

**FREEDOM OF CONSCIENCE, BUT WHICH ONE?
IN SEARCH OF COHERENCE IN THE U.S. SUPREME COURT’S
RELIGION JURISPRUDENCE**

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INTRODUCTION

One searching for an introduction to the state of the Supreme Court's jurisprudence on religion could begin with Justice Clarence Thomas's 2001 dissent to the denial of certiorari in *Utah Highway Patrol Association v. American Atheists, Inc.* Declaring the "Establishment Clause jurisprudence [to be] in shambles,"¹ Justice Thomas catalogued its seeming contradictions:

[A] creche displayed on government property violates the Establishment Clause, except when it does not.

Likewise, a menorah displayed on government property violates the Establishment Clause, except when it does not.

A display of the Ten Commandments on government property also violates the Establishment Clause, except when it does not.

Finally, a cross displayed on government property violates the Establishment Clause, as the Tenth Circuit held here, except when it does not.²

These "wildly divergent outcomes" and the seeming lack of "a workable principle" can be tied, in Justice Thomas's account, to an "Establishment Clause jurisprudence that invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property."³

Some commentators attribute this inconsistency to changes on the bench. Reacting to *Town of Greece v. Galloway*,⁴ where a 5-4 Court held that a prayer

¹ *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, (2011) (Thomas, J., dissenting).

² *Id.* at 1001-03 (Thomas, J., dissenting) (citations omitted), quoted in Linda Greenhouse, Opinion, *Not Following the 'Leader,'* N.Y. TIMES, (Nov. 2, 2011), <http://opinionator.blogs.nytimes.com/2011/11/02/leading-from-behind>. Lower court judges have also expressed dissatisfaction. See, e.g., *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) ("The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance."); see also *Card v. City of Everett*, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring) ("The still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable.").

³ *Am. Atheist, Inc.*, 565 U.S. at 1004, 1006.

⁴ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

ceremony at the start of local municipal council meetings was constitutional, Linda Greenhouse described the Court as “systematically effac[ing]” the Establishment Clause.⁵ She noted a marked shift away from “the school prayer decisions of the 1960s, the 1992 decision barring clergy-led prayer at public high school graduations, and as recently as 2000, a 6-to-3 decision barring student-led prayer at high school football games.”⁶ Is this the case? The state of confusion described by most commentators⁷ may originate much closer to the source. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁸ As much as the Establishment Clause has resulted in scattered rulings, so too has the Free Exercise Clause seen many lives.

After another recent case, commentators again declared the Court’s ruling inconsistent with precedent. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court struck down the Affordable Care Act’s contraception coverage mandate for “closely held corporations” that had religious objections to the mandate.⁹

For instance, Hobby Lobby would have lost its case under the Free Exercise Clause, pursuant to the Court’s 1990 decision in *Employment Division v. Smith*.¹⁰ Instead, the Court decided *Hobby Lobby* under the Religious Freedom Restoration Act of 1993 (RFRA). In so doing, the Court more than restored the pre-*Smith* jurisprudence on religious exemption—it went well beyond it.¹¹ But this move does not just reflect the conservative turn on the Court over

⁵ Linda Greenhouse, Opinion, *Reading Hobby Lobby in Context*, N.Y. TIMES (July 9, 2014), <https://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html?mcubz=0>.

⁶ *Id.*

⁷ See, e.g., 2 DONALD P. KOMMERS & JOHN E. FINN, AMERICAN CONSTITUTIONAL LAW 630 (1998) (assessing Supreme Court jurisprudence on religion as “conceptually and doctrinally confused”); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 227 (2008) (observing that “[r]ecent Establishment Clause cases look like a mess. The proliferation of standards and distinctions is perplexing even to scholars.”); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1264 (2d ed. 1988) (asserting that “it seems impossible to divine a coherent set of principles to explain the judicial evaluations”); Mary Ann Glendon, *Religion & the Court: A New Beginning?*, FIRST THINGS, Mar. 1992, at 21, 22 (noting that the Court jurisprudence on religion “is described on all sides, and even by the judges themselves, as hopelessly confused, inconsistent, and incoherent.”).

⁸ U.S. CONST. amend. I.

⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60, 2785 (2014).

¹⁰ See *Emp’t Div. v. Smith*, 494 U.S. 872, 879, 890 (1990) (holding that a state could refuse to exempt Native Americans from a prohibition on drug use because the law did not purposefully disfavor their religious practices), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012); see also Greenhouse, *supra* note 5 (noting that the plaintiffs in *Hobby Lobby* would not have received an exemption for religious claims under the holding of *Smith* because the Affordable Care Act was not “passed to single out religion for particular disfavor.”).

¹¹ See *Hobby Lobby*, 134 S. Ct. at 2792 (“[A]s RFRA’s statements of purpose and legislative history make clear, Congress intended to restore, not scrap or alter, the balancing test as this Court had applied it pre-*Smith*.”), *quoted in* Greenhouse, *supra* note 5 (describing Justice Ruth Bader Ginsburg’s view that the RFRA’s extension of free-exercise rights to for-profit corporations was unprecedented).

the last few decades, a shift that a change of Justices could reverse. After all, Justice Antonin Scalia delivered the opinion of the Court in *Smith*, and RFRA was passed by a near-unanimous Congress in response.

In fact, the perception of a confusing and contradictory jurisprudence reflects a more fundamental phenomenon: The Court's clause-by-clause interpretative approach to the First Amendment has failed to provide a coherent jurisprudence. With that method, each case demands that the Court first distinguish between the Free Exercise and Establishment Clause and then begin working through the doctrinal implication of the relevant clause. The case law for each clause is assumed to be distinct and internally coherent. This method has dominated—and continues to dominate—the way jurists and academics approach these two clauses and understand the Court's interpretation of them.

But a more unified and comprehensive approach lies beneath the surface. This approach was displayed in two rare opinions written by two Justices. In order to understand the jurisprudence and to find coherence in it, these Justices considered not only both Religion Clauses, but also all cases pertaining to religion that involved other constitutional provisions.¹²

This *global* alternative was first developed in Justice William Brennan's concurrence in a school prayer case—*School District of Abington Township v. Schempp*.¹³ Justice Brennan seized the opportunity presented by a concurrence to study extensively all of the Supreme Court's decisions related to religion from a socio-historical perspective. He found that the Court's reasoning could not be traced to a unitary philosophical principle; instead, it hinged on a principle of differentiation on the basis of the particular publics, spaces, and levels of compulsion that arose in each case.¹⁴ While Brennan's approach may seem unsatisfactory, given both that it was expressed in a concurrence and that it seems to lack a clear underlying principle, it came to exercise a strong influence over the way in which the Court would deal with religion cases.¹⁵ The

¹² For example, the First Amendment, U.S. CONST. amend. I, the Due Process Clause, U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1, and the Equal Protection Clause, U.S. CONST. amend. XIV, § 1.

¹³ *Sch. Dist. v. Schempp*, 374 U.S. 203, 294–97 (1963) (Brennan, J., concurring) (arguing that determining the permissible relationship between government and religion requires an inquiry into the “special circumstances” giving rise to each case).

¹⁴ *Id.* at 296–304; see also Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 702, 705, 707 (1968) (discussing the problems posed by the clause-by-clause approach of the Supreme Court with an emphasis on Brennan's concurring opinion as an attempt to change the approach).

¹⁵ Justice Brennan's concurrence in *Schempp* has become a central part of the Court's jurisprudence, being cited by thirteen different Justices in twenty-seven opinions since 1963. Justice Brennan cited it in nine cases. *Edwards v. Aguillard*, 482 U.S. 578, 584 & n.5 (1987) (Brennan, J., majority opinion); *Lynch v. Donnelly*, 465 U.S. 668, 715, 717, 719 (1984) (Brennan, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 812, 816–17, 818 (1983) (Brennan, J., dissenting); *Plyler v. Doe*, 457 U.S.

second important step in the alternative approach came decades later, with Justice John Paul Stevens's majority opinion in *Wallace v. Jaffree*.¹⁶ Stevens "identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."¹⁷ Unlike Brennan, Stevens did not elaborate on this principle; rather, it was a one-time flash of genius that extracted from a disconcerting jurisprudence an interpretation developed in a few paragraphs and then largely gone unnoticed by jurists.

The Article demonstrates how Justice Stevens's concept of individual freedom of conscience, combined with Justice Brennan's framework, unifies and gives structure to the Supreme Court's religion jurisprudence. Implemented differently depending on the spaces involved, as well as the type of public and degree of coercion, the concept of "freedom of conscience" has structured—implicitly or explicitly—the Court's religion-related jurisprudence.

This Article relies on research conducted in previously unexplored archives of various Justices who participated in deciding many religion-related cases since the Second World War. But more than bringing unavailable material to our attention, these archives permit us to refocus our attention on parts of opinions that have often been neglected or ignored.

202, 221 (1982) (Brennan, J., majority opinion); *McDaniel v. Paty*, 435 U.S. 618, 638 n.17 (Brennan, J., concurring); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 770, 772 (1976) (Brennan, J., dissenting); *Hunt v. McNair*, 413 U.S. 734, 750 (1973) (Brennan, J., dissenting); *Neb. State Bd. of Educ. v. Sch. Dist. of Hartington*, 409 U.S. 921, 926 (1972) (Brennan, J., concurring); *Walz v. Tax Comm'n*, 397 U.S. 664, 680–81 (1969) (Brennan, J., concurring). Justices Souter and Marshall cited it in three cases each. *Mitchell v. Helms*, 530 U.S. 793, 872 (2000) (Souter, J., dissenting); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (Souter, J., majority opinion); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 576 (1993) (Souter, J., concurring in part and concurring in the judgment); *Rendell-Baker v. Kohn*, 457 U.S. 830, 848 n.2 (1982) (Marshall, J., dissenting); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (Marshall, J., majority opinion). Justice Powell and Chief Justice Burger cited it in two cases each. *Bowen v. Roy*, 476 U.S. 693, 705 (1986) (Burger, C.J., plurality opinion); *Marsh*, 463 U.S. at 791 (Burger, C.J., majority opinion); *Ambach v. Norwick*, 441 U.S. 68, 77 (1978) (Powell, J., majority opinion); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39, 786 (1973) (Powell, J., majority opinion). Justices O'Connor, Stevens, Blackmun, Scalia, Thomas, Breyer, Kennedy, and Chief Justice Rehnquist cited it in one case each. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (Kennedy, J., majority opinion); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (Breyer, J., dissenting); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 618 (1989) (Blackmun, J., majority opinion); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (Stevens, J., majority opinion); *id.* at 72 (O'Connor, J., concurring); *id.* at 99 (Rehnquist, J., dissenting).

¹⁶ See *Wallace*, 472 U.S. at 52–54 (1985) (describing the First Amendment clauses as collectively protecting an individual's right, or "freedom of conscience," to select and observe any religion).

¹⁷ *Id.* at 50; cf. *Schempp*, 374 U.S. at 222 (noting that the First Amendment clauses overlap because they both require neutrality, but not constructing neutrality as a common principle covering the two clauses beyond the Establishment Clause).

Part I of the Article describes how the Court's jurisprudence has traditionally been guided by an approach that distinguishes between the two Religion Clauses. Within this clause-bound doctrinal approach, Justices have competed to impose their own views for determining whether a law violated the Establishment Clause or the Free Exercise Clause. Part II of the Article shows how Justice Brennan's interpretation of the Court's religion jurisprudence—based on the differentiation of spaces, audiences, and degrees of coercion—transcended the formal distinction between the two clauses. Justice Brennan's interpretation first gained legitimacy through popular mobilizations, and then through threshold or test cases. Although the Justices offered different justifications for that jurisprudence, the Court ultimately settled Brennan's frame, for example by strictly distinguishing children and adults. Part III of the Article addresses how the concept of "freedom of conscience" emerged, through religion cases located outside the scope of the clauses, before being used to justify cases within the clauses. In Part IV, I show that freedom of conscience—as applied to different spaces, publics, and degrees of constraint—provides a framework to the Court's jurisprudence. For the Court, freedom of conscience involves the right of the individual not to suffer harm in the form of an external imposition of another's conscience, even in those recent cases that have triggered the most controversy. Given the Court's understanding of freedom of conscience, *Hobby Lobby* can be seen for what it is: an heir of *Wisconsin v. Yoder*, wherein the Court found that Amish parents' fundamental right to freedom of religion, which outweighed the state's interest in educating children, was implicitly conditional on these mature children not being harmed and not refusing to leave their school.¹⁸ Since the Court, despite the polysemy of the concept, has applied one interpretation of freedom of conscience, not only as a strong guiding principle in all its decisions since 1943 but as an almost absolute right, I suggest in conclusion that the Court could posit this right—in both a negative and a positive sense—as a privilege and immunity of the American citizen.

I. THE TRADITIONAL STORY OF THE FIRST AMENDMENT CLAUSES ON RELIGION

For the past seventy-five years, the dominant approach taken by the Supreme Court toward the First Amendment's Religion Clauses has been a clause-by-clause interpretation separating the Free Exercise Clause and the Establishment Clause. Very few religion cases arose before World War II. The sharp spike in such cases that occurred afterwards can be attributed to three main factors: first, the diversification of American society in the realm of religion, both

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972); see also *infra* Part IV.B.

with the increase of diverse religious traditions and the more public presence of atheists and agnostics;¹⁹ second, the development of the modern state, first more regulatory,²⁰ then more involved in welfare²¹ and in international wars; and third, and most importantly, the application of the First Amendment to the states through incorporation under the Fourteenth Amendment.

A. *The Establishment Clause and the Search for a Standard*

The Court had already incorporated the Free Exercise Clause in 1940,²² when the incorporation of the Establishment Clause appeared in Justice Hugo L. Black's decision in *Everson v. Board of Education*.²³ Arch Everson, a taxpayer in Ewing Township, NJ, had brought a suit against the local board of education for providing tax-funded subsidies for busing to public and private school-children.²⁴ Everson argued that funding students of private religious schools violated the Establishment Clause.²⁵ The Court struggled to decide exactly where to draw the line between acceptable funding and unconstitutional promotion of religion. By a 5-4 margin, the Court ultimately came down in favor

¹⁹ When Gallup surveyed religious trends in 1948, 69% of those surveyed by Gallup identified as Protestant, 22% as Catholic, and 4% as Jewish, with only 2% identifying as "None" and less than .5% as "Other." *Religion*, GALLUP, <http://news.gallup.com/poll/1690/religion.aspx> (last visited Nov. 7, 2017). By 1980, those numbers were 61% Protestant, 28% Catholic, 2% Jewish, 2% Otherwise, and 7% None, and by 2012, 41% Protestant, 10% Christian (nonspecific), 23% Catholic, 2% Jewish, 4% Other, and 14% None, respectively. *Id.* Another survey of more than 35,000 Americans by the Pew Research Center finds that the percentage of adults (ages 18 and older) who describe themselves as Christians has dropped from 78.4% in an equally massive Pew Research survey in 2007 to 70.6% in 2014. *America's Changing Religious Landscape*, PEW RES. CTR. 3 (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

The percentage of Americans who are religiously unaffiliated—describing themselves as atheist, agnostic or "nothing in particular"—has jumped more than six points, from 16.1% to 22.8%. *Id.* And the share of Americans who identify with non-Christian faiths has risen 1.2 percentage points, from 4.7% in 2007 to 5.9% in 2014. *Id.* Racial and ethnic minorities now make up 41% of Catholics (up from 35% in 2007), 24% of evangelical Protestants (up from 19%), and 14% of mainline Protestants (up from 9%). *Id.* at 5.

²⁰ See Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395, 1396–97 (2014) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION* (2013) and ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013)) ("[T]he growth of the modern regulatory state creates ever more opportunities for friction between legal and religious obligations.").

²¹ See Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 388–96 (1990) (describing how the rise of the welfare state aggravated the difficulty of interpreting the Establishment Clause).

²² *Cantwell v. Connecticut*, 310 U.S. 296, 303, 305 (1940).

²³ *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947).

²⁴ *Id.* at 3; see also Donald L. Drakeman, *Everson v. Board of Education and the Quest for the Historical Establishment Clause* 49 AM. J. LEGAL HIST. 119, 128 (2007) (explaining the background of *Everson*).

²⁵ *Id.* at 8.

of the busing program's constitutionality.²⁶ Black likened school buses to "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."²⁷ While incorporating the First Amendment to the states through the Fourteenth Amendment, Black argued, in the name of the Court, that the State of New Jersey did not contribute money to the religious schools, nor did it otherwise support them.²⁸ It was just helping parents "get their children, regardless of their religion, safely and expeditiously to and from accredited schools."²⁹ The distinction between what occurred within the school and outside the school seems to have played a pivotal role, which it would continue to play in the Court's subsequent case law, especially *Illinois ex rel. McCollum v. Board of Education*³⁰ and *Zorach v. Clauson*.³¹ Both *McCollum* and *Zorach* involved setting a dedicated time for religious instruction of public school students.³² In *McCollum*, the program involved the regular use of school facilities, classrooms, utilities like heat and light, and time from the regular school day.³³ The Court considered "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" as falling under the ban of the First Amendment.³⁴ All religious instruction under the *Zorach* program, by contrast, was conducted entirely off the school premises and was declared constitutional.³⁵

Although opponents to the separation between public schools and religion regained some hope after *Zorach*, that light quickly dimmed with the Court's decisive opinions in *Engel v. Vitale*³⁶ in 1962 and, the following year, *Abington School District v. Schempp*.³⁷ *Engel* concerned New York state officials' composition of an official school prayer, which students in public schools were encouraged to recite.³⁸ Writing for a 6-1 majority, Justice Black found that such government-directed prayers violated the Establishment Clause, because they promoted religious belief through "indirect coercive pressure" and "writing or sanctioning official prayers."³⁹ *Schempp* concerned a family's

²⁶ *Id.* at 18.

²⁷ *Id.* at 17-18.

²⁸ *Id.* at 18.

²⁹ *Id.*

³⁰ *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

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

³² *McCollum*, 333 U.S. at 205; *Zorach*, 343 U.S. at 308.

³³ *McCollum*, 333 U.S. at 205; *id.* at 234 (Jackson, J., concurring).

³⁴ *McCollum*, 333 U.S. at 210.

³⁵ *Zorach*, 343 U.S. at 308-11.

³⁶ *Engel v. Vitale*, 370 U.S. 421 (1962).

³⁷ *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

³⁸ *Engel*, 370 U.S. at 422.

³⁹ *Engel*, 370 U.S. at 431, 435-36. Neither Justice Frankfurter nor Justice White took part in the decision, as Justice Frankfurter was incapacitated and Justice White was not yet participating. *Id.* at 436; SUSAN DUDLEY GOLD, *ENGEL V. VITALE: PRAYER IN THE SCHOOLS* 81 (2006).

suit against the Abington School District to enjoin it from requiring their children to participate in mandatory Bible readings as required under Pennsylvania law.⁴⁰ Ruling 8-1, the Court found that the practice of school-sponsored mandatory prayer violated the Establishment Clause.⁴¹

1. *The Lemon Test and its Limits*

Taken collectively, the line of cases from *Everson* to *Engel* and *Schempp* emphasizes a need to keep religion separated from a public institution. Nevertheless, in 1971, the Court's predominant interpretation of the Establishment Clause took a turn from refereeing separation to maintaining neutrality. *Lemon v. Kurtzman*⁴² addressed public subsidies of salaries of teachers and of secular educational materials in (primarily religious) private schools in Pennsylvania and Rhode Island. Chief Justice Warren Burger, writing for the Court, declared these subsidies unconstitutional.⁴³ He laid down a three-prong test for determining whether a statute "respecting" religion meets the Establishment Clause's requirements: (1) it must have a secular legislative purpose; (2) its principal effect must be one that neither advances nor inhibits religion; and on the basis of two recent cases,⁴⁴ (3) it must not foster excessive governmental *entanglement* with religion.⁴⁵

The *Lemon* test dominated the Court's jurisprudence for a decade. In 1980, for example, in *Stone v. Graham*, the Supreme Court found that a Kentucky statute requiring the posting on the wall of each public school classroom in the state of a copy of the Ten Commandments, purchased with private contributions, had no secular legislative purpose, thus failing the first prong of the *Lemon* test.⁴⁶ In reaching its decision, the Court applied the test to determine "whether a challenged state statute is permissible under the Establishment Clause."⁴⁷ However, that same year, the Court admitted that

⁴⁰ *Schempp*, 374 U.S. at 205–06.

⁴¹ *Id.* at 223.

⁴² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁴³ *Id.* at 604, 625.

⁴⁴ See *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (finding that state grants of tax exemption to religious organizations do not violate the Establishment Clause); see also *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968) (upholding legislation providing secular textbooks free of charge to students at religious schools).

⁴⁵ *Lemon*, 403 U.S. at 612–13.

⁴⁶ *Stone v. Graham*, 449 U.S. 39, 42–43 (1980).

⁴⁷ *Id.* at 40; see *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 785–86 (1973) (holding that a state statute which provided financial assistance to private schools violated the Establishment Clause because it induced parents to send children to sectarian institutions); see also *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 474, 482 (1973) (holding that a state law reimbursing parochial schools for testing and recordkeeping costs violated the Establishment Clause because it failed to ensure that the funds were not being used for religious purposes).

the *Lemon* test “sacrifices clarity and predictability for flexibility.”⁴⁸

Moreover, in a 1983 case involving legislative prayer, *Marsh v. Chambers*, the Court broke from the strictures of the *Lemon* test.⁴⁹ This case examined the constitutionality of the Nebraska legislature’s practice of opening sessions with a prayer, led by a state-funded chaplain.⁵⁰ The Supreme Court held that government funding for chaplains was constitutional because of the “unique history” of the chaplaincies in American legislative bodies.⁵¹ Writing for the 6-3 majority, Chief Justice Burger highlighted that three days before the First Amendment was passed by the First Congress and sent to the states for ratification, on September 25, 1789, Congress authorized the hiring of legislative chaplains.⁵² The Chief Justice interpreted this as a clear indication that, at least for the amendment’s Framers, the Establishment Clause was not meant to cleave religion and public life entirely apart; rather, it was meant to prevent the more insidious intermixing of church establishments and the government.⁵³

Marsh was not the first time the Court cited history to justify a religious presence in the public sphere. In 1961, an important set of cases had profoundly divided the Court and the country. The Court handed down cases that touched on both Religion Clauses and found that Sunday laws, or restrictions on what commercial activities could be done on Sunday, neither represented a law establishing religion nor constituted a violation of individuals’ religious liberty. Instead, the Court found that these originally religious laws had taken on a secular value.⁵⁴ As Chief Justice Earl Warren explained,

[D]espite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be

48 *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (“This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes.”).

49 *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

50 *Id.* at 784.

51 *Id.* at 791, 795.

52 *Id.* at 788.

53 *Id.* at 788, 792.

54 *See Braunfeld v. Brown*, 366 U.S. 599, 600, 605 (1961) (finding that a Pennsylvania statute barring Sunday retail sales did not infringe upon religious rights, but “simply regulate[d] a secular activity” of store ownership); *Gallagher v. Crown Kasher Super Mkt. of Mass., Inc.*, 366 U.S. 617, 618, 627 (1961) (holding that a Massachusetts statute forbidding Sunday business activity had a secular, not religious, purpose because it intended to “provide an atmosphere of recreation”); *McGowan v. Maryland*, 366 U.S. 420, 422, 444–45 (1961) (describing Maryland’s Sunday Closing Laws as secular because they promoted a day of rest for all citizens); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 583–84, 595 (1961) (recognizing a Pennsylvania statute barring Sunday business operation as secular because it “was amended to permit healthful” Sunday exercises).

heard more distinctly and the statutes began to lose some of their totally religious flavor. . . . More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come.⁵⁵

In these cases, history was justifying a policy that—though originally religious—had become secular. Twenty years later, history was used to justify the publicly funded expression of religion within a public institution, or a public body. However, the implications of *Marsh v. Chambers* for broader jurisprudence remained contested and unclear for some time.

Over time, a majority of the Justices on the Court found the *Lemon* test unsatisfactory. As Professor Jesse Choper has argued, taken literally, the first prong of the test, “secular purpose,” would make unconstitutional all religious exemptions, from the military *or* from schooling.⁵⁶ “Entanglement” also suffers from conceptual flaws. For example, while the Court forbade states from financing parochial schools, it allowed them to set statewide educational standards for public and private schools alike.⁵⁷

2. *Developing New Standards: Non-Endorsement and Non-Coercion*

Justices Sandra Day O'Connor and Anthony Kennedy, newcomers to the bench and moderately conservative appointees of President Reagan, each developed a new heuristic for applying the Establishment Clause to particular cases. In 1984, Justice O'Connor introduced the non-endorsement test in her concurring opinion in *Lynch v. Donnelly*.⁵⁸ Noting the lack of clarity around the *Lemon* test, she proposed “[f]ocusing on institutional entanglement and on endorsement or disapproval of religion . . . as an analytical device.”⁵⁹ She explained:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political commu-

⁵⁵ *McGowan*, 366 U.S. at 433–34.

⁵⁶ Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501 (2002).

⁵⁷ See *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (noting the parties' stipulation that the Catholic schools at the heart of the litigation “teach the secular subjects required to meet the State's minimum standards”); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245–46 (1969) (“[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.”); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (asserting in dicta that states possess the constitutional power to regulate studies in all schools to make “certain [that] studies plainly essential to good citizenship [are] taught”); Choper, *supra* note 56, at 502 (noting one of the conceptual flaws of the “entanglement” prong is the Supreme Court's willingness to allow states to regulate the curricula of parochial schools).

⁵⁸ *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

⁵⁹ *Id.* at 689.

nity. . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. . . . Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.⁶⁰

Justice O'Connor then cited three cases: *Walz v. Tax Commission*,⁶¹ where the Court held that tax exemptions for religious, educational, and charitable organizations were constitutional; *McGowan v. Maryland*,⁶² where it sustained a mandatory Sunday closing law; and *Zorach v. Clauson*,⁶³ where it accepted released time from school for off-campus religious instruction. "What is crucial," O'Connor concluded, "is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."⁶⁴

The non-endorsement approach marked a shift from liberty to equality. It sent a message against favoritism of one faith to children because nobody—child or adult—should feel like an outsider in a good society.⁶⁵ For the following fifteen years, non-endorsement became an approach used by numerous Justices, indeed, a majority of them successively, but never simultaneously.⁶⁶

In between, in 1989, Justice Kennedy had developed his own heuristic for approaching Establishment Clause cases: the non-coercion test.⁶⁷ Joined in his partial concurrence and partial dissent to *County of Allegheny v. ACLU* by Chief Justice Rehnquist and Justices Scalia and White, Kennedy found that holiday displays on municipal property featuring both a crèche and an eighteen-foot Hanukkah menorah did not violate the Establishment Clause insofar as neither could be seen as an attempt to coerce observers into adopting

⁶⁰ *Id.* at 687–92.

⁶¹ *Id.* at 692 (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

⁶² *Id.* at 692 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)).

⁶³ *Id.* at 692 (citing *Zorach v. Clauson*, 343 U.S. 306 (1952)).

⁶⁴ *Id.* at 692.

⁶⁵ See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 695–98 (2002) (discussing the nature of the non-endorsement approach and its emphasis on protecting the political standing of religious minorities). Feldman traces in Frankfurter's concurring opinion in *McCullum* the focus of the feeling of religious-minority children and his focus on unity. *Id.* at 697.

⁶⁶ See Choper, *supra* note 56, at 505–08 (discussing various Supreme Court cases in which the Justices relied on the Endorsement Test to reach their holding).

⁶⁷ In addition to Justices Berger, O'Connor, and Kennedy, Justice Souter has traced and constructed the coherence of the Establishment Clause in his dissent in *Mitchell vs. Helms*, 530 U.S. 793, 878–83 (2000), from neutrality (used in *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1946) and *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968)) to evenhandedness (started in *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1972)).

a particular set of religious views.⁶⁸ In contrast, Justice Harry A. Blackmun and the majority of the Court found that the centrality of the crèche made displaying it unconstitutional.⁶⁹

In his approach, Kennedy consciously distances himself from the two prior predominant strands of Establishment Clause jurisprudence. In particular, he characterizes the *Lemon* test as an overly narrow reading of the Establishment Clause, as potentially

giv[ing] the impression of a formalism that does not exist [and which t]aken to its logical extreme . . . would require a relentless extirpation of all contact between government and religion. . . . Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society.⁷⁰

Kennedy also rejects Justice O'Connor's "endorsement test," finding that it was inconsistent with the results in the Court's previous decisions, especially *Marsh*, and the Court's apparent acceptance of symbolic endorsements—like "In God We Trust" on U.S. currency.⁷¹ He takes as central the proposition that, "whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence."⁷²

Returning to *Zorach v. Clauson*, where the Court "permitted New York City's public school system to accommodate the religious preferences of its students by giving them the option of staying in school or leaving to attend religious classes for part of the day,"⁷³ Kennedy stated that "rather than requiring government to avoid any action that acknowledges or aids religion,

⁶⁸ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 664, 679 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁶⁹ *Id.* at 599–602 (majority opinion).

⁷⁰ *Id.* at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part). Kennedy resists too facile a reading of the *Lemon* test, writing that he is "content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area." *Id.* at 655.

⁷¹ Indeed, Kennedy explicitly notes the test's genesis in Justice O'Connor's jurisprudence, writing: Although a scattering of our cases have used "endorsement" as another word for "preference" or "*imprimatur*," the endorsement test applied by the majority had its genesis in Justice O'Connor's concurring opinion in *Lynch*. The endorsement test has been criticized by some scholars in the field. Only one opinion for the Court has purported to apply it in full, but the majority's opinion in these cases suggests that this novel theory is fast becoming a permanent accretion to the law. For the reasons expressed below, I submit that the endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.

Id. at 668–69 (citations omitted).

⁷² *Id.* at 669.

⁷³ *Id.* at 658 (citing *Zorach v. Clauson*, 343 U.S. 306 (1952)).

the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society.”⁷⁴

The border between accommodation and establishment requires diligent observation of two limiting principles:

government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”⁷⁵

However, since it was first invoked, numerous Justices have resisted the non-coercion approach.

3. *The Disputed Dominance of the Non-Coercion Test*

In his opinion for the Court in *Allegheny*, Justice Blackmun argued that, “Kennedy’s reading of *Marsh* would gut the core of the Establishment Clause” because “fail[ing] to recognize the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith, even he is forced to acknowledge that some instances of such favoritism are constitutionally intolerable.”⁷⁶ O’Connor too resists Kennedy’s critique of the “endorsement test.” She points out that Kennedy’s

Establishment Clause standard that prohibits only ‘coercive’ practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in [her] view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.⁷⁷

In the following years, in order to marshal the support of a majority of colleagues, Justices writing for the Court in cases related to the Establishment Clause would continue to use different tests—*Lemon*, non-endorsement, and non-coercion—illustrating Justice O’Connor’s statement that, “[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.”⁷⁸

In 1993, if Justice Scalia could describe the *Lemon* test as “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, . . . frightening the little children,”⁷⁹ it was because even if six of the Justices sitting on the Court had

⁷⁴ *Id.* at 657.

⁷⁵ *Id.* at 659 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

⁷⁶ *Id.* at 604–05 (majority opinion).

⁷⁷ *Id.* at 627–28 (O’Connor, J., concurring in part and concurring in the judgment) (citation omitted).

⁷⁸ *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994).

⁷⁹ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).

criticized it, the *Lemon* test was still the basis for *Lamb's Chapel v. Center Moriches Union Free School District*—the case in which Scalia made this comment.⁸⁰ And it would still be proudly used and invoked in 2005 by Justice Souter when he delivered the Court's opinion in *McCreary County v. ACLU of Kentucky*, a case concerning a display of the Ten Commandments.⁸¹

Indeed, even in instances where Justice Kennedy's approach prevailed, strong disagreements remained. In *Lee v. Weisman*, Kennedy, writing for the Court, found that a prayer at a public middle school graduation ceremony violated the Establishment Clause.⁸² For Justice Kennedy, the children were effectively forced to participate in this prayer, since "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions."⁸³ But Justice Scalia derided this approach based on indirect coercion as "lay[ing] waste a tradition that is as old as public school graduation ceremonies themselves" with "a boundless, and boundlessly manipulable, test of psychological coercion."⁸⁴

More recently, in *Town of Greece v. Galloway*, where Kennedy delivered the opinion of the Court, he did not gather a majority for that part of the opinion where he again invoked the non-coercion concept.⁸⁵ The four dissenting Justices rejected it.⁸⁶ In his concurring opinion, Justice Thomas based his support for prayer recitation in a municipal council on his originalist reading of the Establishment Clause which provides for its application to the federal government, not to the states.⁸⁷ In part two of his opinion, joined by Justice Scalia, Thomas argued "actual legal coercion" is unconstitutional, which does not include merely social or psychological coercion.⁸⁸ In the end, Justice Kennedy's non-coercion standard only garnered the approval of two other Justices.⁸⁹

⁸⁰ *Id.*

⁸¹ 545 U.S. 844, 859–61 (2005) (referencing *Lemon's* "three familiar considerations for evaluating Establishment Clause claims" and rejecting calls to abandon *Lemon's* purpose test).

⁸² 505 U.S. 577, 599 (1992).

⁸³ *Weisman*, 505 U.S. at 595. Interestingly, when Justice Stevens wrote the majority opinion in *Santa Fe Independent School District v. Doe*, he explicitly cited *Lee* as guiding his analysis, but incorporated much of Justice O'Connor's endorsement reasoning in his analysis finding that student-led, student-initiated prayer at a public high school football game was unconstitutional. 530 U.S. 290, 302 (2000).

⁸⁴ *Id.* at 632 (Scalia, J., dissenting).

⁸⁵ 134 S. Ct. 1811, 1815, 1824–25 (2014).

⁸⁶ *Id.* at 1841 (Kagan, J., dissenting).

⁸⁷ *Id.* at 1835 (Thomas, J., concurring in part and in the judgment).

⁸⁸ *Id.* at 1837–38.

⁸⁹ *Id.* at 1824–25 (Kennedy J., plurality opinion) (writing for only Chief Justice Roberts, himself, and Justice Alito).

B. The Free Exercise Clause and the Uncertain Status of Exemption

Parallel to the unfolding of this Establishment Clause jurisprudence, the Court wrote equally serpentine opinions regarding the Free Exercise Clause. The first of these Free Exercise cases came in *Reynolds v. United States*, the famous Mormon polygamy case, in which the Court upheld a ban on polygamy.⁹⁰ In doing so, the Court distinguished between beliefs and conduct, finding the former protected under the Free Exercise Clause but the latter fully vulnerable to the legislative power of the government. Writing for the Court, Justice Morrison Waite investigated the history of religious freedom in the United States and quoted a letter from Thomas Jefferson in which he wrote that there was a distinction between religious belief and the actions that flowed from religious belief. The former “lies solely between man and his God,” thus “the legislative powers of the government reach actions only, and not opinions.”⁹¹

Except in cases involving Mormon polygamy, the nineteenth and early twentieth century saw little else in terms of Free Exercise litigation.⁹² This began to shift in 1940 when, in *Cantwell v. Connecticut*, the Court incorporated the First Amendment’s Free Exercise clause against the states.⁹³ Overturning the conviction of Newton Cantwell and his two sons—all Jehovah’s Witnesses—for violating Connecticut’s solicitor licensing regulations and inciting a breach of the peace, Justice Owen Roberts argued that

to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.⁹⁴

⁹⁰ 98 U.S. 145, 166–68 (1878). *Reynolds* was the first case in which the Court dealt with the Free Exercise Clause substantively. See Donald L. Drakeman, *Reynolds v. United States: The Historical Construction of Constitutional Reality*, 21 CONST. COMMENT. 687, 687 (2004). The first case to reach the U.S. Supreme Court in which a party invoked the Free Exercise Clause of the First Amendment was *Permoli v. Municipality No. 1*, 44 U.S. 589 (1845); the Court stated unanimously that the clause did not apply—at that time—to the acts of state and local governments. See Michael W. McConnell, *Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court’s First Free Exercise Case*, in *FIRST AMENDMENT STORIES* 40 (Richard W. Garnett & Andrew Koppelman, eds., 2012).

⁹¹ 98 U.S. at 164.

⁹² This was largely because, before the passage of the Fourteenth Amendment and the subsequent incorporation of the Bill of Rights to the states, few plaintiffs could base their cases on that First Amendment guarantee. If violations implicating an individual’s Free Exercise rights arose, they often originated with a municipality or state authority, as the federal government passed few laws bearing on those rights. In *Davis v. Beason*—the case that followed *Reynolds*—the Supreme Court reiterated its previous holding, stating that “[c]rime is not the less odious because sanctioned by what any particular sect may designate as religion.” 133 U.S. 333, 345 (1890). This holding was further reiterated in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States* 136 U.S. 1, 49–50 (1890).

⁹³ 310 U.S. 296, 303 (1940).

⁹⁴ *Id.* at 307.

This reasoning also helped to guide the Court's decision in *Murdock v. Pennsylvania*, which struck down a Pennsylvania ordinance requiring solicitors to register.⁹⁵ Justice William O. Douglas characterized this provision as a religious tax imposed on Jehovah's Witnesses to prevent them from preaching and worshipping God in the way they felt called to.⁹⁶

In 1962, with *Sherbert v. Verner*, the Court changed its reasoning.⁹⁷ The case concerned Adell Sherbert, a Seventh-Day Adventist denied unemployment compensation after being fired for refusing to work on the Sabbath.⁹⁸ The Court found this denial of government benefits to be an unconstitutional infringement of her Free Exercise rights.⁹⁹ Justice Brennan's majority opinion broke with the previous distinction made by the Court between beliefs and conduct. For conduct not posing "some substantial threat to public safety, peace or order," it raised the standard for overcoming infringements on individuals' Free Exercise rights to heightened scrutiny.¹⁰⁰ Brennan writes that "some compelling state interest . . . [must] justif[y] the substantial infringement of [an] appellant's First Amendment right" in order for that statute to stand.¹⁰¹ Although seemingly following in line with the allowances in *Cantwell* and *Murdock*, Brennan's use of heightened scrutiny marked a major shift in the doctrine. As Justice Harlan noted:

The implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. . . . I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area.¹⁰²

Nine years later, *Wisconsin v. Yoder* presented a case where three Amish parents declined to send their children, aged fourteen and fifteen, to public school after they completed the eighth grade.¹⁰³ The parents were convicted of violating the compulsory education obligation imposed until the age of sixteen by a state law and fined \$5 each.¹⁰⁴

In the Court opinion, the State's interest in universal education had to be balanced against other fundamental rights, such as those protected by the Free Exercise Clause of the First Amendment and the traditional interest of

⁹⁵ 319 U.S. 105, 108–10, 117 (1943).

⁹⁶ *Id.* at 112.

⁹⁷ 374 U.S. 398 (1963).

⁹⁸ *Id.* at 399–401.

⁹⁹ *Id.* at 410.

¹⁰⁰ *Id.* at 403.

¹⁰¹ *Id.* at 406.

¹⁰² *Id.* at 422–23 (Harlan, J., dissenting).

¹⁰³ 406 U.S. 205, 207 (1972).

¹⁰⁴ *Id.* at 208.

parents in directing their children's religious upbringing.¹⁰⁵ The Court found that at the request of their parents, Amish children should be exempted from mandatory public schooling after the eighth grade in order to permit the Amish faith to survive by transmission and practice.¹⁰⁶ Chief Justice Berger, writing for the Court, noted that:

[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.¹⁰⁷

Twenty years later, the Court's jurisprudence suggested that directing heightened scrutiny for every policy that infringed on someone's religious convictions might be too cumbersome. This conclusion is most strongly stated in *Employment Division v. Smith*, a 1990 case on whether the state of Oregon had violated the Free Exercise Clause in denying unemployment benefits to a person fired for violating the state prohibition on the use of peyote—even though the use of the drug was part of a Native American religious ritual.¹⁰⁸ Delivering the opinion for the Court, Justice Scalia found that the request for a state compelling interest test applied in matters of free speech would, when applied to religious exemptions, create an entirely unruly and unworkable system.¹⁰⁹ Scalia argued that to adopt a true “compelling interest” requirement for laws that affect religious practice would lead towards “anarchy.”¹¹⁰

For Scalia:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.¹¹¹

Instead, Scalia encouraged Smith and his backers to obtain the exemption through legislative processes at the state level.¹¹²

¹⁰⁵ *Id.* at 213–14.

¹⁰⁶ *Id.* at 219.

¹⁰⁷ *Id.* at 214.

¹⁰⁸ 494 U.S. 872, 874 (1990).

¹⁰⁹ *Id.* at 888.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 888–89 (citations omitted).

¹¹² *Id.* at 890.

The reaction to *Smith* was swift and clear. Seeing religious liberty as under attack, Congress almost unanimously passed the Religious Freedom Restoration Act of 1993 (“RFRA”)¹¹³ “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.”¹¹⁴

The Court, however, did not back down. In 1997, it found RFRA unconstitutional as applied to the states. In *City of Boerne v. Flores*, the Court declared that Congress had only a remedial and not a substantive power under Section Five of the Fourteenth Amendment upon the states.¹¹⁵ Writing for the Court, Justice Kennedy found that Congress had exceeded its constitutional powers by imposing the *Sherbert* compelling interest test, enshrined in RFRA, on the states, because it was not congruent and proportional response to the threat to religious liberty faced by U.S. citizens all over the country.¹¹⁶

Congress again reacted, this time by passing, by unanimous consent in voice votes, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) in 2000. This bill provided a more capacious definition of religious exercise as well as strong protections for an imprisoned person’s right to worship. It also protected churches and religious institutions from having a “substantial burden” imposed upon them through land use regulations.¹¹⁷

In *Smith*, the Court allowed legislatures to make religious exemptions to generally applicable laws and regulations.¹¹⁸ However, exemptions based on “assertedly sinful conduct of others” seem to have been expanded by the Court in *Hobby Lobby* to limits as yet unseen.¹¹⁹

¹¹³ *All Information (Except Text) for H.R. 1308—Religious Freedom Restoration Act of 1993*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-info> (last visited Aug. 23, 2016). It was voted by voice vote in the House and 97 against 3 in the Senate. *Id.*

¹¹⁴ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2012) (citations omitted) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); then citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). RFRA provides as follows:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a–b).

¹¹⁵ 521 U.S. 507, 519 (1997).

¹¹⁶ *Id.* at 520, 532 (finding that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”).

¹¹⁷ Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

¹¹⁸ 494 U.S. 872, 890 (1990).

¹¹⁹ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015); see *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2761–62, 2767–75 (2014) (tracing the history of RFRA and its aftermath).

Although *Hobby Lobby* does not stand in formal contradiction with *Smith*—wherein Scalia encouraged legislatures to set new rules if they wished—it contradicts the spirit of Scalia’s opinion in *Smith*, in which he warned against the risk of anarchy.

In the latest Establishment Clause cases, non-coercion remains the guiding principle. However, it has failed to win over the whole Court, as *Galloway* illustrates.¹²⁰ In addition to being in competition with other guiding principles, non-coercion does not attend to the details of every situation. One could claim that coercion exists even when it is not particularly strong, such as in the *Hamilton* case where students were compelled to participate in a military exercise, or during legislative prayer.¹²¹

Above all, the non-coercion test vindicates a *negative* right. It is unable to justify the state’s active role in supporting religion in the military or in prisons, or in situations of voluntary or involuntary confinement, where the government finances religious infrastructure and chaplaincies—seemingly in violation of the Establishment Clause—all while forbidding chaplains to proselytize—seemingly in violation of the Free Exercise Clause. Is it possible to find coherence across all situations, a quality recognized by Justice Kennedy as defining an effective guiding principle, on the basis of a different standard?

II. BRENNAN’S DIFFERENTIATION OF AUDIENCES, SPACES, AND LEVELS OF COERCION

Although the jurisprudence of both the Establishment Clause and the Free Exercise Clause appears muddled, a unitary principle has been at work behind this apparent disorder. In 1963, in his concurring opinion in *Schempp*, Justice Brennan provided a socio-historical approach to the Court’s jurisprudence on religion, covering not only the two Religion Clauses, but also other Constitutional protections that had been invoked by the courts. Covering a wide range of topics, Brennan’s entire opinion is structured around the idea that the Court’s jurisprudence on religion can be understood and interpreted in terms of differentiation of audiences, spaces, and degrees of constraint.

Brennan devoted over three months to writing his concurrence, a 77-page opinion buttressed with 410 footnotes.¹²² With his two clerks, Robert O’Neil and Richard Posner, he not only researched previous decisions, law reviews articles, books on the problem of church-state relations, and reports on the adoption of the First and Fourteenth Amendments in the eighteenth

¹²⁰ See *supra* Part I.A.3 (discussing Justice Kennedy’s failure to obtain majority approval of his non-coercion analysis in *Galloway*).

¹²¹ *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 250 (1934).

¹²² James Marlow, *Brennan Writes Longhand, Then Scrubs What He Writes*, RED BANK REG., July 3, 1963, at 8, <http://209.212.22.88/data/rbr/1960-1969/1963/1963.07.03.pdf>.

and nineteenth centuries, respectively, but also in the constitutions of India, Japan, and the German Republic of 1922.¹²³ Brennan and his clerks also investigated the views of James Madison, Patrick Henry, Thomas Jefferson, Rogers Williams, Oliver Cromwell, and “a lot more.”¹²⁴ Brennan wrote in longhand, crossed out what he wrote, and then wrote again, “constantly in search of the exact word.”¹²⁵

This effort was a response to a massive popular mobilization. One year earlier, *Engel* had generated a tremendous public outcry. The Court’s decision was opposed by 85% of Americans and sparked an enormous popular movement to keep prayer, Bible readings, and other forms of religious practice in the nation’s public schools.¹²⁶

A. The Schempp Concurrence: A Product of a Social Mobilizations and Counter Mobilizations

After *Engel*, the Court received more mail than after the desegregation and Communist-subversion decisions, the largest in Court history up to that point.¹²⁷ Representative Frank Becker (R-N.Y.), a major advocate of constitutional amendments to protect religious expression in schools, introduced two bills in the 88th Congress.¹²⁸ Becker’s later proposal read:

Section 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

Sec. 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

Sec. 3. Nothing in this article shall constitute an establishment of religion.¹²⁹

At the same time, a coalition of religious leaders and legal scholars joined together to oppose the so-called “Becker Amendment.” Deans of law schools across the country as well as leaders of Jewish, Catholic, Protestant, and

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 171 (2010).

¹²⁷ See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 187 (2002) (“The Court received more mail complaining about *Engle* than any other case.”). Rutledge’s biographer notes, for example, that “Rutledge received more mail on *Everson* than on any opinion of his to date, much of it forwarding ‘resolutions of protest by various interested bodies.’” JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 266 (2004).

¹²⁸ H.R.J. Res. 693, 88th Cong. (1963); H.R.J. Res. 9, 88th Cong. (1963).

¹²⁹ H.R.J. Res. 693, 88th Cong. (1963).

Evangelical denominations reached out to members of the House Judiciary Committee urging them not to pass such an amendment.¹³⁰ The Committee organized a series of public hearings at which these prominent anti-amendment voices took center stage and pointed to the many constitutional problems such an amendment would create.¹³¹ These delay tactics helped extend the discussions into June. When the proposed amendment stalled, despite widespread public pressure to bring it to a vote, Becker filed a petition to have the resolution (now H.R.J. Res. 693) discharged from the Judiciary Committee and brought directly to the House floor. Although it failed, Becker's petition nevertheless garnered 167 of the necessary 218 signatures in the House, at which point Becker's term ended and pro-amendment forces started to peter out.¹³² The Court did not yield to the uproar. The Justices had been sensitive to the criticisms they received, but "this did not deter . . . them."¹³³ The differences in how children and adults came to be confronted with challenges on religion proved pivotal for the elaboration and eventual fate of Brennan's analysis.

Twenty years earlier, the Court had responded to a similar public uproar by overturning recent precedent.¹³⁴ In 1940, a time of great patriotic fervor, the Court had taken up a case involving children and religion. This case considered whether a public school could force young Jehovah's Witnesses to salute the American flag and say the Pledge of Allegiance. In *Gobitis*, the Court held that public schools could compel their students to salute the Flag and recite the Pledge of Allegiance, despite some religious children, such as the Jehovah's Witnesses, protesting against these requirements as running counter to their religious beliefs.¹³⁵ With only Justice Harlan F. Stone in dissent, the Court found these religious liberty and free expression claims lacking. Felix Frankfurter, writing for the Court, emphasized:

National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible

¹³⁰ *Congress Fails to Act on School Prayer Amendments*, 20 CONG. Q. ALMANAC 398 (1964), <http://library.cqpress.com/cqalmanac/document.php?id=cqal64-1304697> ("In a statement submitted June 8 to the House Judiciary Committee, 223 of the nation's leading constitutional lawyers, including the deans of 55 law schools, expressed opposition to any attempt to overturn the Court's decisions.")

¹³¹ *Id.* (outlining the "18 days of hearings" before the House Judiciary Committee concerning Becker's amendment).

¹³² *Id.* ("By the time the House Judiciary Committee finally held hearings in the spring of 1964, Becker's petition had obtained 167 of the necessary 218 signatures.")

¹³³ Marlow, *supra* note 122.

¹³⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹³⁵ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591, 598-600 (1940).

ugliness of littered streets to the free expression of opinion through distribution of handbills.¹³⁶

For Frankfurter, this case was a matter of the state being allowed to promote the public good—in this instance, patriotism and a strong sense of national pride—in the face of a challenge by a few individuals.

The reactions to this decision were heated. On the one hand, many saw this case as an instance of betrayal by the Jehovah's Witnesses. Their lodges were burned, and one Witness was even assaulted as a wave of violence broke out against them in the wake of the decision.¹³⁷ Reacting immediately to these developments, First Lady Eleanor Roosevelt, Solicitor General Francis Biddle, and—two months later, in August 1940—FBI Director J. Edgar Hoover engaged in a public, well publicized defense of the Witnesses' freedoms.¹³⁸ On June 8, 1942, Justices Black, Douglas, and Murphy wrote an exceptional dissent in a case where the Court affirmed the constitutionality of a city ordinance requiring licenses and taxes for the selling of books and pamphlets imposed upon Jehovah's Witnesses. There, the Justices expressed that, despite being in the majority in *Gobitis*, they “now believe that it was also wrongly decided.”¹³⁹ The time to overturn it came during the following term. In *West Virginia State Board of Education v. Barnette*, they could join Stone and two new associate Justices—Robert H. Jackson and Wiley B. Rutledge—on the Witnesses' side.

By a 6-3 vote, the Court overruled its previous decision in *Minersville School District v. Gobitis* and found that public school pupils ought not to be forced to behave against their religious convictions.¹⁴⁰ Jackson delivered the opinion of the Court, criticizing and rejecting *Gobitis*. He argued:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.¹⁴¹

“To the contrary,” observed Justice Jackson, “[w]e think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and

¹³⁶ *Id.* at 595.

¹³⁷ See SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 79 (2000).

¹³⁸ See Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 402–13 (2008).

¹³⁹ *Jones v. City of Opelika*, 316 U.S. 584, 624 (1942) (Black, Douglas, & Murphy, JJ., dissenting). Black had changed his mind at the end of 1940. Douglas reported it to Frankfurter, who asked him, “Has Hugo been re-reading the Constitution during the summer[?]” Douglas replied, “No—he has been reading the papers.” H. N. HIRSH, THE ENIGMA OF FELIX FRANKFURTER 152 (2014).

¹⁴⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁴¹ *Id.* at 637.

spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”¹⁴² Black concluded his concurring opinion in *Barnette* by rejecting “compelling little children to participate in a ceremony which ends in nothing for them but a fear of [spiritual] condemnation.”¹⁴³

The turnaround during the episode probably made a strong impression on the Court, especially on those members who reversed their opinions. The struggle that led to the decision in that case and the jurisprudence which followed likely hinged on Justice Black and Justice Douglas—another switched vote—as they integrated the right of children to be exempt from coercion in any religious matter as a cornerstone of their jurisprudence, with both Justices continuing to defend it convincingly in years to come.¹⁴⁴

By 1962, they had Chief Justice Warren and Justice Brennan on their side. In *Engel*,¹⁴⁵ the Court was confirming *Barnette*, despite new popular mobilizations. One year after the *Engel* outcry, Brennan seized the opportunity presented by *Schempp* to go further and to examine the Court’s entire jurisprudence regarding religion on historical and comparative grounds. Brennan also extended his inquiry beyond cases that dealt strictly with the two clauses, expanding his scope to all cases in which religion had had an impact, especially *West Virginia v. Barnette*.

He found distinctions between spaces—public, semi-public, and private—and audiences: for example, between adults and children. He could also distinguish between the degrees of coercion individuals would confront in each situation to conform with some obligations related to religion, while paying attention to, for instance, whether someone would face serious repercussions for not engaging in the relevant religious conduct.¹⁴⁶

Compare *Barnette* to a 1934 case, *Hamilton v. Regents of the University of California*.¹⁴⁷ Both cases dealt with mandated behavior in educational institutions. In *Barnette*, the Court found that children ought not to be forced to behave against their religious convictions.¹⁴⁸ *Hamilton*, on the other hand, concerned the objections of several religious students at the University of

¹⁴² *Id.* at 642.

¹⁴³ *Id.* at 644 (Black, J., concurring).

¹⁴⁴ Chief Justice Harlan F. Stone, who was a lone dissenter in *Gobitis*, wrote to Justice Black to express his personal appreciation: “The sincerity and the good sense of what you have said will, I believe, make a very deep impression on the public conscience. It also states in simple and perfectly understandable form good constitutional law as I understand it.” Letter from Harlan Stone, Chief Justice, U.S. Supreme Court, to Hugo Black, Associate Justice, U.S. Supreme Court (Apr. 1, 1943) (on file with Library of Congress, Hugo Black Papers, Box 220, Folder 2).

¹⁴⁵ *Engel v. Vitale*, 370 U.S. 421 (1962), see also *supra* notes 36, 38–39 (discussing *Engel*).

¹⁴⁶ See generally *Sch. Dist. v. Schempp*, 374 U.S. 203, 230–308 (1963) (Brennan, J., concurring).

¹⁴⁷ 293 U.S. 245 (1934).

¹⁴⁸ *Barnette*, 319 U.S. at 642.

California to mandatory instruction in military science and tactics.¹⁴⁹ Brennan found it significant “that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. This distinction warrants a difference in constitutional results.”¹⁵⁰

While the former pertained to young children attending compulsory elementary school, the latter dealt with university students. This distinction allowed the Court to uphold the university’s required military training classes, at least in part, because when the students chose to apply to a particular program they knew these requirements would be imposed on them.

Brennan next turned to the difference between *Illinois ex rel. McCollum v. Board of Education*¹⁵¹ and *Zorach v. Clauson*.¹⁵² Both cases involved released time for religious instruction of public school students. But for Brennan, in *McCollum*, the problem was not so much—as it was for Black and the majority—that the “program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day . . . even though the actual incremental cost may have been negligible.”¹⁵³ Instead, “[t]he deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom and in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not.”¹⁵⁴ As Brennan explained it, “the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.”¹⁵⁵ Therefore, *Engel* and *Schempp* could be explained not as a step towards excluding religion from all state domains, but rather as an effort to account for the compulsory attendance of, or coercion on, minor children.

B. Brennan’s Frame is Tested: Children Remain Protected

After *Schempp*, popular mobilization in favor of preserving religion in public schools declined. Perhaps the opinion of the Court—similar in its content to *Engel*, but different in tone and in how it was justified—played a role, illuminated as it was by Brennan’s opinion. In the following years, the Justices continued to differ in the justifications they gave for their decisions—employing the *Lemon*, the non-endorsement, or the non-coercion test—depending

¹⁴⁹ *Hamilton*, 293 U.S. at 250–53.

¹⁵⁰ *Schempp*, 374 U.S. at 252–53 (Brennan, J., concurring) (“The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve.”).

¹⁵¹ *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

¹⁵² *Zorach v. Clauson*, 343 U.S. 306 (1952); see also *supra* notes 30–35 (discussing *McCollum* and *Zorach*).

¹⁵³ *Schempp*, 374 U.S. at 261–62.

¹⁵⁴ *Id.* at 262.

¹⁵⁵ *Id.* at 263.

on the facts of the cases and the Justice writing for the majority. However, all these different justifications led to a convergent common outcome: they fit with Brennan's framework and did not stray from it in reaching their conclusions. For example, in case after case the distinction between children and adults—and within that distinction, that between the space of the public school and other spaces, and between compulsory and voluntary attendance—was confirmed.

The first test for Brennan's frame came twenty years after *Schempp*, with *Marsh v. Chambers*. At stake was a legislative prayer program, led by a state-financed chaplain who opened each session of the Nebraska legislature.¹⁵⁶ On this issue, the Brennan of *Schempp* had written:

The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.¹⁵⁷

For the Brennan of 1963, minor children were to be treated differently than adults whose conscience is structured and mature, just as compulsory attendance is different from voluntary attendance.

But twenty years later, Brennan the analyst gave way to Brennan the fighter. By 1983, the opinion he had written to add consistency to the Court's jurisprudence had one effect: protecting children from religious interference in public schools. It would not prevent him from steering the Court's jurisprudence around two consistent but distinct readings of the two clauses, each with its own philosophy, its own distinct and internal logic: his own reading of the Free Exercise Clause already expressed in a majority opinion in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,'" (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1944))).¹⁵⁸ Brennan argued that religious individuals and organizations have a constitutionally protected right to exercise their faith, even in the face of contrary laws or regulations, unless the government can establish a compelling interest to act.¹⁵⁹ His interpretation of the Establishment Clause, defended "primarily in light

¹⁵⁶ *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983).

¹⁵⁷ *Schempp*, 374 U.S. at 299–300.

¹⁵⁸ Compare *Goldman v. Weinberger*, 475 U.S. 503, 523 (1986) (Brennan, J., dissenting) ("It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion."), with *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,'" (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1944))).

¹⁵⁹ Michael W. McConnell, *Justice Brennan's Accommodating Approach Toward Religion*, 95 CALIF. L. REV. 2187, 2188 (2007).

of his focus on the Free Exercise Clause,¹⁶⁰ was an endorsement of the *Lemon* test: it prevented government involvement which would “undermine religion itself.”¹⁶¹ Therefore, in *Marsh v. Chambers*, Brennan found the legislative prayer of Nebraska “a clear violation of the Establishment Clause.”¹⁶² He held that there was “no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”¹⁶³

However, the majority of the Court did not follow him. In *Marsh*, the *Lemon* test would not prevail because the Court chose to turn to history and to respect the long-standing tradition permitting legislative prayer. Still, the Court’s new majority was willing to remain faithful to the Brennan of 1963.

The Court’s reliance on Brennan’s *Schempp* concurrence appears, first, in the memo Justice Blackmun wrote to himself in *Marsh*.¹⁶⁴ Blackmun recalled the three reasons suggested by Brennan in *Schempp* for considering that the appointment of legislative chaplains did not implicate “involvements of the kind prohibited by the Establishment Clause,” including that “[l]egislators are mature adults who may, without penalty, absent themselves from these public ceremonies.”¹⁶⁵ This adherence appeared even more clearly in the exchange of letters between Chief Justice Burger, author of the majority opinion, and Justice Blackmun, his friend on the Court. At stake was a paragraph in Chief Justice Burger’s first draft circulated on May 26, 1983, which read, “*The Establishment Clause does not always bar a state from regulating conduct simply because it ‘harmonizes with religious canons.’*” And this is especially true where, as here, *the individual claiming injury by the practice is an adult, presumably not readily susceptible to ‘religious indoctrination.’*”¹⁶⁶

The danger for Blackmun was that the case would be seen as a signal that the Court was wavering on school prayer. “As the sentence stands,” Blackmun told Burger, “it could suggest that the Establishment Clause might

¹⁶⁰ Robert Post, *Brennan and Religion*, 95 CALIF. L. REV. 2193, 2193 (2007).

¹⁶¹ *Id.*

¹⁶² *Marsh v. Chambers*, 463 U.S. 783, 796 (1983).

¹⁶³ *Id.* at 800–01.

¹⁶⁴ Since his tenure on the Eighth Circuit, Blackmun would dictate a memo to himself summarizing the arguments he found compelling from the briefs submitted by the parties and in the memos of his clerks, before giving his preliminary responses. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 31 (2006).

¹⁶⁵ Memorandum of Harry Blackmun, Associate Justice, U.S. Supreme Court 23–24 (Sept. 27, 1982) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8, at 24) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963)) (stating that the two other reasons are that “the issue may be a political question committed by the Constitution to Congress, at least on the federal side; and standing problems”).

¹⁶⁶ Chief Justice Warren Burger, *Marsh v. Chambers* 8 (circulated on May 26, 1983) (first draft) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8) (emphasis added) (citations omitted).

not bar a State from conducting public prayers even when the individual claiming injury is a child—a result inconsistent with our prior cases.”¹⁶⁷ Later Blackmun observed that “because children are susceptible to religious indoctrination and peer pressure, school prayer presents what Arthur Goldberg called a ‘real threat,’ and not a ‘mere shadow,’”¹⁶⁸ an allusion to Goldberg’s quotation at the end of the Chief Justice’s opinion, as to deny that the legislative prayer was a real threat.

Blackmun told his clerk David Ogden that he was willing to do something “to cement-in the school prayer cases.”¹⁶⁹ At Ogden’s suggestion, Blackmun asked Burger to excise the phrase “*And this is especially true where, as*” in the second sentence of the paragraph, which would then read “*The Establishment Clause does not always bar a state from regulating conduct simply because it ‘harmonizes with religious canons.’ . . . Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to ‘religious indoctrination.’*”¹⁷⁰

By June 3rd, Chief Justice Burger accepted the change requested by Blackmun at which point David Ogden could write to Blackmun that he felt “that the opinion now suggests that the school prayer cases are still good law and will make clear that legislative prayer is to stick to its historical roots and may be barred if it seriously threatens the values of the Establishment Clause.”¹⁷¹ As this exchange of letters makes clear, the Justices in the *Marsh* majority confirmed the distinction between children and adults.

The second test for Brennan’s frame came when Justice Kennedy confirmed the continuing relevance of this *Marsh* distinction in 1992 with *Lee v. Weisman*.¹⁷² The case was heard on November 6, 1991. When the Justices met in conference to discuss the case two days later, Kennedy’s vote brought the 5-4 majority against the claimant, in favor of allowing the prayer at a middle school graduation ceremony. Chief Justice Rehnquist assigned Kennedy the Court’s opinion. But after working on it for four months, Kennedy decided to shift sides.¹⁷³ On March 30, 1992, he wrote to Blackmun, “After

¹⁶⁷ Letter from Harry Blackmun, Associate Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (May 31, 1983) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8).

¹⁶⁸ *Id.*

¹⁶⁹ Letter from David Ogden, Law Clerk, U.S. Supreme Court, to Harry Blackmun, Associate Justice, U.S. Supreme Court 1 (May 31, 1983) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8).

¹⁷⁰ *Id.* at 2; Letter from Harry Blackmun, Associate Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (May 31, 1983) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8).

¹⁷¹ Letter from David Ogden, Law Clerk, U.S. Supreme Court, to Harry Blackmun, Associate Justice, U.S. Supreme Court (June 3, 1983) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8).

¹⁷² 505 U.S. 577, 596–97 (1992).

¹⁷³ Charles Lane, *Papers Underline Issue of Controlling Court*, WASH. POST (Mar. 7, 2004),

writing to reverse in the high school graduation prayer case, my draft looked quite wrong. So I have written it to rule *in favor of the objecting student*.¹⁷⁴ Then he told Blackmun, “[a]fter the barbs in [*County of Allegheny v. ACLU*], many between the two of us, I thought it most important to write something that you and I and the others who voted this way can join.”¹⁷⁵ Kennedy then circulated five successive drafts to incorporate the suggestions of Blackmun, Stevens, Souter, and O’Connor, the other four Justices in the majority. In the majority opinion he delivered on June 24, 1992, he relied again on the criteria of non-coercion. However, in *County of Allegheny*, he had expressed that coercion could manifest itself in three ways: (1) taxation, (2) “direct compulsion to observance,” or (3) indirectly through “governmental exhortation to religiosity that amounts in fact to proselytizing.”¹⁷⁶ Blackmun was not convinced by this non-coercion theory. But he vigorously rejected the use of the “proselytization” approach as a metric for indirect religious constraint or coercion, an approach that Kennedy had borrowed from *Marsh v. Chambers*¹⁷⁷ and had generalized to all Establishment cases.¹⁷⁸ Here, in *Lee v. Weisman* the pressure on the student was “subtle and indirect.”¹⁷⁹ However, Kennedy had abandoned “proselytization.” The concept does not appear anywhere in his opinion and never appears again in any of Kennedy’s further opinions with the exception of *Town of Greece*, a case of legislative prayer directly connected

https://www.washingtonpost.com/archive/politics/2004/03/07/papers-underline-issue-of-controlling-court/2560f973-010c-457b-a7ed-24af0c6441ab/?utm_term=.5b1d1db5f7ae.

¹⁷⁴ Letter from Anthony Kennedy, Associate Justice, U.S. Supreme Court, to Harry Blackmun, Associate Justice, U.S. Supreme Court (Mar. 30, 1992) (on file with Library of Congress, Harry Blackmun Papers, Box 586, Folder 6) (emphasis added).

¹⁷⁵ Letter from Anthony Kennedy, Associate Justice, U.S. Supreme Court, to Harry Blackmun, Associate Justice, U.S. Supreme Court (Mar. 30, 1992) (on file with Library of Congress, Harry Blackmun Papers, Box 586, Folder 6).

In his original memo to Justice Blackmun, Justice Kennedy mentioned *Lynch v. Donnelly* instead. The same day he wrote a handwritten note to Justice Blackmun: “My own early morning use of the word processor has its perils, and in my memo to you I talked of our exchange in *Lynch v. Donnelly*. Of course, I meant *Allegheny County*.” Handwritten Note from Anthony Kennedy, Associate Justice, U.S. Supreme Court, to Harry Blackmun, Associate Justice, U.S. Supreme Court (Mar. 30, 1992) (on file with Library of Congress, Harry Blackmun Papers, Box 586, Folder 6).

¹⁷⁶ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 659–60 (1989).

¹⁷⁷ In his *Marsh v. Chambers* opinion, Chief Justice Burger found that “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

¹⁷⁸ Blackmun took issue with Kennedy’s characterization of the public religious display in *County of Allegheny* as analogous to *Marsh*, as if the allowance of legislative chaplains had opened the door to all forms of government endorsement as long as it does not cross over into overt coercion or proselytization. *Cty. of Allegheny*, 492 U.S. at 602–03. Blackmun argued that Kennedy’s “claim that prohibiting government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents must fail. . . . [I]t simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians.” *Id.* at 611–12.

¹⁷⁹ 505 U.S. 577, 593 (1992).

to *Marsh v. Chambers*.¹⁸⁰ Thanks to this move, Kennedy could rally a majority of the Court, for this case did not require the Justices “to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens.”¹⁸¹ The issue was about minor children in public schools and “[o]ur decisions in *Engel v. Vitale* and *School Dist. of Abington* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion.”¹⁸²

Kennedy was persisting with the use of the “coercion test,” but he quoted also the *Lemon* test and the non-endorsement test, with all three integrated into his use of Brennan’s frame in *Schempp* considering spaces, publics and degrees of constraint.

Justice Kennedy would always continue to stand with the distinction between adults and children. In *Town of Greece v. Galloway*, citing *Marsh*, he reiterated it. For him, children are younger and impressionable—they want to conform to authority figures through the standards those figures set out, including examples of religious observance from which they should be protected.

Adults often encounter speech they find disagreeable—an offense that does not equate to coercion. An Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum. The presence of non-believers was not compulsory; they could “choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed.”¹⁸³

III. CONSCIENCE, THE CONSTITUTION AND THE COURT

From *Barnette* to *Town of Greece*, the protection of children in public institution against any faith-related pressure has become a fundamental feature of the jurisprudence on religion. This concern for the protection of children emerged—after *Gobitis*—from political and social mobilization and counter-mobilization in the name of conscience. Interestingly it is in that same name that, fifty years later, after another political and social mobilization, *Smith* was de facto reversed.

¹⁸⁰ *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816, 1819, 1824 (2014).

¹⁸¹ *Weisman*, 505 U.S. at 586 (1992); see also Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1632 (2006) (“The coercion test was the sole basis for the decision in *Lee*. The Court held that it need not consult the other tests for Establishment Clause violations because ‘at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise’ and the school policy in question failed this threshold requirement.” (quoting *Weisman*, 505 U.S. at 587)).

¹⁸² *Weisman*, 505 U.S. at 592 (citations omitted).

¹⁸³ *Galloway*, 134 S. Ct. at 1827.

A. *From Barnette to Smith: Counter Mobilizations in the Name of Conscience*

In 1940, after the Court decided *Gobitis*, an anti-liberal reaction arose against the religious liberty of minorities. In response, a political counter-mobilization succeeded, leading to *Barnette*.

The most active reaction to the Court's decision in *Gobitis* as anathema to civil liberties came from the political sphere—in that case from the executive: President Franklin D. Roosevelt, the Attorney General, and the Department of Justice. Just after *Gobitis* was delivered, Robert Jackson, the Attorney General, expressed his disgust for the decision. *Gobitis* was also thwarting the strategy of Roosevelt to emphasize what would become his “four freedoms” speech. In his annual message to Congress on January 6, 1941, Roosevelt—then at the height of his power—committed to building a “world founded upon four essential human freedoms”, the first two of which were “freedom of speech and expression everywhere in the world” and “freedom of every person to worship.”¹⁸⁴ To fight Nazism, America wanted to become “the great arsenal for democracy,” and priority was given to “a national commitment to expressive freedom and religious worship above all other constitutional duties.”¹⁸⁵ This insistence on the importance of the individual liberties enshrined in the First Amendment would guide Roosevelt's appointments to the Supreme Court.

In 1941, Justice Stone, the lone dissenter in *Gobitis*, was elevated to Chief Justice, and Robert Jackson—an early opponent to *Gobitis*—took Stone's seat as Associate Justice. When a new seat became vacant in 1942, Roosevelt chose Wiley Rutledge over Learned Hand, the highly respected Chief Judge of the Second Circuit and close friend of Frankfurter. Rutledge had become known for harshly criticizing *Gobitis* a few days after it was decided, despite being a sitting judge on the D.C. Circuit: “We forget [] . . . that it is [in] the regimentation of children in the Fascist and Communist salutes that the very freedom for which Jehovah's Witnesses strive has been destroyed.”¹⁸⁶

The executive actively sought another case in which the Court's previous work could be reversed until they found *Barnette*. The next pivotal moment of popular counter-mobilization would take place fifty years later in the wake of the Court's decision in *Employment Division v. Smith*.

Again, an active Democratic reaction to a Court decision in the name of a fundamental freedom forced the Court to a de facto reversal. *Smith* found that the state of Oregon could deny unemployment benefits to an individual

¹⁸⁴ Tsai, *supra* note 138, at 386.

¹⁸⁵ *Id.* at 389–90.

¹⁸⁶ *Id.* at 400 (alterations in original). The fact that reversing *Gobitis* was a key factor in Roosevelt's choice of Rutledge is confirmed by Gerald Gunther. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 564–67 (1994).

fired for violating the state's prohibition on peyote, even if the use of peyote was tied to a religious ritual.¹⁸⁷ *Smith* became a landmark case because it faced an intense "popular" mobilization, which came as a surprise for the Court. The Court did not picture their decision as the pivotal one of the 1989-90 term. As Stephen Carter and Marci Hamilton have shown,¹⁸⁸ from 1963 to 1990, "[a] literal handful of cases"¹⁸⁹ applied the strict scrutiny demanded in *Sherbert*. Aside from *Voder*, which was just the most famous, there was only one area in which the Court ruled in favor of claimants who sought accommodations—unemployment compensation cases, in the line of *Sherbert v. Verner*. In three additional cases, the Justices decided that, if an employer refuses to accommodate the reasonable religious needs of an employee and the employee is subsequently dismissed or leaves her job, the state could not deny unemployment compensation.¹⁹⁰

However, in *Bowen v. Roy* (1986), the Court refused to enjoin the statutory requirement that state agencies use people's Social Security numbers, despite protestation by several Native American plaintiffs that the application of such labels to their children violated their religious liberty.¹⁹¹ Likewise, in *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Court found that the U.S. Forest Service's construction of a road on sacred land "may make it more difficult to practice" one's religion but will not "coerce individuals into acting contrary to their religious beliefs."¹⁹² Justice O'Connor, writing for the Court, argued that the program did not "prohibit the free exercise of religion" and, foreshadowing Justice Scalia in *Smith*, that

¹⁸⁷ 494 U.S. 872, 878 (1990).

¹⁸⁸ See MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 216-218 (2005) (highlighting the application of strict scrutiny following *Sherbert* to a series of unemployment compensation cases); Stephen L. Carter, Comment, *The Resurrection of Religion Freedom?*, 107 Harv. L. Rev. 118, 120-21 (1993) (discussing the unemployment compensation cases following *Sherbert*).

¹⁸⁹ HAMILTON, *supra* note 188, at 216.

¹⁹⁰ See *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 830, 835 (1989) (holding that the State had failed to identify a compelling interest to justify denying unemployment benefits to the plaintiff, who refused a job which necessitated working on Sundays as doing so was against his religion); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 138, 141, 146 (1987) (applying the *Sherbert* strict scrutiny standard to determine that the plaintiff, who was fired for refusing to work on Sundays for religious reasons, was entitled to unemployment compensation); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710, 718, 720 (1981) (utilizing the strict scrutiny standard and holding that the plaintiff could not be denied unemployment compensation benefits when he quit a job that involved working with weapons for religious reasons); see also Carter, *supra* note 188, at 120-21 ("In the line of cases that began with *Sherbert v. Verner*, the Justices have explained that, if an employer refuses to accommodate the reasonable religious needs of an employee and the employee is subsequently dismissed, the state cannot deny unemployment compensation.").

¹⁹¹ *Bowen v. Roy*, 476 U.S. 693, 695, 712 (1986).

¹⁹² *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

[t]he Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.¹⁹³

However, in the months following *Smith*, Congress reacted to this creep in the jurisprudence and Justice Scalia's opinion that nondiscriminatory religious-practice exemptions should be left to the political process.¹⁹⁴ Following strong academic criticisms of *Smith* led by Professor Douglas Laycock and Michael W. McConnell,¹⁹⁵ the Coalition for the Free Exercise of Religion—comprised of dozens of organizations, including the ACLU, the Traditional Values Coalition, the National Association of Evangelicals, the National Council on Islamic Affairs, the Union of American Hebrew Congregations, and the Native American Church of North America—was created.¹⁹⁶ Congress quickly united around the Religious Freedom Restoration Act of 1993 and later, in 2000, around the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to affirm the country's commitment to religious liberty. In Congress, the most active advocates for the RFRA and RLUIPA came from the Democratic Party. RFRA was introduced on March 11, 1993 by Representative Charles Schumer, a Democrat from New York, on behalf of himself and 170 cosponsors. The same day, a companion bill was introduced in the Senate by Senator Ted Kennedy (D-Mass.). The bill was well received by dozens of newspaper and magazine articles recognizing RFRA “as a remedy to the erosion of religious legal rights resulting from *Smith*.”¹⁹⁷

Interestingly, victory was achieved after *Gobitis* and after *Smith* in the name of one principle: conscience. In a memo sent to Roosevelt on June 3,

¹⁹³ *Id.* at 452.

¹⁹⁴ See *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012) (advancing that the political process should be the determinant of the appropriate use of the nondiscriminatory religious-practice exemption, not the judiciary); see also H.R. REP. NO. 103-88, at 6 (1993) (“The legislative response to the *Smith* decision is H.R. 1308, the Religious Freedom Restoration Act of 1993. The bill restores the compelling governmental interest test previously applicable to First Amendment Free Exercise cases by requiring proof of a compelling justification in order to burden religious exercise.”).

¹⁹⁵ Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 102 (1990) (“There are many reasons for believing that the Court's opinion may be in error. The opinion appears to be inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent. It strips the free exercise clause of independent meaning.”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (criticizing “the opinion's use of legal sources—text, history, and precedent—and its theoretical argument” to demonstrate the problems with the Court's decisions in *Smith*).

¹⁹⁶ See HAMILTON, *supra* note 188, at 178–80, for the list of all of the members of the coalition.

¹⁹⁷ Michael D. Currie, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject Employment Division v. Smith and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1375 (2014).

1940 after *Gobitis*, Attorney General Jackson highlighted Justice Stone's position that the guarantee of religious freedom forbade the legislature to "compel public affirmations which violate . . . religious conscience."¹⁹⁸

Roosevelt then underscored repeatedly in his correspondence with members of the clergy and civic leaders "his commitment to 'freedom of conscience, as written into the Federal Constitution.'"¹⁹⁹ When *Barnette* was finally decided, interestingly, Justice Jackson did not endorse Justice Stone's approach in *Gobitis*, which advocated for an exemption from state compulsion if the state violated an individual's religious conviction. It would have given a "special constitutional bonus to religious dissenters"²⁰⁰ in violation of the Establishment Clause. Instead, Jackson endorsed Frankfurter's view that the flag salute was a secular regulation, but a bad one, that constrains freedom of the mind and of *conscience*.

"[F]or scrupulous protection of Constitutional freedoms of the individual," observed Justice Jackson, "we are not to strangle the free mind at its source."²⁰¹ Then he contrasted "[t]he action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army" with these local school regulations: "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."²⁰² Justice Black, joined by Justice Douglas, brought this point forward in his short but compelling concurrence to the case, writing: "Words uttered under coercion are proof of loyalty to nothing but self-interest. . . . The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose."²⁰³

The word "conscience" penetrated the debate between the Justices.²⁰⁴ It appears twenty-eight times in the opinions of the different Justices, including in the majority opinion, as a guiding principle to justify where the protection

¹⁹⁸ Tsai, *supra* note 138, at 398 (quoting Letter from Attorney General Robert H. Jackson, to President Franklin D. Roosevelt (June 3, 1940) (on file with *Washington University Law Review*)).

¹⁹⁹ *Id.* at 391 (quoting Letter from President Franklin D. Roosevelt, to Edward McCullen (June 6, 1940) (on file with *Washington University Law Review*); Letter from President Franklin D. Roosevelt, to John J. Baker, President, Golden Jubilee Convention, First Catholic Slovak Union of the United States (June 18, 1940) (on file with *Washington University Law Review*); Letter from President Franklin D. Roosevelt, to Dr. Emmanuel Chapman, Committee of Catholics for Human Rights (July 27, 1940) (on file with *Washington University Law Review*)).

²⁰⁰ David R. Manwaring, *A Review of Render unto Caesar: The Flag-Salute Controversy*, in *SHADOW AND SUBSTANCE: ESSAYS ON THE THEORY AND STRUCTURE OF POLITICS* 235 (1964).

²⁰¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

²⁰² *Id.* at 638.

²⁰³ *Id.* at 644 (Black, J., concurring).

²⁰⁴ Tsai, *supra* note 138, at 422–23.

of the Jehovah's witnesses comes from.²⁰⁵ Despite not being directly connected with the religious clauses of the First Amendment, *Barnette* involved religious freedom in the name of freedom of conscience.

Fifty years later, after a seeming reversal in *Smith*, the Court was brought back on track by another political and social movement. As a consequence, most recently, in *Hobby Lobby*, the Court endorsed a conscience-based exemption and reemphasized the role of conscience in the jurisprudence of the Court on religion.²⁰⁶ It is in the name of the right to “conscience,” that the Court decided *Barnette* and *Hobby Lobby*. In between, in 1985, Stevens had, in *Wallace v. Jaffree*, argued that “the Court has identified *the individual’s freedom of conscience* as the central liberty that unifies the various Clauses in the First Amendment.”²⁰⁷ This statement was based on *Cantwell* but also—critically—on *Barnette*.²⁰⁸ In his opinion, Stevens mentions that *Barnette* had been recently invoked by Chief Justice Burger “with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all” because “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”²⁰⁹

B. Stevens’s Freedom of Conscience and the Court’s Religion Jurisprudence

For Stevens, *Barnette* underscored that individual freedom of conscience, at the very least, protected the individual’s right to speak or remain silent. Stevens’s statement could be related to John Stuart Mill’s connection between freedom of conscience and freedom of expression. Writing in *On Liberty*, Mill stated:

[T]he appropriate region of human liberty . . . comprises, first, the inward domain of consciousness; demanding liberty of conscience The liberty of expressing and publishing opinions may seem to fall under a different principle . . . but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.²¹⁰

²⁰⁵ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Murphy, J., concurring) (“Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving *freedom of conscience* to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.” (emphasis added)).

²⁰⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding that requiring companies to “provid[e] health insurance that covers [particular] methods of birth control” substantially burdened the owners’ free “exercise of religion” as doing so contradicted their religious beliefs).

²⁰⁷ *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (emphasis added).

²⁰⁸ *Id.* at 50–51 (discussing how the Court in *Barnette* utilized the overarching idea of conscience it had highlighted previously in *Cantwell*).

²⁰⁹ *Id.* at 51 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

²¹⁰ JOHN STUART MILL, *ON LIBERTY* 82–83 (David Bromwich & George Kateb eds., Yale University

But was Stevens right to say that all First Amendment freedoms stemmed from the individual freedom of conscience—or, at least, that the Court’s jurisprudence on religion did so?

Conscience was a central concern in the drafting of state and then federal constitutions in the United States.²¹¹ However, it was *liberty of conscience*, not *freedom of conscience* that constituted this concern. Both John Witte, Jr. and Noah Feldman have emphasized that “[l]iberty of conscience was the general solvent used in the early American experiment in religious liberty.”²¹² For Feldman, liberty of conscience “was the theoretical basis for both religion clauses and remained so even after the word ‘conscience’ disappeared from the draft language.”²¹³

But the affirmation of this liberty, which was present in the first drafts of the First Amendment, was deleted in its last and current version in favor of the right of free exercise.²¹⁴ Still, the concept of liberty of conscience remained present in the minds of lawyers in the early Republic: for instance, in *People v. Philips* (1813), against the prosecution who attempted to order a Catholic priest to disclose the content of a confession, a New York court held that Catholic priests “are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.”²¹⁵ But the evolution of the language of the First Amendment and the ultimate choice of “free exercise” language over “conscience” language made such invocation of liberty of conscience increasingly rare.

Freedom of conscience became a central term in more contemporary discussions of religious freedom as a more individual—and not always religious—

Press 2003) (1859).

²¹¹ See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425–27, 1456, 1457 n.242 (1990) (describing the incorporation of liberty of conscience in various state constitutions). Concerning the origins of the First Amendment, Rhode Island’s Charter of 1663 was the first to protect liberty of conscience, and the Carolinas and New Jersey soon followed in several land agreements. *Id.* Ten states had religious liberty provisions that specifically referenced individuals’ liberty of conscience, often coupled to a guarantee of free exercise, by the time of the adoption of the First Amendment. *Id.* These states are New York, New Hampshire, Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina (nearly a word-for-word copy of New York’s provision), and Virginia. *Id.*

²¹² John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 389 (1996).

²¹³ Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 404 (2002).

²¹⁴ See McConnell, *supra* note 211, at 1431, 1436, 1443–44 (explaining how religious freedom in the United States evolved from John Locke’s argument for freedom as tolerance to the stronger, post-revolution argument for freedom as exercise, as a response to the unpopularity of the Church of England, the advent of judicial review, and evolving notions of the nature and role of religion).

²¹⁵ Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 38 (2004) (quoting *People v. Philips* at 114 (N.Y. Ct. Gen. Sess. 1813), reported in WILLIAM SAMPSON, CATHOLIC QUESTION IN AMERICA (photo reprint 1974) (1813)).

right. “Freedom of conscience” appears in Chief Justice Charles E. Hughes’s dissent in *United States v. Macintosh* (1931), in which he defended the right of an alien who was trying to gain citizenship to refrain from uttering an oath. Hughes, joined by Justices Louis D. Brandeis and Oliver W. Holmes, emphasized that “the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience.”²¹⁶

After this opinion, “freedom of conscience” began appearing with greater frequency, in many other cases, such as *Cantwell v. Connecticut* (1940),²¹⁷ *Minersville v. Gobitis* (1940),²¹⁸ and *Schneiderman v. United States* (1943),²¹⁹ a denaturalization case which was decided one week before *Barnette*.

The outcry after *Gobitis* had demonstrated that a new realm, focused on the free individual’s conscience and the protection of her autonomy, needed protection.²²⁰ Until then, freedom of conscience had been present in the jurisprudence but only on its periphery. Its newly central “signaling” role was the product of a very particular political mobilization.²²¹

Barnette was central to Justice Brennan’s 1963 frame—it is from *Barnette* that the distinction between children and adults arose. But Brennan did not deduct “conscience” from his study of the jurisprudence. In *Sherbert*, Brennan based his defense of religious exemption on the “appellant’s conscientious objection to Saturday work”²²² and on reasons “having to do with matters of conscience or religion.”²²³ In his dissent in *Marsh*, Brennan stated that the first purpose of the Establishment Clause was to “guarantee the individual right to conscience.”²²⁴ He also mentioned that this purpose was “most

²¹⁶ *United States v. Macintosh*, 283 U.S. 605, 631 (1931) (Hughes, C.J., dissenting).

²¹⁷ 319 U.S. 296, 303 (1940) (“Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.”).

²¹⁸ 310 U.S. 586, 597 (1940) (“To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.”).

²¹⁹ 320 U.S. 118, 132 (1943) (“[S]uch general phrases ‘should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience.’” (quoting *Macintosh*, 283 U.S. at 635 (Hughes, C.J., dissenting))).

²²⁰ Tsai, *supra* note 138, at 375.

²²¹ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 272, 277, 279 (1991) (using the concept of “signaling” to describe popular mobilization at exceptional moments of higher lawmaking in United States constitutional history).

²²² *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *cf. id.* at 412 (Douglas, J., concurring) (writing in support of the majority’s conscience principle: “[t]he harm is the interference with the individual’s scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.”).

²²³ *Id.* at 401 n.4 (majority opinion).

²²⁴ *Marsh v. Chambers*, 463 U.S. 783, 803 (1983) (Brennan, J., dissenting).

closely related to the more general conceptions of liberty found in the remainder of the First Amendment.”²²⁵

But it is Stevens who in *Wallace v. Jaffree* had the intuition and explicitly expressed that “*individual’s freedom of conscience* [i]s the central liberty that unifies the various Clauses of the First Amendment.”²²⁶ In his key majority opinion in *Lee v. Weisman*, Justice Kennedy recognized the full strength of freedom of conscience in the Free Exercise Clause: “[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment.”²²⁷ For the Establishment Clause as well, Kennedy reiterated the distinction between children and adults in the name of freedom of conscience: “As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” Kennedy cited in support of this contention *Schempp*, *Edwards v. Aguillard* and *Board of Education v. Mergens*.²²⁸

However, Stevens’s opinion in *Wallace v. Jaffree* did not provoke an intellectual shock among his brethren. The Court returned to its customary process, dealing with the cases in light of each Clause. The fact that individual freedom of conscience would—as a principle—unify the federal courts’ jurisprudence on religion has not come out explicitly in the Court’s jurisprudence as the use of Brennan’s distinction between spaces, publics and degrees of constraints had. I can see one main reason for that: under the umbrella of freedom of conscience, Stevens applied the clauses in quite a mechanical way. In *Wallace v. Jaffree*, for example, after affirming freedom of conscience as the principle unifying all the clauses, Justice Stevens assigned the case to the Establishment Clause and applied the *Lemon* test. Stevens did not notice those of the religion cases in the Court jurisprudence—like *Barnette*—which were in tension or in contradiction with the clauses themselves.²²⁹

C. Individual Freedom of Conscience Subsumes the Law and Constitution

Alexander Bickel in “The Morality of Consent” had emphasized the centrality of an individual’s freedom of conscience in American jurisprudence.²³⁰

²²⁵ *Id.*

²²⁶ *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (emphasis added).

²²⁷ *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

²²⁸ *Id.* at 592.

²²⁹ See Vincent Blasi & Seana V. Shiffirin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *FIRST AMENDMENT STORIES* 121 (Richard W. Garnett & Andrew Koppelman, eds. 2012) (arguing that *Barnette* “turns out to be surprisingly difficult to defend” as not having been either a case of free exercise or of non-establishment; its rationale is also not easy to find).

²³⁰ See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 91–111 (1975) (defining civil disobedience

Writing in the context of the Pentagon papers, Bickel stated that American law has traditionally recognized a certain autonomy of conscience, “some conscientious objections, particularly to war, although not to war alone.”²³¹ Bickel was referring to a 1965 case, *United States v. Seeger*,²³² related to objection of conscience to the Vietnam War. In the majority opinion in this case, Justice Tom Clark quoted Chief Justice Hughes, who remarked in 1931 that “in the forum of conscience, duty to moral power higher than the State has always been maintained,”²³³ and an article by Harlan Stone from 1919, which found that “[m]orals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state.”²³⁴

When joining the military became compulsory under the draft in 1916, the recognition of conscientious objections developed beyond the Selective Service Act’s exemption for members of pacifist religious sects to include individual claimants’—even atheists’—objection of conscience. This exemption applied regardless of whether the claimants were sectarian or non-sectarian, religious or non-religious, by executive and administrative action. The question was not so much of fundamental rights, but “of how best to discipline conscripts.”²³⁵

But Bickel took *Seeger* in a higher direction. “The unlawfulness of disobedience to law on sincerely held grounds of conscience is frequently not taken as conclusive proof of the illegitimacy of disobedience.”²³⁶ Disobedience, to the contrary, “raises a question about the law at which it is directed, about its effectiveness, . . . its rightness, or at least its utility.”²³⁷

Disobedience to the law: this is what the Court had in fact decided in the case following *Seeger*—*Welsh v. United States*—where, under the impulse of Justice Black, “religious” exemption was extended to non-religious beliefs so deeply embedded in the mind that they are like religious beliefs.²³⁸ This was done against the express phrasing of the statute. Justice Harlan, writing in a

through the context of American history).

²³¹ *Id.* at 94.

²³² 380 U.S. 163 (1965).

²³³ See BICKEL, *supra* note 230, at 94 (quoting *Seeger*, 380 U.S. at 170).

²³⁴ See *id.* at 94 (quoting Harlan Stone, *The Conscientious Objector*, 21 COLUM. U. Q. 253, 269 (1919)) (“So deep in its significance and vital, indeed, is it to the integrity of man’s moral and spiritual nature that nothing short of self-preservation of the state should warrant its violation.”).

²³⁵ Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1120 (2014); Stone served on the Board of Inquiry, which studied conscientious objections, under the Wilson administration during the First World War. *Id.* at 1095.

²³⁶ BICKEL, *supra* note 230, at 94.

²³⁷ *Id.*

²³⁸ *Welsh v. United States*, 398 U.S. 333, 340 (1970).

strong concurring opinion, recalled that the Universal Military Training and Service Act of 1948 provided exemptions to persons who, “by reason of religious training and belief” were “conscientiously opposed to participation in war” but it expressly excluded the ones who opposed war for “essentially political, sociological, or philosophical views or a merely personal moral code.”²³⁹ Harlan thought the law should be declared unconstitutional for not guaranteeing equal treatment to all beliefs. He reasoned that it was not in the power of the Court to declare it constitutional by redefining words so as to change and reverse the explicit intent of Congress.²⁴⁰

But for Justice Black and the majority of the Court,

[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God.’²⁴¹

Disobedience not simply to law but to the Constitution itself: this was what some Justices were defending—with the approval of numerous judges from federal courts, if not explicitly by the Supreme Court—in exceptional cases related again to the military but also to prisons in regard to chaplaincies.

In *Schempp*, both Brennan and Stewart in their concurring and dissenting opinions, respectively, referred to chaplaincies in the military and in prisons and endorsed them as legitimate practices aiming to guarantee religious liberty, even if violative of the Establishment Clause. Justice Brennan stated in his concurrence:

There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.²⁴²

²³⁹ *Id.* at 346 (Harlan, J., concurring).

²⁴⁰ *Id.* at 344–48 (Harlan, J., concurring).

²⁴¹ *Id.* at 340.

²⁴² *Sch. Dist. v. Schempp*, 374 U.S. 203, 296–98 (1963) (Brennan, J., concurring).

In a previous version of his opinion, Brennan had stated in the first sentence of this passage that “There are practices *ostensibly* violative of the Establishment Clause.” William Brennan, *School District of Abington v. Schempp* 62 (preliminary draft) (on file with Library of Congress, William Brennan Papers, Box I-88) (emphasis added).

Justice Stewart expressed similar views in his dissent:

[T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case.²⁴³

The Supreme Court never took a case regarding chaplaincy in the army. However, if it had, the Court would also have had to consider that the military bars such chaplains from proselytizing, an important aspect of many religious traditions. This restriction itself presents a seeming violation of the Constitution—this time the Free Exercise Clause, but it is a condition the Court already addressed in *Chambers* at the request of Justices Blackmun and O'Connor. Both Justices approved the constitutionality of legislative prayer in Nebraska on the condition that: “the forum provided to the chaplain was not exploited as a means of proselytizing.”²⁴⁴ Barring proselytism is, moreover, one of the key features of the current leading case on military chaplaincies, *Katcoff v. Marsh* (1985),²⁴⁵ and of all chaplaincies cases.

²⁴³ *Schempp*, 374 U.S. at 309 (Stewart, J., dissenting).

²⁴⁴ In *Marsh v. Chambers*, Chief Justice Burger consented to another change to his first draft, requested by Justices O'Connor and Blackmun, both concerned that the legislative chaplaincy could be used “to proselytize for a particular faith.” Letter from Harry Blackmun, Associate Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (May 31, 1983). At the end of Burger’s opinion, when his first draft was saying “*The content of the Nebraska prayers is not, and cannot be of concern to us,*” the opinion would now say “*The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief*” to the satisfaction of Blackmun. *Marsh v. Chambers*, 463 U.S. 783, 794 (1983) (emphasis added); Letter of David Ogden, Law Clerk, U.S. Supreme Court to Harry Blackmun, Associate Justice, U.S. Supreme Court (June 3, 1983) (on file with Library of Congress, Harry Blackmun Papers, Box 382, Folder 8).

²⁴⁵ In *Katcoff v. Marsh*, the federal leading case, two Harvard law students brought a suit in 1979 arguing that military chaplains should be replaced with non-combat volunteers or contractors. 755 F.2d 223, 224–25 (2d Cir. 1985). The U.S. Court of Appeals for the Second Circuit upheld the right of the military to employ chaplains. *Id.* at 224. The Second Circuit acknowledged that strict application of the *Lemon* test in isolation would render the Army chaplaincy unconstitutional, as the “immediate purpose [of the chaplaincy] is to promote religion by making it available, albeit on a voluntary basis, to our armed forces. *Id.* at 232. The effect of the program, moreover, is to advance the practice of religion.” *Id.* However, the Court relied on the War Power Clause of Art. I, Sec. 8, which provides in pertinent part that Congress shall have the power to “provide for the common Defence,” “to raise and support Armies,” and to “make Rules for the Government and Regulation of the land and naval Forces.” *Id.* at 233 (quoting U.S. CONST. art. I, § 8). The Court also added,

In the most extreme situations of isolation, where all the freedoms of the First Amendment are suppressed or strictly restricted and where human beings face the possibility of death or of absence of liberty, freedom of conscience appears to be the absolute right that must be provided and guaranteed by the state, even though it is not expressly mentioned in the First Amendment and even when it apparently violates its plain text. In the extreme examples of involuntary confinement, using mainly public funds, prisons provide chaplaincy services to inmates, while also conditioning the chaplains' ability to live out their own faith by preventing them from proselytizing other inmates. Next comes the military, where one can be drafted or engaged, but from which one can be exempted in the name of conscience, whether religious or not. Once one is in the military, however, public-funded chaplains—seemingly in violation of the Establishment Clause—provide for the religious needs of soldiers, and again the military bars chaplains from proselytizing, an important aspect of many religious traditions and seemingly a violation of the Free Exercise Clause.

These scenarios have nothing to do with the situations Justice Ruth Bader Ginsburg categorized in *Cutter v. Wilkinson* as having “‘room for play in the joints between’ the Free Exercise and Establishment Clauses.”²⁴⁶ She was quoting Justice Rehnquist in her opinion, who—in a case involving a publicly funded scholarship which excluded students pursuing a degree in devotional theology—stated that, “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”²⁴⁷ These cases, though, appear to conflict directly with the express provisions of the Establishment and Free Exercise Clauses—they are not “in the joints.” In the cases of confinement, even if it is not what the Constitution expresses formally, there is a higher principle, which *requires* the state to provide the possibility of ‘practicing’ freedom of conscience (*e.g.*, dialogue, individual prayer, or confession with chaplains). Freedom of conscience stands then as the only freedom guaranteed to persons in exceptional situations, despite its tension with or the violation of a formal reading of the First Amendment.

Therefore, the role and the meaning of freedom of conscience go beyond what Stevens had envisioned it—just as a principle *unifying* all clauses of the First Amendment.

No chaplain is authorized to proselytize soldiers or their families. The chaplain's principal duties are to conduct religious services (including periodic worship, baptisms, marriages, funerals and the like), to furnish religious education to soldiers and their families, and to counsel soldiers with respect to a wide variety of personal problems.

Id. at 228.

²⁴⁶ *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Locke v. Davey*, 540 US 712, 718 (2004)).

²⁴⁷ *Locke v. Davey*, 540 U.S. 712, 719 (2004).

IV. INDIVIDUAL FREEDOM OF CONSCIENCE UNIFIES THE RELIGION JURISPRUDENCE OF THE COURT

Up to this point, I have tried to provide a historical account of changes in the Court's religion jurisprudence. Now, however, I propose a conceptual interpretation that can make sense of the historical account.

What is happening in the Court's religion jurisprudence can be summarized in three propositions:

1. Freedom of conscience serves as an organizing principle for religion jurisprudence in all circumstances—those in which the individual can move freely between spaces, and those in which she cannot.
2. Where the individual *can* move freely between spaces, freedom of conscience operates by organizing the different clauses of the First Amendment, by differentiating between spaces, publics and degrees of coercion.
3. Where the individual *cannot* freely move between spaces, freedom of conscience operates by trumping those clauses in order to guarantee a positive right of conscience.

A. *Freedom of Conscience Within Brennan's Framework*

When a person is confined to a closed space from which there is either no possibility to reach a place of worship, such as in prisons, or no easy possibility, such as for those serving in the military, the state provides such a person resources to preserve the basic right of conscience which she has in normal daily life, when she can freely move between different spaces.

This differentiation and circulation characterizes liberal societies by combining different spheres of norms and freedoms, built through the art of separation that permits the emergence and the guarantees of liberties and independence toward political power.²⁴⁸ To understand the world of adults outside prisons and in the military, we can refer to ancient Greece. Marcel Hénaff and Tracy B. Strong differentiate between four kinds of spaces organized by human beings in relation to deities, and these spaces speak accurately to the modern situation: private, sacred, common, and public:

A space is *private* when a given individual or set of individuals are recognized by others as having the right to establish criteria that must be met for anyone else to enter it. . . .

. . . .

²⁴⁸ See Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 315 (1984) (discussing how liberal theorists' "art of separation" produces different spheres of activity and liberties).

Sacred space is . . . [the] space of the gods. . . not subject to secular legal processes, for such spaces were not under human control.

. . . Common space admits of no criteria; it is open to all in the same way. It is not owned or controlled. . . [A]ll can go there to extract from it what is there. Thus the sea, pastures, forests are (or can be) common space. This is not a space to which one goes to speak with others. . . common space is not public space, for it not a human construct.

. . . .
 . . . *Public space is a human construct, an artifact*, the result of the attempt by human beings to shape the place and thus the nature of their interactions. . . .

. . . [I]t is [also] *theatrical*, in that it is a place which is seen and shows oneself to others.²⁴⁹

In the contemporary United States, private and sacred spaces are similar, while the Greek common space has become a public space in which all kinds of beliefs can be expressed, and the Greek public space has become the state and the political one. And the two religion clauses, which simultaneously guarantee freedom *of* religion and freedom *from* religion, help organize the distinction between spaces without fixing the limits of each space and the level of religious presence or autonomy, which remains a matter of conflict and interpretation.

In the sacred (*i.e.*, religious space especially guaranteed by the Free Exercise Clause and reinforced by RLUIPA),²⁵⁰ the Court protects the rights of religious organizations to make autonomous decisions in matters of governance,²⁵¹ and the selection of members and clergy;²⁵² it shields such organizations from anti-discrimination regulations for employees or employees not

²⁴⁹ Marcel Hénaff & Tracy B. Strong, *Introduction: The Conditions of Public Space: Vision, Speech and Theatricality*, in *PUBLIC SPACE AND DEMOCRACY* 2–5 (Marcel Hénaff & Tracy B. Strong eds., 2001).

²⁵⁰ It is fascinating to notice that in RLUIPA, Congress has implicitly agreed on the Brennan's distinction of spaces, publics and degrees of constraint by precisely targeting some spaces—prisons and religious land use—to lift any substantial burden on the religious exercise (unless there is a compelling governmental interest and the least restrictive means have been used for furthering that compelling governmental interest). 42 U.S.C. § 2000cc (2012). It is also important to notice that a previous bill, The Religious Liberty Protection Act of 1998 (“RLPA”), introduced as H.R. 4019 and S. 2148 in the 105th Congress, which was not targeting specific areas but would have lifted substantially the burden on a person's religious exercise in any local or state program or activity, operated by a government, that receives federal financial assistance, even if the burden results from a rule of general applicability, did not pass. In its original version, RLPA could have undermined many state and local civil rights laws.

²⁵¹ See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 449 (1969) (explaining that “the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes”).

²⁵² *Serbian Orthodox Diocese v. Milivojevich*, 426 U. S. 696, 698 (1976) (holding that the Illinois Supreme Court violated the First and Fourteenth Amendments by inquiring into “matters of ecclesiastical cognizance and polity” when it determined that proceedings surrounding removal of a Bishop were defective).

involved in religious activities.²⁵³ At the same time, as we have seen, the Establishment Clause justifies the Court's refusal to accept in public schools, in the name of individual freedom of conscience, the submission of children to ceremonies that could impress or affect them.²⁵⁴ It also justifies a religious presence in the state and political space. In the political sphere, there are large margins of appreciation left to the political body. For example, legislatures are free to hold organized prayers, thanks to *Marsh v. Chambers*—recently reaffirmed in *Galloway*—but they are also free not to do so and to defend a stricter separationist approach to the Establishment Clause. Nevertheless, no conscience right can be claimed to overturn this policy choice as unconstitutional, for adults can face conflicting environments which are not permanent, central, or compulsory and does not proselytize.

The range of cases that deals with monuments and symbols is instructive. Explicitly religious installations, when they are central (even if temporary), are banned—like a crèche on a county courthouse's front steps.²⁵⁵ Confronted with two different public displays of the Ten Commandments, the Court only invalidated the one—in *McCreary*—that was recent and appeared too central.²⁵⁶ In *McCreary*, visible copies of the Ten Commandments had been installed in 1999 in two Kentucky county courthouses and in a school district in a third county.²⁵⁷ The Court approved the other display in *Van Orden*. In that case, the display was part of the cultural landscape—it had been standing for forty years—and its presence, in the words of Justice Breyer (the decisive vote in both cases), “in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the ‘ideals’ of those who settled in Texas and of those who have lived there since that time” could not have been seen as an establishment or an endorsement.²⁵⁸ “In God We Trust” on currency and “under God” in the Pledge have become, despite some protest, signs of a national civic religion and a general invocation of

²⁵³ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337–39 (1987) (invoking the two religion clauses of the First Amendment to justify the exemption).

²⁵⁴ Here, when conscience fully applies as a limit to constraint, the different interpretations of the Establishment Clause all end in the same conclusion.

²⁵⁵ See *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (holding that the crèche, given its position, had the unconstitutional effect of promoting or endorsing religious beliefs, while a menorah in a different “physical setting” did not).

²⁵⁶ *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005); see also *Van Orden v. Perry*, 545 U.S. 677, 681–83 (2005) (finding that an observer to the monument would not, in context, view it as a state endorsement of religion). For an overview of the facts and issues at stake in the cases, see Mike Schaps, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 CALIF. L. REV. 1243, 1254–60 (2006).

²⁵⁷ *McCreary*, 545 U.S. at 850.

²⁵⁸ *Van Orden*, 545 U.S. at 702.

God that is unlikely to unduly burden the conscience of any adult. But in these cases, the Court's jurisprudence is fragile and Justices themselves recognize a degree of appreciation.²⁵⁹

In relation to public institutions in which one can voluntarily engage, divergent scruples of conscience cannot be easily invoked with the backing of the Court. A college student cannot claim such scruples in a higher education program that he has chosen freely to apply to, even if that program imposes military training.²⁶⁰ And, more recently and controversially, a county clerk cannot refuse to issue marriage licenses to same-sex couples in the name of her religious beliefs.²⁶¹ Conscience remains as a limit forbidding the use of public tax for permanent and compulsory religious purposes, like subsidies to religious schools or teachers. It has been associated since Madison wrote his great Memorial and Remonstrance with the fact that "the best interest of a society required that the minds of men always be wholly free."²⁶² Recently, the Court has significantly reduced the impact of *Flast v. Cohen*, which held that a taxpayer has standing to sue the government to prevent an unconsti-

²⁵⁹ In his concurrence in *Schempp*, Justice Brennan suggests that American citizens have interwoven the motto "In God We Trust" "so deeply into the fabric of [the] civil polity that its present use may well not present that type of involvement which the First Amendment prohibits." *Sch. Dist. v. Schempp*, 374 U.S. 203, 303 (1963). Responding to a letter from Adolf Grunbaum, (professor at University of Pittsburgh), challenging his statement, Justice Brennan wrote: "I concede that there may be more than one answer to the problem you discuss. What is constitutionally an impermissible 'danger of involvement' may itself be a matter of degree. That at least was the approach I attempted to suggest." Letter from William Brennan, Associate Justice, U.S. Supreme Court, to Adolph Grunbaum, Professor, University of Pittsburgh (Sept. 7, 1963) (on file with Library of Congress, William Brennan papers, Box I 89).

²⁶⁰ *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 668–69 (2010) (holding that a college may deny funding to a student group with a selective membership policy).

²⁶¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (declaring that states must recognize lawful same-sex marriages performed in other states). After *Obergefell* was decided, a county clerk of Rowan County, Kim Davis, refused to issue marriage licenses to any couple, same-sex or opposite-sex. *Miller v. Davis*, 123 F. Supp. 3d 924 at 929, 944 (E.D. Ky. 2015). On July 1, 2015, the American Civil Liberties Union of Kentucky representing four couples, two same-sex and two opposite-sex, filed a lawsuit in the District Court for the Eastern District of Kentucky against Kim Davis. *ACLU of Kentucky Files Class Action Suit Against Rowan County and its Clerk*, ACLU (July 2, 2015), <https://www.aclu.org/news/aclu-kentucky-files-class-action-suit-against-rowan-county-and-its-clerk>. On August 12, 2015, Judge David L. Bunning issued a preliminary injunction ordering her to issue marriage licenses to any qualified couple. *Miller*, 123 F. Supp. 3d at 944. Davis immediately appealed the ruling to the United States Court of Appeals for the Sixth Circuit. On August 26, a unanimous three-judge panel composed of Judges Damon J. Keith, John M. Rogers, and Bernice B. Donald denied the stay pending appeal. *Miller v. Davis*, No. 15-5880, 2015 WL10692640, at *1–2 (Aug. 25, 2016). Davis turned then to the Supreme Court, which, on August 31, 2015, with no dissent, declined to stay the district court's ruling. Adam Liptak, *Supreme Court Says Kentucky Clerk Must Let Gay Couples Marry*, N.Y. TIMES (Aug. 31, 2015), <https://www.nytimes.com/2015/09/01/us/supreme-court-says-kentucky-clerk-must-let-gay-couples-marry.html?mcubz=0>.

²⁶² *Everson v. Bd. of Educ.*, 330 U.S. 1, 12 (1947).

tutional use of tax funds allocated to parochial schools in violation of the Establishment Clause.²⁶³ In *Arizona Christian School Tuition Organization v. Winn*, the Court declared that taxpayers lacked standing to challenge Arizona's provision of tax credits to donors of school tuition organizations, which provide scholarships to students attending private or religious schools.²⁶⁴ For Justice Kennedy, following James Madison's *Memorial and Remonstrance Against Religious Assessments*'s path,²⁶⁵ "that tax credits and governmental expenditures can have similar economic consequences," but they have to remain distinguished as they "do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience."²⁶⁶

In fact, for the Court, conscience includes the highest dimension of religious belief. It does not cover every thought or action related to religion. In a confined area like the military, one could not successfully make a conscience claim for wearing a yarmulke, associated with "desires," "interests," and "personal preferences."²⁶⁷ For Justice Rehnquist, the First Amendment

[d]oes not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.²⁶⁸

In semi-public forums, an organization claiming to be Christian or religious cannot, in the name of conscience, be exempted from an antidiscrimination regulation, when the Court finds it is an issue of free speech and not of

²⁶³ 392 U.S. 83, 106 (1968).

²⁶⁴ 563 U.S. 125, 129–30 (2011).

²⁶⁵ James Madison, *Memorial and Remonstrance Against Religious Assessments*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-08-02-0163>,

²⁶⁶ *Id.* at 141–42 (citing *Flast*, 392 U.S. at 106). Justice Sotomayor employed a similar reasoning, invoking freedom of conscience and violation of the Establishment Clause, in her dissent in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). In that case, at the joints between the Free Exercise and Establishment Clauses, the Court decided that the exclusion of a religious entity from a state grant related to the improvement of a playground violated the Free Exercise Clause, as it was forcing the entity to choose "between their religious beliefs and receiving a government benefit." *Id.* at 2023 (citing *Locke v. Davey*, 540 U.S. 712, 720–21 (2004)). The Court decided to consider not what the entity was—i.e. religious—but what it was doing: opening a playground to children of all or no faith, in a preschool and daycare center (i.e., at an early age, when they cannot be submitted to a religious indoctrination). Moreover, the fact that the decision was limited in scope to a playground shows the Court's attention to its earlier jurisprudence (the Court did not want to open the door to the financing of sectarian activities by governmental expenditures). *Id.*

²⁶⁷ MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 69 (1996).

²⁶⁸ *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (permitting the Military to forbid required religious headgear).

free exercise of religion.²⁶⁹ On the other hand, in the name of free speech, the Court has authorized a public university to support a range of publications, including religious ones, as soon as they met the funding-eligibility criteria.²⁷⁰

Religious identity can, however, be defended and protected in an antidiscrimination framework. The First Amendment affords religious groups a zone of protection from state interference in decisions about their internal governance. It is Title VII of the Civil Rights Act of 1964 that protects employees and applicants from adverse treatment by employers. Title VII says that an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin,”²⁷¹ except if such accommodation proves an “undue hardship.”²⁷² In *EEOC v. Abercrombie & Fitch, Inc.*, the Supreme Court considered the case of a Muslim woman turned down for a job at a clothing retailer because her headscarf would violate the store’s “Look Policy.”²⁷³ Holding that a job applicant need only show that her need for an accommodation was a motivating factor in her employer’s adverse decision and that the employer need not know that it was a *religious* accommodation, the Court also found that the EEOC accommodation requirements applied even to facially neutral policies:

Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual . . . because of such individual’s” “religious observance and practice.” An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an “aspec[t] of religious . . . practice,” it is no response that the subsequent “fail[ure] . . . to hire” was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.²⁷⁴

Freedom of conscience, the common denominator of the jurisprudence of the Court, the core dimension of religious belief, guarantees the freedom of conscience of religious and non-religious people. Guided by the clauses of

²⁶⁹ *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 674 (2010) (upholding a law school’s policy of refusing to officially recognize a Christian student group unless it agreed to openly accept all members).

²⁷⁰ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–41, 843–44 (1995) (finding that a public university’s refusal to allow printing funds to be used by a Christian publication was unconstitutional if all other qualifications for funding were satisfied); *see also* *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) (“[L]imits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices.” (citing *Rosenberger*, 515 U.S. 819)).

²⁷¹ 42 U.S.C. § 2000e-2 (2016).

²⁷² *EEOC v. Abercrombie & Fitch, Inc.*, 135 S. Ct. 2028, 2031 (2015).

²⁷³ *Id.*

²⁷⁴ *Id.* at 2034 (alterations in original).

the First Amendment, freedom of conscience sets the limit of public and private intervention in religious issues, depending on location, degree of constraint, and the publics involved. It also set the limits of divergence between Justices in the interpretation of each clause.

Therefore, if we take Kennedy's central proposition that "whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence,"²⁷⁵ then Justice Stevens seems correct in writing that "the individual's freedom of conscience [i]s the central liberty that unifies the various Clauses in the First Amendment."²⁷⁶ It even goes beyond unifying them; it also trumps them when conscience is at risk.

But when, in the most recent and controversial exemption case (*Hobby Lobby*), conscience was also affirmed, was it the same "conscience" intended by Stevens—a choice made by an individual for him or herself?²⁷⁷ This is not exactly what happened in the *Hobby Lobby* case, where the Court decided that the conscience of a person could concern or extend to a closely held for-profit corporation, which have sincere beliefs preventing them to facilitate access to contraception for their employees.²⁷⁸

The Court could have used the term "conscience" because of its polysemy. At least the existence of two competing conceptions of conscience was emphasized by Michael J. Sandel in a direct and explicit reaction to Stevens's majority opinion in *Wallace v. Jaffree*, which Sandel developed in *Democracy's Discontent* (1996).²⁷⁹ In a long and important comment, Sandel criticizes Justice Stevens's opinion, as the "most explicit statement of the voluntarist conception of religious liberty" in the Court's history, for confusing freedom of conscience with freedom of choice, for making religious beliefs worthy of respect, "not in virtue of what they are beliefs *in*, but rather in virtue of . . . being beliefs of a self unencumbered by convictions antecedent to choice."²⁸⁰ For

²⁷⁵ *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989).

²⁷⁶ *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (invalidating an Alabama statute that authorized a period of silence for "meditation or voluntary prayer"). Previously, in his majority opinion in *Schempp*, Justice Clark has mentioned that the clauses overlap because they both require neutrality. *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963). But he did not construct neutrality as a common principle covering the two clauses, beyond the Establishment Clause. *Id.*

²⁷⁷ *Jaffree*, 472 U. S. at 50.

²⁷⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

²⁷⁹ SANDEL, *supra* note 267, at 63–64. Conscience has a variety of definitions and interpretations developed, for example, in Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 226–31 (2009). Inspired by Koppelman, *id.*, and Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597–98 (1982), I would say that the courts have considered conscience as an innermost conviction of its possessor about what is morally right in relation to life and death.

²⁸⁰ SANDEL, *supra* note 267, at 63–64.

Sandel, *Barnette* is in fact the first sign of the “procedural republic” in which patriotism is a “matter of choice, not of inculcation,” where “the Supreme Court assumed as its primary role the protection of individual rights against government infringement.”²⁸¹ Freedom of conscience as “respect for persons’ freedom to choose their religious convictions for themselves”²⁸² (i.e. individual choice in matters of religion) underlies important Court decisions such as *Cantwell* or *Schempp*. Stevens reemphasized the latter two by stating that

[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful²⁸³

For Sandel, conscience is not always a matter of individual choice. He rightly recalls that, originally, Madison and Jefferson understood religious liberty “as the right to exercise religious duties according to the *dictates of conscience*, not the right to *choose* religious beliefs.”²⁸⁴ Sandel quotes the first sentence of Jefferson’s “Bill for Establishing Religious Freedom”: “the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their own minds.”²⁸⁵ And it is precisely because belief is *not* governed by the will that Sandel considers freedom of conscience inalienable. He concedes that the Supreme Court has—in certain cases—accorded respect to what he called “encumbered selves.”²⁸⁶ Among these cases, Sandel mentions *Wisconsin v. Yoder*. In that case, the Court found that, due to Amish parents’ fundamental right to freedom of religion, their children could be exempted from mandatory public schooling after the eighth grade to keep their religious tradition alive.²⁸⁷

The express purpose of the Religious Freedom Restoration Act was “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.”²⁸⁸ In *Yoder*, claims of individual conscience are oriented toward third parties and impose conduct on them—here, children of the claimants—in the name of imperative religious

²⁸¹ *Id.* at 54–55.

²⁸² *Id.* at 62.

²⁸³ *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985); *see also* SANDEL, *supra* note 267, at 63 (quoting *Wallace*, 472 U.S. at 52–53 (1985)).

²⁸⁴ SANDEL, *supra* note 267, at 65 (emphasis added).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 68–69 (describing cases in which the Supreme Court has addressed individuals’ rights to practice their religion).

²⁸⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

²⁸⁸ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012) (citations omitted).

scruples.²⁸⁹ Bearing this in mind, *Hobby Lobby* can appear to be the heir to *Yoder*, one of the cases quoted and endorsed by RFRA. However, an examination of the historical record of *Yoder* and an analysis of the process that led to the final versions of the different opinions will help us examine this case from a different angle, one where freedom of religion—in the name of conscience—cannot be imposed upon or harm another individual conscience.

B. *Yoder, a Misinterpreted Parent of Hobby Lobby*

The Court heard oral arguments for *Wisconsin v. Yoder* on December 8, 1971,²⁹⁰ and it deliberated in conference on December 10, 1971.²⁹¹ Only seven Justices were present, as Rehnquist and Powell were either not appointed or not yet confirmed. The Court unanimously agreed to affirm the decision of the Supreme Court of Wisconsin, which the State of Wisconsin had appealed.

Chief Justice Burger selected himself to write the opinion and on April 7, 1972, sent a first draft to his colleagues.²⁹² After reading it, Potter Stewart wrote to him that he was in “basic agreement” with his “admirably thorough opinion,” but expressed two reservations.²⁹³ First, he suggested that “since the case involves . . . state laws, . . . there should be a specific reference to the Fourteenth Amendment in the first paragraph of the opinion.”²⁹⁴ His main concern, however, was the invocation of “parental direction” as a constitutional right.²⁹⁵ “To be sure,” he added:

[O]ur society has long been organized in terms of the monogamous family structure, and this Court’s cases make clear that the interests arising from that structure enjoy procedural due process as well as equal protection immunity from governmental interference. But it is something else to say that those interests are substantive constitutional rights.²⁹⁶

²⁸⁹ It does not matter if the citizens do or do not belong to a faith community. On that point, I disagree with NeJaime and Siegel. See NeJaime & Siegel, *supra* note 119, at 2591 (arguing that groups and individuals who bring complicity-based conscience claims harm other citizens by enforcing traditional norms against individuals outside of their faith community who have different religious beliefs).

²⁹⁰ *Yoder*, 406 U.S. at 205.

²⁹¹ Memorandum of William O. Douglas, Associate Justice, U.S. Supreme Court (Dec. 10, 1971) (on file with Library of Congress, William O. Douglas Papers, Box 1553).

²⁹² Memorandum from Warren Burger, Chief Justice, U.S. Supreme Court to the Conference on First Draft of *Wisconsin v. Yoder* (Apr. 7, 1972) (on file with Yale University Library, Potter Stewart Papers, Box 80).

²⁹³ Letter from Potter Stewart, Associate Justice, U.S. Supreme Court, to Warren Burger, Chief Justice, U.S. Supreme Court (Apr. 10, 1972) (on file with Yale University Library, Potter Stewart Papers, Box 80) (copy on file with author).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

The Chief Justice agreed to incorporate Potter Stewart's two suggestions into a new draft that he circulated April 21st. "As to 'parental rights,'" he wrote to Stewart, "that can be converted into a looser observation as to the parental interest."²⁹⁷ Stewart joined him, as did Brennan. But on April 26th, Douglas circulated an unexpected dissenting opinion.²⁹⁸

Douglas agreed "that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools," but he disagreed with the Court's conclusion that the matter is "within the dispensation of parents alone."²⁹⁹ "The difficulty with this approach," according to Douglas, was that "parents are not seeking to vindicate their own free exercise claims, but those of their high-school age children."³⁰⁰ The problem for him was that if the Court had for a long time shown "little regard for the views of the child," in recent cases, it has declared that "the children themselves have [a] constitutionally protectible interest[] in their own right" and that they are "'persons' within the meaning of the Bill of Rights," able to claim rights under the First or Fourteenth Amendments.³⁰¹ Douglas referred to *Barnette*, where the Court had declared that the salute to the flag was in "interference with the child's free exercise."³⁰² Douglas thought that in the present matter—his or her education and future—the child might have decided views. "He may want to be a pianist or an astronaut or an ocean geographer. To do so he will have to break with the Amish tradition."³⁰³ He should at least be heard. Only one of the three children involved in the case had been heard as a witness in the trial—she had agreed to leave high school. Because the two others had not spoken, Douglas dissented in their cases.

One day later, on April 27th, Potter Stewart circulated a concurring opinion, in which Brennan immediately joined. The concurrence reminded the other Justices that *Yoder* concerned the criminal punishment of Amish parents who did not want their children to attend school in accordance with their religious beliefs. It did not deal with "the right of children of Amish parents to attend public school . . . if they wish to do so," the two Justices claimed.³⁰⁴ "[T]here is no suggestion whatever in the record that the religious beliefs of

²⁹⁷ Letter from Warren Burger, Chief Justice, U.S. Supreme Court, to Potter Stewart, Associate Justice, U.S. Supreme Court (Apr. 11, 1972) (on file with Yale University Library, Potter Stewart Papers, Box 80).

²⁹⁸ Justice William O. Douglas, Dissent to *Wisconsin v. Yoder* 1 (Apr. 26, 1972) (third preliminary draft) (on file with Yale University Library, Potter Stewart Papers, Box 80) (copy on file with author).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1–2.

³⁰² *Id.* at 2.

³⁰³ *Id.* at 3.

³⁰⁴ Justice Potter Stewart, Concurrence to *Wisconsin v. Yoder* 1 (Apr. 27, 1972) (draft 1) (on file with Yale University Library, Potter Stewart Papers, Box 80) (copy on file with author).

the children here concerned differ in any way from those of their parents,” Stewart added.³⁰⁵ To the contrary, the only student who testified answered that the reason she did not want to go to school was her religion.³⁰⁶

On May 3rd, the Chief Justice added two pages to his latest draft. In an explicit response to Douglas, he stated that the Court decision “in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents.”³⁰⁷ The parents were subject to prosecution for failing to send their children to school. It was their right of free exercise—not their children’s—that determined Wisconsin’s power to impose criminal penalties.³⁰⁸ Somewhat defensively, the Chief Justice added that:

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.³⁰⁹

However, it was not over yet. On May 11th, Justice White, joined by Stewart and Brennan, signed another concurring opinion finding that missing the ninth and tenth grades did not harm a person’s ability to resume a secular life if they later wished to do so.³¹⁰

Evidently, the heart of Douglas’s dissent, that parents’ choices could seriously harm their mature children, was unsettling to his colleagues. It provoked a detailed response from the Chief Justice writing for the majority, as well as two concurring opinions emphasizing that the Court’s decision would not undermine the state’s interest in providing every child with a basic education. All Justices took seriously the issue of harm to third parties, i.e., the children. In the majority opinion, Chief Justice Burger mentions that in the case, there was no “harm to the physical or mental health of the child.”³¹¹ In his concurring opinion, joined by Justices Brennan and Stewart, Justice White went further, emphasizing that these exemptions, which would provoke children’s early drop from high schools, would not harm their ability to make life choices, especially future professional ones.³¹²

³⁰⁵ *Id.* at 1.

³⁰⁶ *Id.*

³⁰⁷ Justice Warren Burger, *Wisconsin v. Yoder* 25 (May 3, 1972) (draft 4) (on file with Yale University Library, Potter Stewart Papers, Box 80) (copy on file with author).

³⁰⁸ *Id.* at 25–26.

³⁰⁹ *Id.* at 26.

³¹⁰ Justice Byron White, *Wisconsin v. Yoder* 3 (draft 1) (May 11, 1972) (on file with Yale University Library, Potter Stewart Papers, Box 80) (copy on file with author).

³¹¹ *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972).

³¹² *See id.* at 240 (finding that the State has failed to demonstrate that Amish children who leave school in eighth grade will be unable to acquire new academic skills later, upon choosing to leave the Amish way of life).

A majority of the Court—the dissent and the three concurring Justices—were thus centrally concerned with the harm the decision should *not* do to the choices and interests of third parties (i.e., the children).³¹³ In fact, when one reads all the opinions in *Yoder* in a row—the majority and then, successively, the two concurring and the dissenting opinions, the feeling of discomfort is so obvious that we might ask if the Supreme Court’s decision would have been the same if the district court record had contained the testimony of a child who wished to remain in school. There is good reason to have doubts. One could even say that a careful reading of *Yoder* leads to an acknowledgment that there is implicitly a conditionality to the exercise of the parents’ power to withdraw their children from school in the name of religious freedom: the mature children’s individual conscience, whatever this conscience is the product of—be it inner scruples or choice.³¹⁴

It is perhaps with this necessity in mind that John Rawls reacted to a situation in *Yoder* where “various religious sects oppose the culture of the modern world and wish to lead their common life apart from its unwanted influences” by suggesting educating the children as to their constitutional rights.³¹⁵ Rawls notes that:

³¹³ The Justices’ concern was more about material harms (i.e., those with tangible, practical effects, such as access to goods and services) than with dignitary harms (i.e., social meaning, including stigma), which they could have been also concerned with. See NeJaime & Siegel, *supra* note 119, at 2562 (describing litigants’ efforts to deny wedding services to same-sex couples, including the baking and selling of wedding cakes, citing religious beliefs).

³¹⁴ Very few scholars raised the issue of children in their comments on *Yoder*, illustrating Marci Hamilton’s study that the children are missing in law and religion scholarship. See generally MARCI HAMILTON, *The Missing Children in Law and Religion Scholarship*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY AND EQUALITY* (Susanna Mancini & Michael Rosenfeld eds., 2017). Leo Pfeffer raises the issue that the Court left unanswered a possible “conflict between the parents’ rights and the children’s religious freedom.” LEO PFEFFER, *GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION* 137 (1974). The “rights of mature minors” was also an issue raised in Pfeffer’s brief to the Court, in the name of the Synagogue Council of America and its Constituents. Brief for the Synagogue Council of America, et al. as Amici Curiae Supporting Respondents, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (No. 70-110), at 22. Pfeffer mentions first, as most significant, the “high value which we have from our beginnings as a nation placed upon freedom of conscience. Recent decisions of this Court show that only the clearest proof of immediate threat to a compelling state interest will justify so serious an infringement upon that freedom.” *Id.* at 4. Then he notes that this case is not difficult because there is no division within the family either among the parents or between parents and children. *Id.* at 22. Basing his reasoning in the many domains in which a mature minor can make decisions on his or her own—for example, in joining the military or leaving school—Leo Pfeffer claims that the mature minor has a right to “participate in deciding the extent of his education, and that this right is within the ambit of the Free Exercise Clause, the Due Process Clause and the Ninth Amendment.” *Id.* at 23; see also MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 230–31 (2016) (describing Chief Justice Burger’s position that *Yoder* involved parents’ rights to determine their children’s religious education, while the children are not parties to the litigation).

³¹⁵ JOHN RAWLS, *POLITICAL LIBERALISM* 199 (1993).

The liberalism of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less. It will ask that children's education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to insure that their continued membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist.³¹⁶

When passing RFRA, Congress reacted to *Smith* by explicitly referencing two and only two Supreme Court cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*, on which *Hobby Lobby* relies. *Sherbert v. Verner* involved a Seventh-Day Adventist whose scruples of conscience could not permit working on the Sabbath. They were *individual* scruples, which did not have any direct impact on other individuals. This was not how *Yoder* was the most commonly interpreted, when the Court stated that parents could decide the educational fate of their adolescent children.

However, as I have shown, in *Yoder*, the Douglas dissent is as important as the majority opinion for its impact on all of the other opinions in the case: freedom of religion cannot go against "individual conscience"—it must at least not harm it. A majority of the Justices explicitly emphasized a "no harm" condition on the children of the *Yoder* parents.

Whether conscience is a matter of choice or inner obligation, what is guaranteed in *Sherbert* and in *Yoder* is an individual freedom of conscience, which ought not to harm other individuals, including mature children able to express their own conscience. It was with the invocation that no harm to other individuals resulted from the exercise of the freedom of conscience that Justice Kennedy could justify his decisive opinion in *Hobby Lobby*. And it is on that ground—that the exemption *does* harm other individuals—that the challenge to *Hobby Lobby* is the most legitimate.³¹⁷ However, in these cases of exemptions, when the Court decides to acknowledge conscience and to protect it, it creates an asymmetry in favor of the individual(s) protected that can be minimized or reduced, but not totally erased. This preference should be minimized by the Court's reception of the third parties' testimonies that could help her decide on exemptions and assess harms.

³¹⁶ *Id.*

³¹⁷ For a critical approach of this point, see NeJaime & Siegel, *supra* note 119, at 2532–33 (discussing the harm that accommodating religious-based conscience claims in *Hobby Lobby* may inflict on legislative attempts to protect the rights of LGBT individuals).

CONCLUSION: COULD FREEDOM OF CONSCIENCE BE A
PRIVILEGE AND IMMUNITY OF U.S. CITIZENS?

If individual freedom of conscience convincingly informs the entire federal judiciary's jurisprudence regarding religion, why is this right not set and affirmed in the Court's interpretation of the Constitution? It is not a penumbra, as the penumbra is an emanation of rights expressed formally in the Constitution.³¹⁸ Quite the opposite, in Stevens's view, the rights proclaimed in the First Amendment emanate from freedom of conscience. One could therefore associate this affirmation of freedom of conscience by Justice Stevens and by other prominent Justices as what Philip Bobbitt calls an ethical interpretation of the Constitution.³¹⁹ For Bobbitt, an ethical approach to the Constitution permits one to assert new personal rights beside the ones already in the text of the Constitution and to limit the means of the government on these newly recognized individual rights.³²⁰ But if freedom of conscience which arises, as a negative right, from the popular mobilization around *Barnette* and against *Smith*, has justified the Court in limiting the means of government, it also developed, as a positive right, an obligation on the State to facilitate individuals' freedom of conscience (e.g., by providing chaplains).³²¹

Why not therefore acknowledge the status of individual freedom of conscience more explicitly in the jurisprudence, by making it a privilege and immunity of the citizen guaranteed by the Fourteenth Amendment, one of the techniques Bobbitt suggests?

In the battle that started with *Gobitis* and would eventually lead to *Barnette*, the Court debated the status of conscience or of conscientious scruples as absolute rights. In *Gobitis*, Justices did not at first recognize conscience as an absolute right. Justice Frankfurter stated, "the conscience of individuals collides with the felt necessities of society."³²² "Even when it comes to these

³¹⁸ See Benjamin M. Eidelson, *A Penumbra Overlooked: The Free Exercise Clause and Lawrence v. Texas*, 30 HARV. J. L. & GENDER 203, 204 (2007) ("To be sure, the general debate over whether constitutional rights must be spelled out explicitly in order to 'count' for the purposes of judicial review, or whether they may reasonably be inferred from the text's capacious language, remains active.")

³¹⁹ PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

³²⁰ *Id.* at 176.

³²¹ Some religion-clause scholars (e.g., John Witte and Steven D. Smith) have recently argued for a "jurisdictional" theory of conscience—i.e., that the state simply have no authority in questions of religion. The idea of a positive right of conscience is, of course, different and contrary to a jurisdictional theory. See, e.g., STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 108 (2014) ("The religion clauses of the First Amendment came to be an anchor for hard constitutional commitments to church-state separation and to freedom of conscience"); John Witte, Jr. & Joel A. Nichols, *Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER L. REV. 321, 324 (2013) (predicting controversies over the place of faith-based family laws and religious tribunals "as various religious individuals and groups . . . press for greater freedom to make judgments about sex, marriage, and family life based on their own religious beliefs.").

³²² *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940).

ultimate civil liberties,” Frankfurter wrote to Justice Stone, “insofar as they are protected by the Constitution, we are not in the domain of absolutes.”³²³ Stone, the lone dissenter in *Gobitis*, did not agree: in his dissent, he stated that although “the constitutional guaranties of personal liberty are not always absolutes,” nevertheless “[t]he very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion.”³²⁴ Two years later, however, in 1942, in the middle of the struggle that would lead to *Barnette*, a unanimous Supreme Court took a further step, stating that there was an absolute individual personal right related to conscience and thought. In the words of Justice Reed, writing for the majority in *Jones v. City of Opelika*:

There are ethical principles of greater value to mankind than the guarantees of the Constitution, personal liberties which are beyond the power of government to impair. These principles and liberties belong to the mental and spiritual realm, where the judgments and decrees of mundane courts are ineffective to direct the course of man. The rights of which our Constitution speaks have a more earthy quality. They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument.³²⁵

And Chief Justice Stone—together with Justices Black and Douglas—joined Justice Murphy’s dissenting opinion to affirm that freedom of thought was an “absolute” right.³²⁶

When the Fourteenth Amendment was passed in 1868, Senator Jacob M. Howard presented the clause as guaranteeing all the rights of the first eight amendments of the Bill of Rights. This is not how the Court interpreted the clause in the *Slaughter-House Cases*; rather, it selected some absolute rights (i.e., rights which are not submitted to limitation through due process, such as property, liberty, or life).³²⁷ The Court distinguished the ones it defined as owing to the Constitution—namely, the rights guaranteed by the Thirteenth,

³²³ Letter of Felix Frankfurter, Associate Justice, U.S. Supreme Court, to Harlan Stone, Associate Justice, U.S. Supreme Court 1–2 (May 27, 1940) (on file with Library of Congress, Harlan Stone Papers, Box 65).

³²⁴ *Gobitis*, 310 U.S. at 602, 604 (Stone, J., dissenting).

³²⁵ *Jones v. City of Opelika*, 316 U.S. 584, 593 (1942).

³²⁶ *See id.* at 618 (Murphy, J., dissenting) (“Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.”)

³²⁷ Exactly two years after its *Slaughter-House Cases* decision, the Court, in *Minor v. Happersett*, 88 U.S. 162 (1875), confirmed its conception of privileges and immunities as absolute rights. To Mrs. Virginia Minor, who claimed that the Fourteenth Amendment made her right to vote a privilege and immunity, the Court responded that Congress would not have included in the amendment the possibility of denying the right to vote to certain males “if suffrage was the absolute right of all citizens.” 88 U.S. 162, 175 (1875).

Fourteenth, and Fifteenth Amendments, as well as rights to peaceably assemble, petition for redress of grievances, and claim the privilege of the writ of habeas corpus—from other absolute rights which “owe their existence to the Federal government, its National character, its Constitution, or its laws.”³²⁸ Some of these rights are negative, but some are positive in the sense that they request some intervention of the state. However narrowly defined, this minimalist conception turns out to be consequential. Recently, Justice Stevens has used the approach of the *Slaughter-House Cases*³ majority opinion in delivering the Supreme Court’s opinion to reaffirm or to include in *Saenz v. Roe*³²⁹ the absolute right of an American citizen to move and settle without conditions in another state of residence within the U.S. Within that perspective, would it not be possible for the Court to acknowledge the freedom of conscience as an absolute right and privilege of the American citizen?

As we have just seen, privileges and immunities do not need to be expressed in the wording of the Constitution to be recognized as such. Isn’t the freedom of conscience a privilege and immunity as well? Surging from an original repression in the final wording of the First Amendment to the Constitution, freedom of conscience has come back in contemporary jurisprudence above explicitly enumerated constitutional rights as a kind of absolute right that trumps the formal expression of First Amendment liberties in the name of a higher liberty.

Finding a space for this right in constitutional interpretation would increase the Constitution’s ability to guarantee other rights, give a direction to the jurisprudence on religion, and emphasize its place in the meaning and purposes of the American Republic since its founding.

³²⁸ 83 U.S. 36, 79 (1873). These include, for example, the rights to freely access the nation’s seaports and to use the navigable waters of the United States. *Id.*

³²⁹ 526 U.S. 489, 507–08 (1999). On the analysis of *Saenz v. Roe* and its possible consequences, see Akhil Reed Amar, *Lost Clause: The Court Rediscovered Part of the Fourteenth Amendment*, NEW REPUBLIC 14 (June 14, 1999); see also Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999); Stacey L. Winick, Comment, *A New Chapter in Constitutional Law: Saenz v. Roe and the Revival of the Fourteenth Amendment’s Privileges or Immunities Clause*, 28 HOFSTRA L. REV. 573 (1999).