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THE FLEXIBLE WALL OF SEPARATION BETWEEN CHURCH AND STATE:

A Study of Supreme Court Cases from the Second Half of the Twentieth Century that Significantly Impacted Upon the Privileges and Immunities of American Jews

by

Steven L. Mills

Thesis submitted in partial fulfillment of the requirements for Ordination

Hebrew Union College-Jewish Institute of Religion
1993

Referee, Dr. Jacob Rader Marcus

To Estelle and Rafi

Thank you for always "being there" for me...you are the source of the greatest joy in my life.

TABLE OF CONTENTS

Digest..... 4

Chapter 1: An Historical, Legislative, and Judicial Overview of Church/State Relations Prior to 1953..... 7

Chapter 2: The Warren Court: Decisions in the Extreme..... 26

Chapter 3: The Burger Court: In a State of Flux.... 51

Chapter 4: The Rehnquist Court: A Surprisingly Moderate Court..... 71

Chapter 5: Conclusion..... 89

Bibliography..... 94

Table of Cases Cited..... 98

DIGEST

The primary focus of this thesis is upon how the Supreme Court of the United States has interpreted the Free Exercise and Establishment Clauses of the First Amendment to the Constitution. The First Amendment provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Every case concerning religious freedom must be reviewed in light of these words.

Prior to 1940, the Supreme Court continually held that the religious clauses of the First Amendment were not applicable to the states. However, in 1940, the Court opened the door to covering the states under the First Amendment; it accomplished this by incorporating the First Amendment's protections into the Fourteenth Amendment's Due Process provision. The Due Process Clause forbids states to "...make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The process of using the Fourteenth Amendment to make provisions of the Bill of Rights applicable to the states is known as "selective incorporation."

Earl Warren became Chief Justice of the Supreme Court in 1953, and his Court continued to change the landscape of church/state law through the use of selective incorporation. It created a high wall of separation between church and state in the area of school prayer, as it prohibited schools from opening their days with prayers or biblical readings. Yet, the wall of separation was chipped away at when the Warren Court determined that the states have a compelling interest in making Sunday a day of rest for all people.

The Burger Court is most closely associated with creating a test to determine whether a state action violates the First Amendment's religious clauses. This test, known as the "Lemon Test" (named after the case in which it was set forth), provides that state action must meet the following elements: 1) the primary effect of the action must neither advance nor inhibit religion; 2) the action cannot foster excessive government entanglement with religion; and, 3) the action must have a secular purpose. During the later part of Burger's tenure as Chief Justice, the Court became more conservative and accommodationist in church/state cases.

After Burger retired, the Court continued to accommodate state intrusions into matters of a religious nature. Prior to 1992, many believed that the Court would overturn the Lemon Test; however, in a case decided in the

summer of 1992, the Court specifically refused to overturn the Lemon Test, as it held that clergy could not offer prayers at public secondary school graduation exercises. The majority, led by a moderate-conservative center (Justices O'Connor, Kennedy, and Souter), found the prayers to be coercive in light of the setting in which they were offered. Therefore, this Court now seems to be surprisingly moderate in the area of church/state law.

After all of these years, the wall of separation between church and state still stands firm. Yet, as Supreme Court cases reflect over the past 40 years, the wall of separation is not a stationary structure.

CHAPTER 1

An Historical, Legislative, and Judicial Overview of Church/State Relations Prior to 1953

The First Amendment to the United States Constitution provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This provision calls for government to neither officially sponsor one religion over another nor to interfere with the free exercise by each citizen of his right to practice the religion of his choice. However, the First Amendment did not develop in a vacuum; therefore, it is important to understand a bit about the environment in which the Amendment developed, as this will give one a better grasp on how the Amendment might have been viewed when it was first proposed and adopted.

One might be surprised to learn that the colonies were not as religiously tolerant as might be expected. At the start of the Revolutionary War, nine states had established churches, only Rhode Island, New Jersey, Pennsylvania and Delaware were free from the burden of an established church.[1] Further, it is imperative to remember that the First Amendment to the Bill of Rights was applicable only to the federal government at the time of its adoption in 1791. In other words, the federal government's power was severely

limited in the area of religion, but the states were not burdened with the same limitations on their power. Additionally, six of the original thirteen states would not have entered into the Union had the First Amendment been applicable to the states.[2] As a matter of fact, the last establishment provision was not repealed until 1833 in Massachusettes.[3]

The religious movement known as the Great Awakening spread throughout the colonies before the Revolution. "It placed great emphasis on individual conversion and thus tended to make church membership more a matter of personal decision and less a matter of family inheritance. It also produced church leaders who subsequently urged disestablishment and advocated religious freedom."[4]

While the idea of religious freedom was generally encouraged by the colonies, no colony legally permitted atheism. It was not until the passage in 1786 of the Virginia Charter of Religious Freedom that atheism was legally permitted. This document was a clarion to the development of the First Amendment, as its author, Thomas Jefferson, and its advocate in the Virginia legislature, James Madison, were also instrumental in drafting and lobbying for the passage of the Bill of Rights. Thomas Jefferson offered this bill before the Virginia Assembly in June 1779, and it was not passed by the Assembly until 1785

(it became law on January 16, 1786). The crux of the law provided, "We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[5]

In 1785 James Madison wrote "A Memorial and Remonstrance" in response to a proposal in the Virginia House of Delegates that would have taxed Virginians in order to use the revenue to teach religion; Madison's letter was instrumental in defeating the proposal. He wrote touchingly that, "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[6]

Many in the new nation realized that the Articles of Confederation needed to be revised. In this light, the

Philadelphia Convention was convened in 1787, and a new federal Constitution was framed. James Madison was instrumental in drafting the document, for which he is known as the "Father of the Constitution."[7]

As one can see in the writings of Jefferson and Madison, the Constitution was "...in line with the Enlightenment's ideas of contract theory and of natural law. In accordance with natural law, the framers assumed that the populace already possessed sovereignty and a body of rights."[8] That is one reason the framers of the Constitution spent so little time on the issue of religion. Days after the Constitution began, Charles C. Pinckney submitted a draft which included the following language, "the legislature of the United States shall pass no law on the subject of religion..."[9] This proposal did not pass but later a more limited proposal did pass; it eventually became the last clause of Article VI of the Constitution. Article VI provides, in part, "...no religious test shall ever be required as a qualification to any office or public trust under the United States." At the time of the Revolution, the thirteen colonies had religious tests that reserved public office for Protestants. "With the inclusion of this article [Article VI] in the new Constitution, the delegates took a leap for freedom that catapulted them beyond most of their states...when the Constitutional

Convention met, Jews, Catholics, Unitarians, agnostics, freethinkers and atheists could not hold public office in any state, and in most, could not serve on juries."[10]

The Constitutional ratification process found the Federalists and anti-Federalists debating the implications of the proposed Constitution. Some of the strongest criticism during the entire state ratification process concerned the absence of a bill of rights, which would specifically guarantee religious liberty and other fundamental rights.[11] New Hampshire, Virginia, New York, and North Carolina ratified the Constitution only upon the condition that an amendment guaranteeing religious liberty would be added.[12] At the time of the state ratification process, Thomas Jefferson was a representative of the United States government in France, and he wrote to his friend, James Madison, regarding his particular concerns with respect to the Constitution: "I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion..."[13]

Madison and the Federalists opposed the idea of a bill of rights when the Constitution was created, because they believed that defining civil rights might actually limit them.[14] However, many Federalists, Madison included, suggested that support for a bill of rights might extinguish

the anti-Federalists's best argument against the Constitution.[15] Advocates of the Constitution committed themselves to the adoption of a bill of rights when the new government was established. George Washington, the President of the new nation, realized the desire of citizens toward civil and religious liberty. In his now famous replies to various religious congregations in the United States, he expressed the following to the United Baptist Churches in Virginia (May 1789):

> If I could have entertained the slightest apprehension, that the constitution framed in the convention, where I had the honor to preside, might possibly endanger the religious rights of any ecclesiastical society, certainly I would never have placed my signature to it; and, if I could now conceive that the general government might ever be so administered as to render the liberty of conscience insecure, I beg you will be persuaded, that no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution. For you doubtless remember, that I have often expressed my sentiments, that every man, conducting himself as a good citizen, and being accountable to God alone for his religious opinions, ought to be protected in worshipping the Deity according

to the dictates of his own conscience."[16]

Washington, in his first act as President, called for congressional action on the commitments made in state ratifying conventions. On June 8, 1789, Congressman James Madison submitted amendments to the Constitution.[17] Madison proposed two amendments related to religion[18]; one addressed the proposed nonestablishment of any national church, and the other applied establishment restrictions against the states. The latter proposal was immediately dropped.[19] Madison's initial draft was sent to a special House of Representatives committee, and on August 15, 1789, the committee developed the following language from Madison's draft: "no religion shall be established by law, nor shall the equal rights of conscience be abridged." After much debate on the House floor, the representatives approved an altered version: "Congress shall make no law establishing a religion, or to prevent the free exercise thereof, nor to infringe the rights of conscience." In September 1789, the Senate reviewed the version approved by the House. The Senate's version of the amendment declared: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." Since two different versions of the amendment were adopted, a conference committee was convened to draft a joint resolution; the final language provided: "Congress

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."[20]

One of the most often quoted statements in the area of Church/State separation flowed from the pen of Thomas Jefferson in 1802. In a letter to the Connecticut Baptist Association he wrote, "I contemplate with reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a **wall of separation between church and State** [emphasis added]." The First Amendment to the Constitution set up a "wall of separation" only against the federal government, but this understanding was soon called into question by the Supreme Court. In Fletcher v. Peck, Chief Justice John Marshall seemed to suggest that the provisions of the federal Bill of Rights could be extended to the States when he declared, "The Constitution of the United States contains what may be deemed a Bill of Rights for the people of each state.[21] However, in 1833, Chief Justice Marshall made it clear that the Bill of Rights would not be extended to the states as he said, "These amendments contain no expression indicating an intention to apply them the State governments. This Court cannot so apply them."[22] The non-applicability of the First Amendment to the states remained in effect for nearly 100 years

following the Barron opinion. For example, in Permoli v. First Municipality of New Orleans, the Court decided its first "religious liberty" case. In this case, New Orleans prohibited the display of dead bodies in other than a certain designated church. The plaintiff, Father Permoli, decided to conduct a funeral in which the body of the deceased was displayed in a place other than the one designated by the city. Father Permoli refused to pay the fine and claimed that the city ordinance violated his Free Exercise rights under the First Amendment. The case finally reached the Supreme Court. The Court held that it had no jurisdiction over the case since the First Amendment only applied to the federal government.[23]

A 1878 Supreme Court case had to decide whether the practice of polygamy was protected under the First Amendment for Mormons. George Reynolds, a Mormon and the defendant in Reynolds v. United States, claimed that a law passed by Congress prohibiting plural marriages violated his First Amendment rights. In responding to the case, the Court reviewed how the First Amendment was framed and noted that it recognized Jefferson's "wall of separation" between church and state. The Court held that Congress has no jurisdiction over belief, but the Congress did have a compelling state interest to prohibit the practice of polygamy. In so holding, the Court determined that the

government has a compelling interest in maintaining order and decency.[24] Therefore, Mr. Reynolds has a Constitutionally guaranteed right to believe as he wants, but he does not have the freedom to do anything he wants.

In the mid 1870's, Congressman James G. Blaine introduced an amendment to the Constitution that would have altered and added to the First Amendment as follows:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any state for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted by divided between religious sects or denominations.[25]

The Blaine Amendment overwhelmingly passed the House by a 180 to 7 margin. In the Senate, the Amendment failed to obtain the necessary two-thirds majority, and, thus, the measure died on the Senate floor.[26] However, what the Blaine Amendment expressly tried to do through the amendment process, the Court would do some fifty years later through the Fourteenth Amendment. The Fourteenth Amendment, which unquestionably applies to the states, forbids the states to "...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." From the time of the adoption of the Fourteenth Amendment, there were individuals who suggested that the Amendment had the effect of making the entire Bill of Rights applicable to the states. This view was not accepted by the Court in any measure until a 1925 case. In the case of Gitlow v. New York, the Supreme Court opened the door to the "selective incorporation" of elements of the Bill of Rights; this case recognized the concept that certain fundamental Constitutional rights should be extended to the states via the Fourteenth Amendment. Justice Sanford, writing for the majority, noted, "we may and do assume that freedom of speech and press--which are protected by the First Amendment from abridgement by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[27] This case extended the First Amendment's freedom of speech and press protections to the states, but it did not extend the religious protections to the states. For example, in a case that was also decided in 1925 the Court reviewed an issue involving separation of church and state. In 1922, the Oregon legislature passed a law that

required all students to attend public schools. A private military academy and a school operated by the Society of Sisters of the Holy Name of Jesus and Mary challenged the law. The Court held that the Oregon law denied private and parochial schools the right to engage in business and it interfered with the right of parents to educated their children as they choose. However, the Court did not base its decision upon the First Amendment, but, rather, the due process clause of the Fourteenth Amendment.

In Cantwell v. Connecticut the Supreme Court determined that the First Amendment's Free Exercise clause was applicable to the states through the Fourteenth Amendment. Jesse Cantwell, a Jehovah's Witness, and his two sons asked passersby on the street to listen to a record entitled "Enemies" that severely attacked the Roman Catholic Church. Even though no violence ensued, the father and sons were arrested and convicted of breach of peace and of failure to obtain in advance a "certificate of approval" from a state authority. The state authority had the ability to subsequently determine whether the applicant was a "religious one" or was a "bona fide object of charity and philanthropy and conforms to the reasonable standards of efficiency and integrity." The Court, in addition to making the Free Exercise clause applicable to the states, went beyond the "belief-action test" set forth in a series

of Mormon cases (described in the Reynolds case above). The "belief-action test" was maintained, but the Court warned that one's freedom to act must not infringe unduly upon the protected freedom. One part of the opinion explained that the purpose of the First Amendment "...was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." One of the most often quoted statements in all of church/state literature is by Justice Black in Cantwell, he wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in religion. No person can be punished for

> entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[28]

In 1947, the Court incorporated the Establishment clause of the First Amendment into the Fourteenth Amendment. The Court in Everson v. Board of Education held that state-supported bus rides were permissible to help children attend church schools. Certainly the Supreme Court rejected the contention in Everson v. Board of Education that the Establishment clause prohibits only governmental preference of one religion over another. The Court stated that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[29]

Cases decided in 1948 and 1952 shifted the focus from

State support of schools to the issue of "released time." For example, in 1948 the Court held by an 8-1 majority that teaching of religion on school property was impermissible.[30] Yet, just four years later, the Court held that children could be released from school for religious instruction off of school property (while other students remained in school). Justice Douglas wrote:

> We are a religious people whose institutions presuppose a Supreme Being...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[31]

These cases then reflect that the Court found it permissible to have a program that released students from school, during school hours, for religious instruction, but the Court would not permit the instruction to take place on school ground.

An expressed purpose of this study is to both examine Supreme Court decisions in the area of Church/State separation, but, also, to explore the impact of Court

decisions upon the American Jewish community. It is my opinion that every case in this area has some impact on the American Jewish community, because caselaw in this area sets precedent that certainly impacts upon the rights and privileges of the American Jewish community. Of course, there are cases which deal with such matters as an Orthodox Jew's right to work on Sunday--despite a Sunday closing law.[32] However, facts of Supreme Court cases need not directly relate to Jews for the Jewish community to experience the ramifications of these decisions. One need only recognize that Jewish constituent organizations have been the leading interest group litigators in Supreme Court religion cases over the past forty years (most of these cases did not directly involve Jews or the Jewish community).[33] Therefore, in this thesis, I have included cases that directly impact upon the rights and privileges of Jews and the American Jewish community, but the vast majority of cases do not directly deal with the Jewish community.

The cases decided before Earl Warren became Chief Justice literally changed the complexion of church/state relations. We take for granted now that the Free Exercise and Establishment clauses are applicable to the states, but prior to 1940 the States did not come under the purview of the First Amendment. One should also realize many

publications seriously analyzed whether the First Amendment should be applied to the states.[34] To this day, the question is still debated among those sitting on the Court. Yet, the Warren Court would now have to deal with the significant shift in precedent that it received, and in most cases, it continued to strengthen the separation between church and state on the local, state and national levels.

ENDNOTES

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21 Fletcher v. Peck, 6 Cranch 87 (1810).

22 Barron v. Baltimore, 7 Peters 243 (1833).

23 Permoli V. Municipality No. 1 of the City of New Orleans, 3 Howard 589 (1845).

24 Reynolds v. United States, 98 U.S. 145 (1878).

25 Morgan, The Supreme Court and Religion, p.51.

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27 Gitlow v. New York, 268 U.S. 652 (1925).

28 Cantwell v. Connecticut, 310 U.S. 296 (1940).

29 Everson v. Board of Education, 330 U.S. 1 (1947).

30 McCollum v. Board of Education, 333 U.S. 203 (1948).

31 Zorach v. Clauson, 343 U.S. 306 (1952).

32 Braunfeld v. Brown, 366 U.S. 599 (1961).

33 Greg David Ivers, "Should God Bless America? American Jewish Groups in Supreme Court Religion Cases" (Ph.D. dissertation, Emory University, 1989), pp. 154, 237.

34 Stanley Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" Stanford Law Review 2 (Dec. 1949) 139.

CHAPTER 2

The Warren Court: Decisions in the Extreme

In 1953, Earl Warren became the Chief Justice of the Supreme Court. Warren remained on the Court until 1969, and during his tenure as Chief Justice the Court pursued and activist agenda, particularily in the area of civil liberties. However, for a long period of time the Warren Court generally steered away from church/state cases. "Having decided several important church-state cases in a relatively short period of time, the Court decided to pull back from any further adjudication in this area until it was presented with new constitutional challanges that it believed merited full review.[1]

When the Warren Court finally decided to once again actively examine church/state issues, it turned its attention to cases concerning religion and public education and Sunday closing laws. Engel v. Vitale is the first of the pivotal cases in the area of religion and public education.[2] The State Board of Regents, the supervisory and policy-making arm of the State of New York, caused the following prayer to be said in the state's public schools:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.[3]

The prayer, known as the Regents' prayer, was challenged by the parents of ten students who claimed that the use of this prayer was "...contrary to the beliefs, religions, or religious practices of both themselves and their children."[4] The challenge to the prayer was based upon the Establishment Clause of the First Amendment. The New York Court of Appeals sustained the Regents' prayer as part of the the daily procedure of the public schools "...so long as the schools did not compel any pupil to join in the prayer over his or her parents' objection."[5]

The Court held that the Regents' prayer was inconsistent with the Establishment Clause, because the prayer was a religious activity. The parents argued that the Regents' prayer in public schools breaches the Constitutional wall of separation between church and state. The Court responded by further holding that "...laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[6] After reaching its holding, the Court launched into an historical overview of the First Amendment, and finally the Court provided its understanding of the reason for writing the First Amendment:

These men knew that the First Amendment, which tried to

> put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that the government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious funtion to the people themselves and to those the people choose to look to for religious guidance.[7]

Therefore, the Court recognized that the Regents' prayer did not amount to a total establishment of one particular religious sect to the exclusion of all others. Certainly the Court recognized that the prayer seemed to be relatively insignificant when compared to governmental encroachments upon religion which were commonplace at the founding of the United States. It was at this point that the Court deferred to the words of James Madison, the author of the First Amendment, when he stated:

> It is proper to take alarm at the first experiment on our liberties...Who does not see that the same authority

> which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[8]

Justice Douglas, in his concurring opinion, recognized that "...the First Amendment leaves Government in a position not of hostility to religion but of neutrality. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[9] Whereas, Justice Stewart's dissenting opinion could not understand how an official religion was established, particularily in light of Zorach v. Clauson, which declared, "We are a religious people whose institutions presuppose a Supreme Being."[10] He stated, "I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."[11]

Another pivotal Establishment Clause issue surfaced in Abington School District v. Schempp.[12] This Supreme Court decision examined two different cases raising the same basic issue: whether it was permisible for public schools to begin each day with readings from the Bible. One of the cases, originally out of Pennsylvania, was brought by Edward and Sidney Schempp. The Schempps were of the Unitarian faith and had two children attending Abington Senior High School. All Pennsylvania schools, including Abington High School, were required by the state to read at least ten verses from the Bible. The specific provision provided, "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."[13] At Abington High School the intent of the statute was carried out by broadcasting ten verses of the Bible over the school's public address system. Thereafter, the Lord's Prayer was said and each homeroom class saluted the flag. During the exercises "...the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during

the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises."[14] The Shempps brought suit to stop the practice of reading verses from the Bible, because the literal reading of the Bible was contrary to their religious and familial beliefs. They decided against excusing their children from the daily Bible ritual for a variety of reasons, including the belief that "...the children's relationship with their teachers and classmates would be adversely affected."[15]

Expert testimony was advanced in the trial court by the Schempps and the school district. The trial court summarized the testimony of the school district's expert as follows, "Dr. Weigle stated that his definition of the 'Holy Bible' would not be complete without the New Testament. He stated that the New Testament 'conveyed the message of Christians.' In his opinion, reading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice."[16] The Schempps called upon Dr. Solomon Grayzel to offer expert testimony; the trial court summarized his testimony, which included, in part, the following:

> ...Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that,

from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was 'practically blasphemous.' He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school. Dr. Grayzel also testified that there was significant difference in attitude with regard to the respective Books of the Jewish and Christian Religions in that Judaism attaches no special significance to the reading of the Bible per se and that the Jewish Holy Scriptures are source materials to be studied."[17]

Both experts and the court agreed that many portions of the New and Old Testaments contained passages "...of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court."[18]

In the companion case, the petitioners were Madalyn

Murray and her son, William. The Murrays were atheists and did not approve of the practice of having a reading each morning from the King James Bible in William's class. The Murrays claimed in their suit that the Bible reading, adopted pursuant to Maryland law, violated their rights

> ...in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.[19]

At the lower court level the Pennsylvania law was found unconstitutional and the Maryland law was declared constitutional; with this difference of opinion in two different circuits, the Supreme Court granted certiorari. The Court reviewed precedent in the area and recognized that, "As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof."[20] The majority decision then went on to express a test that was to become a prong of the

Burger Court's Lemon test.[21] "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[22] The Court further explained the interplay between the Free Exercise and the Establishment Clauses when it observed, "...a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[23]

The Court held that in both cases the laws did create religious exercises which were in direct violation of the rights of the appellees and the petitioners. Further, the Court made it clear that the exercises were not mitigated by the fact that that students could absent themselves from the exercises. Nor did the Court find this to be a relatively minor encroachment upon the First Amendment, as it set forth the following 'trickling stream' argument: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties."[24]

Five years later another case concerning religion and public education came before the Supreme Court. Epperson v. Arkansas examined the issue of teaching evolution in the

public schools.[25] An 'anti-evolution' statute was adopted by the State of Arkansas in 1928 to prohibit the teaching in public schools and universities of the theory that humans evolved from other species of life. Prior to 1965, the textbooks at the school in question (Central High in Little Rock) did not include a chapter on evolution. But in 1965, the school administration adopted and prescribed a textbook that contained a chapter on Darwinism. Susan Epperson, a tenth grade teacher at Central High, was placed in a quandary, as she had to decide whether to teach the prescribed curriculum or violate the Arkansas statute. Therefore, she instituted an action seeking a declaratory judgment. The Chancery Court held that the state violated the Fourteenth Amendment to the Constitution. However, on appeal, the Supreme Court of Arkansas reversed the decision of the lower court. The Supreme Court then took up the case for consideration.[26] The Court held:

> ...the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of

the Book of Genesis by a particular religious group.[27]

Engel, Abington, and Epperson show just how far the Warren Court was willing to protect Free Exercise and Establishment Clause rights in the public schools, and as one can see, it was an activist Court in this area. The Engel decision immediately came under fire by people who claimed that God had been taken out of the schools and that public schools had become secularized.[28] The Abington companion case went even further than Engel, because Engel only prohibited state-composed prayers, whereas, Abington determined that any recitation of a prayer or devotional Bible reading was prohibited under the Establishment Clause. Finally, in Epperson the 'anti-evolution' statute was found to be unconstitutional because it imposed upon the school curriculum one particular theological viewpoint.

These decisions concerning religion and the public schools certainly reflect that the Warren Court was willing to strengthen the wall of separation between church and state. However, the Court was not quite as willing to extend the First Amendment's religion clauses to those who observed a Sabbath on a day other than Sunday.

Sunday closing laws, or Blue Laws, were historically established for religious reasons and later were maintained by the states in order to provide at least one day of rest for the population of each respective state. The laws

permitted businesses that provided for basic human welfare or which facilitated rest and recreation to remain open.[29] Exodus 20:8-11, from which the idea of a day of rest developed, specifically provides:

> Remember the sabbath day and keep it holy. Six days you shall labor and do all your work, but the seventh day is a sabbath of the Lord you God: you shall not do any work--you, your son or daughter, your male or female slave, or your cattle, or the stranger who is within your settlements. For in six days the Lord made heaven and earth and sea, and all that is in them, and He rested on the seventh day; therefore the Lord blessed the sabbath day and hallowed it.[30]

For Jews the Sabbath runs from sundown on Friday to sundown on Saturday. Early in the second century of the Common Era, Sunday was adopted as the day of rest among Christians, according to the Christian belief that Jesus was resurrected on a Sunday.

In 1610, the first Sunday observance law was instituted in colonial America, it mandated:

> ...no man or woman shall dare to violate or breake the Sabbath by any gaming, publique or private abroad, or at home, but duly sanctifie and observe the same, both himselfe and his familie, by preparing themselves at home with private prayer that they may be the better

> fitted for the publique, according to the commandments of God, and the order of our Church, as also every man and woman shall repaire in the morning to the divine service, and Sermons preached upon the Sabboth day, and in the afternoon to divine service, and Catechising, upon paine of the first fault to lose their provision, and allowance for the whole weeke following, for the second to lose the said allowance, and also to be whipt, and for the third to suffer death.[31]

Every colony adopted some form of a Sunday observance regulation. Laws were later enacted in American history to prohibit the sale of merchandise on Sunday.[32] The two groups most directly affected by this type of legislation were Jews and Seventh-day Adventists. Yet, an Establishment Clause argument was brought by neither a Jew or a Seventh-day Aventist in McGowan v. Maryland.[33] The appellants were seven employees of a Maryland discount department store who were all arrested and convicted of violating the Maryland Blue Law. The items sold by these employees were prohibited from being offered to the public on Sunday according to Maryland law. A Free Exercise Clause argument was proferred by the appellants, but the Court set aside this argument because it held that the appellants had only complained of an economic injury and they had not shown how their own religious rights were

affected. Thereafter, the appellants argued that the Blue Laws were in violation of the Establishment Clause because they had the effect of coercively sanctioning the Christian day of rest over others. This argument was explained by the Court as follows:

> The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day.[34]

The Court phrased the issue before it in historical terms, as it asked "...what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character."[35] The Court recognized that the original Sunday closing laws were motivated by religious forces, but it went on to find that the Sunday closing legislation had lost its religious character.

Eventually the Court held that the Maryland law did

not violate the Establishment Clause by using coercive power to aid one religion over another.[36] Earlier in the decision the majority provided its rationale for deciding the case as it did:

> It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.
>
> However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility--a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available on working days.[37]

Justice Douglas wrote a scathing dissent to McGowan and the three related Sunday closing law cases decided by the Court on the same day, he wrote, in part:

> The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the "day

of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community, they provide a coercive spur to the "weaker brethren," to whose who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday.[38]

Two other cases decided at the same time as McGowan involved the question whether Sunday closing laws violate an Orthodox Jew's right to freely exercise his religion.

In both Braunfeld v. Brown and Gallagher v. Crown Kosher Market the appellants were Orthodox Jewish businessmen who desired to keep their businesses open on Sunday (a violation of the Sunday closing laws).[39] The Court recognized that the appellants, and all others who wanted to work on Sunday, would be burdened economically by Sunday closing laws, particularily where their religion prohibits them from working on Saturday. However, the Court's inquiry was whether in these circumstances "...the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants."[40]

It was recognized by the Court that the statute did not bar any religious practice of the appellants, but, rather, the Sunday Closing Law "...simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday."[41] It was clear that the Court would permit legislation that only imposed an indirect burden on the exercise of religion.[42] The Court held in both Braunfeld and Gallagher that the Sunday closing laws in these cases did not violate the Equal Protection Clause of the Fourteenth Amendment, and they did not violate the religious clauses of the First

Amendment.[43]

Only two years later did the Court review the case of a Seventh-day Adventist who would not work on Saturday, the Sabbath of her faith. In Sherbert v. Verner, a South Carolina company discharged the appellant for refusing to work on Saturday, and then she filed for unemployment compensation under the South Carolina Unemployment Compensation Act. The law provided that a claimant had to be "...able to work and...available for work." The Claimant would be ineligible for benefits if "...he has failed without good cause...to accept available suitable work when offered by the employment office or the employer..."[44] The Employment Security Commission found that the appellant's restriction disqualified her for benefits. The decision was appealled all the way to the South Carolina Supreme Court; the State Supreme Court held that the appellant's ineligibility did not infringe on her Constitutional liberties because the state "...places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[45]

Upon review by the United States Supreme Court, the decision was reversed. The majority opinion held that the appellant's disqualification for benefits imposed a burden

on the free exercise of her religion.[46] Sherbert, in many ways, does not look much different than McGowan, Braunfeld, and Gallagher, yet, the Court distinguished the later cases from the former by determining there was a compelling state interest in the legislation, and the legislation only indirectly burdened the claimants. The Court addressed the apparent inconsistency by observing:

> In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of (Orthodox Jewish merchants')...religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case--a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the court found, only by declaring Sunday to be that day of rest.[47]

The issues of school prayer and Sunday closing laws were then put on the back burner, as the Court decided its last major religious case during the Warren Era. Board of Education v. Allen concerned the issue of financial aid to

parochial schools. This case concerned a New York law which required local school boards to purchase textbooks and lend them without charge "to all children residing in the district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law."[48] A school board challanged the state law as being contrary to the the principles of the First and Fourteenth Amendments. The New York Court of Appeals ruled against the appellant school board because the law did not establish a religion by aiding private schools.

The Court's decision in Everson (permitting states to finance bus rides for children in private schools) was invoked a number of times in upholding the statute in the instant case. In comparing the present case with Everson, the Court noted, "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of section 701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval."[49] The Supreme Court affirmed the lower court's decision, thus

finding it Constitutional to make secular books directly available to both public and parochial schools students. It made it clear that this law did not furnish books or funds directly to parochial schools. The principle involved here is referred to as the "child-benefit" theory.

Quite interestingly, Justice Black, who wrote Everson, was one of the three dissenters on the present case; he explained in his dissent how he could distinquish the facts of Everson with this case, he states:

> The First Amendment's bar to establishment of religion must preclude a State from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although "secular," realistically will in some way inevitably tend to propagate the religious views of the favored sect. Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.[50]

During the Warren Era, the Court found near-unanimity on school prayer cases. It literally changed the practices of thousands of schools by setting out a high wall of separation between church and state in the public school.

However, in the area of Sunday closing laws the Court created a hole in the wall of separation by holding that states have a compelling interest in regulating activity on Sunday. The Court noted that observing Sunday as a day of rest had evolved from having a strictly religious character to having a secular purpose (providing the same day of rest for all people). Yet, it was the Allen case that would have the most far reaching impact for the next Chief Justice and his colleagues. Chief Justice Warren stepped down from the Court in 1969, and the new Chief Justice, Warren Burger, and his brethren on the Court, immediately began examining cases involving public financial aid to parochial schools.

ENDNOTES

1 Gregg David Ivers, "Should God Bless America? American Jewish Groups in Supreme Court Religion Cases" (Ph.D. dissertation, Emory University, 1989), pp. 110-111.

2 Engel v. Vitale, 370 U.S. 421 (1961).

3 Ibid., p. 422.

4 Ibid., p. 423.

5 Ibid.

6 Ibid., p. 425.

7 Ibid., p. 435.

8 Ibid. p. 436.

9 Ibid. p. 443.

10 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

11 Engel, p. 445.

12 Abington School District v. Schempp, 374 U.S. 203 (1963).

13 Ibid., p. 205.

14 Ibid., p. 207.

15 Ibid., p. 208.

16 Ibid., p. 210.

17 Ibid., p. 209.

18 Ibid., p. 210.

19 Ibid., p. 212.

20 Ibid., p. 222.

21 Lemon v. Kurtzman, 403 U.S. 602 (1971).

22 Abington, p. 222.

23 Ibid.

24 Ibid., p. 223.

25 Epperson v. Arkansas, 393 U.S. 97 (1968).

26 Ibid., p. 101.

27 Ibid., p. 103.

28 Robert T. Miller and Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (Waco, Texas: Markham Press Fund, 1982), p 307.

29 Ibid., p. 205.

30 Exodus 20:8-11 (JPS).

31 Miller, Toward Benevolent Neutrality: Church, State and the Supreme Court, p. 206.

32 Ibid.

33 McGowan v. Maryland, 366 U.S. 420 (1961).

34 Ibid., p. 431.

35 Ibid.

36 Ibid., p. 453.

37 Ibid., p. 450.

38 Ibid., p. 576.

39 Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961).

40 Braunfeld, p. 603.

41 Ibid.

42 Ibid., pp. 605-606.

43 Braunfeld, p. 609; Gallagher, p. 630.

44 Sherbert v. Verner, 374 U.S. 398 (1963).

45 Ibid., p. 400.

46 Ibid., p. 401.

47 Ibid., p. 402.

48 Board of Education v. Allen, 392 U.S. 236, 239 (1968).

49 Ibid., p. 240.

50 Ibid., p. 252.

CHAPTER 3

The Burger Court: In a State of Flux

In 1969, President Nixon nominated Warren Burger to be Chief Justice of the Supreme Court, and he was confirmed by the Senate a short time later. The Court had only examined an handful of cases concerning the Establishment Clause prior to 1969. The Allen case, decided in 1968 by the Warren Court, would prove to be typical of the kind of case decided during Burger's term as Chief Justice. For seventeen years the Burger Court encountered heavy pressure to endorse governmental support of religious schools. During the 1980's, the Court also had to deal with the expanding political power of the Religious Right; this caused the Court to be very "accommodating" to religion in several First Amendment cases (some accommodation with religion has long been recognized as being necessary when balancing one's rights under the Free Exercise Clause with the protections set forth in the Establishment Clause).

Precedent clearly demonstrated that religious schools could not expect financial support from the government to teach religion; yet, the Burger Court was still faced with a number of cases where religious organizations requested money from the government for teaching secular subjects.

The central case in the area of governmental support

for religious institutions is Lemon v. Kurtzman.[1] This matter, decided in 1971, was the first to articulate a test to be used when examining a statute under the First Amendment. Two state statutes were examined in this case, both provided financial assistance to nonpublic schools to supplement teachers' salaries. The Rhode Island statute authorized state officials to supplement the salaries of nonpublic school teachers in an amount not to exceed 15% of a teacher's annual salary.[2] The Pennsylvania statute authorized the Superintendent of Public Instruction to purchase secular educational services from nonpublic schools.[3] This case noted that "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[4] Yet, the Court held that the statutes were unconstitutional. It based its decision upon the following three-part test:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S.

263, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion, Walz v. Tax Commission, 397 U.S. 664, 668 (1970).[5]

This decision also recognized that early decisions permitted states to provide religious schools "...secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."[6] However, the Court specifically distinguished this case from Allen by declaring:

> In Allen the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that *teachers have a substantially different ideological character from books*. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation [emphasis added].[7]

Chief Justice Burger, the author of the majority opinion in Lemon, desired to create a Constitutional standard that would counter the tendency for religious schools to use prior Court cases to argue for increased governmental aid. Therefore, he wanted to distinguish the facts of the instant case from the Walz case decided by the Court a year earlier. Walz involved a plaintiff landowner who claimed that tax exemptions for religious bodies effectively required him to make an indirect contribution to those religious entities. Thus, he claimed that this was in violation of the Establishment Clause. The Court held that the exemption was Constitutionally valid, and even guarded against excessive government entanglement with religion.[8] The majority opinion in Lemon noted:

> In Walz it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.
>
> The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the

state programs before us today represent something of an innovation.[9]

Tilton v. Richardson was decided at the same time as Lemon, and the Court held in Tilton that federal construction grants to church-related colleges was permissible so long as the facilities were used exclusively for secular educational purposes.[10] The majority in this case distinguished their decision from Lemon by stating that "...college students are less impressionable and less susceptible to religious indoctrination...Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."[11]

In a series of decisions after Lemon the Court struck down a number of attempts to provide aid to church-related schools. The overall effect of these decisions "...was to dash accommodationists' hopes of providing a new means for aiding church-related schools."[12] A 1977 case out of Ohio seemed to set out the boundaries for how far the Court would go in permitting governmental aid to church-related schools. The case, Wollman v. Walter, examined an Ohio statute that authorized a variety of funding to religious schools.[13] Justice Blackmun, writing for a splintered majority, wrote:

In summary, we hold constitutional those portions of the

> Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services. We hold unconstitutional those portions relating to instructional materials and equipment and field trip services.[14]

By 1977, the Court had become divided on the boundaries concerning governmental support of church-related schools. Justices Powell, Blackmun, Stewart and Stevens would not permit remedial services at the religious school. Chief Justice Burger and Justices White and Rehnquist would permit these state-sponsored remedial services to take place in the church schools. And Justices Brennan and Marshall would prohibit the services no matter where they were performed. In Wollman, only Justice Brennan dissented from reimbursing religious schools for diagnostic services performed by public-school employees on religious school grounds. Eight years later the Court once again took up the issue of whether remedial courses could be taught by public-school teachers in private schools, and the Court struck down the programs in two different cases. Justice Brennan, writing for the majority in Grand Rapids v. Ball and Aguilar v. Felton, observed that the two programs had the effect of government advancing religion.[15]

Separation of church and state has been a central

theme in Establishment Clause cases; however, a countervailing theme of "accommodation" has also been sounded. In 1952, Justice Douglas noted in Zorach v. Clauson that "When a state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[16] Sherbert v. Verner also recognized that some accommodation with religion is necessary when it affects a person's rights under the Free Exercise Clause (Sherbert held that a state could not deny unemployment compensation to a woman who refused to work on Saturday due to her religious beliefs).[17]

The 1981 case of Widmar v. Vincent would muddy the accommodation waters for years to come, even though the decision was based upon the First Amendment's Free Speech and Association rights. The case concerned a policy adopted by the University of Missouri at Kansas City in 1972. This policy prohibited the use of University buildings or grounds "for purposes of religious worship or religious teaching."[18] From 1973 until 1977 the Cornerstone, a registered religious group with the University, regularly received permission to meet in University facilities. However, in 1977 the group was

denied any further access to University facilities. Members of the Cornerstone immediately filed suit against the University claiming that the University policy discriminated against religious activity and violated their rights under the First and Fourteenth Amendments.[19] The District Court upheld the challenged University regulation, finding that it was both justified and required under the Establishment Clause. The Court of Appeals rejected the lower court's analysis and reversed the decision, as it viewed the regulation as a content-based discrimination against religious speech. Whereupon, the Supreme Court granted certiorari.[20] The Court observed:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place [citations excluded]...our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities [citations excluded].[21]

In the instant case, the Court determined that the

University's failure to grant equal access to University facilities by religious groups was unconstitutional under the Free Speech and Freedom of Association Clauses of the First Amendment.[22] The Court provided the following test as a basis for excluding a religious group from a public forum:

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end [citation excluded].[23]

The University then raised the issue that it had a compelling state interest in maintaining the strict separation between church and state, based upon its reading of the Establishment Clause. Immediately the Court applied the Lemon test to determine whether the equal access policy would be incompatible with Court precedent touching upon the Establishment Clause; the Court observed:

> ...[A] policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the (governmental policy) must have a secular legislative purpose; second, its principal or primary effect must be

one that neither advances nor inhibits religion...; finally, the (policy) must not foster 'an excessive government entanglement with religion.' [citations excluded].

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech [citation excluded]. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.[24]

According to the Court, the University did not have a compelling state interest to justify content-based

discrimination against the Cornerstone's religious speech.[25] Thus, the decision was based upon the First Amendment's Free Speech and Freedom of Association Clauses. The Court went out of its way to note that "The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards."[26]

The concern after Widmar was that the Establishment Clause might be rendered ineffective if religious student activity were allowed in cases where there was no free-speech violation. It was not until the Rehnquist Court that the issue of equal access would again be examined, and at that time the issue concerned organized religious activity in public elementary and high schools (in Westside Community Bd. of Ed. v. Mergens the Rehnquist Court held that the federal Equal Access Act, adopted after Widmar, did not violate the Establishment Clause, and a religious club must be allowed to use a school facility when a facility has been maintained as a limited open forum, 496 U.S. 227).

Accommodation of religion reigned triumphant in the

1984 case Lynch v. Donnelly.[27] The challenged issue in Lynch concerned whether a creche displayed in a private park and paid for by public funds violated the Establishment Clause. It would seem that the state sponsorship of a clearly religious symbol would violate all precedent in the area of Establishment Clause law. Further, a First Amendment Free Speech argument, as in Widmar, was not an available "accommodation" defense for those supporting the display of the creche. The Court's decision is based upon a complete understanding of the following facts as described by the Court:

> Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation--often on public grounds--during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing

such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shephards, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it is now valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years."[28]

Pawtucket residents and individual members of the American Civil Liberties Union brought this action to challenge the city's inclusion of the creche in the annual display. The District Court held that the inclusion of the creche violated the Establishment Clause. It found that by including the creche in the display, the city "tried to endorse and promulgate religious beliefs" and the creche had "...the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents."[29] The Court of Appeals affirmed the lower court's decision, and certiorari was granted by the

Court.[30]

Chief Justice Burger wrote for the majority. He prefaced the decision by stating:

> In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.[31]

Burger then launched into an historical discussion of the various accommodations to religion recognized by the Court and government (such accommodations included "In God We Trust" on coins and the phrase "One Nation Under God" in the Pledge of Allegiance). The Chief Justice determined that the three-part test in Lemon was met in this case, as the display of the creche had a "secular purpose" by depicting the historical origins of the National Holiday; the "primary effect" did not directly benefit religion; and, there was no "entanglement" since there was no direct subsidy to a religious institution. These are the Court's specific words with respect to each prong of the test:

> {Secular Purpose} When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or

surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralisitic society a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.[32]

{Primary Effect} We are unable to discern a greater aid to religion deriving from the inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about legislative prayers in Marsh [citation excluded], and implied about the Sunday Closing Laws in McGowan is true of the city's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some...religions [citation excluded].[33]

{Excessive Government Entanglement} To forbid the use of this one passive symbol--the creche--at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public

> places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.[34]

Justice Brennan's dissent in Lynch sensitively recognized that the nativity scene represents a fundamental theological difference between Christians and non-Christians (particularly Jews). Brennan wrote:

> The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma--that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the creche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the creche has profound

> significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."[35]

Even in the face of Lynch, the Burger Court continued to adhere to the principle that all religious faiths are constitutionally equal, and all people are free to exercise a belief or non-belief in God without any governmental influence. For example, the last major case concerning religion during the Burger era was Wallace v. Jaffree.[36] In this case an Alabama law authorized a period of silence "for meditation and voluntary prayer."[37] The Court found that the legislative history reflected that the statute in question was adopted with the intent to reintroduce prayer into Alabama public schools. Therefore, the Court held the statute violated the Establishment Clause because it was not motivated by any secular purpose. Further, the State's endorsement of prayer activities was considered by the Court to be violative of the established principle that government must br neutral toward religion.[38]

One clearly notes that the decisions of the Court were not entirely consistent during Burger's stewardship over the Court. Much of this had to do with intense pressure for governmental funding of religious schools and from an increasingly influencial Religious Right. Yet, the Court

generally held firm to the principles first enunciated by the Court during the 1940's. However, with Burger's departure in 1985, the Court would be significantly reconfigured; the conservative scholar, Antonin Scalia, was appointed to fill the vacancy on the Court, and the conservative jurist, William Rehnquist, was elevated to Chief Justice. The "Wall of Separation" between church and state would now face its most serious challenge during the Rehnquist years.

ENDNOTES

1 Lemon v. Kurtzman, 403 U.S. 602 (1971).

2 Ibid., p. 607.

3 Ibid., p. 609.

4 Ibid., p. 614.

5 Ibid., p. 612.

6 Ibid., p. 616.

7 Ibid., p. 617.

8 Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

9 Lemon, p. 624.

10 Tilton v. Richardson, 403 U.S. 672 (1971).

11 Ibid., p. 679.

12 Robert T. Miller and Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court (Waco, Texas: Markham Press Fund, 1982), p. 427. See Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Meek v. Pittenger, 421 U.S. 349 (1975).

13 Wollman v. Walter, 433 U.S. 229 (1977).

14 Ibid., p. 239.

15 Grand Rapids School District v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 87 L.Ed.2d 290 (1985).

16 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

17 Sherbert v. Verner, 374 U.S. 398 (1963).

18 Widmar v. Vincent, 454 U.S. 263, 265 (1981).

19 Ibid., p. 266.

20 Ibid.

21 Ibid., p. 268.

22 Ibid., p. 263.

23 Ibid., p. 269.

24 Ibid., p. 271.

25 Ibid., p. 276.

26 Ibid., p. 277.

27 Lynch v. Donnelly, 465 U.S. 668 (1984).

28 Ibid., p. 671.

29 Ibid., p. 672.

30 Ibid.

31 Ibid.

32 Ibid., p. 680.

33 Ibid., p. 682.

34 Ibid., p. 686.

35 Ibid., dissent.

36 Wallace v. Jaffree, 472 U.S. 38 (1985).

37 Ibid.

38 Ibid.

CHAPTER 4

The Rehnquist Court: A Surprisingly Moderate Court

This chapter will focus upon two cases that reflect how severely splintered the Rehnquist Court is in the area of church/state law. The cases, out of Pennsylvania and Rhode Island, provide a good overview of the present status of church/state law. Interestingly, each case involved issues directly impacting upon the privileges and immunities of the American Jewish community. In 1991, Justice Sandra Day O'Connor said, "There is no more important provision of the Constitution than the First Amendment. And protecting religious freedoms may be even more important in the late 20th century than it was when the Bill of Rights was ratified."[1] O'Connor went on to explain how she believed church/state law will change in the future; she said:

> We live in a pluralistic society, with people of widely divergent religious backgrounds or with none at all. Government cannot endorse beliefs of one group without sending a clear message to non-adherents that they are outsiders. This is consistent with the history of the Establishment Clause.[2]

O'Connor's remarks reflect that she is in favor of using an "Endorsement Test" to decide church/state cases.

In fact, O'Connor applied this test in deciding the "moment of silence" case from Alabama (Wallace v. Jaffree). In that case, she decided the law failed the Endorsement Test because the state was sending the message to children that the moment of silence should be used for prayer. Her opinions in this area have become very important, because she and Justices Kennedy and Souter now control the moderate-conservative center of the Court.

In a matter arising out of Pittsburgh, the Court had the opportunity to reconsider its opinion in Lynch v. Donnelly (creche case). The case, Allegheny County v. Greater Pittsburgh ACLU, concerned two holiday displays located on public property in downtown Pittsburgh. One was a creche placed alone in the center of a courthouse, and the second was a 18" Chanukah menorah placed outside a government building (the menorah was set next to a 45" Christmas tree and a sign saluting liberty).[3] This litigation arose because the American Civil Liberties Union filed suit to enjoin the county and city from displaying the creche and the menorah. It was claimed that the displays violated the Establishment Clause of the First Amendment (made applicable to the states through the Fourteenth Amendment). The District Court found that "the creche was but a part of the holiday decoration of the stairwell and a foreground for the high school choirs

which entertained each day at noon. It said regarding the menorah that "it was but an insignificant part of another holiday display.[4] The Court of Appeals reversed the lower court's decision, because it believed both displays had the effect of endorsing religion.[5]

Justice Blackmun, writing for the majority, noted that "...the Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."[6] Blackmun then explained how the Lemon test had been applied to Establishment Clause cases since 1971, but he also recognized that "In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence."[7] Therefore, one notices that O'Connor's Endorsement Test has been adopted by the Court as an additional test in Establishment Clause cases.

It was Blackmun's intention to distinguish the instant case from Lynch, and he did this by explaining that Lynch

provided no guidance for deciding future cases; he set forth:

> First, the opinion states that the inclusion of the creche in the display was "no more an advancement or endorsement of religion" than other "endorsements" this Court has approved in the past [citation excluded]--but the opinion offers no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the opinion observes that any benefit the government's display of the creche gave to religion was no more than "indirect, remote, and incidental,"[citation excluded]--without saying how or why.[8]

Blackmun also made a point of noting that the only analytical test arising out of Lynch was found in Justice O'Connor's concurring opinion. Her concurrence set forth a test to determine whether the government's use of an object with religious meaning has the effect of endorsing religion; she observed that the effect of the display depends upon the message that the government's practice communicates--"what viewers may fairly understand to be the purpose of the display."[9]

> Thus, despite divergence at the bottom line, the five Justices in concurrence and dissent in Lynch agreed upon the relevant constitutional principles: the government's

> use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. These general principles are sound, and have been adopted by the Court in subsequent cases. Since Lynch, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices [citation excluded].[10]

Therefore, the issue before the Court was "...whether the display of the creche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs."[11]

The Court further distinguished its opinion in the present case from the holding in Lynch:

> Here, unlike Lynch, nothing in the context of the display detracts from the creche's religious message. The Lynch display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the creche, and had their specific visual

> story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the creche. Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.[12]

With respect to the creche, the Court said "that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ."[13] Therefore, the Court held that the display of the creche in this particular context violated the Establishment Clause.[14]

Yet, this case presented the Court with another element not found in Lynch: a Chanukah menorah. The Court recognized that the inclusion of a menorah in a public holiday display would present a closer Constitutional question. Blackmun observed that just as "...government may celebrate Christmas as a secular holiday, it follows that government may also acknowledge Chanukah as a secular holiday."[15] The issue before the Court was whether a display of a Christmas tree, a sign praising freedom, and a menorah have the effect of endorsing Christianity and Judaism. The Christmas tree, according to the Court, was

no longer a religious symbol, but the menorah retained its religious significance.[16] However, in the particular setting set forth in this case, the Court held that the menorah did not violate the Establishment Clause; the Court reasoned:

> In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as contemporaneous alternative tradition.[17]

A recent major ruling in the area of church/state law can be found in the 1992 case, Lee v. Weisman.[18] In an article written before the decision in Lee was announced, the original co-plaintiff, Daniel Weisman, described why he brought suit against the school district in Providence, Rhode Island:

> Merith Weisman's graduation ceremony at Nathan Bishop Middle School in Providence, R.I., was a happy event, marred only by the conduct of the minister who gave the invocation.

"He was a very polemical kind of person," recalls Daniel Weisman, Merith's father. "He asked us to thank Jesus for the accomplishments of our children. In this case I thought it went beyond the bounds of propriety. As Jews we were asked to stand and give homage to Jesus at a public event. That's not reasonable."

Three years later in 1989, as Weisman's younger daughter, Deborah, then 14, approached graduation from the same school, the family took action to ensure there would be no repeat performance of the earlier incident. The Weismans sent letters to school administrators months before the ceremony, expressing their concerns that the school-sponsored prayers violated church-state separation.

School officials didn't seem to understand the basis of the complaint. Weisman remembers that the principal said, "You don't have anything to worry about; we've gotten a rabbi this year."

Remarked Weisman, "My answer was, 'that's going to make someone else uncomfortable.' Why do anything? Separation of church and state applies."[19]

The rabbi invited to deliver the opening and closing prayers at the graduation exercises was Rabbi Leslie Gutterman of Temple Beth El in Providence. Before Rabbi Gutterman spoke, he was provided with a pamphlet entitled

"Guidelines for Civic Organization," prepared by the National Conference of Christians and Jews. This pamphlet provided recommended guidelines for public prayers at nonsectarian civic ceremonies.

Daniel and Deborah Weisman sought a temporary restraining order to stop Rabbi Gutterman from delivering an invocation and benediction. The District Court denied the motion for lack of adequate time to consider it. However, after the ceremony, the court held that the petitioners' practice of including an invocation and benediction violated the Establishment Clause, and the court enjoined the school from continuing the practice. On appeal, the court affirmed the lower court's decision. Thereafter, the Supreme Court granted certiorari.

In a highly unusual step, the Solicitor General of the United States filed a amicus curiae brief urging the Supreme Court to hear the case. Justice Department lawyers believed the federal government had a vital interest in the case. One publication in 1991 observed (before the decision was announced):

> ...[I]n its 19-page brief the Justice Department goes way beyond the narrow issue of graduation invocations. Instead, the solicitor general calls on the Supreme Court to throw out more than 20 years of church-state jurisprudence and abandon a key test for determining

violations of the First Amendment's no-establishment clause. If adopted, the administration's view could lead to sweeping changes in the court's understanding of separation of church and state.

The immediate object of the Bush legal team is the so-called "Lemon Test," a 20-year-old doctrine the court fashioned during a parochiaid case to determine whether a statute runs afoul of church-state separation. A frequent target of accommodationists, the Lemon Test states that church-state separation is breached whenever the government violates any one of the test's three conditions. For a law to be constitutional, it must have a nonreligious purpose, its primary effect must neither advance nor inhibit religion and it must not foster excessive entanglement between government and religion.[20]

The Court clearly and forcefully addressed the federal government's intervention in this case by stating, "...we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in Lemon v. Kurtzman [citation excluded]. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[21] Therefore, the sole issue before the Court was "...whether including

clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts."[22]

Now the Court turned its attention to whether the graduation prayers had the imprint of the state. The instant matter reviewed Court precedent and observed that government can have no part in composing prayers for the American people, even if the state, in good faith, is attempting to make the prayer acceptable to most people.[23] Therefore, the Court determined that the "...degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."[24]

The Court then turned its attention to how the students might feel about the prayer. But first, this opinion provided a "primer" for understanding the delicate interplay between the First Amendment's free speech and religion clauses. It stated:

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most

> important speech is to persuade the government to adopt an idea as its own [citations excluded]. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all.[25]

In trying to determine how the graduates viewed the prayers, the Court noted "There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.[26]

The dissent argued that no coercion or appearance of participation in a graduation prayer occurs when someone, who objects to the prayer, stands or sits quietly during said prayer.[27] This dissenting opinion even projected that "...invocations and benedictions will be able to be given a public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers."[28]

The majority, over a vocal dissent, held that young graduates are induced to conform when a prayer is delivered at public school graduation exercise; therefore, due to the

Establishment Clause, clergy are forbidden to offer prayers at an official public school graduation ceremony.[29]

During 1992 Supreme Court term the Court granted certiorari to the following four cases touching upon the First Amendment's religion clauses (three of the four cases deal with issues concerning schools):

Steigerwald v. Center Moriches Union Free School Dist.--This case concerned a school district's refusal to afford access to a group sponsoring a religious film series, and the Second Circuit concluded that the school facilities were limited forums not open to religious uses.[30]

Jones on Behalf of Jones v. Clear Creek Independent School Dist.--A suit was brought by graduating seniors and parents to enjoin the school district from allowing invocations and benedictions at High School graduation exercises. The Court of Appeals held that the Establishment Clause was not violated by having student volunteers, with the consent of the senior class, present nonsectarian graduation prayers.[31]

Zobrest v. Catalina Foothills School Dist.--The Ninth Circuit held that the Establishment Clause was violated by a provision which provided for a state-funded sign

language interpreter at a Catholic school.[32]

Church of the Lukumi Babalu Aye v. City of Hialeah--The court held that the City of Hialeah had the Constitutional right to regulate the ritual sacrifice of animals (based on the risks to the public health and animal welfare). The ordinances were not targeted at the Church, but were meant to prohibit all animal sacrifice.[33]

Each case granted certiorari has at least one strong recent decision from which to seek guidance. Widmar and Westside both provide that equal access must be granted to religious groups when a limited public forum is created. Therefore, the school district in Steigerwald will have a difficult time showing that it did not create a limited public forum.

An interesting issue has been raised in Jones, as the Court in Lee left the question open as to whether a non-clergy member could read a prayer at a graduation exercise. This case would provide the accommodationists on the Court with an excellent opportunity to carve out an exception to Lee.

The final outcome of the Zobrest decision is very difficult to predict, because a series of decisions during the 1970's held that state aid for parochial school

teachers would not be permitted. Yet, an interpreter is probably more like a therapeutic and remedial service to the hearing impaired child, and this type of governmental aid was allowed by the Wollman case.

A case decided in 1990 is probably most instructive on how the Court will view the case concerning the Church of the Lukumi Babalu Aye. In Employment Div., Dept. of Human Res. v. Smith, the Court held that Native American Church members could be denied unemployment benefits for being fired from their jobs after smoking peyote, a ritual sacrament of their church. According to the Court, they were fired for good cause, as peyote is considered a controlled narcotic by Oregon law. This case ruled that states no longer have to demonstrate a "compelling state interest" before barring certain religious practices.[34] In light of Employment Division, the Court will probably find that ritual animal sacrifice can be prohibited since the city ordinances only incidentally impinge on the church's religious liberty.

Justices O'Connor, Kennedy, Souter now hold the swing votes in most cases. Therefore, the ideological strength of this Court rests with this moderate-conservative bloc. The Court, in its current configuration, will continue to be unpredictable and volatile. Yet, one thing is clear: the Lee v. Weisman decision signals that the Court will

continue to follow, ever so reluctantly, over 40 years of precedent in the area of church-state relations.

ENDNOTES

1 Rob Boston, "Religious Liberty at the Crossroads," Church and State, July-August 1991, p. 4.

2 Ibid.

3 Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

4 Ibid., p. 588.

5 Ibid., p. 579.

6 Ibid., p. 590.

7 Ibid., p. 592.

8 Ibid., p. 594.

9 Ibid., p. 595.

10 Ibid., p. 597.

11 Ibid.

12 Ibid., p. 598.

13 Ibid., p. 601.

14 Ibid., p. 602.

15 Ibid., p. 615.

16 Ibid., p. 616.

17 Ibid., p. 617.

18 Lee v. Weisman, 112 S.Ct. 2649 (1992).

19 Rob Boston, "Bushwacking the First Amendment," Church and State, April 1991, p. 4.

20 Ibid.

21 Lee, p. 2655.

22 Ibid., p. 2652.

23 Ibid., p. 2656.

24 Ibid., p. 2657.

25 Ibid.

26 Ibid., p. 2658.

27 Ibid., p. 2682.

28 Ibid., p. 2685.

29 Ibid., p. 2650.

30 Steigerwald v. Center Moriches Union Free School Dist., 959 F.2d 381 (C.A.2-N.Y. 1992).

31 Jones on Behalf of Jones v. Clear Creek Independent School Dist., 930 F.2d 416 (C.A.5-Tex. 1991).

32 Zobrest v. Catalina Foothills School Dist., 963 F.2d 1190 (C.A.9-Ariz. 1992).

33 Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D.Fla. 1989).

34 Employment Div., Dept. of Human Res. v. Smith, 110 S.Ct. 1595 (1990).

CHAPTER 5

Conclusion

Any study on church/state law must begin with the First Amendment, and, likewise, it should end with this clarion of religious freedom. Therefore, the religion provisions of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The reach of this provision was clear to most legal scholars for over 150 years after its adoption, as the Supreme Court consistently held that the Amendment was only applicable to the federal government--and certainly not to the states! This was the understanding for the entire Bill of Rights until a 1925 case selectively incorporated the Free Speech provisions of the First Amendment into the Fourteenth Amendment, thus making that part of the Bill of Rights applicable to the states.

It was not until the 1940's that a revolution in the area of church/state law took place; for the first time the protections of the Free Exercise and Establishment Clauses were extended to the states through the Fourteenth Amendment. These cases, decided before the Warren Era, literally changed the complexion of church/state relations.

However, the Warren Court itself spearheaded dramatic changes in American schools; certainly it did this through its decisions concerning civil liberties, but it also mandated controversial changes in all public schools by prohibiting prayer in these state-sponsored institutions. It therefore created a high wall of separation between church and state in this area. Yet, it created a gaping hole in the wall of separation by holding that states have a compelling interest in mandating a uniform day of rest for all people--that day being Sunday.

Burger's Court focused much of its energy upon cases involving state aid to parochial schools. In these cases, mostly decided during the early 1970's, the Court was not an accommodationist body. These early years of the Court also created a test, based upon precedent, to examine church/state cases. This test, known as the Lemon Test, provides that any state action must meet the following elements: 1) the primary effect of the action must neither advance nor inhibit religion; 2) the action cannot foster excessive government entanglement with religion; and, 3) the action must have a secular purpose. During the 1980's the Court became more conservative and accommodationist in church/state cases. Much of this had to do with strong pressure from the Religious Right. But the Court continued to steer a course that was in line with the principles

first enunciated in the 1940's.

It was believed by many that the Rehnquist Era would be strongly accommodationist toward church/state issues, as the ideological right seemed to have the controlling majority. However, recent decisions, such as Lee v. Weisman, seem to reflect that a new "power bloc" has been created on the Court: the moderate-conservative center. The new "power bloc" consists of Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter (all Reagan-Bush appointees). The ideological right is composed of Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, and sometimes Justice Byron R. White. The liberal voices on the Court belong to Justices Harry A. Blackmun and John Paul Stevens. This Court has stayed within the chain of tradition set forth in the area of church/state relations since the 1940's.

After the decision in Lee, one publication was so shocked at the result that the title of the article read: "The Wall Still Stands."[1] This hearkens one back to Thomas Jefferson's words of 1802, where he said, "I contemplate with reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."[2] The wall still stands, but one

should never think of it as a stationary structure--it is continually changing shape with each and every Court.

ENDNOTES

1 Rob Boston, "The Wall Still Stands," Church and State, August 1992, p. 4.

2 Richard E. Morgan, The Supreme Court and Religion, (New York: The Free Press, 1972), p. 29.

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