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Separation, Accommodation and the Future of Church and State

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SEPARATION, ACCOMMODATION AND THE FUTURE OF CHURCH AND STATE*

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There is a resurgence of scholarly interest in the law of church and state, linked to a rising tide of cases raising such questions. The docket of the United States Court currently (March, 1985) contains at least a half-dozen cases that could be landmarks. Their subject matter includes school aid by so-called "shared time,"[1] a moment of silence in public schools,[2] equal access for a high school religious club,[3] religious objections to a driver's license photograph,[4] sabbath observance by employees,[5] and a religious exemption from employment laws.[6]

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[7] After almost two centuries, the meaning of this vitally important provision of the Bill of Rights still remains uncertain. Its most critical term, *religion*, remains undefined. Overall, the constitutional doctrine derived from the religion clause consists

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1. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983), *cert. granted sub nom.* School Dist. of Grand Rapids v. Ball, 104 S. Ct. 1412 (1984); Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir.), *juris. postponed sub nom.* Aguilar v. Felton, 105 S. Ct. 241 (1984).

2. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *prob. juris. noted*, 104 S. Ct. 1704 (1984).

3. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-773).

4. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1983), *cert. granted sub nom.* Jensen v. Quaring, 105 S. Ct. 79 (1984).

5. Estate of Thornton v. Caldor, Inc., 191 Conn. 336, 464 A.2d 785 (1983), *cert granted*, 104 S. Ct. 1438 (1984).

6. Tony & Susan Alamo Foundation v. Donovan, 722 F.2d 397 (8th Cir. 1983), *cert. granted*, 105 S. Ct. 290 (1984).

A seventh case, posing a variation of the validity of a nativity scene on public property, McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), was affirmed by an equally divided Court just two days before this lecture was given. Board of Trustees of Scarsdale v. McCreary, 105 S. Ct. 1859 (1985).

7. U.S. CONST. amend. I.

of what one scholar recently described as "contradictory principles, vaguely defined tests, and eccentric distinctions."[8]

The prohibition against establishment seems to forbid government support for religion, but the guarantee of free exercise seems to compel the very same support.[9] In the relationship between government and religion, free exercise seems to require accommodation,[10] while non-establishment forbids it. These countervailing commands require comprehensive unifying principles to guide their application to specific cases. The law still lacks such principles for the religion clause.

The leading religion clause precedents are typically classified as "establishment" or "free exercise" cases. Neither classification has yet provided the unifying principle necessary to resolve their apparent inconsistencies. Professor Kurland of the University of Chicago was the first to suggest such a principle. Kurland hypothesized that "government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."[11] Kurland's principle of neutrality met with disfavor in the Supreme Court, and other scholars tendered alternative principles.[12] Most recently, Professor Mansfield of Harvard University has suggested a single standard of decision for both establishment and free exercise. Mansfield's unifying principle turns on what he calls the "constitutional philosophy," an intriguing concept he does not define but says is definable.[13] Other suggestions will doubtless be made.

This article neither suggests a unifying principle nor tenders a comprehensive definition of religion. It takes a long view of the law of church and

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8. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

9. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1980); Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 849 (1984).

10. *See infra* notes 14-17 and accompanying text.

11. P. KURLAND, RELIGION AND THE LAW (1962), first published in Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

12. P. KAUPER, RELIGION AND THE CONSTITUTION (1964) (author examined implications of doctrine with respect to current church problems); Choper, *supra* note 9, at 675 (establishment clause should forbid only government action likely to impair freedom by coercing beliefs); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981) (different rights protected by each clause); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978) (fundamental principle underlying both clauses is protection of individual choice); Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984); Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175 (1983).

13. Mansfield, *supra* note 9, at 858, 906. According to Professor Mansfield, the Constitution is not neutral in regard to human nature and the meaning of life. There is, rather, a philosophy that addresses these fundamental matters and deals with the proper exercise of governmental power.

state, and seeks to provide a perspective for viewing the present and anticipating the future.

America is passing a critical intersection and taking a new direction in the law of church and state. This article describes the nature and causes of that new direction and where it is leading us.

I. SEPARATION AND ACCOMMODATION

To use the familiar vernacular, "separation" is giving way to "accommodation." The dividing line between church and state, once a "wall . . . high and impregnable,"[14] is now a hedge low-lying and penetrable.[15]

The current transition to accommodation has two aspects, which correspond to the two commands in the religion clause of the first amendment. Not surprisingly, courts are softening both commands. The judicial prohibition against an establishment of religion is relaxing. This allows an increase in the extent of permissible government support of religion.[16] Courts are also weakening the guarantee of free exercise of religion. Religious organizations are subject to more regulation and taxation, and religious-based exemptions from laws of general application are on the decline.[17]

For purposes of this analysis, one may visualize the relationship between the divergent commands of non-establishment and free exercise in terms of a beam scale, as portrayed in the familiar scales of justice. The two scale pans receive the force of the countervailing commands of non-establishment and free exercise. This article suggests that forces in law or public policy tend to balance this scale in equilibrium. When some force increases the weight on one side of the scale, a state of equilibrium will be restored by a corresponding increase on the other side. Therefore, when non-establishment law permits an increase in government support of religion, free exercise law soon restores the equilibrium by permitting an increase in government regulation and taxation of religion. A similar result occurs when the sequence is reversed.

Under this metaphor, "separation" and "accommodation" represent the total weight on the scales, although these labels are logically related to the establishment side. Thus, "separation" signifies a minimum quantity of government support of religion, and a corresponding minimum amount of government regulation and taxation. Non-establishment and free exercise are

14. Everson v. Board of Educ., 330 U.S. 1, 16, 18 (1947).

15. In Lynch v. Donnelly, 104 S. Ct. 1355, 1359 (1984), the Supreme Court declared that the "wall" metaphor is "not a wholly accurate description of the practical aspects of the relationship." *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U.L. REV. 645, 646-50. Reservations about the appropriateness of Jefferson's metaphor were expressed twenty-two years ago: "The modern popularity of the wall metaphor should not conceal its inappropriateness as an expression of current church-state relationships . . . . Indeed, the metaphor may have its highest and best use as the title of a book." THE WALL BETWEEN CHURCH AND STATE 2-3 (D. Oaks ed. 1963).

16. *See infra* notes 52-87 and accompanying text.

17. *See infra* notes 88-100 and accompanying text.

in their most rigorous state. The scales are in balance, and the relationship is in equilibrium.

"Accommodation" signifies a condition where the weight of government support has been increased. Such an increase is followed by, or follows, a comparable increase in the extent of government regulation and/or taxation. The accommodation equilibrium represents increased weight on both sides of the scales: government support on one side and regulation and taxation on the other. Stated otherwise, acommodation represents a relaxation of both the non-establishment and free exercise commands of the religion clause.

There are many unanswered questions regarding the transition from separation to accommodation. Which side of the scales is affected first, and what accounts for the equilibrium in the hypothesis? Do changes in the level of government support cause comparable changes in the level of regulation or taxation, as the sequence seems to suggest? Or is the relationship the reverse? Or are both changes produced by some third force?

Even when changes in legal rules or results move sequentially, it is difficult to identify the causes of change.[18] In fact, it is not certain what produces the equilibrium in this hypothesis. It may be as simple as the common-sense operation of accountability and fairness: what government supports it regulates or taxes, and, on the other hand, what government regulates or taxes it will also support, directly or indirectly. Perhaps the most likely explanation is that the movement from separation to accommodation between church and state is produced by forces outside that relationship.

A. The Change From Separation To Accommodation

The change in emphasis from separation to accommodation seems to be a consequence of two interrelated developments of the last half-century: the expansion in the role of government, and the changing definition of religion.

1. The Role of Government

During our lifetimes we have seen increased government regulation of relationships and activities in which churches engage in approximately the same way as other organizations and individuals. These relationships and activities include employment relations, commercial exchanges, financing, and the use of land or other property. The vision of those who devise and administer such regulations is shaped to their subject matter. For this purpose the regulatory vision detects little or no difference in whether the regulated activity involves a religious institution or not. Thus, those who regulate employment relationships tend to look at a church employer like any other employer. It is difficult to persuade regulators that religious institutions should have special exemptions. As a result, the regulatory burden on churches has

18. *E.g.*, D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 154-65 (1968); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678-709 (1970) (presenting empirical evidence on effect of the exclusionary rule on law enforcement personnel).

tended to increase along with the regulatory burden on others.

We have also seen increased regulation of the unique activities of all non-profit organizations, such as charitable solicitation and financial disclosure. Laws restricting tax exemptions for non-profit organizations have also affected churches. Although these kinds of changes typically are not aimed at churches as such, they inevitably enlarge the area of the tender interface between church and state.

Finally, as the scope of government has increased, federal, state, and local governments more and more have become a competitor of churches. This has increased church-state conflicts in such areas as education, hospitalization, adoption, counseling, and other social services.

The expanding interface of religion and government has increased the practical difficulty of what may be termed the "separation equilibrium" and also has enhanced the relative attractiveness of what may be called the "accommodation equilibrium."

2. *"Religion" Defined*

Despite over a century of religion clause litigation, the United States Supreme Court has never articulated a consistent workable definition of "religion."[19] Scholarly literature, however, is abundant.[20] Most commentators acknowledge the need for a definition of religion, although one recent article labeled the definitional search "misguided."[21] While most authors

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19. *See infra* notes 27-30 and accompanying text.

20. On the definition of religion for purposes of the first amendment, see generally P. KAUPER, *supra* note 12, at 22-34; Boyan, *Defining Religion in Operational and Institutional Terms,* 116 U. PA. L. REV. 479, 488-89 (1968); Bowser, *Delimiting Religion in the Constitution: A Classification Problem,* 11 VAL. U.L. REV. 163, 198, 223 (1977); Choper, *Defining "Religion" in the First Amendment,* 1982 U. ILL. L.F. 579; Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Greenawalt, *Religion as a Concept in Constitutional Law,* 72 CALIF. L. REV. 753 (1984); Johnson, *supra* note 8; Mansfield, *supra* note 9; Merel, *supra* note 12, at 829-41; Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause,* 1981 UTAH L. REV. 309, 355-64; Rabin, *When Is a Religious Belief Religious:* United States v. Seeger *and the Scope of Free Exercise,* 51 CORNELL L.Q. 231 (1966); Slye, *Rendering Unto Caesar: Defining "Religion" for Purposes of Administering Religion-Based Tax Exemptions,* 6 HARV. J. LAW & PUB. POL'Y 219 (1983); Comment, *The Unseen Regulator: The Role of Characterization in First Amendment Free Exercise Cases,* 59 NOTRE DAME LAW. 978 (1984); Comment, *Beyond* Seeger/Welsh: *Redefining Religion Under the Constitution,* 31 EMORY L.J. 974 (1982); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.,* 32 U. CHI. L. REV. 533, 542 (1965); Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978); Note, *Belief in God and Transcendental Meditation: The Problem of Defining Religion in the First Amendment,* 3 PACE L. REV. 147 (1982); Note, *The Sacred and the Profane: A First Amendment Definition of Religion,* 61 TEX. L. REV. 139 (1982) [hereinafter cited as Note, *The Sacred and the Profane*]; Note, *Objective Criteria for Defining Religion for the First Amendment*—Malnak v. Yogi, 11 U. TOL. L. REV. 988 (1980) [hereinafter cited as Note, *Objective Criteria for Defining Religion*]; Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,* 90 YALE L.J. 350, 370 (1980) [hereinafter cited as Note, *Religious Exemptions Under the Free Exercise Clause*].

21. Freeman, *supra* note 20. "There simply is no essence of religion, no single feature or

acknowledge the need for a single definition, a significant body of opinion advocates different definitions of "religion" for different purposes.[22]

The most radical version of the multiple definition theory maintains that "religion" should be defined entirely in subjective terms. Under this approach, "religion" would encompass any belief or activity which an interested organization or individual designated as being "religious."[23] It is inevitable and desirable that the definition of religion would have some subjective element. However, a definition that is entirely or even predominantly subjective is unworkable in a constitutional context that imposes special burdens on, and extends significant advantages to, something that is termed "religion." The religion clause could be rendered either all-inclusive or practically meaningless if the government could not identify some objectively defined category of activities and organizations for special treatment.

A second and more seductive example of the multiple definition theory asserts that religion has different meanings for purposes of the guarantee of free exercise than for the prohibition against establishment.[24] But despite the tendency of courts and commentators to speak of two religion clauses,[25] there is actually only one, and the term "religion" occurs just once in that clause. There are obvious interpretive problems in deriving two different meanings from the same word in one clause. More importantly, if religion does not have a single definition, the meaning of the religion clause's vital commands and guarantees could be manipulated according to whether the issue was characterized as free exercise or establishment.[26]

The definition of religion is a crucial factor in the law of church and state. The area of confrontation between church and state grows as the number of organizations and types of activities included within the definition of religion increases. Increased confrontation between church and state will intensify pressure to relax the prohibition against government support of religion. Thus, the more inclusive the definition of religion, the greater the pressure for accommodation. A larger area of confrontation will also

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set of features that all religions have in common and that distinguishes religion from everything else. There is only a focus coupled with a set of paradigmatic features." *Id.* at 1565. Dean Choper, however, concedes the need for a definition, but argues that the content and application of the substantive rules should be such that the definition is of limited significance. Choper, *supra* note 20, at 580, 612.

22. *See infra* notes 23-43 and accompanying text.

23. Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 264; Weiss, *Privilege, Posture and Protection: "Religion" in the Law,* 73 YALE L.J. 593, 604 (1964).

The subjective definition was expressly rejected in Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). *See* Note, *Objective Criteria for Defining Religion, supra* note 20, at 1007; Note, *The Sacred and the Profane, supra* note 20, at 161. The subjective approach is at least impliedly rejected by every effort to formulate an objective definition. *See* authorities cited *supra* note 20.

24. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 828 (1978); Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1686-87 n.14 (1969); Note, *Toward a Constitutional Definition of Religion, supra* note 20, at 1083-86, 1088-89.

25. *See supra* note 8 and accompanying text.

26. Johnson, *supra* note 8, at 821-22.

tend to weaken the guarantee against government regulation and taxation of religion.

a. "Religion" and the Guarantee of Free Exercise

For purposes of the guarantee of free exercise, the definition of religion has moved from theism to "ultimate-concern" philosophy.[27] In 1890 the Supreme Court defined religion as "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[28] In 1931 Chief Justice Hughes wrote for himself and Justices Stone, Holmes, and Brandeis that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[29] In the famous 1947 *Everson* opinion,[30] however, Justice Black included "non-believers" in his listing of various denominations and categories of religion.

The significance of including non-believers in the definition of religion became apparent in *Torcaso v. Watkins,*[31] in which an election candidate challenged a Maryland statute that forced candidates to declare their belief in God as a condition for public office. The Supreme Court invalidated the statute, and applied a broad definition of religion that had far-reaching consequences for purposes of free exercise:

> Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[32]

The Supreme Court applied this broadened definition of religion in the interpretation of the statutes on conscientious objection to military service. The draft laws exempted persons whose objections to war resulted from "religious training and belief." Congress had defined that term as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," and had expressly ruled out an exemption based on beliefs that were "essentially political, sociological, or philosophical."[33] Nevertheless, in *United States v. Seeger,* the Supreme Court held that the draft-law exemption also applied to a man who disclaimed any guidance from God.[34] The Court defined the necessary belief in a "Supreme Being"

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27. *See* Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1031-37 (3d Cir. 1981) (proposing "broad, non-theistic" definition of religion for purposes of free exercise claim). *See generally* authorities cited *supra* note 20.

28. Davis v. Beason, 133 U.S. 333, 342 (1890).

29. United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

30. 330 U.S. 1, 16 (1947).

31. 367 U.S. 488 (1961).

32. *Id.* at 495 (footnotes omitted).

33. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 604 (current version at 50 U.S.C. App. § 456(j) (1976)).

34. 380 U.S. 163 (1964). *See also* Rabin, *supra* note 20.

under the draft law to include "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . ."[35] Under *Seeger,* religious belief is not so much a matter of content as a matter of sincerity. A few years later the Court expanded its statutory definition to include intensely held beliefs "purely ethical or moral in source."[36] Many scholars interpret these decisions as expressing constitutional as well as statutory construction, at least with reference to free exercise.[37] In this manner, the first amendment's guarantee of free exercise of "religion" has been expanded from the traditional limits of theism to include the sincere free exercise of philosophy—religious, anti-religious, or otherwise.

The problem with a definition of religion that includes almost everything is that the practical effect of inclusion comes to mean almost nothing. Free exercise protections become diluted as their scope becomes more diffuse. When religion has no more right to free exercise than irreligion or any other secular philosophy, the whole newly expanded category of "religion" is likely to diminish in significance.[38] This has already happened.

b. "Religion" and the Prohibition Against Establishment

In contrast, for purposes of the prohibition against government establishment, religion has retained its traditional theistic connotations of worship and belief in God.[39] The legal gatekeeper for this part of the wall between church and state has blocked any government traffic that would not pass the three-prong test for establishment: a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and an administration that does not foster excessive government "entanglement" with religion.[40] The irony of this three-prong test is that, as applied, it has screened out government support for only that form of religion which fits under the traditional theistic definition. No other philosophy or value system among those enjoying

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35. 380 U.S. at 176.

36. Welsh v. United States, 398 U.S. 333, 340, 342-43 (1970). *See also* Bowser, *supra* note 20, at 167-81; Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection,* in CHURCH AND STATE—THE SUPREME COURT AND THE FIRST AMENDMENT 168, 172-84 (P. Kurland ed. 1975); Pfeffer, *The Supremacy of Free Exercise,* 61 GEO. L.J. 1115, 1136 (1973); Comment, *"Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Beliefs,* 13 HARV. C.R.-C.L. L. REV. 751, 757-59 (1978).

37. *E.g.,* Freeman, *supra* note 20, at 1528; Greenawalt, *supra* note 20, at 760; Rabin, *supra* note 20, at 1136.

38. *See* Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?* 34 OHIO ST. L.J. 15, 41 (1973).

39. *See generally* authorities cited *supra* note 20. See Oaks, *Religion and Law in the Eighties,* in BELIEF, FAITH AND REASON (1981) (address to the Philadelphia Society, 1980), also published as an Ethics and Public Policy Reprint (1981).

40. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *See also* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 SUP. CT. REV. 57, 71-77.

the expanded guarantee of free exercise has had to pass this test. Notwithstanding the comprehensive belief systems and the religious fervor of those who have promoted secular humanism, environmentalism, behaviorism, or other theories of value or human behavior, their causes have received government support without having to pass the three-prong test. Only traditional theistic religion has been banished from the "public square."[41]

The Supreme Court has never explained why religion has a broad non-theistic meaning for purposes of free exercise and a narrow theistic meaning for purposes of non-establishment.[42] There are many scholarly works on the definition of religion under the first amendment,[43] but most deal with religion for purposes of free exercise and gloss over the awkward fact that the same definition does not apply to establishment.

In the long run we have a right to expect that the United States Supreme Court will formulate a definition of religion that can be applied to both the guarantee of free exercise and the prohibition of non-establishment. The language of the religion clause dictates a common definition, and fairness and practicality demand it.

Theoretically, a common definition could be achieved if the Court would return to its original theistic definition.[44] A return to the original definition would limit the number of organizations and beliefs to which the religion clause applies. The consensus of knowledgeable commentary considers this alternative unlikely, since it would be unacceptable to exclude non-theistic eastern religions and emerging systems of philosophical belief from the protections of the first amendment.[45] This consensus has undeniable force.

The more likely alternative for uniformity is for the Supreme Court to formulate a comprehensive definition of religion analogous to the broad non-theistic definition it has applied in free exercise cases. There is, however, a problem with this non-theistic alternative. A broad definition of religion

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41. R. NEUHAUS, THE NAKED PUBLIC SQUARE (1984).

42. As Professor Richard E. Morgan noted, the Court has never reconciled "its strictness as to establishment with its permissiveness as to free exercise." Morgan, *supra* note 40, at 97.

43. *See supra* note 20.

44. For a case applying a theistic definition of religion and expressly rejecting one that would include "all other beliefs and philosophies," see South Place Ethical Society, Barralet and others v. Attorney General and others, [1980] 3 All. E.R. 918, 924, noted in Hofler, *Religion, Sanity and the Law*, 131 NEW L.J. 761 (1981).

Some observers have argued that the *Yoder* and *Thomas* cases indicate a trend back toward a theistic definition. *See* Slye, *supra* note 20, at 234, 238-39; Note, *The Sacred and the Profane, supra* note 20, at 149-51, 155-56.

45. *See, e g.*, Choper, *supra* note 20, at 579-80 (definition of religion hindered by unprofitable results, potential judicial preference to certain groups, and possible violations of the first amendment); Johnson, *supra* note 8, at 832-33 (lack of uniform concept of religion prohibits attempt to define); Note, *Toward a Constitutional Definition of Religion, supra* note 20, at 1072-75 (government defines religion on basis of own parochial experience leading to arbitrary exclusion); Note, *Religious Exemptions Under the Free Exercise Clause, supra* note 20, at 362-64 (definition of religion difficult because nontheistic religions like Buddhism neither recognize influences on human behavior, belief, and adherence to principles nor common source of authority).

when applied to the current rules prohibiting the "establishment" of religion would drive government out of some areas of activity where its sponsorship, support, and influence are now pervasive. Under a broad definition of religion, the traditional rules against establishment might bar the government not only from sponsoring educational activity involving religious or philosophical values, but also from taking actions overtly based on such values.[46]

If applied to anti-establishment, a broad definition of religion would so enlarge the area of interface between church and state that the current rules against government support of religion might lead to a paralyzing tangle of litigation that could put a host of government programs in jeopardy.[47] The obvious corrective for this unacceptable prospect is for the substantive rules against the establishment of religion to relax to the point that both religion and government can co-exist along the enlarged border of interface.[48]

When this hypothesis was first suggested,[49] the best authority offered for the relaxation of the prohibition against establishment was *Walz v. Tax Commission*,[50] in which the Supreme Court sustained the constitutionality of real estate tax exemptions that included churches. Further authority included scholarly articles that saw signs of increased tolerance for government support of religion.[51] Today the trend toward relaxation of the prohibition of establishment is pronounced, and it has a name: accommodation.

II. TREND UNDER THE ESTABLISHMENT CLAUSE

In the last four years, the United States Supreme Court has decided six major cases in which state support or other state action was challenged under the establishment clause. In four of these cases the Court rejected the

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46. *See, e.g.*, L. TRIBE, *supra* note 24, at 827-28 ("in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect"); Note, *Objective Criteria For Defining Religion, supra* note 20, at 1012; Hogan, *"Sorry, No Teaching of Values allowed,"* New York Times, May 20, 1979, at E21. *See also* THE WALL BETWEEN CHURCH AND STATE, *supra* note 15, at 5 ("In recent years there have been repeated reminders that irreligion demands the protection of the free-exercise phrase; the irreligious must be equally willing to accept the proscriptions of non-establishment").

47. Note, *Toward a Constitutional Definition of Religion, supra* note 20, at 1082-84.

48. Choper, *supra* note 20, at 591-613. Dean Choper illustrates this tendency by proposing substantive rules which minimize the necessity for defining religion.

49. Oaks, *supra* note 39.

50. 397 U.S. 664 (1970).

51. *See, e.g.*, Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 708-37 (1968); Schotten, *The Establishment Clause and Excessive Governmental Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 236-44 (1979); Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 717 (1979). *See also* Merel, *supra* note 12, at 822 (advocating "a narrowly drawn test—not of religion, but of establishment").

challenge.[52] The remaining two cases[53] involved uncommon factual circumstances and rules of law that are unlikely to spawn numerous progeny. In view of the outcome and the reasoning of these most recent establishment clause cases, it is not surprising that the commentators, including Dean Jesse Choper,[54] are declaring the total inadequacy or imminent demise of the three-prong test.[55] The establishment clause cases yet to be decided by the Supreme are expected to reinforce this trend.

The four recent cases that rejected the establishment challenge are fraught with implications for the future. In three of these cases the court sustained state support of religion through an extremely lenient interpretation of its three-prong test, which had been used previously to invalidate most types of government support. In the fourth case, the Court ignored the three-prong test entirely and simply relied on a tradition of accommodation in a particular area.

In *Widmar v. Vincent,*[56] the Supreme Court held that there was no establishment clause violation when a public university that had opened its facilities for use by student groups allowed one such group to hold a voluntary religious service. The Court reasoned that religious worship was a form of communication that was protected by the speech and association provisions of the first amendment.[57] Such protected activity could not be abridged without a compelling state interest.[58] The state would have a compelling interest in denying equal access to religious assemblies if such support would constitute a forbidden establishment of religion.[59] The Court held that the State did not have a compelling interest because, *inter alia,* religious meetings on public premises did not have the "primary effect" of advancing religion.[60] The Court justified this conclusion with reasoning that

52. *See infra* notes 56-76 and accompanying text.

53. *See infra* notes 78-87 and accompanying text.

54. Speech by Dean Jesse Choper, Professor of Law and Dean of the School of Law, University of California at Berkeley, *The Free Exercise Clause: A Re-examination of the Existing Structure* (Nov. 17, 1983). *See also* Choper, *supra* note 9 (Court-developed establishment clause three-prong test directly conflicts with the free exercise clause balancing test).

55. *See* Dunsford, *Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome,* 1984 UTAH L. REV. 1, 9, 16 (cases involving establishment clause lack uniformity); Johnson, *supra* note 8, at 826-31 (the concepts of religious purpose, effect and entanglement "do not help us decide where to draw the line"); Mansfield, *supra* note 9, at 848 (three-prong test does not help in "understanding what is really at stake"); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 783 (three-prong approach described as "any more than" test). The entanglement test is criticized in Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy,* 24 ST. LOUIS U.L.J. 205 (1980), and Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment,* 27 UCLA L. REV. 1195 (1980).

56. 454 U.S. 263 (1981).

57. *Id.* at 269.

58. *Id.* at 270.

59. *Id.* at 271.

60. *Id.* at 273.

is potentially far-reaching. The benefit of equal access was available to a broad class of organizations—nonreligious as well as religious—and the establishment clause does not bar "the extension of general benefits to religious groups. . . ."[61] Counsel for the state later characterized this reasoning as "the beginning of the death march for the establishment provision of the first amendment. . . ."[62]

In *Mueller v. Allen*,[63] the Supreme Court did not find an establishment clause prohibition against state tax deductions for tuition and other educational expenses paid for public and private schools, including parochial schools. Once again, the Court applied the three-prong test leniently. The Court did not even consider evidence on whether the primary effect of the statute, as applied, benefitted religious schools, since the law was facially neutral as to all types of schools.[64]

In *Marsh v. Chambers*,[65] the Supreme Court held that the State of Nebraska did not violate the establishment prohibition when it paid the salary of a chaplain to offer prayers in its legislative assembly. The Court's opinion ignored the three-prong test. Just as it did in sustaining real estate tax exemptions in *Walz*, the Court relied on "the weight to be accorded to history."[66] The opinion noted that ever since the founding of the republic "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[67] One learned commentator promptly contended that the Supreme Court's reasoning and result in this case exposed the infirmities in each element of its three-prong test.[68] He boldly called for abolishing the three-prong test and overruling *Everson v. Board of Education*, the fountainhead of the separationist philosophy, calling that opinion "shabby history and unacceptable legal analysis."[69]

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61. *Id.* at 274.

62. Ayres, Widmar v. Vincent: *The Beginning of the End for the Establishment Clause*, 8 J.C. & U.L. 511, (1981-82).

63. 103 S. Ct. 3062 (1983).

64. *See generally* Schachner, *Religion and the Public Treasury After* Taxation with Representation of Washington, Mueller *and* Bob Jones, 1984 UTAH L. REV. 275, 290 (stating that *Mueller* overruled *Nyquist*).

65. 103 S. Ct. 3330 (1983).

66. *Id.* at 3334.

67. *Id.* at 3333.

68. Dunsford, *supra* note 54, at 2.

69. *Id.* at 20. *See also* M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Johnson, *supra* note 8, at 817; Mansfield, *supra* note 9, at 847.

Taking his cue from Judge Brevard Hand's widely noted opinion in *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd*, 705 F.2d 1526 (11th Cir. 1983), another observer has proposed resurrecting an even more radical basis for overruling *Everson*: since the fourteenth amendment did not incorporate the Bill of Rights, the establishment clause is therefore not a limitation on state power. James McClellan, *Hand's Writing on the Wall of Separation* (paper delivered at American Enterprise Institute conference, Washington, D.C., Feb. 9, 1985).

The fourth recent case to reject an establishment clause argument is *Lynch v. Donnelly*.[70] *Lynch* involved a challenge to a Rhode Island city's inclusion of a nativity scene in its annual Christmas display. Emboldened by the *Marsh* decision, the Solicitor General filed an amicus brief advocating abandonment of the three-prong test in this case. Although the Court did not comment expressly on the Solicitor General's argument, the analysis in *Lynch* clearly relegated the three-prong test to the category of a "useful . . . inquir[y]."[71] In a passage one commentator promptly recognized as evidence that "an altogether new test was aborning,"[72] the opinion observes that the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area."[73] The opinion asserts that the Court has "consistently" declined "to take a rigid, absolutist view of the Establishment Clause."[74] It is replete with references to government's "accommodation" of the religious beliefs and practices of its citizens. In one especially significant sentence, the Court declares that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation not merely tolerance, of all religions, and forbids hostility toward any."[75]

The rationale in *Lynch* is a far cry from the separationist philosophy of *Everson*. As one critic noted, by the standards of *Everson*, "[t]he wall of separation between church and state had clearly been breached"[76] by the city's sponsorship of the nativity scene, in preference to the symbols of other faiths.

Daniel Boorstin has observed that "Americans have a habit of writing premature obituaries."[77] Even if this is so, there is no need for the Supreme Court to inter the three-prong test when it has already been displaced so prominently. With the Court's recharacterization of that test as merely a "useful inquiry" and with its frequent approving references to "accommodation," the Supreme Court seems to have adopted and named a new philosophy under the establishment clause. Unfortunately, the Court has not yet succeeded in articulating the underlying principles to define the limits of government support under this new philosophy.

The two recent Supreme Court cases that overturned state action on the basis of the establishment clause preceded the four cases discussed above. More important, their reasoning is not contrary to this analysis.

In *Larkin v. Grendel's Den, Inc.*,[78] the Court struck down a state law that gave churches a veto power over the issuance of liquor licenses to operate within

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70. 104 S. Ct. 1355 (1984).

71. *Id.* at 1362.

72. Van Alstyne, *supra* note 54, at 783.

73. 104 S. Ct. at 1362.

74. *Id.* at 1361.

75. *Id.* at 1359.

76. Van Alstyne, *supra* note 54, at 781.

77. A Report from the Librarian of Congress, BOOKS IN OUR FUTURE 3 (Joint Committee on the Library, Congress of the United States, 1984).

78. 459 U.S. 116 (1982).

a particular radius of the church. The Court held that this delegation of governmental power to churches constituted a fusion of government and religious functions that inescapably violated the establishment clause.[79]

In *Larson v. Valente*,[80] the Supreme Court invalidated a provision of the Minnesota Charitable Solicitations Act that imposed registration and reporting requirements on religious organizations, but exempted those organizations receiving more than fifty percent of their support from their own members. The major principle the Court stated for this decision was "that one religious denomination cannot be officially preferred over another."[81] This principle of non-preference is surely subject to some exceptions—at least those of a historic and symbolic or *de minimis* character—in view of the Court's subsequent approval of a nativity scene on public property.[82] The *Larson* opinion contains a puzzling mixture of non-establishment and free exercise analysis.[83] Thus, it makes incidental references to "entanglement," one of the three-prong tests, but it also contains an extended discussion of compelling state interest, a test not previously associated with establishment analysis.[84]

The *Larson* opinion cries for further clarification. This may be provided most sensibly by conceding the merit of Dean Choper's conclusion.[85] He contended that *Larson* should have been analyzed not as a prohibited establishment, but as a challenged regulation of religion. The statute was invalidated as a violation of free exercise because it was neither justified by a compelling state interest nor implemented by the least restrictive means.

In summary, the Supreme Court's de-emphasis of its three-prong test, its adoption of "accommodation" in the rhetoric of its opinions, and its recent succession of holdings rejecting challenges to government support, all indicate that the Supreme Court is relaxing the establishment clause prohibition. The separationist ideology, which Richard Neuhaus characterizes as having moved us from "government neutrality toward religion, to government hostility to religion,"[86] seems to be giving way to a philosophy of accommodation. This modification may permit a more public role for religion. If so, and if citizens of different faiths can join hearts and hands as one people under God, we may yet, as Neuhaus advocates, "become partners in rearticulating the religious base of the democratic experiment."[87]

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79. *Id.* at 126.
80. 456 U.S. 228 (1982).
81. *Id.* at 244.
82. Lynch v. Donnelly, 104 S. Ct. 1355 (1984).
83. *Id.* at 1358.
84. *Id.* at 1362.
85. Choper speech, *supra* note 53.
86. R. NEUHAUS, *supra* note 41, at 148.
87. *Id.* at 264.

III. TREND UNDER THE FREE EXERCISE CLAUSE

The other half of the hypothesis—that the guarantee of free exercise is also weakening—is probably less obvious. There is evidence for this thesis in two areas. The first area involves increased taxation of churches and religious activities. The second area involves increased regulation of churches and of individual actions that are motivated by religious belief. The area of increased regulation suggests that the Supreme Court is retreating from its recent generosity in approving religious exemptions from laws of general application.

A. Taxation

The trend of legislative and administrative action is to impose additional taxes on religious organizations. Ever in need of revenues, state and local governments are tightening the noose on religious exemptions from real estate taxes. The administration of traditional exemptions is becoming more stringent, as reflected in stricter interpretations of qualifying provisions like "used exclusively for . . . religious worship."[88] More states are requiring annual exemption certificates that require churches to disclose their finances and report on the use of exempt properties. Additionally, more local governments are imposing "benefit" or "special district" taxes, which charge church properties for the use of government services.[89]

Congress has recently removed churches' traditional exemption from payroll taxes, which is the area of greatest and most consistent increase in federal taxation. Significantly, no congressional leaders suggested any constitutional problem with this amendment, even though it effectively imposed a direct tax on an essential function of religious organizations, the employment of personnel.[90] The constitutionality of this new payroll tax on churches has not yet been tested, but a recent Supreme Court decision suggests that it would be upheld.

In *United States v. Lee*,[91] Amish employers challenged the Social Security tax as a violation of their free exercise of religion. The Supreme Court rejected this challenge, reasoning that in an organized society which must preserve operating latitude for its legislature, "some religious practices [must] yield to the common good."[92] "The state may justify a limitation on religious

88. *E.g.*, In re Loyal Order Of Moose, #259 v. County Board of Equalization, 546 P.2d 257 (Utah 1982).

89. *See* Serritella, *Real Property Tax Exemption—Current Trends At the State Level*, 26 CATH. LAW. 236, 242-43 (1981); *Real Property Tax Exemptions for Religious Organizations*, 47 ALB. L. REV. 1117, 1166-79 (1983).

90. *The Social Security Amendments of 1983: A Tax on Religion*, BENCHMARK, Jan./Feb. 1984, at 11-12. The origin of the federal tax exemption involving churches is described in THE WALL BETWEEN CHURCH AND STATE, *supra* note 15, at 9-10.

91. 455 U.S. 252 (1982).

92. *Id.* at 259.

liberty," the Court said, but it must show that such limitation "is essential to accomplish an overriding governmental interest."[93] The Court then held that the government's interest in maintaining a comprehensive Social Security system outweighed the taxpayer's free exercise rights because "mandatory participation is indispensable to the fiscal vitality of the social security system . . . ."[94] Congress and the courts must be "sensitive to the needs flowing from the Free Exercise Clause," the Court concluded, "but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."[95]

The principles declared in *United States v. Lee* portend great difficulty for free exercise challenges to comprehensive government taxation schemes that fall on religious organizations in the same manner as they fall on other organizations similarly situated as to the tax involved.

B. Regulation and Exemptions Based on Religion

By any measure, the weight of government regulation of churches and religious activities is increasing. Dean Kelly has observed that "only now are we beginning to recognize that government intervention in religious affairs is the largest, most nebulous, pervasive, and portentous religious-freedom issue of our day."[96] Kelly gives more than a dozen illustrations. Whatever the merit of any individual example, the trend is evident and ominous.

There will be more cases in which the Supreme Court sustains the regulation of churches or religiously motivated behavior under laws affecting activities that are religious for some and nonreligious for others. This includes such efforts as administrative attempts to regulate the employment contracts of parochial school teachers. The NLRB failed in such an attempt against the Chicago Diocese,[97] but a state labor relations board recently succeeded in such an effort against another diocese.[98] The Supreme Court recently allowed the Minnesota State Fair to apply its "time, place, and manner" regulations against charitable solicitations that were admittedly a first amendment-protected religious practice of the International Society for Krishna Consciousness.[99] Cases like this, which present the issue of religious exemptions from laws of general application, will certainly increase in number.[100]

The extent of permissible regulation under the free exercise clause is also being enlarged through manipulation of two important legal standards: compelling state interest and least restrictive means. If the state's interest in

93. *Id.* at 257.

94. *Id.* at 258. *See generally* Schachner, *supra* note 64, at 280.

95. 455 U.S. at 261.

96. Kelly, *Uncle Sam, Church Inspector,* LIBERTY, May/June, 1984, at 3.

97. 216 N.L.R.B. 249 (1975), *rev'd,* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd,* 440 U.S. 490 (1979). *See also* Laycock, *supra* note 12.

98. Catholic H.S. Ass'n of Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985).

99. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

100. *See infra* notes 117-25 and accompanying text.

a regulatory statute is defined in very general terms, such as compulsory education or maintaining the integrity of the Social Security system, and is then balanced against a narrow definition of the individual's interest, the state's interest is much more likely to prevail.[101] Thus, in *United States v. Lee,*[102] the Court concluded that the tax system *as a whole* could not function if it tolerated exemptions for an Amish employer.[103] Because the state's interest was defined in such grandiose terms, it was easy for the Court to hold that it eclipsed the individual's free exercise claim.

In contrast, some of the Supreme Court's earlier free exercise cases have insisted that individual and state interests be compared and balanced at equivalent levels of generality. In *Wisconsin v. Yoder,*[104] for example, the Court balanced the free exercise interests of Amish students[105] not against the state's general interest in compulsory education, but rather against the state's marginal interest in compulsory education of Amish children after the eighth grade. The comparison can also be distorted if a court fails to insist on a showing that no less restrictive means are available to further a compelling state interest that infringes on the free exercise of religion.[106]

The increase in permissible government support of religion under the weakening establishment clause will expand the regulation of religious organizations and activities. Government will probably attempt to regulate, directly or indirectly, whatever it subsidizes, directly or indirectly. Recent Supreme Court decisions are consistent with this trend, and have strengthened the theoretical basis for government regulation of churches and religious activities. Two examples will suffice. One case involved the effect of tax exemptions and deductions in general, and the other case applied this principle in the specific context of an institution that should have been protected under the free exercise clause.

Although not dealing with a church, *Regan v. Taxation with Representation*[107] strengthens the theoretical argument for regulating churches on the basis of the benefit they derive from tax exemptions or from the tax deductions taken by their contributors. *Taxation with Representation* held that a federal tax exemption could be denied to a non-profit organization that had engaged in the type of lobbying activities which exempt organizations are prohibited from pursuing.[108] The Court rejected the taxpayer's argument

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101. Pepper, *supra* note 20, at 341-44.

102. 455 U.S. 252 (1982).

103. *Id.* at 260. The employer claimed that he was "self-employed" and thus exempt from certain taxes under 26 U.S.C. § 1402(g) (1976 Supp. III). *Id.* at 254-55.

104. 406 U.S. 205, 221-29 (1972).

105. The free exercise interest was not of the child but was actually that of the parent, along with the "traditional interest" of parents with respect to the religious upbringing of their children. *Id.* at 214.

106. Pepper, *supra* note 20, at 343.

107. 461 U.S. 540 (1983).

108. *Id.* at 544.

that the lobbying restriction violated its free speech rights. The Court held that the Constitution did not require Congress to subsidize lobbying efforts.[109] As an essential element in the decision, the Court declared that:

> [b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.[110]

Some government officials will interpret this passage as an invitation to subject churches and religious activities to the same regulations currently imposed on organizations that receive direct government appropriations or subsidies.

The initial case involving a conflict between tax exemption requirements and the guarantee of free exercise of religion is *Bob Jones University v. United States.*[111] In *Bob Jones,* the Court sustained the denial of tax exempt status to a church-related university that discriminated on the basis of race.[112] In the absence of express Congressional action, the Court relied on the Internal Revenue Service's definition of the public policy applicable to tax exemption.[113] By holding that the university's right to the free exercise of religion must yield to administrative action in *Bob Jones,* the Court seems to have signaled a clear diminution in the dimensions of the consititutional guarantee of free exercise of religion. It remains to be seen whether that diminution will apply to public-policy-based regulations other than the racial discrimination to which the *Bob Jones* opinion was expressly limited. In view of the Supreme Court's increased tolerance for indirect government support of religion, exemplified in such cases as *Mueller v. Allen,*[114] the number of instances in which churches or religious institutions will be expected to conform to public policies articulated by government action are bound to increase.[115]

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109. *Id.* at 550.

110. *Id.* at 544. *See also* Schachner, *supra* note 64, at 282.

111. 103 S. Ct. 2017 (1983).

112. *Id.* at 2036.

113. Though conceding the inevitability of its result, commentators have criticized the reasoning of the *Bob Jones* case for taking its public policy from administrative action and Congressional inaction, and for its probable tendency to erase the historic line between state action and private action, an essential distinction in a pluralistic society. *E.g.,* Freed & Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 5-20.

114. 103 S. Ct. 3062 (1983).

115. As one commentator noted:

> The ultimate result of *Mueller,* therefore, will be increased reliance by religious organizations on governmental financial assistance. Additionally, by allowing governments to condition assistance to religious organizations that are not 'purely religious' on the observance by those organizations of public policies, and to closely scrutinize the activities of the recipient organizations, *Bob Jones* will lead to an unhealthy degree of governmental supervision of religious organizations seeking to retain governmental assistance.

Schachner, *supra* note 64, at 311-12.

In contrast to the manner in which *Mueller, Taxation with Representation,* and *Bob Jones* increase the bases for federal regulation, there has been no comparable enlargement in the bases for regulation of churches by state governments. The California legislature recently provided an important bellwether against state regulation when it repudiated its Attorney General's attempt to impose a general regulatory scheme on churches. As has been shown, the charitable trust theory on which the California Attorney General mounted its assault on the free exercise of religion in that instance was entirely without foundation in the common law.[116] Hopefully, the books have been closed on the assertion of that basis for state regulation.

Controversies over attempts to regulate churches or religious activities often arise in the context of claims to exemptions from laws of general application. Such exemptions are claimed on the basis that the application of such laws to religious organizations or the religiously-motivated actions of believers would violate the free exercise of religion. Claims of this character have involved such familiar subjects as laws regulating crimes, taxation, and employment, and such unfamiliar and diverse subjects as the laws governing prison discipline, snake-handling, and malpractice by clergymen.[117]

In *Reynolds v. United States,*[118] decided in 1878, the Supreme Court established the direction of the law of free exercise as it pertains to claims for religious exemption. The *Reynolds* Court rejected a Mormon's asserted exemption from a law which outlawed the practice of polygamy in the territories.[119] This pattern of hostility to religious exemptions continued until as recently as 1961. In *Braunfeld v. Brown,*[120] the Court upheld the application of a Sunday closing law to Orthodox Jews, rejecting the argument that because their religion commanded them to close on Saturday they should have an exemption to do business on Sunday.

In the subsequent two decades, however, the Supreme Court reversed its direction, and favored some religious exemptions.[121] In 1963, the Court granted a claim of exemption in *Sherbert v. Verner,*[122] holding that a Seventh-day Adventist could not be disadvantaged under state unemployment compensation laws because he would not work on his sabbath. This type of exemption was reaffirmed in 1981 in *Thomas v. Review Board of Indiana.*[123]

116. Oaks, *Trust Doctrines in Church Controversies,* 1981 B.Y.U. L. REV. 805.

117. *See generally* Note, *Religious Exemptions Under the Free Exercise Clause, supra* note 20, at 351-52 (lists claims for religious exceptions); Note, *The Sacred and the Profane, supra* note 20, at 139 n.3; Ericsson, *Clergyman Malpractice: Ramifications of a New Theory,* 16 VAL. U.L. REV. 163 (1981) (clergyman malpractice expanded with respect to elements of cause of action for negligence).

118. 98 U.S. 145 (1878).

119. *Id.* at 166-67.

120. 366 U.S. 599 (1961).

121. P. KAUPER, *supra* note 12, at 41-44; Pepper, *supra* note 20, at 330-45.

122. 374 U.S. 398 (1963).

123. 450 U.S. 707 (1981) (exemption sought by Jehovah's Witness who refused to work in a department producing weapons).

Another important religious exemption was granted in 1972 in *Wisconsin v. Yoder*.[124] In *Yoder* the Court held that a state could not apply its criminal penalty to punish Amish parents who kept their children out of school after the eighth grade.[125]

Some authorities believe that this quarter-century of limited favoritism for religious exemptions is nearly over. As Charles M. Whelan wrote several years ago:

> A small but growing number of religious leaders of all faiths fear that the golden age of religious exemptions has ended. They believe that we are already in the twilight of substantially increased government regulation.[126]

Three recent cases discussed earlier support that fear. In *United States v. Lee*,[127] decided in 1982, the Supreme Court refused to grant an exemption to an Amish employer who had a religious objection to paying social security taxes for his employees. Several commentators have noted that *Lee* seriously qualifies the vitality of *Sherbert* and *Thomas*.[128] In 1981, the Court decided the *Heffron* case,[129] which denied a religious exemption from the charitable solicitation regulations of the Minnesota State Fair. In *Bob Jones*,[130] decided in 1983, the Court was almost peremptory in rejecting a church institution's claims of religious exemption from the public policy forbidding racial discrimination.

In terms of results, the tide seems to be turning against exemptions based on religion. In fact, some scholars have criticized the whole concept of such exemptions.[131] Other commentators have conceded that the Supreme Court has not articulated a workable theory to explain which exemptions will be granted and which will be denied, and have suggested alternative theories.[132] Regardless of the approach, exemptions based on religion are at least on the defensive.

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124. 406 U.S. 205 (1972).

125. *Id.* at 234.

126. Whelan, *Government and the Church*, AM., Dec. 16, 1978, at 450.

127. 455 U.S. 252 (1982).

128. United States v. Lee, 455 U.S. 252, 263-64 n.2 (1982) (Stevens, J., concurring); Mansfield, *supra* note 9, at 901; Schachner, *supra* note 64, at 280; Note, United States v. Lee: *An Insensitive Approach to the Free Exercise of Religion*, 18 TULSA L.J. 305, 324-35 (1982). *Sherbert* is criticized on another basis in Laycock, *supra* note 12, at 1414.

129. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

130. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983). *See supra* note 111 and accompanying text.

131. M. MALBIN, *supra* note 69, at 40; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313-14, 1322 (1970) (governments must not "go out of their way" to favor or disfavor religion); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 16-17 (1978) (government inconsistently exempts some religious factions from activities and requires compliance of other religious factions).

132. Freed & Polsby, *supra* note 113, at 29 ("bottom line" is no free exercise allowed); Note, *Religious Exemptions Under the Free Exercise Clause*, *supra* note 20, at 362-69.

Overall, the Supreme Court's new direction on free exercise and nonestablishment represents a movement toward what Michael J. Malbin's 1978 study represents as the intentions of the authors of the first amendment:

> The modern Supreme Court correctly perceives that the framers wanted to encourage religion. But the Court uses the free exercise clause to grant religion special favors that the framers never thought were required, while prohibiting the non-discriminatory assistance the framers would have permitted . . . .[133]

IV. CONCLUSION

Under the modern law of church and state, the relationship between rules forbidding establishment and guaranteeing free exercise may be visualized in terms of a beam scale driven by forces that will keep the two sides in balance. If the extent of permissible government support of religion increases, the extent of permissible regulation and taxation of churches and religious activities will also increase. The reverse is also true. Whatever forces produce a change on either side, the relationship between the government support side and the regulation-taxation side will be brought into equilibrium.

Until recently, the law of church and state was in a state of equilibrium that emphasized *separation*. The scales now seem to be moving toward an equlibrium that emphasizes *accommodation*. This new emphasis diminishes the constitutional obstacle to government support for churches and religious activities, and correspondingly diminishes the constitutional guarantees against taxation and regulation. In this position, constitutional litigation will be a less effective safeguard of free exercise, and churches and religious practitioners will need to protect their interests more frequently through legislative lobbying.

If the diminishing guarantees of first amendment free exercise provide a less significant barrier to government action against churches and religious activities, the robust first amendment free speech guarantees may take up a portion of the slack. When the Supreme Court held in *Widmar v. Vincent* that "religious worship and discussion" are "forms of speech and association protected by the first amendment,"[134] the Court may have positioned a significant safety net for a portion of the free exercise of religion.[135] While free speech guarantees would protect words and acts that communicate religious messages, there is substantial doubt about the extent to which the less clearly defined freedom of "association" would protect religious autonomy and a host of other essential activities of churches and their adherents.

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133. M. MALBIN, *supra* note 69, at 40.

134. 454 U.S. 263, 269 (1981).

135. Some commentators have argued that free exercise is simply a subspecies of the freedom of expression. *E.g.*, Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 547 (1983) ("no more stringent protection [should] be allowed free exercise claims than would be granted to comparable secular activity").

A generalized (and secularized) guarantee of free "speech and association" is not a substitute for the constitutional guarantee of free exercise of religion. Just as the first amendment has separate clauses dealing with religion and speech, the courts must preserve the principle that religious liberty is a distinct value warranting independent and preferred protection.[136]

"Accommodation" does not mean that religion must "accommodate" to the secular order by surrendering its unique role in society and by equating the unique protection of "free exercise" of religion with the comprehensive guarantee of free "speech and association." Religion must preserve its unique status in our pluralistic society in order to make its unique contribution—its recognition and commitment to values that transcend the secular world. Accommodation signifies a closer relationship between church and state. Religion cannot survive this closer relationship unless our legislative and judicial lawmakers are committed to preserve the distinctive identity of religion and to preserve the freedom necessary to make its unique contribution.

The future will probably see religion defined under both phrases of the Religion Clause in essentially the same terms as the current broad definition that is now applied to free exercise. Even if the Supreme Court never formulates uniform principles to reconcile the contrary demands of non-establishment and free exercise, the pragmatic balance previously struck in these areas will probably continue to move toward "accommodation." "Accommodation" consists of increased support for religion and increased taxation and regulation of churches and religious activities. Direct governmental support will, of course, remain limited to reinforcing the generalized piety that has been called "civil religion." Indirect support for religion will increase, but it will not include overt and significant favoritism for one particular denomination.

The sacramental and sacerdotal activities of churches and religious organizations are relatively safe from government regulation. Increases in taxation and regulation are likely to bear most heavily on the "business" activities of churches or religious organizations. These activities include employment or the use of property, which are comparable to those activities conducted by non-religious organizations. In any event, government regulation of church-related activities and religiously motivated behavior is likely to be an area of increasing conflict in years to come.

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136. M. HOWE, THE GARDEN AND THE WILDERNESS 91-118 (1965); P. KAUPER, *supra* note 12, at 13-44; Pfeffer, *supra* note 36; Saladin, *Relative Ranking of the Preferred Freedoms: Religion and Speech*, 1964 RELIGION AND THE PUBLIC ORDER 149, 171 ("freedom of religion is accorded the supreme place in the hierarchy of American civil rights").