but one state with Shaker communities—passed such divorce laws. Connecticut was merely near Massachusetts, where several Shaker communities were located.

The Shakers also faced a fair amount of hostility from the public in their early years. Part of this was because some of the Shakers, including Mother Ann Lee, were blunt. Lee was frequently attacked physically, and she did not hold her tongue in return. Lee once was attacked for calling a woman "a filthy whore." The Shakers created their own courts and tribunals to deal with their members, and sometimes expelled those who did not follow the rules of the group. There do not appear to have been any attempts by those forced out to go to the secular courts for redress.

The Shaker community did not gain any members through natural reproduction (indeed, individuals who had joined the colony often left as a couple), and so had to find members through orphans or converts. By the late 1800s, many of the early feminists who might have thought of becoming Shakers had the burgeoning women's movement to support, and there were fewer orphans for the Shakers to adopt. For these reasons, the numbers of new Shakers dwindled, and their overall numbers shrank correspondingly. Many Shaker villages closed in the early 1900s. Shaker Village of Pleasant Hill, in Kentucky, near Harrodsburg, which has been restored as a monument to the Shakers, closed as a Shaker village in 1910, and the last Shaker in Kentucky died in 1923.

Another community of religious separationists in the early Americas was the Oneida community, which was located in upstate New York for most of its existence. However, where the Shakers abstained from sexual relations of any kind, the Oneidas were the source of the term "free love," which gained popularity with the radical hippie movement in the 1960s. The Oneidas did not believe in marriage but in temporary unions, and they raised their few children collectively. The group was founded by John Humphrey Noyes, trained (though never ordained) as a minister at Yale. His extremely radical ideas formed the basis of the free love society. He believed that marriage, tied in with sex, was the root cause of unhappiness, and that happiness for all could be achieved if sex was removed from the bonds of marriage. He believed marriage was too selfish an idea to have been part of God's plan. He believed, in fact, that all people were supposed to be married to one another, and property was supposed to be held in common as well. Some in a community were ranked higher than others, partially by age. Any couple could have mutually consensual sex, but only if the pairing was agreed to not remain exclusive. Reproduction was prohibited, though pregnant women were not evicted from the group.

Older men taught the younger men how not to ejaculate, or what is called coitus reservatus. Younger men then had sex with postmenopausal women until they had mastered the technique. It should be noted that the system appears to have worked surprisingly well, as the community, which averaged about 250 people, had only forty children in twenty years, in an age that saw families averaging many more children than adults. Late in its existence, the Oneida community also originated an early version of eugenics, with the idea of creating ideal children. Starting in the late 1860s, if the community agreed a child was desired, then the most highly ranked men would breed in order to produce the best babies. This was a somewhat early form of eugenics.

Noyes initially tried his idea in Vermont. After being charged with adultery, he fled from Putney, Vermont, to Oneida, New York, where he established his settlement. He argued against property and marriage through biblical quota-

tions and support. Noyes believed, or claimed to believe, in a system of love that was not tied to any one person. Those who wanted to be married to only one person could be expelled from the community. The Oneida community survived for some thirty years and broke apart in the 1870s, as the children who grew up in the community were not as religiously interested as those who had entered it voluntarily. Another reason the community dissolved was that Noyes tried to transfer control of the community to his son, an agnostic who was not nearly as well respected as his father.

The Oneida experience is interesting in that it does not seem to have aroused the opposition of the local authorities, even though it was clearly radical for the times. The legal agencies of New York did not pursue Noyes the way Vermont did. There is no clear reason for this, but the court system of New York does not seem to have mobilized against it.

One legacy of the Oneida community is its silverplate. After the community broke apart as a living arrangement, the members desired to continue producing silverware, which they had been doing as a community. They reorganized as a business company that produced silverware until 2004.

The Shakers and the Oneida community serve as two very different examples of separationist religious groups in nineteenth-century America. Both communities received some opposition, but not as much as might be expected, either from the law or from public opinion. Both communities also lasted several decades, but neither remained strong into the twentieth century. Both also, finally, show that attempts to redefine society are not limited to the 1960s, as is commonly assumed.

See also *Cantwell* v. *Connecticut;* General legal treatment of Mormons; *Reynolds* v. *United States; Roe* v. *Wade*

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Sherbert v. *Verner*

374 U.S. 398 (1963)

The schedule of the American workplace had long been organized, in part, around the belief that most of the workers were Christian. One sign of this is that Sunday was the one day given to most workers as a non-work day in the mid-nineteenth-century industrial system on the assumption that Sunday was the day on which everyone would worship. Of course, if a worker's worship day was Saturday, or Friday, or any other day, and the individual failed to work that day in order to attend services, he or she would be fired. As religious protections were increased by the Warren Court in the 1950s and 1960s, this area was also reconsidered.

A member of the Seventh-Day Adventist Church was fired for refusing to work on Saturday, and she could not get another job as she would not work on Saturday, and she was then refused unemployment compensation. She sued, and her case went all the way to the Supreme Court. Justice Brennan wrote the opinion of the Court, striking down the refusal. Brennan first noted that the member's unwillingness to work on Saturday was prompted by her religion. He then noted that the refusal of the state to pay unemployment

benefits was a burden on her religion. South Carolina argued that unemployment compensation was a privilege, not a right, but the Court responded, "nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege' " (374 U.S. 398: 404). The Court next considered "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right" (374 U.S. 398: 406). Brennan answered that it did not, as the issue of fraud had not been mentioned in the case below, nor could it have sustained the statute even if it had been and he differentiated this case from a Sunday closing law, holding that the state in those laws had the desire to create a uniform day of rest, which was not the issue here. The Court closed by noting that they were not helping the Seventh-Day Adventist Church by establishing it but were just requiring the government to be neutral.

Justice Douglas filed a concurrence. He argued that it was not how much one was injured that mattered but that one was injured because of his or her religion, which was unforgivable. "The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages" (374 U.S. 398: 412). Thus Douglas agreed with the case and its holding, but would have gone further.

Justice Stewart also concurred in the result. He argued that the Court had painted itself into a corner with its free exercise and establishment clause cases. He stated that the Court had held, under the free exercise clause, that she ought to be able to have Saturday as a religious holiday, but that the Court had also, under its establishment clause cases, basically forbidden a state to assist religion, which Stewart found to be happening here, as her religion was being assisted. Stewart also thought that this case did not agree with the decisions allowing Sunday closing laws. Stewart would have overruled the Sunday closing laws, which was not done here, but also agreed with the result of allowing the Seventh-Day Adventist her unemployment compensation.

Justices Harlan and White dissented, in an opinion written by Harlan. They held that this woman was only "unavailable for work" due to "personal considerations" (those being her religion), and as such the Court was ordering the states to create religious exceptions. Harlan suggested that this case should have overruled the Sunday closing laws, even though it did not, and that the state was not compelled to create this exception as doing so constituted special treatment for religion. He suggested that exceptions were allowed, but not required, and so these two justices dissented, as the Court decision here required the exception.

Seventh-Day Adventists are required to observe the Sabbath on Saturday and this woman's observance caused her to lose her job; she could not find any other employment without working Saturdays and the state would not provide her with unemployment insurance. The Supreme Court found this to be wrong. The Court, however, still did not see forcing businesses to close on Sunday to be a violation of the separation of church and state. Thus, if workers had a Saturday Sabbath, they could be forced to take two days off without violating their religion, but if they were to be fired for not working on the Saturday Sabbath and were unable to find a job if they refused to work Saturdays, the state would have to give them unemployment compensation even though they would not normally get that benefit for refusing

to work. Clearly the Warren Court has woven a complex web, and the web has not become any clearer in the intervening years.

See also *Ansonia Board of Education* v. *Philbrook; Braunfeld* v. *Brown; Employment Division* v. *Smith; McGowan* v. *Maryland; Metzl* v. *Leininger; Trans World Airlines* v. *Hardison*

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Sherman v. *Community School District 21*

980 F.2d 437 (7th Cir. 1992)

This case dealt with whether a school district can require teachers to lead students in saying the Pledge of Allegiance. Two cases in the 1940s had ultimately determined that students objecting to the pledge for religious reasons could be excused from its recitation. In those cases, the students objected to saluting the flag, as their religion (Jehovah's Witness) forbade saluting any graven image, including the flag. In the 1950s, the phrase "under God" was added to the pledge, and many atheists, among others, opposed this as an establishment of religion. The controversy continued until the 1970s, but ultimately many of those who objected to reciting the pledge on the grounds that it established a religion were also excused from saying it.

This case, in the 1990s, dealt with a frontal challenge to the recitation of the pledge. A parent had claimed that his son experienced peer pressure to participate, but not enough of coercion was documented to become a judicable claim. The court then examined the pledge as both a patriotic exercise and a test of First Amendment rights. It held that a state can teach patriotism. "Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught" (980 F.2d 437: 444). On the whole, on the issue of patriotism, the court concluded that "so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who want to pledge allegiance to the flag 'and to the Republic for which it stands'" (980 F.2d 437: 445).

The court then turned to the use of the phrase "under God." It first argued that the Founding Fathers had used references to God, as had Abraham Lincoln. The court then concluded, "Unless we are to treat the founders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as 'establishment.' They did not" (980 F.2d 437: 445). The court also held that this use of God in the pledge was good enough for previous courts and so was good enough for them. Thus, use of the pledge was deemed constitutional, a policy maintained to the present, and the Supreme Court may finally rule directly on the issue, as the *Newdow* case is again working its way through the legal system.

See also Addition of "under God" to Pledge of Allegiance; *Elk Grove Unified School District* v. *Newdow;* Saluting the flag

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Shift away from anti-Catholicism from 1960 to 2004

John F. Kennedy, in the 1960 presidential election, was often attacked for being Catholic, and it was whispered that if he was elected, the pope would run America's government. By 2004, the complaint about John F. Kerry was that he was not Catholic enough when he made a bid for the American presidency, and it had no real impact on the race's outcome. Thus, being Catholic turned from being a potential liability for Kennedy in 1960, to mostly being a nonfactor for Kerry in 2004. The exact reasons for this shift in American public perception of Catholic candidates needs to be further examined.

John F. Kennedy was the first successful Catholic candidate for president. There had been a Catholic candidate before, Al Smith in 1928, but Smith had been unsuccessful. People were wary of Kennedy's Catholicism. However, in a Houston speech to Protestant Church leaders, he argued that his religion was a private matter, and elsewhere he argued that if America was to have true freedom of religion, no one should be barred from the presidency due to his religion. While some might have expected this sort of opposition to Kennedy among the less well educated, several writers noted that even some seemingly open-minded, well-educated individuals did not trust Kennedy because of his religion. As noted, in his campaign Kennedy managed to reduce the impact of his religion on the public's perceptions of him as a politician. While president, Kennedy took a strong stand in favor of the separation of church and state, further decreasing the anti-Catholic bias. Kennedy, even before he became president, also tried to reach out to the conservative Protestant portion of America. After winning the election, he maneuvered a supporting statement out of Billy Graham, and he continued to work for inclusion of different religions.

After Kennedy, and with Kennedy's electoral success and post-assassination popularity, Catholic candidates were considered for "balance" on the national electoral ticket. Barry Goldwater in 1964 picked his running mate, William Miller, in part for his Catholic faith. The Republicans were not the only ones, as Hubert Humphrey, Democratic candidate in 1968, picked his running mate, Edmund Muskie, for his Catholicism, among other reasons. Once President Johnson withdrew from the race, two of the leading candidates for the Democratic presidential nomination in the 1968 Democratic primaries were Robert Kennedy and Eugene McCarthy, both Catholic. Indeed, Catholicism was not a significant issue in that campaign, as it was dominated by the related issues of Vietnam and anti-communism. In 1972, George McGovern picked Sargent Shriver, a Catholic, as his vice-presidential choice after his first choice had to withdraw during the presidential race. In 1984, the Democratic ticket contained Geraldine Ferraro as a vice-presidential candidate. In addition to being the first woman vice-presidential nominee of a major party, she was chosen in part for her Catholicism.

Besides continuing to pick Catholics for the vice-presidential spot, the parties also sometimes tried to appeal to voters on what they considered Catholic issues. The Republican Party appealed much more on these issues, while the Democrats, as noted, were more likely to choose Catholics for their nominees. Two of the main issues facing presidential candidates in the 1970s and 1980s were abortion and aid to parochial schools, and part of the appeal of these issues to Republicans was their draw on the Catholic vote.

Geraldine Ferraro, when nominated in 1984, was criticized for her pro-choice stance on abortion. In fact, many fellow Catholics felt she was too liberal. It was never specifically polled, but her stance on abortion was apparently more important to them than their shared religion. The Catholic Church's hierarchy also voiced opposition to Ferraro due to her pro-choice views.

Democrats used to assume the Catholic vote. It was one of the party's major power bases from its founding until the 1970s. With the rise of the abortion issue, however, along with the parochial schools issue, Catholics often have moved away from the Democratic Party. Catholic Pat Buchanan's attempts throughout the 1990s to be nominated as a Republican presidential candidate amply demonstrated this move. In 2000, Pat Buchanan did run for president, but for the Reform Party, which won only 450,000 votes, or less than one-half of one percent of the votes from across the country.

Finally, in 2004, another Catholic candidate was nominated for president from a major party, again from the Democratic Party. This time, as noted, John Kerry was criticized for not being sufficiently Catholic. The main issue he was criticized on was abortion, as his pro-choice views clashed with those of the Catholic Church. Some even called on him not to take communion, as, in the Catholic Church and some others, one is not supposed to take communion unless one is living (and believing) in accordance with the views of the church. However, by 2004, religious perspectives in general had shifted across the country, so that voters took little interest in the different shades of Christianity represented by the two major parties. That election was decided more by voters' perceptions about the liberal or conservative views of the two candidates. Thus, in 1960, Kennedy was viewed as being too Catholic, and his opponents claimed he would allow the Catholic Church to have too much influence in America, but by 2004, Kerry was criticized by his opponents as listening too little to the Catholic Church, particularly its moral views. The startling implication, based on the 1960 election, that Kerry's critics felt he would allow the Catholic Church too little influence, is actually somewhat misleading. His opponents were really aiming to persuade voters that Kerry was a hypocritical Christian who followed his religion only halfheartedly, and to equate that supposed hypocrisy with his political stances. However, the election still demonstrates quite a shift in the country's perceptions of Catholic presidential candidates in less than half a century.

See also Bible controversy and riots; Maryland Charter and 1654 law disestablishing religious freedom; 1960 election and role of anti-Catholic sentiment; Religion in presidential elections before 1960

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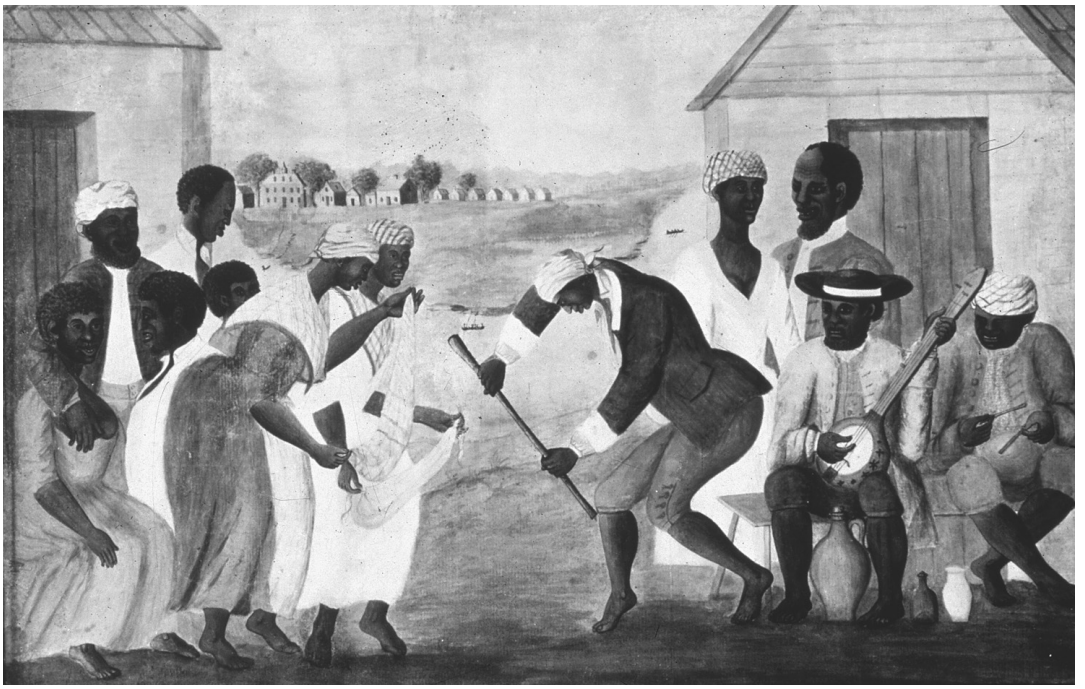
Slaves, rights, and religion

American slaves had absolutely no rights, particularly in the area of religion. This is especially seen in two areas, those being marriage and the right to have their own churches. However, this did not stop slaves from developing their own religion which diverged sharply from the religion their masters tried to force down their throats, although both were forms of Christianity.

Slaves had no right to marry. However, masters liked to see the number of slaves they owned increase through reproduction. Thus, it was in the best interest of the masters for the slaves to form families. Slave owners would sometimes arrange marriages, have ceremonies, and might even provide a cake for a wedding feast. This did not necessarily mean those slave owners did not later break apart their slave families. And when a master died,



Slave wedding in the early nineteenth century. Slave marriages were a common occurrence, while never legalized. Depending on the benevolence of the slave owner, public celebrations such as this often followed the marriage service. (MPI/Getty Images)

even if he had never separated families, his heirs might. A master formerly unwilling to break up families also might change his mind in tough economic times. Slave owners might punish rebellious slaves by selling them away, or selling away their families. Slaves generally held their own ceremonies to give their marriages legitimacy, even if their status did not extend to any legal condition. After the Civil War, getting married and finding lost relatives ranked high on the list of freedmen's goals.

Slaves frequently brought an African religion with them to the United States, and this served as a tie to their native lands. However, slave owners wished to imbue their slaves with Christianity for a variety of reasons, including the slave owners' belief that they were civilizing their slaves, that the owners thought Christianity could be used to teach the slaves to be docile and obey their masters, and that they wished to have control over all elements of the slaves' lives, including religion. Slaves were brought to white services, or at the very least whites were present to enforce order in formal services, and preachers were told to preach to the slaves on their obligation to obey their masters, often basing their sermons on various Bible verses to that effect, including Ephesians 6:5, 1 Timothy, and Colossians. White preachers also told slaves to do good on earth and await their rewards in heaven, meaning that slaves should not rebel. Masters, however, were wary of some influences of Christianity, believing that the slaves might use other parts of the Bible to justify rebellion, and they definitely did not want slaves to actually read the Bible or hold their own services. Thus, while many masters wanted their slaves to have religion, they also wanted to dictate every element of it.

Slaves, by contrast, often maintained their own religions separate from those of their masters. Many slave communities formed their own churches and met after dark, mingling Christianity with native African religions.

These services were often more joyful than the masters' services, including much singing. The slaves were careful to try to avoid white detection. The mingling of African religion with Christianity could be seen in both the services and the detection avoidance methods. Slaves would sometimes place an overturned pot on the ground near their services, believing it would catch the noise before their masters could hear it. The religion also contained a large number of references to water, which was very important in both Christianity and African folk beliefs, often symbolizing hope or life. Slaves also discussed the Promised Land and how they would get to that land, which they publicly claimed was heaven but privately hoped was freedom.

Religion carried over to the slaves' field songs, which were often accompanied by hand clapping. Slaves were forbidden to own drums or horns, as their masters feared these would be used to spread notice of a revolt. Songs often had a double or triple meaning. For instance, a song talking about "I see Master Jesus coming" could also be a way to communicate. If a slave boss, either a white overseer or a black driver, had assigned a task to a group of slaves and left, some might rest in the center of the group while those on the outside worked and kept a lookout. If the overseer returned, the outer slaves would break out into the song, warning those in the center to return to work.

Thus, religion was one of many areas in which slaves had absolutely no rights, and slave owners tried to manipulate the system to control their human property. However, resistance led slaves to form marriages outside the established white churches and to hold their own religious ceremonies that did not follow the same downtrodden path encouraged by their masters. Slaves' religion became an important element of rebellion, helping to guide freedom seekers using the Underground Railroad and to undermine masters' authority wherever possible.

See also African American draft resisters during the Vietnam War; Divorce, marriage, and religion; Martin Luther King, Jr.; *Loving* v. *United States;* Native American combination of religion and law; Religion and the defense of slavery; Religious elements of the civil rights movement

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Smith v. *Board of School Commissioners of Mobile County*

827 F.2d 684 (11th Cir. 1987)

The books used in school and present in school libraries touch off a large number of concerns. One concern is what level of censorship a school board can place over these books. Another, and the subject of the case here, is when approval of a certain book creates an establishment of religion. Smith had sued against more than forty books on the publicly approved list of textbooks in the Mobile County School District; he thought they advanced the religion of "secular humanism" and thus violated the First Amendment. The district court agreed.

The case then moved up a level, and the Eleventh Circuit first looked at the district court trial and stated that the *Lemon* test was the one to use. That test required a secular purpose of legislation, required neither an advancement nor hindrance of religion as the

legislation's main effect, and required that the legislation not improperly entangle the government and religion. The court here, with the consent of both parties, focused on the second part, the effect of the approved texts. After reviewing the texts, the court held that "use of the challenged textbooks has the primary effect of conveying information that is essentially neutral in its religious content to the school children who utilize the books; none of these books convey a message of governmental approval of secular humanism or governmental disapproval of theism" (827 F.2d 684: 690). Those suing had claimed, among other things, that the books slighted religion and did not tell how important it had been to American history and so was promoting humanism. The appeals court disagreed, however, holding "we do not believe that an objective observer could conclude from the mere omission of certain historical facts regarding religion or the absence of a more thorough discussion of its place in modern American society that the State of Alabama was conveying a message of approval of the religion of secular humanism" (827 F.2d 684: 693). The court also reiterated precedents holding that a benefit to any religion was not enough to invalidate a statute, but that the main effect of the statute must be the promotion of the religion. About the district court's decision as a whole, the higher court held that "the district court's opinion in effect turns the establishment clause requirement of 'lofty neutrality' on the part of the public schools into an affirmative obligation to speak about religion. Such a result clearly is inconsistent with the requirements of the establishment clause" (827 F.2d 684: 695). Thus, text and library books must be evaluated with an eye to their primary effect, not just some incidental effect.

See also *Board of Education* v. *Pico; Crowley* v. *Smithsonian Institution; Roberts* v. *Madigan*

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Snyder v. *Charlotte Public Schools*

365 N.W. 2d 151 (Mich. 1984)

This case was heard in the supreme court of Michigan and concerned whether a public school could be ordered to admit a private school student to a nonessential class (in this case, a band class) when the private school did not offer band. The lower courts found in favor of the school board. However, the parents appealed to the state supreme court, which reversed the lower court's decision.

The court first surveyed the history of education and held that students had a right to an education. The court then turned and examined what powers a school board had, holding that the school board had general discretion, and that "in reviewing a school board's decision, a court cannot substitute its judgment for that of the board. Its inquiry is limited to whether the board's actions were arbitrary and unreasonable. The actions are presumed to be reasonable and proper unless there is a clear showing of abuse" (365 N.W. 2d 151: 156).

The court then looked at the history of shared time instruction and when it was allowed and banned. The court held that the school board should have allowed the student to register. The school board had argued that there would be a large number of difficulties with allowing private students to take part-time courses, but the court disagreed. "Arrangements could easily be made to limit disorganization and inconvenience. It would be just as easy, economical, and convenient (if not more so) to open these classes to nonpublic school students as it would be to provide these classes to them if they became full-time public school students. The administrative difficulties are minimal" (365 N.W. 2d 151: 159). The school board had

argued also that the part-time students would decrease full-time enrollment, but the court did not find this argument supported by the record. The court noted, however, that the core subjects could not be taken in a public school in this manner, and that the private schools would still have to provide that core curriculum. The court concluded that "'nonessential elective courses,' such as band, art, domestic science, shop, advanced math, and science classes, etc., need not be taught in nonpublic schools. These are the types of courses that have traditionally been offered on a shared time basis. Thus, once these types of courses are offered to public school students in the district, they must also be offered to resident nonpublic school students" (365 N.W. 2d 151: 162).

Federal constitutional issues were next addressed, particularly whether the shared time program aided the private schools, some of which were religious. The court held that there was an allowable secular benefit here, that the benefit to private schools that occurred was allowable, and that the Supreme Court had repeatedly allowed various services for private school students at public school sites.

One judge dissented. Judge Brickley thought that the majority adopted a "strained" interpretation of the school statutes. He thought that no part of the Michigan constitution guaranteed a right to attend school on a part-time basis, and, because of this, the school board could exclude the private school student if they wished. If the students did have a right to attend both, Brickley held, then the private school students could attend any course they wished at the public school, not just the nonessential ones. As he felt the majority was adopting a strained interpretation, the dissent would have upheld the lower court and thus upheld the school board's decision not to admit the private school student.

See also *Agostini* v. *Felton; Duro* v. *District Attorney, Second Judicial District of North Carolina; Everson* v. *Board of Education; Lemon* v. *Kurtzman; Members of Jamestown School Committee* v. *Schmidt; Swanson* v. *Guthrie Independent School District No. I-1*

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State constitutions and the federal First Amendment

It is well known that the U.S. Constitution's First Amendment both provides for religious freedom and prevents the U.S. government from establishing a religion. What is less well known is that most state constitutions also have provisions dealing with the freedom of religion. These provisions were crafted in large part due to the fact that the U.S. Constitution did not apply against the states, in the area of religion, until 1940, and many states felt the need to safeguard religion in their own areas against a future state government's acts.

One question that is seldom discussed, although often thought about once these facts are understood, is what happens when the federal and state constitutions conflict? It is also possible to find a state constitutional provision that protects a practice not covered at the federal level. The first thing to realize is that state constitutional protection of the freedom of religion

is never smaller than that of the federal Constitution. As soon as the federal Constitution covered freedom of religion against state action, it became a limit that could not be abridged.

However, state constitutional protection of religious freedom can be larger than the federal Constitution. State constitutions are often more detailed than the federal First Amendment, allowing for restrictions on liberty when public policy dictates it, or defining religion and worship in more detail. State courts have also not always interpreted their religious liberty clauses in the same ways as the federal ones. After the First Amendment was applied against the states subsequent to 1940, many state courts deferred to the federal interpretation. However, once the federal courts began to restrict religious liberty, some state courts began to articulate a more expansive view. The Supreme Court, in *Sherbert* v. *Verner* (1963), required that laws impinging on religious freedom pass strict scrutiny, meaning that these laws needed to advance a compelling interest and be the least damaging way to accomplish a task—a tall order leaving most state courts feeling no need to go beyond *Sherbert*. In 1990, *Sherbert* was overturned in *Employment Division* v. *Smith,* which held that neutrality was the key, and that if a law was neutral and general, it only needed a rational basis.

After *Employment Division,* many states were in a quandary. Many of their courts had ceased conducting separate analyses of religious liberty under the state constitutions but had instead used the federal Constitution, and so were leaning toward following *Employment Division*'s more restrictive view, even if they did not want to. However, not all states had ceased such analysis. At least four, including Kentucky and Tennessee, had continued to analyze their own constitutions and decided on state constitutional grounds that the strict scrutiny standard was needed, meaning that it should survive the holding in *Employment Division*.

Other state courts have held, after *Employment Division,* that a strict scrutiny analysis is still needed for state constitutional free exercise claims. Two of these states have language in their constitutions allowing for free exercise except when the public peace is threatened, and have interpreted their constitution as still abiding by the *Sherbert* standard. Alaska has reached this same result, even though the text of Alaska's free exercise provision mirrors the federal one. The same language, Alaska is saying, does not have to lead to the same result. Thus, although states have generally tracked federal court free exercise jurisprudence in recent years, some states are moving away from that mimicking.

Another issue to consider when comparing the state constitutions and the federal Constitution is the states' positions on the establishment clause, as all states are required to have at least the federally mandated limits on establishment that the Supreme Court determines are created by the U.S. Constitution. Once again, the language in the state constitutions is often more specific. In addition to the general language prohibiting an establishment, many state constitutions ban aid to any religion and mandate separation in education. Some states ban both direct and indirect aid to education or to any religion in general. Aid to education is the main area in which the state courts have been more restrictive than the federal ones. The federal courts have allowed loans of textbooks to private schools ever since *Board of Education* v. *Allen* in 1968. However, the Nebraska Supreme Court ruled just the opposite in 1974, holding that lending of textbooks constituted "aid" and all aid was banned under Nebraska's constitution. Alaska has also made a similar ruling. Thus, in the establishment clause, as in the free exercise clause, state courts have moved beyond the federal courts, using the state constitution to adopt a more restrictive reading and limiting state aid to religion and state legislative power over religion, among other things.

After the rulings extending the First Amendment to reach both state and federal laws, it might seem that questions of what is and is not constitutional apply to only the fed-

eral Constitution. However, the state constitution still is brought to bear when it differs from the federal one and when the state courts hold it to be applicable. In several instances, particularly recently, state courts have held that the state constitution prohibits either state regulation of religious practices or state aid to religion, both of which would seem to be allowable under federal precedents.

See also *Baehr* v. *Lewin; Employment Division* v. *Smith;* First Amendment; Incorporation

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Stone v. *Graham*

449 U.S. 39 (1980)

This case dealt with a Kentucky law that required the Ten Commandments to be posted in every public classroom. The copies to be posted were purchased with private funds. The U.S. Supreme Court held the practice to be unconstitutional in a per curium opinion and issued its opinion without hearing arguments by either side. Per curium means the decision was written by the Court as a whole rather than by one particular justice. The Court first turned to the *Lemon* test. The first part of that test is whether the requirement has, at its base, "a secular purpose" (449 U.S. 39: 41). The lower courts had cited the legislature's pronouncement of the secular legislative purpose, and the legislature had claimed, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States" (449 U.S. 39: 41). However, the Court said that it was not enough for a legislature to claim a secular purpose, and the Court looked for itself into the purpose of posting the commandments. It held that "the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" (449 U.S. 39: 41). The Court held that in some cases a study of the Ten Commandments, as part of a larger curriculum looking at the history or literature including the Bible, would be acceptable, but that this was not the case here, as the Ten Commandments stood alone and undoubtedly promoted religion. The private contributions funding the postings were held to be irrelevant, as the state support in posting them was enough to violate the Constitution.

Four justices dissented from the per curiam. It would appear from the dissents that Stewart very well might have voted against the Court after hearing the case, as he stated that the courts below had acted correctly, and so he probably would not have reversed them. Regardless, with at most only four judges opposing the decision, it does not appear that a hearing would have made any difference.

Justice Rehnquist dissented and wrote an opinion. Rehnquist first opposed the Court's determination that the statute lacked a secular purpose. He correctly argued that the Court had not given any justification for this determination, other than their own logic (which, of course, he held to be not good enough). Rehnquist also reminded the Court that legislatures are frequently given deference as to the legislature's findings, which would include the legislature's finding here that the Ten Commandments had a secular purpose. He also cited evidence agreeing with the legislature's finding of a secular purpose behind the posting of the Ten Commandments and argued that their religious elements did not bar the commandments from having a secular purpose. He held that "the Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin" (449 U.S. 39: 45–46). He closed by commenting, "I therefore dissent from what I

cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky" (449 U.S. 39: 47).

Similar issues were also considered in several other cases. The first two cases are *McCreary County* v. *ACLU* and *Van Orden* v. *Perry,* discussed elsewhere in this encyclopedia. There, copies of the Ten Commandments had been posted in public courthouses, and then, after a lawsuit was filed, copies of other historical documents, such as the Magna Carta, were added to the display. This case went first to the district court and then to the Sixth Circuit Court of Appeals; then it was combined with cases from Pulaski County, in Kentucky, and from Texas (the *Van Orden* case), and the case was heard in the Supreme Court. The display was not allowed, as the Court held that it advanced religion, but a display in Texas combining the Ten Commandments with other documents was allowed, as it had existed for a long time without complaint, which was the deciding factor. Justice Breyer was the swing vote, finding that, in Texas, the fact that the display existed for forty years suggested that the public did not view it as an establishment of religion, and this was enough to sway him to agree.

Earlier, the same issue had been considered in *Ring* v. *Grand Forks School District No. 1.* There, the state had ordered that the schools post, in every classroom, a copy of the Ten Commandments. The federal District Court for North Dakota held that the state was not allowed to order the posting of the Ten Commandments as this improperly advanced religion. *Stone* was one of the earlier federal cases to strike down the posting of the Ten Commandments. The 1960s Supreme Court had held it unconstitutional to force students to say prayers or read Bible verses in public schools. *Stone* moved beyond that to rule the same thing about the Ten Commandments in schools. By the early twenty-first century, the Court had expanded that to public areas in general in many cases, but not all.

See also Celebration of Halloween and singing Christmas carols; *County of Allegheny* v. *Greater Pittsburgh ACLU; Engel* v. *Vitale;* "In God We Trust" on U.S. currency; *McCreary County* v. *ACLU*; *School District of Abington Township* v. *Schempp*

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Swaggart Ministries v. *California Board of Equalization*

493 U.S. 378 (1990)

The First Amendment guarantees the freedom of religion, which would seem to put many activities of the church beyond the reach of the law. However, to ensure that the state does not promote religion, other laws come into play. For instance, does a sales tax apply to the sale of religiously oriented materials by a church? The Supreme Court, in *Swaggart Ministries* v. *California Board of Equalization,* said yes.

Swaggart Ministries was headquartered in Louisiana and was charged sales tax on sales in California, as is required by California law. Justice O'Connor wrote the opinion for the Court, which focused fully on the First Amendment claims. Other claims had been made, but they were dismissed as not being proper for the Court's consideration. O'Connor first discussed the tax, that Swaggart Min-

istries had conducted some twenty-three "crusades" in California, and that California had requested its monies from the sales tax on items sold in the state. Thus, California had enough of a connection with Swaggart Ministries to request the revenue.

The Court first noted that the free exercise clause of the First Amendment "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion" (493 U.S. 378: 384). Swaggart had relied on a past decision prohibiting a city from charging evangelists a license tax. The Court differentiated that decision, holding that "flat license taxes that operated as a prior restraint on the exercise of religious liberty" were illegal, whereas sales taxes are not a prior restraint (493 U.S. 378: 386). A license creates a "precondition" to religious liberty which a sales tax does not. O'Connor also noted that sales taxes on newspapers had been upheld. Whether California could legally exempt religious organizations from paying the sales tax was an interesting question, O'Connor suggested, but was not before the Court in this case. The Court concluded, "Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs per se; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. . . . There is no danger that appellant's religious activity is being singled out for special and burdensome treatment" (493 U.S. 378: 389–390).

The Court also looked at history in the area of other taxes as a guide. The decision noted past rulings specifically stating that property taxes on religious lands were also allowed. While less money for a church (as the tax revenues had to be deducted now from the total sales) might harm religion somewhat, this was not held as sufficient to be a violation of the First Amendment, and as "imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant" (493 U.S. 378: 391). Swaggart had also argued that the oversight required to collect the tax and determine the amount to be assessed created an excessive entanglement with religion, also banned by the *Lemon* decision. The Court dismissed this claim, suggesting that little new burden was added and that mere record keeping does not create an entanglement. Thus, O'Connor, writing for a unanimous Court, held that there were no First Amendment grounds to prohibit California from collecting its sales tax. This decision allows states to tax the sale of religious materials. A state would probably not be allowed to tax the distribution of religious materials if those materials were given freely, nor force groups to be licensed to distribute those materials, nor force licensing of the evangelists.

Televangelist Reverend Jimmy Swaggart gestures with a Bible as he addresses a crowd of 14,000 faithful during his Los Angeles crusade on March 30, 1987. (AP Photo/ Mark Avery)

California here was allowed to, and did, charge sales tax on revenue gained from publication sales, and the Court left open the question of whether a religious group could be exempted from the sales tax, as such an exemption might be viewed as a promotion of religion, which also would violate the First Amendment.

See also *Bob Jones University* v. *United States; Fairfax Covenant Church* v. *Fairfax City School Board; Hibbs* v. *Winn; Walz* v. *Tax Commission of the City of New York*

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Swanson v. *Guthrie Independent School District No. I-1*

942 F. Supp. 511 (Okla. 1996)

This case dealt with whether the state could force a home-schooled student to attend school on a full-time basis if she wanted to enroll in some classes. Though generally home schooled, Annie Swanson wished to attend some classes at the local public school. The school district forbade this practice, in part because monies were given by the state only for full-time students. Her parents appealed, claiming that the student had a right to a free education and a right to her freedom of religion.

The court found for the school board. They first agreed that the parents had a right to home school and that the student had a right to attend school. However, the court left control of the school up to the school board and held that it "also declines to adopt Plaintiffs' strained interpretation of Oklahoma law to create a right to a free part-time public education" (942 F. Supp. 511: 515). As for parental control over the student's education, the court found that such control did not extend as far as forcing the school board to allow part-time attendance. The court also ruled that the parents' freedom of religion was not inhibited by the board's refusal to allow the student to attend school part-time. The court concluded that the parents "have failed to show how the defendants' requirement that Annie attend school full time violates any cardinal principle of their religious faith" (942 F. Supp. 511: 516). It should be noted that this requirement did, as the court admitted, allow the student to be educated full-time at home.

The defendants had also claimed that the school board had violated their rights established by the Religious Freedom Restoration Act of 1993, which required that when a government practice substantially burdens a person's free exercise of religion, the government must prove that it used the least restrictive means possible, and that the law doing so advanced a substantial government interest. However, here, the court ruled again that the parents' free exercise of religion was not burdened.

Thus, on all of the claims, the court refused to overrule the school board and force it to allow the student to be admitted on a part-time basis. Nothing in this court's ruling would prevent a school board from admitting such a student on a part-time basis, but the ruling was also very clear that a school board ruling as this one did in not allowing the student to attend part-time, at least in the mind of this judge, did not violate anyone's constitutional rights.

See also *Farrington* v. *Tokushige; New Jersey* v. *Massa; Null* v. *Board of Education; Snyder* v. *Charlotte Public Schools*

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T

Tilton v. *Richardson*

403 U.S. 672 (1971)

Freedom from religion has often been held to include not only freedom from having to worship a certain way but also generally freedom from having to support any given church. A tax to fund a state church, which was common before the American Revolution, is frequently seen as banned by the First Amendment. However, if some state services, such as fire protection, were denied a church, then that would seem to be hindrance of a religion, which was also banned. Thus, state financial assistance and services should neither inhibit nor promote religion. In terms of higher education, the question of the First Amendment soon focused, among other things, on whether states could provide funds to religious colleges, and *Tilton* v. *Richardson* (along with two other cases) addressed this.

Tilton dealt with the Higher Education Facilities Act, which gave money to colleges and universities to build buildings, as the name suggests. The question was whether this act could give money to religious colleges. The plurality decision, written by Chief Justice Burger and joined by three other justices, first noted that the act, as interpreted by the U.S. commissioner of education, held that "no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school" (403 U.S. 672: 675). The Court then noted that Congress had intended to include religious schools in their definition of higher education, and so religious schools were not excluded from funds. The Court then turned to what test should be used and defined the *Lemon* criteria, decided the same day, as a guide rather than a test, and then used it. The secular purpose was held to be one of improving education, and even though the buildings were at a religious institution, the act's primary purpose was not held to be advancing religion.

The Court then examined another part of the bill, which said that after twenty years, the buildings could be used for any purpose by the university or college, whereas before that the ban noted above applied. The government was allowed to recover some of the funds if, within a twenty-year period, the building was used for religious purposes. This twenty-year limitation, however, was not held to be based on any rational calculation, and so the twenty-year limitation was arbitrary, and handing over the building after twenty years creates an interference with the First Amendment. In this way, the Court concluded, "The Act therefore trespasses on the Religion Clauses" (403 U.S. 672: 683). The Court then turned to the questions of entanglement and the free exercise clause, deciding that there was little risk of entanglement and that tax money supporting the construction did not violate the free exercise clause.

Justice White provided the fifth vote to uphold the overall statute with the twenty-year provision removed, and wrote, "It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion" (403 U.S. 602: 664). (His opinion in *Lemon* also covered the *Tilton* case.) Thus, White allowed aid in *Tilton* but also would have allowed it in *Lemon* (the majority decision did not) and did not see the contradiction between the two cases, holding that they either both must rise or both must fall. He also, however paradoxically,

agreed that the twenty-year provision was unacceptable. Thus, with White's vote, aid was allowed as long as there was no twenty-year provision after which the buildings created by the aid could be used for any purpose.

Justices Douglas, Black, and Marshall concurred in part with the decision, and dissented in part, as they agreed that the return of the building after twenty years was an "outright grant" and therefore illegal, but they would have also overturned the entire program, as "the sectarian purpose is aided by making the parochial school system viable" (403 U.S. 672: 692). Douglas also suggested that there was a risk of "excessive entanglement."

Justice Brennan dissented in general, based on his opinion in *Lemon,* and said that aid to religious schools was invalid, but other aid was permissible.

The Court here believed, or at least enough justices did, that aid could be given to religious institutions in programs that provided aid to a wide variety of colleges, as long as that aid did not help the religious parts of that institution. The Court also held, though, that buildings created could not be freed for indiscriminate use by the college or university after a certain amount of time, as Congress did not have a rational basis for the length of time universities and colleges were to wait.

Two years later the Court returned to the issue of aiding education at religious colleges, but this time it was a state program. Justice Powell delivered the opinion of the Court in *Hunt* v. *McNair* (1973), which was a 6–3 decision. This case dealt with a South Carolina program that created bonds allowing religious schools to build nonreligious buildings and then to control the building when the bonds were repaid. The program was not limited to religious schools, but religious schools were allowed to participate. Powell used the *Lemon* test, holding first that the purpose was to advance education, which clearly was a secular purpose. The "primary effect" (the second prong of the *Lemon* test) was held not to be one of advancing religion—even though this was a Baptist college, only 60 percent of students were Baptist—and religious activities were banned in the buildings constructed. The Court finally looked at the issue of entanglement and concluded, largely based on the way the South Carolina Supreme Court had interpreted the statute, that there was little risk of "excessive entanglement."

Justices Brennan, Marshall, and Douglas dissented in an opinion written by Brennan. Brennan first held that the First Amendment banned government participation where "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice" (413 U.S. 734: 750). Brennan also objected as he saw an excessive entanglement occurring. "Indeed, under this scheme the policing by the State can become so extensive that the State may well end up in complete control of the operation of the College, at least for the life of the bonds" (413 U.S. 734: 752). He also differentiated this case from *Tilton* in that *Tilton* did not involve interaction with the everyday life of the colleges, which he, in this case, saw happening. Indirect as well as direct help was banned. Brennan concluded that the Constitution "forbids any official involvement with religion, whatever its form, which tends to foster or discourage religious worship or belief" (413 U.S. 734: 754). Thus, the Supreme Court allowed direct grants to build buildings as long as religious activities were not conducted in them, and allowed bonding aid as long as that aid was repaid before religious activities occurred in those buildings.

Finally, in the 1976 case of *Roemer* v. *Maryland Public Works Board,* the Supreme Court considered whether general grants were allowed. This was quite a splintered decision. Justice Blackmun wrote the decision for the Court and was joined by Justice Powell and Chief Jus-

tice Burger. Blackmun first reviewed the program, noting that general grants were given but they could not be used for "sectarian purposes." Blackmun claimed that the main goal of the First Amendment, in programs such as these, was that "the State must confine itself to secular objectives, and neither advance nor impede religious activity" (426 U.S. 736: 747). Blackmun next reviewed the precedents and held that they were settled and that new lines or tests did not need to be drawn or created, but that the Court's goal was "merely to insure that they are faithfully applied in this case" (426 U.S. 736: 754). The question of the statute's purpose was not at issue here. The Court then agreed with the district court that these colleges were not "pervasively sectarian" and this, along with the ban on use for "sectarian purposes," prevented the primary effect from being one of advancing religion. The Court then decided that there was no risk of excessive entanglement from oversight and agreed with the district court that there was not enough risk of a political entanglement to require its overturning the program.

Justices White and Rehnquist concurred in the judgment only. They thought that the *Lemon* test "imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes" (426 U.S. 736: 768). These two justices concluded that "no one in this case challenges the District Court's finding that the purpose of the legislation here is secular. . . . And I do not disagree with the plurality that the primary effect of the aid program is not advancement of religion. That is enough in my view to sustain the aid programs against constitutional challenge, and I would say no more" (426 U.S. 736: 769–770).

Justices Brennan and Marshall dissented. They felt that this program advanced religion and that the institutions should be required to repay all funds paid to them. Justice Stewart also dissented. He, who had upheld the *Tilton* grant, said that in this case religion courses were not taught as academic courses, and so these required courses, in his mind, might advance religion. Justice Stevens also dissented, and added a consideration. He noted, "I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith" (426 U.S. 736: 775). That is a consideration often not taken into account.

Thus, in general in the 1970s, the Supreme Court allowed aid to religious schools as long as the programs granting the aid were open to religious and nonreligious schools alike and as long as there were safeguards to prevent religious content from occurring either in those buildings built or being directly assisted from grants. The Supreme Court found nonpersuasive the arguments made by its own members that any aid to a religious educational institution was helpful to religion and therefore illegal, and thus aid to religious schools was allowed as long as it met the *Lemon* test.

See also *Agostini* v. *Felton; Aguilar* v. *Felton; Everson* v. *Board of Education; Hibbs* v. *Winn; Mitchell* v. *Helms; Zelman* v. *Simmons-Harris*

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Tipton v. *University of Hawaii*

15 F.3d 922 (9th Cir. 1994)

This case considered the circumstances and regulations under which a university may deny funding to a religious student organization. In this case, the University of Hawaii had refused to fund three religious organizations, which in turn sued. The university won in the district court and the Ninth Circuit Court of Appeals affirmed that decision.

The university had established procedures covering which student organizations received funds. First, the organizations had to register. Second, the student union decided who was funded, and their regulations initially "favor[ed] programs with 'inherent cultural, economic, or social impact, and those which str[o]ve to manifest goals,' which include[d] 'developing a responsible as well as a critical awareness of prevalent attitudes and actions through participation in co-curricular activities' " (15 F.3d 922: 923). After an ACLU lawsuit, the student union agreed to adopt the *Lemon* test for funding. An organization had to have a secular purpose, it had to neither promote nor retard religion as its primary effect, and the funding had to avoid excessive entanglement with religion. Tipton then sued against these regulations, arguing that religious organizations had ceased to be funded. The district court found that a nonpublic forum had been created, meaning that the university could set up regulations on access. The court also found that the denial did not create any coercion against people's religion, and thus was allowable.

The Ninth Circuit reviewed the district court's decision and agreed with it. The court upheld the use of the *Lemon* standard by the student union and held that the university was under no obligation to fund any speech. The university could choose to fund no one, and thus Tipton had no right to a subsidy. The regulations adopted could have allowed Tipton funding, but as he had no right to the subsidy, the mere possibility of the speech being funded was not enough to force adoption of those possible regulations. If he had a right to a subsidy, the standards would have been different.

The court also narrowly defined what it was reviewing. It did not decide whether the state could fund only nonreligious groups, as the court found that the state was funding all groups under the same nonreligious criteria, and it did not decide whether the state could fund religious events. The regulations here are in the middle, and the court held that "between the two extremes of denying student religious groups all financial support, on the one hand, and subsidizing indisputably religious activities, on the other, the University has wide latitude in adopting a funding policy to allocate the limited resources available to promote students' extracurricular activities" (15 F.3d 922: 926). The court stated that the policy had to be applied equally to all, and, as the challenge here was to the policy as a whole rather than to any specific decision for funding, the policy was assumed to be applied equally. Also, the policy still had to allow access for religious groups on the same basis as secular ones, and access for private religious groups had to be granted on the same basis as private secular groups. Thus, if some nonuniversity groups were allowed access, all needed to be given access on the same basis. Access is a bit different from funding, as funding is often more limited than space, and state facilities have generally been considered open to all groups if open to one group, as long as space permits.

This case was followed up in the next year with *Rosenberger* v. *University* of *Virginia,* in which the University of Virginia's decision to refuse funding for a student publication was denied. The publication was denied funding as

the people writing it (and the tone of the paper) demonstrated a belief in a supreme being. The Supreme Court held that this was discrimination based on a religious viewpoint and so not allowed, and it reversed the denial of funding. The Court agreed that the university could have denied funds if the group had been supporting a religious activity, but it could not deny funds merely because the group using them had a particular viewpoint. There, as here, the university could have chosen not to fund any student newspaper but instead chose to fund them generally. Because it chose to fund student newspapers, it had to fund all of them on the same basis. A difference between the situation in Virginia and the one in *Tipton* is that in Virginia, a particular denial of funding was being challenged, whereas in Hawaii, the policy as a whole was being challenged.

State agencies, particularly colleges, exist between the two parts of the First Amendment. They cannot fund religious activities, but they also cannot discriminate against people due to their religious viewpoints. Hawaii found an acceptable solution by funding only activities that had secular purposes and were neutral in the area of religion. At the very least, its policy was found to be acceptable, though the application still could be challenged. Virginia's general policy was not challenged. Instead, its method of applying that policy to one student publication came under scrutiny, and the application was determined to be unfair. In the area of access to facilities, court rulings have been more broad, holding that allowing access to any nonuniversity group means that access must be given to all on religiously neutral terms.

See also *Board of Education Kiryas Joel Village School* v. *Grumet; Board of Regents of the University of Wisconsin System* v. *Southworth et al.; Bronx Household of Faith* v. *Community School District No. 10; Chapman* v. *Thomas; Good News Club* v. *Milford Central School; Lamb's Chapel* v. *Center Moriches School District; Lemon* v. *Kurtzman; Rosenberger v. Rector and Visitors of the University* of *Virginia; Widmar* v. *Vincent*

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Torcaso v. *Watkins*

367 U.S. 488 (1961)

Originally, power in many colonies, and sometimes even admittance into the colony, was reserved for certain people. Generally, as many who have quickly surveyed American history would expect, authority was concentrated in the hands of the rich white males, but another qualification was also generally added, either spoken or unspoken. One had to be of the same religion as the majority in the colony to hold power. Colonists in America sometimes were fleeing religious persecution in England, but they did not see themselves as being hypocritical to establish religious persecution here. For instance, Massachusetts was established for the Puritans who felt that they were persecuted in England, but Massachusetts also expelled all those who did not follow the official Puritan line. Best known of these were Anne Hutchinson and Roger Williams. Massachusetts also helped to pay for the Puritan churches. Other colonies, while allowing other religions, were nearly as intolerant in official policy. Maryland, although established as a colony originally for Catholics in 1632, by 1654 had banned Catholics from voting. By the American Revolution, most state support for churches had

ended, but vestiges of religion remained, and some states, including Maryland, kept provisions in the state constitution requiring officeholders to be believers in God. That is the provision in question here.

Justice Black wrote this opinion of the Court. The case dealt with a requirement in the Maryland constitution that "no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God" (367 U.S. 488: 489). Torcaso wanted to be appointed a notary public but was refused as he would not swear his belief in the existence of God. Torcaso then took his case to the court system, claiming that this provision violated the First Amendment as applied to the states through the Fourteenth Amendment. Black first outlined the history of the case and declared that this provision "sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland" (367 U.S. 488: 489–490). Black next noted the history of religious tests and commented that it was ironic that Maryland had them, as the founder of Maryland, Lord Baltimore, had fled England to escape such a test.

Black then reviewed the history of First Amendment cases, summarizing *Cantwell, Everson,* and *McCollum*. He concluded that these cases adequately covered the issue at hand here: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (367 U.S. 488: 495). Applying this affirmation to the case at hand, Black wrote, "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him" (367 U.S. 488: 496). Thus, the provision requiring that one state his or her belief in God was struck down.

This decision effectively ended a requirement that one be a Christian, or be a believer in a Western religion (depending on how tightly the term "God" was interpreted) in order to hold office. Since *Torcaso,* no states have tried to create such requirements again, even though many electorates effectively require belief in God to win elections. For instance, of America's forty-three presidents, all but one have been Protestant, with the other Catholic (Kennedy). No one who believes in a non-Christian religion has been nominated nor have any publicly professed agnostics or atheists. Thus, while no official bans exist, a practical one operates for some, if not most, elected offices in most areas.

See also Anne Hutchinson; Maryland Charter and 1654 law disestablishing religious freedom; *Stone* v. *Graham; United States* v. *Kauten;* Virginia Statute for Religious Freedom; Roger Williams

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Trans World Airlines v. *Hardison*

432 U.S. 63 (1977)

Many laws today do not allow employers to discriminate on the basis of religion. In hiring, the application of that principle is relatively straightforward. However, once a person is hired, the provision and how it should be observed is less clear.

This specific case, *Trans World Airlines* (TWA) v. *Hardison,* dealt with an employee of TWA who was a mechanic and refused to work Saturdays. The employee had been able to avoid

working Saturdays in a previous job with TWA as he had seniority, but when he changed jobs, he was low on the seniority scale and could not get a shift that allowed him Saturdays off. The union and TWA tried somewhat to work with him, but no accommodation was forthcoming and so he was fired. He then sued.

Justice White delivered the opinion of the Supreme Court. White first noted the law as making "it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. At the time of the events involved here, a guideline of the Equal Employment Opportunity Commission (EEOC), . . . (1968), required, as the Act itself now does, . . . that an employer, short of 'undue hardship,' make 'reasonable accommodations' to the religious needs of its employees" (432 U.S. 63: 66). White then examined the legislative and legal history of what a reasonable accommodation was and concluded that "in brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines" (432 U.S. 63: 75).

White then examined what accommodations TWA had made, noting that the seniority system in place (which had helped Hardison at first but then denied him the days off after the job switch) represented an accommodation to all employees. The court of appeals had held that the failure of TWA to find a different job for Hardison was a lack of accommodation, but White disagreed. White also held that the seniority system, at that time, should trump the statutory prohibition on religious discrimination. He wrote that "without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances" (432 U.S. 63: 79). White suggested that accommodating Hardison would have discriminated against another employee for his lack of belief in a religion that required Saturdays off. "There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities" (432 U.S. 63: 81).

The court of appeals had suggested that TWA could have paid overtime for other employees to come in or just allowed the shift to be short, but the Supreme Court disagreed. "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship" (432 U.S. 63: 84). On the whole, the majority concluded that "as we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath" (432 U.S. 63: 85).

Justices Marshall and Brennan dissented in an opinion written by Marshall. They first noted that "today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act do not really mean what they say" (432 U.S. 63: 86–87). They next looked at the purpose of Congress's amendment to the EEOC requiring that a reasonable accommodation be made, and noted that the equal treatment of Saturday Sabbatarians was a

main stated goal. However, as the dissent notes, "the Court today, in rejecting any accommodation that involves preferential treatment, follows the Dewey decision in direct contravention of congressional intent" (432 U.S. 63: 89). Note that the majority of the Court had claimed that the intent of Congress was unclear in this area when passing the act, and the minority clearly disagreed with that.

The dissent then reviewed past decisions and noted that religious exceptions had been made in the past, without the imbalance noted by the majority. They concluded that "if the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does—and, consistently with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process" (432 U.S. 63: 90–91). The dissent then looked at what TWA and the union had done, noting that no effort to find volunteers to replace Hardison had been made and that TWA was required to prove that no reasonable accommodation was possible; thus, this was not done. They also noted that other options were available, even though these "would have violated the collective-bargaining agreement" (432 U.S. 63: 95). However, "plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations" (432 U.S. 63, 96). Thus, even if the majority was right that requiring costs on the part of TWA would have gone beyond the required "reasonable accommodation," the majority never proved, in the eyes of the dissent, that such costs were necessary to accommodate Hardison.

Overall, the dissent concluded by trumpeting that "what makes today's decision most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshiping their God. The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased" (432 U.S. 63: 96–97).

Employers thus are not allowed to discriminate when hiring, but they do not, under federal law, have to make significant accommodations, especially when those accommodations would be costly, to those whose religious practices fall outside the mainstream. Many people in their religion either do not mind working Sundays or are given Sundays off anyway, as that is when the majority's religions worship; those asking for accommodation are of the minority religion and thus are the main ones subject to penalty, even though the companies are not directly seeking to punish employees of minority religions. The Court's opinion here favors the rights of employers not to have to add extra costs over the rights of the employees, and that opinion stands today.

See also *Braunfeld* v. *Brown; Estate of Thornton* v. *Caldor; Little* v. *Wuerl; Maguire* v. *Marquette University; Sherbert* v. *Verner*

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Treatment of Jews, both in colonial times and after the American Revolution

Jews were generally treated poorly in most American colonies, and later. However, this treatment varied greatly from colony to colony, and state to state. Things slowly improved over time, but anti-Semitism remains in America.

One must first understand that Jews rightly saw America as a better place for religious freedom than Europe in the pre-revolutionary era. Judaism had been persecuted in European society, and the term "ghetto," still used today, originally referred to the Jewish quarter of many European cities, as the city leaders segregated the city religiously and often strictly. Europe also periodically erupted into anti-Jewish riots. Thus, when the American colonies were started, Jews, like many others, looked there to see if their lives would be better.

Their treatment was indeed better in America, although still far from equal with that of most colonists. Most colonies refused to allow Jews to vote, or to allow the election of Jews to public office. The restriction on the right to vote remained until well past the American Revolution in some places. In Rhode Island, even though that was where Roger Williams had gone to have religious freedom, Jews were not allowed to vote until the 1840s. In North Carolina, Jews could not vote until after the Civil War. Jews also often had to pay taxes to support the official (i.e., Christian) churches of their colonies, where this practice existed. Some colonies took official positions of resisting Jewish immigration, including New Amsterdam, the Dutch colony that became New York in 1664. Some Jews ran afoul of more religiously based laws—for instance, Jews in Maryland were sometimes falsely arrested under the anti-blasphemy law there (which prohibited taking the name of God in vain). One was even sentenced to death until he decided to change his religion to Christianity.

Jews, however, were able to survive and prosper. Unlike the situation in many European countries, Jews in America were generally able to establish synagogues in places where enough Jews lived. Synagogues, as of the middle of the eighteenth century, existed in New York City, Philadelphia, Charlestown, and Savannah. Once America became a country, life for Jews continued slowly improving. The Bill of Rights contained provisions for religious freedom and the prevention of a congressional establishment of religion, but that part of the First Amendment did little to help Jews. Most involvement of the government in religion occurred on the state level and the whole Bill of Rights was held to apply only to the federal government in the early 1800s. The First Amendment was not applied against the states in the area of religion until the 1940s, and so, from 1789 to the 1940s, the First Amendment did little to increase Jews' religious freedom.

Jews did file large numbers of lawsuits in state courts against the state provisions, however. Most of these lawsuits were unsuccessful, as state constitutions were held generally not to prohibit religious discrimination, and the common law, or the law created by judges over time, was not held to prohibit it either; some judges even ruled that Christianity had become embodied in the common law. This is not too surprising in retrospect as generally Christian legislatures had made the laws and Christian judges enforced them. One lobbying effort was successful, though. In Ohio, Jews fought for a law banning the teaching of religion in the public schools and this was upheld in the 1870s in the Ohio Supreme Court.

Jews also suffered from anti-Semitism in ways that were more subtle and harder to prove. For instance, many of the top private high schools would not admit Jews, and also the top colleges had limits on the numbers of

Jews they would accept. Even if a Jewish lawyer graduated from a top law school, most law firms would not hire Jewish attorneys. Such practices were, unfortunately, legal until the 1960s, as no federal law existed banning discrimination on the basis of religion. Jews also often did not have access to the same social networks, as country clubs banned Jews from membership, and many other private clubs, such as the Eagles, required members to be Christians. During the period leading up to World War II, America refused to admit many Jews to this country, causing the Holocaust's death toll to rise. Unfortunately, there was no outcry against these limits, and religious and ethnic bias was part of the reason behind those tight controls.

There were also seemingly neutral laws that were actually quite discriminatory. For instance, blue laws, which either ban the sale of certain items on Sunday or force all stores in an area to close on Sundays, were discriminatory against Jews, whose Sabbath begins at sundown Friday night and ends at sundown on Saturday. Jewish businesses were (and still are in some places) effectively forced to close two days. Jews also faced unfair public scrutiny and bias into the twentieth century in America. A prime example of this is Louis Brandeis, who joined the Supreme Court in 1916. He was opposed by many people simply for being Jewish and was ostracized by one of his fellow Supreme Court members for his religion.

Thus, throughout American history, there has been an unfortunately high level of legal anti-Semitism, even while that level has frequently been lower than in other countries. Title VII of the Civil Rights Act of 1964 rectified much discrimination that was formerly legal, and while discrimination persists today, Jews have far more legal recourse than in the past.

See also *Board of Education Kiryas Joel Village School v. Grumet;* Felix Frankfurter; The Holocaust and lawsuits by survivors; Jewish seat on the Supreme Court

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Treatment of Muslims by the public after September 11, 2001

One area in which religion and public opinion have interacted in recent years, and the law has acted, or not acted, is in the way Muslims were treated by the public after the tragedy of September 11, 2001. A bit of background will help explain why public perceptions became so skewed in the wake of the terrorist attack on the Pentagon in Washington, D.C., and destruction of the World Trade Center's twin towers in New York.

Islam is one of the faster-growing religions in the United States, especially in terms of its previous position. Very few people in America were Muslims before 1900. The first mosque was built around 1915, or less than one hundred years ago, and even today it is estimated that fourteen states, or nearly 30 percent of the states, have fewer than ten mosques. The big boom in the nation's Muslim population and in mosque construction has occurred since 1960, due both to changed immigration regulations and to the rise of the Black Muslim movement. More than six of every ten Americans who convert to Islam are African American. Also, more people have immigrated to the United States in recent years from predominantly Muslim areas, including South Asia and the Middle East, than did so earlier. Because the U.S. Census Bureau does not collect data on religious affiliation, it is difficult to say the

Police officer guards the entrance to the Islamic Center of Greater Cincinnati on September 12, 2001, in West Chester, Ohio, after the center received about a half-dozen threatening calls. (AP Photo/Al Behrman)

precise number of Muslims in the United States, but all estimates agree that the number is increasing. Well-respected institutions have given estimates ranging from as low as 1.1 million, or about .4 percent, to as high as 7 million, or 2 percent of the population.

Public opinion toward Muslims has definitely worsened in recent years. Many Muslim mosques in the United States suffered attacks after September 11, 2001, and since. Roughly 1,500 incidents of anti-Muslim civil rights violations have been reported, and even four years after the terrorist actions, anti-Muslim attacks on mosques and schools are still being filed. In polls immediately following the World Trade Center and Pentagon attacks, public views were more tolerant of Islam and Muslims than in later polls that came after the initiation of the military actions in Iraq and Afghanistan.

Muslims also have not been helped out by the mainstream news media. Much recent mass media coverage of Muslims portrays the entire religion as being of one mind, and that is simply not the case. There are some beliefs that all Muslims hold, but just as with most religions, there is also great variation in belief. Within the Muslim community, there are divisions over such issues as banking and food—whether to use banks that charge interest (which is prohibited in strict Muslim law) and whether to eat food that has not been prepared in strict accordance with Muslim regulations. One Islamic belief justifies holy war, or jihad, but not all Muslims agree about what type of holy war is justified. Most mainstream news media discussions make it seem as if all Muslims support a holy war exterminating all Americans or all non-Muslims. Obviously that is not the case. For example, some branches of American Islam believe that the jihad referred to is a war against one's own failings and errors. That is only one example of how some of the media have misrepresented Islam.

In addition to tending to lump all Muslims together, the mass media often conflate being Arab (a description of where one comes from) with being Muslim (a designation of what religion one belongs to). There are in fact several religions predominant in the Middle East, and media assumptions make it seem as though all Middle Eastern countries are dominated by despotic oil baronies that have no respect for outside influence.

Another example of misrepresentation came in early 2006, with a continuing controversy over the publication of cartoons that depicted the prophet Muhammad in an extremely negative light. Rather than explaining why Muslims were offended or drawing comparisons to cartoons or images that might offend Christians, most accounts depicted the protests as illegitimate as the protestors essentially wanted decreased freedom of the press, or portrayed the protests as nonsensical. Thus, rather than acting as a vehicle to explain cultural difference, the

media largely encouraged prejudice in their depictions of the Muslim response to the cartoons.

Much of the United States has mistreated the Muslim religion, either actively or passively, since the September 11, 2001, tragedy. Islam was used as a motivating tool by Osama Bin Laden in order to recruit the hijackers, but that does not justify considering all Muslims terrorists, and it does not justify lumping all Muslims together. Nor does it justify any mistreatment of Muslims. Unfortunately, all of those have occurred, and the law has done very little to protect Muslim victims of religious violence.

See also African American draft resisters during the Vietnam War; African American religious conscientious objectors in World War II; 1995 statement on "Religious Expression in Public Schools"

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Tudor v. *Board of Education of Borough of Rutherford*

100 A.2d 857 (N.J. Sup. Ct. 1953)

This series of cases, which in large part began with a 1953 New Jersey case, *Tudor,* concerned the circumstances under which a religious organization could distribute Bibles on public school property. The Gideons International organized themselves with the purpose of distributing Bibles, both to individuals and in more of a mass fashion, as the Gideons are the ones who place Bibles in most hotel rooms. They also, by the early 1950s, had established the practice of handing them out on public school and college campuses, resulting in this lawsuit.

The New Jersey Supreme Court made the final decision in the *Tudor* case, as the U.S. Supreme Court refused to hear it. The Rutherford Board of Education had allowed the Gideons to distribute Bibles to only those who had requested one; students would fill out request slips, to be signed by their parents, and then would report at the end of the day to receive their Bibles. Bernard Tudor had sued. Both Jews and Catholics had opposed the board's decision as the Gideon Bible was seen as unacceptable by both religions. The supreme court of New Jersey struck down the distribution in a unanimous opinion. The court reviewed the facts of the case, and the history of religious freedom around the world and in the United States. The court then examined the Gideon Bible, holding it to be sectarian, or pronouncing the Protestant version of the Bible, and also held that the student request slip did not make the procedure acceptable. There still was the impression created that the school board wanted people to accept this version of the Bible and thus become Protestants.

The court held that this action went beyond a mere accommodation of religion, like that discussed in the *Zorach* case (decided just a year before), which had allowed students to leave school and have religion classes off school grounds. The U.S. District Court for the Central District of Illinois in 1989, some thirty-six years later, in *Bacon* v. *Bradley-Bourbonnais High School District,* considered a case in which the Gideons wanted to distribute Bibles on a sidewalk in front of a high school. The high school's attorney had believed that this practice could be banned and so the Gideons sued. The sidewalk was school owned, but the court noted that sidewalks are considered public

areas, and this is important as the nature of the area largely determines what types of regulations are allowed. As use of that sidewalk was generally not restricted, and as no notices were posted of any restrictions on that sidewalk, the court reaffirmed that this was a public area. The school had cited safety as a concern, but it was unable to show any cases in which safety had been affected. Thus, there was no reason not to allow the distribution, and the ban violated the Gideons' right to free speech. The school had allowed picketing only by teachers and had not permitted any other activity on the sidewalk; the court found that this policy violated the equal protection clause of the Constitution. Thus, Gideons were allowed to distribute Bibles, and the school was unable to regulate them until a difficulty arose, and the school was, it is heavily implied, not to treat them any differently from any other group wanting to use the sidewalk for legal activities.

The Seventh Circuit Court of Appeals in 1996 considered the question of what types of regulation were allowable. (The decision was appealed to the U.S. Supreme Court, who decided not to hear the case.) A fourth-grader wished to pass out flyers during "non-instructional time" inviting people to attend a Bible study. The school denied the request, stating that the flyer's content was neither connected to the school's instruction nor school supported. The school had a policy of allowing distribution of nonrelated materials as long as they were approved by the principal and had a disclaimer stating that the activity did not necessarily agree with the school's views; if the principal found the flyer libelous, inciting of a disturbance, insulting to any group, or disruptive, he or she could ban it. The Circuit Court of Appeals stated that the nature of the forum that exists in an elementary school greatly controls the amount of free speech that exists. The court held that a nonpublic forum existed, as the school had controlled (and even perhaps overcontrolled) the amount of speech that was allowed, and that restraints, even prior restraints, on speech were allowed if reasonable. The school also held that content-based regulations (which are generally frowned upon) were allowable in this nonpublic forum. Therefore, the student was not allowed to distribute the flyer. The court also held that the disclaimer was allowable, even though a lower court had struck it down.

Thus, schools can establish reasonable regulations both on and off campus, but they have more power on the campus and inside the classroom. Schools cannot allow organizations to distribute religious literature in the schools, even though such is allowed on the sidewalks near the school. As in other areas, schools are given a fair amount of power to control the activities there, but the First Amendment is not wholly silent in schools, even when the consideration is student rights of religious expression, and is especially vocal when protecting students' rights not to have the school create a religion.

See also *Chapman* v. *Thomas; Engel* v. *Vitale;* 1995 statement on "Religious Expression in Public Schools"; *Zorach* v. *Clauson*

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United States v. *Board of Education for the School District of Philadelphia*

911 F.2d 882 (3d Cir. 1990)

The 1964 Civil Rights Act holds that in most workplaces, discrimination based on religion is unconstitutional. It adds that employers need to make accommodations for employees' religion but only when those accommodations do not create an undue burden. The question is then quite complex, and one area of consideration is clothing. For instance, do employers have to allow employees to wear religious clothing? In the school systems, the general answer is no.

One of the leading cases on this topic is *United States* v. *Board of Education for the School District of Philadelphia*. There, the school board had enforced a Pennsylvania statute that had banned all teachers from wearing any identifying religious clothing. The teacher in question had taught for twelve years, became a Muslim in 1982, and started wearing a head covering; she wore that dress for two years, and then in 1984 was refused teaching posts as a substitute. She filed a claim with the Equal Employment Opportunity Commission, who in turn eventually sued the school board and Pennsylvania. The Third Circuit Court of Appeals ruled in favor of Pennsylvania. They first reviewed the facts of the case and cited Title VII of the 1964 Act, which required accommodation unless that accommodation created an undue burden. The United States argued that religious apparel should be banned only when it could be proven that not wearing religious apparel was a necessary occupational qualification rather than what the state suggested—that if accommodating it could be shown to be a hardship, then the ban was allowed. The court agreed with the school board. It reviewed past cases and agreed with the Supreme Court that school statutes requiring nonreligious dress are permissible because they advance a compelling state interest. The school board also, according to the court, risked prosecution if it violated the state statute and so was allowed to enforce the statute against the teacher, as risking prosecution would be an undue burden. One judge concurred, noting that he thought allowing the teacher to wear her religious garb would indicate that the state favored religion, thus creating an endorsement. Therefore, the court upheld the Pennsylvania statute banning religious clothing in the classroom.

The Oregon Supreme Court had, some four years before, decided a similar case, and the Third Circuit Court of Appeals relied on that case, *Cooper* v. *Eugene School District No. 4J,* in the case above. In *Cooper,* a Sikh had wished to wear white clothes and a white turban, and was suspended from teaching as her actions violated Oregon's law forbidding religious clothing in the classroom. The decision first examined the nonconstitutional issues of the case, and then examined the Oregon constitution. The court held that the state constitution's provision to avoid sectarian influence in the public schools allowed it to ban religious dress, and that ban did not violate the First Amendment's protection of freedom of religion as the law's purpose was sufficient to justify banning religious clothing.

Not all courts have agreed with this, however. In *EEOC* v. *READS, Inc.,* the U.S. District Court for the Eastern District of Philadelphia ordered READS, a private company providing services to private schools on behalf of the Philadelphia school board, to hire a Muslim counselor whom they had refused to hire because she covered her head. The

decision here was much more circumstance based than the previous cases. The court examined the times that the counselor had been asked about her head covering and her responses and concluded, "There is no evidence that Moore's attire in any way diminished her efficacy as a counselor, or that she ever sought to indoctrinate students in her religious beliefs when questioned about her attire or at other times" (759 F. Supp. 1150: 1153). Similar to the 1990 *Board of Education* case, READS cited the Pennsylvania clothing statute in its defense. However, the court held that READS was required to show an undue hardship, and merely citing a law that it was supposed to follow was not enough. The court also held that the teacher's scarf was not patently religious clothing, nor would students necessarily identify it as such. It also noted that neither READS nor the teacher would be in the public schools when counseling took place. It then concluded that if "the clothing is worn for religious reasons but is unlikely to convey a message concerning religious affiliation or belief to students, the risk is not present and the prohibition is unnecessary" (759 F. Supp. 1150: 1153). As READS could have accommodated the clothing without undue hardship, and as the clothing was not religious clothing under the statute, the court held that the refusal to hire was illegal and thus ordered her hired.

Most, but not all, courts have held that public schools and their agencies are allowed to discriminate on the basis of religious clothing. The regulations themselves are clearly allowable, but the application of them depends at least in part on the circumstances, exactly what religious clothing is being worn, and the public perception of that clothing. However, it is clear that if a state wishes to publicly announce that blatantly religious outfits cannot be worn, Title VII, which prohibits religious discrimination, does not prevent it from doing so.

See also *Ansonia Board of Education* v. *Philbrook; Employment Division* v. *Smith; Goldman* v. *Weinberger; Trans World Airlines* v. *Hardison*

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United States v. *Kauten*

133 F.2d 703 (1943)

Some American pacifist draftees have suffered tension between the duty to serve their country and the duty to listen to what they consider God's will. In World War I, America allowed those who were in established pacifist religions, such as the Quakers, to be granted conscientious objector status and then to serve the military in alternative service. The treatment given to these men greatly varied and about 10 percent of those inducted as conscientious objectors into the military did not comply with military regulations. Some of these noncompliants were eventually tried in military courts and given harsh sentences. One factor influencing the treatment of conscientious objectors was their willingness (or lack thereof) to wear army uniforms and follow army disciplinary policies. Those who refused to do so were much more likely to run afoul of the army's legal apparatus. Before World War II, another draft was established, and this time the draft allowed conscientious objectors who "by reason of religious training and belief" opposed participating in any war to avoid service (133 F.2d 703: 705).

Matthew Kauten was drafted during World War II but requested an exemption on conscientious objector grounds. He gained a hearing at both the local and appeals boards but was

denied both times, and then was ordered to report for induction. On refusing to appear, he was tried and convicted. At his trial, he argued that the local board had erred in deciding his case and that he should not have had to report for induction. The Second Circuit Court of Appeals disagreed, holding that the proper procedure was to report for induction, be inducted, and then apply for a writ of habeas corpus for wrongful induction. It might seem odd to us now that Kauten should have had to be inducted to complain about a wrong classification, but the military system of World War II had numerous similar quirks. One justification for this was the government's reasoning that if the person turned out to be unfit for military service or was not selected, then there was no reason to have a hearing over whether the military board had acted properly.

Regardless, the court next turned to the constitutional issue, and whether Kauten had been properly inducted. The court noted that Kauten was either an agnostic or an atheist, and that Kauten himself had written, next to the language requiring an opposition to war based on one's religious belief and training, that "this is not my case" (133 F.2d 703: 707). The court also added that the sincerity of Kauten's belief was irrelevant, as political or philosophical opposition to war was not enough for exemption. No argument seems to have been made that the draft was favoring religion over atheism and thus not being neutral. The court concluded, "Moreover, the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based on 'religious training and belief'" (133 F.2d 703: 707).

The court did note, however, that to be a conscientious objector one did not need to belong to a religion that as a whole opposed war, a change from requirements in the previous world war. Rather, one needed to show that religious ideas were the cause of one's opposition to war. Thus, the exemption had been widened since World War I to exempt all religiously motivated conscientious objectors who could convince their draft boards that they had a permanent opposition to war, but Kauten refused to claim this status.

The court noted that it would not attempt to define religion and gave a wide-ranging set of people, including Socrates, who were moved by what they defined as religion. For the act's purposes, it held "there is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse" (133 F.2d 703: 707).

The court also did not state that Kauten's opposition was absolutely not religiously based, just that he could not prove that he had demonstrated his religious motivation clearly enough in the past to overturn his induction. It held that such a decision was a fact-based ruling that the draft system made and that there was enough evidence in the record to support the board's decision. It should be noted that others during World War II did try to claim religion as the cause of their conscientious objector status, but their claims were given short shrift by the draft boards due to the boards' view of their religions. African American Muslims in the South particularly were subject to this attitude. During the Vietnam War era, the case of Dan Seeger would again challenge the draft board's position on conscientious objectors, this time causing it to broaden the class significantly.

See also Abuse of nonreligious conscientious objectors in World War I; African American

religious conscientious objectors in World War II; *Goldman* v. *Weinberger; United States* v. *Seeger*

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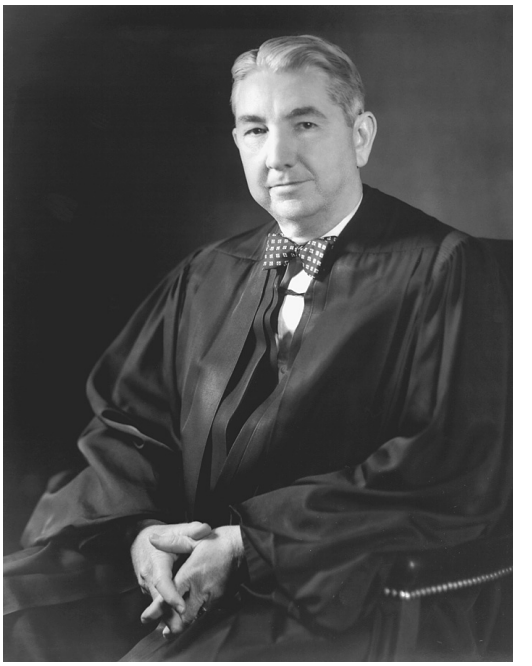
United States v. *Seeger*

380 U.S. 163 (1965)

Ever since World War I, when the first twentieth-century draft was instituted, people were allowed exemptions from that draft if they could prove religious opposition to war. Being a conscientious objector, as that status came to be called, did not exempt a person from service, necessarily, but just from performing a direct military function; and being a conscientious objector was not always accepted by society. Nonetheless, the idea that those whom the society viewed as religiously opposed to war should be exempted was a relatively old one by the time the Vietnam War came about. One had to be *religiously* opposed to war, though. The requirement in both World War I and World War II was that one's "religious training and belief" had to lead to that opposition, or no exemption would be granted. By the time of Vietnam, however, some were arguing that they were opposed to war, vehemently, but were also not religious, and so should not be discriminated against due to their atheism. The case of Dan Seeger and two other men, which came before the U.S. Supreme Court in *United States* v. *Seeger,* was one such instance.

Justice Clark wrote the opinion for the Court. The Court summarized the conscientious objector requirement at the time as that it "exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form" (380 U.S. 163: 164–165).



Tom C. Clark was appointed associate justice of the U.S. Supreme Court by President Harry Truman in 1949. Clark was generally considered to be a conservative justice. (Collection of the Supreme Court of the United States)

In this case three defendants had claimed a conscientious objection from the draft on the grounds that their beliefs against war were centered in a worldview that opposed war, and so they should fall under a conscientious objector designation. However, none of these men believed in "God" and so did not fall under the designation as it had been understood. Congress, in relating instructions for that section, had required belief "in relation to a Supreme Being" (380 U.S. 163: 165).

The Court concluded that "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this

construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not" (380 U.S. 163: 165–166).

After presenting the Court's conclusion, Clark surveyed the facts in each case and then turned to the history of the conscientious objector classification. The Court noted that "by the time of the Civil War there existed a state pattern of exempting conscientious objectors on religious grounds" (380 U.S. 163: 170). The opinion also noted that exemptions were allowed by both sides in the Civil War on conscientious objector grounds. In World War I, at first only conscientious objectors who belonged to a pacifist sect were allowed, but later in that war, "the Secretary of War instructed that 'personal scruples against war' be considered as constituting 'conscientious objection'" (380 U.S. 163: 171). The same provision was continued into World War II, although by then one did not have to belong to a pacifist sect, but merely had to be opposed to war due to religious belief, and the Supreme Being language was added only in 1948.

The Court then considered the whole question of the "Supreme Being" language. It first noted that Congress had excluded some groups from consideration and it did not argue with this exclusion. Among those excluded were people who believed for "essentially political, sociological or economic considerations that war is wrong" (380 U.S. 163: 173). The Court held that Congress had enlarged the exemption by using the term "Supreme Being" rather than "God." After surveying some of the statements by congressmen about this language, the Court concluded that "under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition" (380 U.S. 163: 176). The Court also noted that there was a wide range of religious beliefs in this country that was ever growing, and Congress wanted to recognize this growing nature by using the term "Supreme Being." The Court was doing the same by allowing beliefs parallel to those of a belief in God. As guidance to the lower courts in applying this ruling, the Supreme Court stated that the key question was, "Does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" (380 U.S. 163: 184) Thus, a belief held in the same place in one's mind as another's religion would qualify. As to whether Seeger and the two others' beliefs were accurate or supported, the Court held that this could not be questioned by the courts or government. The tenacity of belief could be questioned, but the veracity could not be.

Justice Douglas concurred with the Court. He wrote that while various draft acts of Congress could be interpreted to deny conscientious objector status to these defendants and to others in various religions, to do so would be unconstitutional as it would discriminate against them on the basis of their religion. While this expansion was not the clear aim of Congress, Douglas reminded the Court that "in a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt'" (380 U.S. 163: 188). Thus, when choosing between a reading that would deny these defendants an exemption because they were not religious (and which would be in

turn unconstitutional in Douglas's view) and this reading, Douglas held that this one should triumph.

Douglas concluded that "when the Congress spoke in the vague general terms of a Supreme Being I cannot, therefore, assume that it was so parochial as to use the words in the narrow sense urged on us. I would attribute tolerance and sophistication to the Congress, commensurate with the religious complexion of our communities. In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. None comes to us an avowedly irreligious person or as an atheist; one, as a sincere believer in 'goodness and virtue for their own sakes.' His questions and doubts on theological issues, and his wonder, are no more alien to the statutory standard than are the awe-inspired questions of a devout Buddhist" (380 U.S. 163: 192–193).

The Supreme Court thus expanded the conscientious objector class. Originally one had to be a member of a noted pacifist sect (World War I) and then one had to be opposed to war due to one's religious beliefs (World War II); after this decision, one merely had to be opposed to war due to one's beliefs that occupied the center of one's persona, similar to what religion was thought to do. As draft boards were often conservative, it is unknown how many people qualified for conscientious objector status with belief systems close to Seeger's and were denied. After all, if a person could not prove the belief to the satisfaction of the draft board (or if the draft board believed, contrary to this ruling, that an individual had to be a member of a religious pacifist sect or that no exemptions were deserved), then the person had to fight the decision in the court system, which was often beyond many people's resources. Peter Irons notes in *The Courage of Their Convictions* that he was opposed to war but still was not exempted from service in the Vietnam War. (His case did occur before the *Seeger* ruling, but he suggests that the judge might not have ruled differently even after *Seeger.*) The draft ended before the Vietnam War did and has never been reinstituted, but the treatment of those opposed to war for moral reasons, and not religious ones, is still a contested issue in the minds of many Americans, even if the *Seeger* case resolved it, for the most part, for the Supreme Court.

See also Abuse of nonreligious conscientious objectors in World War I; Abuse of religious conscientious objectors in World War I; African American draft resisters during the Vietnam War; *Welsh* v. *United States*

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V

Valley Forge College v. *Americans United*

454 U.S. 464 (1982)

This case dealt with the transfer of a closed military hospital to a Christian college at no cost, because the college was an educational institution. A group sued, claiming that this was a violation of the separation of church and state, even though no preferential treatment had been given on the basis of religion. The court of appeals had held that the group suing did have standing as taxpayers.

The issue of standing was the main one addressed by the Supreme Court in an opinion written by Justice Rehnquist. He first turned to the issue of standing and noted that an individual had to have an actual injury before he or she could sue. He also noted that "the 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums" (454 U.S. 464: 473). Injury was also needed so that the Court was not constantly reviewing the actions of the legislative and executive branches but only those actions that caused an actual injury. The party suing also had to advance its own interest, the best forum to serve those interests had to be in the judicial branch, and constitutional questions had to be at stake. The standing issue was held by Rehnquist to be as important as anything else in the Constitution, not just a precursor to suing.

Rehnquist then looked at when taxpayers could sue. He held that early in the twentieth century, courts had held "that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer" (454 U.S. 464: 477). However, taxpayers had been allowed to sue in recent years when an act of Congress was suggested as unconstitutional. The act here, though, was an administrative one, for which previous cases had not allowed challenges, and that the transfer was under the property clause of the Constitution, not the taxing clause. Rehnquist held that "although respondents claim that the Constitution has been violated, they claim nothing else," and so their claim must fall (454 U.S. 464: 485). In closing, Rehnquist held that "were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause. Ultimately, that exception derives from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. The existence of injured parties who might not wish to bring suit becomes irrelevant. Because we are unwilling to countenance such a departure from the limits on judicial power contained in Art. III, the judgment of the Court of Appeals is reversed" (454 U.S. 464: 489–490).

Justice Brennan, along with Justices Marshall and Blackmun, dissented. Brennan felt that the Court was using the issue of standing to ignore a larger issue. He wrote "the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits'" (454 U.S. 464: 490). Instead of making Article III co-equal, which Rehnquist claimed to do, Brennan suggested that the majority made Article III paramount by using its

standing requirements to allow abuses of the rights granted under the Bill of Rights. He also argued that the rights asserted here under the First Amendment were more clear and direct than past issues that had been asserted as bars on the spending of tax dollars, noting past establishment clause cases dealing with the spending of tax dollars in which taxpayers' standing had been upheld. Brennan then summarized the history of established churches in the United States. He concluded that summary by stating, "It is clear, in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax moneys for religious purposes. The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion" (454 U.S. 464: 504). Brennan saw this as similar to other cases in which those opposed to government spending for religious purposes had sued and had been held to have standing.

Brennan then turned to the majority opinion and disagreed with the assertion that the challenge here could not stand because the action being challenged was an administrative one. He pointed out that the administrative action was taken under a congressional act. He also disagreed with the majority's differentiation between the taxing power and the property clause. He closed by holding that "plainly hostile to the Framers' understanding of the Establishment Clause, and Flast's enforcement of that understanding, the Court vents that hostility under the guise of standing, 'to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits.' . . . Therefore, I dissent" (454 U.S. 464: 513).

Justice Stevens also dissented, noting "today the Court holds, in effect, that the Judiciary has no greater role in enforcing the Establishment Clause than in enforcing other 'norm[s] of conduct which the Federal Government is bound to honor,' . . . such as the Accounts Clause, . . . and the Incompatibility Clause. . . . Ironically, however, its decision rests on the premise that the difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause is of fundamental jurisprudential significance. With all due respect, I am persuaded that the essential holding of *Flast* v. *Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and the Property Clause" (454 U.S. 464: 515).

The majority denied standing to those challenging the transfer and thus dismissed the case. Standing has been increasingly used as a bar to those who would challenge tax provisions and other issues, and, like other procedural requirements, is often used by courts to avoid dealing with constitutional questions. An example of this would be in the 2004 Pledge of Allegiance case, in which the Supreme Court, rather than deciding on the merits of the case, argued that the man opposing the pledge did not have standing because he did not have principal custody of his daughter. Thus, the requirement of standing continues, as does the controversy over whether the court system is creating standards that are too stringent for that prerequisite.

See also Americans United for Separation of Church and State; *Doremus* v. *Board of Education; Elk Grove Unified School District* v. *Newdow; Hibbs* v. *Winn;* William H. Rehnquist; *Tilton* v. *Richardson*

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Virginia Statute for Religious Freedom

The Virginia Statute for Religious Freedom was largely drafted by Thomas Jefferson and backed by James Madison, and these two Founding Fathers are frequently seen as the leading advocates of the separation of church and state in this nation. For this reason, it is important to look at the background of this statute and the circumstances surrounding its passage.

When Virginia was founded, the Anglican Church was set up as the official church of the colony. To further help that church, a statewide tax was instituted to support it, and local elites also put their support behind the church. Church leaders were generally also society leaders, and they chose among their members for local and state official positions. Little dissent was allowed, even though the power of the church was less here than in Massachusetts, as the churches (and people in general) were more geographically spread out in Virginia. The Great Awakening from the 1740s to the 1760s told of religious unhappiness with the current church, and the American Revolution demonstrated both political unhappiness and the willingness of the people to sponsor change.

Thus, politics were definitely challenged and revised by the 1770s. Some called for a change in the church as well, or at least a willingness to listen to the less-than-prominent people. People were not always consistent in these demands. It is well known that Patrick Henry was opposed to British government in the colonies, for instance, but what is less well known is that his ideas of liberty did not extend to the area of church-state separation; he still favored state support of churches. The first steps toward a division between church and state were taken with the establishment of a new government. As Virginia was a royal colony, with the American Revolution, it needed a new charter to justify its existence. (Obviously if the Crown could not tell Virginia what to do, it also could not tell Virginia that she existed.)

Jefferson first wrote the Statute for Religious Freedom in 1776, hoping to have it passed as part of the state constitution. In that new state constitution, freedom of religion was recognized, but the issue of state support for the church was not dealt with, and so Jefferson failed. Madison and Jefferson appear to have had at least two different motives for their continuing support for a bill banning state support for the church. One, of course, was the desire to allow each man to follow his own conscience, but another was a desire for stability. They thought that continuing political unrest about state support for the church might challenge the entire new society, including their privileged place in it. Thus, ideals and social preservation combined here.

Jefferson, starting in 1785, was out of the country, serving as the new nation's ambassador to France. Madison then was left to take up the fight. In 1784, the Episcopal Church, which had ceased its formal existence as the Church of England in 1776 when America declared its independence, was established as a replacement for the Anglican Church. Madison had initially thought that this would end a push for state support of that church or for churches in general. He was mistaken, but as was true with Madison at other times in his life, most notably with the Bill of Rights, he used his legislative skills to adapt. He managed to convince the Virginia Assembly to delay action on a bill sponsoring state support for the church, and he then wrote a moving piece, his Memorial and Remonstrance against Religious Assessments, to help sway political opinion. His essay caused the bill to be defeated, and the next year, Madison introduced the Virginia Statute of Religious Liberty, which was passed. All of this was

done in the absence of Jefferson who was minister to France until 1789.

Thus, Virginia became the first state to declare religious liberty. However, this was accomplished not by a permanent amendment to Virginia's constitution but merely by a statute, and the act itself noted that it could be overturned at the next meeting of the Assembly, although arguing against such a step. Thus, Virginia's bill was potentially much less permanent, although arguably no less powerful in the area of religious liberty, than the First Amendment of the Bill of Rights. Madison, though, was interested in both the religious liberty issue and the problem of factionalism, as he thought that religious strife was a threat to the nation. Should Madison's interest in political peace make his commitment to religious liberty seem any less permanent and so make that commitment less commanding to today's courts? Madison was still fully committed to religious liberty, which would suggest a negative answer to that question. State support for religions was seen as divisive and dangerous to political peace, and the current unrest caused by government involvement in the area of religion suggests that Madison was correct about today's political situation as well as his own. Thus, remembering both Madison's aims in supporting Jefferson's Statute of Religious Liberty is actually more rather than less of a reason to keep religion and government separate.

See also American Revolution's effect on religion; Establishment of Pennsylvania as religious colony for Quakers; *Gitlow* v. *New York;* Maryland Charter and 1654 law disestablishing religious freedom; Roger Williams

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Walker v. *Birmingham*

388 U.S. 307 (1967)

This case revolved around how one should challenge an ordinance that previously had been used improperly. It dealt with an injunction, applied for by the city of Birmingham (Alabama), which ordered civil rights demonstrators to cease protesting. The root law was an ordinance that required protestors to have a permit. The demonstrators refused to follow the ordinance or the injunction, as they considered both unlawful. The demonstrators, after marching, were held in contempt and they then attacked the injunction as overbroad, in violation of the First Amendment, and as enforcing the original ordinance, which in the past had been used to support discrimination.

Justice Stewart wrote the opinion for the Court and he first surveyed the history of the case. He referenced a 1922 opinion in which the supreme court of Kansas had held that one must obey an injunction, even if the injunction is in support of an invalid law, and that the way to fight against this injunction was in court, not by disobeying it. Stewart agreed with this rule and thus upheld the injunction. Turning to the merits of the case, Stewart first held that the regulation of traffic was a legitimate government end, and then hinted that the law probably would not be valid, but that since the law was not challenged before it was violated, the law must be upheld. Stewart concluded by saying that "the rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom" (388 U.S. 307: 320–321).

Justices Fortas and Brennan dissented, joining an opinion written by Chief Justice Warren. He wrote, "I dissent because I do not believe that the fundamental protections of the Constitution were meant to be so easily evaded, or that 'the civilizing hand of law' would be hampered in the slightest by enforcing the First Amendment in this case" (388 U.S. 307: 325). He noted that the group who had been arrested was being allegedly treated in a discriminatory fashion, that the group did not flee but turned themselves in to the courts to be tried through the normal process, and that "some cases have required that persons seeking to challenge the constitutionality of a statute first violate it to establish their standing to sue" (388 U.S. 307: 328). Warren argued that this ordinance was wholly unconstitutional and that the abusive ordinance could not be made constitutional simply by including it in an injunction. The majority had suggested that the concept of law would disintegrate if injunctions were allowed to be violated, but Warren held "I do not believe that giving this Court's seal of approval to such a gross misuse of the judicial process is likely to lead to greater respect for the law any more than it is likely to lead to greater protection for First Amendment freedoms. The ex parte temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent from the facts of the case" (388 U.S. 307: 330). An ex parte injunction is one coming out of a hearing where only one side is

heard. Warren also argued that the concept announced in the fifty-year-old case cited by Stewart had since been revised.

Justice Brennan also dissented, joined by Fortas, Warren, and Douglas. Brennan suggested that "like the Court, I start with the premise that States are free to adopt rules of judicial administration designed to require respect for their courts' orders. . . . But this does not mean that this valid state interest does not admit of collision with other and more vital interests. Surely the proposition requires no citation that a valid state interest must give way when it infringes on rights guaranteed by the Federal Constitution. The plain meaning of the Supremacy Clause requires no less" (388 U.S. 307: 343–344). Brennan argued that the First Amendment trumped the state power and concluded that "constitutional restrictions against abridgments of First Amendment freedoms limit judicial equally with legislative and executive power. Convictions for contempt of court orders which invalidly abridge First Amendment freedoms must be condemned equally with convictions for violation of statutes which do the same thing" (388 U.S. 307: 349).

This case does not deal directly with the religion part of the First Amendment, as it deals more with injunctions, freedom of speech, and the freedom of association. However, the Court, both dissenters and majority, lumps the whole First Amendment together and so a significant restriction of the freedom of religion would probably have been treated the same as the overall First Amendment was in this case. Thus, at least by the majority of the Court here, freedom of religion is probably not enough to justify violation of an injunction, and the proper place to fight an injunction is in the courts first and wholly, rather than by just violating it, and then fighting it and the conviction.

See also *Doremus* v. *Board of Education; Hibbs* v. *Winn; Peloza* v. *Capistrano Unified School District*

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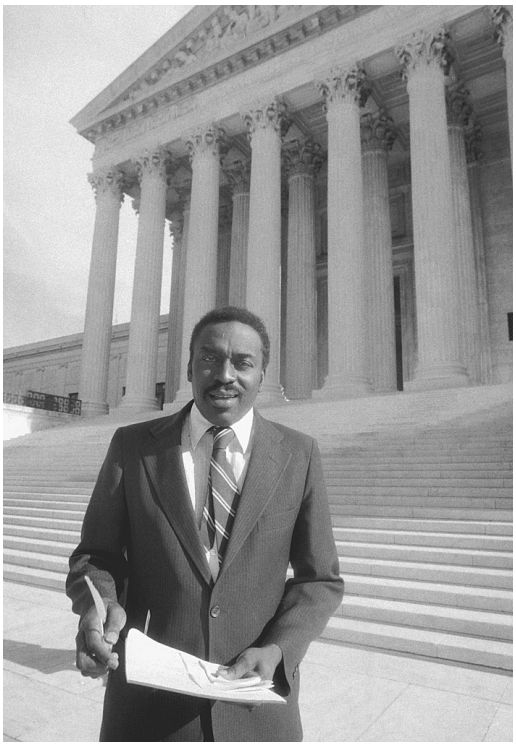
Wallace v. *Jaffree*

472 U.S. 38 (1985)

This case dealt with the whole question of whether a state can enact a moment of silence. The litigation, at its start, dealt with three statutes, one to allow a one-minute moment of silence in general, another to allow it "for meditation or voluntary prayer" (472 U.S. 38: 40, quoting the statute in question), and a third to allow teachers to lead prayer. The only part of the legislation at issue by the time it came to the Supreme Court, however, was the part allowing the moment of silence for meditation or prayer. The lower court ruled in favor of the statute, holding that, in the words of the Supreme Court, this statute was "constitutional because, in its [the district court's] opinion, Alabama has the power to establish a state religion if it chooses to do so" (472 U.S. 38: 41). The Supreme Court looked at the history of the legislation and then firmly noted that the district court was entirely wrong in concluding that a state can establish a religion.

On the whole, the Supreme Court held "just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority" (472 U.S. 38: 52). The Court then noted the continuing use of the *Lemon* test and commented that the issue of the purpose of this



Ishmael Jaffree stands in front of the U.S. Supreme Court during the hearing of his case concerning school prayer on December 4, 1984. Jaffree challenged Alabama's law allowing a moment of silent prayer in schools. (Bettmann/Corbis)

legislation was the important part of that test here. They then examined the legislature's purpose behind this act and held that the main purpose was to give a favored place to prayer, which violated the *Lemon* test as it endorsed religion, and so they held this part of the legislation unconstitutional.

Justice Powell concurred in the judgment but wrote to defend the *Lemon* test. He noted that the *Lemon* test had been generally followed and discussed exactly why he felt that the purpose part of the *Lemon* test was being so strongly violated here.

Justice O'Connor concurred in the judgment only. She wrote to argue that moment of silence laws in and of themselves were not necessarily unconstitutional, even while this legislation clearly was so. She also argued for a refinement of the *Lemon* test, holding that the effect part should be refined to one of "endorsement," and "*Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement" (472 U.S. 38: 69). This test, in her view, "does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred" (472 U.S. 38: 70). O'Connor held that "a state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading" (472 U.S. 38: 72). To understand whether the government was endorsing religion required a "deferential" inquiry into the government's purpose into passing the statute and the government's method of interpreting it. O'Connor then turned and looked at the legislature's purpose and language and held that even if the language of the legislature was downplayed (as she suggested it should be) that the language added to the bill (and the only change to the bill) endorsed prayer.

O'Connor also noted that the dissent suggested that prayer be allowed, as past presidents had issued proclamations including praise, and so on. O'Connor though noted that these proclamations were not coercive, and that the two parts of the First Amendment (the free exercise and establishment clauses) needed to be balanced. On the whole, O'Connor concluded that "the Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray,

and affirmatively endorsing the particular religious practice of prayer" (472 U.S. 38: 84).

Chief Justice Burger dissented. He argued that the legislature merely stated that prayer was one of the things allowed in the moment of silence, and that the statements of the legislator are not clear about his purpose and were largely offered after the statute had passed. He also held that amending statutes to deal with issues of religion did not make them unconstitutional and that the legislature's purpose here was to accommodate religion, not to promote it. Justice White also dissented, agreeing with the chief justice.

Justice Rehnquist also dissented. He looked at the history of the First Amendment, noting that at several places the record was silent. He held that Madison was the main person behind the Bill of Rights and therefore his ideas should rule; Madison would not have wanted the "wall of separation" even though past cases have cited Jefferson, using his writing as a foundation for this position. Rehnquist also cited past presidential proclamations, including one by Washington, which discussed God and called for "his" (to use the language of the time) blessing. Rehnquist also pointed out difficulties with the *Lemon* test and the indistinct line that had been established by past decisions between allowable aid and that which was banned.

Some twelve years later, the Eleventh Circuit Court of Appeals considered the case of a moment of silence. In that case (*Bown* v. *Gwinnett County School District,* 112 F.3d 1464 [11th Cir. 1997]), the Eleventh Circuit held that since the Georgia legislature had a secular purpose (the belief that a moment of reflection would lead to less violence) and that the legislation took no position on prayer, the moment was allowable. The court also differentiated this legislation from *Jaffree,* as the legislature and the governor had not endorsed prayer, which had occurred in *Jaffree.* The court looked at every part of the *Lemon* test in order to reach this decision.

Thus, a moment of silence is now allowed, as long as the state legislature gives no guidance on the purpose of the moment of silence in the area of religion. Those states that put forth a religious justification for the moment or who state that prayer is a purpose for the moment probably have little chance of having the measure found constitutional. However, those who want prayer and find a secular justification for the moment of silence and never mention prayer as a justification will most likely have their moments upheld. Some moments are apparently more constitutional than others and the line between acceptable state-created opportunities for possible religion and unacceptable ones becomes more blurred.

See also Bible controversy and riots; *Engel* v. *Vitale; Lee* v. *Weisman;* 1995 statement on "Religious Expression in Public Schools"; *People ex rel. Ring* v. *Board of Education; School District of Abington Township* v. *Schempp; Torcaso* v. *Watkins*

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Walz v. *Tax Commission of the City of New York*

397 U.S. 664 (1970)

This case dealt with the issue of whether tax deductions that benefited churches were allowed under the First Amendment. The argument against the legitimacy of such tax deductions was that those deductions promoted

religion, which some believed to be an establishment of religion. The argument for such deductions was that denying them, while allowing deductions for other groups, was hostility to religion, which was prohibited under the free exercise of religion. This case aimed to resolve those tensions.

The opinion of the Court was written by Chief Justice Burger. Burger began with a review of the history of the First Amendment. He noted that there was a battle between the two parts of the First Amendment even though the general aim of it was to prohibit government establishment of a church. He concluded that "the course of constitutional neutrality in this area cannot be an absolutely straight line" (397 U.S. 664: 669). Rather than prohibiting all government action in the area of religion, Burger believed that "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" (397 U.S. 664: 669). Burger then looked at what had been allowed in churches and church schools in the past, and enumerated those benefits as including, when given to others, police and fire protection, free books, and bus transportation for students.

The next question asked was the purpose of the tax exemption. Burger believed that "the legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. . . . The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest" (397 U.S. 664: 672–673). The chief justice did not see this exemption as establishing a religion, but rather he stated that "we cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions" (397 U.S. 664: 673). He next turned to the issue of entanglement and stated that the threat of entanglement did exist with the exemption, but also existed without it: if the churches did pay taxes this increased their risk of being shut down which was a large form of state entanglement with religion. On the whole, Burger held that "there is no genuine nexus between tax exemption and establishment of religion" (397 U.S. 664: 675). Burger also noted that historically Congress had considered it proper to grant tax exemptions to churches. He commented that "it appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment. As to the New York statute, we now confirm that view" (397 U.S. 664: 680).

Justice Brennan concurred. He first reviewed the history of property tax exemptions and noted that property tax exemptions for churches started soon after the Constitution was adopted. Brennan then noted the two main secular reasons that property tax exemptions were given: that churches provide aid (as do many other exempt charities) and that churches contribute to pluralism. He then examined the issue of entanglement, noting that the state was always going to be involved with religion, as the absence of an exemption would also be involvement. As the state was always involved, as it was not any more involved with an exemption than it would be with a tax, and as there were secular reasons for the exemptions, Brennan found the exemptions allowable.

Justice Harlan also concurred, and he argued that the two key ideas were those of "neutrality" and "voluntarism," which he summarized as being "short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion" (397 U.S. 664: 696). Harlan agreed that the religious institutions were being helped, but he said that

they were being helped due to the good activities that they were involved in, and that it was only neutral to grant them a tax exemption similar to the exemption granted any other similar charity. Harlan suggested that a direct subsidy would probably be illegal, but also stated that he would wait until such a case made it in front of the Supreme Court to decide that issue.

Justice Douglas dissented. He recalled the *Torcaso* case, in which the Court had held that neither the state legislatures nor Congress "can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (quoting *Torcaso,* 397 U.S. 664: 701). Douglas first argued that history was not a great guide in this manner as the Fourteenth Amendment had altered many things. He then noted the general trend of incorporation (meaning that the Court had recently [historically speaking] begun to incorporate the Bill of Rights' freedoms as limitations against the states) and argued that since incorporation was relatively new, history was not important. Douglas, however, then cited Madison and said that Madison would have been opposed to these tax breaks. It is interesting that the justice considered history to be irrelevant one minute and then in the next gave relevance to what a historical figure had said.

Douglas agreed that churches did provide important functions in the area of social welfare but that churches' religious function is intertwined with their social welfare function, and so a state may not subsidize it. Whether those welfare activities, if carefully separated, could be made tax exempt apart from the religious activities was a question that Douglas did not address, as he believed that was not the issue here. While exemptions are different, and Douglas admits that, he said that if exemptions are allowed, subsidies are next. For these reasons, Douglas dissented.

This case established that the tax policy of the government could be beneficial to religion, and this provision has not been substantially challenged since. *Walz* has this determination as one of its legacies. The other legacy of *Walz* is Burger's idea of some policies occurring in the "play in the joints" area of the First Amendment, meaning that some government actions neither interfered substantially with people's freedom to exercise their own religion nor did they substantially create an establishment of religion. This theoretical area was recalled in subsequent court cases, including those in which the government granted scholarships to students on religiously neutral criteria but denied them to those majoring in theology. Thus, the idea of churches being given the stamp of approval for their existing tax benefits along with their being in an area between "the joints" are two lasting outcomes of this case.

See also Established churches in colonial America; *Fairfax Covenant Church* v. *Fairfax City School Board; Hibbs* v. *Winn; Locke* v. *Davey; Mueller* v. *Allen*

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Washegesic v. *Bloomingdale Public Schools*

33 F.3d 679 (6th Cir. 1994)

This case examined whether a public school could have a large painting of Jesus in its hall-

way. The Sixth Circuit Court of Appeals answered no. The case first was heard in district court, where Judge Gibson issued an injunction against the portrait's presence. The Sixth Circuit upheld his injunction.

The circuit court first reviewed some issues of standing, as the student suing had graduated since the case was first filed. However, the court held that the issue was not moot, as the student might return to the school and have his constitutional rights violated again (if his rights were indeed violated in this case) and so could still sue. The court then turned to the merits, using the *Lemon* test—that a policy must have a secular purpose, must have a principal effect of neither advancing nor retarding religion, and must not entangle the government in religion. The court held that "the display here fails all three prongs of *Lemon*. The portrait is moving for many of us brought up in the Christian faith, but that is the problem. The school has not come up with a secular purpose. The portrait advances religion. Its display entangles the government with religion" (33 F.3d 679: 683). Similar to prayers and the Ten Commandments, the portrait was not allowed as it advanced religion, and it was not an essential part of the curriculum. The school district tried to argue that people from all religions would like the picture, but the court disagreed, holding that Christians were the only ones who would like it and that the few in the minority are the ones whose rights the First Amendment protects. The court concluded by saying that the school controls what is in the hallway and so is responsible for it.

One judge concurred, but only because *Lemon* controlled the decision. He argued against *Lemon* and protested the decision that *Lemon* forced him to make here. (Lower courts are required to follow Supreme Court precedent when it is clear and based on the same situation as that before the lower court.) He thought that the way to control the issue was not by removing the portrait but by having students increase religious diversity. He said, "Let us tackle the problem with some good old Yankee ingenuity—lobby for a course in comparative religions; put a picture of Martin Luther King on the wall; form a Zen Buddhist club; wear a t-shirt proclaiming the virtues of agnosticism; but, if I am permitted to use the expression, for heaven's sake, stay out of the courthouse and quit trivializing the Constitution!" (33 F.3d 679: 683) However, his opinion ultimately was that, as long as *Lemon* was the deciding factor, the portrait was unconstitutional. Thus, at least until the *Lemon* test is overturned, portraits of religious figures will not be allowed to be posted in schools.

See also *Capitol Square Review and Advisory Board* v. *Pinette; County of Allegheny* v. *Greater Pittsburgh ACLU; Lamb's Chapel* v. *Center Moriches School District; Lemon* v. *Kurtzman; McCreary County* v. *ACLU*; *Roberts* v. *Madigan*

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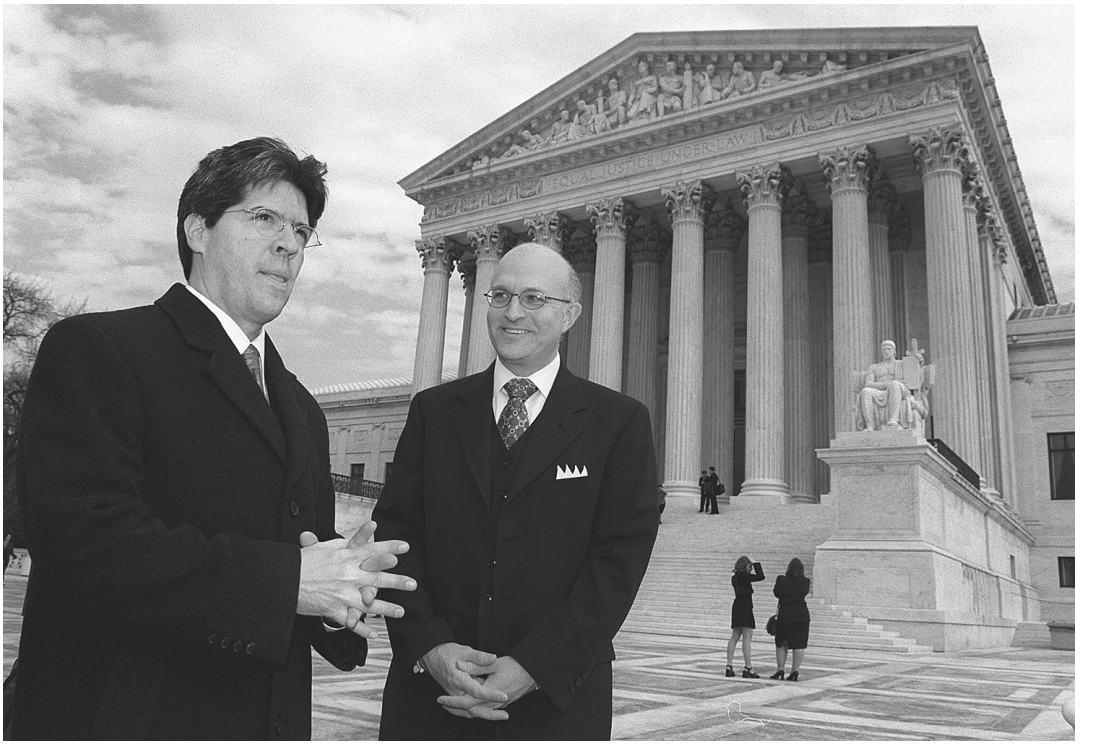
Watchtower Bible and Tract Society of New York v. *Village of Stratton*

536 U.S. 150 (2002)

This relatively recent case dealt with the Jehovah's Witnesses, who are more formally called the Watchtower Society. This group believes, as part of its faith, that believers must go around and witness and distribute their publications. This activity results in a great amount of opposition from non–Jehovah's Witnesses and so many localities have tried to restrict door-to-door solicitation. Such a restriction was being challenged here.

Justice Stevens wrote the Court's opinion. He first surveyed the beliefs of the Jehovah's Witnesses, noting that they do not sell anything, but do accept donations, and then noted the requirements of the village, which required



Attorneys for the Jehovah's Witnesses outside the U.S. Supreme Court after their hearing on February 26, 2002. The village of Stratton, Ohio, requires permits for any door-to-door activity. The town considers it protection for elderly residents who want privacy, but the Jehovah's Witnesses considered it an unconstitutional limit on free speech. (AP/Wide World Photos)

people to get permits and not to solicit those who had posted "no soliciting" signs. Stevens then noted that "for over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering" (536 U.S. 150: 160). He then noted the themes coming out of the cases of the last fifty years, including the value of the speech being restricted, especially its value in the eyes of the Jehovah's Witnesses, that door-to-door work was important for Jehovah's Witnesses, and that the towns did have a right to issue regulations on door-to-door solicitation. Stevens held that the important question was what standard of review should be used in this case. The village here advanced three interests: "the prevention of fraud, the prevention of crime, and the protection of residents' privacy" (536 U.S. 150: 165–166). However, these interests were not enough to justify this requirement, whose "breadth and unprecedented nature" made it dangerous (536 U.S. 150: 168). The regulation also was "not tailored to the Village's stated interests," as it was overbroad, going far beyond what was needed to achieve the named goals (536 U.S. 150: 168). Thus, the regulation was struck down.

Justices Breyer, Souter, and Ginsburg concurred in an opinion written by Breyer. He mainly wrote to argue against the dissent, which had advanced the idea of preventing crime. He noted that the village had never claimed crime as a prime justification for the legislation, nor had it advanced that idea in the lower courts. Justices Scalia and Thomas concurred in the judgment, in an opinion written by Justice Scalia. Scalia agreed with the result, but did not think that merely because people disagreed, on religious grounds, with register-

ing that an ordinance should be invalid. He also did not think that the objections of a few should invalidate an ordinance. What reasons he agreed with, however, he did not state.

Chief Justice Rehnquist dissented. He argued that the majority had created new law, which "contravenes well-established precedent, renders local governments largely impotent to address the very real safety threat that canvassers pose, and may actually result in less of the door-to-door communication that it seeks to protect" (536 U.S. 150: 172). He argued that there was a significant fear of crime, cited stories of crime coming from door-to-door travelers, noted that the village did the best they could without the highly paid lawyers the Jehovah's Witnesses had engaged, and cited cases that had allowed communities to require permits. Rehnquist stated that intermediate scrutiny is the correct level of analysis and that the regulation was content neutral. He also stated that noncommercial door-to-door travelers need to be covered in order for the regulation to be content neutral and that the regulation serves the interest of privacy and preventing crime. Thus, Rehnquist dissented and would have upheld the ordinance.

The fact that the Supreme Court orders something to happen does not make it so, and the best that the Supreme Court can often hope for is following of its orders by the lower courts and a general change in sentiment by the nation to at least toleration of its orders (when they run counter to the national sentiment), if not support. The lower courts have generally followed the Supreme Court here in striking down strict permit requirements, but local communities have still often tried to prevent Jehovah's Witnesses and others from going door to door for religious or other reasons. Thus, while the lower courts have generally restricted the permits, especially when they were not content neutral in wording or application, that has not stopped their use, nor have they stopped the Jehovah's Witnesses from going door to door.

See also *Cantwell* v. *Connecticut; Employment Division* v. *Smith; Jones* v. *Opelika;* Saluting the flag

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Webster v. *New Lenox School District*

917 F.2d 1004 (7th Cir. 1990)

This case examined how much control a school district has over its employees in the area of teaching evolution. A teacher in the New Lenox School District, in New Lenox, Illinois, sued a school district as it had ordered him not to teach "creation science." He sued, claiming that his freedom of religion and speech had been restricted. The district court dismissed the case, holding that Webster, the teacher, did not state a claim under the Constitution. The Seventh Circuit Court of Appeals confirmed.

The circuit court first reviewed the facts of the case, noting that Webster taught social studies and a student complained of being taught creation science in his classroom. After the complaint and a review, the superintendent ordered Webster to stick to the curriculum and avoid advocating a religious viewpoint. Webster wrote a letter back to the superintendent in which he "set forth his teaching methods and philosophy. Mr. Webster stated that the discussion of religious issues in his class was only for the purpose of developing an open mind in his students. For example, Mr. Webster explained that he taught non-evolutionary theories of creation to rebut a statement in the social studies textbook indicating that the world is over four billion years old. Therefore, his teaching methods in no way violated the

doctrine of separation between church and state. Mr. Webster contended that, at most, he encouraged students to explore alternative viewpoints" (917 F.2d 1004: 1006). Webster was told that he could deal with the subject of church and state where it was appropriate, but he was ordered not to teach creation science. Webster then sued, claiming censorship.

The district court held that the school board had a duty to avoid establishing a religion and that the *Edwards* case had held that teaching creation science was teaching religion. The Seventh Circuit Court of Appeals agreed, holding that the superintendent is allowed to set the curriculum, and that "clearly, the school board had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom" (917 F.2d 1004: 1007). There are limits, the court noted—religion cannot be ordered to be taught, nor can every comment be controlled, but the court held here that the school board did have the authority to order a teacher to teach certain things and avoid those that established a religion, especially when the topic to be avoided had been clearly identified.

See also *Edwards* v. *Aguillard; Epperson* v. *Arkansas; Peloza* v. *Capistrano Unified School District; Scopes* v. *Tennessee*/Scopes Monkey Trial

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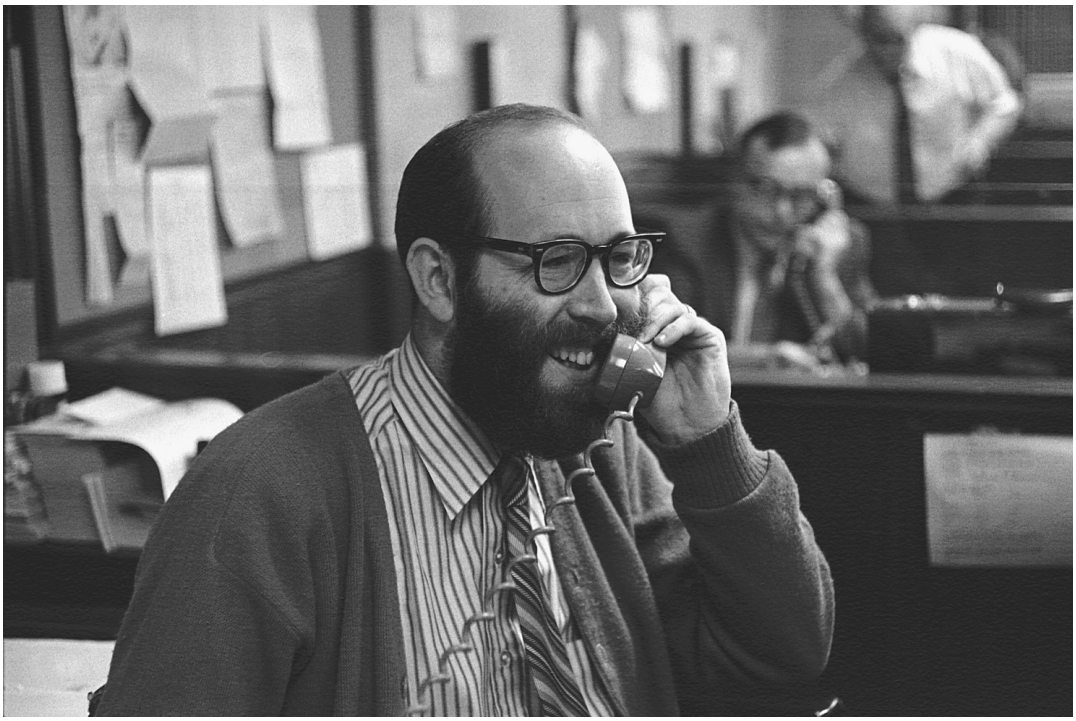
Welsh v. *United States*

398 U.S. 333 (1970)

This case ruled that if a belief is held strongly enough, the believer does not need a specific belief in God. This differs from an earlier ruling, *Seeger,* in that it expands coverage to all those who have a sincere "theistic" belief, while *Seeger* merely eliminates the need for belief in a specific god.

This was quite a divided opinion in the Supreme Court, dealing with a request to be exempted from the draft due to the petitioner's personal conviction against killing. Requests for exemption on religious grounds received much broader support, but both this case and the one setting the groundwork for it, *United States* v. *Seeger,* stirred up questions about the basic definition of religion. In this case, the defendant, Welsh, was denied an exemption for religious conscientious objection and convicted for draft evasion. He would not express an opinion on God's existence, and he had struck out the words "my religious training and" on the conscientious objector form, leaving a statement that said "by reason of belief . . . [he was] conscientiously opposed to participation in war in any form" (398 U.S. 333: 336). The main opinion of the Court, which supported Welsh's right to conscientious objector status, was joined by only four justices (Black, Douglas, Brennan, and Marshall) and was written by Black. Justice Harlan concurred in the result. He did not agree with the larger application of *Seeger* (which struck out the need for a belief in a Supreme Being in order to qualify as a conscientious objector) here, but wanted to preserve the conscientious objector status. Justice Blackmun did not participate in the case, and Justices White, Burger, and Stewart dissented.

The Court looked at Welsh's beliefs and held that "if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons" (398 U.S. 333: 340). Though Welsh had struck out the word "religious" on his original applica-



Elliott Welsh in Beverly Hills, California, speaks on the phone with reporters about the U.S. Supreme Court ruling in his favor on June 15, 1970. The high court ruled that a draftee is entitled to claim conscientious objector status even if that opposition to the war is not "religious" in nature. (Bettmann/Corbis)

tion, the Court held that Welsh was considering the word in its traditional sense, not in the larger sense in which the draft regulations were using it. On the whole, the Court concluded that the part of the draft that created a religious exemption "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war" (398 U.S. 333: 344).

Harlan's concurrence first stated that the removal of the requirement of belief in a Supreme Being, which occurred in the earlier *Seeger* case, was a mistake. He cited the history of the Selective Service Act to prove this. Harlan then argued that religion requires membership in a group, which Welsh lacked. However, when examining the question of constitutional protection, he concluded that in order to be constitutional, "if the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held," not whether the belief is religious (398 U.S. 333: 358). Thus, as written, the legislation was underinclusive, and, to make it constitutional, Harlan enlarged it. He wrote, "When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it. Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a

reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of under-inclusion . . . and can be administered by local boards in the usual course of business" (398 U.S. 333: 366–367). In other words, he believed the Court was, in fact, building on the intent of the conscientious objector law, but that doing so was justified in order to keep those laws constitutional.

He announced that the question was "whether . . . limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. . . . I believe it does, and on that basis I concur in the judgment reversing this conviction, and adopt the test announced by Mr. Justice Black, not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified" (398 U.S. 333: 345). In other words, Harlan had reservations about the Court's decision but felt it was the only decision that could be made without altogether scrapping conscientious objector status.

Justice White wrote an opinion for the dissenters. They believed that "our obligation in statutory construction cases is to enforce the will of Congress, not our own; and as Mr. Justice Harlan has demonstrated, construing [the conscientious objector law] to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption" (398 U.S. 333: 367–368). They believed Harlan was wrong to expand the statute and that the plurality erred in interpreting the exemption to include people like Welsh. They held that "if the Constitution prohibits Congress from exempting religious believers, but Congress exempts them anyway, why should the invalidity of the exemption create a draft immunity for Welsh? Surely not just because he would otherwise go without a remedy along with all those others not qualifying for exemption under the statute. And not as a reward for seeking a declaration of the invalidity of [the conscientious objector law]; for as long as Welsh is among those from whom Congress expressly withheld the exemption, he has no standing to raise the establishment issue even if [the conscientious objector law] would present no First Amendment problems if it had included Welsh and others like him" (398 U.S. 333: 368).

The dissenters believed that the Constitution itself allowed the religious exemption in order to follow the First Amendment, but they did not believe Welsh qualified for this exemption. "We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion" (398 U.S. 333: 373). They thought that Congress should be allowed to make an exemption for religion, but only for religion in the traditional sense of the word, as Welsh had understood it on the form. They concluded, "But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever" (398 U.S. 333: 374). In other words, they did not believe that declaring Welsh ineligible for the exemption made the conscientious objector law in any way unconstitutional, as Welsh's religious freedom was not impaired by the draft. They felt the Supreme Court was, by broadening the intent of the law, actually legislating, rather than merely ruling on the constitutionality of the law.

Welsh was not arguing for exemption on religious grounds but on moral grounds. Since the creation of the draft system and the exemption for those religiously opposed to war, religion had been an element of the test for exemption as Congress had not wanted to

exempt those simply morally, but not religiously, opposed to war. The Court here, however, found that Welsh's moral beliefs were parallel to a belief in God and so were enough to allow him to be exempted. By the time of this case, the draft narrowed in scope as the Vietnam War was winding down, and so fewer troops were drafted and also fewer protests occurred (for the most part). The system had shifted to a lottery system in 1969, which meant that instead of being drafted based on age, where the oldest were always called first (and thus everyone sooner or later had a chance to be called), the dates throughout the year would be given random numbers and then those whose birthdates had a higher number had little or no chance to be called. An all-volunteer army, meaning one that relied on voluntary enlistments rather than a draft, was initiated in 1973. Thus, for the last three decades (and more) the draft has not been used, even while all men have been required to register for the draft at the age of eighteen. A lottery system, just as a note, would be used currently, at least according to the selective service.

See also Abuse of nonreligious conscientious objectors in World War I; Abuse of religious conscientious objectors in World War I; African American draft resisters during the Vietnam War; African American religious conscientious objectors in World War II; Religious conscientious objectors in World War II; *Torcaso* v. *Watkins; United States* v. *Kauten; United States* v. *Seeger*

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Widmar v. *Vincent*

454 U.S. 263 (1981)

One tension inherent in the First Amendment is when a religious group is allowed to use generally open facilities versus when such a facility is allowed to ban such a group. The facility, if part of the state, must weigh a group's right to their free exercise of religion versus the risk of establishing a religion, which would be banned by the First Amendment.

In *Widmar,* the University of Missouri at Kansas City had banned the use of university facilities for "for purposes of religious worship or religious teaching" (454 U.S. 263: 266), even while generally allowing the facilities to be used for other purposes. This regulation was overturned by an 8–1 decision of the Supreme Court. Justice Powell wrote the majority decision and observed that the university had created a public forum. Powell also noted that the university was using a "content-based exclusion" and thus must "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" (454 U.S. 263: 270). The university had claimed that its exclusion was necessary to preserve the separation of church and state. However, the Supreme Court saw the issue as whether religion-based exclusion was permissible. The Court stated that as long as the policy governing the use of facilities was open, meaning that all could use the facilities, and neutral with respect to religion, it would have a "secular purpose" and "avoid entanglement with religion," thus satisfying the first two prongs of the *Lemon* test.

The university argued "that allowing religious groups to share the limited public forum would have the 'primary effect' of advancing religion" (454 U.S. 263: 272). The Court ruled that if the forum was open, it would not have that primary effect, and even if it somewhat promoted religion, this would not amount to an establishment of religion. The Court also noted that merely allowing religious groups to use the forum, like any other group, did not create an "imprimatur of state approval," that college students could tell the difference between the university's allowing a group to do something and the university's promoting the group's activities, and that there was no evidence that religious groups would be the majority users of the forum. All of these things supported the Court's position that allowing religious groups to use the forum did not represent an advancement of religion. The ruling held that the university could still regulate the "time, place, and manner" of the various groups' use of the public forum, and if the university found that a group was interfering "with the opportunity of other students to obtain an education" or violating other campus rules, that group could be banned. However, the university was not able to simply ban a group from using the facilities because of its religious nature.

Justice Stevens concurred in the judgment, arguing that content-based restrictions on the use of campus buildings should be allowed, as all campuses had only limited resources. Stevens argued that "a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest'" (454 U.S. 263: 278–279). However, even though content of specific programs could be considered, the viewpoint of the group could not, and the university still needed to give a good justification. The university had not given this, in his mind, and he believed the regulation should be struck down. Stevens held that there was no proof that anyone would think the university was sponsoring religion.

Justice White dissented, arguing that while a state could allow worship, it was not required to do so. White pointed out that the Court itself had considered the content of speech when deciding whether a state was allowed to do things, such as post the Ten Commandments or allow prayer in public schools. He questioned why, since the state had to consider content in those cases, it could not do so in this one. This case was clearly one dealing with worship, he argued, as the group in question admitted that they were conducting worship services. White looked at comparable cases dealing with public forums and found them to be of little help. He suggested that the question should ask what level of burden is placed on the free speech. White argued that the group would have to move only a short distance, and with the minimal burden, the regulation should be allowable, as it furthered a state aim of maintaining the separation of church and state required by the state constitution.

In spite of these objections, *Widmar* held that content-based restrictions on the use of a public forum are unconstitutional unless serving a "compelling government interest" and narrowly drawn. Clearly, the generic ban here on religious worship was not narrowly drawn, nor did it advance such an interest. The university's claim of a risk of establishing a religion was not validated, as the Court felt that allowing a group to be religious was far from establishing a religion. This case was seized upon by Congress as a reason to pass the Equal Access Act of 1984, which basically turned *Widmar*'s holding into law. Thus, *Widmar*'s ideas still shape the national legal spectrum when one is considering creating regulations for use of public facilities.

See also *Board of Regents of the University of Wisconsin System* v. *Southworth et al.;* Equal Access Act of 1984; *Good News Club* v. *Milford Central*

School; Lamb's Chapel v. *Center Moriches School District; Lee* v. *Weisman; Rosenberger* v. *Rector and Visitors of the University of Virginia*

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Wiley v. *Franklin*

474 F. Supp. 525, 468 F. Supp. 133, 497 F. Supp. 390 (Tenn. 1979)

The use of the Bible for religious purposes or for prayer has been banned in the public schools since the early 1960s. However, some schools have tried to continue using the Bible for allegedly nonreligious purposes, with mixed results.

Wiley considered when Bible study courses for nonreligious purposes can be offered in public schools. In Chattanooga, Tennessee, and the surrounding Hamilton County, the school boards wished to have such a course, and several people sued. These courses had been offered since 1922, being paid for by private funds. The teachers were paid by the private funds but were supervised by school personnel and the classes were taught on public school grounds. The public school staff also approved the curriculum of the Bible study classes. The court noted that while no one particular church was formally affiliated with the courses, most of the churches most closely affiliated with the overall program were evangelical Protestant churches.

The school board argued that the study was limited to the "literary, historical or other nonreligious nature" of the Bible (468 F. Supp. 133: 137). The classes were elective, no grades were given, and those not enrolled remained in the regular classroom. However, about 93 percent of the students did enroll in such courses. The court noted that the expert witnesses greatly disagreed, but that none of them had observed lessons and so would be limited in their knowledge. The judge then turned to the law and used the three-part *Lemon* test. Noting the involvement of the Bible Study Committee, driven in large part by evangelical interests, the court determined that the record suggested the purpose of the courses was really religious, not historical, and ordered the program reformatted.

The court gave the school board forty-five days to pick new teachers, design a new curriculum, and do all of this without outside intervention or religious influence. After the return, the court upheld the requirements and stated that the court would observe the implementation of the program for a year to make sure that no religious influence entered the courses. The court also approved most of the lesson plan suggested. The case returned to court a year later, and the court refused to pass on the academic worth of the program, focusing on the constitutional issues. The court reviewed transcripts of the county and city programs, concluding that the city program conveyed secular themes, but that the county program conveyed religious themes, and thus the county program needed to be discontinued while the city program was allowed to continue. Thus, in answer to the question implied throughout of whether a public school can have a Bible study course, the answer appears to be yes, but it needs to be done very carefully and may very well still run afoul of the law.

Another case dealing with the same topic was *Crockett* v. *Sorenson,* decided by the U.S. District Court for the Western District of Virginia in 1983. Judge Kiser outlined the program that had been going on for forty years in the fourth and fifth grades of the public schools in Bristol, Virginia. He then outlined the history of the various cases, and held that the *Lemon* test applied. He held that these

grades were acceptable times to start Bible courses, but that the program was still unacceptable as it had started under the sponsorship of Protestant churches, and thus was religious in nature.

Not just Bible courses but other courses dealing with religious matters in an attempted secular way may also be unconstitutional. A transcendental meditation course was questioned in *Malnik* v. *Yogi,* decided by the Third Circuit Court of Appeals in 1979. The course in question was an elective and was taught by teachers trained by the Science of Creative Intelligence, who in turn had developed the idea of transcendental meditation. The court stated that the textbook "teaches that 'pure creative intelligence' is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives" (592 F.2d 197: 198). The court held that this class was religious and recited the three-part *Lemon* test, as updated in later cases, requiring that an allowed law or activity have a secular purpose, have a primary effect of neither advancing nor retarding religion, and not excessively entangle the government in religion. The district court had held that the program was religious, and the Third Circuit held that while benedictions may be allowed, they are a onetime thing, while this was a lengthy course. One concurrence agreed that this course promoted religion but did not agree that the mere ideas in transcendental meditation created a religion. He held that the Supreme Court had not yet formulated a definition of religion in modern times, and thus discussed in depth what a religion was. He held that ideas that discussed questions of "ultimate concern" were religion and that the whole idea of this course, claiming that pure creative intelligence was the basis of life, qualified as religion. This answer quickly extended to the course, and as courses cannot teach religion, resulted in the ban on the course, especially as it was taught by teachers trained by the religion.

Thus, courses teaching matters entwined with religion in the public schools are not necessarily always banned, but they need to be very carefully designed to avoid being banned.

See also *Engel* v. *Vitale; School District of Abington Township* v. *Schempp; Smith* v. *Board of School Commissioners of Mobile County*

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Roger Williams

Religious Dissenter
Born: 1603
Died: 1683

Roger Williams was one of the first religious dissenters in the American colonies and one of the originators of the idea of the separation of church and state. Unlike some religious dissenters, he did not dissent because he did not believe in God, nor because he wanted the state to impose his god on others rather than imposing their god. Instead, he dissented because he believed that the state and God need to be in different realms.

Roger Williams was born about 1603 (his birth year is estimated) into a family of wealthy businesspeople, and his relatives included sheriffs and mayors in England. He graduated from Cambridge. His vocation appears to have always been the priesthood; he married and moved to the colony of Massachusetts in 1631. (Priests in the Church of England were always allowed to marry.)

From his early days there, he had a different idea from most of the religious leaders of Massachusetts at the time about the way society was to be run. He believed that religion and society should be separate. Most of the other leaders at

Religious intellectual Roger Williams established the colony of Rhode Island and left a legacy of respect for the principle of religious freedom in America. (Library of Congress)

the time saw the goal of any given colony as promoting the religion of the main group. Williams was as interested in religion as the next man, but did not think that the state should be involved. He did not wish to promote freedom of religion in order to allow individuals free choice, but to save the church. Williams thought that the state, being made of men and thus being created by something other than God (who had created the church), would inevitably be full of sin, and that if the state became involved with the church, it would corrupt the church. He also wanted each church to have more freedom from local politics, and disagreed with the top-down model in Massachusetts in which the leading clergy set the rules for the entire religious community. Additionally, he believed that Massachusetts had improperly obtained the land from the Native Americans, increasing the corruption of the church from state involvement. Finally, he believed in democracy in the colony rather than having the leading citizens order the lives of the rest. For holding all of these positions, Williams was opposed by the leaders of Massachusetts. He was driven out by the state (which was run by the church) in 1635.

The state originally wanted Williams arrested. This was in part because he wished his followers to join him in exile, and the state saw this as a threat. He managed to leave, moving to the area where the Narragansett Indians lived, in what would become Rhode Island. Rather than taking the land, he purchased it and formed Providence. It was to Providence that Anne Hutchinson went in 1637, when she herself was banished as a heretic for daring, as a woman, to preach. Williams negotiated between the Native Americans and the settlers and rebuked the latter group when he felt that they were not treating the Native Americans fairly. He also did not try to convert the Native Americans, in part because he began to question his own religion. Massachusetts for a time allowed Williams's settlement to grow without trouble but in the early 1640s moved to eliminate it. Williams, though, had already traveled to England and received a charter for a separate colony. Not all of the other settlers in that colony liked him and Williams eventually had to get a second charter. Williams welcomed all religions, establishing one of the few colonies to welcome Jews. In time, however, he argued against the Quakers after initially welcoming them with all others. He thought that the Quakers were misguided on a variety of religious issues, but he did not try to ban them.

Rhode Island did not grow quickly, having a population smaller than 1,000 people by 1650. However, it continued to grow, and it was the only colony that practiced religious toleration before 1650. In many ways, it was the only colony to truly practice religious toleration. Williams treated the Native Americans fairly and did not go to war with them until

King Philip's War in the 1670s. At that point, there was war throughout much of New England and it was not a war caused in any part by bad relations between Williams and the local Native Americans. The local Native Americans had, however, allied with other tribes and had attacked the colony. Williams led the forces of the local area in part and the colony, although damaged, managed to survive. Williams continued to lead the colony until his death in 1683.

Williams is important in early New England history for his founding of Rhode Island and for his demonstration that Massachusetts was a colony set up for the religious freedom only of those who agreed with the Puritan hierarchy. In a longer-term sense, he is the founder, in many ways, of several modern ideas. Williams believed in religious freedom for all, well before that idea was popular, even though he favored it for the benefits that it would give the church more than the benefits it would give society or the individual. He also truly treated the Native Americans with decency for most of his life, something that future leaders would not do for at least another three centuries.

See also American Revolution's effect on religion; Established churches in colonial America; Establishment of Pennsylvania as religious colony for Quakers; Anne Hutchinson; Punishment and religion

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Wisconsin v. *Yoder*

406 U.S. 205 (1972)

Public schooling grew in importance in the late nineteenth and early twentieth centuries at the same time that campaigns were rising against child labor. To accomplish both the goals of banning child labor and increasing the education of the populace, most states adopted mandatory education laws, at first running through the eighth grade. By the middle of the twentieth century, school attendance laws required mandatory attendance at some school until the age of sixteen. One might think that this policy would find no objectors, especially on the grounds of religion, but that was not so, as in Wisconsin, Amish parents objected to the law, and that case came before the Supreme Court.

The case dealt with whether a family could be ordered to send their children to school (public or private) past the eighth grade when the family was Amish and said that education after that level threatened their religion. This was a 6–1 decision, with only Douglas dissenting. The laws of the state required school attendance until the age of sixteen. The Amish "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children" (406 U.S. 205: 209). Burger stated why the Amish found this requirement to be such a threat: "They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather

Amish girls walk home from school. The Amish wear simple clothing and renounce technology, including motorized vehicles and electricity, in part to encourage humility and modesty. (Courtesy of Ron Bowman/Pennsylvania Dutch Convention & Visitors Bureau)

than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society" (406 U.S. 205: 210–211).

Burger also noted why the objection to education began at the high school level. He surmised that in addition to the difference in values, at the same time that the Amish children would be going to high school, teenagers in the Amish world were learning life skills that would help them to live as Amish, including farmwork. The first eight grades teach the basics, and are not overly worldly, in the eyes of the Amish, and so are acceptable. Schooling beyond that level is not acceptable, however. After identifying the crux of the Amish objection, Burger noted the interest that a state had in providing education and how that interest interacted with freedom of religion. He held that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests" (406 U.S. 205: 214).

Burger suggested that a state either had to prove that it was not interfering with religion, or that the state interest in education superseded that of the First Amendment. He then examined the way of life of the Amish and tried to determine how this way of life was tied to the Amish religion, and he held that "we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living" (406 U.S. 205: 216). As a whole, on the issue of religion and education for the Amish, Burger held that

"the conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child" (406 U.S. 205: 218).

Burger then examined whether one's actions (in this case the action of desiring to avoid schooling) were outside the First Amendment. He held that while not all actions were protected by the First Amendment, some were, and those included possibly the actions of attending school. The opinion then turned to the issue of balancing education and religion. The state argued that education to the age of sixteen was required for people to survive in society, would help the Amish children if they ever left the order, and was needed to allow Amish children to be part of our democratic process, but the Court did not find any of these ideas persuasive, noting that most Amish children remained Amish, that the Amish society was successful, and that evidence of the benefits of one or two more years of school was not strong enough to justify the burden placed on the Amish children's First Amendment rights. The opinion also noted that it was not weighing the interests of the children in education versus the parents' religious rights but was weighing the state's power to force education versus the parents' religious rights. The Court then noted that the Amish were not newcomers and had kept their way of life for centuries, and that courts were not a good place generally to set educational policy—all comments probably intended to prevent other, newer orders and cults from trying to get their children exempted from school. Thus, for all these reasons, Burger held that Wisconsin could not force Amish children to attend school past the eighth grade nor could the state charge parents with a crime for keeping their children out of school past that point.

Stewart, along with Brennan, concurred, noting that the beliefs of the students did not conflict with those of the parents and so there was no question of a battle between the students and the parents, just between the parents' religious beliefs and the state's right to educate students.

White concurred, along with Brennan and Stewart, and White wrote that the interest in education was an important one, and that groups who wished to keep their children out of school totally might not prevail. He also noted that it was a delicate balancing test, but one that was required.

Douglas dissented in part. Douglas argued that the rights of the students needed to be considered. He noted that the parents had claimed that the rights of the students were at stake and said that the students' interest needed to be considered as their desires might be different from those of their parents. Douglas stated, "On this important and vital matter of education, I think the children should be entitled to be heard" (406 U.S. 205: 244). Douglas wished the case to be remanded so that the desires of all three children could be heard (in the initial case only one child's opinion was asked). Douglas also pointed out that the Court was moving to protect religious actions and suggested that in time the century-old ruling against polygamy, which had held that Mormons did not have a religious right to commit polygamy, might be overturned. Thus, Douglas argued for a wide protection of religious actions believed to be antisocial.

This case dealt with the clash of two different worldviews—that of the Amish, which argued for a cooperative, learned, low-consumerism lifestyle, and that of the larger American world, which argued for a competitive, technology-driven, high-consumerism lifestyle. The First Amendment allows one to pick his or her own religion, and our view of families generally allows parents to pick a reli-

gion for their children, and that was true in this case. The Court held for the parents, allowing them to pick the time for their children to leave school, due to the clash of school and religion, but also held that whether leaving school posed a threat to the children and society needed to be considered. Future courts, for this reason, might not be as compassionate to other religions who want to move their children out of the schools, even if a clear and direct conflict exists between the teaching of the schools and the religion held, if such other religions lack the record of success that the Amish have accrued over time. Thus, while religion held sway over education here, it was not a rule never to be changed, even in the minds of the *Yoder* court.

See also *Berg* v. *Glen Cove City School District; Board of Education Kiryas Joel Village School* v. *Grumet;* Curriculum of home schools and reporting; *Duro* v. *District Attorney, Second Judicial District of North Carolina; New Jersey* v. *Massa; Reynolds* v. *United States*

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Witchcraft and the law—past and present

By the time the American colonies were founded, witches had a long history of condemnation in Europe. Most accused witches were women outside of the societal structure, and this, combined with whatever personal hatred existed, caused people to believe them to be witches. Some opposition to witches and to earth-based religions, which have a complex interaction with witches, exists today.

Witchcraft was banned in most European countries in the Middle Ages. Witches were seen as allies of the devil, and the hand of God, conversely, was seen as closely tied to the government. Many kings claimed a "divine right" to rule, meaning that God had chosen them as ruler. Thus, since God had chosen the ruler and opposed the devil, who was seen as using witches, anti-witch laws carrying the death penalty were quite common.

The state generally used religion to prove whether the woman accused was a witch, and it was difficult for a woman to clear her name once charged. (Some men were accused of witchcraft, or warlockery, but most victims of these accusations were women.) Sometimes an accused person was asked to say prayers to prove that she was not evil, but even the successful prayers might not help. For instance, a woman whose words appeared to heal an illness might be considered either divine or the original source of the sickness. Refusing to say the prayer would probably seal her doom, but even when the afflicted person recovered, there was no guarantee that the accused one would be cleared of charges. The church as a whole was tightly tied up in the fight against witchcraft. Priests were brought in to deal with witches and some priests even accused people of being witches in their sermons and homilies.

Estimates vary of how many people were accused and executed in Europe throughout the Middle Ages. Some scholars suggest that as many as 400,000 may have been tried, with between 50,000 and 200,000 executed. Estimates are extremely inexact though, as the records are very incomplete and the prosecutions of witches occurred in waves, which makes extrapolating from any exact and accurate set of statistics very difficult. In America, the best-known outbreak of witch hysteria was, of course, in Salem, Massachusetts. There, in the 1690s, nearly 20 people were executed, with another 100 jailed and another 200 accused. There were

other accusations in the seventeenth century as well, but a variety of factors kept the overall numbers down, including the fact that most officials, unlike those at Salem, did not allow the introduction at trial of "spectral" evidence, or evidence of what the people had seen the spirit of the devil doing.

Trials and the focus on witchcraft have greatly decreased since the 1600s, even though the term "witch hunt" remains in our vocabulary. However, this does not mean that interest in or fear of witchcraft vanished. In the 1930s, a woman was murdered near Buffalo, New York, and witchcraft was rumored to be involved. Two Native American women were ultimately charged with murder. One woman wanted to marry the victim's husband and the other wanted to cure the victim, whom she thought was a witch. There were several trials and finally the younger woman was acquitted, after it was found that the husband had had affairs with her and with others. It should also be noted that interest in the trial decreased once the repeated adultery was discovered. The older woman pled to second degree manslaughter and was given a short sentence. It finally was determined that the older woman probably did kill the wife, but that she was manipulated into doing it by the victim's husband.

Witches, since the 1930s and generally throughout the twentieth (and now into the twenty-first) century, have become commercialized in our culture. The town of Salem, Massachusetts, does a thriving business from the tourists who come to see where the witch craze occurred, and there have been several TV series dealing with witches, generally presenting them in a relatively positive light.

The whole idea of magic has had a resurgence since the 1960s due in large part to the back-to-nature attitude of the hippies of that period. The Wicca religion, among others, even celebrates witches and witchcraft, focusing on positive magic. There are no particular laws that penalize those who worship in witchcraft-based religions, though it is doubtful these will ever see their holidays chosen as official vacation days by government entities. There have been some scattered reports of students being forbidden from wearing witchcraft objects and of an occasional teacher being discharged for being a witch. There has also been some concern about those who combined witchcraft with other interests, including fringe pagans, neo-Nazi groups, and those in millennialism cults, who argue that the end of the earth is near.

Thus, witchcraft is still somewhat opposed and disfavored, even while growing in popularity. However, the level of public opprobrium in the United States never approached what it had been in Europe, where tens of thousands, if not hundreds of thousands, of accused witches were brought under the onus of religion-inspired law and given a very temporal sentence of death for their supposed religious crimes. While the past attitudes portraying witches as evil remain in many minds, the law has been relatively cleansed of this area of religion.

See also Celebration of Halloween and singing Christmas carols; Punishment and religion; Salem witch trials

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Witters v. *Washington Department of Service for Blind*

474 U.S. 481 (1986)

States are generally not supposed to aid religion or religious enterprises, as the First Amendment prohibits an establishment of religion. However, were the state to deny all aid that helps religion

in any way, the state would have to prevent roads from running in front of (and to) churches and would have to deny fire protection, and few have ever argued that the First Amendment carries matters this far. Where a state's (or the federal government's) generally available aid is allowed to benefit religious institutions is something that has been long contested, and it was contested in the *Witters* case as well.

This opinion was written by Justice Marshall and joined by all eight other justices, at least in part. Marshall first surveyed the facts of the case. A blind person applied for, and was due, aid to study at a college. Washington denied the aid because the student wished to study at a Christian college. Washington "cited Wash. Const., Art. I, 11, providing in part that 'no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment,' and Wash. Const., Art. IX, 4, providing that '[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence'" (474 U.S. 481: 484).

Marshall then turned to the U.S. Constitution and held that the *Lemon* test controlled this decision. The first prong of that test was whether the program had a secular purpose, and this program of giving aid to the blind clearly did. The second prong was whether the program advanced or retarded religion, and the Court held that it did not, even though it was involved with religion. Merely because aid was given to a religion was not a violation of the Constitution. The state also did not give aid, as the program here gave aid to the student, who then chose whether to aid the institution. Nothing about the program gave any hint that religious aid was desired by the state. Marshall also noted that this was the first student who had wanted to study at a religious school and so allowance of this student would not create large amounts of aid to religious institutions.

Justice White concurred with the decision, but wrote to state that this did not mean he had reversed his position in the school aid cases and in other cases where state aid had been ruled unconstitutional, even though he thought it was constitutional in this case. He also thought that *Mueller* v. *Allen* should have been mentioned and correlated with this case, even though it was not mentioned.

Justice Powell also concurred, in an opinion joined by Chief Justice Burger and Justice Rehnquist. Powell wrote, "The Court's omission of *Mueller v. Allen* . . . from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one. I write separately to emphasize that Mueller strongly supports the result we reach today" (474 U.S. 481: 490). He argued that *Mueller* had allowed a tax deduction for educational expenses as that did not advance religion and so was parallel with the current case. The program, Powell argued, was not supposed to be evaluated as to whether it advanced one's participation in a religious school or event, but whether the program, in its totality, advanced religion.

Justice O'Connor concurred in part and concurred in the judgment. She argued that the decision was rightly reached. Although she never directly stated why she did not agree with the whole opinion, it appears that she, at this point, did not like the *Lemon* test and so did not want to validate it by concurring in it.

The *Mueller* decision, which allowed tax deductions for educational expenses, started a new trend in Supreme Court decisions. While these tax deductions benefited religion, they were held to be allowable as people chose where to spend their money (or donate their money in the case of deductions for donations) and they were not held to advance religion. The same was true here as the choice of the student was what helped the religion, not any choice on the part of the state, and so religion was not held to be advanced by the state. Current decisions, including those allowing voucher programs in which students choose the schools to attend, have also generally been allowed, as long as some level of individual choice exists in the direction of the aid.

See also *Agostini* v. *Felton; Everson* v. *Board of Education; Hibbs* v. *Winn; Lemon* v. *Kurtzman; Locke* v. *Davey; Mitchell* v. *Helms; Mueller* v. *Allen; Zelman* v. *Simmons-Harris*

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Wright v. *Houston Independent School District*

486 F.2d 137 (5th Circuit 1973),
366 F. Supp. 1208 (S.D. Tex. 1972)

This case dealt with the continuing evolution controversy and what types of cases needed to be heard at the district court level. Rita Wright sued, claiming that the school district could not teach evolution as part of its curriculum, as that would create an establishment of religion. Her argument was that evolution was directly opposed to creationism and that by teaching evolution, the school board was denying the truth of creationism and disparaging religion. The plaintiffs used the argument of neutrality and said that if it was not neutral to ban evolution, then it was not neutral to teach evolution as it banned creationism. The court dismissed the case, holding that all that had been proven here was that the school district had bought textbooks that supported evolution, which was far from a school board policy teaching evolution in a way that it denied creationism and that might create a religion or teach evolution as the only possible origin of the world. Concerning subjects marginally related to religion, the court held that "teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise" (366 F. Supp. 1208: 1211).

The plaintiffs also suggested that equal time should be given to creation and evolution. The court held that there were so many religious theories available on the origin of the world that the school board would be unable to choose a secular alternative, making the proposed cure worse than the problem. The school board also pointed out that there was an opt-out provision that would allow students opposed to learning evolution to avoid exposure to those theories. The Fifth Circuit Court of Appeals upheld the decision and held that the district court had not abused its discretion and that the Supreme Court had already decided that evolution could not be banned from the classroom for reasons of religion, citing the *Epperson* case decided only five years before.

Thus, while a school board's treatment of evolution, especially if regimentally mandated, might rise to the level of creating a religion, it did not do so in this case, as the main thing complained against was a textbook favorable to evolution. The courts also held that evolution could not be banned just because it might potentially be hostile to religion.

See also *Edwards* v. *Aguillard; Epperson* v. *Arkansas; Scopes* v. *Tennessee*/Scopes Monkey Trial

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Z

Zelman v. *Simmons-Harris*

536 U.S. 639 (2002)

This decision dealt with vouchers for children to attend the school of their choice. Students could attend private school and whatever aid the state would have provided for each pupil (on average) at the public school was then paid toward the cost of the private school, along with an additional amount up to $2,250 (in the challenged program). The program was challenged as it was seen to advance religion as many of the private schools were religiously based.

Chief Justice Rehnquist wrote the opinion for the majority, first noting that Cleveland public schools were in a state of crisis. He described the low achievement by the students and noted that the schools were under a court order to improve. Rehnquist then outlined the program and noted that schools were forbidden from discrimination. The opinion also observed that the amount of tuition aid given depended on the level of economic hardship faced by the people in the program who chose to transfer. The poorest students were given priority for the program. If one chose to remain in the public school, one could then receive tutoring help, up to $360.

Rehnquist then surveyed the program as it had been adopted. He noted that most of the schools participating were private and that the overwhelming number of students in the program were attending religious schools. He also observed the other efforts that Cleveland had undertaken in response to a court takeover (a federal court had taken over the Cleveland School District since it was performing so poorly). These efforts included community schools, run by a local school board rather than the citywide board, and schools that emphasized different teaching methods, like Montessori schools (the latter called magnet schools). He then outlined the history of the legislation.

The decision moved into the heart of the question—whether this program was constitutional. Rehnquist argued that programs of state aid directly to religious institutions were unconstitutional, but programs that allowed private choice of schools and thus aided religion only by the private choice of the parents were constitutional. He cited the Court's decisions in *Witters* and *Rosenberger* as proof of these conclusions. Rehnquist described the results in *Mueller, Witters,* and *Zobrest* as holding that programs that allowed choice but often resulted in aid to religion as a result of those choices were constitutional. Rehnquist also stated that he believed this truly was a private choice and that the government was not putting its thumb on the scales to influence a choice. He noted that the program actually aided private schools less than public, commenting that "the program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools" (536 U.S. 639: 654). Rehnquist turned to the issue of whether the government was appearing to endorse religion, holding that they were not, and commenting that the "objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general" (536 U.S. 639: 655). The majority also noted that there were plenty of other options out there for students whose parents did not want them to go to a religious school, and thus there was true

choice. He noted that "there also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children" (536 U.S. 639: 655). In one of the dissents, Justice Souter had argued that since more religious private schools were participating than secular private ones, the state must be doing something to promote this. Rehnquist refuted this, noting that most private schools across the nation were religious. He also held it to be irrelevant that a full 96 percent of those participating chose private schools, holding that this ignores all those who chose not to participate in the program.

The opinion then turned to differentiate this case from other cases. It was differentiated from *Nyquist* in that the program there helped only private schools, whereas this one helped all schools, and that the decision in *Nyquist* specifically excluded a program like this one from being covered by that decision. Rehnquist, for the Court, held "in sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause" (536 U.S. 639: 662–663).

Justice O'Connor concurred but wrote to emphasize two things. She first wanted to argue that this decision was not a break from the past but more of a continuation and, second, that the perception that this program somehow greatly favored religious schools was incorrect. She first considered the magnitude of aid that flowed to the religious schools. By citing statistics, she suggested that Ohio was giving much more money to community schools and magnet schools than it was giving to religious schools. She then stated that the amount given to religious schools was not a large increase over the money already given religious schools through tax breaks, tax credits, and tax deductions. Other funds such as Medicare also made their way to religious institutions. O'Connor stated, "While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause . . . it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases" (536 U.S. 639: 668).

O'Connor also argued that this aid did not violate the *Lemon* test. In cases where aid was given indirectly, she held that "courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid" (536 U.S. 639: 669). To allow aid similar to the aid here was consistent with the *Lemon* test, she believed, as the aid flowed through the recipients who independently chose to give it to religious schools. She then contended against Justice Souter's dissent, holding that choice did exist for students in Cleveland, and so the students were not going to religious schools because they were the only choice.

O'Connor then took on several other elements in Souter's dissent. She argued that Catholic schools do not necessarily have a cost advantage and that "non-Catholic private schools" (O'Connor's phrase) go after a different type of student from those sought by Catholic schools and so have a different cost structure. She also opposed a number of Souter's other conclusions, going deep into the affidavits to find evidence to refute his suggestions that there were not many alternatives. O'Connor stated that test scores are not the be-all and end-all that Souter thought they

were. (Souter had cited low test scores as a reason that community schools were not true alternatives and so no choice was provided.) After No Child Left Behind, which relies heavily on test scores and was pushed through at the behest of Republican President George W. Bush, one would wonder if O'Connor would still agree with her claim about test scores, at least in public. Thus, O'Connor saw true choice, which means that there was no violation of the *Lemon* test.

Justice Thomas also concurred. He argued that the states should have more latitude than the federal government in the area of religious freedom and that the Fourteenth Amendment did not fully bind the states in the area of the First Amendment. He also argued that education was important, which meant that states should be allowed to experiment with private schools and not be bound as strongly as the federal government by the First Amendment and that this might be the only way for minorities to succeed. For all these reasons, Thomas concurred with the Court.

Justice Stevens filed a dissent. In addition to agreeing with the overall dissent, he wrote to argue that the crisis facing the Cleveland district was not of any relevance to the Court. He stated that the constitutionality of a program had nothing to do with the problem it was adopted to fix. He also argued that "the wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education" (536 U.S. 639: 685). However, in terms of the program's constitutionality, "the fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one 'respecting an establishment of religion'" (536 U.S. 639: 685). Finally, Stevens wrote to argue that choice was not the key issue, but whether the overall program ran afoul of the First Amendment.

Justice Souter filed a dissent that was joined by Justices Stevens, Ginsburg, and Breyer. Souter argued that the Court had ignored the *Everson* decision in approving this program. (In Everson, the Court had approved the state's paying for bus transportation to private schools.) Souter briefly reviewed the stages of First Amendment doctrine in this area and held that the previous stages had been succeeded by the current one, "in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism" (536 U.S. 639: 689–690).

Souter reviewed the past cases and held that until 1983 aid to private schools had not occurred. In that year, in *Mueller* v. *Allen,* the idea of not aiding religious schools had changed from "realism to formalism," in Justice Souter's words. Souter then looked at the issues of neutrality and choice, calling them the current "twin standards." He argued that the program was not neutral, as the majority would have approved a program "in districts with no secular private schools at all" (536 U.S. 639: 697). He also argued that the whole idea of choice had been misapplied here, as the way the majority defined it, as long as the state did not give more money to private schools overall than to public ones and as long as more students did not attend private schools, choice would always exist. This, Souter argued, makes a mockery of the idea of choice: "The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out" (536 U.S. 639: 703).

On the issue of choice, Souter concluded, "There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers.

The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, . . . public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has. For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian" (536 U.S. 639: 707).

Souter then moved to his own reasons for disagreeing with the case (before, he had been arguing that the majority was misapplying his own criteria). He argued that "the scale of the aid to religious schools approved today is unprecedented," and this was relevant as huge amounts of money did help religion, which in turn undermined the First Amendment (536 U.S. 639: 708). Souter also held that this plan could "corrupt" religion, as religious schools were not allowed to favor those of their own religion, and it also forced nonbelievers to support a particular church (or churches), and would create strife and discord.

Justice Breyer also wrote a dissenting opinion, joined by Justices Breyer and Stevens. Breyer emphasized the issue of social conflict. He argued that the aim of the First Amendment was to prevent social conflict, and he noted several decisions, running from *Engel* v. *Vitale* to *Lemon* v. *Kurtzman,* which had held that the possibility of religious conflict was a relevant issue. He also noted that what might have been acceptable 200 or 100 years ago was not acceptable at the present because of its current risk for social divisiveness. At the end of his survey of the twentieth-century cases, Breyer held that "the upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue" (536 U.S. 639: 722–723, emphasis in original).

Breyer also noted the wide diversity of religions in America, noting that there were more than fifty different religions, and he predicted great difficulties if one was to try to provide equal opportunity to each religion through their own religious schools. Breyer agreed that past programs had allowed aid, but held that "school voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past" (536 U.S. 639: 726). This education created division, Breyer argued, holding that "history suggests, not that such private school teaching of religion is undesirable, but that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university" (536 U.S. 639: 727). He also thought that the mere choice of which religion (or none) received the aid did not make the program any less productive of rancor and thus did not make it any less unconstitutional.

On the whole, Breyer held that "the Court, in effect, turns the clock back. It adopts, under the name of 'neutrality,' an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause concern for social concord. An earlier Court found that 'equal opportunity' principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. . . . In a society

composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, . . . I respectfully dissent" (536 U.S. 639: 728–729).

As Breyer and others noted, *Zelman* was at the end of a long line of cases moving away from the ideas first announced in the *Lemon* decision. In *Lemon,* a three-part test was announced that programs had to have a secular purpose, neither advance nor retard religion, and avoid entanglement. By the time of *Zelman,* the doctrine had moved from neither advancing nor retarding religion to one of merely being "neutral," and so religion could be advanced as long as the criteria used for awarding aid was, as was true in the case here, religiously neutral.

See also *Lemon* v. *Kurtzman; Mueller* v. *Allen;* Paying for tests and other aid for private schools; *Rosenberger* v. *Rector and Visitors of the University of Virginia; Witters* v. *Washington Department of Service for Blind; Zobrest* v. *Catalina Foothills School District*

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Zobrest v. *Catalina Foothills School District*

509 U.S. 1 (1993)

This case examined the use of state funds in a religious setting. Here, a deaf child wished to attend a Roman Catholic school with a state-provided interpreter. The child would have been provided an interpreter had he attended a public school, but the school district refused to provide one on the grounds that to do so would be an establishment of religion. The Supreme Court, in a narrow 5–4 decision, agreed with the deaf child and held that providing the interpreter was not an establishment of religion,.

Chief Justice Rehnquist wrote the opinion, first dispensing a summary of the case's history. He then turned to the constitutional claims, noting that neutrality should be the guiding principle and that programs, if neutral, could aid religious schools in their effect. He also noted that past Supreme Court cases had allowed aid that flowed to private schools, including a case in which a blind person wanted to be trained at a Christian college with neutrally available aid. The parents chose where the aid went in this case, and the aid provided no incentive to attend a religious school, so it was acceptable. The chief justice wrote, "By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents" (509 U.S. 1: 10). He also differentiated this from previous aid cases as those cases provided the private school with secular materials, such as maps, that would then have allowed the private schools to save funds. But here, Rehnquist held, the school would not have spent any money without the program, as the student would not have attended. Thus, the program was allowable.

Justices Blackmun, Souter, Stevens, and O'Connor dissented, and one of the dissents was written by Blackmun. He first argued that the Court did not need to reach the

constitutional issue, and it is generally held that when courts do not need to reach constitutional issues to decide cases, they should avoid doing so. The school district had argued that there was no right to interpreters at private schools as long as interpreters were available at the public school, and the district also argued that an established regulation prohibited the spending. Blackmun argued that just because the issues were not discussed in the lower court did not prevent the Supreme Court from remanding the case to have the lower courts brief and hear arguments on those exact nonconstitutional arguments. He then turned to the issues, holding that the program, as held by the majority, would require "a public employee to participate directly in religious indoctrination" (509 U.S. 1: 18). He first pointed out that the institution was extremely religious and that the interpretations would become filled with religious meaning, so that the employee could not avoid participating in the religion. Blackmun then turned to the majority's arguments, starting with the neutral nature of the program and the choice of the parents. Even neutral programs, where the aid is directed to religious schools by choice, can be illegal if the aid, in the constitutional doctrine of the early 1990s, occurred on school grounds and used teachers. Providing an interpreter, for Blackmun and Souter, was enough to violate those rules.

Justices O'Connor and Stevens also dissented separately. They had joined the first part of Justice Blackmun's opinion, which had held that the case should have been remanded. Both of them held that they would have followed the rule that constitutional issues should not be decided until they have to be, and they felt that no constitutional issue had to be reached, as the issue of regulations might have disposed of this had it been remanded. O'Connor, unlike Blackmun, did not even discuss what she would have said had the constitutional issue been properly in front of the Court.

This opinion continued the Rehnquist Court's slow progression to the more accommodationist side of First Amendment jurisprudence. An accommodationist reading of the First Amendment says that the government can accommodate religion without violating the spirit of the free exercise and the nonestablishment clauses. Some accommodationists go so far as to suggest that the First Amendment's establishment clause, when applied to the states, means nothing and only bans the federal government from establishing a national church. Most do not go that far but argue that government can help out religion as long as the aid is made neutrally available, and, the Rehnquist Court repeatedly added, choice by private individuals directed that aid to religion. Those in the minority here continued to hold (and would through the end of the Rehnquist Court) that the First Amendment should be read in a separationist way, that the government and religion must be separate. Both readings have won hearings in the past, even in the area of school aid, as, for example, in the 1980s, when direct aid on the school grounds of religious institutions was struck down, but aid just outside the building in temporary trailers was acceptable.

See also *Agostini* v. *Felton; Lemon* v. *Kurtzman; McCollum* v. *Board of Education; Members of Jamestown School Committee* v. *Schmidt;* Paying for tests and other aid for private schools; *Zelman* v. *Simmons-Harris*

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Zorach v. *Clauson*

343 U.S. 306 (1952)

Released time programs allowed children who attend public schools to leave the school during the day for religious education. After the Supreme Court decision in *McCollum* v. *Board of Education* (1948) established that religious instruction could not be administered on public school grounds, New York City created a program allowing students to leave school for part of the day for religious instruction. The students were released from school, traveled to the programs, and then returned to school when the programs had ended. The situation differed from the one reviewed in *McCollum* because the programs in that case had been carried out in public school classrooms.

The Supreme Court upheld the program in *Zorach* by a vote of 6–3. Justice Douglas wrote the majority opinion. He first reviewed the program, noting its particulars, including that those not participating remained in the classrooms and that attendance was taken and sent back to the schools to ensure that the released students did actually attend the religious classes. He noted that no amount of public funds were spent on the program and then looked at the argument that the state was promoting religion by pushing students into religious instruction. Concerning the schoolteachers, Douglas held that the teachers were neutral and there was no evidence to the contrary. He then looked at how the church and state must be separated. He held that "there cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other" (343 U.S. 306: 312). Thus, he concluded that if there was no contention that the state was either interfering with the free exercise of religion or establishing a religion, then the state was allowed to be active with relation to religion.

Douglas gave two sets of examples to show how holding that the state must always avoid any connection with religion would not work. He first argued that such a holding would prevent the city from providing religious institutions with basic services such as fire and police protection. He went from there seamlessly into religious announcements in the political sphere, noting that the Supreme Court opened every session by saying "God save the United States and this Honorable Court" (343 U.S. 306: 313). Douglas then argued that nullifying the law contested in *Zorach* would have large consequences. He posited that students could not miss school for religious services, if this law were struck down, as he considered allowing students to do this to be similar to the released time programs in question.

Douglas began his closing with one of the more quoted lines from any of his opinions. He stated, "We are a religious people whose institutions presuppose a Supreme Being" (343 U.S. 306: 313). In other words, he believed that, as America was religious, the courts and legislatures should promote programs that recognize and celebrate that diversity, as long as those programs are neutral and no coercion to attend is involved. He summarized his religious test as follows: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no 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" (343 U.S. 306: 314). Whether the

program was a good one, which apparently caused much argument in the proceedings, was not of issue to Douglas, as it was allowable under the Constitution, and the majority of the justices felt that was the only real question.

Justices Black, Jackson, and Frankfurter dissented, an odd combination in most instances but not on the religious question. Justice Black first argued that the *McCollum* case should be deciding here as there was no difference other than the place of the instruction, which was not enough to make a difference for him. Black clearly saw the school system here encouraging attendance at the religious classes, which was unacceptable. He wrote, "Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State" (343 U.S. 306: 318).

Black then argued against Douglas's rationale, first stating that whether U.S. laws presume a deity is irrelevant. He cataloged the religious abuses of the past and argued that the First Amendment guarantees government neutrality in the area of religion. Black believed that neutrality went beyond the government's treating all sects equal, and that it meant, indeed, that the government should treat believers (of any religion) and atheists equally, which this decision did not. He closed by stating, "State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice" (343 U.S. 306: 320).

Justice Frankfurter also dissented individually (he had also joined Justice Jackson's dissent), arguing that the key issue was not whether the schools could close for a religious day but whether it could let religious students go to study religion while compelling students who were not so religiously inclined to remain. Frankfurter noted that coercion had been alleged, but that no trial had ever occurred on that issue, so the fact that no coercion was proven was irrelevant, as no opportunity for that proof to be displayed had ever been allowed. He argued that the schools should close and then let the students (and parents, presumably) choose where to spend their time rather than having the help of the state school system, and argued that free choice, essential in many religions, was obviously lacking here; he thus condemned the program on both religious and constitutional grounds.

Justice Jackson was the final dissenter and, as noted, his dissent was joined by Frankfurter. He argued that the schools were "jails" for those who did not wish to attend religious services and that the force of the state was what was really compelling students to attend the services (as they would be counted truant if they did not), and that this was clearly coercion on the part of the state. Jackson also bristled at the suggestion that hostility to a released time program was hostility to religion and backed up his argument with biblical allusions. He wrote, "As one whose children, as a matter of free choice, have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be anti-

religious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar" (343 U.S. 306: 324–325). The decision alludes to the biblical instruction to render unto Caesar that which is Caesar's and to render unto God that which is God's. Jackson then argued that *McCollum* should rule in this case and that without overruling *McCollum,* this decision had made it pointless. He further argued that this decision was not law, but sociology, writing, "Reading of the Court's opinion in that case [*McCollum*] along with its opinion in this case will show such difference of overtones and undertones as to make clear that the *McCollum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law" (343 U.S. 306: 325).

Zorach remains a controlling precedent today, even though not that many students are directly affected by it. For a variety of reasons, including the increased number of activities that students are involved in today, the increased number of students having after-school jobs, and the increased pressure on schools to make full use of their school day, there are many fewer "released time" programs in existence. Indeed today, the main relevance of *Zorach* is to whether the state may fund programs on private school campuses rather than whether the state may release students to attend religious programs, and the frequent citation of Douglas's line about the U.S. government presuming a Supreme Being. The Supreme Court has always held that the state may provide services to private schools as long as those services are equal to those given public school students and as long as the aid is not divertible to help religious schools. The real sticking point for providing such services as speech therapy and the like is where the services are provided. Until 1985, that issue had not been fully addressed. In 1985, the Supreme Court held that such services must be provided away from the school buildings of the private schools, but in 1997, the Court reversed its decision. Thus, such services can currently be provided on private school grounds. The current Supreme Court seems to be moving away from the *McCollum* and *Zorach* requirements of no financing of religious education and moving more toward neutrality in the sense of providing equal resources to students in public and private schools, even private religious schools. If a pool of money is provided to parents for parents to choose where those funds go, and the parents' choice is that their children (and the accompanying funds) go to private religious schools, that has been deemed constitutionally acceptable. For this reason (along with the scarcity of released time programs in the public school), it is not likely that in the near future *Zorach* would have reason to be reconsidered. Even if it was reconsidered, it would very likely still be upheld. *Zorach,* though, was the first decision of the Court in the area of education when the state was allowed to take a position that benefited religion, albeit to a debated degree.

See also *Agostini* v. *Felton; Engel* v. *Vitale; McCollum* v. *Board of Education; Witters* v. *Washington Department of Service for Blind; Zelman* v. *Simmons-Harris*

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GLOSSARY

Absolutist interpretation View that the order in the First Amendment that Congress shall make "no law" regarding religion means just that, "no law," and that Congress should never be allowed to pass a law creating an establishment of religion or interfering with the free exercise of religion, no matter how slightly.

Accommodationist A view of the First Amendment that the court should generally favor the accommodation of religion. This is in opposition to the separationist position.

Amicus Short for amicus curiae—"friend of the court." These are organizations, generally, that have interests in the case at hand but are not directly involved. The organizations are not usually allowed to speak at the Supreme Court hearings but are allowed to file briefs, sometimes referred to as amicus curiae briefs.

Balanced curriculum See Equal time laws/arguments.

Bill of Rights The first ten amendments to the U.S. Constitution, adopted in 1791.

Blaine Amendment First composed in the 1870s but never enacted at the Federal Level; the amendment would have generally prohibited any money, either state or federal, from going to private religious schools. While current Supreme Court doctrine generally frowns on any direct money to private religious schools, some money is allowed, and other funds can be directed by parental choice, both of which would have been prohibited under the Blaine Amendment.

Bona fide occupational qualification (BFOQ) A job qualification that is truly related to the work performed. In the area of religion, religion is allowed to be used as a qualification for the job when it is a bona fide occupational qualification and when the organization hiring is a religious college. For instance, a religious college might be able to use religion as a qualification if the college could prove a need to maintain a sufficient presence of the religion that founded the college and had kept a strong involvement in its activities. Religious organizations are allowed to use religion as a qualification regardless.

Ceremonial deism The idea that references to religion are allowed at certain times in our public life if they have existed to the point (and been used so commonly) that their religious significance has diminished and they have become a form of ceremonial worship. Among the items that have been defended as ceremonial deism are the references to "under God" in the Pledge of Allegiance, and the use of the phrase "In God We Trust" on American currency.

Cert Short for certiorari. In order for the Supreme Court to hear a case, at least four judges have to vote to hear it, or vote to allow a writ of certiorari to be granted. If not enough justices vote to hear the case, it will not be heard, which is frequently described as the Supreme Court having denied cert.

Circuit courts of appeals The thirteen courts that sit, in terms of how cases are heard, between the U.S. Supreme Court and the district courts. They review the decisions of the

district courts, and generally sit in three-judge panels, often with two circuit court of appeals judges and one district court judge and sometimes three circuit court of appeals judges. There are many more than three judges on any circuit court of appeals, but they sit all together—or en banc, to use the formal term—only if the court decides that the whole panel needs to rehear a case decided by the three-judge panel. Eleven of the circuit courts of appeals have regional jurisdictions, handling from three to nine states. The twelfth is also regional, but its province is the District of Columbia, and the thirteenth is the federal circuit. None can review the other's decisions; all are equal. These courts hear appeals from the district courts. Appeals of circuit court decisions go to the U.S. Supreme Court.

Compelling government interest A type of government interest that is deeply important or vitally necessary as opposed to one that may be important but not essential. An example of a compelling government interest is to prevent racial discrimination, whereas traffic control, while important, is not a government interest that is compelling.

Creation science A view claiming that scientific evidence supports the literal truth of the creation account in the first chapter of Genesis. According to creation science, the world was created in six twenty-four-hour days and is just over 6,000 years old. Proponents of this theory generally oppose teaching evolution in public schools or desire that evolution and creation science share equal time in biology classrooms.

Curriculum-related activity An activity, in a public school, that is related to the schoolwork. A math club would be a curriculum-related activity. A club made up of people of a certain religion would not be a curriculum-related activity and thus would be a noncurriculum-related activity. This is relevant, as the courts allow more restrictions to be placed on building use for noncurriculum-related activities than curriculum-related activities. However, schools still cannot allow a noncurriculum nonreligious-related activity devoted to a certain activity or topic while banning religious groups that discuss those same topics. The school could, however, place controls on the participation of schoolteachers in those religious clubs.

District courts The trial courts in the federal judicial system that handle most of the cases, criminal trials, and so on. Some cases start below this level and can be appealed to this level, but most start here. Only rarely are jury cases or actual trials heard at the appeals or U.S. Supreme Court level (or below the district court level); generally the case starts at the district court level and then is reviewed, if a point of law is contested, at the circuit court of appeals level. There are ninety-four district courts in the United States, and a district court can have from two to nearly thirty judges, depending on how busy the court is.

Equal time laws/arguments Sometimes called balanced curriculum. These arguments hold that evolution and creation science or intelligent design should be given equal classroom time. Equal time laws mandate that equal time be given, or, and this is often added, any discussion of species origin be wholly skipped.

Evolution A biological argument that humans developed from other species, meaning that humans, as they exist now, were not created by a divine being; this conflicts with many people's understanding of their religion. The argument holds that humans and other species, such as apes, have a common ancestor. Evolution does not take a stand on religion, but its science shows that the earth is millions of years old and that new species have occurred since the earth's origin, and these findings conflict

with some people's religiously held beliefs about the age of the earth and human ancestors.

Ex parte A legal term (seldom used today) meaning "from the side of." It mostly appears in legal citations to indicate which party is desiring the legal remedy sued for.

Excessive entanglement of government and religion Part of the *Lemon* test that is seldom used to strike down legislation but often invoked by judges to inform the public as to what type of actions would not be allowed. This part holds that the government cannot be greatly involved in the area of religion.

Faith-based initiatives Efforts, particularly in the area of charity work, done through churches and other faith-based groups. The government receives bids and offers for charity work, then after a selection process gives money to the faith-based groups. Because the government is providing money to religious organizations, some people have concerns about entanglement, but those supporting this method view it as successful and argue that if non-faith-based groups can receive grants, faith-based groups should also be eligible.

First Great Awakening A religious movement that occurred from about 1739 to the early 1770s. The revival began with largely European roots, as traveling ministers came from Europe into the colonies in order to save souls. Among the more famous ministers of this revival were George Whitfield and Jonathan Edwards. The movement brought about the founding of several colleges and some new denominations (or at least new to America), including the Presbyterian and Baptist.

Forum A place of discussion. The Supreme Court allows different rules to be placed upon the discussion based on the nature of the forum. In all areas, restrictions may be placed on the time, place, and manner of discussion as long as they are reasonable, are applied neutrally, and are content neutral. A traditional public forum is one that has traditionally been open to the public with relatively few restrictions. Places that are traditional public forums include parks and sidewalks. In a traditional public forum, content-based restrictions may be placed only if they further a compelling state interest and are narrowly drawn. Few restrictions meet these criteria, but the courts have also been reluctant to grant something a status as a traditional public forum unless it has clearly served this status and has been indicated by the government as a public forum for some time. Airports, for instance, have been held not to be traditional public forums because of their recent (in the eyes of the court) creation. A limited public forum is one specifically created for discussion on certain topics, such as a lecture hall, and it is handled by the courts the same as a traditional public forum, but once again the intent of the government creating this public forum needs to have been clear. Nonpublic forums are all other forums, and they can be restricted as long as the restriction is reasonable, and certain subjects can be prohibited as long as the restriction is neutral with respect to the viewpoint of the speaker. Thus, discussion of religion could be banned from a nonpublic forum as long as all discussions of religion were banned, not just discussion of certain religions. The regulations in nonpublic forums can also allow only certain subjects to be discussed, or can allow only certain uses, but once again they cannot allow the subject only from a nonreligious viewpoint. There could, however, be a ban on any promotion of religion by groups while discussing these subjects. Total bans on all communication will also be struck down as being far too broad.

Genuine/sincerely held religious belief A person's religious belief that the court believes is real and not adopted merely to satisfy

the requirements of the case. Beliefs are never investigated by a court as to their reasonableness or truthfulness, but if a court holds that a religious belief is not genuine and/or sincerely held, the person suing generally loses as the court does not believe that religion is at issue.

Government establishment of religion The level to which a certain action gives government backing to a particular religion or to religion in general. Actions that can be interpreted as resulting in government establishment of religion have been ruled by nearly all judges to be in violation of the First Amendment's prohibition of a governmental establishment of religion.

Government neutrality in the area of religion A view that government needs to be neutral in the area of religion, not favoring one over another. Some judges hold that the First Amendment requires only this, and so governments can generally promote religion as long as they do not promote any one religion. Other judges hold that government neutrality is only a starting point and that governments should strictly stay out of religion.

Heckler's veto Referring to whether those who oppose an activity can prevent it. Those who use this term generally argue that objectors who number in the minority should not be able to cancel an activity. The other side of this argument is, however, that the majority should not be able to oppress the minority simply because they have greater numbers.

Incorporation of the Bill of Rights The process by which the Supreme Court has applied the Bill of Rights to infringements of liberty by the states. The process is based in *Gitlow* v. *New York* (1925), when the Court held that the Fourteenth Amendment makes portions of the Bill of Rights applicable against the states. The freedom of religion clauses were held to be applicable against the states in *Cantwell* v. *Connecticut* in 1940.

Inerrancy Belief that the account of creation in Genesis is literally accurate, meaning that the world was created exactly as Genesis states it.

Intelligent design Also called ID. This idea holds that some things in the universe are so complex that they could not have arisen by chance and thus something intelligent must have designed those things in the universe. This idea, unlike creation science, does not posit a particular age to the earth and can, according to some of its proponents, work along with evolution, after the creation of the earth. Those who oppose it often see it as a mere replacement for creation science and another, more creative, way to advance religion.

***Lemon* test** A test, coming out of the *Lemon* v. *Kurtzman* decision in 1971, which helped to ascertain the constitutionality of a government policy dealing with religion. This test has been modified several times and is under attack from some justices and writers, but it still survives. The test holds that a policy affecting religion, in order to be constitutional, (1) must have a secular purpose, (2) must neither advance nor retard religion as its primary effect, and (3) must not foster excessive entanglement with religion.

Living Constitution A view that the Constitution should change with the times. This is the opposite of original intent.

Lyceum An organization, or the place where that organization meets, that has discussions and lectures on a topic.

Noncurriculum-related activity An activity not related to subjects taught in school. A club limited to people of a certain religion,

or a dance club would generally be a noncurriculum-related club, whereas a Latin Club would not be (assuming that the school taught Latin). This distinction is relevant, as the courts allow more restrictions to be placed on (especially) building use for noncurriculum-related activities than on curriculum-related activities. However, schools still cannot allow a noncurriculum, nonreligious-related activity devoted to a certain activity or topic while banning religious groups that discuss those same topics. The school could, however, place controls on the participation of schoolteachers in those religious clubs.

Nonpublic forum See Forum.

Original intent An argument that the Constitution should mean what the writers of the Constitution meant it to mean and nothing more. Thus, if the founders would have allowed prayer in public schools, modern justices should also. The opposite of this view is sometimes called the living Constitution.

Per curium An opinion that is written by the court as a whole, rather than by one, two, or three specific justices; it is generally short and without much discussion. The Latin means simply "by the court."

Petitioner The party keeping the court case going, or petitioning the higher court to review the case. This is the party that lost at the lower level and who thus has the need to petition the higher court for review.

Prima facie A term meaning that the case has met all the requirements to be allowed into the courtroom as a case. Among the elements to be considered for a case to be prima facie is whether the person suing has a right to sue, whether the government (or whoever is being sued) is involved, and, for the cases considered in this encyclopedia, whether there is potentially an establishment of religion or a violation of the free exercise clause. The Latin phrase means "at first sight" or "on first consideration."

Public forum See Forum.

Reasonable observer test A test of whether an act or a display is a government establishment of religion or an interference with the free exercise of religion (more the former than the latter) by determining what a reasonable person would think of the act or display in question. If the reasonable person would not see a violation of the Constitution, then there was no violation. This is sometimes used as a basis for a judge stepping away (or trying to step away) from his or her own opinion about the facts and substituting the average, but well-informed and reasonable, person's opinion.

Respondent The party responding to the court case. At the Supreme Court level (and at the appeals court level) it is the person who won at the lower level; as the individual was happy with the result there he or she was not asking the court to revisit the case.

Second Great Awakening A religious movement that occurred from about 1790 to about 1840 and consisted of religious revivals across the nation where people would gather to hear religious discussions and the leaders of the revivals, called revivalists, would seek to awaken (or reawaken) the religious desire in their listeners. This period saw the founding of several new religions, including the Church of Latter-day Saints (Mormons), as well as several religious communities, including that of the Shakers.

Secular humanism A philosophy that relies solely on values advanced by human philosophers without bringing in any elements of a divine presence or anything related to the supernatural. When used in the area of

religion and the law, it often actively denies the existence of any god. Those who favor the presence of religion in school argue that the schools, rather than merely ignoring religion, are promoting secular humanism raised to the level of a religion and thus are promoting a religion. As schools are now promoting a religion, the argument continues, schools should be allowed to promote one of the more traditional religions, including the one favored by the argument maker.

Separationist A view of the First Amendment suggesting that the court should generally keep religion and state separate. This is in opposition to the accommodationist view.

Stare decisis A legal concept meaning that precedents should generally stand and be followed until there are good reasons to overturn them. The term technically translates as "decided matters." In order to have stability, decisions that are made should be expected to remain the same until it is in the interest of justice to overturn them. This does not mean that all legal matters have stood once one case on an issue has been heard, but if two cases are identical, the first should rule until the interests of justice require it to be overturned.

Strict scrutiny test A test meaning that the courts are going to examine closely every element of the case to make sure the government has met its burden. In the area of religion, this test is often used with the *Sherbert* test, which holds that the government needs to demonstrate a compelling government interest and that the act in question is needed to advance that interest and both of these areas will be closely examined under this test.

Supreme Court of the United States The Court, now composed of nine judges, that sits in Washington, D.C., and has the final word on the constitutionality of U.S. laws and on the correctness of lower court decisions, both state and federal. It was originally composed of six members, and Congress can raise or lower the number of Supreme Court justices at will, but the number has been nine ever since 1869. Any lower federal court decision can be appealed, eventually, to the Supreme Court, but the Court does not have to hear the case. State court decisions can be appealed when the U.S. Constitution is involved.

Textualism A view that the text of the Constitution should be strictly adhered to, with no room for interpretation.

Undue hardship Any burden placed on someone above what is minimal or absolutely necessary. The term is most commonly used in abortion cases to indicate that the practice is being overly restricted. The term is particularly used in discussions of the burdens and hindrances placed by states on women seeking abortions.

Viewpoint neutral The idea disallowing government regulations that permit nonreligious entities, but not religious ones or only certain religious ones, to discuss a topic. Government regulations, under this idea, can ban certain topics, but must ban the whole topic for all groups, and these bans also come under the scrutiny of the free speech part of the First Amendment as well.

Wall of separation between church and state An idea arising out of an 1802 letter from Thomas Jefferson to several clergymen in Connecticut that said the First Amendment had aimed to create a "wall of separation between church and state." As such a wall is neither directly referred to nor textually obvious from the First Amendment, those people who want a strict separation between church and state use this letter as evidence for their position. Similarly, those who want some level of government involvement in religion try to downplay the letter as evidence.

***Yoder* test** A test growing out of the *Wisconsin* v. *Yoder* decision, which excused Amish children from attending school beyond the eighth grade, as the Supreme Court held that forcing them to continue would violate their religion. The ensuing test holds that for children to be excused from school on religious grounds (and not have to attend an alternative school or be home schooled), their beliefs must be sincere, school attendance must violate their religion, and the state's interest in education must not outweigh the parents' interests.

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