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INTRODUCTION

When Dwight D. Eisenhower nominated William J. Brennan, Jr., on September 30, 1956, to the position of Associate Justice of the Supreme Court of the United States, Will Herberg's book *Protestant-Catholic-Jew*[1] had been in print for a year. Herberg's book illustrated a search in religion for identification in a secularized, middle-class America. The success of *Protestant-Catholic-Jew*[2] reflected an increase in the United States in church membership, a belief in God, prayer, heaven, and the Bible. Herberg's quest was a search for identity, a search for a rooted self in a society which had publicly denigrated roots in favor of the American "melting pot." This severing of roots was exacerbated by the massive post-World War II changes in housing patterns, the economy, Communist hysteria and efforts to create social and cultural conformity. Herberg's book, says Martin Marty, was part of a reinvigoration of religion "inside an America whose way of life itself was often regarded as religious."[3]

When Justice Brennan took the oath of office on October 16, 1956, the Supreme Court had decided only a few cases involving the religion clauses of the first amendment. The Court had incorporated both the free exercise "clause" and the establishment clause into the due process clause of the fourteenth amendment,[4] thus making those provisions applicable to state as well as congressional action. A 1952 decision granted free exercise rights to a religious corporation,[5] but at the time of Justice Brennan's appointment to the Court, judicial interpretation of the religion clauses had been sparing.[6]

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1. W. HERBERG, PROTESTANT-CATHOLIC-JEW (1955).

2. It was revised and reprinted in 1960.

3. M. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 422 (1984). *See also* Niebuhr, *America's Three Melting Pots*, N.Y. Times Bk. Rev., Sept. 25, 1955, at 6 (review of W. HERBERG, PROTESTANT-CATHOLIC-JEW).

4. Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause).

5. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

6. In Davis v. Beason, 133 U.S. 333 (1890), the Supreme Court defined religion as a "belief in the Creator," and in United States v. Ballard, 322 U.S. 78 (1944), the Court held that a prosecution for criminal fraud could not be based on the truth or falsity of the defendants' religious beliefs. Finally, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court held unconstitutional an Oregon statute that forbade parents from sending their children to private or parochial school. In *Pierce*, the Court relied solely on the fourteenth amendment and the implicit liberty within that amendment of parents to control the upbringing and education of their children. *See infra* Section I.

Justice Brennan was asked during his confirmation hearings whether being a Roman Catholic would affect his decisions as a judge. In response, he answered that his duty was to interpret the Constitution without regard to his own religious feelings.[7] Before Justice Brennan's confirmation as an Associate Justice, the list of former Justices who were Roman Catholic was both sparse and, for the most part, lackluster: Chief Justices Roger Brooke Taney and Edward White, and Associate Justice Frank Murphy.[8] In some sense, Justice Brennan was breaking new ground as a Catholic and as an Irish-American, especially since Justice Murphy's tenure on the Supreme Court ended with his death at age forty-nine after nine years on the bench.

Justice Brennan has never written an article or published a speech about the religion clauses or about the role, if any, of religion in American public life. I suggest that Justice Brennan's decisions concerning the religion clauses were partly a product of his upbringing as an Irish-American Catholic, and were related to two powerful cultural beliefs extant during the mid-20th century: (1) the belief in the melting pot, by which immigrants were attuned to the American way of life; and (2) the "Americanization" of Roman Catholics, in which Catholics and others worked to eliminate the separateness and difference of immigrant Catholics and to incorporate Catholics into the largely Protestant middle class. One resulting goal of these cultural beliefs was to avoid political disputes among religious sects.

The predominant method of avoiding disputes among religious groups was to remove religion from American public life and isolate religion in the "private" sphere. The establishment clause was partially suited to achieving this goal. At the same time, since religious conflict was possible, the diversity of religious belief in mid-twentieth century America required the fostering of a related goal, minimizing state-linked coercion of religious belief to preserve religious belief. The free exercise clause was utilized to effectuate this goal. Justice Brennan both agreed with these goals and played a major role in forming constitutional doctrine which attempted to accomplish them.

During the 1960s, these noble purposes were furthered by the Court's (and Justice Brennan's) decisions interpreting the establishment and free exercise clauses. In the 1970s, the Court was concerned not with structuring an interpretive method for determining cases brought under the religion clauses, but

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7. *See* Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 37 (1990). The fear by some Americans that a Roman Catholic's religious beliefs would require him to act contrary to the interests and values of the United States was more explicitly confronted during the 1960 presidential campaign of John F. Kennedy. *See* J.F. KENNEDY, REMARKS ON CHURCH AND STATE IN CHURCH AND STATE IN AMERICAN HISTORY 190 (J. Wilson & D. Drakeman eds. 2d ed. 1987) (a reprint of Presidential candidate John F. Kennedy's speech in Houston, Texas, to Protestant clerics in September, 1960).

8. In *The Believer and the Powers That Are*, author (and Judge) John T. Noonan, Jr., notes that the religious beliefs of Supreme Court Justices have always been regarded as a taboo subject. J.T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 238-39 (1987). The Public Information Office of the Supreme Court refuses to divulge the religious beliefs of the Justices, and their publications listing all Supreme Court justices do not include any mention of religious affiliation. Currently Justices Scalia and Kennedy are identified as Roman Catholic.

with applying that interpretive method to particular situations. By the end of the decade the accretion of religion clause cases led to confusion, not clarity. The struggle in the 1980s was whether a competing paradigm based on a different and more dependent reading of history would replace the interpretive method championed by Justice Brennan and others. In my view, Justice Brennan convinced a majority of the Court of the validity of the old paradigm until the late 1980s, when his interpretive structure was at least partially succeeded by a third paradigm, "endorsement," particularly suited to a revision of the free exercise clause. Justice Brennan's goals were deemed conflicting, not complementary. Justice Brennan's choice was to foster the "privatization" goal. This goal of "privatizing" religion, the focus of the establishment clause, undermined the decisions concerning religious autonomy which is the focus of free exercise jurisprudence.

Herberg's book underscores the dilemma facing the Supreme Court since it began hearing, on a regular basis, cases claiming an impermissible governmental establishment of religion or a governmental infringement on a person's free exercise of religion. When a society believes its way of life is religious, is there any room left in the society for religion? How does law "fit" religion into a society that is both predominantly secular and widely and pluralistically "religious"? How do those who are both religious and believers in the "American way of life" reconcile those divergent beliefs and actions?

In the thirty-four years of Justice Brennan's tenure, the Court worked several revolutions in religion clause jurisprudence—revolutions guided by a sense of the needs of a changing society. Revolution, as demonstrated by the historian of science I. Bernard Cohen, has at least two different historical meanings: to revolve, as in a return to some older order of things, and to make new, as in overturning.[9] Justice Brennan's religion clause opinions were calculated to work a revolution in the sense of a new order, but this revolution sowed the seeds of a return to an older order. Justice Brennan was one of several architects of a new order in establishment clause interpretation, and was the architect in reframing the constitutional view of the free exercise clause. In particular, the all-embracing interpretation of the establishment clause eventually was a catalyst used by a revisionist Supreme Court in 1990 to complete a revolution in free exercise jurisprudence. That revolution returned the legal interpretation of the free exercise of religion to an older order of things. Additionally, the middle level of generality used to evaluate establishment clause claims has neither fostered the higher level goals of the Court nor created a specific understanding for governmental officials to guide their conduct. In other words, the good intentions by which the Supreme Court, including Justice Brennan, decided religion clause cases for much of the period between 1956 and 1990 have led to suspicion, misunderstanding, and confusion, not enlightenment, tolerance, and respect.

9. *See* I. COHEN, REVOLUTION IN SCIENCE 51-76 (1985).

Rigidly separating establishment clause jurisprudence from free exercise jurisprudence creates a false duality about the interrelationship of law, religion, and government. However, in order to clearly present my argument, reference often will be made only to one or the other provision. Section I of this essay is a short, general history of the religion clauses in the Supreme Court. The next three sections chronologically discuss the decisions of the Court from the distinct periods 1956-1970, 1971-1980, and 1981-1990, followed by a conclusion. As in so many areas of constitutional law, Justice Brennan has profoundly affected and influenced academic and popular thinking about religion and law in America. This Article is a preliminary effort to examine Justice Brennan's opinions in light of the values he brought to the Court.

I. RELIGION IN THE SUPREME COURT

The Supreme Court's decisions regarding religion before the Civil War were few. The Court decided two cases assessing the lawfulness of grants of property: the first invalidated a bequest to an unincorporated religious body,[10] and the second upheld a will which bequeathed property to the City of Philadelphia for constructing a college for poor white male orphans with the stipulation that no cleric hold any position with the college.[11] The Court additionally held that property purchased for the use of the Church of England before the Revolutionary War devolved after the war to the Protestant Episcopal Church, not the Commonwealth of Virginia.[12] In 1845, the Court held that the religion clauses were not applicable to the states.[13]

The opinion in *Reynolds v. United States*[14] was the first attempt to define the contours of the religion clauses. The unanimous Court turned to the historical record to define "religion," and in particular, they turned to battle in Virginia in 1784 over state support of teachers of the Christian religion. The debates in Congress over the phrasing and meaning of the religion clauses were conflated with James Madison's Memorial and Remonstrance against the proposed Virginia legislation and Jefferson's 1802 letter to the Danbury Baptist Association interpreting the religion clauses to "[build] a wall of separation between church and State."[15] Consequently, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[16]

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10. Trustees of Philadelphia Baptist Ass'n v. Hart's Exrs., 17 U.S. (4 Wheat.) 1 (1819).
11. Vidal v. Girard's Executors, 43 U.S. (2 How.) 117 (1844).
12. Terrett v. Taylor, 14 U.S. (9 Cranch) 23 (1815).
13. Permoli v. New Orleans, 44 U.S. (3 How.) 671 (1845).
14. 98 U.S. 145 (1878).
15. *Id.* at 164.
16. *Id.* The criminal conviction of Reynolds for bigamy was affirmed.

In a second case involving Mormons in the Territory of Utah, the Court defined religion as referring "to one's views of his relations to his Creator."[17] With the exception of cases involving Jehovah's Witnesses,[18] the development of this definition was largely the extent of the constitutional interpretation of the religion clauses until the decision by the Court in *Everson v. Board of Education*.[19]

The *Everson* case followed *Reynolds* in equating the meaning of the religion clauses with the writings of Jefferson and Madison. The standard in assessing the constitutionality of state action was the "'wall of separation between the Church and State.'"[20] The extent of a breach was not considered—any breach in the wall violated the Constitution. For the five member majority, however, a city program which reimbursed students for their transportation costs to private schools[21] did not breach the wall of separation since the program was a safety measure properly permitted under the sovereign's police power.[22]

The dissent by Justice Rutledge in *Everson* was the first of three separate opinions written which set forth at length a proposed interpretive method of the

17. Davis v. Beason, 133 U.S. 333, 342 (1890). *See also* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (After concurring in the Court's judgment sustaining the Illinois law denying Myra Bradwell's application to practice law, Justice Bradley added, "This is the law of the Creator."); Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892) ("[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.").

18. *See* Follett v. McCormick, 321 U.S. 573 (1944) (holding unconstitutional a city ordinance levying a flat license tax on booksellers as applied to a Jehovah's Witness whose income was derived by selling religious tracts and whose activities were deemed religious); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional on free speech grounds a requirement that all public schoolchildren salute the American flag); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a tax on distribution of literature because the action of the distributors was religiously based); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding child labor law against religious liberty attack); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the free exercise clause into the fourteenth amendment and holding unconstitutional a statute forbidding solicitation for religious purposes unless the Secretary of State had previously determined the solicitation was religiously-based and approved it).

19. 330 U.S. 1 (1947). Several other cases tangentially touch upon the religion clauses. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (deciding, apparently based on federal common law, that Kentucky courts were without jurisdiction to decide a dispute about the ownership of church property because the nature of the dispute was ecclesiastical); Bradfield v. Roberts, 175 U.S. 291 (1899) (holding a federal grant to a hospital incorporated by the District of Columbia and run by the Catholic Sisters of Charity did not make the corporation a religious corporation, making the establishment clause inapplicable); Quick Bear v. Leupp, 210 U.S. 50 (1908) (holding that funds held in trust for Sioux Indians were the property of the Sioux, and thus Congress could not prohibit the Sioux from spending that money for religious education); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that an Oregon law requiring all schoolchildren to attend public schools violated a parent's liberty to control the education and upbringing of their children under the fourteenth amendment); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (holding that a state program providing secular textbooks to children in parochial and private schools did not deprive a taxpayer of property without due process of law).

20. *Everson*, 330 U.S. at 16 (quoting *Reynolds*, 330 U.S. at 164).

21. The ordinance limited the reimbursement to public or Catholic schoolchildren. *Everson*, 330 U.S. at 4 n.2. Since there was no allegation that this program discriminated against any other schoolchildren, the majority refused to consider whether this limitation was unconstitutional.

22. *Id.* at 17-18.

religion clauses. Justice Rutledge's history of the religion clauses thoroughly canvassed the Virginia experience in creating religious liberty, and concluded that the sparseness of the congressional record regarding the meaning of the religion clauses was due to the fact that "the matter had become so well understood as to have been taken for granted in all but formal phrasing."[23] Using Madison's argument in the Memorial and Remonstrance that even a "three pence" tax was too high,[24] Justice Rutledge concluded that any "entangling" aid violated the high wall of separation required by the Constitution.

An interesting aspect of the Rutledge dissent is the manner in which the arguments move. In concluding that the reimbursement of transportation costs is as "essential" to education and as "direct" an aid to religious education as books, tuition, school buildings, salaries, equipment, or anything else, Rutledge argued that "no rational line can be drawn"[25] among these items, and that the only difference is the amount of money involved. In other words, it is simply a difference in degree, not a difference in kind. This difference is no difference at all, according to Madison, so Justice Rutledge concluded that the line must be drawn at prohibiting all aid. This argument was bolstered by a nascent "political divisiveness"/slippery slope argument. Creating fissures in the wall of separation would result in "the struggle of sect against sect"[26] and "[t]he end of such strife cannot be other than to destroy the cherished liberty."[27] Thus, the goal of the establishment clause, like the free exercise clause, is religious liberty, and prohibiting aid is necessary to foster religious liberty. Using this interpretation, the establishment and free exercise clauses are complementary parts of a whole designed to protect religious liberty. The establishment clause is a "negative" liberty which must be paired with the "positive" liberty of the free exercise clause.

After the political divisiveness argument, Justice Rutledge addressed the argument that prohibiting aid restricted the liberty of choice of the parents, thus infringing upon their free exercise of religion. This was met with a formal neutrality argument. The formal neutrality argument is that there is no "legal discrimination" against the parents whose religious beliefs cause them to send their children to religious schools, for they have at least presently "waived" their right to send their children to free public schools. Even if the principle of absolute separation results in a lack of choice or a hampering of religious conscience, "it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education. . . ."[28]

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23. *Id.* at 42 (Rutledge, J., dissenting).

24. *Id.* at 40-41. J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 3 (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 65-66 (1947).

25. *Id.* at 48.

26. *Id.* at 53.

27. *Id.* at 54.

28. *Id.* at 59.

The next year the Court used the "separationist" lens to hold unconstitutional a "released time" program in the public schools.[29] In *McCollum v. Board of Education*, public schoolchildren were taught religion by their Protestant minister, Catholic priest or Jewish rabbi during the school day in the public school classroom. Four years later, the Court found constitutional a "released time" program in which the public schoolchildren were taught religion off the public school grounds.[30]

Finally, in a courageous decision, the Court reversed a decision of the New York Court of Appeals and in effect determined that the true owner of St. Nicholas Cathedral in New York City was a Russian Orthodox religious corporation with clear ties to the Soviet Union, not a distinct Russian Orthodox religious corporation which had denounced Soviet Communism.[31]

II. BUILDING A MODEL, 1956-1970

Justice Brennan was sworn in as an Associate Justice shortly after the beginning of the October 1956 Term; the Court did not decide a religion clause case until June 15, 1960. That case, *Kreshik v. Saint Nicholas Cathedral*,[32] was a per curiam decision upholding a previous decision made by the Court in 1952.[33] In the following three years, however, Justice Brennan would successively write dissenting, concurring, and majority opinions which altered as well as strengthened "the wall of separation metaphor" accepted by all the Justices in *Everson*.

In 1961, Justice Brennan authored a dissenting opinion in *Braunfeld v. Brown*,[34] one of four cases[35] decided the same day concerning the constitutionality of state Sunday closing laws. Justice Brennan joined the majority opinion in the companion case of *McGowan v. Maryland*,[36] which held that neither the establishment clause nor the equal protection clause invalidated laws requiring the closing of some commercial businesses on Sundays.[37] In *Braunfeld*, however, the issue was whether the Pennsylvania Sunday closing law violated the free exercise rights of Orthodox Jews whose religious beliefs compelled them to close

29. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

30. Zorach v. Clauson, 343 U.S. 306, 313 (1952) (The majority opinion by Justice Douglas includes the famous statement, "We are a religious people whose institutions presuppose a Supreme Being.").

31. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952).

32. 363 U.S. 190 (1960).

33. *Kedroff*, 344 U.S. 94.

34. 366 U.S. 599 (1961). Brennan also dissented in Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961), based on his dissenting opinion in *Braunfeld*.

35. In addition to *Braunfeld* and *Gallagher*, the other cases decided were McGowan v. Maryland, 366 U.S. 420 (1961), and Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

36. 366 U.S. 420 (1961).

37. *See id.*

on Saturdays. The majority opinion of Chief Justice Warren dismissed this argument for the reason that the closing law advanced the state's secular goals and imposed only an indirect burden on religious freedom.

In dissent, Justice Brennan noted that the choice was "whether a State may put an individual to a choice between his business and his religion."[38] Even though the law neither required the Orthodox Jew to affirm repugnant beliefs nor to work on the Sabbath, the law in effect forced an Orthodox Jew to choose either his business or his religion.[39] In other words, while the law was not enacted to impair either the religious worship or commercial opportunities of Orthodox Jews (or Sabbatarians), and was formally neutral, the result of the law in action was to force Orthodox Jews to make this choice. Justice Brennan next analogized the Sunday closing law to the ordinance taxing the sale of religious literature declared unconstitutional in *Follett v. McCormick*.[40] The Sunday closing law had the same effect on Orthodox Jews as had the tax on Jehovah's Witnesses; since the latter ordinance had been constitutionally invalidated, the Sunday closing laws were similarly invalid.[41]

The perspective suggested by Justice Brennan's dissent in *Braunfeld* was elaborated upon in his concurring opinion in *School District of Abington Township v. Schempp*.[42] The *Schempp* case reiterated the holding the previous year in *Engel v. Vitale*,[43] that state-sponsored prayer in public schools violated the establishment clause.[44] The majority opinion by Justice Clark in *Schempp* was notable in several respects. First, it created distinctive interpretive methods for the establishment and free exercise clauses; the former clause required no coercive effect for the court to determine the constitutionality of the law, contrary to a case argued under the free exercise clause.[45] Second, the Court stated that it was guided by a neutrality between church and state.[46] Third, the stated "test" for the constitutionality of legislation allegedly violating the establishment clause was formalized as, "[W]hat are the purpose and the primary effect of the enactment?"[47] This "test" formalized Justice Brennan's dissent in *Braunfeld*, a dissent predicated on the free exercise clause.

Justice Brennan's concurrence is masterful, following a tradition of separate opinions in religion clause cases begun by Justice Rutledge in *Everson*.[48] Justice

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38. *Braunfeld*, 366 U.S. at 611 (Brennan, J., dissenting).

39. *Id.* at 613.

40. 321 U.S. 573 (1944). *Follett* was limited to its facts in two cases: Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), and Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990). *See infra* text accompanying notes 158-79 (discussing *Texas Monthly* and *Swaggart*).

41. *Braunfeld*, 366 U.S. at 613.

42. 374 U.S. 203 (1963).

43. 370 U.S. 421 (1962).

44. *Schempp*, 374 U.S. at 220-22.

45. *Id.* at 223.

46. *Id.* at 225-26.

47. *Id.* at 222. *See also Braunfeld*, 366 U.S. at 607 (using language of purpose and effect).

48. For example, Justice Frankfurter wrote a 100 page concurrence in McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J., concurring).

Brennan's concurring opinion attempted to accomplish four things: (1) reduce or eliminate the reliance by the Court on the framer's intent in interpreting the religion clauses; (2) revise 19th and early 20th century Supreme Court "precedent" regarding the religion clauses; (3) establish a comprehensive claim about the meaning and interpretation of the religion clauses; and (4) give specific examples of constitutional and unconstitutional state aids to religion. In each respect Justice Brennan was successful.

The concurring opinion begins by quoting Marshall's rhetoric in *McCulloch v. Maryland*[49] that "it is *a constitution* that we are expounding."[50] Even if Jefferson or Madison had considered the question of prayer in public schools, their answer(s) would not be dispositive since it was the Court's duty to translate the general purpose of the religion clauses into concrete restraints on officials in the twentieth century.[51] Therefore, "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected"[52] due to the ambiguity of history, the historic development of public education, the increasing religious diversity of the United States, and the function of the public schools in forming a melting pot. The assumption underlying the final reason was that the public school was free from parochialism, divisiveness, or separatism, and that it allowed the assimilation of all to a common American heritage.

Justice Brennan then reviewed the history of the Supreme Court and the religion clauses to shed light on the principles involved in *Schempp*. This aspect of the opinion is worth noting because it exemplifies two aspects of Justice Brennan's immense influence as a justice: his facility with precedent, and his ability to restructure the Court's dialogue. While accepting every prior decision of the Court as binding precedent, Justice Brennan re-molded and re-shaped these cases. One set of cases was read to invoke a principle of strict neutrality. The precedential impact of another group of cases was minimized because they really were not decided under the first amendment. A third group of cases constructing the free exercise clause held that while conduct motivated by religious belief could be regulated, government could not compel behavior offensive to religious principles.[53]

After defending the incorporation of the establishment clause into the due process clause of the fourteenth amendment, Justice Brennan concluded that the establishment clause was intended to play the dual role of preventing religious incursions into governmental policy and governmental interference with religion.

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49. 17 U.S. (4 Wheat.) 316 (1819).

50. *Schempp*, 374 U.S. at 230 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407) (Brennan, J., concurring) (emphasis in original).

51. *Id.* at 236-37.

52. *Id.* at 237.

53. *Id.* at 250. The apparent exception to this rule, Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934), was demonstrated as effectively overruled, and if not overruled, inapplicable to the *Schempp* case because college students voluntarily attended school, while elementary and high school students were compelled to attend school. *Id.*

While the specific views of the Framers were not dispositive, the Court was required to follow their general vision, one which forbade those "involvements" of religious and secular institutions "which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."[54]

Then Justice Brennan evaluated the possibility of conflict between the establishment and free exercise clauses. Using the specific examples of state-paid military and prison chaplains, Justice Brennan apparently concluded that there existed no establishment clause violation because neither the military personnel nor the prisoners were coerced into attending religious services, and both groups consisted of adults.[55] However, this did not necessarily mean that the government was required under the free exercise clause to provide chaplains.

This reconciliation of the two clauses focused on the perspective of the believer; the taxpayer who, for either religious or secular reasons, opposed paying taxes for the support of military or prison chaplains was not envisioned in this understanding. As long as the believer was the focus of the approach, the conflict was minimized. However, once the taxpayer's interests were the focus of the Court, the conflict returned.

In response to the argument that the holding in *Schempp* required the invalidation of "every vestige, however slight, of cooperation or accommodation between religion and government,"[56] Justice Brennan demurred. He wrote, "I venture to suggest that religious exercises in the public schools present a unique problem."[57] Justice Brennan then suggested a line of holdings for specific cases. While couched in cautionary, tentative language, the effort appeared to attempt a specific resolution of problems affecting the interpretation of both clauses. Besides the military and prison chaplain example, Justice Brennan suggested the constitutionality of the following: draft exemptions for ministers and conscientious objectors; the temporary use of empty secular buildings for religious worship when the religious group was without a place of worship due to some emergency; the recitation of prayers before legislatures;[58] the non-devotional use of the Bible or discussion of religion in the public schools; tax exemptions for charities, which included religious institutions; activities which no longer had religious connotations; and the awarding of public welfare benefits to those whose eligibility was based on religious considerations.[59]

The constitutionality of the last suggestion was at issue in *Sherbert v. Verner*,[60] decided the same day as *Schempp*. Adell Sherbert was fired as a result of her

54. *Id.* at 295.
55. *Id.* at 298-99.
56. *Id.* at 294.
57. *Id.*
58. *Contra* Marsh v. Chambers, 463 U.S. 783 (1983) (Brennan, J., dissenting).
59. *Schempp*, 374 U.S. at 296-304.
60. 374 U.S. 398 (1963).

refusal to work on Saturdays, her Sabbath as a member of the Seventh-Day Adventist Church. Because of her refusal to work on Saturdays, the state of South Carolina determined she was ineligible for unemployment benefits because she failed, without good cause, to accept suitable work.[61]

Interestingly, Justice Brennan's majority opinion first utilized the statement of the majority in *Braunfeld* that "[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect."[62] Then, stating the issue in the same manner as he did in *Braunfeld*, he wrote, "The ruling [of South Carolina] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[63] As he had concluded in *Braunfeld*, this effectively burdened Adell Sherbert's free exercise of religion. The state's interest in simplifying administration of its unemployment compensation program, and its parallel interest in preventing fraud, were insufficient to infringe Sherbert's free exercise rights.

The *Sherbert* case did not explicitly overrule *Braunfeld* because in the latter case there was "a strong state interest in providing one uniform day of rest for all workers."[64] Finally, this case entailed no conflict between the two religion clauses because it reflected government neutrality in the face of religious differences, and not the involvement of religious with secular institutions.[65]

The *Schempp* and *Sherbert* opinions represent the two goals of Justice Brennan's religion clause jurisprudence: avoiding political divisiveness and fostering religious autonomy. Religion and government needed to be separate in particular public spheres, like the public schools, to protect the polity from corrosion caused by religious differences in the United States. Religion might interfere with a "fusing" of persons from different cultures, societies, and backgrounds regarding American public virtues. For that reason the establishment clause was a "separation" clause.

On the other hand, since the United States comprises a multiplicity of religious groups, and since realistically some state laws (like the South Carolina unemployment compensation law, which permitted Sunday worshippers to obtain benefits without making themselves available for Sunday work) already tilted in favor of religious beliefs subscribed to by larger numbers of believers, the Court

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61. *Id.* at 401.

62. *Id.* at 404 (quoting *Braunfeld*, 366 U.S. at 607). What is interesting about this quote is the absence of the next sentence in *Braunfeld* from Justice Brennan's opinion. It stated, "But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld*, 366 U.S. at 607. The ability of Justice Brennan to "co-opt" precedent, as he did in *Sherbert*, will, in my opinion, be one of the hallmarks of Justice Brennan's tenure on the Supreme Court.

63. *Sherbert*, 374 U.S. at 404.

64. *Id.* at 408.

65. *Id.* at 409.

was responsible for ensuring that the religious conduct of individuals was not to be insensitively overborne by state action. These precepts guided the Court through the end of the 1960s. What guided the Court in this interpretive building phase were the beliefs that separation was possible, and that a "neutral" position regarding the establishment clause and a "neutral" position regarding the free exercise clause were consistent. It was not until 1969 that Justice Brennan would again write an opinion regarding religion.[66]

Two local Georgia churches, members of a hierarchical general church organization known as the Presbyterian Church in the United States ("PCUS"), withdrew from the PCUS after a theological disagreement with the PCUS.[67] The local churches and the PCUS both claimed ownership of the property upon which the local churches were built. The issue before the Supreme Court was the constitutional role state courts could play in resolving the property dispute between the local churches and the PCUS.

In his majority opinion, Justice Brennan held that there were "neutral principles of law"[68] which applied to all lawsuits without violating establishment or free exercise principles. It was crucial for the courts to resolve these disputes without becoming involved in "ecclesiastical questions."[69] Accordingly, the Court found that the state court decision violated the first amendment because it was based on whether the PCUS engaged in a "departure from [theological] doctrine"[70] and thus terminated the trust relationship between the PCUS and the local churches. The case was remanded to the state court with instructions not to base its decision on the departure from doctrine test.

The next year, in a concurring opinion in *Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc.*,[71] Justice Brennan clarified the constitutional requirements for resolving church property disputes. The first option was for the civil court to identify whether the church was congregational or hierarchical in form. If the former, the court should resolve the dispute by adhering to the decision of the majority of the congregation. If the latter, the court should follow the highest authority of the hierarchy. The civil court would not review the correctness of the congregation's (or hierarchy's) decision; it would merely identify which type of religious organization was before the court.

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66. From 1963 to 1969, the Court decided four cases involving religion. Justice Brennan joined the majority in each of these cases: United States v. Seeger, 380 U.S. 163 (1965) (defining "religion" for purposes of determining whether Seeger met the statutory exemption for conscientious objectors to the military draft); Flast v. Cohen, 392 U.S. 83 (1968) (relaxing standing requirements for persons who sue alleging violations of the establishment clause); Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding constitutional a state statute requiring local school officials to lend secular textbooks to all middle and high school students); and Epperson v. Arkansas, 393 U.S. 97 (1968) (holding violative of the establishment clause Arkansas's statute prohibiting the teaching of evolution).

67. Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

68. *Id.* at 449.

69. *Id.* at 451.

70. *Id.*

71. 396 U.S. 367 (1970).

Second, the court could utilize "neutral principles of law" to resolve the case. Neutral principles included reviewing "formal title" ownership of the property, general principles of property law, deeds, reverter clauses, and general state corporation laws.[72] In other words, when the issue was which of two competing religious groups owned church property, "neutral principles" required the court to undertake a secular review of documents explicitly based on religious ideas and ideals.

Third, the state could pass special statutes governing church property arrangements. In this case, the religious organizations would be fitted to the statute, not the statute to the various religious organizations.

The other 1970 case which both completed the building by the Court of a model of interpretation and began the renovation of that same system was *Walz v. Tax Commission*.[73] *Walz* concerned the constitutionality of a New York City property tax exemption for charitable organizations, including religious organizations. The majority opinion by Chief Justice Burger first opined that the religion clauses were imprecisely written, and that previous Court statements regarding the interpretation of the clauses were inconsistent because those interpretations were too broadly stated.[74] Burger restated the constitutional goal of governmental neutrality toward religion, but then concluded that this goal was a "benevolent" neutrality rather than a "strict" or "rigid" neutrality.[75] Assessing whether a statute met the constitutional goal of neutrality required the Court to determine not only whether the purpose of the legislation was secular and its primary effect neither to sponsor nor to be hostile to religion, but also whether "the end result—the effect—is not an excessive government entanglement with religion."[76] Since the uninterrupted history of the United States indicated that religious organizations had enjoyed property tax exemptions, the statute did not violate the establishment clause.

Although Justice Brennan had indicated in his concurring opinion in *Schempp* that tax exemptions were not unconstitutional,[77] his concurring opinion in *Walz* attempted to temper Chief Justice Burger's altered interpretation of the establishment clause. Relying on his concurring opinion in *Schempp*, Brennan noted that while history itself was not determinative of the constitutionality of a statute, it was an important aid in giving meaning to a constitutional provision.[78] The history of property tax exemptions for religious organizations strongly indicated that these exemptions were not unconstitutional. Additionally, and again following his concurrence in *Schempp,* Justice Brennan found two secular reasons for holding the statute constitutional. First, they contributed to

72. *Id.* at 370 (Brennan, J., concurring).
73. 397 U.S. 664 (1970).
74. *Id.* at 668.
75. *Id.* at 669.
76. *Id.* at 674.
77. *Id.* at 693-94 (quoting *Schempp*, 374 U.S. at 301).
78. *Id.* at 681.

the well-being of the community, even when the religious organizations used religious property for exclusively religious purposes. Second, religious organizations "uniquely contribute to the pluralism of American society by their religious activities."[79] Finally, Justice Brennan expanded on the meaning of governmental "entanglement" with religion. There was a qualitative difference between active subsidization of religion and passive exemption from taxation. The former violated the establishment clause, while the latter did not.

By 1970, the Court, through Justice Brennan, had established a method of interpreting the free exercise clause which evaluated the constitutionality of state action in light of the actual impact on those making a claim for exemption. A general law which indirectly burdened a person's religious actions was not, by virtue of either its nonspecificity or deflected impact, necessarily constitutional. *Sherbert* was the first case to hold a statute unconstitutional based solely on the free exercise clause. The religion clauses also were interpreted, largely through Justice Brennan, to protect the autonomy of religious organizations in the formation of church property arrangements. Lastly, the establishment clause formed, in its three-part "test" of constitutionality, a Maginot Line protecting the secular from the religious, and the religious from the secular. This test was a middle level interpretive method operating to attain higher level goals of religious autonomy and fostering some uniform American civic virtues.[80] The boundary separating religion and government promoted "neutrality" between government and religion, a neutrality which the Court viewed as protecting society from religiously-inspired political divisiveness and religion from the profane secular world.

As the Court metamorphosed in the 1970s, other Justices began concretely applying the establishment clause "test" in ways which diverged from the views of Justice Brennan. The "test" of constitutionality remained the same, but its application changed. Consequently, in the establishment clause cases decided during the 1970s, Justice Brennan often dissented or joined dissents. What slight alteration there was in the 1970s in free exercise jurisprudence seemed to expand the reach of the clause. "Neutral principles of law" were both amended and attacked at the end of the decade. In the 1970s, the Court decided approximately seventeen cases involving the religion clauses, and in the 1980s, the Court decided over twenty-five cases. In 1990 alone, the Court decided four cases.

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79. *Id.* at 689.

80. One example of this goal is Epperson v. Arkansas, 393 U.S. 97 (1968) (holding violative of the establishment clause Arkansas's statute prohibiting the teaching of evolution). Religious opposition to evolution was deemed to impinge on the secular goal of educating scientifically literate children. Justice Brennan joined the majority opinion in *Epperson*, and later wrote the majority opinion in Edwards v. Aguillard, 482 U.S. 578 (1987) (holding unconstitutional a Louisiana statute requiring a "balanced treatment" of evolution and creation science in public school on the grounds that the legislation lacked a secular purpose).

III. ADJUSTING, 1971-80

The predominant religion clause issue in the 1970s was the extent to which the establishment clause barred governmental programs affecting private, sectarian schools. The federal government and several state governments created a number of different programs which the Court seemed to review annually.

Lemon v. Kurtzman[81] expressly announced the addition of the "entanglement" prong to the establishment clause, and held unconstitutional programs in Pennsylvania and Rhode Island which, in the former case, permitted nonpublic elementary and secondary schools to seek reimbursements for the secular portion of teachers' salaries, textbooks, and instructional materials, and which, in the latter case, supplemented the salaries of parochial school teachers. While "[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional [law,]"[82] the state programs created an unconstitutional entanglement of government and religion. An additional form of entanglement was the possibility of political divisiveness along religious lines.

This decision appeared consistent with Justice Brennan's vision of the religion clauses. However, the Court held on the same day that a federal program providing construction grants for buildings used for secular educational activities at private, religiously-affiliated colleges did not violate the establishment clause.[83] The entanglement of government and religion which resulted in holding unconstitutional the programs evaluated in *Lemon* did not exist in *Tilton*. "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education."[84]

Based on his concurrences in *Schempp* and *Walz*, Justice Brennan concurred in *Lemon*, concluding that the state programs were unconstitutional because they were direct subsidies to religious institutions, and the subsidies used religious means to serve secular ends where secular ends would suffice.[85] In so concluding, Justice Brennan distinguished the 1968 case of *Board of Education v. Allen*,[86] which held constitutional a state program loaning secular textbooks to nonpublic schoolchildren. The rationale for *Allen*, according to Justice Brennan, was that the aid was in theory to the parents and schoolchildren, not the institution.[87] Therefore, like the transportation reimbursement in *Everson*, the

81. 403 U.S. 602 (1971).
82. *Id.* at 612.
83. Tilton v. Richardson, 403 U.S. 672 (1971).
84. *Id.* at 687.
85. *Lemon*, 403 U.S. at 658 (Brennan, J., concurring and dissenting).
86. 392 U.S. 236 (1968).
87. *Lemon*, 403 U.S. at 656 (Brennan, J., concurring and dissenting).

textbook loan program in *Allen* was "neutral in its relations with groups of religious believers and non-believers."[88]

Dissenting in *Tilton*, Justice Brennan concluded that the federal program was unconstitutional insofar as it disbursed funds to "sectarian" universities. The reason was not that religion "permeated" secular education, but that the goals of secular education and religious instruction were so intertwined that grants supported both goals.[89] The differences in governmental oversight, or governmental entanglement, in the two programs was ephemeral. Therefore, since "the dangers of entanglement are [not] insubstantial,"[90] the federal program, like the state programs, was unconstitutional as applied to grants to sectarian institutions.

The change in application presaged by the *Tilton* case continued throughout the decade. The Supreme Court decided a trio of cases in 1973. A New York program of tuition grants and deductions to parents earning less than $25,000 whose children attended nonpublic schools was held unconstitutional.[91] In addition, the Court held constitutional a program allowing revenue bonds to be issued to finance construction at religiously-affiliated colleges,[92] and unconstitutional a state program reimbursing nonpublic elementary and high schools for costs associated with teacher-prepared examinations.[93] Two years later, in *Meek v. Pittenger*,[94] a program authorizing the state to lend textbooks to all schoolchildren, whether public or private school students, was held constitutional. *Meek* also determined that lending instructional materials directly to nonpublic schools was unconstitutional.[95]

Next, Maryland's practice of providing noncategorical grants to private colleges, including "sectarian" colleges, was deemed constitutional because the funds were not to be used for "sectarian purposes."[96] The distance of the members of the Court from each other regarding the application of the constitutional "test" of the establishment clause was most evident in *Wolman v. Walter*.[97] Seven opinions were written concerning Ohio's expenditure of funds lending secular textbooks and instructional materials, providing standardized testing and scoring services, and offering diagnostic and therapeutic services to nonpublic school students. All but the lending of instructional materials was found constitutional. Finally, in 1980, the Court upheld a New York law

88. *Id.* at 657.
89. *Id.* at 660-61.
90. *Id.*
91. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
92. Hunt v. McNair, 413 U.S. 734 (1973).
93. Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).
94. 421 U.S. 349 (1975).
95. *Id.* at 366.
96. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).
97. 433 U.S. 229 (1977).

reimbursing nonpublic schools for the costs associated with the giving and correcting of state-mandated examinations.[98]

In Justice Brennan's view, making dichotomous cuts at the secondary/post-secondary or benefit-to-child/benefit-to-school levels simply did not adequately apply the requirements of the establishment clause. Justice Brennan consistently voted to strike down any program "aiding" sectarian institutions or nonpublic schoolchildren.[99] In the mid-1970s, Justice Brennan's reasons for dissenting were slightly altered. Until *Meek*, Justice Brennan relied on his opinion in *Schempp* to conclude that any programs which "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice,"[100] were unconstitutional. Even after the Court announced the *Lemon* test, Justice Brennan did not rely on that "test" to ascertain the constitutionality of a statute alleged unconstitutional under the equal protection clause. However, in *Meek* and *Wolman*, the programs were unconstitutional because they caused political division along religious lines,[101] something the Constitution forbade, and which the Court had implicitly "added [as] a . . . fourth factor to the test" in *Lemon*.[102] Justice Brennan also announced in *Meek* that the decision in *Board of Education v. Allen*,[103] which sustained a New York program through which the state lent textbooks to all students in grades seven through twelve, and in which Justice Brennan had joined, was likely unconstitutional after the decisions in *Lemon* and *Nyquist*.[104]

The fear of political divisiveness along religious lines had influenced the Court's understanding of the religion clauses since the *Everson* case. The problem with the "political divisiveness" factor was that it either proved too little or too much. It proved too little if the argument was related to the fear of the framers, because, as Justice Powell noted in a widely quoted opinion in the *Wolman* case:

> [A]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or

98. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

99. *See* Hunt v. McNair, 413 U.S. 734 (1973) (Brennan, J., dissenting); Meek v. Pittenger, 421 U.S. 349 (1975) (Brennan, J., dissenting); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (Brennan, J., dissenting); and Wolman v. Walter, 433 U.S. 229 (1977) (Brennan, J., concurring in part and dissenting in part). In addition, Justice Brennan joined the dissent in Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980) (Blackmun, J., dissenting).

100. *See Hunt*, 413 U.S. at 750 (quoting *Schempp*, 374 U.S. at 295, and citing his opinions in *Walz* and *Lemon*).

101. *Meek*, 421 U.S. at 374-75 (quoting *Lemon*, 403 U.S. at 622-23). *See also Wolman*, 433 U.S. at 256 (Brennan, J., concurring in part and dissenting in part).

102. *Meek*, 421 U.S. at 374.

103. 392 U.S. 236 (1968).

104. *Meek*, 421 U.S. at 378.

> denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.[105]

Additionally, the parents, children, or schools which benefitted from these programs were not a political majority, and there was little indication that the political process itself frustrated any efforts to rescind passage of these bills.[106]

The political divisiveness argument also proved too much. The very act of filing a lawsuit alleging the unconstitutionality of a state-funded program was evidence of the political divisiveness of the program. More importantly, it called into question the efforts of Justice Brennan to carve religiously-based exemptions into general laws. That is, the decision in *Sherbert* was based on the notion that the effect of the law forced persons to choose either to follow the tenets of their faith or abandon those tenets to obtain monetary benefits. The free exercise clause forbade the states from forcing the religious believer to make this choice. However, allowing believers to make those choices indirectly forced others to contribute to state coffers to pay for the compensation benefits of the religious believer.

The nearly unanimous opinion in *Wisconsin v. Yoder*[107] in 1972 broadened the application of the free exercise clause to include a constitutionally-based exemption from state-mandated school attendance requirements. *McDaniel v. Paty*,[108] a 1978 case, called into question the notion of political divisiveness in the context of interpreting the free exercise clause. A Tennessee statutory provision forbade "Ministers of the Gospel" from serving as delegates to the state's constitutional convention.[109] McDaniel, a Baptist minister and candidate to the convention, was sued by his opponent Paty, who alleged that McDaniel was ineligible to serve as a delegate. A plurality of the Court, after first noting that a number of states disqualified ministers from holding legislative office,[110] concluded that this statute violated the free exercise clause not because it infringed on McDaniel's freedom of belief, but because the state's reason for making clergy ineligible, to prevent political divisiveness, was not compelling.

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105. *Wolman*, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

106. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). Given the Court's struggles with these aid programs, it did not appear as though the programs were unconstitutional on their face, another approach suggested in Justice Stone's opinion.

107. 406 U.S. 205 (1972). Justice Douglas dissented in part, on the grounds that the wishes of two of the minor children concerning their desire to attend high school were not ascertained.

108. 435 U.S. 618 (1978).

109. *Id.* at 620. A constitutional provision forbade ministers of the Gospel from serving as Tennessee legislators.

110. *Id.* at 622. The plurality also noted that Madison opposed this disqualification in opposition to Jefferson. *Id.* at 623-24.

In a concurring opinion, Justice Brennan made two incisive points. First, he restated the plurality's opinion as "McDaniel could not be and was not in fact barred for *his* belief in religion, but was barred because of his commitment to persuade or lead others to accept that belief."[111] In Justice Brennan's view, this was an unacceptable (and sophistic) distinction. Second, he marked the contours of the political divisiveness rationale. Avoiding political divisiveness along religious lines was a goal of the establishment clause, but it was necessarily tempered by an understanding of our "tradition of religious liberty."[112] This tradition meant the state could not constitutionally suppress religious ideas, thoughts, and actions in an attempt to avoid political divisiveness.

The last issue addressed by the Court in this area in the 1970s concerned state involvement in church disputes. A 1976 opinion[113] written by Justice Brennan eliminated earlier language which permitted courts to intervene in church property disputes when it was claimed that the ecclesiastical decision was a result of "fraud, collusion, or arbitrariness."[114] The *Milivojevich* case appeared to further insulate religious organizations from state involvement in their property disputes. The difficulty with insulating the religious organizations from state court judgment, of course, is that the insulation creates a distortion which may intrude on the very autonomy the insulation is supposed to protect. The final church property dispute decided by the Court added to that distortion by adopting a "neutral principles of law" approach to resolving a dispute involving a local church which, in a majority decision, voted to withdraw from the Presbyterian Church of the United States ("PCUS").[115] Neutral principles of law permitted the state to adopt "a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means.... Majority rule is generally employed in the governance of religious societies."[116] Consequently, unless a hierarchical church organization (like the PCUS) had identified itself in *secular* terms as a hierarchical church, the ownership of the local church property could be determined based on the form of the congregational religious society.

The Court also held in 1979 that the National Labor Relations Board could not exercise jurisdiction in monitoring the labor relations of two Catholic high schools.[117] Avoiding the constitutional issue, the majority concluded that the

111. *Id.* at 635 (Brennan, J., concurring) (emphasis in original).

112. *Id.* at 638.

113. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

114. *Id.* at 712-13.

115. Jones v. Wolf, 443 U.S. 595 (1979). Justice Brennan voted with the majority in *Jones*, and did not write an opinion.

116. *Id.* at 607.

117. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

federal labor relations laws were not intended by Congress to apply to church-operated schools.[118]

IV. REVOLVING, 1981-1990

Tinkering with the application of the establishment clause to a variety of federal and state programs was a hallmark of the Court in the 1970s. The result satisfied no one. Efforts in the 1980s were made first to scrap the approach rigidified in *Lemon* and to begin anew; when this failed, further efforts were made, beginning with Justice O'Connor, to alter the focus of the *Lemon* approach. While Justice O'Connor's "endorsement" approach has been incorporated into the Court's establishment clause thinking,[119] the approach may also have triggered the complete disintegration of any consensual mode of interpretation of the establishment clause.

Contrary to the record of the Court concerning the establishment clause, the Court in the 1970s was partly successful in making the free exercise clause a meaningful part of the Constitution. The argument that follows is that the efforts to halt a revolution regarding the interpretation of the establishment clause eventually resulted in a revolution regarding the interpretation of the free exercise clause.

In 1983, the Court heard a case involving the constitutionality of Nebraska's practice of opening each legislative day with a prayer.[120] Relying solely on the history of the United States concerning legislative prayers, the Court held that this practice, "deeply embedded in the history and tradition of this country,"[121] was constitutional. In dissent, Justice Brennan both adopted and revised his views expressed in *Schempp*. He relied on *Schempp* for the proposition that history simply was not enough to hold any particular practice constitutional in the late 20th century. He revised his opinion in *Schempp* by concluding, contrary to his conclusion in *Schempp*, that the specific practice of opening each legislative day with a prayer violated the establishment clause under the *Lemon* test.[122] Justice Brennan noted four purposes of the establishment clause: (1) to remind the state of the individual right to conscience; (2) to preserve the autonomy of religious life; (3) to prevent a trivialization of religion; and (4) to assure essentially religious issues do not become part of politics.[123] The

118. *Id.* at 507. In dissent, Justice Brennan wrote that the decision of the majority distorted the language of the National Labor Relations Act, and concluded that the Act permitted the NLRB to assert jurisdiction over lay teachers at parochial schools. Justice Brennan refused to examine whether the NLRB could constitutionally assert such jurisdiction.

119. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (plurality opinion of Blackmun, J.).

120. Marsh v. Chambers, 463 U.S. 783 (1983).

121. *Id.* at 786.

122. *Id.* at 796 (Brennan, J., dissenting).

123. *Id.* at 803-06.

perspective of these purposes is notably that of the religious believer, not the perspective of the state or the non-believer. It is not neutral.

The week before the *Marsh* decision was issued, the Court found constitutional a Minnesota program which allowed citizens to deduct from their taxes expenses for tuition, books, and transportation incurred by their elementary and secondary school children in *Mueller v. Allen*.[124] The deduction was available whether the child attended a public or nonpublic school, but virtually all beneficiaries were parents of nonpublic schoolchildren.[125]

A year after *Marsh* and *Mueller*, the Court held that a display during the Christmas season of a city-owned creche at a privately-owned park was constitutional under the *Lemon* formulation.[126] Justice Brennan dissented, arguing that there was no clear secular purpose for including the creche in the Christmas display.[127]

This shift in the establishment clause abruptly ended in 1985 with the companion cases of *Grand Rapids School District v. Ball*[128] and *Aguilar v. Felton*.[129] Writing for the majority in both cases, Justice Brennan declared unconstitutional programs funded by governmental bodies which assisted the education of nonpublic schoolchildren. In *Ball*, the two programs struck down were known as the Shared Time and Community Education programs. The Shared Time program offered classes at the nonpublic schools during the regular schoolday taught by public school teachers which supplemented the curriculum at nonpublic schools. The Community Education program was an after-school program taught in the nonpublic schools but open to all students. Most of the Community Education teachers were employed full-time as teachers by nonpublic schools. Both programs were determined to have the primary effect of advancing religion in three possible ways: first, the teachers might intentionally or inadvertently inculcate particular religious beliefs; second, the programs might provide a symbolic link between government and religion; and third, the programs provided a subsidy to the schools involved in the programs.[130]

In *Aguilar*, the City of New York used federal funds to pay the salaries of public school teachers who volunteered for assignment to local parochial schools to assist educationally deprived parochial school students from low income backgrounds. The teachers who provided the services under this "Title I" program were monitored by the City to ensure that they did not communicate any religious messages while teaching. Justice Brennan concluded that the

124. 463 U.S. 388 (1983).

125. Tuition expenses for summer public school and for attending a school outside the student's assigned school district were deductible, as were some other expenses not associated with sectarian schools. *See id.* at 391-92 n.2.

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

127. *Id.* at 698 (Brennan, J., dissenting). Brennan also concluded that the primary effect of the display was to advance religion, and the creche impermissibly created both an administrative and political entanglement of government and religion.

128. 473 U.S. 373 (1985).

129. 473 U.S. 402 (1985).

130. *Ball*, 473 U.S. at 385.

monitoring system violated the entanglement provision of the *Lemon* test.[131]

Thus, the Shared Time program in *Ball* violated the "primary effect" requirement of *Lemon* because the government did not monitor the teachers to ensure they did not inculcate certain religious beliefs; and the Title I program in New York City violated the "entanglement" requirement of *Lemon* because the City did monitor the teachers to ensure that no religious message was communicated. Proof that the public school teachers in the Shared Time program might inject religion into the classroom consisted of a notation that approximately 10% of the Shared Time teachers had previously been employed in religious schools, a percentage Justice Brennan deemed "significant."[132] There was no evidence of any attempt to indoctrinate students, but since the parents of the sectarian schoolchildren would have no reason to complain, and since the state would have no knowledge of such incidents because they were not monitoring the program, this lack of evidence was unavailing.[133]

The effect of these decisions on the part of the government was either to end these admittedly beneficial programs or to accept the suggestion of the Second Circuit Court of Appeals and the dissent in the Supreme Court to continue the programs off the premises of the religious school,[134] thus cynically (and formalistically) evading the decisions. The effect on parents was to force them to choose either to forego the program benefits and continue to send their children to religious schools, or remove their children from the religious schools to obtain the benefits at the public schools.

Once government was acknowledged as more than a passive arbiter within the economy or society, the retreat to "neutrality" was impossible. The activities government engaged in eliminated any space for neutrality, because governmental action had an impact on persons within the society. The decision of Justice Brennan in *Ball* and *Aguilar* not to acknowledge that these cases would force some parents to make cruel choices between the material welfare of their children and the spiritual welfare of their children paralleled Justice Rutledge's arguments in *Everson*.[135] While establishment clause jurisprudence disparaged the notion of rational line-drawing among forms of aid, the free exercise clause was much more formally interpreted in light of "neutrality." When government was acknowledged as a more pervasive actor in society, the interpretive choices of the religion clauses become either hostility (or disregard) or advancement (or support). Since the programs in *Ball* and *Aguilar* were perceived by the majority as advancing religion and entangling government and religion, they were unconstitutional.

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131. *Aguilar*, 473 U.S. at 412-13.

132. *Ball*, 473 U.S. at 387 & n.7.

133. *Id.* at 388-89. One problem with this analysis is that there was little evidence that the teachers in either the Shared Time or Title I programs were usually members of the same faith as those they were teaching.

134. *See Aguilar*, 473 U.S. at 430-31 (O'Connor, J., dissenting).

135. *See supra* text accompanying note 28.

Ball and *Aguilar* effectively halted the attempt to revolutionize the interpretation of the establishment clause.[136] *Ball* and *Aguilar* were buttressed by another decision written by Justice Brennan, *Edwards v. Aguillard*.[137] The Court held that a Louisiana statute requiring "balanced treatment" between evolution and creation science was unconstitutional. The law was unconstitutional because it lacked a secular purpose, since the "preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."[138]

Justice Scalia's dissent focused on the difficulty of reconciling the two religion clauses. Since the free exercise clause occasionally required the "intentional governmental advancement of religion,"[139] and since the Court had permitted government to accommodate religion even when not so required by the free exercise clause,[140] it was difficult (if not impossible) to reconcile these cases with the requirement in *Lemon* that governmental action not have the primary effect of advancing religion. The dissent pointed out what Justice Brennan's opinion had so assiduously avoided: teaching evolution in public schools affected the free exercise rights of children who, for religious reasons, did not believe in evolution.[141]

Justice Brennan argued in *Schempp* that the public schools were a neutral, nonreligious site where American values were inculcated. The *Edwards* case brought into relief the argument that the "American values" taught in the public schools could themselves be perceived as anti-religious. *Edwards* again provided a picture in which the space for neutrality (the public schools) was occupied by an ideology which offended some believers. The Court could only avoid the problem by retaining a formal view of the free exercise clause.

Through 1987, the Court, with some important exceptions, continued to extend the range of free exercise protections. *Sherbert* was twice extended to apply to claims for unemployment benefits made by religious believers;[142] religious speech was granted protection equivalent to other forms of speech in public

136. Another case decided a month earlier held unconstitutional a "moment of silence" statute. Wallace v. Jaffree, 472 U.S. 38 (1985). However, Justice O'Connor signaled that her concurrence in the Court's decision was based on the context of the Alabama statute at issue, and that other moment of silence laws were likely constitutional. *Id.* at 67 (O'Connor, J., concurring in the judgment). Chief Justice Burger and Justice Rehnquist wrote dissents urging the Court to abandon the *Lemon* test. *Id.* at 89 (Burger, C.J., dissenting); *id.* at 108-12 (Rehnquist, J., dissenting). Justice Rehnquist's dissent urged a new historical understanding of the establishment clause.

137. 482 U.S. 578 (1987).

138. *Id.* at 591.

139. *Id.* at 617.

140. *Id.*

141. This idea is taken from Freeman & Mensch, *Religion As Science/Science As Religion: Constitutional Law and the Fundamentalist Challenge*, 2 TIKKUN 64, 66 (1987).

142. Thomas v. Review Bd. of Indiana Employment Secur. Div., 450 U.S. 707 (1981) (A Jehovah's Witness who "voluntarily" left his job at a munitions factory was entitled to unemployment benefits); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (an individual who became a Seventh-Day Adventist after being employed, and then was fired for refusing to work on Saturdays, her Sabbath, was constitutionally entitled to unemployment compensation).

forums;[143] regulations aimed at certain religious organizations were found unconstitutional;[144] the Court found constitutional a provision of the Civil Rights Act granting religious organizations an exemption from the Act's prohibition against religious discrimination in employment;[145] and an equally divided Court affirmed a court of appeals decision granting a religious believer an exemption from a Nebraska requirement that an individual's photograph be taken and placed on a driver's license.[146]

In several other cases, however, the Court refused to extend the protection of the free exercise clause. In *United States v. Lee*,[147] the Court, including Justice Brennan, refused to grant an Amish employer an exemption from paying Social Security taxes. The Court also held that a governmental decision to assign, for its administrative purposes, a Social Security number to Little Bird of the Snow Roy did not violate the free exercise rights of Little Bird of the Snow or her parents.[148] The Roy family claimed that, given their religious beliefs, the government's decision to assign a Social Security number to Little Bird of the Snow would rob her spirit. The Court refused to find a constitutional violation under those circumstances. In another case, the Court found a Connecticut statute providing a religious believer a right not to work on his Sabbath violated the establishment clause.[149] Two other cases, *Goldman v. Weinberger*[150] and *O'Lone v. Estate of Shabazz*,[151] elicited dissents from Justice Brennan. In both cases the majority held that the Court should defer to the decisions of the military and prison officials, respectively, regarding free exercise claims. Justice Brennan's opinions urged the Court to engage in a meaningful review, not to abdicate review by "deferring" to governmental authorities.

While this background indicates that free exercise claims were not always vindicated, the claims were not routinely dismissed. The first major shift in interpreting free exercise claims occurred one year after the decision in *Edwards*, in *Lyng v. Northwest Indian Cemetery Protective Association*.[152]

In order to complete a road between the California towns of Gasquet and Orleans, the United States Forest Service planned to build a six-mile stretch of road through the Chimney Rock section of the Six Rivers National Forest. An

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

144. Larson v. Valente, 456 U.S. 228 (1982).

145. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (holding Section 702 of the Civil Rights Act of 1964 constitutional). Justice Brennan concurred on the grounds that the categorical exemption from the prohibition against religious discrimination was constitutional as applied to a nonprofit organization. *Id.* at 340.

146. Jensen v. Quaring, 472 U.S. 478 (1985).

147. 455 U.S. 252 (1982).

148. Bowen v. Roy, 476 U.S. 693 (1986). The Court remanded the issue whether the government could require the Roys to furnish the social security number of Little Bird of the Snow in order to obtain monetary benefits if that action by the Roys violated their religious beliefs.

149. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

150. 475 U.S. 503 (1986).

151. 482 U.S. 342 (1987).

152. 485 U.S. 439 (1988).

environmental impact statement determined that the Chimney Rock area was an integral and indispensable part of Native American religion, and recommended that the road not be completed for that reason. The Forest Service rejected the recommendation, and a lawsuit was filed by the Association. Relying on *Roy*, Justice O'Connor concluded that the free exercise rights of Native Americans were not violated because they would not be "coerced by the Government's action into violating their religious beliefs. . . ."[153] If "coercion" was viewed in formal terms, the decision in *Lyng* was easily defensible since the government was not engaged in "legal discrimination," and it neither prohibited the religious worship of the Native American claimants nor required them to worship.

Justice Brennan's dissent relied on his view of free exercise from his decision in *Braunfeld*. It was the effect of the governmental action that triggered first amendment analysis, not the form of the action.[154] Since the believers had shown that the government's proposed action would effectively prevent them from practicing their religion, the free exercise clause had been violated.[155] In *Lyng*, unlike *Ball, Aguilar,* or *Edwards*, Justice Brennan downplayed the impact on the taxpayer compared with the impact on the believer.

Returning to the establishment clause the next year, the Court found itself without a majority opinion in two important cases. In *Texas Monthly v. Bullock*,[156] Justice Brennan, writing for a plurality, found a Texas statute exempting religious periodicals from its sales tax violated the establishment clause. In *County of Allegheny v. ACLU*,[157] a creche displayed at the Allegheny County courthouse during the Christmas season violated the establishment clause, but a display of a menorah, a Christmas tree, and a sign saluting religious liberty at the entrance to the City-County building a block and a half away did not.

The plurality opinion in *Texas Monthly* changed the interpretation of the religion clauses in four ways. First, the plurality stated that the establishment clause prohibited "legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally,"[158] thus adapting Justice O'Connor's "endorsement" approach to establishment clause problems. Second, cases in which religion benefitted from governmental (and Court) action were re-read to be constitutional only if the benefits "flowed to a large number of nonreligious groups as well."[159] Third, and corollary to the second proposition, governmental aid to religious groups was unconstitutional unless required by the free exercise clause.[160] Fourth, the holdings in the *Murdock*[161] and *Follett*[162]

153. *Id.* at 449.
154. *Id.* at 467 (Brennan, J., dissenting).
155. *Id.*
156. 489 U.S. 1 (1989).
157. 109 S. Ct. 3086 (1989).
158. *Texas Monthly*, 489 U.S. at 8.
159. *Id.* at 11.
160. *Id.* at 15.
161. 319 U.S. 105 (1943).

cases, which granted exemptions to Jehovah's Witnesses from licensing and occupational taxes, and which Justice Brennan had relied upon in his first religion clause opinion, the dissent in *Braunfeld*, would be limited to their facts, and any language which implied that the government could not tax the sale of religious publications was rejected.[163] Unless government was simply including religion among other nonreligious groups, existing societal differences in religion could not constitutionally be accommodated. This broadening of the level of generality eliminated any space for permissible governmental acknowledgment of religion in American public life. Government was not permitted to grant religion or religious believers any benefit unless it was compelled to do so by the free exercise clause. In other words, unless a governmental benefit to religion or religious believers was compelled by the free exercise clause, it was forbidden by the establishment clause.

The concurrence by Justice Blackmun in *Texas Monthly* suggested that the opinion by Justice Brennan resolved "the tension between the Free Exercise and Establishment Clause values simply by subordinating the Free Exercise value, even it seems to me, at the expense of longstanding precedents."[164] The dissent of Justice Scalia, conversely, subordinated the establishment clause to the free exercise clause, according to Justice Blackmun. Justice Blackmun suggested his opinion offered a middle ground between the two polar extremes represented by the plurality and dissenting opinions.[165]

Later that term Justice Blackmun again found himself in the middle of an establishment clause dispute. The County of Allegheny, Pennsylvania, permitted a private, religious organization to place a creche on the grand staircase of the county courthouse. Additionally, an 18-foot menorah, a 45-foot Christmas tree and a sign entitled "Salute to Liberty"[166] were placed at an entrance to the City-County building, jointly owned by the City of Pittsburgh and the County of Allegheny, during the Christmas season. Justice Blackmun, now writing the plurality opinion, held the former display unconstitutional and the latter constitutional.[167] The display of the menorah, tree, and sign was constitutional, Justice Blackmun concluded, because the display was a secular display regarding the "winter-holiday season."[168] Justice O'Connor wrote separately on this point, concluding that the "salute to liberty" display was constitutional because, although the menorah was a religious symbol, the Christmas tree was not, and

162. 321 U.S. 573 (1944).

163. *Texas Monthly*, 489 U.S. at 21-25.

164. *Id.* at 27 (Blackmun, J., concurring in the judgment).

165. *Id.* at 28.

166. The sign stated, "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *County of Allegheny*, 109 S. Ct. at 3095.

167. *Id.* at 3095.

168. *Id.* at 3113.

therefore the government "conveyed a message of pluralism and freedom of belief during the holiday season."[169]

Justice Brennan, as one of the dissenters in *Lynch*, concurred in the decision holding the display of the creche unconstitutional. He challenged Justice Blackmun's conclusion that the "salute to liberty" display was secular on the grounds "that the sight of an 18-foot menorah would be far more eye-catching than that of a rather conventionally sized Christmas tree."[170] The result, then, would be that menorah would dominate the Christmas tree, and a message endorsing religion would be conveyed.[171] He challenged Justice O'Connor's conclusion by arguing that the "pluralism" the government was talking about was *religious* pluralism.[172] Therefore, the Christmas tree was a religious symbol, and government was unconstitutionally endorsing religion.

In *Walz*, Justice Brennan had used words similar to those of Justice O'Connor in finding constitutional New York City's property tax exemption for charitable (including religious) organizations. He stated, "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities."[173] The "pluralism" to which Justice Brennan referred in *Walz* as valuable in American society is *religious* pluralism. By challenging Justice O'Connor's "pluralism" argument, Justice Brennan was challenging his own argument made twenty years earlier. In *County of Allegheny*, Justice Brennan concluded, the pluralism celebrated was a deformed pluralism, distorted to support government's own cause and shaped in ways which he considered offensive to many devoutly religious.[174] This was Justice Brennan's last religion clause opinion.

As in *Texas Monthly*, there was a strong dissent in *County of Allegheny*, on this occasion written by Justice Kennedy. The dissent again suggested a re-framing of the establishment clause based on the perception that the Court's interpretation of the establishment clause manifested hostility to religion.[175]

During Justice Brennan's last term, the Court, with Justice Scalia writing for the majority, held that an Oregon statute criminalizing the possession of peyote did not infringe the free exercise beliefs of Native Americans who used peyote for sacramental purposes during religious ceremonies. Consequently, the state could deny unemployment benefits to those fired for using peyote for religious purposes.[176] "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the

169. *Id.* at 3123 (O'Connor, J., concurring in part and dissenting in the judgment).
170. *Id.* at 3127 (Brennan, J., concurring in part and dissenting in part).
171. *Id.* at 3127.
172. *Id.* at 3125-26 (emphasis in original).
173. *Walz*, 397 U.S. at 689.
174. *County of Allegheny*, 109 S. Ct. at 3128.
175. *Id.* at 3134 (Kennedy, J., concurring in the judgment in part and dissenting in part).
176. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990). Justice Brennan joined the dissenting opinion of Justice Blackmun and Parts I and II of the opinion of Justice O'Connor concurring in the judgment.

State is free to regulate."[177] The *Smith* majority limited the *Sherbert* case to the position as an oddity in the field of unemployment compensation law.[178] Thus an approach evaluating the effect of the governmental action on religious practice was discarded. The Court also unanimously decided in 1990 to limit the holding of *Murdock* and *Follett* to their facts,[179] allowing greater governmental regulation (by taxation) of religiously-based actions involving the sale of religious materials, thereby eliminating another underpinning of Justice Brennan's dissent in *Braunfeld.*

CONCLUSION

It is clear that Justice Brennan will be remembered as one of the great Justices of the Supreme Court of the United States. His empathy, devotion to principle, unfailing patience with the uncertain process of creating jurisprudence, and enormous ability mark his tenure. Those same traits will mark the vast areas of law affected by his opinions, including the religion clauses. This Article has no conclusion. It was premised on the belief that Justice Brennan's religion clause opinions were filled with good intentions for individual religious believers, religious organizations, and American society. The early opinions written by Justice Brennan promoted individual belief both by creating a distance between government and religion, as in *Schempp*, and by making us aware of the "tilt" in laws which required a re-balancing by the Court, as in *Braunfeld* and *Sherbert.* The problem was that the tilt appeared in a myriad of situations, and the only situation in which redressing tilt was recognized was in cases analogizing *Sherbert.* This was always the myth of neutrality, as Justice Brennan seemed to recognize, but the language of neutrality became the interpretive mode for the Court in the dizzying variety of establishment clause cases. "Neutral" space between the two religion clauses was carved away by an increasing number of decisions until *Texas Monthly* suggested to a majority that they had to jump to one clause or the other. The revolution which created Court-based protection for religious belief from legislative interference appears destined to revolve into a situation in which religious belief is protected only through limited forms of legislative grace.

177. *Id.* at 1600.

178. *Id.* at 1602-03.

179. Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990) (holding constitutional California's taxation of the sales of religious publications and other materials).