A Survey of Religious Liberties in the United States

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A Survey of Religious Liberty in the United States

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This is a brief survey of a large field. I have attempted to summarize the current law of religious liberty and how it developed. I hope that scholars in the field will find some new insights, but I am also writing for students and nonspecialists who need a thorough overview.

Professor Kurland completed the last such survey in 1961.1 Much of the law of conscientious objection, much of the law of government aid to church schools, and virtually all the law of school prayer is more recent than that. Expanding church activities have collided with expanding government regulation, producing new issues of church autonomy. Another wave of new and unpopular religions has renewed controversy over limits on the right to proselytize. Politically active fundamentalists have steadily attacked the Supreme Court's establishment clause jurisprudence, and a new generation of scholars has attacked the historical foundations of that jurisprudence. The Reagan Administration has endorsed these attacks with gusto. The cumulative result is that the Supreme Court now is deciding several religious liberty cases each Term, and the great bulk of its religious liberty cases have been decided since 1961. Every time I teach my seminar on religious liberty, I am struck by the lack of any introductory overview to assign or recommend to students. This is an attempt to fill that gap.

Unlike Professor Kurland, I offer no single theory to answer all religious liberty questions.2 I begin with a strong commitment to religious liberty and a belief that constitutional text should be mined for all the meaning it can yield.3 It follows that I take the free exercise and establishment clauses with equal seriousness, and I therefore believe that government neutrality towards religion is a good first approximation for the meaning of the two clauses.4 But neutrality is not self-defining, and to work out the detailed applications of those clauses is a complex task.

I do provide an analytic framework for each major issue or group of decisions. Sometimes my analytic framework closely tracks the Supreme Court's own expla-
nations of its work. On other issues, when the Court’s decisions do not fit together well, my analytic framework is largely independent of anything the Court actually has said. I hope that these analytic frameworks will be useful even after the decisions discussed here are superseded by subsequent decisions.

Parts I and II carry the story up to 1963, with topics arranged in roughly chronological order. Part III reviews developments since 1963 in much greater detail and is organized topically.

I. ORIGINS

By the end of the Revolution, Americans were approaching consensus in support of religious toleration. There was also substantial support for disestablishment, but that was more controversial, and some states still had formally established churches. Several state constitutions written in the revolutionary and immediate post-revolutionary period contained bills of rights that guaranteed free exercise, nonestablishment, or both.5

A. The Debates in Virginia

The most significant developments prior to the Federal constitution occurred in Virginia, where disestablishment of the Anglican church was a recurring legislative issue from 1776 to 1786.6 James Madison and Thomas Jefferson were the most prominent proponents of disestablishment. In the winter of 1785–86, after Jefferson became the American ambassador to France, Madison won a complete victory. Three years later, in 1789, Madison was the principal drafter and sponsor of the religion clauses of the first amendment. Thus, the Supreme Court has often looked to Madison’s views, as expressed in the debates in Virginia, to inform its understanding of those clauses, particularly the establishment clause. Therefore, a brief review of the dispute in Virginia is necessary.

Before 1777, all Virginians were taxed to support Anglican ministers’ salaries, although only half the population was Anglican. In 1776 the legislature voted to suspend the tax. Subsequent debates centered on bills to reinstate it. In 1784, establishment supporters introduced a bill that was not limited to Anglicans. It would have imposed a tax to support all Christian ministers, and it would have allowed each taxpayer to designate the church that would receive his tax. This approach won support from some non-Anglican denominations, and the bill passed second reading in the fall.

Madison was able to delay the bill’s final consideration until the new legislature convened in the fall of 1785. In the meantime, he published his Memorial and Remonstrance Against Religious Assessments,7 articulating his argument against any

5. For a generally excellent overview of the colonial and constitution-making periods, see T. Curey, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986).
6. These developments are reviewed in detail in T. Beekley, Church and State in Revolutionary Virginia, 1776–1787 (1977).
form of establishment. Many other petitions also opposed the bill, and all the large non-Anglican denominations now opposed it. When the legislature reconvened, the bill to tax for the support of ministers died without a vote. In its place, the legislature enacted the Bill for Establishing Religious Freedom—first introduced by Thomas Jefferson in 1779 and unsuccessfully introduced in each intervening legislature. The Bill for Establishing Religious Freedom enacted both free exercise and disestablishment in Virginia.

B. The Framing of the First Amendment

In contrast to the lengthy battle in Virginia, the debates about religion during the drafting of the federal constitution were brief and uninformative. The Constitution was proposed in 1787 without a bill of rights. The only religious reference was the test oath clause: "No religious Test shall ever be required as a Qualification to any Office of public Trust under the United States." 8

The lack of a bill of rights was a principal source of opposition to the proposed Constitution. Some of the Constitution's supporters promised to add a bill of rights by amendment. By July of 1788 eleven states had ratified the new Constitution, but five had appended requests for amendments to their ratifications. Three of the five proposed freedom of religion clauses.

The First Congress was elected that fall and met for the first time in the spring of 1789. Madison promptly moved to consolidate support for the new Constitution by proposing the promised amendments. The religion clauses were included in what became the first amendment. The clauses went through several drafts, with little or no explanation for various wording changes. Some of the changes appear to have been matters of style without substantive significance. Others reflected infighting between federalists and antifederalists about whether the new government was a nation or a federation. But some reflect clear differences in meaning, and it is possible to draw inferences about the drafters' intent by analyzing the versions that were rejected.

Some supporters of government aid to religion argue that the Supreme Court's decisions interpreting the establishment clause are fundamentally wrong. In the view of these critics the establishment clause had a narrow and specific purpose: to prevent government from favoring one religion over another, while permitting non-preferential government support for religion generally. 9 A lawyer trying to draft that view of the establishment clause might write something like this: "Congress shall make no law establishing one Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."

8. U.S. CONST. art. VI, cl. 3.
In fact, that is exactly how it was written in 1789 by members of the First Senate. The Senate tentatively adopted that version on September 3. But later in the day the Senators thought better of it and adopted a draft that spoke of religion generically: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof."\(^{11}\)

The Senate rejected two other drafts that were unambiguously limited to preferential aid.\(^{12}\) But on September 9 the Senate changed its mind again and adopted the narrowest version of the establishment clause considered by either House: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."\(^{13}\)

The House rejected that version. It appointed Madison and two others to a conference committee\(^{14}\) that produced the version ultimately ratified as the first two clauses of the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."\(^{15}\)

The amendment actually adopted is one of the broadest versions considered by either House. It speaks generically of "religion," not "a religion," "a national religion," "one sect or society," or "any particular denomination of religion," another phrase appearing in a rejected Senate draft. Read in light of the alternatives that Congress considered and rejected, the textual inference is plain. The language rejected would have permitted government to support religion generically while trying to be neutral among religions; the adopted language does not. The adopted language appears to require the government to be entirely neutral towards religion.

The legislative history does not add much to our understanding. The Senate met in secret and its debates were not recorded; we have only the Journal entries recording its votes. There was only one recorded debate in the House. There is no verbatim record and the reporter's notes take slightly less than two columns in the Annals of Congress.\(^{16}\) This debate was before any of the events in the Senate and at the very beginning of consideration in the House. The debate concerned a committee draft that was somewhat narrower than the amendment ultimately adopted. The draft provided: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."\(^{17}\)

In debate, Mr. Sylvester expressed concern that the amendment "might have a tendency to abolish religion altogether."\(^{18}\) Mr. Huntington feared the amendment would make it impossible for federal courts to enforce state taxes for the support of

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11. Id.
12. Id. at 151. ("Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society." "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.").
13. Id. at 166.
14. Id. at 181.
15. 3 Documentary History of the First Federal Congress of the United States of America at 228 (House Legislative Journal).
17. Id. at 57.
18. Id.
Huntington also hoped the amendment would not "patronize those who professed no religion at all." Madison tried to reassure the doubters by saying the amendment meant that "Congress should not establish a religion, and enforce the legal observation of it by law."21

Some who favor nonpreferential aid to religion have sought support for their position from Madison's brief description of this preliminary draft in the House. But even they concede that the establishment clause means more than he mentioned. If Congress appropriated one million dollars to support the Presbyterian Church (U.S.A.) it would not be enforcing the "observation" of Presbyterianism by law. But the appropriation would be preferential aid, unconstitutional even under the view that nonpreferential aid to religion is permitted. If Madison's statement described the entire meaning of the clause, the Senate draft forbidding uniform "articles of faith or a mode of worship" would have captured the meaning perfectly. But that draft was rejected.

An important new book by Reverend Curry argues that the Framers did not understand the difference between preferential and nonpreferential aid to religion and that their choice among competing drafts of the establishment clause reflected choices about style rather than principle. Curry supports this position with various quotations in which politicians opposed to schemes of nonpreferential aid denounced them as preferential.

My own sense of the evidence is that Curry's examples show only that political rhetoric was as loose then as it is now. The debates in Virginia in 1785–86 focused squarely on the choice between banning all state aid to religion or banning only preferential aid. It is hard to believe the First Congress could not understand that distinction three years later. I see no sufficient reason to presume that the Framers did not understand what they were doing when they repeatedly rejected drafts that would have permitted nonpreferential aid. Rejecting those drafts was consistent with Madison's successful fight against government support for all churches in Virginia three years before. Nothing in the briefly recorded debate is inconsistent with the natural inference that those drafts were rejected because they did not express the intention of a majority of the First Congress.

It is important to understand that Curry's argument does little to support the attack on the Supreme Court decisions that invalidate nonpreferential aid. The Court's critics argue that the Framers specifically intended to permit nonpreferential aid. If they didn't understand the difference between preferential and nonpreferential aid they can hardly have intended to forbid one and permit the other. The most Curry shows is that the choice was left to a later generation. If the Framers did understand the distinction, which seems likely, the clear difference between the draft they

19. Id. at 758.
20. Id.
21. Id.
23. For a more thorough response to Curry, see Laycock, supra note 9, part V.
adopted and the drafts they rejected shows that they intended to forbid both preferential and nonpreferential aid.

C. The Early Practice of the Government

Government practice during the Framers' generation provides another source for understanding the meaning of the religion clauses. The government did things in that period that supported religion. The First Congress appointed chaplains, and even Madison acquiesced. Presidents Washington, Adams, and Madison issued Thanksgiving proclamations, although Madison did so only in time of war and at the request of Congress, and his proclamations merely invited citizens so disposed to unite their prayers on a single day. President Jefferson refused to issue Thanksgiving proclamations, believing them to be an establishment of religion. In retirement, Madison concluded that both the congressional chaplains and the Thanksgiving proclamations had violated the establishment clause.

Congress also subsidized missionary work among the Indians. Even President Jefferson signed a treaty agreeing to provide a church building and a Catholic priest to the Kaskaskia Indians. Those missionaries were expected to provide secular as well as religious teaching, but there is no doubt that religious teaching was an accepted part of their mission. Congress continued to support sectarian education on Indian reservations until 1898. These practices were uncontroversial in a homogeneous Protestant society, and there is little evidence the Framers thought about their relationship to the establishment clause.

D. The Fourteenth Amendment

As originally adopted the religion clauses did not bind the states. The first amendment refers only to Congress. In Barron v. Mayor of Baltimore, the Supreme Court decided that the protections of the whole Bill of Rights were good only against the United States and not against state or local governments. Some states guaranteed free exercise and disestablishment in their own constitutions, but some did not. Formally established churches persisted in Massachusetts and South Carolina until the 1830s. In 1842 the city of New Orleans made it unlawful to expose dead bodies to public view. A Roman Catholic priest was convicted of violating the ordinance when he blessed the deceased at a funeral mass. The Supreme Court upheld his conviction in Permoli v. City of New Orleans. The first amendment applied only to the federal government; Father Permoli had to look to Louisiana law for protection against New Orleans.

At the end of the Civil War Congress proposed and the states ratified the fourteenth amendment. Section 1 of that amendment provides in part as follows:

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24. These events are reviewed in great detail in R. Cord, supra note 9, at 20-80.
25. See Laycock, supra note 9, part VI.
27. 44 U.S. (3 How.) 589 (1845).
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.  

This amendment was intended to do what the Bill of Rights had not done—to give individual citizens federally enforceable constitutional rights against the states. The Supreme Court has held that those rights include all the rights protected against the federal government by the free exercise and establishment clauses. The most plausible way to reach that conclusion would be to say that free exercise and nonestablishment are privileges and immunities protected by the first clause, but that was not the Court's way. It held instead that state actions establishing religion or interfering with its free exercise infringe upon liberty without due process of law.

A persistent minority has criticized the Court's interpretation of the fourteenth amendment. This minority argues that Congress did not intend to change Barron v. Baltimore or Permoli v. New Orleans and that there is still no federal protection against state interference with religious liberty. Edwin Meese, the incumbent Attorney General of the United States, takes this view. It is occasionally claimed that the legislative history of the fourteenth amendment provides absolutely no support for the Court's view. That claim is simply false: On the floor of the Senate, the amendment's principal sponsor said that the privileges and immunities clause would make the Bill of Rights binding on the states. But the legislative history may not be conclusive because there is also conflicting evidence.

What is conclusive, in my view, is the combined effect of the amendment's language, the sponsor's explanation, the lessons of the Civil War, and the resulting understanding of our governmental structure. In 1789 the federal government was new and fearsome; the Framers perceived it as the principal threat to liberty. The Civil War and its aftermath made clear that state governments can be as much a threat to liberty as the federal government. It would be intolerable to allow individual states the choice to respect religious liberty or not; that right must be guaranteed throughout the land and against government intrusion at all levels. It is textually implausible to suggest that free exercise of religion and freedom from establishment are not privileges and immunities of citizens of the United States. Whether the Supreme Court uses the due process clause or the privileges and immunities clause, the result is the same.

Prohibiting state religious establishments presents one question not raised by other liberties now protected against the states. The establishment clause prohibits any law "respecting an establishment of religion" and not merely any law

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30. See J. Ely, Democracy and Distrust 22-30 (1980); Laycock, supra note 3, at 347-49.
31. The most prominent statement of the view that the Bill of Rights does not apply to the states is R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).
32. Meese, Toward a Jurisprudence of Original Intention, 2 Benchmark 1, 4-5 (1986).
34. The legislative history and subsequent debate are briefly reviewed in J. Ely, supra note 30, at 24-30.
“establishing religion.” The chosen language appears to forbid not just formal establishments, but any law tending toward an establishment. But it is likely that this language also had another purpose. Probably one of the original purposes of the establishment clause was to prevent the federal government from interfering with the formal religious establishments that still existed in some states. Thus the establishment clause affirmatively protected state establishments of religion even as it prohibited such action to Congress. This aspect of the clause implemented the 1789 view of federalism, but it cannot survive the 1868 view of federalism. Protecting state establishments would be wholly inconsistent with the premise of the fourteenth amendment—to protect individual rights against state violations. As it applies to the states through the fourteenth amendment, the establishment clause can mean only that the states may not establish religion. It is logically impossible to apply the federalism aspect of the clause to the states.

Whatever the theoretical questions, it is firmly settled in the case law that both free exercise and nonestablishment are protected from violations by state and local governments. The Supreme Court has persistently rejected all attacks on this conclusion. There is no prospect that it will change its mind.

II. DEVELOPMENTS TO 1963

A. The Mormon Cases

The Supreme Court’s first serious encounter with the religion clauses arose out of the nineteenth century persecution of the Mormons. The early Mormons in the east and midwest encountered hostility from both government and private citizens. Their prophet, Joseph Smith, was murdered by a mob while imprisoned in an Illinois jail. In 1847, the Mormons fled to Utah. They hoped that, isolated and surrounded by desert, they would be left alone.

In 1848, the treaty ending the war with Mexico made Utah a territory of the United States, subject to the power of Congress. In the 1860s, Congress enacted a series of laws against polygamy, obviously directed at the Mormons. Reynolds v. United States was a criminal prosecution under those laws. The Supreme Court affirmed Reynolds’ conviction, rejecting his claim that polygamy was an exercise of his religion protected from congressional interference by the first amendment. The

38. Id. at 128.
39. Act of July 1, 1862, 37th Cong., 2d Sess., ch. 126, 12 Stat. 501 (1862). For a variety of reasons, legislation and enforcement did not promptly follow American acquisition of Utah. The Mormons proclaimed the Kingdom of Deseret and did not recognize American authority until threatened with military force in 1858. P. SMITH, THE NATIONS COMES or Age 562-66 (1981). By then, Congressional power to ban polygamy had become entangled in the bitter debate over slavery in the territories. The Republican platform linked slavery and polygamy as “twin relics of barbarism,” asserting Congressional power to ban both in the territories. D. FERREIMACHER, THE DREAD SCOTT CASE 202 (1978). But no polygamy legislation was passed until the representatives of seceding states had withdrawn from Congress. Serious efforts at enforcement then had to await the end of the Civil War.
40. 98 U.S. 145 (1878).
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Court said that the free exercise clause protected his right to believe, but not his right to act on those beliefs.

Unfortunately for the Mormons, the Court would not protect even their right to believe. In Davis v. Beason, the Court upheld an Idaho territorial statute that required all voters to sign an oath swearing that they were not a member of any organization that taught polygamy or celestial marriage. In effect, voters had to swear that they were not Mormons. The law was indistinguishable from Stuart test oaths imposing civil disabilities on English Catholics. In Mormon Church v. United States, the Court also upheld government confiscation of all the church’s property. The religion clauses had failed at their most fundamental task: they had failed to prevent government persecution of a religious minority.

The Court upheld a conviction of a religiously motivated polygamist as recently as 1946. Presumably it would do so today, although the result would be difficult to reconcile with the modern law of conscientious objection and of constitutional protection for autonomy in matters of sex and the family.

Davis v. Beason, the test oath case, was presumably overruled in Torcaso v. Watkins. The Maryland law in Torcaso required all public office holders to swear that they believed in God. Torcaso refused, and the Supreme Court held the requirement unconstitutional. Davis was not mentioned, and it could conceivably be distinguished, but not on any intellectually respectable ground.

B. The Catholic Experience

Roman Catholics have experienced hostility throughout our history, although little important constitutional litigation has resulted. Nineteenth century hostility toward Catholics was partly religious, partly ethnic, and partly hostility to recent immigrants. Catholicism was viewed as a threat to American liberties. The mid-nineteenth century was marked by violence between Protestant and Catholic mobs. Protestant mobs in Philadelphia burned Catholic churches in 1844. The “Know Nothing” party, the political expression of the Protestant nativist movement, was explicitly anti-Catholic and anti-immigrant. It swept elections in eight states in the 1850s.

41. 133 U.S. 333 (1890).
42. Test Act, 1673, 25 Car. II, c. 2.
43. 136 U.S. 1 (1890).
46. The modern law of conscientious objection is reviewed in part III, section A, infra.
47. The right to autonomy in matters of sex and family is developed in such cases as Moore v. City of East Cleveland, 431 U.S. 494 (1977) (upholding the right of cousins to live together with their grandmother); Roe v. Wade, 410 U.S. 113 (1973) (upholding a right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (upholding a right to contraception for unmarried individuals); and Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding a right to contraception for married couples).
49. The Catholic experience in this country is reviewed in A. Stokes, CHURCH AND STATE IN THE UNITED STATES 784-853 (1950).
50. Id. at 830-35.
51. Id. at 836-37.
Catholics also were victimized by a de facto Protestant establishment. When the states began to create public schools in the nineteenth century, many of those schools openly taught Protestant Christianity and read from the King James version of the Bible. The King James version omits some books included in the Catholic canon. Perhaps more important, it is a Protestant translation, and differences in translations were keenly felt. Catholics viewed the public schools and the "Protestant Bible" as a threat to their children's faith and responded by creating their own schools, many more than any other denomination.\(^5\)

Anti-Catholicism did not end with the turn of the century. Oregon banned private schools in the wake of World War I, a move with enormous impact on Catholics. The Oregon law was invalidated in *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*,\(^5\) a case that also involved secular schools and was not decided on religious liberty grounds. A minority of Protestants openly opposed John F. Kennedy in 1960 because of his Catholicism. The 1963 Presbyterian policy statement on church-state relations found it necessary to consider whether Presbyterians should evaluate the "fitness of candidates for public office on the basis of religious affiliation," a roundabout way of asking whether Presbyterians could vote for Catholic candidates.\(^5\) The answer was yes, but with a caveat that Presbyterians should not vote for any candidate who supported government financial aid to religious schools. Thus, that mainstream and generally liberal\(^5\) Protestant denomination had no objection to Catholic candidates in principle, but it encouraged single-issue voting that disqualified most of them in practice.

At approximately the same time, a fundamentalist press published a five-hundred page hate tract proposing that Catholics be barred from teaching in the public schools or holding high public office.\(^5\) The book described Catholicism as a "totalitarian system" that threatened American freedoms and was more dangerous than Communism because "it covers its real nature with a cloak of religion."\(^5\) Justice Douglas quoted this book in a 1971 opinion,\(^5\) and a court of appeals quoted the book again in 1977.\(^5\) The Ku Klux Klan and similar hate groups continue to attack Catholics and Jews as well as blacks.

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52. Id. at 822-25.
53. 268 U.S. 510 (1925).
55. The same policy statement took positions opposing school prayer, *id.* at 6-7, opposing municipal Christmas displays, *id.* at 7-8, opposing censorship of books and movies, *id.* at 13, supporting no-fault divorce, *id.* at 14, opposing special privileges for the clergy, including draft exemption, *id.* at 16-17, and questioning government pay for military chaplains, *id.* at 18.
C. The Jehovah’s Witness Cases and the Right to Proselytize

Like the Mormons, the Jehovah’s Witnesses in the 1930s and 1940s were an intensely unpopular new religion. Their own doctrines were intolerant, especially of Catholics, and they preached those doctrines aggressively. They proselytized on street corners and door-to-door. All over the country, cities tried to stop the Jehovah’s Witnesses from proselytizing. Many cities invoked ordinances requiring a license to solicit. The cities had no intention of granting licenses to Jehovah’s Witnesses. Moreover, the Witnesses conscientiously objected to applying for a license; they thought the state had no right to license religious teaching. The cities tried many other tactics as well, prosecuting Jehovah’s Witnesses under a wide variety of statutes.

The Witnesses aggressively litigated these prosecutions, producing a large number of cases in the Supreme Court. For the most part, the Witnesses won. Many of these cases were decided under the free speech clause instead of the free exercise clause; religious speech is protected by both.60

The Court struck down licensing laws that gave public officials any discretion to decide who could solicit door-to-door and who could not.61 It struck down outright bans on door-to-door distribution of literature.62 It struck down taxes on the sale of Witness literature.63 It struck down bans on the use of loudspeakers.64 It struck down prohibitions on proselytizing or holding religious services in public parks.65 It overturned breach of peace convictions of Witnesses who promulgated anti-Catholic propaganda in a Catholic neighborhood.66

However, the Court upheld some regulation of proselytizing. It affirmed the conviction of a Jehovah’s Witness who cursed a police officer, denying first amendment protection to “fighting words” that tended to provoke an immediate retaliatory response.67 It upheld application of the child labor laws to Witnesses who allowed their children to help distribute religious literature.68 It upheld restrictions on the sound level produced by loudspeakers.69 And it upheld a nondiscriminatory licensing requirement for religious services in public parks.70

Another controversy involving Jehovah’s Witnesses in this period turned on compulsory flag salutes in public schools. The Witnesses believed that saluting the flag and pledging allegiance to it violated the scriptural commandment not to worship graven images. In 1940, the Court held that the free exercise clause did not exempt religiously motivated conscientious objectors from school room flag salutes.71

60. Largent v. Texas, 318 U.S. 418, 422 (1943).
1943, after a change in personnel and some changes of mind, the Court invalidated compulsory flag salutes on free speech grounds. The Court held that no one can be forced to affirm views he does not believe, whether or not the objection is religiously based.\footnote{West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).}

Perhaps the most difficult case in this period was \textit{United States v. Ballard},\footnote{322 U.S. 78 (1944). For an insightful analysis, see Mansfield, \textit{The Religion Clauses of the First Amendment and the Philosophy of the Constitution}, 72 \textit{Cal. L. Rev.} 847, 869–77 (1984).} a criminal prosecution for fraud. The Ballards claimed to have received divine revelations and miraculous powers. Sometimes they claimed to be the reincarnation of Christ, St. Germain, Joan of Arc, George Washington, and other figures. They claimed to have performed miraculous cures. They solicited contributions on the strength of these representations and sold books and records alleged to have supernatural powers. In their own defense, they noted that other religions made similar claims, including Christianity. They argued that if it is legal to solicit money on the strength of ancient miracles, it cannot be illegal to solicit money on the strength of contemporary miracles.

The trial judge instructed the jury not to consider whether the Ballards' claims were true, but to consider only whether the Ballards really believed their own claims. So instructed, the jury found them guilty. The court of appeals reversed, holding that the jury should have been instructed to find whether the claims were true. The Supreme Court reversed again, holding that no secular court could pass on the truth of religious claims. But the Court did not decide whether the trial court had properly instructed the jury to consider whether defendants really believed their own claims. Instead, it sent the case back to the court of appeals for further consideration.

Justices Stone, Roberts, and Frankfurter would have sustained the convictions and the trial court's original instruction. Justice Jackson would have dismissed the prosecution. He thought it impossible to determine whether defendants really believed their claims without determining whether they were true, that literal truth was often not the point of religion, and that such prosecutions could easily degenerate into persecution of minority religions. He "would have done with this business of examining other people's faiths."\footnote{322 U.S. 78, 95.} But he conceded that any immunity from fraud prosecutions was limited to matters of faith; the Ballards could not solicit money to build a church and spend it on high living for themselves.

The underlying issue in \textit{Ballard} remains unresolved. The convictions eventually were reversed on the ground that women had been excluded from the jury,\footnote{Ballard v. United States, 329 U.S. 187 (1946).} and the Court has never decided whether jurors can decide whether religious solicitors really believe their own claims. But Justice Jackson's view seems to have prevailed in practice. Entrepreneurial preachers continue to solicit money and promise miracles, but prosecutions have been rare. Civil fraud suits against the Church of Scientology are the most notable exceptions.\footnote{E.g., Christofferson v. Church of Scientology, 5 Religious Freedom Rep. 126 (Multnomah County Cir. Ct., Or. 1985).}
D. The Beginnings of Establishment Clause Doctrine

1. Financial Aid

The first significant establishment clause case in the Supreme Court was **Bradfield v. Roberts,**
upholding federal payments to a Catholic hospital for the care of indigents. The Court reasoned that the government was entitled to purchase medical care for its wards and that the religion of those who ran the hospital was wholly irrelevant.

In 1908 the Court approved the use of Indian trust funds to support Catholic schools for Sioux Indians. The decision's main premise was that the trust funds belonged to the Indians and were merely managed by the federal government; the Indians were entitled to pick their own schools and teachers. Citing **Bradfield,** the Court also said that the payments clearly were constitutional. The implication seems to be that even government money could have been spent—that when the government purchases services, the religious affiliation of the provider is irrelevant and that educational services are no different than medical services.

The most important establishment clause case is **Everson v. Board of Education,** decided in 1947. A closely divided Court upheld a program under which state-funded buses transported students to their schools. The program covered both public and parochial schools. The majority viewed transportation to schools as a secular public service that the state could provide to all; the dissenters thought the program gave an impermissible state subsidy to religious education.

The holding in **Everson** is still good law. But the case is more important for its general approach. **Everson** was the first case to hold that the establishment clause is binding on the states, and the first case to explore the history of the establishment clause. All nine justices agreed that the establishment clause embodies Madison's approach to disestablishment, and thus all nine agreed that the clause forbids government aid to religion, even though they divided on the application of these principles to the facts in **Everson.** Despite many doctrinal twists and turns, the Court has adhered to those basic principles ever since.

2. Released Time

The next problem before the Court was "released-time" programs: programs under which public schools released students for religious education by their own churches during regular school hours. Students who chose not to participate were not free to leave, but neither could their secular education continue. In 1948, the Court struck down such programs in **Illinois ex rel. McCollum v. Board of Education.** The Court reasoned that the program invoked the power of the truant officer to coerce students to go to church.

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77. 175 U.S. 291 (1899).
The Court’s reasoning would not have invalidated programs known as “dismissed-time,” in which the school let students out early one day each week to accommodate religious instruction. Under dismissed-time programs, students who chose not to participate in religious instruction could go about their business; they would not be detained at school. The sponsors of released-time programs argued that dismissed-time was inadequate because it did not incorporate religious instruction into the children’s regular working day. Their argument made the Court’s point—released-time programs used the coercive power of the compulsory school attendance laws to increase attendance at religious instruction. Released-time plans worked better than dismissed-time plans precisely to the extent that marginal believers or nonbelievers found religious education more attractive than sitting in school with little or nothing to do. Thus, the widespread protest against McCollum largely vindicated the Court’s judgment.

Even so, the Court retreated in Zorach v. Clauson. Zorach was identical to McCollum in every way but one. In McCollum, the ministers came to the school and gave religious instruction on school property; in Zorach, the students were released to go to their separate churches. That had nothing to do with the rationale of McCollum; in each case, students were detained without purpose unless they went to church. But the majority seized on the incidental distinction to rewrite McCollum. The Court said that the only problem in McCollum was that religious instruction took place on public property; released-time programs were permissible if the religious instruction took place on private property.

3. Sunday Closing Laws

In 1961 the Court upheld several states’ Sunday closing laws. The Court reasoned that Sunday closing laws had come to serve secular as well as religious purposes by providing a uniform day of rest when families could be together. It seemed irrelevant to the Court that this purpose coincided with the doctrines of some religions. The Court also held that the Sunday closing laws did not violate the rights of Orthodox Jews whose religion compelled them to close on Saturday as well.

4. School Prayer

The Court had its first encounter with school prayer the following year. The case was Engel v. Vitale. The New York Board of Regents wrote a prayer and recommended its use in every public school classroom in the state. Local school boards adopted the prayer, but individual students who objected to it could be excused from the room while it was recited. The Court noted the inherently coercive

84. 370 U.S. 421 (1962).
effect on religious minorities but insisted that coercion was not essential to its decision. Rather, the Court held that for the state to promulgate and encourage prayer was wholly inconsistent with the establishment clause.

*Engel* produced a storm of public protest, but this time the Court did not back down. It reaffirmed *Engel* in *School District v. Schempp.*85 The establishment clause violations in *Schempp* were even more egregious than in *Engel.* The prayer at issue in *Engel* had been as nonsectarian as the Regents could make it, although it plainly sounded in Judeo-Christian theology and King James syntax. The cases consolidated for decision in *Schempp* involved no nonsectarian pretense. Pennsylvania required all public schools to begin the day by reading ten verses from the Bible; Maryland required them to begin either by reading a chapter from the Bible or by reciting the Lord’s Prayer. Both states distributed the King James version of the Bible to school teachers, but permitted students to bring other versions if they wished. A Jewish theologian testified that the concept of Christ as the Son of God was “practically blasphemous” to Jews and that parts of the New Testament “tended to bring Jews into ridicule [and] scorn.”86

The Court could have summarily held these practices unconstitutional under *Engel.* Instead, it undertook to respond to the protest, explaining once again, in more than a hundred pages of majority and concurring opinions, why states could not conduct religious exercises consistently with the establishment clause. The protesters were unconvinced. The controversy continues to this day, generating unsuccessful efforts to amend the Constitution and attempts to develop a form of school prayer that will pass constitutional muster.

**E. The Beginnings of Modern Conscientious Objection Doctrine**

In the Mormon cases, the Supreme Court had said that the free exercise clause protects only belief and never action. The implication seemed to be that there is no constitutional right to exemption from governmental policies that violate one’s religion. The Jehovah’s Witness cases made some inroads into that view, but all of them could be explained on free speech grounds as well as on free exercise grounds.

The only area in which there was any significant development of conscientious objection law before 1963 was the military draft. That law derived from statute, not from the Constitution. Congress has made some provision for conscientious objectors in each major war. But the provisions were often narrow. The World War I exemption for conscientious objectors was limited to members of historic peace churches.87 The Court saw no problem in this discrimination against conscientious objectors from other religions.88

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86. *Id.* at 209.
The first Supreme Court case squarely requiring a religious exemption from a law of general application was *Sherbert v. Verner*,\(^8^9\) decided in 1963 on the same day as *School District v. Schempp*. Sherbert was a Sabbatarian who lost her job because she refused to work on Saturday. The state held that she had been discharged for cause and refused to pay unemployment compensation. The Supreme Court disagreed. It held that the state could not penalize her religious belief without a compelling reason, and that denying unemployment compensation because she refused to work on Saturday was a penalty.

Justices Harlan and White dissented. They thought the Court established religion by requiring payments to those who refused Saturday work for religious reasons without requiring payments to those who refused Saturday work for secular reasons. The Court rejected that argument in rather conclusory fashion.

Justices Harlan, White, and Stewart also thought the decision was inconsistent with *Braunfeld v. Brown*.\(^9^0\) *Braunfeld* had rejected an Orthodox Jew's request to be exempted from the Sunday closing laws. His religion compelled him to close on Saturday, and he feared that if he also closed on Sunday, eventually he would be forced out of business. The dissenting Justices thought permanent Sunday closing laws imposed a greater burden on Sabbatarians than denying twenty-two weeks of unemployment compensation.

The majority responded that the *Braunfeld* burden was less direct and that the state's interest in denying exemption was much greater. They argued that allowing Sabbatarian merchants to remain open on Sunday might give them such a competitive advantage that it would make Sunday closing laws unworkable. The competitive advantage of an exemption to Sabbatarians would invite spurious claims and encourage conversions to Sabbatarian religions. The majority thought that unemployment compensation benefits presented neither of these problems.

F. The Beginnings of Modern Church Autonomy Doctrine

Submitting internal church disputes to secular courts is another recurring source of religious liberty litigation. The Supreme Court has imposed substantial restrictions on suits of this type.

The first case was *Watson v. Jones*.\(^9^1\) *Watson* arose out of the schism between the northern and southern branches of the Presbyterian church, a schism produced by fundamental disagreement over slavery. The particular dispute in *Watson* was between two factions of the Walnut Street Presbyterian Church in Louisville, Kentucky. One faction adhered to the northern church, one to the southern. Both claimed the Walnut Street church building.

Several members of the northern faction moved to Indiana so they could sue in federal court, invoking the federal court's jurisdiction over suits between citizens of different states. The case was consequently decided as a matter of federal common

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91. 80 U.S. (13 Wall.) 679 (1871).
law, not as a matter of constitutional right. The Court said its decision was "founded in a broad and sound view of the relation of church and state under our system of laws." The Court held that federal courts were bound by the decision of the highest church authority recognized by both sides before the dispute began. It feared that any other rule would involve secular courts in theological controversies.

The Court constitutionalized these principles in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church.* The Court held that the free exercise clause protects the right of churches to resolve disputes internally. The Court reaffirmed this holding in 1960.

### III. DEVELOPMENTS SINCE 1963

By 1963 the Supreme Court had laid the groundwork for its modern religion clause jurisprudence, but it had done little more than that. It had adopted Madison's view of the establishment clause. It had recognized the right to proselytize and at least some right to conscientious objection under the free exercise clause. And it had recognized a right to church autonomy at least with respect to resolving internal church disputes. But except for the right to proselytize, there had been no opportunity to work out the details of any of these rights.

Since 1963 the Court has had many occasions to elaborate on these basic principles. Whole new doctrines have developed, doctrines that could not have been predicted from any materials extant in 1963. The rest of this Article reviews those developments.

#### A. Conscientious Objection

Judicial recognition of the right to conscientious objection to public policy has its roots in the Jehovah's Witness cases of the 1940s. But those cases all involved speech, and they were largely based on the free speech clause. *Sherbert v. Verner,* the 1963 unemployment compensation case, was the first time the Supreme Court clearly held that the free exercise clause protects religiously motivated conduct. *Sherbert* said that the free exercise clause exempts conscientious objectors from government policy unless the government has a "compelling interest" in denying the exemption.

1. **Conscientious Objection to Military Service**

The Vietnam War produced a large number of cases involving conscientious objection to military service. Most conscientious objection claims were based on the Selective Service Act. The Act exempted from the draft any person who, "by reason

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92. This was in the days when federal courts asserted power to declare the general law in diversity cases. See Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
94. 344 U.S. 94 (1952).
of religious training and belief, is conscientiously opposed to participation in war in any form." At the beginning of the Vietnam War the statute defined religious training and belief as follows:

Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views, or a merely personal moral code.

This definition posed problems analogous to those raised by the World War I exemption for members of the historic peace churches. To exempt conscientious objectors only if they held theistic beliefs discriminated against conscientious objectors with less orthodox beliefs. The Court avoided the constitutional problem by construing the definition of religious belief quite broadly, virtually ignoring the reference to a Supreme Being. In United States v. Seeger, the Court exempted conscientious objectors who did not believe in God if their objection was based on a "sincere and meaningful" belief that "occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."

Congress then amended the statute, deleting the reference to a Supreme Being but retaining the requirement of religious training and belief and the exclusion of "essentially political, sociological, or philosophical views, or a merely personal moral code." Even so, in 1970 the Court construed the exemption to cover "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."

Another provision in the statute limited exemption to those who objected to "war in any form." Those who objected to some wars but not all wars were not exempt. Thus, all those who subscribed to just war doctrine were denied exemption, no matter how deeply held their conscientious belief that a particular war was unjust. Just war doctrine has ancient roots; it was elaborated by pre-Reformation theologians, and it is now taught by many mainstream Christian churches.

In Gillette v. United States, the Court upheld the requirement that objectors object to war in any form. The Court rejected challenges under both the establishment and free exercise clauses. It thought that the greater difficulty of adjudicating claims of conscientious objection to particular wars was a compelling interest that justified both the discrimination between religious beliefs and the burden on the selective conscientious objector's exercise of religion.

98. Id. (1964).
2. Other Conscientious Objection Cases

The constitutional law of conscientious objection has continued to develop in contexts other than the military draft. But there are only a few cases at the Supreme Court level and it is hard to generalize about them.\(^{103}\)

The Supreme Court first upheld a conscientious objection challenge to a criminal statute in 1972, in \textit{Wisconsin v. Yoder}.\(^{104}\) Yoder was an Amish father who refused to send his children to public school beyond the eighth grade. Wisconsin prosecuted him under the truancy laws. The Court found that the Amish continued to train the children for life in the Amish community and that the state’s interest in two more years of public education was insufficiently compelling to justify the severe burden on the Amish religion. The Amish feared that their children would abandon the religion completely if they were exposed to the temptations in a public high school. \textit{Yoder} reaffirmed the approach taken in \textit{Sherbert v. Verner} that only state interests “of the highest order” can justify denying a right to conscientious objection. But the Court also emphasized that the balance of government and religious interests in \textit{Yoder} was “close” and that few religions could qualify for the exemption granted to the Amish.

In \textit{Thomas v. Review Board of the Indiana Employment Security Division}, the Court required Indiana to pay unemployment compensation to a Jehovah’s Witness who quit his job in a defense plant for reasons of conscience.\(^{105}\) The Court found it irrelevant that other Witnesses worked in the plant. The test of individual conscience is what the individual believes, not what his denomination believes.

In \textit{United States v. Lee},\(^{106}\) the Court refused to exempt Amish employers from the Social Security tax on their Amish employees, although self-employed Amish are exempted by statute. The Court found the Social Security tax indistinguishable from any other tax and found the government interest in collecting its revenues to be compelling. The Court used the example of war tax resisters to illustrate how unworkable it would be to let people refuse to pay taxes for programs to which they had religiously motivated objection.

The Court also rejected a conscientious objection claim in \textit{Bob Jones University v. United States}.\(^{107}\) The university, on grounds of religious belief, refused to allow interracial dating among its students. The Court held that the government’s interest in eliminating racial discrimination in education substantially outweighed the university’s free exercise rights. Thus, the Court upheld the Internal Revenue Service revocation of Bob Jones’ tax-exempt status.

More recently, in \textit{Jensen v. Quaring}, the Court was presented with a woman’s claim that she conscientiously objected to having her picture on her driver’s

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103. For another review of these cases, see Mansfield, \textit{supra} note 73, at 896–903.
license. Frances Quaring took literally the commandment to make no graven images. The court of appeals held that the Constitution protected her right to a driver's license without a photograph. The Supreme Court was unable to decide the case. Four Justices would have allowed her claim; four would have rejected it; Justice Powell did not participate. That split affirmed the lower court decision in favor of Quaring, but it did not establish a rule for anyone else.

The Court's sharp division continued in the 1985 Term's conscientious objection cases. In Goldman v. Weinberger, the Court refused to invalidate military rules that precluded an Orthodox Jewish officer—a psychiatrist stationed in a state-side hospital—from wearing his yamulke with his uniform. The Court's opinion deferred to the military's asserted need for uniformity for the sake of uniformity, and it was impossible to identify any more substantial interest. The case may be of little precedential value outside the military. But the government's brief and three concurring justices took the possibly broader ground that yamulkes could not be distinguished from turbans, saffron robes, and dreadlocks without invidiously discriminating among minority religions. These justices were unwilling to draw such lines, and they were unwilling to exempt all religious garments. They did not explain why the lines they refused to draw among minority religious practices were more objectionable than the line the military had already drawn between majority and minority religious practice. There were four dissents.

Bowen v. Roy involved an applicant for welfare benefits who conscientiously refused to request or provide a social security number. Three justices thought it important that the government merely withheld welfare benefits and did not impose criminal penalties on individuals without social security numbers. They would uphold a statute denying benefits without any effort to accommodate conscientious objectors if the rule is facially neutral, is not motivated by any intent to discriminate on religious grounds, and is "a reasonable means of promoting a legitimate public interest." The statute requiring social security numbers easily passed that deferential test. They distinguished application of the compelling state interest test in earlier public benefit cases on the ground that the statutes in those cases provided for individualized determinations of eligibility and the Social Security Act did not. Much of this analysis was derived from the government's brief.

The Court's judgment was simply to vacate and remand for further proceedings. The lead opinion represented neither a majority nor a plurality, and five
justices rejected its proposed test.\textsuperscript{117} These five failed to write an opinion for the Court because Justice Blackmun thought the case was probably moot and announced his view of the merits only in dictum, and Justice White refused to join Justice O'Connor's opinion for the other three.\textsuperscript{118} If the trial court's findings on remand persuade Blackmun that the case is not moot, there appear to be five votes to apply the compelling interest test and invalidate the requirement that conscientious objectors personally apply for and use their social security number.

3. The Current Status of Conscientious Objection

Collectively, these cases reveal judicial ambivalence about a constitutional right to conscientious objection. Conscientious objectors won in \textit{Sherbert}, \textit{Yoder}, and \textit{Thomas}; they lost in \textit{Gillette}, \textit{Lee}, \textit{Bob Jones}, and \textit{Goldman}; \textit{Bowen} remains unsettled. One way to reconcile these cases is to note that conscientious objectors to state statutes have won; conscientious objectors to federal statutes have lost, although \textit{Bowen} may eventually break that pattern. The Court is generally more deferential to federal statutes, but that cannot be the whole explanation.

Another way to reconcile most of the cases is to say that the government's interests in raising armies in \textit{Gillette}, in collecting taxes in \textit{Lee}, and in racial integration in \textit{Bob Jones}, are more compelling than its interests in preserving unemployment compensation funds or forcing Amish children to get two more years of formal education. But that formulation conceals a deeper difference in the cases. The Court has defined the government interests at inconsistent levels of generality.

The state interest in educating children is surely compelling, but that is not how the Court posed the question in \textit{Yoder}. Rather, it assessed the state's interest in requiring ninth and tenth grade for Amish children who would reside in an agricultural community that eschewed modern technology and trained its own youth in skills important to that community. The comparable formulation in \textit{Bob Jones} would not be the interest in eliminating racial discrimination in education, but rather the interest in protecting interracial dating among students at a small, private, and pervasively religious school that restricted student conduct in many other ways. The comparable formulation in \textit{Lee} would not be the interest in collecting taxes, but the interest in collecting social security taxes for Amish employees of Amish employers, all of whom lived in a tight-knit community that, as a matter of religious belief, took care of its own needy members. A broad or narrow formulation of the governmental interest virtually determines the result.

The appearance of inconsistency is reinforced by the Court's continued citation of pre-1963 cases that rejected conscientious objection claims without applying the

\textsuperscript{117} \textit{id.} at 2160 (Blackmun, J., concurring in part); \textit{id.} at 2165–69 (O'Connor, J., joined by Brennan and Marshall, JJs, dissenting in part); \textit{id.} at 2169 (White, J., dissenting).

\textsuperscript{118} Justice Stevens also thought the case was probably moot. \textit{id.} at 2161–64 (Stevens, J., concurring in part). He expressed no view on the merits, but his announced view is that almost no conscientious objection claims should be recognized. United States v. Lee, 455 U.S. 252, 261–64 (1984) (Stevens, J., concurring); see also \textit{Goldman v. Weinberger}, 106 S. Ct. 1310, 1314–16 (1986) (Stevens, J., concurring).
compelling government interest standard. These include *Braunfeld v. Brown*,\(^{119}\) allowing states to enforce Sunday closing laws against Sabbatarian merchants, *Prince v. Massachusetts*,\(^{120}\) enforcing child labor laws against a Jehovah's Witness whose niece helped her sell religious literature, and *Reynolds v. United States*,\(^{121}\) enforcing polygamy laws against a Mormon polygamist. The Court explicitly refused to apply the compelling interest test to the military in *Goldman*;\(^{122}\) three justices would not have applied it to government benefit programs in *Bowen*;\(^{123}\) and Justice Stevens would not apply it at all.\(^{124}\)

Professors Freed and Polsby have suggested another consideration that might reconcile the modern conscientious objection cases.\(^{125}\) Recognizing conscientious objection in *Gillette, Lee*, or *Bob Jones* might invite large numbers of false claims from those who fear combat, begrudge taxes, or hate racial minorities. Such persons might see much personal gain and no cost in exemption from a burdensome legal duty. A court or an agency would have to determine the sincerity of each claim, trying to separate the true conscientious objectors from the opportunists. These determinations would be difficult; in large numbers they could be extraordinarily burdensome. Certainly this was the experience with thousands of statutory conscientious objection hearings during the Vietnam War. Freed and Polsby suggest that avoiding such hearings is sometimes a substantial reason to refuse to recognize a right to conscientious objection. They might have said that the government interest in avoiding these hearings is compelling, but they avoid using the phrase.\(^{126}\)

This problem is absent, or at least greatly attenuated, in *Sherbert, Thomas*, and *Yoder*. Sherbert and Thomas lost their jobs; Yoder gave up free public education for his children. Unemployment compensation would be only a temporary and partial substitute for Sherbert and Thomas; immunity from truancy prosecutions would offset none of Yoder's loss. Each claimant bore substantial costs even after his claim of conscientious objection was allowed. Those costs provide a substantial check on the claimant's sincerity, greatly reducing the number of claims and the state's need to litigate the sincerity of those claims that are filed. Perhaps this difference in the temptation to false claims explains the cases, although the Court has not focused on that. There is little temptation to abuse in *Goldman* and *Bowen*, but *Goldman* may be explained as a military case, and the conscientious objector may yet prevail in *Bowen*.

Freed and Polsby suggested the explanation, but they do not think it quite fits the cases. They see substantial risk of false claims in *Sherbert* and *Thomas*. Many people would like to quit their jobs, and unemployment compensation can help cushion the blow.\(^{127}\)

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120. 321 U.S. 158 (1944).
121. 98 U.S. 145 (1878).
126. Id. at 23.
127. Id. at 30.
None of these theories can explain four votes to require pictures on driver's licenses in *Jensen v. Quaring*. The state's interest in pictures on driver's license is largely a matter of administrative convenience. There is no economic or other self-interested incentive to falsely claim conscientious objection to driver's license photographs. If the right to conscientious objection amounts to anything, *Jensen v. Quaring* should have been an easy case. But the Court could not decide it.

The United States filed an amicus brief in *Jensen*, arguing that the government's interest should be measured by the cost of removing pictures from the licenses of all the drivers in the state and not by the much smaller cost of exempting conscientious objectors. Under that standard, few claims of conscientious objection would ever be allowed. The government took a similar position in *Bowen*, and in *Goldman* it argued that the claim should be measured by the disruptive impact of saffron robes instead of the yamulke at issue.

These government briefs cast important light on the Reagan Administration position. It has been quite vocal in its minimalist view of the establishment clause. But in these cases it took an equally minimalist view of the free exercise clause. Its position in these briefs is not proreligion, but simply statist. The Administration does not believe that minorities should have many rights that are judicially enforceable against majorities.

4. Exempting Conscientious Objectors as Discrimination Against Others

The problem of fairness to others has troubled the Court ever since it worried that exempting Sabbatarian merchants from the Sunday closing laws would give them an unfair advantage over other merchants. Any exemption for conscientious objectors can be viewed as discrimination against people who do not qualify for the exemption. The Court has dismissed the problem in some cases and grappled with it in others.

There are two quite different aspects to the discrimination problem. One issue is whether the state can exempt some conscientious objectors and not others. Surely the state can not explicitly exempt conscientious objectors from some denominations and

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129. Id., Brief for the United States as Amicus Curiae 3, 5-6.
130. Brief for the Appellants 35.
131. See *Goldman v. Weinberger*, 106 S. Ct. 1310, 1315 (Stevens, J., concurring); *id.* at 1319 (Brennan, J., dissenting).
132. Some of the government's positions may have been dictated by the Justice Department's duty to defend its clients in the other agencies. The United States did not oppose the free exercise claim in *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 2718 (1986).
exclude conscientious objectors from other denominations, as in the World War I draft statute that exempted members of the historic peace churches. But in 1971 the Court did permit Congress to exempt objectors to all wars without exempting objectors to unjust wars.

A variation on the problem of equal treatment of conscientious objectors is whether the state can grant exemption to objectors whose claims are based in religion and deny exemption to those whose claims are based in secular moral philosophy. It was to avoid that problem in the Vietnam draft cases that the Court interpreted the requirement of religious training and belief in a way quite different from what Congress intended.

The second aspect of the problem is that any conscientious objector exemption appears to discriminate against those who are burdened by the state’s policy or who object to it for reasons unrelated to conscience. The problem of the merchants closed on Sunday is just one example. If Sabbatarian airline clerks are given Saturdays off, other workers who would like to spend Saturday with their families will be unable to do so. If ten thousand conscientious objectors are exempt from the military draft, ten thousand others must serve in their place. Some of the substitutes may be killed. In a sense, these other workers and other draftees are discriminated against because of their religion. If only they would adopt religious beliefs that made them conscientious objectors, they too would be exempt from the draft and from working on Saturday.

The Court acted on these concerns in Estate of Thornton v. Calder, Inc. A Connecticut statute allowed every employee to designate his Sabbath and refuse to work on that day. An employee designating a Sabbath did not have to claim that his conscience compelled him to abstain from work. In a narrow opinion, the Court held that the statute supported religion by granting an absolute preference for religious interests over the competing interests of employers and fellow employees. Consequently, the statute violated the establishment clause.

Thornton was an extreme case that highlights the problem. It does not follow that conscientious objectors can never be exempted from governmentally imposed requirements, even if the result is to shift the burden of the requirement to someone else. Professors Galanter and Pepper have each offered an explanation for the Court’s intuitive judgment that most exemptions for conscientious objectors do not impermissibly discriminate against others. They independently argue that exemption for conscientious objectors assures that religious minorities will be treated equally with adherents of mainstream religions. The political process provides substantial protec-

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135. See supra note 87 and accompanying text.
138. This was the problem in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), a case decided under the religious discrimination provision of the Civil Rights Act of 1964. On those facts, the Court rejected Hardison’s claim that requiring him to work on his Sabbath violated the statute.
139. 105 S. Ct. 2914 (1985). For a criticism of the case, see McConnell, supra note 134, at 50–58.
tion against government policies that violate the consciences of large numbers of believers in mainstream religions. Democratic governments do not feel free to trample on conscience when more than small numbers of idiosyncratic believers are affected. Thus, Galanter and Pepper argue, constitutionally mandated exemption for conscientious objectors redresses a form of discrimination: it gives small numbers of idiosyncratic believers the same protection that the political process affords to large numbers of mainstream believers.

It is also important to note that not every exemption for conscientious objectors shifts a burden to someone else. If Frances Quaring is issued a driver’s license without a picture, no one else has to carry two pictures to make up for her exemption. Merchants who are afraid to take her checks can refuse to take them; the inconvenience will fall on her. In this fairly common kind of conscientious objection case, fairness to others is not seriously at issue.141

B. Church Autonomy

The extent to which the Constitution protects church autonomy is an increasingly important issue. Church autonomy claims are distinct from conscientious objection claims. If a church entity conscientiously objects to some requirement placed on it by the government, the church entity will be protected under the same standards that would apply to an individual conscientious objector.142 But, more often, churches object to government interference not on grounds of conscience, but on the ground that the government is interfering with the church’s control of its own affairs. Such claims arise in many forms; I will refer to them collectively as church autonomy claims.

I have argued elsewhere that the right to church autonomy is guaranteed by the free exercise clause, because interference with church autonomy hampers the exercise of religion.143 Professor Esbeck has argued that church autonomy is part of the structural relationship between church and state guaranteed by the establishment clause.144 The courts have protected church autonomy sporadically; the right is well established only in certain contexts.

1. Internal Church Disputes

Unfortunately, churches and their members continue to take internal disputes to the secular courts. Most of these cases involve disputes over the right to a church building claimed by a denomination and also by a local church, or claimed by two factions within a local church. Sometimes they involve even more sensitive

141. This distinction is developed in Laycock, General Theory, supra note 4, at 1416.
142. Examples are Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (1985), and Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980), each holding that a church that believed homosexuality was a sin could not be liable for discharging homosexual employees.
143. Laycock, General Theory, supra note 4.
questions. For example, in 1975 the Illinois Supreme Court undertook to decide which of two competing claimants should be the North American Bishop of the Serbian Eastern Orthodox Church.  

By 1963 the Supreme Court had apparently constitutionalized the rule that secular courts faced with internal church disputes were bound by the decision of the highest church authority to consider the matter. However, subsequent decisions, less protective of the autonomy of churches, have created a choice of rules. Secular courts may defer to the highest church authority if they choose. Or, they may decide the case themselves, construing deeds, contracts, and church constitutions under "neutral principles of law." "Neutral principles" must treat these church documents as ordinary legal instruments, construing them without regard to religious doctrine. The Court continues to hold that secular courts are constitutionally forbidden to resolve questions of religious doctrine. It has forbidden the once widespread rule that disputed church property should be awarded to the faction that, in the view of the secular court, adhered to the original teaching of the church.

Proponents of the neutral principles rule argue that it gives churches freedom to structure their relationships in a variety of ways; local churches can affiliate with a hierarchical church without being subject to unreviewable decisions by the hierarchical tribunals. Opponents respond that this freedom of contract protection for churches is of little value because there are hardly any occasions on which affiliating churches might want their future decisions reviewed by secular courts. But, they argue, the neutral principles approach does substantial harm because it authorizes secular courts to review the decision of church authorities in every internal church dispute.

So far, the Supreme Court has permitted the neutral principles approach only in church property disputes. In Serbian Eastern Orthodox Diocese v. Milivojevich, the Court required deference to the highest church tribunal. Serbian Diocese involved two internal church questions, neither of which was characterized as a property dispute. One was which of two competing claimants should be the Bishop. The other was whether North America should be one diocese or three.

148. For an apparent defense of that rule, and an argument against both of the alternatives permitted by the Court, see Mansfield, supra note 73, at 858-68.
150. See Laycock, General Theory, supra note 4, at 1403-05. This point was made much more forcefully by the church officials with whom I worked in my consultations with the Presbyterian Church (U.S.A.). They report that it is quite rare for independent local churches to affiliate with national denominations. In the great bulk of cases, the national denomination creates the local church and subsidizes it until it can become self-supporting.
2. The Entanglement Precedents

The Supreme Court's entanglement doctrine also suggests constitutional protection for church autonomy. The Court has repeatedly said that a major purpose of the religion clauses was to prevent excessive entanglement between church and state. But "entanglement" has been a vague term with changeable meaning.\(^{152}\) Sometimes it seems to mean contact, or the opposite of separation. Sometimes it seems to mean church regulation. Sometimes it seems to mean government surveillance of churches.

A restriction on entanglement in any of these senses supports a right to church autonomy. But that implication has not been developed. The entanglement doctrine has mainly been developed in cases on financial aid to religious institutions. In that context, entanglement doctrine is not used to protect resisting churches from government interference, but to forbid certain kinds of government aid to church institutions. The litigants complaining about entanglement are not churches, but organizations defending a no-aid-of-any-kind view of the establishment clause.

One cannot confidently predict that the Court will use the entanglement doctrine to protect churches from objectionable government regulation. But the doctrine is well established in the financial aid cases, and it is even more appropriate in cases that do not involve financial aid. It cannot fairly or logically be that churches are protected from entanglement when the government wants to help, but not when the government wants to regulate. The Supreme Court implicitly recognized as much in two cases in which religious organizations challenged government regulation as an excessive entanglement.\(^{153}\) The Court decided each case on the merits, without raising any questions about standing or the relevance of entanglement doctrine.

3. Government Regulation of Churches

Government regulatory agencies have been increasingly unwilling to exempt church activities from the scope of regulation and churches have been increasingly unwilling to submit to burdensome regulations. The result has been a series of clashes over the right of churches to be exempted from regulation. Some of these cases involve claims of conscientious objection, but more often the church is claiming a right to autonomy.

The case most squarely presenting an autonomy claim in the Supreme Court is NLRB v. Catholic Bishop.\(^{154}\) Catholic Bishop involved the attempt to form a teacher's union in Roman Catholic schools in the Archdiocese of Chicago. It was one of many similar cases in Catholic dioceses around the country. The church claimed exemption from the National Labor Relations Act. This claim was not based on conscientious objection, because Catholic doctrine has long affirmed the moral right of workers to organize.\(^{155}\) Rather, the claim was based on a right to church autonomy. Catholic

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152. For a review of the Court's many uses of the term, see Laycock, General Theory, supra note 4, at 1392–93.
schools are religious institutions and the church asserted its right to control them. It refused to share control with a government agency, the National Labor Relations Board, or with a secular private organization, a union. The Seventh Circuit held that the church schools were constitutionally exempt from the Act.156

The Supreme Court affirmed, but on statutory grounds. The Court found that collective bargaining under the supervision of the Board posed a serious risk of excessive government entanglement with religion. Without resolving the constitutional question, the Court held the Act inapplicable to church schools. It believed that Congress did not intend such an arguably unconstitutional application of the Act. Four dissenterers thought the Act applied, although they agreed that to apply it would raise a serious constitutional question.

The constitutional issue arose again when New York applied its State Labor Relations Act to Catholic schools. In 1985 the Second Circuit upheld the law.157 That court plainly did not take the right to church autonomy seriously. Most of the opinion was devoted to attenuated conscientious objection claims. And the court commented that the Framers were more motivated "to prevent the establishment of an authoritarian state church like, for the example, the Church of England, than with state regulation" of churches.158 Conceding that the Act might chill the narrow free exercise rights acknowledged by the court, the court found a compelling state interest in "the preservation of industrial peace and a sound economic order."159

This is the tactic of asserting the state's interest at the highest level of generality; the court did not explain why the state had any interest at all in industrial peace or economic order inside a religious institution. This opinion also reflects a watering down of the compelling interest test in another way. In 1944, the first time the Supreme Court found a compelling government interest that required it to uphold a statute that infringed what would otherwise have been constitutional rights, it relied on the government's interest in defending against a feared invasion of the Pacific coast.160 That was the only compelling interest the Court found for decades. The Court's critics suggested that it would never find another one.161 But the test has gradually been weakened; every bureaucracy now argues that its program serves a compelling interest. The casual acceptance of that argument in the New York collective bargaining case suggests an increasing danger that any reasonable government program will be held to serve a compelling interest.

The state courts and the lower federal courts have decided many other church autonomy claims. Courts generally have refused to exempt churches from the employment discrimination laws,162 but they have done so with respect to the

156. Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), aff'd on other grounds, 440 U.S. 490 (1979).
157. Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985).
158. Id. at 1170.
159. Id. at 1171.
161. Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting); see Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) ("scrutiny that was "strict" in theory and fatal in fact").
162. EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D.
employment of ministers and in cases where compliance would violate church teachings. There have been dozens of cases in which religious schools challenged state licensing, curriculum, and teacher certification requirements. The regulatory authorities have won most of those cases, but some state supreme courts have protected substantial autonomy rights in religious schools. One state has recognized that burdensome and unnecessary building code enforcement against church schools can violate constitutional rights.

There has also been litigation over government regulation and Internal Revenue Service monitoring of church day care centers, orphanages, social service agencies, and other church agencies. In many of these cases the government argues that the church agency is not performing a religious function because secular agencies could and sometimes do provide similar services. This position implicitly asserts that the government can define the scope of the church’s mission.

C. Proselytizing, Religious Speech, New Religions, and the Right to Conversion

The Jehovah’s Witness cases of the 1940s established that religious speech is constitutionally protected on the same terms as secular speech. The Supreme Court has continued to take that approach. The constitutional equivalence of religious and secular speech was the basis for the Supreme Court’s holding that college students cannot be prevented from discussing religion on campus. Congress and the lower courts have disagreed on whether high school students receive the same protection.
The contemporary equivalent of the Jehovah's Witnesses are the new proselytizing sects, especially the Hare Krishnas. There have been dozens of lower court cases involving the Hare Krishnas' right to solicit in various public places. Only one of these cases has reached the Supreme Court. In *International Society for Krishna Consciousness v. Heffron*, the Court upheld a rule that required solicitors and exhibitors at the state fair to remain in a booth. The Court has always permitted reasonable restrictions on the time, place, and manner of speech when the state's purpose is traffic control or some other legitimate goal unrelated to censorship. The Court thought the booth rule was reasonable in light of the congestion at state fairs.

Reasonable restrictions on speech must be applied in an even handed way. Thus, the Court struck down a charitable solicitation ordinance that applied to some churches but not others; the state is not permitted to discriminate between religions. The scope of permissible nondiscriminatory regulation of charitable solicitation, by churches or secular charities, remains unsettled.

The most serious issues about the new religions have not yet reached the Supreme Court. These issues relate to allegations that some of the new religions convert new adherents by brainwashing, and to efforts by parents and others to forcibly withdraw converts from these religions. Parents have physically abducted adult converts and held them against their will until they agreed to leave their new religion. Other parents have held their adult children under guardianship orders during efforts to turn them away from a new religion. Parents often hire persons who specialize in persuading or coercing abducted converts to renounce their new religion. These persons, who call themselves "deprogrammers," say that some "deprogrammed" converts leave their new religion and express gratitude at being rescued. Others return to their new religion at the first opportunity and sue their parents and the "deprogrammers."

The resulting litigation has produced mixed results. Most appellate courts have recognized the threat to free exercise rights and have been reluctant to legitimize abduction, involuntary "deprogramming," or guardianship orders against adults not proven to be mentally incompetent. But some courts have assumed that brainwashing by religions is a serious threat and have tolerated, or even assisted, parental intervention by force and threats of force. Even in cases where the "deprogrammed" converts won, juries rarely have returned substantial verdicts.

The right to convert to a new religion deserves better protection than this. The right to choose one's own religious beliefs is the very essence of religious liberty. Courts and families might legitimately intervene when a conversion is truly

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involuntary. But the importance of the right to convert, and the likelihood that the
majority’s perceptions of new religions will be distorted by hostility, require a strong
presumption that conversions are voluntary. Such a presumption is not rebutted by
evidence of an intense emotional experience and a sharp break with the past; these
often accompany wholly voluntary religious conversions. Little more than that has
been offered in most of the reported cases. In most of these cases there has been no
evidence that proselytizers for the new religion used physical force, and little
evidence of brainwashing, but there has been largely undisputed evidence of physical
force by the parents and “deprogrammers.”

It is easy to exaggerate the threat posed by new and unorthodox religions, and
fears of exaggerated or imaginary threats can quickly lead to persecution. The history
of the Mormons, Catholics, and Jehovah’s Witnesses illustrates as much. If we are
to avoid repeating those mistakes with today’s new religions, we must insist on clear
proof when the new religions are charged with wrongdoing, and especially clear
proof when the right to religious conversion is at risk.

D. Religious Participation in Public Life

Because religiously motivated speech is protected by the free speech and free
exercise clauses, there can be no doubt that churches and believers are entitled to
participate in political affairs. Those who attack the right of churches to participate
in politics simply misunderstand the first amendment; they have been misled by the
metaphor of separation of church and state. The word “separation” does not appear
in the first amendment. That amendment forbids the state from trying to influence the
church, either by helping (the establishment clause) or hindering (the free exercise
clause). But it does not restrict church efforts to influence the state. Those efforts are
constitutionally protected, just like any other private efforts to influence the state in
a democracy.

The Supreme Court has not equivocated on these points. In 1978 it struck down
a clause of the Tennessee constitution that precluded clergy from serving in the
legislature. In 1961 and again in 1980 it rejected claims that legislation supported
by religious groups violates the establishment clause merely because of its religious
support.

The only serious restriction on the right of churches to participate in political
affairs appears in section 501(c)(3) of the Internal Revenue Code, which limits the
political activities of tax exempt organizations. That statute is discussed in the next
section of this Article.

178. See notes 37–72 and accompanying text.
179. For a vigorous debate on these issues, see Delgado, When Religious Exercise Is Not Free: Deprogramming and
the Constitutional Status of Coercively Induced Belief, 37 Vand. L. Rev. 1071 (1984); Delgado, Religious Totalism:
Gentle and Ungentle Persuasion Under the First Amendment, 51 S. Cal. L. Rev. 1 (1977); Shapiro, Of Robots, Persons,
E. Church Tax Exemption

1. The Right to Exemption

Churches have traditionally been tax exempt, and there has been little constitutional litigation about that exemption. Most litigation is in state courts and involves details of applying the exemption to auxiliary church facilities. There is no decision holding that churches are entitled to a general tax exemption. *Murdock v. Pennsylvania* holds that the state cannot tax religious solicitation. That supports a more general argument that the state cannot tax religious exercise as such. Arguably, it follows that the state cannot tax church property essential to religious exercise. Selling a church sanctuary at a tax foreclosure sale surely raises a serious free exercise issue. But the Court explicitly reserved that issue in *Murdock*.1

There has also been litigation attacking the property tax exemption as an establishment of religion. The Supreme Court dealt with that claim in *Walz v. Tax Commission*, holding that churches constitutionally may be included in a broad tax exemption for charitable organizations generally. Undoubtedly, the Court would decide the same way with respect to the exemption from federal income tax. Exemptions available solely to religion, and not to secular charities, such as the income tax exemption for housing allowances for ministers, would be much harder to defend under the *Walz* rationale.

As a purely political matter it is easy to predict that the Supreme Court would uphold the income tax deduction for gifts to churches. But that opinion would be much harder to write. The deduction resembles the property tax exemption in *Walz* in only one way: it is available to a wide range of charities, many of which are secular. But the deduction for gifts to churches is not a case of the state refraining from taxing the churches. Rather, it reduces the taxes that would otherwise be due on secular income to ordinary taxpayers. Economically, it is very much like a matching grant in the same proportions as the taxpayer's marginal tax bracket.

2. Exemption as a Means of Regulation

The Internal Revenue Service increasingly views tax exemption as a means of regulating tax exempt entities, including churches. In *Bob Jones University v. United States*, for example, the Supreme Court held that tax exempt entities must comply with public policy. The IRS has just given up its long and unsuccessful effort to force church entities providing services that it considers to be secular, such as orphanages and social service agencies, to file informational tax returns.

1. 319 U.S. 105 (1943).
2. Id. at 112.
Undoubtedly the most serious regulatory use of tax exemption is section 501(c)(3) of the Internal Revenue Code. That section provides that tax exempt entities cannot endorse candidates for public office or devote any substantial part of their funds to influencing legislation. The Supreme Court has never passed on the constitutionality of this provision as applied to churches. The Court has upheld the restriction as applied to secular organizations' efforts to educate the public about political issues. Several justices in that case relied on the availability of section 501(c)(4) to save the constitutionality of the restrictions in section 501(c)(3). An organization that wishes to receive tax deductible contributions and also influence legislation or elections can divide itself into two organizations, one created under section 501(c)(3) and one under section 501(c)(4). The (c)(4) affiliate must do all the political work, and contributions to it are not tax deductible. But that is not a viable solution for a church whose religious faith compels it to speak through its religious leaders on the moral aspects of political issues.

F. Religious Expression in Public Places

The Supreme Court has adhered to its decisions in the school prayer cases despite continued political attack. But it has not enforced the principle of those cases in other contexts.

The school cases that have reached the Court since 1963 have involved efforts to attenuate the state's relationship with the prayer or religious observance at issue. Thus, a Kentucky statute provided that if private donors would provide copies of the Ten Commandments, the public schools would post them in classrooms. The Court invalidated the practice under the establishment clause; Kentucky was endorsing the scriptures of a particular religious tradition.

A Louisiana statute authorized school teachers to ask if any student wanted to lead a prayer. If none volunteered, the teacher could lead the prayer, but did not have to. The state argued that this left school prayer to the voluntary actions of teachers and students. But the teacher—the state's employee—plainly was sponsoring the prayer. The court of appeals invalidated the statute, and the Supreme Court summarily affirmed.

Most recently, in Wallace v. Jaffree, the Court invalidated an Alabama statute authorizing teachers to announce "that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer." The Court found that the purpose of the statute was to endorse prayer, a purpose that violates the heart of the establishment clause.

A distinct but related issue is whether schools can accommodate students who wish to pray privately during the school day. In Wallace v. Jaffree, the Court hinted...
broadly that public schools could observe a moment of silence to provide an opportunity for prayer by students so inclined, so long as the state did not encourage or endorse prayer when it announced the moment of silence. A divided panel of the Third Circuit has rejected that reading, holding that any legislative intention to accommodate religion is a religious purpose forbidden by earlier Supreme Court precedents.195

Another way to accommodate those students would be to allow voluntary student prayer groups to meet in classrooms before or after school, on the same basis as other extracurricular groups but without school sponsorship. The Supreme Court approved meetings for college students, holding that the free speech clause requires universities to give student religious organizations the same privileges accorded other student organizations.196 But three courts of appeals have distinguished high school students from college students. Two of the cases held that high school prayer groups are not entitled to meet on campus;197 one held that schools could not permit meetings without violating the establishment clause.198 These courts believed that high school students were impressionable, unaccustomed to academic freedom, and that they would mistake toleration of religious speech on campus for government endorsement of religion. Congress responded to these decisions with the Equal Access Act,199 forbidding schools to discriminate among extracurricular groups. The Supreme Court has failed to resolve the controversy because of standing problems.200

The Court has avoided passing on other common religious observances in the public schools. Baccalaureate services and Christmas assemblies remain common, although they appear irreconcilable with the school prayer decisions. One court of appeals approved Christmas programs with religious symbols and Christmas carols, but it forbade more intensely religious parts of the school’s program, such as a set of questions and answers about the baby Jesus.201

The Supreme Court has permitted state sponsored prayer or religious observance in contexts other than schools. Thus, it allowed states to hire legislative chaplains to open each legislative session with prayer.202 And it permitted a municipal Nativity display that was part of a larger display that included Santa Claus, reindeer, and other nonreligious symbols.203

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The Court made no serious attempt to reconcile its decisions in these cases with those in the school prayer cases. In the legislative prayer case it noted that the First Congress had both proposed the establishment clause and appointed a chaplain; long historical usage suggested that legislative prayer was permissible. In the Nativity display case the Court invoked a variety of rationales, not all of them entirely consistent. It said that the history of legislative chaplains and of Thanksgiving proclamations showed that some government support for religion was permissible. Then it said there could be no single test for deciding what support of religion was permitted and what was forbidden. Then it said that the creche display was not an attempt to express a religious message, but that it “principally” depicted “the historical origins of this traditional event” and that to do so was a “secular purpose.” The Court also seemed to assume that Christmas carols in the public schools were permissible.

G. Government Aid to Religious Schools

Government aid to religious schools has been on the Supreme Court’s docket almost continuously since 1968. The Court has been unwilling either to ban all such aid or to permit all such aid. Instead, it has groped for a compromise formulation that would permit some aid but not too much. At least six inconsistent theories have been endorsed by one or more justices. The majority has switched from one theory to another more than once. At least four of these theories are plausible. The result has been a series of inconsistent and almost inexplicable decisions.

1. The Possible Theories

The no-aid theory. One plausible view is the no-aid theory: that any state money paid to a religious school or its students expands the school’s budget and thereby aids religion. Even if the state’s money is used to buy math books, that frees some of the school’s money to spend on religion, or it enables the school to lower tuition and make it easier for children to attend a religious school. That appears to have been the view of the dissenters in Everson v. Board of Education, the 1947 case upholding public bus transportation to religious schools. The majority saw bus rides as a secular public service; the dissenters thought free bus rides made it easier to attend religious schools. The dissenters’ approach in Everson became the majority’s approach with respect to instructional materials in Wolman v. Walter.

The purchase-of-services theory. A second plausible view is the purchase-of-services theory: that state money paid to a religious school is simply a purchase of educational services. The state is obligated to provide a free education for all its children; it can do so directly or through independent contractors. As long as the state

204. Id. at 673–78.
205. Id. at 678–79.
206. Id. at 680–81.
207. Id. at 686.
does not pay more than the costs of the secular education provided, it is simply paying for services rendered and not subsidizing religion. Thus, to talk about these programs as “aid” is to beg the question.\textsuperscript{210}

The Court applied the purchase-of-services theory to government payments to religious hospitals that cared for indigents in \textit{Bradfield v. Roberts},\textsuperscript{211} an 1899 decision that has never been questioned. The Court appeared to take the same view of payments for Indians’ education in \textit{Quick Bear v. Leupp},\textsuperscript{212} but it has not done so in any of its modern education cases.

\textit{The equal-treatment theory.} A third plausible view is the equal-treatment theory. In its strong form, it holds that the government is obligated to pay for the secular aspects of education in religious schools; in its weak form, it holds that government is free to make such payments if it wishes.

Children have a constitutional right to attend religious schools.\textsuperscript{213} If they do not exercise that right and attend public schools, the state will be required to spend substantial sums on their education. If they do exercise their constitutional right, they forfeit the state subsidy of their education. This can plausibly be viewed as a penalty on the exercise of their constitutional right. Chief Justice Burger took that view with respect to the Court’s holding that the state could not provide on-site remedial and therapeutic services to children in religious schools.\textsuperscript{214}

The equal-treatment theory relies on the principle that government cannot discriminate against religion, which is as basic as the principle that the government cannot support religion.\textsuperscript{215} The discrimination against religion would be clear if any state adopted a voucher plan, issuing education vouchers that could be spent at any public or private school except religious schools. \textit{Witters v. Washington Department of Services for the Blind}\textsuperscript{216} was equally clear. The state provided scholarships for vocational training for the blind, but it refused to let Witters use his scholarship to be trained as a pastor or church youth director. Because he apparently could have used the scholarship to learn any secular occupation, the Supreme Court held that it would not violate the establishment clause to let him use the scholarship for religious training.

The Court has applied the strong form of the equal-treatment theory to religious speech, requiring colleges to allow student prayer groups to meet on campus.\textsuperscript{217} It has applied the weak form of the equal-treatment theory to religious school aid, arguing that the Constitution does not require states to discriminate against children in

\textsuperscript{210} Dean Choper’s view resembles the purchase-of-services theory, although he does not use the phrase. Choper, \textit{The Establishment Clause and Aid to Parochial Schools}, 56 CAL. L. REV. 260 (1968).
\textsuperscript{211} 175 U.S. 291 (1899).
\textsuperscript{212} 210 U.S. 50 (1908).
\textsuperscript{213} Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
\textsuperscript{215} The tension between the two principles is discussed in Johnson, supra note 56, at 822–24; Mansfield, supra note 73, at 879–81.
\textsuperscript{216} 106 S. Ct. 748 (1986).
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religious schools. But in these school aid cases, equal treatment was merely a justification for the state's program; the Court did not suggest that states are required to spend as much money to educate students in religious schools as they spend to educate students in public schools.

The child-benefit theory. A fourth plausible view of the school aid issue is the child-benefit theory: that the state can provide educational benefits directly to children or their parents, even if the benefits are used at or in connection with a religious school. But the state cannot provide the same aid directly to the school. The majority of the Court has relied on the child-benefit theory to uphold bus rides in Everson, textbook loans in Board of Education v. Allen, and state income tax deductions in Mueller v. Allen.

Proponents of the no-aid theory note that aid to a school and aid to the students in that school are economically equivalent: either makes it less expensive for students to attend the school. But others have found it symbolically important that the aid goes to the child rather than to the school. Directing the aid to the child may be seen as a symbolic affirmation of the purchase-of-services or equal-treatment theory, emphasizing that these programs provide education as well as religion. In Witters v. Washington Department of Services for the Blind, the Court said, in the alternative, that the student's independent choice to use his scholarship at a religious school meant that the payment to the school was not state action.

The tracing theory. A fifth view of the school aid issue has attracted the Court, but it is only superficially plausible. Under the tracing theory the Court tries to divide all the activities of a religious school into components that are wholly secular and components that are, or might be, affected by religion. Then it tries to trace each dollar of government money to see what the school spent it on. The Court approves aid if, and only if, the money can be traced to a wholly secular expenditure. This was part of its approach to bus rides in Everson, and to secular textbooks in Board of Education v. Allen. But this approach cannot be applied consistently. The task of dividing school activities into secular and religious components is conceptually impossible; the whole purpose of such schools is to integrate secular and religious education.

In applying the tracing theory, the Court has distinguished primary and secondary education from higher education. The Court has concluded that religious primary and secondary schools are pervasively religious, but that religious colleges and universities are not. Consequently, aid to primary and secondary schools must be traced to uses that cannot possibly be diverted to serve religion. For those schools, the Court assumes that any teacher in any subject might also teach religious values. But

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221. 106 S. Ct. 748, 752–53 (1986).
222. For an analysis and colorable rationales, see Mansfield, supra note 73, at 882–84.
the Court assumes that most instruction at the university level is secular, or at least conducted in an atmosphere of academic freedom. Consequently, aid to colleges and universities is permissible as long as it cannot be diverted to chapel services, explicit religious instruction, and the like.225

The little-bit theory. The Court occasionally alludes to a sixth theory, which may explain more of the Court’s results than the theories it relies on more often.226 This is the theory that a little bit of aid to religious schools is permissible, but it must be structured in a way that keeps it from becoming too much. Indeed, this theory may be generalizable in ways that explain other establishment clause conundrums, such as the Court’s approval of legislative chaplains and municipal Nativity scenes: perhaps, in general, the Court believes that a little bit of government support for religion is unobjectionable.

2. The Court’s Results

It is hardly a surprise that this mix of theories has not produced coherent results. The variety of theories and the attempt to distinguish the indistinguishable in the tracing theory have produced distinctions that do not commend themselves to common sense.

Thus, bus transportation to and from school is permitted,227 but bus transportation on field trips is forbidden.228 Why? Because the teacher might discuss religion on the field trip. Thus, under the tracing theory, the bus ride to school is wholly secular, but the field trip might not be.

The state can loan secular textbooks to students in religious schools,229 but it cannot loan maps, projectors, or other instructional materials.230 The child-benefit theory might have reconciled these holdings, because each child needs his own textbook but only the school needs maps and projectors. But that is not what the Court said. Rather, it decided the first textbook case on a combination of child-benefit and tracing theories; then it decided the instructional materials case on the theory that any aid to the school helps religion. The Court noted that its approach to books was inconsistent with its approach to other instructional materials, but it declined to reconcile the cases.231 Even more strange, in the very opinion in which it adopted the no-aid theory for instructional materials, it used the tracing theory to allow state-administered tests in religious schools.232

The Court also used the tracing theory to hold that guidance counseling, remedial instruction, and other therapeutic services are permissible if provided by

229. Id. at 236-38 (plurality opinion); Meek v. Pittenger, 421 U.S. 349, 359-62 (1975) (plurality opinion); Board of Educ. v. Allen, 392 U.S. 236 (1968).
232. Id. at 238-41.
public school teachers away from the religious school campus, but not if provided by public school teachers on the religious school campus. Why? Because the public school teachers might be influenced by the religious environment and inadvertently discuss religion with their students; that danger is insubstantial away from the religious school. However, diagnostic services are permissible even on the religious school campus because the diagnostician will not spend enough time with any one student to develop a relationship. Without a relationship he is unlikely to talk religion.

Grand Rapids School District v. Ball offered two additional reasons why supplemental public instruction cannot be offered on religious school campuses. First, public instruction at the religious school creates a symbolic union of church and state. Second, in an explicit application of the little-bit theory, the Court said that public instruction might gradually displace the entire secular part of the religious school curriculum, resulting in too much aid.

The tracing theory also produced paradoxical results with respect to teacher salaries and testing expenses. The state cannot pay fifteen percent of the salary of teachers who teach secular subjects in religious schools. It cannot pay religious schools for the cost of conducting state-mandated testing if the religious school teachers design and grade the test. In neither case could the money be traced to wholly secular uses, because the teachers might include religious material in their classes or on the exams, even in secular subjects. But the state is permitted to administer required tests to religious school students and grade the tests itself. State designed and administered tests present no danger of religious content; they are wholly secular.

Does it follow that the state can pay the school to administer objective secular tests designed by the state? The Court said yes. There was no risk of testing religious content, and paying the school to administer the tests was no more a subsidy than having the state administer the tests directly. Either approach relieved the school of the expense. On the same rationale, the state could require religious schools to take attendance and pay for the expense of doing so. In each case the expense consisted of part of the teachers’ time; the state paid as much as 5.4% of faculty payroll under this program. So it turns out that, with enough red tape, the state can pay part of the salaries of teachers in religious schools after all. The state need only identify wholly secular job components and the time required to perform them, and pay the school for that time. This carried the tracing theory to its fictional extreme. And this

233. Id. at 244–48.
241. Id.
242. Id. at 665 (Blackmun, J., dissenting).
decision came after the Court rejected the tracing theory with respect to instructional materials.

In 1983, *Mueller v. Allen* held that state income tax *deductions* for the expenses of sending children to religious schools are permissible. But ten years earlier, *Committee for Public Education and Religious Liberty v. Nyquist* held that state income tax *credits* for the expenses of sending children to religious schools are forbidden. What is the difference? The Court said that the tax credits in *Nyquist* were dovetailed with a scholarship program for low income students, making it clear that the tax credits were themselves a thinly disguised scholarship. In addition, the credit applied to private school tuition only. The tax deduction in *Mueller* also applied to transportation and supply expenses, which could be claimed by parents of public school children, and to tuition payments by the handful of children attending public schools outside their own district.

Those were real differences, but they were not very significant. Again, a theory shift was more important. *Nyquist* was written on the tracing theory, or perhaps on the no-aid theory. Scholarships and tax credits were invalid under either theory because once the students paid the money to the school it went into general revenues and could not be traced. But in *Mueller* the Court emphasized the child-benefit theory and the equal-treatment theory. The Court thought it important that the tax savings went to parents instead of religious schools, and that parents decided independently whether to send their children to public or private schools. The state was not required to discriminate against religion by denying a deduction available to parents of public school children. It was irrelevant that ninety-six percent of the deductions were in fact claimed by parents of children in Catholic and Lutheran schools. This was a break with earlier cases in which the Court had thought it significant that most private schools were religious. *Mueller* obviously rejected the no-aid theory, and did not mention the tracing theory.

Whatever the Court said, a comparison of tax deductions and tax credits suggests consistent application of the little-bit theory. There is no structural limit on a tax credit; a state could allow a credit for 100% of private school tuition. But a deduction can never be worth more than the private school’s tuition multiplied by the state’s marginal tax rate; and most state income tax rates are quite low. This inherent limit on the aid that could be channeled through a tax deduction may have influenced some justices to vote for the *Mueller* result without being committed to new theoretical directions in the opinion.

These tax deduction and tax credit cases also highlight an inconsistency in public perception of the issues, and probably in judicial perception as well. Tax deductions for tuition paid to religious schools are widely perceived as a form of aid that at least raises serious questions under the establishment clause. Yet tax deductions for gifts to the same schools, or to churches themselves for purely religious purposes, are

244. 413 U.S. 756 (1973).
widely perceived as raising no problem. It is hard to believe that both perceptions can be correct. The breadth of the charitable contribution deduction offers weak ground for distinction, because a tuition tax deduction is always a small part of a state’s efforts to finance, encourage, and subsidize education. The long-standing familiarity of the charitable contribution deduction, and the novelty of tuition deductions, explain but do not justify the differences in constitutional perception.

Many commentators thought that Mueller’s approval of tuition tax deductions indicated a substantial shift in direction—that the Burger Court would now allow much more aid. But in 1985, in Grand Rapids v. Ball and Aguilar v. Felton, the Court returned to the tracing theory to strike down supplemental courses in religious schools. The political context highlights the majority’s aversion to substantial aid: Aguilar struck down federally funded remedial instruction for impoverished children. The Court again thought it significant that most private schools receiving the aid were religious schools. If Mueller were intended to be a new beginning, that new beginning was erased in Grand Rapids and Aguilar.

H. The Three-Part Test for Establishment

In 1971 the Court distilled from its earlier cases a three-part test to identify establishment clause violations. The Court said: “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.’”

The Court generally has adhered to this verbal formulation ever since. In cases involving prayer or religious teaching in the public schools, the Court has generally found no secular purpose. In the cases on financial aid to religious institutions, the Court has held that states are pursuing the secular purpose of educating children. But it has generally found a dilemma in the second and third parts of its test. Under the tracing theory, if aid cannot be traced to a wholly secular function it has a primary effect of advancing religion. But if the state imposes substantial controls to insure that the aid is not diverted to religious purposes, that creates too much entanglement between church and state. One way or the other, most aid to religious schools fails the three-part test.

The Court’s three-part test has been subject to intense scholarly criticism.

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246. Federal income tax law makes these contributions deductible from income, 26 U.S.C. § 501(c)(3) (1982), and many state income tax laws incorporate federal deductions.
250. Id. at 3235; 105 S. Ct. at 3223.
Some scholars have argued that the ban on excessive entanglement in the third part of the test, and on effects that inhibit religion in the second part of the test, are free exercise concepts that have nothing to do with the establishment clause.253 The dispute is more than academic. Only the affected churches or believers can sue to prevent inhibition of religion or entanglement with religion under the free exercise clause. But, by making these problems establishment clause violations, the Court permits nonbelievers to file taxpayer suits to save the churches from "inhibition" and "entanglement," whether or not the churches want to be saved.

In addition to this expansion of the usual understanding of establishment, the three-part test has been so elastic in its application that it means everything and nothing. The meaning of entanglement has been especially slippery.254 All of the financial aid cases summarized in the previous section were decided under the three-part test; the Court modified the three parts as necessary to accommodate all the different results and all the different theories. The Court upheld municipal Nativity scenes under the three-part test, finding that depictions of the Holy Family had a secular purpose and effect(!) and did not cause excessive entanglement between government and religion.255 I have described the prayer cases and the financial aid cases, the two pre-eminent establishment clause issues, without ever mentioning the three-part test. I have done so because I think the three-part test does not help explain the Court's results and actually hampers understanding of the real issues.

IV. CONCLUSION

This Article has emphasized the kinds of religious liberty issues that reach the Supreme Court of the United States. Those tend to be the most difficult issues. Some of them are difficult in principle; others are clear in principle but seem difficult when applied to benefit religions that seem strange, unpopular, or threatening, or when applied to the seeming disadvantage of religions that are familiar and comfortable to the majority.

These difficulties demand our sustained attention precisely because they are difficult. But we should not lose sight of the religious liberty issues that are not difficult. Free choice of religious belief is unquestioned in this country. The right to basic religious observance is unquestioned in this country. Religious tolerance and pluralism are our political and societal norm. We do not perfectly achieve that norm, and intolerance has not been eliminated, but it is not respectable and it is often muted. Even those who attempt to forcibly dissuade recent converts to new religions do not claim any right to interfere with free choice of religious belief. Rather, they claim that the original conversion was involuntary and that they are, in fact, protecting the convert's right to free choice. Our societal commitment to religious

254. See Laycock, General Theory, supra note 4, at 1392-94.
freedom is strong enough that no other justification for their activities could even become the subject of debate.

When the Constitution's Framers wrote the religion clauses they hoped to end the history of religious persecution and civil war that had plagued humankind for so long. Their effort has largely, but not perfectly, succeeded. That success is partly a direct result of the rules established by the religion clauses. It is partly the result of the strong societal commitment to tolerance symbolized by those clauses and now shared by most of the major religions in this country.

The constitutional clauses and the societal commitment reinforce each other in important ways. The constitutional guarantee of religious liberty provides a legal mechanism by which any individual who thinks his religious liberty is violated may call the government to account judicially, and a rhetorical mechanism by which he may call the society to account politically. But efforts to invoke the Constitution would ultimately be futile if the society became sufficiently hostile to religious liberty. Once established, religious intolerance tends to be self-sustaining, as illustrated by the cycle of religious violence and counter-violence in Northern Ireland and the Middle East. So every generation must nurture and pass on the commitment to religious liberty. Grappling with the difficult and controversial issues of religious liberty is part of that responsibility.