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# Uncovering the First Amendment: A Research Guide to the Religion Clauses

Lucy Salsbury Payne

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# BIBLIOGRAPHY

## UNCOVERING THE FIRST AMENDMENT: A RESEARCH GUIDE TO THE RELIGION CLAUSES

LUCY SALSBUURY PAYNE\*

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## INTRODUCTION

A large body of literature concerning the first amendment religion clauses<sup>1</sup> has appeared over the past decade. Factors contributing to this burgeoning body of resources include debate over the role of original intent in constitutional interpretation, courts' difficulties in applying the *Lemon* test, the emergence of the Religious Right as a potent political force, growth of the regulatory state, and general concern over increased secularization.<sup>2</sup> In response to this growing interest in the religion clauses, this essay seeks to organize selected materials published from 1980<sup>3</sup> and to suggest methods for accessing them.<sup>4</sup>

In Part I, I discuss the religion clauses in a general way. Part II explores specific research problems related to the clauses. In Part III, I discuss various information sources from a first amendment perspective. Part IV explains the organization and selection criteria for the sources in Part V, and Part V contains the annotated selective bibliography of recent books and law review articles relating to the religion clauses. Lists of symposia and pertinent organizations are appended. Specialists who deal in religion cases daily may prefer to focus primarily on the sources in Part V. Others might obtain the best strategic sense for research by first reading through the essay portion.

Because certain aspects of church-state law are extremely complex in themselves, as yet undeveloped in terms of case law, or too tangential in relation to the huge expanse of extant materials central to the first amendment, I have excluded them

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1. Congress shall make no law respecting an establishment of religion [the establishment clause], or prohibiting the free exercise thereof. . . [the free exercise clause]. U.S. CONST. amend I.

2. See also Vogel, *A Survey and Commentary on the New Literature in Law and Religion*, 1 J.L. & RELIGION 79, 80 (1983) discussing the "new literature in law and religion" and tracing the impetus for additional publication to developments in the seventies.

3. Materials are from 1980 to early Fall 1989.

4. Although I assume the researcher's general knowledge of legal research tools, I have presented the materials in a way that will enable the non-law trained researcher to locate the material with minimal help from a reference librarian.

from treatment in this work: abortion,<sup>5</sup> income tax,<sup>6</sup> human rights,<sup>7</sup> nuclear weapons policy,<sup>8</sup> legal ethics,<sup>9</sup> Christian ethics,<sup>10</sup> Christianity and law,<sup>11</sup> religious foundations of law<sup>12</sup> and the sanctuary movement.<sup>13</sup>

#### PART I-THE RELIGION CLAUSES<sup>14</sup>

The original text of the constitution prohibits religious tests as a prerequisite to holding public office,<sup>15</sup> but the opening words of the Bill of Rights, "Congress shall make no law respecting an establishment of religion [establishment clause], or prohibiting the free exercise thereof [free exercise clause]. . .", provide the primary basis for religious freedoms in the United States. The Supreme Court has incorporated both the establishment and the free exercise clauses into the four-

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5. See, e.g., J. BURTCHAELL, *RACHEL WEeping AND OTHER ESSAYS ON ABORTION* (1982).

6. See, e.g., R. HAMMAR, *PASTOR, CHURCH AND LAW* (1983), which covers practical problems and includes a chapter on taxes.

7. See, e.g., Livezey, *U.S. Religious Organizations and the International Human Rights Movement*, 11 HUMAN RTS. Q. 14 (Feb. 1989).

8. See, e.g., G. HALSELL, *PROPHECY AND POLITICS* (1986).

9. See, e.g., T. SHAFFER, *FAITH AND THE PROFESSIONS* (1987).

10. See, e.g., S. HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* (1981).

11. See, e.g., T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981).

12. See, e.g., H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (G. MacEoin ed. 1983).

13. See, e.g., R. GOLDEN AND M. MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* (1986); I. BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985); *SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE* (1985).

14. Because the primary purpose of this paper is to point to sources discussing the religion clauses, this section provides only the most basic information necessary to use the bibliography. For a complete introduction to the religion clauses, see, for example, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, Chapter 14, "Rights of Religious Autonomy," 1154-1301 (2d ed. 1988); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, Chapter 17, "Freedom of Religion," 1030-1102 (Hornbook Series, 3d ed. 1986). Less current and less in-depth, but easy to read is L. MANNING, *THE LAW OF CHURCH-STATE RELATIONS IN A NUTSHELL* (1981).

15. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3.

Another provision arguably related to religion is, "[the President] shall take the following Oath or Affirmation. . ." U.S. CONST. art II, cl. 8.

teenth amendment.<sup>16</sup> Consequently, they apply to state and local governments as well as to the federal government.<sup>17</sup>

Some of the research problems associated with the religion clauses are typical of constitutional interpretation generally. As with other constitutional provisions, these clauses have elicited a wide range of interpretations.<sup>18</sup> Other writers have written about the various views regarding the religion clauses,<sup>19</sup> but for the purpose of this paper the researcher should recognize that a wide spectrum exists. At one end are the *absolute separationists*, who see the realm of religion as totally distinct from that of the state.<sup>20</sup> At the other end are the *Christian revisionists* who believe the nation has a distinctly Christian mission.<sup>21</sup>

Between those polar positions lie three more widely held views. The generic *separationist* recognizes that religiously motivated citizens have a role to play in political affairs, but believes that both the state and the church will be stronger if they coexist separately. Seeing religion as intertwined in our nation's heritage, the *accommodationist* believes the state should adjust where necessary to allow religion to flourish. The *nonpreferentialist* argues that government may assist religion as long as it assists all religions equally. The researcher must bear in mind these varying positions as material on church-state issues, even historical analysis, tends to reflect the author's views. However, these positions are not marked off by believer-nonbeliever distinctions, or even by denominations.

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16. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause).

17. Debate exists as to whether the clauses should apply to the states. See Rice, *The Jaffree Case*, 1 BENCHMARK 15 (May-June 1984) (arguing that the Court incorrectly incorporated the first eight amendments, especially the establishment clause).

18. See, e.g., Slinger, Payne & Gates, *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106, 109-112 (1989) (discussing differing views of the Senate's role).

19. E.g., McConnell, *You Can't Tell the Players in Church-State Disputes without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987) (describing seven views); Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371.

20. For examples of cases illustrating the strict separationist position see Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 380, n.19.

21. E.g., F. SCHAEFFER, *HOW SHOULD WE THEN LIVE* (1976), W. STANMEYER, *CLEAR AND PRESENT DANGER: CHURCH AND STATE IN POST-CHRISTIAN AMERICA* (1983), and J. WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* (1982).

In addition to varied views on interpretation, there are problems that are unique to litigation, such as "standing" to sue.<sup>22</sup> Courts have available to themselves several ways of avoiding constitutional questions. They can, for example, construe a statute so as to reconcile it with the Constitution.<sup>23</sup> Federal courts can also abstain from hearing a case until appropriate state agencies have had a chance to address it.<sup>24</sup> Moreover, a first amendment doctrine which applies in many church autonomy issues is that of judicial deference whereby courts will refuse civil jurisdiction and defer to church authorities whenever a dispute might otherwise embroil the court in an internal dispute.<sup>25</sup> Even if a Court does decide to hear a case

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22. *E.g.*, *Karcher v. May*, 484 U.S. 72 (1987) (dismissing for lack of standing case involving moment of silence in public schools); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (dismissing for lack of standing case involving equal access to high school facilities); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (dismissing for lack of standing case challenging government's turning over property to parochial college; standing requires injury, causation and redressability).

23. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (sidestepping constitutional issue of whether NLRB's attempts to compel parochial schools to bargain violated first amendment by construing National Labor Relations Act).

Frequently, cases decided on statutory grounds give clues nevertheless to potential constitutional principles. *See infra* note 51 and accompanying text on the definition of a religious belief as enunciated in the "conscientious objector" cases.

24. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (ruling that *Younger* abstention precludes federal intervention in case involving dismissal of pregnant married teacher who did not follow "Biblical chain of command" to resolve non-renewal of her contract).

25. *See infra* notes 32 and 33 and accompanying text regarding entanglement under the establishment clause.

Church autonomy issues typically arise under one of three general scenarios. First, they may involve internal disputes over church property, *e.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872) (taking hands off approach to internal church dispute based on common law). Other leading church property cases are: *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Maryland & Va. Eldership of the Churches of God v. Church of God*, 396 U.S. 367 (1970) (*per curiam*); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190 (1960) (*per curiam*); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872).

The second type encompass the growing number of tort claims, *e.g.*, *Nally v. Grace Community Church*, 47 Cal.3d 278, 763 P.2d 948, 253 Cal.

that raises a religion clauses issue, state constitutional protections may be different than those provided by the Federal Constitution.<sup>26</sup> This causes cases to reappear before the High Court.<sup>27</sup> From a practice perspective, the state constitutional provisions<sup>28</sup> as well as the federal ones should always be pursued.

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Rptr. 97 (1988), *cert. denied*, 109 S. Ct. 1644 (1989) (non-therapist counselors, i.e., clergy, have no duty of care to refer potentially suicidal persons to mental health professional); *Gorman v. Swaggert*, 524 So.2d 915 (La. Ct. App. 1988), *cert. denied*, *Swaggart v. Adler*, 109 S. Ct. 1134 (1989) (holding statements to media as part of church's internal discipline procedure not protected by First Amendment from civil court's jurisdiction in defamation suit); *Guinn v. Church of Christ*, 775 P.2d 766 (Okla. 1989) (holding former member can recover for defamation for remarks made in course of church discipline after she withdrew from membership); *Holy Spirit Ass'n v. Molko*, 46 Cal.3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988); *cert. denied*, 109 S. Ct. 2110 (1989) (former members allowed to sue former church for fraud, deceit, intentional infliction of emotional distress and false imprisonment); *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985) (holding religious organization immune from sexual orientation discrimination suit, but not from related torts suits).

The third type involves church resistance to government regulations and usually is less successful unless the church shows that the regulation impinges on some area so central to the church's ministry, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (First Amendment precludes application of Title VII sex discrimination charge brought by female minister); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (religious school successful in resisting state accreditation); *but cf.* *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed sub nom Faith Baptist Church v. Douglas*, 454 U.S. 803 (1981) and *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) (state prevailed on requiring accreditation for church run schools).

See Payne, *Looking Behind the Church Door: A Research Guide to Church Autonomy Issues*, forthcoming.

26. See, e.g., *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) *on remand to* 112 Wash.2d 363, 771 P.2d 1119 (1989), *cert. denied*, 110 S. Ct. 147 (1989) (Washington Supreme Court holding on remand that state constitution prohibited granting aid and denial was not violation of free exercise).

27. *Id.* See also *Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660, *on remand to* *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990) (holding free exercise clause allows the state to prohibit sacramental peyote use and to deny unemployment benefits to persons discharged for its use).

28. See Greenawalt, *The Concept of Religion in State Constitutions*, 8 CAMPBELL L. REV. 437 (1986) (discussing the interplay of state and federal constitutions in religion cases).

Although it is somewhat dated, C. ANTIEAU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965), provides an extensive survey of state constitutional provisions relating to various religion topics. The 66 page appendix contains selected state constitutional clauses dealing



### A. *The Establishment Clause*

While both religion clauses are guarantees of religious freedom, doctrinally each has developed separately. After a series of cases beginning in 1947 with *Everson v. Board of Education*<sup>29</sup> the Court in 1971 enunciated in *Lemon v. Kurtzman*<sup>30</sup> the test it still uses<sup>31</sup> to determine whether a law passes constitutional scrutiny under the establishment clause. Under the *Lemon* test a law must have a secular purpose, it must have a primary secular effect, and it must not result in excessive entanglement with religion. The third prong eliminates situations where the church takes over government functions,<sup>32</sup> or where

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with religion, as does A. BURSTEIN, *Appendix C, Religion Clauses in Selected State Constitutions*, in RELIGION, CULTS AND THE LAW, 54-101 (2d ed. 1980).

See also Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989) (arguing for relying first on state constitutional provisions in establishment clause cases); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625 (1985) (discussing many state courts' more restrictive stance regarding interpretation of state establishment clauses); Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & ST. 509 (1987) (discussing early cases under state constitutions); Weisbrod, *On Evidences and Intentions: "The More Proof, The More Doubt"*, 18 CONN. L. REV. 803 (1986) (discussing the Connecticut Constitution of 1818 with respect to religious liberty); Note, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499 (1986) (contrasting federal and California provisions regarding displays like the one in *Lynch*); Green, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, 5 ALASKA L. REV. 237 (1988) (comparing religious liberty under the Alaska constitution with that of the federal); Hollberg, *Religious Liberty Law and the States*, 3 GEORGIA ST. U.L. REV. 19 (1986) (comparing federal and Georgia constitutional provisions regarding religion); Utter and Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988) (providing historical analysis of Washington's two establishment clauses).

29. 330 U.S. 1 (1947) (upholding publicly funded transportation for parochial school children). *Everson* is considered the beginning of modern establishment clause cases. Earlier the Court had upheld federal financial support of a hospital located in the District of Columbia and owned and operated by nuns in *Bradfield v. Roberts*, 175 U.S. 291 (1899).

30. 403 U.S. 602 (1971).

31. Occasionally the Court deviates from *Lemon*. For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding city erected creche as part of Christmas display of secular symbols) and in *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding state legislature's practice of retaining a legislative chaplain who prayed at opening of each legislative day) the Court looked to historical practice and found that the practices did not contravene government neutrality.

32. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (striking down a zoning law which granted churches or schools veto power over liquor license applications within a 500 foot radius of the institution). *But cf.* Bowen

the threat of government aligning itself too closely with religion or a particular religious group exists. With respect to the last, the entanglement prong also encompasses concerns over political divisiveness along religious lines.<sup>33</sup>

With respect to research, *Lemon* directs the researcher to attempt to locate a secular purpose for contested legislation, most likely from the legislative history,<sup>34</sup> despite the disfavor with which such histories are viewed by some members of the Court.<sup>35</sup> Frequently, legislative histories for federal statutes are already compiled.<sup>36</sup> N. Johnson, *Sources of Compiled Legislative Histories* (1988 and supp.) lists sources of compilations through the 99th Congress. Researching state legislative histories is much more difficult. L. Hellebust, *State Legislative Sourcebook: 1989: A Resource Guide to Legislative Information in the Fifty States* (1988 and supp.) and M. Fisher, *Guide to State Legislative and Administrative Materials* (4th ed. 1988) indicate sources for determining legislative intent.<sup>37</sup>

History has shaped the Court's establishment clause jurisprudence<sup>38</sup> though it seldom provides the sole rationale for a decision.<sup>39</sup> The role of history in understanding the first

v. Kendrick, 487 U.S. 589 (1988) (rejecting a facial challenge to federal statute which provides federal grants to various organizations including pervasively religious ones for the purpose of eliminating teenage pregnancy and remanding for further findings on the as-applied challenge).

33. For a discussion of religious disputes in America, see *Uncivil Religion: Interreligious Hostility in America* (R. Bellah & F. Greenspahn ed. 1987).

34. "LEGISLATIVE HISTORY - that information embodied in legislative documents [bills, committee reports, debates, hearings] that provides the meanings and interpretations (intent) of statutes. . ." J. JACOBSTEIN & R. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* xxxiv (1987 ed.)

35. See J. Rehnquist's discussion in *Wallace v. Jaffree*, 472 U.S. 38, at 108 (1985) (Rehnquist, J., dissenting) and J. Scalia in *Edwards v. Aguillard*, 482 U.S. 578, at 625-26 (Scalia, J., dissenting).

36. C. KUNZ, D. SCHMEDEMANN, C. ERLINDER, M. DOWNS & A. BATESON, *THE PROCESS OF LEGAL RESEARCH: SUCCESSFUL STRATEGIES* 191-214 (2d ed. 1989) explains necessary steps for compiling a legislative history for federal statutes.

37. See also L. HELLEBUST, *STATE LEGISLATIVE SOURCEBOOK: 1990: A RESEARCH GUIDE TO LEGISLATIVE INFORMATION IN THE FIFTY STATES* (1989) for an overview of legislative history sources and Manion, *Researching State Legislative Histories: A Bibliography*, 29 L. LIB. LIGHTS 14 (Mar./Apr. 1986) indicating sources which cover all the states and sources for about fifteen specific states.

38. For example, despite the 5-4 split in *Everson*, even the dissenters agreed with the Court's reading of history.

39. See *supra* note 31. In addition, in *Walz v. Tax Comm'n*, 397 U.S. 664, 675-76, 680 (1970) the Court considered the churches' historically held exemptions in explaining the purpose and effect of the statute, and in

amendment has produced a great amount of writing about both history itself and about the balance between historical accounts and the principle of *stare decisis*.<sup>40</sup> While reliance upon history alone may be dangerous, an examination of the following historical sources may prove helpful<sup>41</sup> to students of the first amendment:

B. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (1878).

M. Farrand, *The Records of the Federal Convention of 1787* (1911 and 1987 supp.) (standard source for documents including participants' notes and proposed plans).

W. Swindler & D. Musch, *Sources and Documents of U.S. Constitutions*, 2d. series (1982-1987).

U.S. Bureau of Rolls and Library of the Dept. of State, *Documentary History of the Constitution of the United States of America, 1786-1870* (1894-1905) H.R. Doc. No. 398, 69th Cong., 1st Sess. (1927).

*The Federalist*, available in many editions (essays of Madison, Jay and Hamilton in support of the Constitution).

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McGowan v. Maryland, 366 U.S. 420 (1961) the Court held that history had removed the significance of Sunday closing laws.

40. See, e.g., Marshall, *Unprecedented Analysis and Original Intent*, 27 Wm. & MARY L. REV. 925 (1986) (questioning whether lack of clarity in religious cases justifies overturning based on an understanding of original intent an entire jurisprudence); G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 135-36 (1987) (arguing that *stare decisis* does not justify continued following of *Everson* line); Note, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345, 371-76 (1986) (arguing that *stare decisis* should not have role in constitutional adjudication).

41. Several books treat the relationship of religion in American history to First Amendment religion jurisprudence, e.g., R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); M. HOWE, *THE GARDEN AND THE WILDERNESS* (1965); L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); M. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); W. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986) M. PETERSON & R. VAUGHAN, *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* (1988).

Other books focus on a single person's impact, e.g., *THE FIRST AMENDMENT: THE LEGACY OF GEORGE MASON* (T. Shumate ed. 1985) and *JAMES MADISON ON RELIGIOUS LIBERTY* (R. Alley ed. 1985).

J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836-59, reprinted 1987) (ratification debates).

M. Jensen, *Documentary History of the Ratification of the Constitution* (1976 and supp.) (multivolume set compiling documents, not yet complete).

*Annals of Congress* (reports Congressional debates 1789-1824, that is, 1st-18th Cong., 1st Sess.).

Ames, *Proposed Amendments to the Constitution during the First Century of its History*, H.R. Doc. No. 353, Pt. 2, 54th Cong., 2d Sess. (1897).

P. Kurland & R. Lerner, *The Founders' Constitution*, vol.5 (1987) (references to and excerpts from primary materials relating to the first twelve amendments).

J. Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) (1st ed. Boston 1833).

T. Cooley, *A Treatise on Constitutional Limitations* (7th ed. 1903).

Recurring establishment clause questions include the permissibility of state-sponsored financial aid to religiously-affiliated schools<sup>42</sup> and the permissibility of religiously-oriented

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42. Regarding aid to parochial schools, see for example, *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state statute granting taxpayers deductions for expenses incurred to send their children to either private or public school), but compare that with *Sloan v. Lemon*, 413 U.S. 825 (1973) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (both invalidating tuition reimbursement and tax credit schemes for parents of nonpublic school students). See also *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (striking down community education and shared time programs held in sectarian schools); *Aguilar v. Felton*, 473 U.S. 402 (1985) (striking down use of federal funds to pay public school educators providing services at private schools including religious ones); *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding statute authorizing reimbursement to nonpublic schools for expenses connected with state mandated functions); *Wolman v. Walter*, 433 U.S. 229 (1977) (fragmented Court following earlier rulings to uphold textbook loans, subsidization of standardized tests, but not for lending materials and funding student field trips); *Meeck v. Pittenger*, 421 U.S. 349 (1975) (invalidating several forms of aid to parochial schools, but upholding a textbook loan program); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (invalidating payment to parochial schools for state mandated services); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down as too entangling state efforts to subsidize parochial schools); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding a program providing textbooks to parochial school students).

With respect to colleges see, *Witters v. Washington Department of*

practices in state-run schools, where an element of religious coercion might be present.<sup>43</sup> The Court has determined that government sponsorship should be forbidden since it appears to endorse either a particular religion<sup>44</sup> or religion in gen-

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Servs. for the Blind, 474 U.S. 481 (1986) (unanimous reversal of state high court ruling that vocational rehabilitation at Christian college for religious career would advance religion), *on remand*, 112 Wash. 2d 363, 771 P.2d 1119 (1989) (holding state constitution prohibits granting aid and that denial does not violate free exercise clause), *cert. denied*, 110 S. Ct. 147 (1989); *Roemer v. Public Works*, 426 U.S. 736 (1976) (upholding state program providing annual grants to non-public colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding state program of issuing bonds to benefit private colleges); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding federal grants for construction of facilities not involved with religious activity).

Regarding other types of financial benefit to religion, see, *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (striking down statute which granted tax exemption to religious publishers); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding I.R.S. authority to deny tax exempt status to sectarian schools which discriminate on racial grounds due to sincerely held religious belief); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding property tax exemptions for churches as part of a wider program exempting nonprofit institutions).

43. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down statute mandating equal treatment for evolution and creation science); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down statute mandating silence for meditation or prayer in public schools); *Stone v. Graham*, 449 U.S. 39 (1980) (summary disposition striking down statute requiring posting in public school classrooms privately purchased copy of ten commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that the state cannot forbid teaching of evolution in public schools without a secular purpose); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (holding daily Bible reading in public schools violative of establishment clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding state board prepared nondenominational prayer as violative of establishment clause); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding release time for religious training off school premises); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (striking down program of released time in which public school classrooms were turned over to clerics during the school day).

See also *Mozert v. Hawkins County Pub. Schools*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (in free exercise case, court held that requiring public schools students to study basic reader did not create unconstitutional burden on religion); *Smith v. Board of School Comm'n*, 827 F.2d 684 (11th Cir. 1987) (textbooks which failed to refer to religious aspects of historic events not violative of establishment clause); *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985), *appeal dismissed sub nom.* *Karcher v. May*, 484 U.S. 72 (1987) (circuit court found one minute period of silence had religious purpose, advanced and inhibited religion and fostered excessive government entanglement; Supreme Court dismissed for want of jurisdiction since appellants no longer held presiding offices in state legislature, i.e., capacity in which they had appealed).

44. E.g., *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989) (holding a creche in the county courthouse violates

eral,<sup>45</sup> thereby violating the principle of government neutrality toward religion. This principle is widely regarded as necessary to religious freedom. Separation of church and state, expressed in a "wall metaphor"<sup>46</sup> has proved particularly problematic in the 1980's, especially with respect to what role the religious should play in politics. As late as 1978, laws prevented clergy from full participation.<sup>47</sup>

### B. *The Free Exercise Clause*

Under the free exercise clause, a law which substantially burdens religion may stand only if it is incidental to a regulation of secular activities, is "compelling" and is narrowly tailored to achieve the desired government end. The Court makes a belief/action distinction,<sup>48</sup> the former receiving greater protection under the free exercise clause. The claimant

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the establishment clause, but a Christmas tree and menorah together outside the city-county building had a secular status); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (allowing city display of creche surrounded by secular holiday symbols).

See also *Douglas County School Dist. v. Jager*, 862 F.2d 824 (11th Cir.), cert. denied, 109 S. Ct. 2431 (1989) (holding invocation prior to high school football games violates first amendment); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (holding as proper high school commencement invocations and benedictions which preserve liberty of conscience, but disallowing prayers in question as symbolically approving Christian prayers).

45. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (striking down tax exemption for religious publishers as favoring religion over other nonprofits); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (striking down statute which forced accommodation for Sabbathkeepers as favoring particular religious belief); *Larson v. Valente*, 456 U.S. 228 (1982) (striking down as preferential statute which required reporting by only religious organizations that solicited more than fifty percent of donations from nonmembers).

Cf. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (holding that Title VII provision exempting religious organizations from religious discrimination as applied to nonprofit secular activities does not unconstitutionally favor religion).

46. Jefferson's phrase that the first amendment erects a "wall of separation" between church and state has proved problematical. While all the justices on the 5-4 *Everson* court agreed with that conception, there was disagreement as to how high or impregnable that wall is.

47. *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down state law disqualifying clergy from legislative office).

48. In *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1879) (upholding federal law prohibiting polygamy) the Court stated that although the first amendment prohibited Congress from reaching an individual's opinions, it could prohibit actions in order to preserve societal order.

seeking an exemption or otherwise challenging a government practice first must establish that he/she sincerely holds the religious belief and that the government practice results in a substantial burden to the individual. While the compelling interest test formerly mimicked the equal protection analysis by which the state had to choose the least restrictive alternative if religion had to be burdened, recent Court decisions focus less on whether the interest is compelling and more on whether the practice is actually prohibited.<sup>49</sup>

Although the claimant's belief must be a religious one, the Court has not created a constitutional definition of religion. Early on, the Court established that a court could not question the validity of a belief, but must accept the belief provided the adherent holds it sincerely.<sup>50</sup> During the 1960's in a series of cases involving conscientious objectors, the Court construed broadly a statutory definition of religion.<sup>51</sup> Although trial strategy implications exist, a religious adherent's practice need not be consistent with other's of a particular sect<sup>52</sup> nor does a claimant need to be a member of a religious sect to be pro-

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49. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding free exercise did not preclude timber harvesting or road construction through areas used for religious purposes by Native Americans because the adherents would not be coerced to violate their religious beliefs nor be penalized for holding such beliefs). As this bibliography was going to press, the Court announced its decision in *Employment Div., Dep't of Human Resources v. Smith*, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990). A statement from Justice O'Connor's concurrence indicates the potential impact on an understanding of free exercise jurisprudence: "In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.* at 4438 (O'Connor, J., concurring).

50. See *United States v. Ballard*, 322 U.S. 78 (1944) (holding in a mail fraud case that courts may not inquire into the accuracy or truthfulness of religious beliefs).

51. See *Welsh v. United States*, 398 U.S. 333 (1970) (holding statute providing military exemptions for religiously based opposition to war covered those whose deeply held belief was based on moral, ethical or religious grounds); *United States v. Seeger*, 380 U.S. 163 (1965) (holding statute's requirement of "belief in relation to a Supreme Being" embraces any sincere belief paralleling one filled by the orthodox belief in God).

*Cf.* *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting as selective opposition bid for conscientious objector status by claimant opposing unjust war).

52. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (holding unconstitutional state denial of unemployment benefits to Jehovah's Witness who quit job which required him to produce war materials although other Jehovah's Witnesses at the factory did not believe it to contravene the sect's beliefs).

tected.<sup>53</sup> However, the centrality of the belief to a sect may affect the outcome.<sup>54</sup>

Most free exercise claims at the Supreme Court level have involved claims by members of minority religions.<sup>55</sup> The earliest cases concerned federal prosecutions of Mormons who practiced polygamy.<sup>56</sup> During the 1930's and 40's the Court decided on the basis of free speech a number of cases brought by Jehovah's Witnesses whose religious practices were burdened by various local licensing requirements<sup>57</sup> and by laws requiring that school children salute the flag.<sup>58</sup> In addition, the claims of Seventh-day Adventists and other Sabbatarians have reached the Court with regard to employment related claims.<sup>59</sup>

53. See *Frazee v. Illinois Dept. of Employment Sec.*, 109 S. Ct. 1514 (1989) (holding unconstitutional state's denial of unemployment benefits to petitioner, a non-affiliated Christian whose belief kept him from working on Sunday).

54. Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish from compulsory education after the eighth grade) with *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upholding U.S. Forest Service's plan to construct a road through portion of national forest used by three tribes for religious purposes).

55. In an attempt to provide understanding of minority religions, G. BRASWELL, *UNDERSTANDING SECTARIAN GROUPS IN AMERICA* (1986) discusses the beliefs of many of these faiths.

56. See *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1879) (upholding federal law prohibiting polygamy); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding territorial jurisdiction to enforce criminal law prohibiting polygamists from voting); *Church of Latter Day Saints v. United States*, 136 U.S. 1 (1890) (charter of Mormon Church repealed as not a religious corporation due to purported religious tenet of polygamy).

These were preincorporation cases. In *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the Court relied on the due process clause of the fourteenth amendment to strike down a statute which required teaching only in English to students below the ninth grade and one which required students to be educated in public schools. These cases stand for parental autonomy in educating children.

57. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down members' convictions for soliciting funds and distributing materials without a license).

*Murdock v. Pennsylvania*, 319 U.S. 105 (1943), *overruling Jones v. Opelika*, 316 U.S. 584 (1942) (holding soliciting tax could not be applied to religious proselytizers) focused on religious freedom rather than both freedoms of speech and religion.

58. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

Years later, in *Wooley v. Maynard*, 430 U.S. 705 (1977) the Court overturned criminal sanctions imposed on Witnesses who found a license plate motto, "Live Free or Die," repugnant to their beliefs.

59. The Court determined that unemployment benefits could not be denied to Seventh-day Adventists whose beliefs prohibited them from



Cases involving the Church of Scientology,<sup>60</sup> Hare Krishna's,<sup>61</sup> "Moonies"<sup>62</sup> and Amish<sup>63</sup> have come before the Court more recently.

Establishing a free exercise claim is difficult<sup>64</sup> and the level of accommodation required is relatively slight. Ease in administration,<sup>65</sup> military discipline,<sup>66</sup> and prison security needs<sup>67</sup> have provided government interests which the Court found justified particular burdens on religious beliefs. In addition, public policy concerns such as eradicating racial discrimination,<sup>68</sup> over-

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working during Sabbath hours in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (Adventist convert who had previously worked during those hours) and *Sherbert v. Verner*, 374 U.S. 398 (1963).

Members of the Worldwide Church of God also honor a Sabbath and celebrate holy days as well. In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986), the Court remanded for further factual development on the issue of religious accommodation under Title VII, but held that unpaid leave for certain religious holidays would not be a reasonable accommodation when paid leave is provided for all but religious purposes. *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (holding Title VII does not require an employer to bear more than *de minimis* costs to accommodate religion) involved a member of the Worldwide Church of God seeking alteration of a Saturday work schedule which would have violated a union seniority system.

60. *E.g.*, *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989).

61. *E.g.*, *Heffron v. International Society for Krishna Consciousness, Inc.*, 453 U.S. 640 (1981).

62. *E.g.*, *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert denied*, 466 U.S. 971 (1984); *Holy Spirit Ass'n for the Unification of World Christianity v. Molko*, 46 Cal.3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert denied*, 109 S. Ct. 2110 (1989).

63. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *United States v. Lee*, 455 U.S. 252 (1982).

64. *See, e.g.*, *Braunfield v. Brown*, 366 U.S. 599 (1961) (holding economic burden of Sunday closing laws on Orthodox Jews only an indirect burden so no exemption required); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding solicitation rule under free speech clause even when applied to members of religious sect); *Mozert v. Hawkins County Pub. Schools*, 827 F.2d 1058 (6th Cir. 1987), *cert denied*, 484 U.S. 1066 (1988) (reversing requirement that schools exempt fundamentalist Christian children from reading materials that offended their religious beliefs).

65. *See Bowen v. Roy*, 476 U.S. 693 (1986) (refusing to exempt Native American from using social security number); *United States v. Lee*, 455 U.S. 252 (1982) (denying Amish employer exemption from participation in social security system).

66. *See Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding Air Force regulation prohibiting other than military headdress in context of Orthodox Jew's need to wear yarmulke while on duty).

67. *See O'Lone v. Shabazz*, 482 U.S. 342 (1987) (applying deferential standard in upholding prison regulations which prevented Islamic prisoners from attending religiously compelled Friday service).

68. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)

riding health considerations,<sup>69</sup> and child protection,<sup>70</sup> especially related to education<sup>71</sup> have been found to outweigh religious beliefs.

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(upholding denial of tax exempt status to school that practiced race discrimination due to sincerely held religious belief).

See also *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (religious university must allow gay student group equal use of facilities under local ordinance prohibiting discrimination on the basis of sexual orientation).

69. Numerous state cases hold that health considerations can override religious objections. *E.g.*, *Wright v. DeWitt School Dist.*, 238 Ark. 906, 385 S.W.2d 644 (1965) (upholding vaccination requirement); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 309 U.S. 598 (1968), *reh'g denied*, 391 U.S. 961 (1968) (appointing guardian for medical treatment for child whose parents religion prohibits such treatment); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1959), *cert. denied*, 344 U.S. 824 (1952) (upholding appointment of guardian for obtaining consent to blood transfusion for child over parents' religious objection). *Cf. Fosmire v. Nicoleau*, 75 N.Y.2d (1990) and *Public Health Trust v. Wons*, 541 So. 2d 96 (1989) (upholding adult refusal of blood transfusion).

Despite statutes in some states which exempt from child abuse and neglect laws parents who withhold traditional medical treatment for their children and practice spiritual healing, Christian Science parents in Florida, Massachusetts, Arizona and California have been prosecuted when the spiritual healing failed. See *When Faith Healing Fails*, A.B.A. J., July 1989, at 22-24. See *Commonwealth of Pennsylvania v. Barnhart*, 345 Pa. Super. 10, 497 A.2d 616 (1985), *cert. denied*, 109 S. Ct. 55 (1988) (parents may not defeat under free exercise clause criminal charge for child's death); *Walker v. Superior Court*, 47 Cal.3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988), *cert. denied*, 109 S. Ct. 3186 (1989) (statutory exemption only for misdemeanor, not for felony manslaughter).

70. See, *e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor law as to child distributing religious materials).

71. Courts have held state education requirements outweigh religious concerns. *E.g.*, *Mozert v. Hawkins County Pub. Schools*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (holding that requiring public school students to study basic reader did not create unconstitutional burden on religion); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) (holding no free exercise violation where students were assigned alternate book and excused from class discussion).

*State v. Melin*, 428 N.W.2d 227 (N.D. 1988), *cert. denied*, 109 S. Ct. 367 (requiring certification of teacher in home school); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989) (holding private school must meet local school committee approval in accord with Massachusetts statute), *cert. denied*, 58 U.S.L.W. 3627 (U.S. Apr. 2, 1990) (No. 89-1118); *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed*, 454 U.S. 803 (1981) (holding state's interest in promoting education overcame school's claim that any state regulation violated religious tenets); *Bangor Baptist Church v. State of Maine, Dep't of Educational and Cultural Servs.*, 576 F. Supp. 1299 (D. Maine 1983) (holding

### C. Relationship Between the Two Clauses

As with the broad spectrum of interpretive views of the first amendment,<sup>72</sup> agreement about the relationship between the religion clauses in insuring religious freedom does not exist. To a certain extent, the doctrinal split is an artificial one, in that the Court frequently refers to both clauses even while basing its decision on one clause. Furthermore, it is not uncommon for an author to appear inconsistent in a variety of issue contexts as they are considered under one clause or the other. Certain issues have been presented to the Court under each clause.<sup>73</sup> Church autonomy issues frequently involve both clauses.<sup>74</sup>

Several commentators have noted a "tension" between the two clauses.<sup>75</sup> They point, for example, to exemptions which might benefit one religion over another<sup>76</sup> or of religion over nonreligion.<sup>77</sup> In 1981, then Associate Justice William Rehn-

state's compulsory education laws did not prohibit operation of private schools simply because schools lacked state approval).

*Cf.* *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (holding state's regulations infringed on parent's interest to direct religious education).

72. Discussed *supra* notes 18-21 and accompanying text.

73. *See, e.g.*, the Sunday closing cases, under the free exercise clause, *Braunfield v. Brown*, 366 U.S. 599 (1961) and *Gallagher v. Crown Koshers Supermarket*, 366 U.S. 617 (1961); under the establishment clause, *McGowan v. Maryland*, 366 U.S. 420 (1961) and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

More recently, school curricula have been treated under each of the two doctrines in, *Mozert v. Hawkins County Pub. Schools*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (in free exercise case, court held that requiring public schools students to study basic reader did not create unconstitutional burden on religion) and *Smith v. Board of School Comm'n*, 827 F.2d 684 (11th Cir. 1987) (textbooks which failed to refer to religious aspects of historic events not violative of establishment clause).

74. Discussed *supra* note 25.

75. *E.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (arguing that same principle which prohibits government action which coerces, compromises or influences religious belief undergirds both clauses); McCoy & Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986) (arguing that the clauses should be read as one).

76. *E.g.*, *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (overturning statutory exemption granted Sabbathkeepers as establishing Sabbathkeeping); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (rejecting Navajo's request for accommodation as establishment of religious shrine).

77. *E.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (striking down statute which granted tax exemption to religious publishers). *See also* *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990)

quist gave as three reasons for the tension recent expansions of social welfare legislation, incorporation of the first amendment and "our overly expansive interpretation of *both* Clauses [which has] narrowed the channel. . . through which any state or federal action must pass. . . to survive constitutional scrutiny."<sup>78</sup> Tension arose in the 1980's regarding equal access to government facilities.<sup>79</sup> In 1984 Congress enacted the Equal Access Act<sup>80</sup> requiring schools which already permit non-curriculum related student groups to meet to extend the same privileges without respect to the content of the speech.

#### D. *Religion in American Political Life*

Even where religious beliefs do not result in litigation, several controversies exist over religion in American life. Americans feel deeply about their religious beliefs or their choice not to hold "religious" beliefs.<sup>81</sup> Because religious beliefs often are articulated in terms of faith or allegiance to a higher power, believers often receive criticism when they make political decisions based upon a deeply held religious belief. However, when such a decision is articulated in a nonreligiously based way, the public may be more receptive to it.<sup>82</sup>

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(upholding application of California sales tax to religious publications distributed by religious organizations).

78. *Thomas v. Review Board*, 450 U.S. 707, 720-721 (1981) (Rehnquist, J., dissenting).

79. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating state university's refusal to provide religious students equal access to state university facilities).

80. Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (codified at 20 U.S.C. §§ 4071-4074) (Supp. V 1987) On January 9, 1990 the Court heard in *Westside Community Schools v. Mergens*, #88-1597, opinion below, *Mergens v. Board of Educ.*, 867 F.2d 1076 (10th Cir. 1988), *cert. granted*, 109 S. Ct. 3240 (1989) arguments on the constitutionality of the law.

81. *See generally* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 219-49 (1985) (observations based on survey research of religion in American life). *See also* M. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* (1984) (500 page history of religious groups in the United States).

82. Due to the higher visibility of Christians in politics including the strong backing of Ronald Reagan by Conservative Christians as well as the presidential candidacies of Rev. Jesse Jackson and Rev. Marion (Pat) Robertson, a number of books relating to religion in American political life came out during the 1980's. In addition to those annotated in the selective bibliography, the following examples can be retrieved with the given Library of Congress subject headings: *THE BIBLE, POLITICS AND DEMOCRACY: ESSAYS* (R. Neuhaus ed. 1987) (Democracy—Religious Aspects—Christianity); R. PIERARD & R. LINDER, *CIVIL RELIGION AND THE PRESIDENCY* (1988) (Civil

Another difficulty that arises when political speech is dressed in religious garb is that because religious beliefs may derive from a "higher authority," belief-driven societal concerns may fit a preconceived, but seldom universally accepted, notion of what is "right" for society. Rather than engendering further discourse in the quest for compromise and consensus, participants have difficulty separating unswerving commitment to a religiously ordered position from the give and take of the process of governance in a democracy with a pluralistic populace.<sup>83</sup>

Among the underlying issues regarding constitutional interpretation are disputes about perceptions of the framers' view of the role of religion in America and what effect that view should have in constitutional adjudication, and about the place of minority religions and adherents' religious freedom *vis-à-vis* that of the majority. The pluralistic nature of the religious landscape creates a very different situation than the predominantly Protestant scene which once dominated those who practiced any religion.<sup>84</sup>

Several church organizations<sup>85</sup> historically have held public policy positions on social issues, among them the National Council of Churches and American Jewish organizations. More recently the American Catholic Church has expressed views on economics,<sup>86</sup> war<sup>87</sup> and abortion.<sup>88</sup> Evangelical groups have

Religion—United States; Presidents—United States—Religion); P. PALMER, *THE COMPANY OF STRANGERS: CHRISTIANS AND THE RENEWAL OF AMERICA'S PUBLIC LIFE* (1981) (Christians—United States).

83. See Simon, *Religion and Public Life: A Partnership of Convenience or Conviction?* Speech given at the University of Notre Dame, expressing questions about religiously motivated political acts.

84. See, e.g., W. ROOF & W. MCKINNEY, *AMERICAN MAINLINE RELIGION: THE CHANGING SHAPE AND FUTURE* (1987) (United States—Religion—1960- ); R. WUTHROW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988) (United States—Religion—1945- ).

85. Refer to Appendix B for a list of organizations involved in church-state issues.

86. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S ECONOMY* (1986) (American economic development).

87. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* (1983) (pastoral letter on war and peace).

88. The participation of the Catholic Church in discussions about abortion brought a challenge to its tax-exempt status in *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982), *on reh'g*, 603 F. Supp. 970 (S.D.N.Y. 1985), *on appeal sub nom In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987), *cert. granted sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 484

become involved in various issues in response to perceived encroachment on traditional values.

Christians, especially in recent years, seem to have rediscovered the ballot box.<sup>89</sup> For Christians, following the words of Jesus, to “[r]ender to Caesar the things that are Caesar’s and to God the things that are God’s[.]”<sup>90</sup> seems to have taken on a slightly new meaning as Christians recognize that in a democracy they *are* Caesar. Perhaps they are applying the words in Paul’s letter to the Romans claiming that “the powers that be are ordained of God[.]”<sup>91</sup> viewing their input as duty to stand for the right.

#### E. *Contemporary Problems Under the Religion Clauses*

In addition to the breakdown of cases along doctrinal lines, as noted above, particular factual situations repeatedly present conflicts under the religion clauses. In addition to areas the framers may have envisioned, such as legislative chaplains, conscientious objectors, financial aid to religion and observance of Sabbaths and religious holidays, because government now touches almost every aspect of daily life, religion cases arise from numerous sources.

Among the employment related statutes which impact religion, probably the most frequently litigated provision is section 701(j) of Title VII of the Civil Rights Act of 1964, which requires employers to reasonably accommodate an employee’s religious practice without undue hardship on the employer’s business.<sup>92</sup> Problems also arise under other aspects of Title VII,<sup>93</sup> as well as under other federal<sup>94</sup> and state employment

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(1987), *remanded*, 108 S. Ct. 2268 (1988) to 885 F.2d 1020 (2d Cir. 1989) (dismissed for lack of standing), *petition for cert. filed*, 58 U.S.L.W. 3584 (U.S. Feb. 1, 1990) (No. 89-1242).

89. In previous times religious groups have been involved in such political movements as abolition, prohibition, antiwar and civil rights.

90. *Mark* 12:17.

91. *Romans* 13:1.

92. “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (1982). *See* *Trans World Airlines, Inv. v. Hardison*, 432 U.S. 63 (1977) (holding employer not required to bear more than de minimis costs) and *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60 (1986) (holding statute requires reasonable accommodation and that undue hardship is only one factor in determining reasonableness).

93. *See, e.g.*, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding the

statutes,<sup>95</sup> schooling,<sup>96</sup> freedom of religion for Native Americans<sup>97</sup> and problems relating to church autonomy.<sup>98</sup> The rise

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constitutionality of Title VII exemption for religious organizations) and Equal Employment Opportunity Comm'n v. Townley Engineering and Manufacturing Co., 859 F.2d 610 (9th Cir. 1988), *cert. denied*, Townley Manufacturing Co., Inc. v. E.E.O.C., 109 S. Ct. 1527 (1989) (prohibiting employer from holding mandatory chapel services for employees); Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (holding employee constructively discharged after leaving due to required staff meetings which included religious exercises); Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd on procedural grounds*, 474 U.S. 978 (1985) (6th Circuit ruled free exercise clause prevented Commission inquiry into sex discrimination); E.E.O.C. v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (gender discrimination not protected by free exercise clause).

94. Cases construing other federal statutes include, Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (upholding enforcement of the Fair Labor Standards Act as to nonprofit religious organization); United States v. Lee, 455 U.S. 252 (1982) (upholding Social Security Act requirement that Amish employer contribute to system); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) (exempting church related school from the Federal Unemployment Tax Act as a matter of statutory construction); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (rejecting N.L.R.B.'s attempts to compel parochial schools to bargain by construing National Labor Relations Act); Universidad Central de Bayamon v. N.L.R.B., 793 F.2d 383 (1st Cir. 1985).

95. Examples of cases involving state statutes include, Estate of Thornton v. Caldor, 472 U.S. 703 (1985) (striking down state statute which required absolute accommodation for Sabbathkeepers); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (striking down as unconstitutional rule that would have prevented new convert who lost employment due to religious reasons from obtaining state unemployment benefits).

96. See *supra* note 42 regarding disputes over aid to church-related educational institutions. See *supra* note 43 regarding questions of what arguably religious influences may be in the schools.

Other school related conflicts arise out of states' efforts to protect children under health and safety regulations which cover everything from fire and lighting regulations to curriculum and teacher certification requirements. See *supra* note 71.

Closely related to the conflict between church institutions and the state over regulation is that which arises between individuals who want to educate their children at home and state compulsory education requirements. See, e.g., New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (holding proposed approval process does not violate the first amendment), *cert. denied*, 58 U.S.L.W. 3627 (U.S. Apr. 2, 1990) (No. 89-1118). See also Shepperd, *Home Schooling: Dimensions of Controversy*, 31 J. CHURCH & ST. 101-14 (1989).

97. See, e.g., Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, *on remand to Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990) (holding free exercise clause allows the state to prohibit sacramental peyote use and to deny unemployment

in popularity of non-western religions has presented various issues.<sup>99</sup> Moreover, a number of miscellaneous issues, some of them of great importance, have reached the courts.<sup>100</sup>

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benefits to persons discharged for its use); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upholding U.S. Forest Service's plan to construct a road through portion of national forest used by three tribes for religious purposes); *Bowen v. Roy*, 476 U.S. 693 (1986) (upholding Social Security regulation requiring Native American to use a Social Security number for his daughter though in conflict with religious beliefs); *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (holding unconstitutional application of state criminal laws to Native Americans using peyote in religious ceremony). *See also* 42 U.S.C. § 1996 (1982) (purported government policy that land worshipped by Native Americans be left unspoiled).

98. *See supra* note 25.

99. *E.g.*, *Hernandez v. Commissioner*, 109 S. Ct. 2136 (1989) (holding payment of auditing service to church not deductible for income tax purposes). Note the dissent where J. O'Connor argues that the Scientology audit and counseling practice is comparable to buying a ticket to a Yom Kippur service, paying a mass stipend or buying a pew. *Id.* at 2154-55.

Although the state court followed traditional deferential treatment in *Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n*, 55 N.Y.2d 512, 435 N.E.2d 662, 450 N.Y.S. 2d 292 (1982) (reversal of denial of property tax exemption for religious entity), in *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (tax fraud prosecution of church's spiritual leader) the Second Circuit refused to apply the neutral principles approach to the Unification Church as not applicable under the facts.

*See also* *Molko v. Holy Spirit Ass'n*, 46 Cal.3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 109 S. Ct. 2110 (1989) (former members allowed to sue former church for fraud, deceit, intentional infliction of emotional distress and false imprisonment).

To gain a general understanding of the social dynamics of some of the new religious movements, see M. GALANTER, *CULTS: FAITH, HEALING AND COERCION* (1989) and *CULTS AND NEW RELIGIOUS MOVEMENTS* (M. Galanter ed. 1989).

100. *See, e.g.*, *Jensen v. Quaring*, 472 U.S. 478 (1985) (equally divided Court affirming claimant's request for exemption from state's requirement of picture on driver's license); *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J. Super. 414, 479 A.2d 935 (1983) (sheltering homeless free exercise claim as against zoning ordinance); *Bartling v. Superior Court*, (Glendale Adventist Medical Center), 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (Seventh-day Adventist hospital raised but did not prevail on free exercise claim as against patient family's attempts to remove life support); *Avitzur v. Avitzur*, 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983) (court enforced a Jewish divorce under secular contract principles); *Curran v. Catholic University of America*, Civ. Action No. 1562-87 (Super. D.C. Feb. 28, 1989) (suit, with first amendment implications, for breach of contract due to Papal letter finding plaintiff unsuitable to teach Catholic theology); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1638 (1989)



## PART II-RESEARCH PROBLEMS

Research problems related to the religion clauses derive from substantive idiosyncracies as well as those related to the sources themselves.

A. *The Doctrinal Split*

The first amendment doctrinal split presents initial research problems. While cases have been grouped into establishment and free exercise cases, that initial determination is somewhat arbitrary or haphazard, determined by factors such as a practitioner's creativity or a lower court's characterization of the facts. For example, if an employee's job in a gender discrimination suit can be characterized as integral to a church's ministry, as in the case of a minister, the Court will find that the first amendment blocks adjudication of church matters.<sup>101</sup> Similarly, in church property disputes characterization of the church organization as hierarchical or congregational determines whether entanglement prevents a court from adjudicating.<sup>102</sup> Education issues also frequently turn upon characterization.<sup>103</sup>

Since the likelihood of appeal is great, the minute factual distinctions require that characterization and facts carefully be

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(upholding zoning ordinance precluding church construction in agricultural zone).

101. See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972) (first amendment precludes application of Title VII to sex discrimination charge brought by female minister).

102. In *Jones v. Wolf*, 443 U.S. 595 (1979) the Court determined that in adjudicating church property disputes either of two methods, the neutral principles of law approach, or the deference approach, may be employed. The former approach allows a court to interpret and apply secular provisions of a church's governing documents to determine the outcome. The latter approach calls for a court to defer to the determination of the church's highest authority.

The problem with the former is that the court must assume that the church's legal documents reflect informed member's expectations. The problem with the latter is that it allows churches to have a preferred status over other groups in society. In addition, under the deference rule, the Court assumes that all churches can be classified as either hierarchical or congregational, and thus forces court inquiry into church affairs to determine which organizational classification applies, thus bordering on the entanglement problem which use of the test is meant to avoid.

103. For a full discussion of characterization problems, see Note, *The Unseen Regulator: The Role of Characterization in First Amendment Free Exercise Cases*, 59 NOTRE DAME L. REV. 978 (1983-84) (authored by Brent Marshall) (discussing relationship between characterization and outcome).

established at the trial level.<sup>104</sup> With respect to the doctrinal split, strategy too is important, as the remedy may differ under each clause.

### B. *Federalism*

The doctrinal split is not the only place dualism presents a trap for the unwary researcher. Principles of federalism, especially where constitutional issues are concerned mandate that the state constitution always be consulted as well.<sup>105</sup> Even where the text of the state provisions parallel that of the federal constitution, individual state courts may interpret the language so as to give broader protection.<sup>106</sup>

This holds true for statutes as well. Even where a federal statute is implicated, a nearly parallel state statute may exist. Frequently state statutes or local ordinances<sup>107</sup> protect from discrimination certain minority groups not protected by federal legislation. In addition certain federal laws require adherence to state protections as a procedural prerequisite to exploring the federal remedy. In religious freedom cases the current Court has carefully allowed the applicable state high courts to interpret their own state statutes. As a result, cases bounce back to the Supreme Court again.<sup>108</sup>

### C. *The Church Related/First Amendment Distinction*

Simply because an issue involves a church it does not necessarily implicate the first amendment. Most church contracts, "slip and fall" type torts and zoning compliance issues parallel

104. See the importance of setting with respect to outcome for holiday displays of a menorah and creche in *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*; *Chabad v. A.C.L.U.*; *Pittsburgh v. A.C.L.U. Greater Pittsburgh Chapter*, 109 S. Ct. 3086 (1989) (holding a creche in the county courthouse violates the establishment clause, but a Christmas tree and menorah together outside the city-county building had a secular status). See also Justice Marshall's discussion in *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2150-51 (1989) on development of litigation and problems with resolving factual distinctions, and Justice O'Connor's dissent, at 2151-56, on the same points.

105. See *supra* note 28 and accompanying text.

106. See generally Greenawalt, *The Concept of Religion in State Constitutions*, 8 CAMPBELL L. REV. 437 (1986) (comparing results under federal and state provisions).

107. See, e.g., *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (en banc) (upholding District of Columbia law which forbids colleges from denying equal treatment to students on the basis of sexual orientation).

108. See *supra* notes 26 and 27 and accompanying text.

those related to any nonprofit corporation.<sup>109</sup> The first amendment may come into play in any of these "ordinary" conflicts when the state's police power reaches into the domain governed by church doctrine, at which point the church may seek protection for free exercise.<sup>110</sup> The presence of a church as a party alerts the researcher that the facts may present the need to look beyond, for example, simple tort, property or contract principles to constitutional protections offered by the first amendment.

Prospective counseling constitutes a major part of church-state practice. New church organizations preparing by-laws may choose a particular hierarchal or congregational scheme much the same as a secular enterprise might choose a business form.<sup>111</sup> Public school boards must make curricular and administrative decisions, and religious as well as secular employers make hiring decisions which implicate for the first amendment. Thus, knowing both the current law and trends becomes an important aspect of research.

#### D. Bias

Because material about the first amendment often bears the bias of the author,<sup>112</sup> in addition to reading books and articles with an eye for recognizing bias, the first amendment novice should read more than one source on a particular aspect. In addition, the researcher should read all opinions in leading cases, not merely the majority opinion. A 5-4 split or a plurality made up of several opinions is not uncommon in this area. While some commentators remain deeply troubled by these inconsistencies and unpredictable results, seemingly based upon minute factual distinctions, others consider this less a problem of confused issues and more an example of the complexities of guaranteeing religious freedom to a nation of diverse beliefs and practices.

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109. *E.g.*, *Curran v. Catholic Univ. of America*, Civ. Action No. 1562-87 (Super. D.C. Feb. 28, 1989) (holding that Professor Curran's contract with the University did not give him a right to teach Catholic Theology there).

110. *See supra* note 25 on the point at which a civil court will refuse to even hear the case because the issue involves a matter deemed an internal ecclesiastical one and cases in note 93 which illustrate some gray areas in determining that point.

111. *See Morgan, The Significance of Church Organizational Structure in Litigation and Government Action* 16 VAL. U.L. REV. 145 (1981).

112. *See supra* notes 18-21 and accompanying text regarding the varied views on the meaning of the first amendment.

### E. *Interdisciplinary Nature of the First Amendment*

The First Amendment interests more than legal scholars, law practitioners in a variety of specialties, clergy and laypersons. Because it also affects educators, historians, political and social scientists, and even geologists, materials regarding church and state have been written by all of the above. This poses a research problem in that the classification of materials into any particular grouping is seldom clearcut. Consequently, the researcher should narrow his/her scope, and depending on the desired scope, the researcher may need to consult a variety of subject headings to cover the topic.<sup>113</sup> Moreover, this eliminates to a large extent the suitability of shelf browsing in a single area.<sup>114</sup>

## PART III-INFORMATION SOURCES FROM A FIRST AMENDMENT PERSPECTIVE

In addition to all of the problems discussed in Part II of this essay, the materials themselves create difficulties due to certain organizational features and to various methods of indexing. This section discusses various sources and potential problems in using them.

### A. *Bibliographies*

Bibliographies provide a good starting point, especially when the researcher knows something about the compiler's work, either by writing associated with it, such as where the bibliography appears within a book,<sup>115</sup> or by association or reputation.<sup>116</sup> The *Journal of Church and State*<sup>117</sup> annually publishes a list of recent doctoral dissertations covering church and state.<sup>118</sup> Some recent bibliographies include:

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113. See *infra* Part III regarding specific sources where I give detailed suggestions about dealing with organization problems within specific sources.

114. See *infra* notes 145-147 and accompanying text regarding Library of Congress subject headings and various applicable call numbers.

115. See *infra* Part V, Bibliography pointing out which sources contain bibliographies.

116. Some of the organizations listed in the appendix produce bibliographies. As might be expected, at times those bibliographies reflect the bias of the organization.

117. See description *infra* under "Periodicals."

118. For a retrospective search of doctoral dissertations, see G. LANOUE, A BIBLIOGRAPHY OF DOCTORAL DISSERTATIONS UNDERTAKEN IN AMERICAN AND CANADIAN UNIVERSITIES, 1940-1962, ON RELIGION AND POLITICS (1963).

*Church and State in America: A Bibliographical Guide*, J. Wilson, ed., 2 vol. (Greenwood 1986 & 1987).

This chronologically arranged work contains twenty-two essays, each accompanied by a selected bibliography. Volume one covers "The Colonial and Early National Periods," and the second volume covers "The Civil War to the Present Day." Produced by the Princeton Project on Church and State, the volumes provide a historiographical survey of church-state issues. Each volume contains an index.

D. Choquette, *New Religious Movements in the United States and Canada: A Critical Assessment and Annotated Bibliography*, 235 pp. (Greenwood 1985).

Authored by the head of public services and special collections at the Graduate Theological Union Library in Berkeley, this work emphasizes groups founded in the 1960's and 70's or sects which experienced new growth during that time period and includes sections on scholarly material arranged by discipline, reference works, personal accounts and popular works. Reflective of the author's experience with researchers using the New Religious Movements Research Collection, some annotations contain evaluative comments while others are descriptive.

T. Robbins, *Civil Liberties, "Brainwashing" and Cults: A Select Annotated Bibliography*, 2d. ed. rev. & ex., 48 pp. (Center for the Study of New Religious Movements 1981).

This work is divided into four overlapping sections, "Conversion and Commitment Processes in 'Cults'," "Civil Liberties and Public Policy," "Social and Psychological Processes in Religious Deprogramming," and "The Nature of 'Brainwashing'," and includes an author index.

A. Menendez, *Religious Conflict in America: A Bibliography*, 130 pp. (Garland 1985).

Part of the "Garland Reference Library of Social Science", this selective bibliography printed in manuscript includes both secondary and primary materials focusing primarily on historical works, though some sociological interpretations are included. Taking a chronological approach and covering through 1983, the compiler, who has created annotated bibliographies for Americans United Research Foundation, provides a brief overview for each of the seventeen sections. Also in the Garland series is Menendez's *School Prayer and Other Religious Issues in American Public Education: A Bibliography* 168 pp. (1985).

Briefer works are, Blackburn, *Church and State in the United States: A Bibliography of Law-Related Materials*, 17 Southwest Association of American Law Libraries Bulletin 22-27 (Jan. 1986); and from the nonannotated Vance series, C. Chisolm and A. Stewart, *Religion and Politics in the 1980's: A Selective Bibliography*, 12 pp. (1987) and J. Buchanan, *A Guide to Materials About Public Aid to Religious Schools*, 23 pp. (1985).

### B. General Works

While the scope of this bibliography is limited primarily to law-related materials, at some point the researcher may need to learn more about a particular religious group. The following materials provide basic information.

J. Wilson and T. Slavens, *Research Guide to Religious Studies*, 192 pp. (American Library Association 1982).

Number one of a six volume series in the humanities, this guide contains information on the history of, research methodology and current issues in religion written by a specialist in religion. The second part contains a list of major reference works arranged by subject and annotated by an information specialist. The book covers major world religions. It contains both a subject index and an author-title one.

*Encyclopedia of Religion*, E. Eliade, ed., 16 vols. (MacMillan 1987).

This set contains signed articles, charts, maps, references and an index volume. A sample entry is, Berman and Witte, "Church and State," a seven page article.

*Encyclopedia of the American Religious Experience: Studies of Traditions and Movements*, C. Lippy and P. Williams, eds., 3 vols. (Scribner 1988).

Organized by topic and theme, the essays in this set take a broad view of "American" though they primarily emphasize the U.S. Part VIII, "Religion and the Political and Social Orders" is most pertinent to this topic, but the entire work provides valuable insights. For example, the entry "Church and State" by Glenn Miller is 21 pages and contains a brief list of references.

*Directory of Religious Organizations in the United States of America*, 2d ed., J. Geisendorfer, ed., 553 pp. (McGrath 1982).

This work contains information supplied by the included organizations. Classified into nine sections, the 1,569 organizations include religious as well as secular ones relating to reli-

gion. In addition to basic directory information, each entry gives religious affiliation and membership figures.

*Yearbook of American and Canadian Churches*, 57th ed., C. Jacquet, Jr., ed., 294 pp. (Abington 1989).

Prepared by the National Council of the Churches of Christ, this work contains current information on major religious bodies, including Christian, Jewish and Muslim groups. Information includes a brief history of each group, organizational information, names of officials, periodicals and affiliated colleges. Statistical data reflects membership and giving patterns.

In addition to general information on religion, the church-state researcher may desire a fuller introduction than this bibliography provides. A number of constitutional law treatises provide a general explanation.<sup>119</sup> While it is now dated, A. Stokes, *Church and State in the United States*, 3 vol. (Harper 1950) gives the subject comprehensive treatment.<sup>120</sup>

On September 19, 1989 the Public Broadcasting System aired *The Supreme Court's Holy Battles*, a sixty minute documentary exploring the history and continuing debate over the role of religion in American life. The 32 page companion guide amplifies through text and photos the historical information presented in the video, and it includes essays, a list of important Supreme Court cases and a select bibliography. In addition to its value as a good introduction to the topic, the guide contains a list of libraries and museums with permanent collections about the history of religious liberty.<sup>121</sup>

119. See *supra* note 14.

120. The original edition contains a 68 page bibliography. The work is updated by the single volume revised edition of 1964 prepared by Pfeffer after the death of Stokes in 1958. Two other works by Pfeffer update the work, *CHURCH, STATE AND FREEDOM* (1953, rev. ed. 1967) and *RELIGION, STATE AND THE BURGER COURT* (1984), see bibliographic entry *infra*.

121. In addition, C. PESTANA, *LIBERTY OF CONSCIENCE AND THE GROWTH OF RELIGIOUS DIVERSITY IN EARLY AMERICA, 1636-1786* (1986) is a catalog published in honor of the 350th anniversary of the founding of Rhode Island. It accompanied an exhibit at the John Carter Brown Library, Providence Rhode Island. The catalog contains an essay providing an historical perspective, and it contains photos of historical documents and works that were in the display.

A book appropriate for young readers is WEISS, *GOD AND GOVERNMENT: THE SEPARATION OF CHURCH AND STATE* (1982). It probes issues about separation, the influence of churches on American government and bringing religious beliefs to bear upon political decisionmaking.

Two casebooks centering on the first amendment religion clauses exist<sup>122</sup>: R. Miller and R. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court*, 612 pp. (Markham Press, 3rd ed. 1987) and J. Noonan, *The Believer and the Powers That Are: Cases, History and Other Data Bearing on the Relation of Religion and Government*, 510 pp. (MacMillan 1987). The latter contains historical documents and ancillary material as well as cases and is highly suited for nonlaw school classes as well.

### C. Currency Sources

Among the challenges of dealing with a subject so broad and riddled with research problems is that of staying abreast of developing trends in types of cases and in schools of thought with respect to interpretation of the federal and state constitutional provisions. The closest thing to a looseleaf service and the best single current awareness source in the area of church-state law is the *Religious Freedom Reporter*, a publication of the Church-State Resource Center. Begun in 1980, this comprehensive reporter provides summaries of pending and decided cases, Attorney General Opinions, new legislation and regulations, law review articles and other resources related to church-state issues. The Table of Contents allows the researcher opportunity for case name recognition and includes the digest number. After the case summaries in the body of the reporter, an ongoing "United States Supreme Court Watch" appears, followed by a cumulated state by state case list and cumulated table of cases.

Several organizations produce newsletters as well as journals with more substantive articles.<sup>123</sup> An example of the former is *Court Report*, produced quarterly by the Department of Public Affairs and Religious Liberty of the General Conference of Seventh-day Adventists. Like the *Religious Freedom Reporter* it fully covers religious liberty cases on the Supreme Court docket, in the federal circuit and district courts and cases of interest from the state courts, however it takes a more journalistic approach. Other newsletters dwell less on litigation and serve more as a means of staying aware of what is being written in the area. For example, *The Religion & Society Report*, of the

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122. Another casebook is expected soon, to be published by the University of Pennsylvania Press. In two volumes, the authors are the Honorable Arlin M. Adams, whose writings are included as entries in this bibliography, and Charles Emmerich, former director of the Center for Church-State Studies at DePaul University.

123. See *infra* Appendix B. *Infra*, "Periodicals" discusses various scholarly journals.



Rockford Institute on Religion & Society<sup>124</sup> includes information not only about current books, but about articles in current journals as well.

Besides publishing newsletters and journals, several organizations offer seminars and frequently publish the proceedings in a journal symposium issue or in a separate bound anthology. Printed symposia are an excellent source of information in the church-state area.<sup>125</sup> The symposium may take a broad approach and cover several areas of church-state relations, or it may take a broad area and treat it from a particular viewpoint, such as history, or it may take a narrow issue and explore it indepth.<sup>126</sup> In addition, symposia which cover some aspect of constitutional law, state or federal, or about labor or education law often contain an article on the religion clauses.<sup>127</sup> Frequently law reviews publish summaries of recent church-state decisions.<sup>128</sup> One of the best is Survey, *Developments in the Law: Religion and State*, 100 Harvard Law Review

124. See Appendix B listing organizations.

125. See Appendix A for a list of symposia published during the 1980's. Recent conferences not yet in print include, "Religious Dimensions of American Constitutionalism," held at Emory University, April 7-8, 1988 and to be published Winter 1990 in the *Emory Law Journal*; "Law, Faith and Justice in a Post-Modern World," held at Hamline University on October 13-14, 1988 and to be published in the *Journal of Law and Religion*; "Symposium on Church/State Relations" held at Valparaiso University, February 4, 1989; "Religion and the Constitution," on April 13-14, 1989 and "Religion and Public Policy," on April 14-15, 1989, both held at Georgetown University and to be published in the *Journal of Religion*.

126. In addition, journals sometimes provide a printed symposium where two or three articles appear covering the same topic from varying viewpoints, e.g., 26 HARV. J. ON LEGIS. (1989) contains Boothby, *The Establishment and Free Exercise Clauses and Their Impact on National Child Care Legislation*, at 549, Liekweg, *Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers are a Constitutional Alternative*, at 565 and Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously Affiliated Child Care Facilities*, at 573.

Another technique is to publish an ongoing "dialogue" where an author responds to a previously published article, e.g., Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1979) and Davidow, "Secular Humanism" as an "Established Religion": A Response to Whitehead and Conlan, 11 TEX. TECH L. REV. 51 (1979).

127. E.g., Kahn, *Ideology, Religion, and the First Amendment, in Judging the Constitution: Critical Essays on Judicial Lawmaking* (M. McCann & G. Houseman eds.) 409-41 (1989).

128. E.g., Teitel, *The Supreme Court's 1984-85 Church State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651 (1986) (concluding that 1984 term decisions indicate deference to majoritarian legislation).

1606 (1987). This comprehensive treatment provides background, explanations and criticisms of recent developments and suggests better sensitivity to cultural biases that permeate church-state doctrine. The *Journal of Law and Religion*<sup>129</sup> also provides annual surveys.

#### D. Periodicals

Periodical articles provide invaluable assistance both for their substance, usually well thought out and current, and for the references they provide. Both religious periodicals and legal periodicals contain articles on church-state issues, however I will focus primarily on the legal sources.<sup>130</sup> Legal periodicals of all types cover religious freedom topics,<sup>131</sup> however a few journals devoted solely to law and religion exist<sup>132</sup> and several journals, some associated with religiously affiliated law schools<sup>133</sup> frequently publish symposia on freedom of religion and/or articles devoted to some aspect of that topic. Listed below are legal journals which focus on religion and law.

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129. See description *infra* under "Periodicals."

130. *Religion Index, Religious Periodicals, Humanities Index, Arts & Humanities Citation Index, Public Affairs Information Service Bulletin* and *Writings on American History* are among those that index other periodicals which cover church-state material.

One appropriate non-legal periodical devoted to religious liberty material, the bi-monthly illustrated *Liberty* magazine, published since 1888 by the International Religious Liberty Association contains timely articles about church-state issues, book reviews and is indexed by *Current Christian Abstracts*.

131. In addition to academic law reviews with articles and notes regarding freedom of religion, bar journals, especially the *American Bar Association Journal* and legal newspapers such as the *National Law Journal* and the *New York Daily Journal*, as well as the *New York Times*, frequently contain newsy articles about religious liberty topics. Specialty journals are a good source for articles about religious liberty issues which arise in that particular area, such as labor law journals, family law journals and the following: *American Indian Law Review, Human Rights Quarterly, Journal of College and University Law*, and the *Journal of Law and Education*. Public policy journals and those particularly focused on constitutional law or the courts, such as *Harvard Journal of Law and Public Policy, Law and Contemporary Problems* and the *Notre Dame Journal of Law, Ethics and Public Policy* from the former group, and *Bill of Rights Journal, Harvard Civil Rights-Civil Liberties Law Review, Hastings Constitutional Law Quarterly* and the *Supreme Court Review* from the latter, also frequently contain articles devoted to religious issues.

132. Discussed *infra*.

133. E.g., *Brigham Young University Law Review* (Church of Jesus Christ of Latter-day Saints); *Campbell Law Review* (Southern Baptist); *Creighton Law Review* (Roman Catholic); *DePaul Law Review* (Roman Catholic); *Mercer Law Review* (Baptist); *Notre Dame Law Review* (Roman Catholic); *Pepperdine Law Review* (Churches of Christ); *Valparaiso University Law Review* (Lutheran Church-Missouri Synod).

*Catholic Lawyer*

As the title indicates, this bar association type journal publishes articles of interest to Catholic practitioners. Published by the St. John's University School of Law, this quarterly publication began in 1955. It contains illustrations, features book reviews and is internally indexed. In addition to the two major legal indexes,<sup>134</sup> two Catholic services index it.

*CLS Quarterly*

This quarterly publication of the Christian Legal Society<sup>135</sup> includes book reviews and brief articles and commentary of concern to Christian lawyers. Both major legal indexes include it.

*Decalogue Journal*

Published since 1951 by the Decalogue Society of Lawyers, of interest to practicing Jewish lawyers and the general legal community, this bar association type journal contains brief articles, book reviews and illustrations. InfoAccess indexes it.

*Journal of Christian Jurisprudence*

Published since 1980, this journal now comes out of the College of Law and Government at CBN University. Published annually as a symposium, the journal's past contributors include among others these authors who frequently write on issues of religious liberty issues: Herbert Titus, Russell Kirk, Lynn Buzzard, Samuel Ericsson, William B. Ball, John W. Whitehead and Charles E. Rice. Most articles are less than 20 pages; it also contains book reviews. It too is indexed by InfoAccess.

*Journal of Church and State*

The best of the legal journals devoted only to religion and law, this journal began in 1959 and is published three times per year by the J. M. Dawson Institute of Church-State Studies,<sup>136</sup>

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134. *Index to Legal Periodicals* (ILP) and the various formats of Information Access Corporation's [hereinafter InfoAccess] index, both discussed in detail *infra*.

135. *Infra* Appendix.

136. The Institute also produces books, most of which are collections of essays, and are included in the bibliography. To be published early in 1990 is *The First Liberty: The Bicentennial of the First Amendment*, with essayists Henry J. Abraham, Leo Pfeffer, Edwin Scott Gaustad, David Little, John F. Wilson and Douglas Laycock.

located at Baylor University. In addition to articles covering issues of church and state, each issue contains numerous book reviews and usually a few book notes. Indexing is provided by an annual internal index as well as by these services: *Historical Abstracts*, *Public Affairs Information Service Bulletin* (PAIS), *Religious Periodicals, Abstracts and Book Reviews of Current Legal Periodicals*, *Book Review Index*, the legal indexes produced by InfoAccess and a number of humanities indexing services. It is not, however, contained in the *Index to Legal Periodicals*.

### *Journal of Law and Religion*

Published at the Hamline University School of Law, and cosponsored by the Council on Religion and Law, this semi-annual publication which began in 1983 contains not only lead articles, but an occasional colloquium, an annual survey of trends and developments prepared by an editor of the *Religious Freedom Reporter*, book reviews and longer book review essays. The journal is indexed in *Religious Periodicals* and by InfoAccess from 1984, but is not indexed by ILP.

Cases involving church-state issues at all court levels are particularly popular topics for law student notes and case comments. While most of these have more immediate utility rather than long term value, occasionally a student note develops an original idea rather than merely analyzing a current case.<sup>137</sup>

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137. E.g., Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984) (proposing an approach based on conception of the self as separate and as connected to others); Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985) (proposing a pluralistic model inclusive of all views in public schools); Note, "I Know It When I See It": *Mail-Order Ministry Mail Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (1987) (positing that the IRS approach to determining whether organizations are religious for tax purposes limits religious freedom by deferring to mainstream religious groups, but threatening other less traditional, but legitimate religions); Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982) (proposing a definition based on characterization of religion as a way of perceiving reality); Note, *General Laws, Neutral Principles, and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980) (proposing neutral principles based on Wechsler's approach (73 HARV. L. REV. 1 (1959)) for free exercise adjudication); Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986) (proposing an understanding of civil religion as a means of distinguishing between the religious dimension of American life with religious meaning and that which fosters social identity for all of the polity).

E. *Periodical Indexes*

As indicated above, several of the journals devoted to law and religion contain internal indexing. However, the most frequent method of discovery of articles through an index is through either of the two major legal indexing services.

InfoAccess has published since 1980, the *Current Law Index* (CLI), a printed index which indexes over 700 legal periodicals, and the *Legal Resource Index* (LRI),<sup>138</sup> which indexes all the CLI titles plus legal newspapers and newsletters. Because InfoAccess's subject headings are based on Library of Congress subject headings, subject searches are precise. Useful headings are:

- Church and State (plus subheadings)
  - Freedom of Religion<sup>139</sup>
  - Religion and Law
  - Religion and State (plus subheadings)
  - Religious Liberty<sup>140</sup>

Whenever possible the narrowest heading should be used.

Narrower headings include:

- Christianity and Politics
- Church and Education
- Church Colleges
- Church Discipline
- Church Property
- Church Schools
- Churches
- Religion and Politics
- Religion in the Public Schools
- Religious and Ecclesiastical Institutions
- Sabbath Legislation
- Sunday Legislation

The *Index to Legal Periodicals*,<sup>141</sup> published since 1908, covers fewer periodicals. Missing are the *Journal of Church and State* and the *Journal of Law and Religion*, two major sources. Depending on the subject matter, ILP's broader subject headings can

138. LRI is available in three formats, on microfilm; on a compact disc system called LegalTrac; and online through DIALOG, through WESTLAW using the identifier LRI, and through LEXIS in either of the LAWREV or LEXREF libraries using the LGLIND file.

139. The heading "freedom of religion" replaced "religious liberty" in 1987.

140. *Id.*

141. In addition to the hard copy, ILP is available through WILSONLINE, through WESTLAW using the identifier ILP, and through LEXIS in either the LAWREV or LEXREF libraries using the ILP file.

be useful, in that it uses the doctrinally based headings of "Free Exercise" and "Establishment Clause." However searches require greater sifting by the researcher.

#### F. Books

Two major problems in finding books covering the religion clauses confront the researcher. The first involves determining which subject heading will yield books on topics associated with the clauses. The second involves the split locations of books within the library which limit the usefulness of shelf browsing.

Selected books appear in the bibliography. In newer books, the lower left of the back of the title page usually contains a reproduction of the Library of Congress cataloging information for the particular book. The Arabic numbered phrases at the bottom are the Library of Congress subject headings.<sup>142</sup>

Theoretically, the researcher can look under the given subject heading for an appropriate book in hand and retrieve other books on the same topic. Unfortunately, in the area of the religion clauses, that method will not retrieve *all* books because there are several appropriate subject headings which overlap.<sup>143</sup> In addition, one of the most fruitful headings, "Religious Liberty," was changed to "Freedom of Religion" in 1987. Consequently, the researcher must use at least those two to retrieve materials cataloged under the "same" heading over time.

Other points to remember when searching are that the headings may subdivide by location or form-type. For example, *Church and State in America: A Bibliographical Guide*<sup>144</sup> appears under the heading "Church and State — United States — Bibliography." Because books are placed under the narrowest possible heading, a book which covers church-state matters in Virginia will have the state subdivision rather than United States. Other examples of narrowing form type qualifiers are "Cases", "Congresses" or "History." A book about creationism in public schools may appear under creationism or public

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142. Most libraries use the given subject headings, with only slight variations for local practice.

143. See *supra* "Periodical Indexes" discussing pertinent headings for InfoAccess. The overlap between headings occurs because of the variations between catalogers' judgments in assigning subject headings to books and because of the scope of the headings themselves.

144. Discussed *supra* in Part III, A.

schools depending upon the perceived emphasis of the book. This general rule of narrowest entry coupled with the overlap of coverage requires that the researcher use persistence and creativity within the list of acceptable subject headings<sup>145</sup> for comprehensive searches.

Whereas researchers often obtain a call number<sup>146</sup> and then browse the shelf area, this method will bring good results in the first amendment area only when the researcher is satisfied with books which fall within the same discipline. Because under the Library of Congress classification scheme, books about religious freedom may be classified with religion, theology, history, social science, political science or various law classifications, researchers who rely upon shelf browsing should be aware of its limitations.<sup>147</sup>

### G. Book Reviews

Legal literature contains three types of book reviews, the "books received" announcement, the brief review, and the book review essay. The first type, simply lists bibliographic information about new publications. The second type, anywhere from one to seven pages, written by an author knowledgeable of the given substantive topic, usually comments on the author's premise and discusses various features in reviewing a given book. The essay, often similar in length to a lead article and written by a leading scholar, goes beyond a review of the book.<sup>148</sup> Much of the discussion consists of original thought, rather than mere commentary about the book under review. All three type reviews appear after publication of the

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145. Libraries which follow the Library of Congress scheme have a three volume reference work, Library of Congress, *Subject Headings* 12th ed. (1989) which gives subject headings.

146. The back of the title page of newer books also contains the Library of Congress call number and often a Dewey decimal number so that other copies of the particular book in libraries which follow either system are likely to have a similar, though not necessarily identical number.

147. Depending on the book's perceived perspective and partly on local practice, a bibliography, for example, may appear under "Z" (Library Science), "KF" (Law) or "BR" (Religion). Under the "KF" classification one of several breakdowns may apply, for example, 4162 for works relating to religious practice in public schools; 4541, constitutional law; 4783, individual freedom of religion and conscience; 4865, church and state; and 4869 for particular denominations.

148. E.g., McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501 (1989) (review of M. PERRY, MORALITY, POLITICS AND LAW); Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131 (1989) (review of K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE).

book reviewed; the problem with the review essay is that relatively few books capture the fancy of many reviewers.

The *National Law Journal*, a weekly legal newspaper lists new publications as does the *Chronicle of Higher Education*. Both the *Journal of Church and State* and the *Journal of Law and Religion* contain both short and long reviews. In addition, many law reviews provide book reviews. Both the major legal periodical indexes provide access to book reviews. ILP does so through a separate section, while the InfoAccess products interfile the book reviews. The latter assigns a grade to the review based on the reviewers reaction to the book, with A reflecting a review very favorable to the author.

#### H. Government Documents

Despite the literally prohibitive language of the first amendment, Congress, as well as state legislatures and government agencies both federal and state, considers legislation which impacts religion, often directly. Frequently legislative action comes in response to results in court decisions.<sup>149</sup> Usually the researcher will refer primarily to legislative materials in an attempt to determine legislative intent.<sup>150</sup> However, other government documents should not be overlooked. Such agencies as the Equal Employment Opportunity Commission<sup>151</sup> and

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149. E.g., the Equal Access Act, see for example, *Religious Speech Protection Act: Hearing Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor*, 98th Cong., 2d Sess. on H.R. 4996 (March 28, 1984), *Hearings on the Equal Access Act: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor*, 98th Cong., 1st Sess., on H.R. 2732 (1984), *Equal Access: A First Amendment Question: Hearings Before the Comm. on the Judiciary*, 98th Cong., 1st Sess., on S. 815 and S. 1059 (1984).

150. See *supra* notes 35-37 and accompanying text regarding legislative histories.

Other examples of pertinent federal documents are, *Issues in Religious Liberty: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. (1985) (oversight hearing on the state of Religious liberty in America); *Social Security Coverage for Employees of Religious Organizations: Hearings on S. 2099 Before the Senate Committee on Finance*, 98th Cong., 1st Sess. (1984) (hearing to explore mandatory coverage for all nonprofit organizations including religious ones); *Indian Religious Freedom Issues: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (outlines the problems faced by Native Americans in attempting to exercise freedom of Religion, despite American Indian Religious Freedom Act of 1978 which arose due to problems of federal agencies denying religious freedom to Native Americans).

151. The EEOC makes available to the public the revised guidelines on



the U.S. Commission on Civil Rights<sup>152</sup> produce materials for the public and those agencies produce internal documents which are available.<sup>153</sup>

When seeking government documents through a subject approach, the most direct, but not least expensive way is through an online<sup>154</sup> or CD-ROM product<sup>155</sup> which contains the *Monthly Catalog of U.S. Government Publications*. Where neither is available a manual search of the *Monthly Catalog* will enable the researcher to discover government documents by agency, title, author or subject.<sup>156</sup>

If the researcher has narrowed his/her request to a federal legislative source, then the Congressional Information Service (CIS) CD-ROM or *Microfiche Collection* will provide easy access to the documents in question. For state legislative matters on current topics of national concern, the National Conference of State Legislatures in Denver, Colorado produces a reference series, the State Legislative Report.<sup>157</sup>

### I. Practice Tools

Unlike specialties such as bankruptcy, corporate, tax or labor law, which have numerous looseleaf services and formbooks, for the most part<sup>158</sup>, practice oriented freedom of

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discrimination because of religion, 29 C.F.R. 1605, in a publication entitled *Religious Discrimination*.

152. *E.g.*, U.S. COMMISSION ON CIVIL RIGHTS, RELIGION IN THE U.S. CONSTITUTION: A DELICATE BALANCE (1983) (79 page report of the independent bipartisan agency on civil rights issues relating to freedom of religion, focusing especially on issues relating to employment and prisons); U.S. COMMISSION ON CIVIL RIGHTS, RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUES (1979) (541 page transcript of proceedings upon which previous report is based).

153. *E.g.*, OFFICE OF LEGAL POLICY DEPARTMENT OF JUSTICE, RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1988) (165 page document, including 5 appendices, which provides proposed analytical framework and applies it to free exercise clause cases).

154. *GPO Monthly Catalog* (GPO) is available through database vendors BRS, DIALOG, TECH-DATA and WILSONLINE.

155. CD-ROM's are storage media which look like the familiar audio compact discs and which use search techniques similar to those used with online products. In comparison with online sources, CD-ROM's trade some currency for potentially lower cost. WilsonDisc and SilverPlatter are among the vendors who provide an index to the *Monthly Catalog*.

156. In libraries which catalog government documents along with the rest of the collection the material will be available through the public catalog.

157. *E.g.*, NAT'L CONF. OF STATE LEGISLATURES, HOME SCHOOLING: A PRIMER FOR STATE EDUCATION POLICY: 1988 (Jan. 1989).

158. *See supra* regarding the *Religious Freedom Reporter*. Occasionally other specialties produce practice materials, such as the ABA Section of Tort

religion materials appear sprinkled throughout general research tools. Recognizing the limitations of these general materials, the researcher may be able to make good use of them.

Legal encyclopedias, such as *American Jurisprudence 2d* (AmJur), *Corpus Juris Secundum* (CJS) or a state encyclopedia,<sup>159</sup> provide a useful starting point for someone already versed in constitutional law and who seeks an answer to a discrete issue. Unfortunately, as with a number of these general tools, finding the appropriate index term can be challenging. Generally, the narrowest term provides entry through the index to the appropriate topic.

AmJur topic, "Constitutional Law," sections 464-495 address religious freedom and the topic "Religious Societies" relates to church institutions.<sup>160</sup> The substantive area of the law, may provide a more suitable starting point such as the topic, "Labor and Labor Relations" or very specifically, under the topic, "Schools," "Schools and the Church-State Relationship," sections 290-306. AmJur's "Table of Statutes, Rules and Regulations Cited" may also point the researcher to the appropriate section.

In addition to providing a starting point for case finding, the legal encyclopedias produced by Lawyers Co-operative provide cross references<sup>161</sup> to other practice oriented materials

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and Insurance Practice, *Tort and Religion Law* (1989) (course materials from the National Institute's course of the same name).

Because first amendment law arises out of other areas of the law, specialty looseleaves on other topics, such as bankruptcy, education, non-profit organizations, labor, Native Americans, taxation, and zoning, provide access to statutes and administrative materials, federal and state. Several state statutes mimic the applicable federal statutes and many provide even further protection. For example some states or localities include sexual orientation as a protected class in antidiscrimination statutes. See *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) where student gay rights groups sued the University for violation of the District of Columbia's Human Rights Act which makes it unlawful for an educational institution to deny its facilities to any otherwise qualified student based upon, among other things, his/her sexual orientation.

159. State encyclopedias generally follow the same pattern as either *Am. Jur.*, published by Lawyers Co-operative Publishing Company, or *CJS*, published by West Publishing Company, as those two publisher dominate legal publishing.

160. Legal publishers use similar but not exactly the same index terms.

161. West's *CJS* provides cross references to its other products, such as the topic and key numbers.

such as *Proof of Facts*,<sup>162</sup> now in its 3d series, a set which, as its title suggests, provides helpful information for trial preparation, and *American Jurisprudence Legal Forms*.<sup>163</sup>

Furthermore, Lawyers Co-operative encyclopedias refer to annotations in *American Law Reports* and *United States Supreme Court Reports, Lawyers' Edition*.<sup>164</sup> These annotations summarize selected cases on both sides of narrow topics and offer practice tips. While the annotations are considered less scholarly than law review articles, they represent hours of research and are updated through pocket parts and an 800 number. Several annotations in both the Fourth and Federal series and in Lawyers Edition have appeared during the 1980's.<sup>165</sup>

### J. Digests

Case law provides the grist for most first amendment issues. The numerous cases cited in the footnotes above can serve as a starting point for those pertinent issues. From there, the researcher can easily move into a West digest or to WESTLAW using the appropriate key number. The most frequent topic for first amendment cases is, "Constitutional Law," "Religious Liberty and Freedom of Conscience" key 84, with its two subdivisions and its newer subdivision, "Particular Matters and Applications," key 84.5 with its 19 subdivisions.<sup>166</sup>

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162. E.g., 35 AM. JUR. 2D *Harassment or Termination of Employee Due to Religious Beliefs or Practices* § 209 (1983 & Supp.).

163. Numerous formbooks from several publishers are available which provide general forms or subject specific forms. These can be adapted for church organizations.

164. A five volume *Index to Annotations* provides subject indexing.

165. See *Index to Annotations* under "Religion and Religious Societies" or with a specific problem, take a narrow fact oriented approach to the index.

166. West's topical outline of the law, is based on seven divisions of law, Persons, Property, Contracts, Torts, Crimes, Remedies and Government. To illustrate the confusion this can cause, "Persons," is divided into five subdivisions where, for example, the topic "Civil Rights" under "Relating to Natural Persons in General" contains keys 9.10—Employment Practices pertaining to Title VII mandated accommodation of religious practice; "Sunday" key 2—Statutes and Ordinances covers Blue laws. The topic "Indians" appears under the subdivision "Particular Classes of Natural Persons" and under key 6(2)—Constitution and Operation of Statutes it lists *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988), since it arose under the American Indian Religious Freedom Act. Topics "Colleges and Universities" and "Religious Societies," the second of which covers all types of cases dealing with religious organizations, appear under "Associated and Artificial Persons." While this explanation does little to point the researcher to the proper title, awareness of this system helps to explain some of the difficulty encountered when using the index to the digests.

### K. Briefs

Briefs provide insights for planning strategy or gaining deeper understanding of opinions. Supreme Court briefs for cases orally argued from 1979 onward are available on LEXIS in the GENFED library, BRIEFS file. In addition Congressional Information Service and Microform, Inc. publish briefs in microform. The latter also publishes briefs of the U.S. Court of Appeals. These collections also contain *amicus curiae*, "friend of the court," briefs. *Amicus* groups, that is, groups interested in policy outcomes of specific cases who have received permission to present briefs and to participate in oral argument, play a very important role in first amendment law.<sup>167</sup>

Less available in a firm library, but useful nonetheless, are oral arguments of the Supreme Court on micro-fiche<sup>168</sup> which enable the appellate lawyer to study the type of questions raised and level of participation by particular justices.

### L. Online Services

In addition to the literal search capacity of LEXIS and WESTLAW<sup>169</sup> the latter allows key number searching as well, however the system requires that the topic's numerical equivalent be entered in lieu of the topic itself.<sup>170</sup> WESTLAW includes topical databases which contain documents which relate to all the federal first amendment protections. The iden-

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167. Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROBS. 83 (Spring 1981) (discussing groups filing *amicus* briefs, topics in which they intervene and functions of intervention).

Numerous groups presented arguments to the Court on behalf of the Reverend Sun Myung Moon in his petition for certiorari in conjunction with his conviction for tax fraud, *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). See CONSTITUTIONAL ISSUES IN THE CASE OF REV. MOON: AMICUS BRIEFS PRESENTED TO THE UNITED STATES SUPREME COURT (H. Richardson ed. 1984) (reprinting the *amicus* briefs filed).

168. University Publications of America provides complete oral arguments since the 1953 term.

169. In addition to the legal databases and periodical indexes mentioned previously, bibliographic databases through carriers such as DIALOG which provide access to citations on first amendment materials include Dissertation Abstracts Online (citations, some with abstracts, to published American dissertations since 1861) and America: History and Life (abstracts American history and history-related topics in the social sciences and humanities in journals since 1964).

170. See Appendix A in the *Westlaw Reference Manual*, 3d.

tifier FCFA may be used with federal database identifiers for case law, statutes and regulations.<sup>171</sup>

Online services allow special searching capabilities, such as date or court restriction. Searching by judge provides an easy means of determining his/her past reasoning on a particular type of issue.<sup>172</sup> Searching only majority, concurring or dissenting opinions is easier on LEXIS.

### M. Organizations

Organizations serve as an excellent source of information. Not only do they closely track church-state litigation, many provide litigation support or referrals. Furthermore, many maintain a speakers' bureau, others produce various publications, and some sponsor conferences and/or seminars which not only disseminate information, but also allow for exchange among interested persons.

Many churches have organizations devoted to religious liberty, but other non-sectarian organizations focus on church-state issues as well. Several law schools and universities have centers which examine public policy issues, some focusing especially on religious freedom. In addition, the American Bar Association and the Association of American Law Schools have sections which consider first amendment issues. Appendix B lists representative significant organizations.<sup>173</sup>

## PART IV - DESCRIPTION OF THE BIBLIOGRAPHY

The purpose of this bibliography is to gather and to organize into a coherent whole current material which treats the religion clauses from a legal perspective. Although I have prepared the preceding research guide for the novice researcher in first amendment law, the bibliography will be of use to anyone seeking law-related sources on the religion

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171. The WESTLAW online directory lists these First Amendment databases with their applicable identifiers:

|          |                             |
|----------|-----------------------------|
| FCFA-USC | U.S. Code Sections          |
| FCFA-CFR | Code of Federal Regulations |
| FCFA-CS  | Federal Cases               |
| FCFA-CS  | Courts of Appeal            |
| FCFA-DCT | District Courts             |

172. Another means of garnering information about a particular judge is through judicial directories. The *Federal Judiciary Almanac*, in looseleaf format, includes attorney comments.

173. For a complete list of organizations, the researcher should consult a directory such as, the *Encyclopedia of Associations* (23d ed., K. Koek, S. Martin, & A. Novallo eds. 1989).

clauses. Law students, graduate students in other disciplines, reference librarians and policy makers seeking information on the clauses from a legal perspective should find it especially useful; practicing lawyers, legal scholars and others interested in the religion clauses may find it helpful as well.

#### A. *Selection Criteria*

The amount of material generated on freedom of religion mandates that this be a selective compilation. Despite the many entries included, for comprehensive coverage a fuller search must be undertaken. Moreover, because of the huge expanse of material, I chose to focus on legally oriented materials, excluding much historically, theologically or sociologically oriented material. In addition, due to the constant stream of works generated, the reader will have to update the entries listed here.

The annotated bibliography that follows includes books, symposia and articles published since 1980. Works have been chosen without regard to the viewpoint espoused. Where a topic appears laden with works from a particular viewpoint that phenomenon reflects the number of works published. Because this research guide is aimed at a broad audience, the level of the works varies; I have tried however to indicate the audience to whom works are directed.

In addition to research involved in preparing the preceding guide, to obtain books I used the LC MARC<sup>174</sup> database and the following general subject headings with various subheadings:

Church and State — United States

Freedom of Religion — United States

Religious Liberty — United States

I supplemented this core search with book reviews from sources mentioned in the research guide, alternative subject headings provided in works obtained through the core search and conversations with Professor John Robinson, Director of the Thomas J. White Center on Law and Government.

For symposia and articles, I searched the *Current Law Index* and updated with the *Current Index to Legal Periodicals*<sup>175</sup> through October 27, 1989. As to criteria for article inclusion, the vast

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174. Library of Congress Machine Readable Catalog, available on DIALOG.

175. This is a weekly subject guide to new law review publications designed to bridge the time gap involved in publishing the two major index services.

output necessitated a somewhat crude set of characteristics for initial exclusion. While certainly many worthwhile student notes exist, I have not included those. Use of the previously mentioned research methods in the periodical indexes will bring up these notes, some of which may prove especially useful when a single case is under analysis.

Authored articles for inclusion had to be at least twenty pages in length, a somewhat arbitrary condition, but justified since most research works exceed that length. Unfortunately, that automatically cut articles from bar journals and certain journals whose style runs to shorter articles, and eliminated a number of speeches and essays from all journals. Some of these briefer articles can be accessed through the listed symposiums, or by following the suggestions given above.<sup>176</sup> Pertinent periodicals adversely affected by this cut-off are *Catholic Lawyer*, *CLS Quarterly*, *Decalogue Journal* and *Journal of Christian Jurisprudence*. These journals are indexed in InfoAccess products, or the researcher can consult the journals directly. In addition to the somewhat arbitrary exclusionary effect, other limitations present in these criteria arise primarily from the interdisciplinary nature of the topic. This two-pronged problem is most evident under the topic, "Religion in American Political Life." The rise of conservatism and the reentry of religious groups into political life along with increased conflict over the place of religion in American schools and in political life have spawned much discussion. The bibliography is heavy with books on the topic, partly because of the grey area between "religion and politics" and "religious foundations of law." The latter is not within the scope of this work.

The section on "Contemporary Problems Under the Clauses" posed a special problem in that each problem can be researched alone. Consequently, the books listed are merely offered as a sampling. Furthermore, because of the 20 page cut-off, the list of articles under "Religion in American Political Life" appears artificially short. Many other publications, including speeches and papers delivered at symposia exist, but are not included here.<sup>177</sup>

Finally, even with the twenty page, authored article standard, too many articles remained. While the initial cut was

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176. See *supra* "Periodical Indexes."

177. Unfortunately these absent works do not clump together under a single subject heading. Using the InfoAccess products fruitful headings with overlap, are: religion and politics; Christianity and politics; church and state—analysis; church and state with various other subheadings; freedom of religion—political aspects; freedom of religion—social aspects.

arbitrary, I consulted the works and final cuts were made based on the prominence of the author within the field, the reputation of the publishing journal, and the need for balance in the bibliography. Despite these constraints I have tried to have the bibliographic entries reflect the number of publications in each area surveyed.

### B. *Organization*

The six major topics roughly follow those treated at the Religion Clauses Conference sponsored by the Thomas J. White Center on Law and Government, March 30 - April 1, 1989, at the Notre Dame Law School. In many instances, a particular source can logically appear under more than one heading. Space limitations prevent cross-referencing or indexing.

Rather than interfiling books, symposia and articles together under particular topics, I have created separate sections for each type of publication. Books are listed first, followed by articles. Within each subdivision, entries are arranged alphabetically by author, or title for edited works. Symposia are listed alphabetically by title in Appendix A.

In addition to these materials, the footnotes to Part I, discussing background for the research guide, provide extensive references to significant United States Supreme Court cases on the first amendment. Since many organizations get involved in writing *amicus* briefs and otherwise informing the public about freedom of religion issues, I have appended an alphabetical list of organizations. I examined the *Encyclopedia of Associations* to determine organizations active in the area of church and state, and I became aware of others while gathering sources. The groups included are primarily those who get involved in church-state litigation or who produce public policy studies.

### C. *Annotations*

Most of the symposium and article entries' complete titles coupled with their placement within the various categories give sufficient information about the works. The book annotations contain more complete information. There, I have attempted to inform about the author where appropriate, to indicate the intended audience and the scope of the work, and to point out special features such as tables or inclusion of a bibliography.

### D. *General Comments*

In an attempt to include works representing many viewpoints, I have not provided evaluations. In the research guide I



have indicated what some of the views are, and I have alerted the researcher to the frequent presence of bias. Beyond that, experienced first amendment watchers will probably recognize authors or publishers that they associate with one or another viewpoint. The uninitiated should examine more than one entry under any given heading to guard against the bias of any particular author.

Because the spheres of church and state are not static ones, a guide such as this is outdated in some respects by the time it is printed. However, through the description of numerous types of sources the researcher should be able to adapt this guide according to his/her research goal, substantive knowledge, legal research experience levels, and available materials. As always, this guide is only a starting point, presenting choices which once chosen must be updated.

## PART V - SELECTIVE BIBLIOGRAPHY

### A. Books

#### 1. Religion Clauses Generally

Borden, Morton, *Jews, Turks, and Infidels*, Chapel Hill, North Carolina: University of North Carolina Press, 163 pp. (1984).

This book chronicles the vigilance of the Jewish presence in America and its part in defining religious liberty. The author examines the American paradox of the constitutional protection of religious liberty juxtaposed with government efforts to secure, for example, Sunday legislation. While the author examines state constitutions and early state practices as do so many other books, the Jewish perspective makes it unique.

Buzzard, Lynn R. and Samuel Ericsson, *The Battle for Religious Liberty*, Elgin, Illinois: David C. Cook, 303 pp. (1982).

Written for a Christian audience, the authors present a legal handbook and call to action for resisting assaults on the religious liberties of Christians. After establishing the need for the book by providing a general view of the present state of religious liberty for Christians the authors explain the legal basis and processes regarding religious liberty. Over two thirds of the book is devoted to specific issues affecting Christians' rights. An appendix includes summaries of cases.

*Church State Relations: Tensions and Transitions*, Thomas Robbins and Roland Robertson, eds., New Brunswick, New Jersey: Transaction Books, 296 pp. (1987).

This "reader" on church-state relations contains nineteen essays presented in three sections: study of religion as impli-

cated by the religion-political nexus in today's society; American church-state issues; and finally a comparative approach. Authors include Dean M. Kelley, Executive for Religious and Civil Liberty of the National Council of Churches and Leo Pfeffer, church-state scholar.

*Conceived in Conscience*, Richard A. Rutynas and John W. Kuell, eds., Norfolk, Virginia: Donning Company, 138 pp. (1983).

Billed as "An Analysis of Contemporary Church-State Relations," this volume contains 14 essays, the result of a conference co-sponsored by the Virginia Foundation for the Humanities and Public Policy. Divided into two sections, the first treats the historical and constitutional portions, and the latter analyses contemporary political perspectives of church-state issues. Authors include constitutional law scholars Charles E. Rice and Frederick Schauer. Each essay is preceded by an abstract.

Daum, Annette, *Assault on the Bill of Rights*, New York: Union of American Hebrew Congregations, 145 pp. (1982).

Published for the Commission on Social Action of Reform Judaism, this comprehensive source is designed for use in youth groups and with adult education. It covers eight church-state issues, providing an historic overview, legal background, exploration of relevant Jewish values and of community relations implications. Each chapter also includes educational aids for use in discussion groups. The resource list includes organizations as well as printed materials.

*Ecumenical Perspectives on Church and State: Protestant, Catholic and Jewish*, James E. Wood, Jr., ed., Waco, Texas: Dawson Institute of Church State Studies, 175 pp. (1988).

As its title suggests, this volume contains nine essays reflecting various perspectives and originally presented at a conference sponsored by the Dawson Institute, the Anti-Defamation League of B'nai B'rith and the Texas Conference of Churches. It contains a seven page bibliography.

*Freedom and Faith: The Impact of Law on Religious Liberty*, Lynn R. Buzzard, ed., Westchester, Illinois: Crossway Books, 168 pp. (1982).

This collection of essays on the impact of law and government policy on religious freedom from a conference sponsored by the Christian Legal Society includes work by Supreme Court litigator, William B. Ball; former special counsel to President Nixon, Charles W. Colson; and director of religious and civil liberty at the National Council of Churches, Dean M. Kelley,

and about "issues of human value, the powers of government, the rights of conscience, and the character of public life."

*How Does the Constitution Protect Religious Freedom?* Robert A. Goldwin and Art Kaufman, eds., Washington, D.C.: American Enterprise Institute for Public Policy Research, 175 pp. (1987).

Part of an AEI series project, "A Decade of Study of the Constitution," the seven essays in this volume present issues from opposite sides in this book. For example Leonard Levy's essay on the establishment clause is opposite now Chief Justice William Rehnquist's dissent in *Wallace v. Jaffree*.

Maddox, Robert L., *The Separation of Church and State: Guarantor of Religious Freedom*, New York: Crossroad, 196 pp. (1987).

Addressed to a general audience, the author, Director of Americans United for Separation of Church and State, explains how it is that some religious people have come to believe that separation of church and state preserves religious liberty.

Pfeffer, Leo, *Religion, State and the Burger Court*, Buffalo, New York: Prometheus Books, 310 pp. (1984).

Written for a general audience, the book provides an introduction to a variety of church-state issues decided in the seventies and early eighties. The author attempts to present the material in a nonpartisan way; He makes no effort, however, to hide his strict separationist views.

*Religion and the State: Essays in Honor of Leo Pfeffer*, James E. Wood, Jr., ed., Waco, Texas: Baylor University Press, 596 pp. (1985).

This collection of essays pays tribute to Leo Pfeffer's contributions to the church-state debate. Covering a broad range of topics, authors include Ronald B. Flowers, Kent Greenawalt, A.E. Dick Howard, Milton R. Konvitz, Judge Edward Weinfeld, Norman Redlich, and Sharon L. Worthing. The work also includes a 46 page autobiographical sketch and a 33 page chronologically arranged bibliography of Pfeffer's works including court briefs.

*The Supreme Court on Church and State*, Robert S. Alley, ed., New York: Oxford University Press, 445 pp. (1988).

An updated edition of Joseph Tussman's 1962 volume of the same title, this collection of cases with commentary seeks to make available to the general public leading church-state cases. In many respects a casebook, the volume begins with a brief historical overview followed by Madison's "Memorial and Remonstrance" and Jefferson's "Bill for Establishing Religious Freedom." Especially useful is the chart listing 35 cases from

1940-87 with a detailed analysis of each justice's vote in each case.

## 2. History and Interpretation

Bradley, Gerard V., *Church-State Relationships in America*, New York: Greenwood Press, 166 pp. (1987).

This book criticizes what the author calls "historical overgeneralization" on both the liberal extreme which he associates with Leonard Levy, and on the part of "Christian nation" conservatives. After examining Church-State relationships from colonial times through the end of the eighteenth century, the author concludes that principles of *stare decisis* do not outweigh the need to correct First Amendment interpretation by reading the establishment clause as meaning sect equality. In addition to historical documents in the appendices, a brief bibliographical essay provides a critical guide to church-state materials.

*Church and State in American History: The Burden of Religious Pluralism*, John F. Wilson & Donald L. Drakeman, eds., Boston: Beacon Press (2d ed., expanded & updated), 313 pp. (1987).

The editors emphasize the interrelationships of political, legal and religious phenomena in a given period by presenting a collection of primary readings with critical interpretations. The introduction defines the editor's conception of "Church and State" and, provides context for the work as a whole, while each of the seven sections also includes a brief introduction. Among the readings are official colonial documents, court opinions, legislation, presidential documents, and selections from theologians and constitutional scholars.

Cord, Robert L., *Separation of Church and State: Historical Fact and Current Fiction*, New York: Lambeth Press, 307 pp. (1982).

The author, a political scientist, uses documentary and statutory evidence from the founding era to show that political figures in that era approved of the nonpreferentialist subsidy of religious organizations in the pursuit of permissible secular objectives. This influential work should be read by those who seek to understand the conflict between nonpreferentialists and strict separationists.

Curry, Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment*, New York: Oxford University Press, 276 pp. (1986).

This well-documented historical study attempts to uncover the intentions underlying the First Amendment by viewing con-

cepts of religious freedom within the context of colonial and revolutionary America. The work emerged from the author's study of public colonial and state documents and earlier American newspapers.

Dreisbach, Daniel L., *Real Threat and Mere Shadow: Religious Liberty and the First Amendment*, Westchester, Illinois: Crossway Books, 351 pp. (1987).

While recognizing the limitations in using the historical approach to constitutional interpretation, the author finds an examination of history crucial to determining the legitimacy of the separatist approach in *Everson* and subsequent cases: He also believes that historical research can help determine what practices were to be encompassed in "an establishment of religion." On balance, however, he finds historical research more useful in negating interpretations of the religion clauses that rely on uncritical historical scholarship than in constructing an adequate interpretation of them. In addition to careful documentation, the author provides a twenty-five page selected bibliography. This is one of the more scholarly works among those that contrast the nonpreferentialist approach with the separationist.

Edel, Wilbur, *Defenders of the Faith: Religion and Politics from the Pilgrim Fathers to Ronald Reagan*, New York: Praeger, 263 pp. (1987).

While this is one of the better of the books written in response to revisionist books calling for a "return to Christian America," the use of notes filled out only by reference to the bibliography detracts from its usefulness. However, the author takes a somewhat different approach from the usual by including references to Muslim belief and practice as well as to Christian ones back to the early centuries, and in devoting nearly half the book to developments since 1980 with particular focus on Ronald Reagan as well as discussing religion and foreign policy.

Eidsmoe, John, *Christianity and the Constitution: The Faith of Our Founding Fathers*, Grand Rapids, Michigan: Baker Book House, 415 pp. (1987).

Another of the recent books which seeks to examine for a Christian audience, the backgrounds, including religious beliefs, of a dozen delegates to the Constitutional Convention. The author also includes a section entitled "Biblical Principles Found in the Declaration and the Constitution." Useful as an exposition of church-state view from the perspective of the reli-

gious right, the book closes with a call to Christians to get involved in public life.

*Freedom of Religion in America: Historical Roots, Philosophical Concepts and Contemporary Problems*, Henry B. Clark II, ed., New Brunswick, N.J.: Transaction Books, 143 pp. (1982).

This volume contains Highlights from a Conference Sponsored by the Center for Study of the American Experience, held at the Annenberg School of Communications, University of Southern California, April 27-30, 1981. The brief papers look at contemporary problems from an historical perspective. Works include the keynote address by historian Nancy Steele Commager, "The Significance of Religion in American History," and articles by sociologist Robert N. Bellah, historians Jonathan Butler, Jay P. Dolan and William Lee Miller, and James E. Woods, Jr.

Gaustad, Edwin S., *Faith of Our Fathers: Religion and the New Nation*, San Francisco: Harper & Row, 196 pp. (1987).

This book deals with the fifty years from the signing of the Declaration of Independence to the deaths of Thomas Jefferson and John Adams in 1826. The author believes that understanding the "compass-setting" during that period in both religion and politics will enlarge our wisdom. He provides a four page bibliographical essay as well as two significant appendices, "Major Documents Pertinent to Religion, 1785-1789" and "Selected State Declarations of Rights and Constitutions with Respect to Religion, 1776-1799."

Levy, Leonard W., *The Establishment Clause: Religion and the First Amendment*, New York: MacMillan, 236 pp. (1986).

This book, by the author of more than 20 other books on various aspects of constitutional law, has received criticism for not meeting the scholarly standards of his earlier works. The author attempts to counter nonpreferentialism by examining the history prior to the adoption of the first amendment, as well as subsequent to it, and devoting an entire chapter to "The Nonpreferentialists." He includes a two page annotated selective bibliography.

*The Lively Experiment*, Jerald C. Brauer, ed., Macon, Georgia: Mercer University Press, 250 pp. (1987).

This book contains a section of essays about how church-state relations have worked out in American history and one which explores aspects of American church history such as the early Mormon movement, intentions of the founders, Roman Catholicism, and church-state relations in Canada.

Miller, William Lee, *The First Liberty: Religion and the American Republic*, New York: Alfred A. Knopf, 373 pp. (1986).

The author, a historian, traces America's approach to securing religious liberty. He devotes nearly two-thirds of the book to early American history; appendices contain Jefferson's "Bill for Establishing Religious Freedom" and the "Memorial and Remonstrance."

*The Republic of Reason: The Personal Philosophies of the Founding Fathers*, Norman Cousins, ed., San Francisco: Harper & Row, 463 pp. (1988).

Previously published as *'In God We Trust'*, this new paperback edition with a foreword by Richard B. Morris and an updated six page bibliography, primarily contains the writings of nine "founding fathers." The editor provides introductory background and connecting comments.

Semonche, John E., *Religion & Constitutional Government in the United States: A Historical Overview with Sources*, Carrboro, North Carolina: Signal Books, 244 pp. (1985).

The first section of this book seeks to place the religion clauses in context by looking at their evolution and American practice under them. The second section looks at how the Supreme Court has interpreted them. A third section contains historical documents. Included also is an annotated list of suggestions for additional reading.

### 3. Free Exercise

Fetzer, Joel, *Selective Prosecution of Religiously Motivated Offenders in America: Scrutinizing the Myth of Neutrality*, Lewiston, New York: Edwin Mellen Press, 142 pp. (1989).

This book asserts that to discover how the federal government treats religion, one should focus on agency action more than on judicial opinions. Focusing on the Department of Justice the author argues that despite DOJ guidelines stating otherwise, defendants' religion appears to play a role in determining whether to prosecute. He illustrates with the sanctuary movement, Rev. Sun Myung Moon and abortion clinic firebombers. In addition to tables and charts throughout, the book includes appendices on sentencing of sanctuary workers and of abortion-clinic bombers, a selected nine page bibliography and one of legal citations.

Greenawalt, Kent, *Conflicts of Law and Morality*, New York: Oxford University Press, 383 pp. (1987).

In this wide ranging essay on moral philosophy the author addresses the problems of individuals faced with conflicts between claims of morality and law and how legislators should deal with these dilemmas.

Office of Legal Policy, United States Department of Justice, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause*, Washington, D.C.: GPO, 165 pp. (1986).

In addition to summarizing the historical context for the clause, this memorandum analyses the text, history and theory of the free exercise clause to propose a theoretical framework and then to apply it in the types of cases which have made it to the Supreme Court level. There are five appendices including one analyzing the cases and one commenting on the impact on religious liberty of the then proposed Grove City amendment.

Perry, Michael, *Morality, Politics and Law*, New York: Oxford University Press, 323 pp. (1988).

From a perspective of law, philosophy and theology, the author examines the relation of moral and religious beliefs to politics and law, by looking at the nature of morality, and at the liberal vision of morality and politics. The author then discusses problems of coercive legislation and conscientious disobedience.

#### 4. Role of Religion in American Life

*American Political Theology: Historical Perspectives and Theoretical Analysis*, Charles W. Dunn, ed., New York: Praeger, 195 pp. (1984).

The editor combines his commentary with a collection of various documents, breaking American history into four epochs in an effort to simplify complex issues of American political theology. He uses tables throughout to illustrate his theories. He includes a six page bibliography.

Benson, Peter L. and Dorothy L. Williams, *Religion on Capitol Hill: Myths and Realities*, San Francisco: Harper & Row, 224 pp. (1982).

This book provides the results of research on the religious beliefs and values of members of the U.S. Congress. The study attempted to discover the accuracy of six claims and found that the data showed all six "myths" incorrect. The authors carefully detail their method and the underlying rationale for their random sampling of 112 names with a 72% response rate. They frequently use tables to illustrate their findings.



*Between God and Caesar: Priests, Sisters and Political Office in the United States*, Madonna Kolbenschlag, ed., New York: Paulist Press, 468 pp. (1985).

This collection of essays focuses on overt participation by religious in political offices, in political parties and in the exercise of civil power. Written from a primarily Roman Catholic view, the several contributors examine the church's mission and its relation to "human promotion in general." Among the contributors are U.S. Senator John Danforth, former U.S. Representative Robert F. Drinan, Father Theodore Hesburgh, and Agnes Mary Mansour, director for social services for the State of Michigan.

*The Bible in American Law, Politics, and Political Rhetoric*, James Turner Johnson, ed., Philadelphia: Fortress Press, 204 pp. (1985).

Published by the Society of Biblical Literature, this is one in a series of books focusing on the Bible in American culture. The essays are grouped in two parts, the stages of historical development and major themes in American political life. Each essay includes notes and a bibliography of materials consulted. Authors include Edward McGlynn Gaffney, Mark Valeri and John F. Wilson.

Buzzard, Lynn, *With Liberty and Justice: A Look at Civil Law and the Christian*, Wheaton, Illinois: Victor Books, 152 pp. (1984).

This book contains practical legal guidance written from a Christian perspective and focuses on "how our spirituality touches vital areas of law today." Intended to raise issues rather than to provide answers, it is aimed at a general, but Christian, audience.

Castelli, Jim, *A Plea for Common Sense: Resolving the Clash Between Religion and Politics*, San Francisco: Harper & Row, 202 pp. (1988).

From *People for the American Way*, this book applies to events of the 1980's a framework based on the author's premise that terms must be precisely defined and myths eradicated to develop "rules for mixing religion and politics." His discussions distinguish between church and state and religion and politics.

Chidester, David, *Patterns of Power: Religion and Politics in American Culture*, Englewood Cliffs, New Jersey: Prentice Hall, 316 pp. (1988).

This book fills a gap in that rather than being about religion in politics, it is about the intersection of religion and poli-

tics within the dynamics of power. The author breaks down what he calls "systems of power" into "theocracy, democracy and civil religion," and then deals with several areas barely treated in other works in this bibliography: Native, Black and Immigrant Americans and Vietnam. He then moves to new religious movements as well as discussing free exercise and establishment.

*Churches on the Wrong Road*, Stanley Atkins and Theodore McConnell, Lake Bluff, Illinois: Regnery Gateway, 270 pp. (1986).

This collection of essays looks at the effect of churches' political focus on its spiritual mission. Authors include priests, pastors and professors from various denominations.

Eidsmoe, John, *The Christian Legal Advisor*, Milford, Michigan: Mott Media, 578 pp. (1984).

Written to help churches and pastors, this book purports to be "a comprehensive statement of the Christian view of law." Divided into three parts, the first introduces biblical principles of law and explains how they can be applied in modern society; the second explains the first amendment and other constitutional principles and applies them to issues of interest to Christians; part three discusses practical legal problems which involve Christians but not particularly at the Constitutional level. It includes a fourteen page bibliography.

Fowler, Robert Booth, *Religion and Politics in America*, Metuchen, N.J.: The American Theological Library Association and the Scarecrow Press, Inc., 351 pp. (1985)

This study discusses the interconnection of religion and politics in contemporary America and attempts to develop a theory of religious group involvement and influence in politics. The author examines several religious interest groups but finds that organized religion does not have significant political influence. The book includes a 20 page bibliography.

Greenawalt, Kent, *Religious Convictions and Political Choice*, New York: Oxford University Press, 266 pp. (1988).

The author argues that political decisions should not be made on a single person's determination that something is "sinful" and that using religious convictions is appropriate where secular ideas are not conclusive. He argues that value judgments make a positive contribution to political life. He then applies his theory to legal and constitutional questions.

Hertzke, Allen D., *Representing God in Washington: The Role of Religious Lobbies in the American Polity*, University of Tennessee Press, 260 pp. (1988).

This assessment which fills a gap otherwise left in the literature, provides numerous tables throughout. An especially useful chapter analyzes the impact of religious lobbying on the Equal Access Act of 1984. In the appendix the author explains his methodology and includes the names and organizations he interviewed. He includes a 6 page bibliography.

Hutcheson, Richard G., Jr., *God in the White House: How Religion Has Changed the Modern Presidency*, New York: MacMillan, 267 pp. (1988).

The author examines the historical relationship of religion to the presidency and then focuses on the place of religion in post-Watergate presidencies. He concludes that the religious aspect of recent presidencies must be understood in historical context; it has not been accidental, nor has it violated the principle of separation of church and state; it has brought negatives as well as positives; the polarized state of American religion weighs heavily in evaluating it, and the moral issues underlying it remain compelling.

*Liberty and Law: Reflections on the Constitution in American Life and Thought*, Ronald A. Wells and Thomas A. Askew, eds., Grand Rapids, Michigan: Eerdmans Publishing Company, 174 pp. (1987).

These brief essays represent diverse views on three themes: impact of the constitution on early American life; a comparative approach to the Constitution; and the implications of constitutional thinking today. Although the general topics are broadly about the Constitution, most of the eight essays actually represent reflections from a Christian viewpoint.

McBrien, Richard P., *Caesar's Coin: Religion and Politics in America*, New York: MacMillan, 294 pp. (1987).

Designed for nonspecialists, yet heavily documented, this book examines issues of religion and politics as distinguished from, but within the context of, church and state. After setting out a theoretical framework, the author applies it to traditional church-state issues such as schools, creches, Sabbatarian claims, conscientious objectors and other practical issues such as abortion, the sanctuary movement, gay rights, pornography and nuclear armament. The author's seven page suggested reading list and appendixes of definitions and Supreme Court cases makes the book particularly useful as a research tool.

Mooney, Christopher F., *Public Virtue: Law and the Social Character of Religion*, Notre Dame, Indiana: Notre Dame Press, 180 pp. (1986).

The author, a priest, theologian, lawyer and educator, in writing about the interface between religion and law, poses questions about whether a religious person or group promoting its values in the public sphere does so to the exclusion of an understanding of the religious and nonreligious beliefs of others. He asks how those efforts can withstand public scrutiny and contribute to public virtue.

Morgan, Richard E., *The Politics of Religious Conflict: Church and State in America*, 2d ed., Washington, D.C.: University Press of America, 156 pp. (1980).

Analyzing church-state matters from a political science viewpoint, the author provides graphs and tables to illustrate his points. By its explanation of the sources of tension and positions of various groups, it provides a good introduction to the topic. The author includes a bibliography.

Noll, Mark A., *One Nation Under God? Christian Faith and Political Action in America*, San Francisco: Harper & Row, 211 pp. (1988).

Starting with the premise that "for believers, the demands of the faith should always provide the framework for political action. . ." the author looks historically at the relationship between religion and politics in America. The author concludes by providing "a framework for Christian political involvement today."

Neuhaus, Richard John, *The Naked Public Square: Religion and Democracy in America*, Grand Rapids, Michigan: Eerdmans Publishing Company, 280 pp. (1984).

Written in essay style with references to American history, this book discusses the relationship between religion and politics with particular emphasis on the need for some type of religiously based values to inform societal decision making.

*Reformed Faith and Politics: Essays Prepared for the Advisory Council on Church and Society of the United Presbyterian Church in the U.S.A. and the Council on Theology and Culture of the Presbyterian Church in the U.S.*, Ronald H. Stone, ed., Washington, D.C.: University Press of America, 201 pp. (1983).

Prepared over a two year period partly in response to concern over political activity by the religious right, various essays are aimed at scholars, laity, ministers and students. Authors include Paul Minear, Jane Dempsey, and Senator David Pryor.

Reichly, A. James, *Religion in American Public Life*, Washington, D.C.: Brookings Institution, 402 pp. (1985).

The author examines the impact of religion on American public life and provides a conceptual framework for values grounded in both, showing that religion and politics have been intertwined. He examines how that involvement can continue without threat to civil liberties and without polarizing religion. He provides a topology of value systems and follows the history of religion in public life.

*Religion in American Politics*, Charles W. Dunn, ed., Washington, D.C.: CQ Press, 193 pp. (1988).

The book's premise is that tension characterizes the relationship between religion and politics in the United States. In four parts seventeen scholars, among them A. James Reichley, Robert Booth Fowler and Kenneth D. Wald, examine those tensions: "Religious Liberty and the Constitution," "Religious Participation in American Politics," "Voting and Group Behavior" and "Evangelical Protestant Politics."

*Religion and Politics in the American Milieu*, Leslie Griffin, ed., Notre Dame, Indiana: Review of Politics, 172 pp. (1989).

The lead articles in this collection were written by Paul Sigmund, Gerald Fogarty, Richard McBrien, Bryan Hehir, John Gilligan, Lindy Boggs and others. Among the respondents are John Robinson, Leslie Griffin and David O'Brien. The works focus primarily on the interaction between American politics and Catholicism.

*Religion and the Public Good: A Bicentennial Forum*, foreword by John F. Wilson, Macon, Georgia: Mercer University Press, 139 pp. (1988).

This book includes essays by William Lee Miller, Robert N. Bellah, Martin E. Marty and Arlin M. Adams. Topics are the influence of religious pluralism on the constitution, religious language and public discourse, religious freedom and church and state, and accommodationism.

*Religion, Morality, and the Law*, J. Roland Pennock and John W. Chapman, eds., New York: New York University Press, 287 pp. (1988).

Volume 30 of the NOMOS series, this collection grew out of meetings of the American Society for Political and Legal Philosophy held in conjunction with the Association of American Law Schools in January 1986.

Stanmeyer, William A., *Clear and Present Danger: Church and State in Post-Christian America*, Ann Arbor, Michigan: Servant Books, 219 pp. (1983).

This book calls Christians to action as citizens in domestic matters such as crime prevention and law enforcement, particularly with reference to drug use and pornography. The author provides concrete suggestions for citizen action and in the footnotes provides several organizational sources.

Vetterlil, Richard & Gary Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government*, Totowa, N.J.: Rowman & Littlefield, 269 pp. (1987).

Although this book centers on the purportedly lost concept of public virtue and its importance in preserving the Republic, a substantial portion of it bears upon religion in American life, arguing against absolute separation of church and state. After defining and tracing the development of "public writing" the authors contend that America's religious foundations provided the driving force for public virtue in this country. They discuss authors from both ends of the church-state spectrum, but they rely heavily on the work of de Tocqueville. The full documentation makes this a good reference point.

Wald, Kenneth, *Religion and Politics in the United States*, New York: St. Martin's Press, 301 pp. (1987).

Writing from a social science perspective, the author posits that "[t]here is much more to the religious factor in American politics than just the church-state debate. . . ." He attempts to highlight ways in which religion affects political life as well as circumstances limiting its influence. After discussing religion and several aspects of American political behavior, the author discusses some particular religious groups and concludes by weighing the pros and cons of religion's contributions to political life in America. The chapter endnotes are primarily textual, but the chapter reference lists provide a valuable source for further study.

Whitehead, John, *The Second American Revolution*, illustrated by Wayne Stayskal, Elgin, Illinois: David C. Cook, 253 pp. (1982).

Written for a general audience from a Christian perspective, this book discusses what the author believes is the dilemma between the United States as a country founded "under God," and the United States as a country dominated by secular humanism. The numerous editorial cartoons, originally appearing in the *Chicago Tribune*, elicit thoughtful response.

## 5. Contemporary Problems Under the Religion Clauses

a. *Church Autonomy*

Buzzard, Lynn R. and Thomas S. Brandon, Jr., *Church Discipline and the Courts*, Wheaton, Illinois: Tyndale House, 271 pp. (1987).

Starting with a case where a woman was allowed to sue the elders of her church who had applied church disciplinary rules to her, this book explores the issues raised by that case and maintains that the church should practice Biblical discipline, to preserve church integrity. The authors outline the Biblical process, giving guidelines and sample forms in the three appendices. The book is targeted to church leaders; it is carefully documented with court cases and endnotes.

*Government Intervention in Religious Affairs, I and II*, Dean M. Kelley, ed., New York: Pilgrim Press, 213 pp. and 245 pp. (1982 and 1986).

These volumes contain the proceedings of a conference on church autonomy and include presentations by William B. Ball, Laurence H. Tribe, William Lee Miller, James J. Wood, Jr., Sharon L. Worthing, Douglas Laycock, Carl H. Esbeck, Arlin Adams and Samuel E. Ericsson.

Hammar, Richard R., *Pastor, Church and Law*, Springfield, Missouri: Gospel Publishing House, 447 pp. (1983).

This is a practical publication directed toward pastors. It includes a section on church-state conflicts, however the greater part of the book deals with practical problems which have legal implications

Weber, Paul J. and Dennis A. Gilbert, *Private Churches and Public Money: Church-Government Fiscal Relations*, Westport, Connecticut: Greenwood Press, 260 pp. (1981).

The authors, political scientists, evaluate church-government fiscal relations from an equity dimension and propose a policy of fiscal neutrality which "would treat religion and all similarly situated organizations equally." Characteristically, in taking a social science approach, the authors present information in more than a dozen tables, and in two appendices. Their fifteen page bibliography includes a section on "Documents, Dissertations, and Reports."

b. *Education*

Buzzard, Lynn R., *Schools: They Haven't Got a Prayer*, Elgin, Illinois: David C. Cook, 192 pp. (1982).

Written in clear language for a general audience, the author discusses school prayer and related issues, carefully presenting both sides.

Gilkey, Langdon, *Creationism on Trial: Evolution and God at Little Rock*, Minneapolis: Winston Press, 301 pp. (1985).

The author details his participation as a theological witness for the plaintiffs in *McLean v. Arkansas Board of Education* (1981). In addition to a number of textual footnotes the author provides in appendices the state law at issue in *McLean* and the district court opinion enjoining enforcement of it.

McCarthy, Martha M., *A Delicate Balance: Church, State and the Schools*, Bloomington, Indiana: Phi Delta Kappan Educational Foundation, 178 pp. (1983).

While several important judicial decisions affecting schools have come out since July, 1983, the cut-off date for this book, it still provides an objective background look at legal principles as they are involved in church-state education issues. Aimed at a broad audience, the article contains footnotes sufficient to assist additional study. Topically arranged, the materials include Religious Observances and Activities in Public Schools, Religion Exemptions from Public School Programs, Religious Challenges to the Public School Curriculum, Rental, Shared-Time, and Released-Time Arrangements, State Aid to Parochial Schools, and Governmental Regulation of Parochial Schools.

McMillan, Richard C., *Religion in the Public Schools*, Macon, Georgia: Mercer University Press, 301 pp. (1984).

This book argues that "the constitutionally defined and appropriate relationship of religion to public education is attained only through studies about religion," and that "in a pluralistic society dedicated to religious freedom governmentally sponsored and required acts of religious devotion have no place in public schools." The author traces the development of First Amendment principles, provides edited versions of major Supreme Court rulings on religion and the public schools and suggests how a curriculum about religion might work. He explains what the local minister can do to help develop such a curriculum. The four appendices contain lists of cases and edited versions of them. Also included is an eighteen page, partially annotated bibliography.

*Private Schools and the Public Good: Policy Alternatives for the Eighties*, Edward McGlynn Gaffney, Jr., ed., Notre Dame, Indiana: University of Notre Dame Press, 212 pp. (1981).



This volume contains papers and discussion generated at a 1980 conference sponsored by the Institute of Public Policy of the University of Notre Dame. Contributors include Frederick J. Weintraub, Sen. Daniel Patrick Moynihan, then professor Antonin Scalia and Walter Berns. In addition to the text of the discussions, editorial explanations of cases or legislation mentioned in the discussions rounds out the information.

*Religion, The State, and Education*, James E. Wood, Jr., ed., Waco, Texas: Baylor University Press, 151 pp. (1984).

This volume commemorates the 35th anniversary of the *McCullum* case and the 20th of the *Schempp* case; it is a collection of essays with such contributors as James E. Wood, Jr., Wesley J. Badin, David Fellman, Edwin Scott Gaustad, James R. Kirkpatrick, Niels C. Nielson, Robert A. Spivey, Donald E. Boles, and Sharon L. Worthing. It contains a 5 page bibliography.

Smith, Rodney K., *Public Prayer and the Constitution*, Wilmington, Delaware: Scholarly Resources, 305 pp. (1987).

This book is as much about constitutional interpretation generally as it is about the prayer question. Distinguishing his approach from that of Edwin Meese, the author argues that history provides the Court principles for resolving difficult issues. He heavily relies on the views of James Madison and Justice Joseph Story, and details the incorporation debate, concluding that while incorporationism may not meet strict originalist criteria, it is in fact a constitutionally defensible practice. The second half of the book discusses prayer, Bible reading and equal access in public schools.

### c. *New Religious Movements*

Burstein, Abraham, *Religion, Cults and the Law*, rev. 2d ed., Dobbs Ferry, N.Y.: Oceana, 117 pp. (1980).

A brief reference work designed for a general audience, this book provides a "nutshell" type approach to laws concerning not merely religion and religious cults, but religion and public education as well. The appendices provide forms for drafting articles of incorporation and religion clauses in selected state constitutions. Twelve tables contain statistics on distributions of religious groups relative to geography, income, occupation and political affiliation.

*Cults, Culture and the Law: Perspectives on New Religious Movements*, T. Robbins, W. Shepherd and J. McBride, eds., Chico, California: Scholars Press, 238 pp. (1985).

This collection arose from presentations at a seminar sponsored by the Center for the Study of New Religious Movements affiliated with the Graduate Theological Union in Berkeley, California. The articles, by the editors, Richard Delgado and Robert Shapiro, and others, are meant to clarify through legal and moral analysis some of the controversies associated with "cults."

Shepherd, William C., *To Secure the Blessings of Liberty: American-Constitutional Law and the New Religious Movements*, New York: Crossroad, and Chico, California: Scholars Press, 155 pp. (1985).

This work is about the vindication of private rights in civil proceedings. Written by a professor of religion, from the standpoint of the social sciences, but completed by his widow, a practicing attorney, this book focuses on preserving liberties of members of "socially scorned religious groups." The seven page bibliography contains several references to cults and deprogramming practices.

## B. *Articles*

### 1. Religion Clauses Generally

Adams, Arlin and Sarah Barringer Gordon, "The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses," 37 *DePaul Law Review* 317-45 (1988).

The authors propose a test designed to preserve the non-establishment and free exercise guarantees, yet to accommodate religion and diminish the tension between the two religion clauses. A voluntary accommodation, as opposed to one in response to a free exercise violation, would require identifying "two basic components: (1) a governmentally-imposed burden on religious exercise, which (2) does not entitle the believer to constitutionally-compelled relief."

Anastaplo, George, "Church and State: Explorations," 19 *Loyola University of Chicago Law Journal* 61-193 (1987).

This wide ranging article is based upon nine of the author's previous presentations spanning a twenty-five year period. It covers everything from the witch hunts of the fifteenth-seventeenth centuries to a discussion of the *Bhagavad Gita*, an ancient sacred Hindu text.

Beschle, Donald L., "The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor," 62 *Notre Dame Law Review* 151-91 (1987).

The author believes that the goal of separation in religion clause jurisprudence is misguided and that it should be replaced with the goal of liberal neutrality, the central message of which is, "that government may not endorse or disapprove any set of religious values[.]"

Bradley, Gerard V., "Dogmatomachy - A 'Privatization' Theory of the Religion Clause Cases," 30 *Saint Louis University Law Journal* 275-330 (1986).

The author's premise is that since *Everson* the Court has attempted to privatize religion, that is, to move it into the realm of subjective preference. This, the author believes, eliminates religious consciousness, and therefore fails to meet what the author views as Madisonian empowerment of religion.

Choper, Jesse H., "Defining 'Religion' in the First Amendment," 1982 *University of Illinois Law Review* 579-613.

In discussing the problems inherent in formulating a constitutional definition of religion, the author posits that what constitutes religion need be answered in only a limited way since most violations of the free exercise clause may be vindicated under freedom of speech and those of the establishment clause may be handled under freedom of expression and association principles, though less readily.

Choper, Jesse H., "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 *University of Pittsburgh Law Review* 673-701 (1980).

The author argues that a single principle should underlie resolution of claims under both religion clauses, that is, "the establishment clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs."

Esbeck, Carl H., "Religion and a Neutral State: Imperative or Impossibility?" 15 *Cumberland Law Review* 67-88 (1984).

Responding to the theocentrist assertion that the state cannot be neutral toward religious matters, the author argues that "the state cannot be neutral on moral issues, but it can and should be neutral on questions central to religious faith."

Esbeck, Carl H., "Toward a General Theory of Church-State Relations and the First Amendment," 4 *Public Law Forum* 325-54 (1985).

The author's thesis is that the free exercise clause, like other Bill of Rights provisions, protects individual liberties, but that the establishment clause defines the relationship between

government and religious organizations. He describes that relationship as one in which "[t]he state must be nonsectarian or neutral. . . . [The establishment clause] prohibits churches from being treated like other voluntary associations that may enjoy the government's largesse and incur its regulation."

Freeman, George C. III, "The Misguided Search for the Constitutional Definition of 'Religion'," 71 *Georgetown Law Journal* 1519-65 (1983).

As its title suggests, the article's author argues that no single set of features characterizes religion, and that while lack of a definition may not make adjudication any easier, it will improve the way it is performed.

Garvey, John H., "Freedom and Equality in the Religion Clauses," 1981 *Supreme Court Review* 193-221.

In an attempt to reconcile the two religion clauses, the author argues that failure of the government to allocate funds to religiously motivated individuals in free exercise cases such as *Thomas* and *Sherbert* is not a burden on free exercise, but a question of equality under the establishment clause. He does so by distinguishing between what he calls protecting religious liberty and promoting religious options.

Greenawalt, Kent, "Religion as a Concept in Constitutional Law," 72 *California Law Review* 753-816 (1984).

Recognizing the problem posed by cases where a threshold determination must be made as to whether religion is present, the author suggests that since no single feature or combination of elements can capture all that is regarded as religious in modern culture, the courts should use an analogical approach which begins by determining "what is undisputably religious," determining the "significant aspects of analogy for the particular legal context," and by determining "the religiousness of disputed cases by comparison to the indisputably religious in the contextually relevant aspects."

Hitchcock, James, "The Supreme Court and Religion: Historical Overview and Future Prognosis," 24 *Saint Louis University Law Journal* 183-204 (1980).

This account concludes that the thrust of the Court's philosophy has encouraged the process by which religion has ceased to be seen as having a central place in American life.

Ingber, Stanley, "Religion or Ideology: A Needed Clarification of the Religion Clauses," 41 *Stanford Law Review* 233-333 (1989).

In considering the constitutional meaning of religion as it pertains to public school curricular decisions, the author argues that while attempting to define religion is "fraught with danger" a distinction between religion and ideology must take place in order for the religion clauses to have significance and for the public schools to survive. He proposes such a definition and applies it to *Mozert*, *Smith* and *Aguillard*.

Johnson, Phillip E., "Concepts and Compromise in First Amendment Religious Doctrine," 72 *California Law Review* 817-46 (1984).

The author discusses three indeterminate areas present in religion clause doctrine and the way in which ideologies held by the Justices shape the result in attempts to reach neutral compromise. The areas of indeterminacy are: characterization, use of subjective tests, and the lack of a definition of religion.

Laycock, Douglas, "A Survey of Religious Liberty in the United States," 47 *Ohio State Law Journal* 409-51 (1986).

The author provides a thorough overview of religious liberty issues from the origins of the First Amendment through topically arranged cases, with an analytic framework for each topic.

Lupu, Ira C., "Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution," 18 *Connecticut Law Review* 739-78 (1986).

The author compares "the principles underlying the religion clauses with those of the equal protection and free expression clauses" and concludes that the religion clauses "tolerate the religious concerns of individuals, yet limit the power of government to aid religious institutions."

Mansfield, John H., "The Religion Clauses of the First Amendment and the Philosophy of the Constitution," 72 *California Law Review* 847-907 (1984).

Avoiding terminology used by the Court in his discussions, the author attempts to show that resolving problems under the religion clauses requires a "philosophy of the Constitution regarding human nature, human destiny and other realities[.]"

Mauney, Constance, "Religion and First Amendment Protections: An Analysis of Justice Black's Constitutional Interpretation," 10 *Pepperdine Law Review* 377-420 (1983).

The article presents a political scientist's view of Justice Black's religion clause jurisprudence.

McBride, James, "Paul Tillich and the Supreme Court: Tillich's 'Ultimate Concern' as a Standard in Judicial Interpretation," 30 *Journal of Church and State* 245-72 (1988).

The author discusses the usefulness of and the problems associated with the incorporation of Tillich's ideas into the American legal arena.

McConnell, Michael W., "Accommodation of Religion," 1985 *Supreme Court Review* 1-59.

The author argues that an interpretation of the religion clauses emphasizing the centrality of religious liberty and grounded in political theory underlying the Constitution helps distinguish what he sees as a permissible class of government actions whose purpose and effect is to facilitate religious liberty.

McConnell, Michael W., "Neutrality Under the Religion Clauses," 81 *Northwestern University Law Review* 146-67 (1986).

Recognizing the importance of neutrality as a starting point, but asking is it "enough" in achieving religious liberty, the author suggests "an analysis for determining when departures from religious neutrality are either permissible or constitutionally required."

McConnell, Michael W. & Richard A. Posner, "An Economic Approach to Issues of Religious Freedom," 56 *University of Chicago Law Review* 1-60 (1989).

The authors propose, as one component of a needed "fresh approach" to the religion clauses, "using an economic definition of 'neutrality' to determine when government action impinges impermissibly on religious choice." They provide normative analyses of aid to parochial schools and of exemptions under the free exercise clause as well as a descriptive analysis of the Court's doctrines in cases decided under the religion clauses.

McCoy, Thomas R. & Gary A. Kurtz, "A Unifying Theory for the Religion Clauses of the First Amendment," 39 *Vanderbilt Law Review* 249-74 (1986).

The authors argue that the Court should apply the religion clauses as a single unit with the underlying principle that the risk of political oppression on religious lines can be outweighed if the government can demonstrate an interest sufficient to outweigh the oppression.

Oaks, Dallin H., "Separation, Accommodation and the Future of Church and State," 35 *DePaul Law Review* 1-22 (1985).

In reviewing recent trends in first amendment case law, the author concludes that the balance sought in the law of church and state is tending toward equilibrium emphasizing accommodation and that resultant increases in taxation and regulation will primarily impact activities of religious organizations which parallel those of non-religious organizations.

Paulsen, Michael A., "Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication," 61 *Notre Dame Law Review* 311-71 (1986).

The author argues that the Court's "reading of the religion clauses is completely indefensible - historically, textually and practically." In an effort to provide an alternative with internal consistency, he proposes an equal protection model.

Pepper, Stephen L., "The Case of the Human Sacrifice: In the Supreme Court of the New States: Spring Term 2383: *State v. Williams*," 23 *Arizona Law Review* 897-934 (1981).

In a style reminiscent of Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949), the author sets out the mythical majority, concurring, and dissenting opinions in an imaginary case involving "the ritual sacrifice of one competent consenting person by another in the context of genuine religious belief and practice."

Pfeffer, Leo, "Freedom and/or Separation: The Constitutional Dilemma of the First Amendment," 64 *Minnesota Law Review* 561-84 (1980).

The author discusses various cases to show that despite purported conflict between the religion clauses, they "represent only different facets of a single freedom."

Smith, Michael E., "The Special Place of Religion in the Constitution," 1983 *Supreme Court Review* 83-123.

In tackling the question of what justifies the special constitutional place of religion, the author describes the Court's articulated justifications and examines the Justices' underlying views toward religion.

Smith, Rodney K., "Justice Potter Stewart: A Contemporary Jurist's View of Religious Liberty," 59 *North Dakota Law Review* 183-210 (1983).

In an effort to counter what he sees as commentators' failure to focus on the jurisprudence of Justice Stewart, the author analyzes the religious liberty opinions of the Justice and concludes that the Justice's approach to the two clauses is not so much inconsistent as it is flawed in applying a right-privilege distinction to limit free exercise rights in the public sector.

Teitel, Ruti G., "The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance," 21 *Harvard Civil Rights-Civil Liberties Law Review* 651-88 (1986).

In analyzing *Wallace v. Jaffree*, *Aguilar v. Felton* and *Grand Rapids School District v. Ball*, *Board of Trustees v. McCreary*, *Thornton v. Caldor, Inc.*, *Alamo Foundation v. Secretary of Labor*, and *Jensen v. Quaring* the author argues "that the deferential nature of the Court's review, and the absence of a workable theory to secure individual religious liberty, seriously undermine the protection of that liberty against legislative encroachment."

Tushnet, Mark, "The Constitution of Religion," 18 *Connecticut Law Review* 701-38 (1986).

The author argues that "the social relations of our society do not now provide the support needed for a concept of politics into which religion would comfortably fit." He analyzes the existing doctrinal and theoretical approaches to the law of religion, examines what he calls the two principles, reduction and marginality, that seem to explain the Court's framework, and explains why both the liberal and republican traditions must be revived in order to improve our understanding of the place of religion in the constitutional order.

Vogel, Howard J., "A Survey and Commentary on the New Literature in Law and Religion," 1 *Journal of Law and Religion* 79-169 (1983).

The author traces the recent interest in the study of law and religion and discusses by subject the resulting literature. The appendix includes a list of pertinent organizations, and the bibliography lists books, articles, book reviews, and addresses and speeches.

Worthing, Sharon L., "'Religion' and 'Religious Institutions' Under the First Amendment," 7 *Pepperdine Law Review* 313-53 (1980).

The author argues that if the government may construct definitions of "religion" or "religious institutions," it may impose through definition what it cannot impose directly, by "tacitly establishing existing religions against developing religions."

## 2. History and Interpretation

Cord, Robert L., "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," 9 *Harvard Journal of Law and Public Policy* 129-72 (1986).



The author explores how history supports the "no-preference" doctrine with respect to the establishment clause and analyzes the *Everson* Court's reading of history.

Curry, Patricia E., "James Madison and the Burger Court: Converging Views of Church-State Separation," 56 *Indiana Law Journal* 615-36 (1981).

The author relates James Madison's view of separation to his view of government and shows how his views depend on two values, control of faction and encouragement of multiple sects.

Drakeman, Donald L., "Religion and the Republic: James Madison and the First Amendment," 25 *Journal of Church and State* 427-45 (1983).

This article analyzing the views of James Madison concludes that the vagueness of the final version of the first amendment may be its greatest political strength, that Madison's chief fear was infringement of freedom of conscience, and that complex issues of church and state may be too difficult to solve according to eighteenth century demarcations.

Graham, John Remington, "A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion," 1981 *Brigham Young University Law Review* 333-59.

After examining the historic origins of the first amendment, the author concludes that the intended meaning of the establishment clause would not preclude public support of private schools.

Kurland, Philip B., "The Origins of the Religion Clauses of the Constitution," 27 *William and Mary Law Review* 839-61 (1986).

Discussing the historical background of the religion clauses, the author states that "[h]istory should provide the perimeters within which the choice of meaning may be made[,] but that it "ordinarily should not be expected. . . to provide specific answers to the specific problems that bedevil the Court."

Laycock, Douglas, "'Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 *William and Mary Law Review* 875-923 (1986).

Drawing on Kurland's article at 27 *William and Mary L. Rev.* 839 (1986), T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986) and his own review of history, the author argues that the claim that the framers intended to permit nonpreferential aid is false.

Pfeffer, Leo, "The Deity in American Constitutional History," 23 *Journal of Church and State* 215-39 (1981).

As the title suggests, this article traces the invocation of the Deity by government officials from the initial landing of the Pilgrims to Court use of the term "Supreme Being" and argues that such invocations are constitutionally permissible outside of the context of public school education.

Smith, Rodney K., "Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the *Reynolds* and *Everson* Decisions," 20 *Wake Forest Law Review* 569-643 (1984).

The author criticizes the two seminal cases as subordinating rights of free exercise to strict separation of church and state. He argues that closer examination of history and application of "the Madisonian standard of non-preference and equal treatment" would help repudiate the rationale of *Everson*.

Van Patten, Jonathan K., "In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses," 27 *Saint Louis University Law Journal* 1-93 (1983).

The author's premise is that an understanding of the problem of religion and democracy as the founder's understood it is a necessary first step in attempting to define the dimensions of contemporary problems, but that no simple prescription exists for reaching the founder's belief that religion should remain politically impotent but at the same time should provide the moral basis for self-government.

Veltri, Stephen, "Nativism and Nonpreferentialism: A Historical Critique of the Current Church and State Theme," 13 *University of Dayton Law Review* 229-65 (1988).

In this essay the author questions the nonpreferentialist reading of history by reviewing the roles played by nativism and anti-Catholicism in developing the constitutional prohibition against financial aid to sectarian schools.

### 3. Establishment Clause

Braveman, Daan, "The Establishment Clause and the Course of Religious Neutrality," 45 *Maryland Law Review* 352-86 (1986).

In examining the principle of neutrality, the author finds that while the Court reaffirmed that principle in the 1985 term, it had departed from it in the earlier *Lynch* case and that despite

a return to neutrality, the earlier departure poses a threat to religious liberty.

Conkle, Daniel O. "Toward a General Theory of the Establishment Clause," 82 *Northwestern University Law Review* 1113-94 (1988).

This article explores the relationship between the Court's establishment clause doctrine and various theoretical models of judicial review. The author concludes that a type of judicial activism is necessary to preserve political and moral health with respect to the relationship between religion and government.

Cornelius, William J., "Church and State - The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?" 16 *Saint Mary's Law Journal* 1-39 (1984).

The author, a member of the Texas judiciary, suggests a theory of benign neutrality in which the two clauses should be read together, and government would not be religion-blind. Government may, on this theory, indirectly support action benefiting religion if it is nonpreferential between all religions and nonreligion and is noncoercive.

Dow, David R., "Toward a Theory of the Establishment Clause," 56 *University of Missouri-Kansas City Law Review* 491-513 (1988).

The author argues that neutrality, one of the establishment clause's central values, requires that the government not create "outsiders," and that accommodation laws do just that where they reward religious belief rather than secular deeds or actions.

Dunsford, John E., "Prayer in the Well: Some Heretical Reflections on the Establishment Syndrome," 1984 *Utah Law Review* 1-44 (1984).

The author claims that *Marsh* exposes the unconstitutionality of the *Lemon* test and concludes that the relevant standard for defining establishment is "whether the state expresses a preference for one religion over another, or undertakes to bestow a governmental endorsement on particular religious beliefs[.]"

Gaffney, Edward McGlynn, Jr., "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," 24 *Saint Louis University Law Journal* 205-36 (1980).

The author argues that the Court should "abandon the political divisiveness test because the test is dysfunctional, illib-

eral, theologically unsound, constitutionally impermissible, and historically erroneous,”

Gedicks, Frederick Mark, “Motivation, Rationality, and Secular Purpose in Establishment Clause Review,” 1985 *Arizona State Law Journal* 677-726.

The author argues for more careful scrutiny of governmental motivations and purposes as a means of clarifying permissible boundaries under the establishment clause.

Jones, Richard H., “Accommodationist and Separationist Ideals in Supreme Court Establishment Decisions,” 28 *Journal of Church and State* 193-223 (1986).

The author argues that the Court does not rely upon tests so much as upon broader abstract principles held by individual justices regarding the proper relation of governmental activity and religion.

Lines, Patricia M., “The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?” 17 *Journal of Law and Education* 1-33 (1988).

The author raises the troubling results under the *Lemon* test by which tax relief for private education is available to middle-class parents (*Mueller v. Allen*), but that aid to poor children through assistance to private schools is not (*Aguilar v. Felton* and *Grand Rapids v. Ball*).

Mott, Kenneth F., “The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond,” 14 *Journal of Law and Education* 111-45 (1985).

Written by a political scientist for that audience, this article reviews establishment clause cases and contrasts the separationist ideals of the early decisions with the accommodationist ones of the more recent Court.

Riggs, Robert E., “Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition,” 18 *Valparaiso University Law Review* 285-330 (1984).

The author argues that confusion in establishment clause cases results because the premise underlying the second and third prongs of the *Lemon* test, “that religion can be established by being inhibited[,]” is a false one. He finds that such an approach detracts from the way in which the two clauses should work together.

Ripple, Kenneth F., "The Entanglement Test of the Ten Year Clauses — A Ten Year Assessment," 27 *U.C.L.A. Law Review* 1195-1239 (1980).

The author appraises the entanglement test from the perspective of overall doctrinal development, practical problems in implementing the test and possible future developments under the test.

Serritella, James A., "Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts," 44 *Law and Contemporary Problems* 143-67 (Spring 1981).

The author offers an entanglement test based on a factor analysis focusing on the religious character of the activity, the frequency and effects of contacts and the government interest served.

Shortt, Bruce Nevin, "The Establishment Clause and Religion-Based Categories: Taking Entanglement Seriously," 10 *Hastings Constitutional Law Quarterly* 145-85 (1982).

The author proposes a reformulation of the entanglement test which would require facial neutrality of all legislation and regulation. He points out that this would not eliminate exemptions for religious organizations as long as they were included under broad provisions including all nonprofit organizations. He would leave the free exercise doctrine intact, which would protect religion from unduly burdensome facially neutral provisions.

Simson, Gary J., "The Establishment Clause in the Supreme Court: Rethinking the Court's Approach," 72 *Cornell Law Review* 905-35 (1987).

The author proposes reform of the *Lemon* test by requiring the state to meet the burden of showing that adoption of the law in question was not dependent on a nonsecular purpose, which he defines as those that "sponsor religion, support religion with public funds, or involve the state actively in religious activity;" by requiring the law to serve a substantial state interest where its effects may be adverse ones; and by eliminating the entanglement prong.

Smith, Steven D., "Separation and the 'Secular': Reconstructing the Disestablishment Decision," 67 *Texas Law Review* 955-1031 (1989).

The author argues that replacement of the concept of separatism with that of secularism has led to current difficulties in dealing with the establishment clause and that the clause

should be construed to require institutional separation, but not political or governmental secularism.

Smith, Steven D., "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 *Michigan Law Review* 266-332 (1987).

The premise of this highly analytical article is that the "no endorsement" test suggested by Justice O'Connor appeals to scholars and jurists because it seems to express the current drift of the establishment clause doctrine, but that the test would generate chaotic results.

Swift, Joel H., "To Insure Domestic Tranquility: The Establishment Clause of the First Amendment," 16 *Hofstra Law Review* 473-501 (1988).

The author analyzes the historical divisions caused by the use of public funds for churches as a means of showing that rather than accepting Rehnquist's *Mueller* footnote stating that divisive political potential is relevant only in direct financial aid cases, the proper interpretation is that the adoption of the establishment clause came at a time when there existed belief that "political division over religious issues. . . was harmful."

Tushnet, Mark, "The Emerging Principle of Accommodation of Religion (Dubitante)," 76 *Georgetown Law Journal* 1691-1714 (1988).

In examining the usefulness of the accommodation principle the author concludes that it resembles the neutrality principle in the level of difficulty in applying it as a coherent principle of constitutional adjudication.

Valauri, John, "The Concept of Neutrality in Establishment Clause Doctrine," 48 *University of Pittsburgh Law Review* 83-151 (1986).

In analyzing the concept of neutrality, the author posits that while the dilemma posed by the contradictory neutrality principles of *Everson* which are furthered in *Lemon* cannot be resolved singularly, replacing constitutional monism with constitutional pluralism will serve many constitutional values.

#### 4. Free Exercise

Choper, Jesse H., "The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments," 27 *William and Mary Law Review* 943-61 (1986).

After discussing the types of government action which give rise to free exercise claims and the Burger Court's rulings in

the area, the author discusses perceived difficulties primarily due to conflict with the establishment clause.

Garvey, John H., "Free Exercise and the Values of Religious Liberty," 18 *Connecticut Law Review* 779-802 (1986).

The author suggests three values underlying free exercise: "avoiding the special suffering endured by those forced to violate religious norms[,] . . . avoiding the moral bind faced by religious claimants torn between conflicting duties[, and] the consequentialist values of preventing widespread disobedience, unusually large enforcement costs, and loss of respect for the law."

Laycock, Douglas and Susan E. Waelbroeck, "Academic Freedom and the Free Exercise of Religion," 66 *Texas Law Review* 1455-75 (1988).

This article explores issues raised by the employment dispute between Father Charles Curran and the Catholic University of America. The authors argue that while the Constitution protects believers and churches from the state, it cannot protect believers from each other.

Lupu, Ira C., "Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination," 67 *Boston University Law Review* 391-442 (1987).

The author examines religious institutions' claims for free exercise exemptions from statutory prohibitions against employment discrimination on bases other than religion. He argues for a "members only" principle, based on the right of association, by which religious institutions could exclude from employment only those they would also exclude from membership.

Lupu, Ira C., "Home Education, Religious Liberty, and the Separation of Powers," 67 *Boston University Law Review* 971-90 (1987).

After examining *Care and Protection of Charles*, 399 Mass. 324, 504 N.E.2d 592 (1987), a home education case, the author argues that home education is not constitutionally protected and that it should be discouraged.

Lupu, Ira C., "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harvard Law Review* 933-90 (1989).

The author argues that court's focus on "burden" avoids application of heightened scrutiny, posing an intolerable risk of discrimination against non-mainstream religions and threatening religious liberty generally. He offers a constitutional test

derived from common law norms and enhanced by notions of entitlement and designed to co-exist with the establishment clause and equal protection.

Marshall, William P., "Solving the Free Exercise Dilemma: Free Exercise as Expression," 67 *Minnesota Law Review* 545-94 (1983).

The author argues that by determining free exercise cases under the first amendment freedom of expression tension with the establishment clause would be eliminated and neutrality in church-state relations would result because religious ideas would no longer receive favored status.

Pepper, Stephen, "Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause," 1981 *Utah Law Review* 309-78.

The author provides an in-depth look at historical free exercise interpretations, establishment clause constraints on the free exercise clause interpretation, and several alternatives for free exercise interpretation. He concludes by asking whether, given the advance of secularization over the past two hundred years, deference to a religious world view via the free exercise clause is still warranted.

Pepper, Stephen, "Taking the Free Exercise Clause Seriously," 1986 *Brigham Young University Law Review* 299-336.

The author's premise is that no other liberty is as absolutely protected as religious liberty, but that recently the Justice Department has attempted to undo what he calls the *Sherbert-Yoder* doctrine. He argues that the religion clauses require "not only that intentional religious discrimination by government be prohibited, but also that indirect and unintended government incursion upon the religious conduct of individuals and minorities be found constitutionally impermissible."

Reilly, Elizabeth, "'Secure the Blessings of Liberty': A Free Exercise Analysis Inspired by Selective Service Nonregistrants," 16 *Northern Kentucky Law Review* 79-144 (1988).

Written by one of the attorneys who represented a Mennonite nonregistrant, this article discusses the case (*United States v. Schmucker II*, 815 F.2d 413 (6th Cir. 1987) and argues for a free exercise test that would require accommodation of religiously motivated conscientious action unless accommodation would accord affirmative political power to the accommodated.

Taylor, Timothy B., "Redemption Song: An Update on the Rastafarians and the Free Exercise Clause," 9 *Whittier Law Review* 663-82 (1988).



The author traces litigation regarding Rastafarianism since 1984 in an effort to review the level of free exercise protection which that sect has received.

Wolman, Benson A., "Separation Anxiety: Free Exercise Versus Equal Protection," 47 *Ohio State Law Journal* 453-74 (1986).

Focusing on *Ohio Civil Rights Commission v. Dayton Christian Schools*, the author examines the Biblical "chain of command" issue in religious disputes and whether Ohio's antidiscrimination laws should include exceptions for religious institutions with respect to religious discrimination. He concludes by discussing possible approaches to an ecclesiastical exemption from civil rights laws.

##### 5. Role of Religion in American Life

Bernardin, Joseph Cardinal, "The Role of the Religious Leader in the Development of Public Policy," 34 *DePaul Law Review* 3-21 (1984).

The author, a Catholic bishop, discusses the moral implications of public policy, the Church's role in the development of public policy, and the role of the religious leader in that policy development. He sees as misconceptions the notions that "morality is limited to private matters[.]" and that "the development of public policy is a purely secular or political endeavor[.]"

Cover, Robert, "Forward: Nomos and Narrative," 97 *Harvard Law Review* 4-68 (1983).

In this forward to the annual review of Supreme Court decisions, the author explores the problem of developing legal meaning as determined by the force of interpretive commitments. The essay includes a critique of the *Bob Jones* case.

Cuomo, Mario M., "Religious Belief and Public Morality: A Catholic Governor's Perspective," 1 *Notre Dame Journal of Law, Ethics & Public Policy* 13-31 (1984).

The author argues that "we create our public morality through consensus and in this country that consensus reflects to some extent religious values of a great majority of Americans[.]" but that "all religiously based values do not have an *a priori* place in our public morality."

Esbeck, Carl H., "Five Views of Church-State Relations in Contemporary American Thought," 1986 *Brigham Young University Law Review* 371-404.

In an effort to provide a nonpejorative vocabulary for the church-state debate, the author presents a typology defining five positions.

Gaffney, Edward McGlynn, Jr., "Biblical Religion and Constitutional Adjudication in a Secularized Society," 31 *Mercer Law Review* 422-48 (1980).

Appearing in the symposium, "The Secularization of Law," this article attempts, "without the arrogance of exclusivity or of contempt for the experience of others[.]" to expose "aspects of law perceived in biblical religion and to invite similar reflection on the grounding of law from other perspectives."

Gedicks, Fred and Roger Hendrix, "Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America," 60 *Southern California Law Review* 1579-1619 (1987).

In this essay the authors argue that liberal affinity for individualism has created negative perceptions of religious institutions, that religious morality has been excluded from political discourse, but that liberal democracy does not require that arguments be barred from public policy discussions solely due to religious origin.

Greenawalt, Kent, "Church-State Relations and Religious Convictions," 35 *Cleveland State Law Review* 219-35 (1987).

Focusing on the place of religious convictions in the political resolution of church-state issues, the author concedes that "promotion of religious views and practices is not the business of the state[, but that nothing] "requires good liberal citizens to try to disregard their religious convictions when they resolve many political issues."

Greenawalt, Kent, "Religious Convictions and Lawmaking," 84 *Michigan Law Review* 352-404 (1985).

The author addresses the question of whether Americans properly rely on their religious convictions in deciding what policies to support. He argues that they may when secular morality is unable to resolve issues, examples of which are animal rights, environmental protection and abortion rights. He concludes that liberalism demands understanding of the place of religious premises in believers' lives and of the dangers of religious discourse that overwhelm the common dialogue of rational secular morality.

Greenawalt, Kent, "Religiously Based Premises and Laws Restrictive of Liberty," 1986 *Brigham Young University Law Review* 245-97.

The author develops further his premise "that neither citizens nor officials should prohibit actions in a liberal society just because they believe the actions are wrong from a religious standpoint[,]" but that religious convictions have a proper place in determining the level of protections for certain entities and that such convictions may properly be used to resolve conflicts among secular values when rational secular morality is inconclusive.

Hyde, Henry J., "Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life," 1 *Notre Dame Journal of Law, Ethics & Public Policy* 33-51 (1984).

Addressing a Catholic law school from a Catholic perspective, the author addresses the relationship of politics and religion, particularly with respect to abortion, and argues for establishing the legitimacy of an appeal to religiously based values in conducting public debate over public business.

Katz, Lucy V., "Caesar, God and Mammon: Business and the Religion Clauses," 22 *Gonzaga Law Review* 327-64 (1987).

An article in the first of a two part issue entitled, "In Celebration of the Bicentennial of the United States Constitution 1787-1987," this work, focusing on business and the religion clauses, examines six cases in which business entities were before the Court, litigating under the first amendment. The author proposes an approach based on the *Lemon* test, but which utilizes greater flexibility "so that free exercise values can be weighed against other claims."

McConnell, Michael W., "Political and Religious Disestablishment," 1986 *Brigham Young University Law Review* 405-63.

The author compares government policies toward political expression and religious advocacy, proposing that bringing the two doctrines into closer alignment would sensitize government (1) to the reduction in religious choice because of widespread government subsidies and (2) to the risk of not protecting individuals from compulsory support of others' political advocacy.

Perry, Michael J., "Conscientious Disobedience," 11 *Hamline Law Review* 1-39 (1988).

In this essay which predates *Morality, Politics and Law: A Bicentennial Essay*, the author examines disobeying the law as an alternative when moral discourse runs out.

Pickerell, Thomas W. and Mitchell A. Horwich, "'Religion as an Engine of Civil Policy': A Comment on the First Amendment Limitations on the Church-State Partnership in the Social

Welfare Field," 44 *Law and Contemporary Problems* 111-42 (Spring 1981).

The authors explore the first amendment limitations on church-state relationships in the area of social welfare and conclude that both entities share a common purpose to help the needy, that the two may work together in secular tasks, and that the tension between the two religion clauses will continue to be tested in this area.

Seeburger, Richard H., "Public Policy Against Religion: Doubting *Thomas*," 11 *Pepperdine Law Review* 311-30 (1984).

The author argues that the least restrictive alternative test used in *Thomas* should not be used in cases of both specific prohibitions of religious practices and indirect financial burdens based upon religious claims, but that a test is needed which "would be sensitive to the *degree of the burden* and the *importance of the religious practice*["]

Sirico, Louis J., Jr., "The Secular Contribution of Religion to the Political Process: The First Amendment and School Aid," 50 *Missouri Law Review* 321-76 (1985).

The author argues that religion makes a secular contribution to society and the positive effect of religious forces on the American governmental process justifies an accommodationist approach rather than the preoccupation with potential dangers in church state relations.

Wagner, William Joseph, "Reflections on the Symposium: An Ordered Inquiry into the Relation of Civil Rights Law and Religion," 5 *Journal of Law and Religion* 5-37 (1987).

This article describes the work of the "Symposium on the Religious Foundations of Civil Rights Law," and provides an overall analysis of the roles ascribed by the participants to religion with respect to aspects of civil rights law.

Weisbrod, Carol, "Family, Church and State: An Essay on Constitutionalism and Religious Authority," 26 *Journal of Family Law* 741-70 (1988).

The author presents a descriptive analysis of church-state interaction in relation to the family, arguing that since religious groups may see themselves as a source of authority they may view issues of church and state as involving competing systems of law.

## 6. Contemporary Problems Under the Religion Clauses

## a. Church Autonomy

Adams, Arlin M. and William R. Hanlon, "*Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*," 128 *University of Pennsylvania Law Review* 1291-1339 (1980).

The authors argue that the "neutral principles of law" approach to resolving internal church disputes is the constitutionally required approach because it meets the underlying value of the two religion clauses, that is, equal treatment.

Bradley, Gerard V., "Forum Juridicum: Church Autonomy in the Constitutional Order," 49 *Louisiana Law Review* 1057-87 (1989).

The author argues that "to preserve religious liberty we must, in some decisive way, keep Christianity [including inchoate Judaistic elements] in the public arena."

Dutile, Fernand N., "God and Gays at Georgetown: Observations on *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*," 15 *Journal of College and University Law* 1-20 (1988).

The author examines several questions related to the *Gay Rights Coalition* case, which pitted students' claim of civil rights violations under a District of Columbia statute against the free exercise claims of a church-related university.

Ellman, Ira Mark, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes," 69 *California Law Review* 1378-1444 (1981).

Dealing primarily with property cases the author is critical of judicial deference to church decisions. He asserts that most church disputes ordinarily can be decided under contract principles, and that "[o]nly when doctrinal decisions or the imposition of external policies" exists should a court take a hands-off approach.

Gedicks, Frederick Mark, "Toward a Constitutional Jurisprudence of Religious Group Rights," 1989 *Wisconsin Law Review* 99-169.

The author uses *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* and *Corporation of the Presiding Bishop v. Amos*, both employment discrimination cases, to explore the question of whether individuals have more to fear from governmental power than from religious group autonomy. He concludes that they do.

Sirico, Louis J., Jr., "Church Property Disputes: Churches as Secular and Alien Institutions," 55 *Fordham Law Review* 335-62 (1986).

Using property disputes raised by withdrawing churches due to ordination of women to illustrate the danger to church autonomy posed by a court's assumptions about church organizational structures, the author offers an alternative test for adjudication, the secular documents test. Despite the test's bias toward those in control of a church's legal apparatus, the author advances it as more judicially convenient and more fair in that it encourages churches to translate into secular language accessible to the courts church expectations regarding property ownership.

Young, David J. and Steven W. Tigges, "Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes," 47 *Ohio State Law Journal* 475-99 (1986).

After discussing both the Court's "deference" approach and its "neutral principles" approach, the authors attempt to reconcile these two approaches for resolving religious disputes.

#### *b. Education*

##### *i. Aid to Religious Schools*

Anastaplo, George, "The Religion Clauses of the First Amendment," 11 *Memphis State University Law Review* 151-230 (1981).

The article originally appeared in 1978 as a memorandum entitled "Title I Funds, Church-Sponsored Schools and the First Amendment: From Child-Benefit to Community-Benefit?" as part of a study, "The Participation of Private School Students in ESEA Title I Programs." The author questions the Court's doctrines regarding aid to parochial schools especially with respect to Title I funds.

Capps, Kline & Carl H. Esbeck, "The Use of Government Funding and Taxing Power to Regulate Religious Schools," 14 *Journal of Law and Education* 553-74 (1985).

The authors attempt to assess the likelihood of increased government regulation of religious schools should government funding of those schools go into effect. They recount events in France, Spain and Malta as instructive regarding increased government regulation. An appendix shows selected enrollment trends for religious schools over a twenty year period.

Garvey, John, "Another Way of Looking at School Aid," 1985 *Supreme Court Review* 61-92.

The author compares the *Lemon* antiestablishment principle in *Grand Rapids* and *Aguilar* with the Title IX antidiscrimination principle in *Grove City College v. Bell* and concludes that the concern of both is preventing improper effects of government financial assistance to private institutions. He posits that should the Court abandon what he calls hypotheses about entanglement, it would eliminate what he calls the establishment clause "kink" present in cases involving primary and secondary religious school cases.

Gibney, Mark P., "State Aid to Religious-Affiliated Schools: A Political Analysis," 28 *William and Mary Law Review* 119-53 (1986).

The author, a political scientist, analyzes the institutional relationships between the Supreme Court and lower federal courts and the Court and the states. He argues that the Court should abandon the *Lemon* test and replace it with a type of equal protection analysis. When applying the author's analysis in aid cases the Court would apply a deferential standard.

Young, David J. and Steven W. Tigges, "Federal Tuition Tax Credits and the Establishment Clause: A Constitutional Analysis," 28 *Catholic Lawyer* 35-71 (1983).

The authors explore the constitutionality of federal tuition tax credits for school children. They conclude that well drafted legislation would pass muster.

## ii. Public Schools and Curriculum

Becker, William H., "Creationism: New Dimensions of the Religion-Democracy Relation," 27 *Journal of Church and State* 315-33 (1985).

The author examines the *McLean* Arkansas creationism case through a six dimensional analysis which he maintains should be applied in today's church-state cases. The dimensions are: legal-institutional and religious-cultural (circular); historical-geographical and sociological (horizontal); and anthropological and spiritual-prophetic (vertical).

Boisvert, Robert C., Jr., "Of Equal Access and Trojan Horses," 3 *Law and Inequality: Journal of Theory and Practice* 373-406 (1985).

In examining the Equal Access Act, the author finds that religious meetings do not belong in public schools, but postulates that the Court will not find the Act a violation of the establishment clause because it will actually strengthen students' free speech rights.

Buchanan, G. Sydney, "Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values," 28 *UCLA Law Review* 1000-48 (1981).

In determining whether religious activity may be accommodated in a public school, the author proposes a six factor analysis: disruption, constraint, financial support, encouragement, neutrality and student age.

Caudill, David S., "Law and Worldview: Problems in the Creation-Science Controversy," 3 *Journal of Law and Religion* 1-46 (1985).

The author discusses *McLean* and the circuit opinion in *Aguillard* before presenting an interdisciplinary overview of historical analyses of the nature of science. He concludes that the question persists as to "whether students should be taught, in some communicable. . . manner, that all of their courses. . . are taught from a particular perspective, and that neutrality and objectivity are often imagined and illusionary."

Dent, George W., Jr., "Religious Children, Secular Schools," 61 *Southern California Law Review* 863-941 (1988).

After examining the constitutional problems resulting from public education for children from a variety of religious backgrounds, the author analyzes various remedies and concludes that "[f]ree exercise does not require that government guarantee everyone the ability to practice religion without difficulty; it requires only that government structure its activities to minimize any burden on religion, but only if it can act without preferring religion or seriously impairing compelling state interests."

Dhooge, Lucien J., "From *Scopes* to *Edwards*: The Sixty-Year Evolution of Biblical Creationism in the Public School Classroom," 22 *University of Richmond Law Review* 187-234 (1988).

The author defends the Court's treatment of evolution and creation science as a proper protection of constitutional freedom and concludes that "accommodation of competing religious beliefs with government preference for none," justifies the limits on the scope of classroom inquiry created by *Edwards*.

Drakeman, Donald L. and Robert P. Seawright, "God and Kids at School: Voluntary Religious Activities in the Public Schools," 14 *Seton Hall Law Review* 252-84 (1984).

The authors argue that in cases where the establishment and free exercise rights conflict, the Court should balance the two interests with preference to free exercise in close cases.



Gelfand, Gregory, "Of Monkeys and Men - An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools," 16 *Journal of Law and Education* 271-338 (1987).

The author, an atheist who attended public school during the period of required Bible reading, argues that in order to forge a path of religious neutrality regarding evolution and creation-science in the public school curriculum, *Epperson v. Arkansas* should be overruled and evolution should be removed from the curriculum.

Laycock, Douglas, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Northwestern University Law Review* 1-67 (1986).

Appearing in a Symposium on Associational Freedom and Private Discrimination, this article, in exploring the meaning of neutrality, argues that the Constitution permits a moment of silence and requires equal access for religious speech.

Leedes, Gary C., "Monkeying Around with the Establishment Clause and Bashing Creation Science," 22 *University of Richmond Law Review* 149-82 (1988).

The author examines scientific creationism and argues that legislatures may require public school students to study competing scientific theories so long as educators use the same kind of evidence as that used by evolutionists.

Lider, Michael D., "Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court's Establishment Clause Jurisprudence," 22 *Wake Forest Law Review* 813-89 (1987).

The author argues that neutrality is impossible, at least in the realm of education. In addition to discussing the history of religion in the United States, the author includes several statistical tables, including one which shows changes in church membership from 1960 to 1975 for selected "evangelical protestants" and selected "accommodationist protestants."

Mangrum, R. Collin, "Extracurricular Religious Activities in the Public Schools: Constitutionally Permissible, Required or Proscribed?" 22 *Creighton Law Review* 955-1006 (1988/89).

The author examines *Mergens v. Board of Education* and *Garnett v. Renton School District No. 403* in which the eighth and ninth circuits split over whether extracurricular student initiated groups could meet on school premises on an equal basis with other clubs. The author concludes that they should.

Mitchell, Mary Harter, "Secularism in Public Education: The Constitutional Issues," 67 *Boston University Law Review* 603-746 (1987).

The author argues that Secularism should be considered a religion for establishment clause purposes, but that many of the public school practices under fire would still pass the *Lemon* test, and that no legal doctrine for limiting promotion of Secularism in public schools currently exists.

Mueller, Lori Leff, "Religious Rights of Children: A Gallery of Judicial Visions," 14 *Review of Law & Social Change* 323-51 (1986).

Based on the premise that the Court delineates constitutional rights for children based upon its perception of their needs and of the proper roles for family and state relative to child development, the author examines four models of judicial conceptions of religious rights, particularly in light of the "inherent tension between the Establishment Clause and the socializing function of social education[.]"

Nuger, Kenneth P., "Judicial Responses to Religious Challenges Concerning Humanistic Public Education: The Free Exercise and Establishment Clause Debate Continues," 39 *Alabama Law Review* 73-101 (1987).

The author examines how courts have dealt with religious objections to humanistic education and concludes that courts may be more willing to consider humanism a religion when students seek exclusion from school activities on free exercise grounds than when free exercise claims are advanced against humanistic education.

Smith, Michael E., "Relations Between Church and State in the United States, with Special Attention to the Schooling of Children," 35 *American Journal of Comparative Law* 1-45 (1987).

This article takes an historical approach in describing the interrelatedness of American church-state law and education. It appears in a symposium on Law and Religion with articles on Ireland, the Soviet Union, the Muslim Middle East, Israel and India.

Smith, Norman B., "Constitutional Rights of Students, Their Families, and Teachers in the Public Schools," 10 *Campbell Law Review* 353-409 (1988).

This article takes a multifaceted approach in discussing competing constitutional interests which arise in public school settings especially in regard to family rights, religious claims, academic freedom and freedom of expression. The author

concludes that in unclear situations, the route favoring more speech and expanded debate should be followed.

Smith, Rodney K., "Now Is the Time For Reflection: *Wallace v. Jaffree* and Its Legislative Aftermath," 37 *Alabama Law Review* 345-89 (1986).

The author argues that properly drafted silent reflection, meditation or prayer legislation would be permissible under what he calls "[t]he Madisonian view [which] would permit a statute that facilitates individual exercises in a nonpreferential way, but [which] would not support a law intended to promote a particular religion or form of religious practice."

Spiro, Daniel A., "The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision," 39 *Alabama Law Review* 1-71 (1987).

This article explores the way religion should be addressed in public schools. The author concludes that what is currently taught in public schools is more "American Civil Religion" than secular humanism, but that the former derives from secularism, "The American Way of Life," and diluted Christianity. He calls for improvement of the public schools through greater societal commitment to increased funding, through vesting professionals with greater control over curricula in their own classroom, and through exposing students to diverse ideas regarding religion.

Stone, Geoffrey R., "In Opposition to the School Prayer Amendment," 50 *University of Chicago Law Review* 823-48 (1983).

In this work adapted from the author's testimony before the Senate Judiciary Committee the author argues against the adoption of former President Reagan's proposed constitutional amendment to eliminate the bar against school prayer. He finds the proposed amendment itself inconsistent with contemporary constitutional jurisprudence, and the amendment process inappropriate for achieving whatever legitimate ends the amendment may have.

Strossen, Nadine, "A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?" 71 *Cornell Law Review* 143-83 (1985).

The author looks at the equal access issues raised by *Bender v. Williamsport Area School District* and proposes an approach that

accords discretion to school officials in a flexible but specific analytical framework for evaluating equal access cases.

Strossen, Nadine, " 'Secular Humanism' and 'Scientific Creationism': Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom," 47 *Ohio State Law Journal* 333-407 (1986).

This article proposes that a high degree of protection be accorded any arguably religious belief in the public school context, and recommends evidentiary guidelines that preserve local educational autonomy, but which allow courts to overturn policy decisions that limit students' freedom of belief in the arguably religious sphere.

Teitel, Ruti, "The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis," 12 *Hastings Constitutional Law Quarterly* 529-95 (1985).

The author argues that equal access programs in high schools raise establishment clause problems and that the Equal Access Act unconstitutionally sponsors religion notwithstanding the Act's requirement that clubs be student-initiated and have equal access.

Teitel, Ruti, "When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools," 81 *Northwestern University Law Review* 174-89 (1986).

Appearing in same symposium as Laycock's article arguing that equal access is required and a moment of silence could be permitted, this article argues that Laycock's analysis does not survive scrutiny. The author proposes an equality standard that varies depending on the type of speech, and he applies that standard to issues of religion in the public schools.

West, Ellis, M., "The Supreme Court and Religious Liberty in the Public Schools," 25 *Journal of Church and State* 87-112 (1983).

In examining the relationship between religion and the public schools the author begins with the premise that any discussion of religion and the schools should center on religious liberty, but then asks whose religious liberty should be protected. He believes that the policy of benevolent neutrality opens the way for greater protection of religious liberty.

Wood, James E., Jr., "Religion and Education in American Church-State Relations," 26 *Journal of Church and State* 31-54 (1984).

The author provides a descriptive overview of American religion and education since 1947 and identifies what he sees as five trends regarding the Supreme Court's views of religion, the Constitution, and the schools.

Wood, James E., Jr., "Religion and the Public Schools," 1986 *Brigham Young University Law Review* 349-70.

The author discusses secular humanism, scientific creationism, state sponsorship of religion in schools, and equal access. He concludes that efforts to Christianize the public schools, even though supported by millions of Americans, have made the schools a battleground for crucial political issues.

### iii. Regulation of Church Schools

Carpenter, James G., "State Regulation of Religious Schools," 14 *Journal of Law and Education* 229-49 (1985).

This practice-oriented article discusses two approaches for litigating cases involving regulation of church schools and suggests that state rather than federal claims may produce more favorable results for church schools.

Durrant, Matthew B., "Accrediting Church-Related Schools: A First Amendment Analysis," 38 *Arkansas Law Review* 598-639 (1985).

The author examines the question whether the religion clauses create restrictions for the accreditation process for postsecondary schools in light of the extensive entanglement of the accrediting agencies with the state. His answer is that the clauses compel assurance of a minimal level of educational quality without resorting to standards restricting the religious function of these schools.

Mangrum, R. Collin, "Family Rights and Compulsory School Laws," 21 *Creighton Law Review* 1019-45 (1988).

This article discusses the constitutionality of compulsory school laws with respect to state regulation of church schools in light of family rights. The author concludes that when free exercise claims are raised in challenges to compulsory school laws, the state should bear the burden of proof.

Ross, Charles, E., "'Train Up a Child in the Way He Should Go': State Regulation of Private Religious Education," 9 *Mississippi College Law Review* 101-34 (1988).

The author argues that a free exercise standard conforming to free speech principles would advance free exercise rights of parents who want to educate their children privately because of their religious convictions.

Titus, Herbert W., "Education, Caesar's or God's: A Constitutional Question of Jurisdiction," 1982 *Journal of Christian Jurisprudence* 101-80.

The author argues that government support of education is unconstitutional under both religion clauses, and that education properly is a matter of family and church control.

Toner, John F., "Rendering Unto Caesar 'Til It Hurts: How Far May the States Constitutionally Regulate Private Religious Schools?" 5 *Journal of Christian Jurisprudence* 55-85 (1984).

After examining cases involving state approval requirements as applied to private and home schools, the author proposes an analysis using *Sherbert* and *Yoder* and concludes that use of national standardized tests would provide the best alternative for insuring that the state's interest in education is met.

Whitehead, John W., "Judicial Schizophrenia: The Family and Education in a Secular Society," 1982 *Journal of Christian Jurisprudence* 49-99.

In arguing for greater family autonomy, the author traces the historic role of the family and education in the Bible, in early America, and in court decisions.

### c. *Employment*

Boyle, John P., "Religious Employers and Gender Employment Discrimination," 4 *Law and Inequality Journal: A Journal of Theory and Practice* 637-65 (1986).

The author discusses exemptions from discrimination laws for the employment relationships of church-minister, seminary administration, and theology faculty. He concludes that since eradication of sex discrimination is a compelling state interest, courts should allow investigations of alleged discrimination whenever possible.

Durso, John J. and Roger T. Brice, "*NLRB v. the Catholic Bishop of Chicago*: Government Regulation Versus First Amendment Religious Freedoms," 24 *Saint Louis University Law Journal* 295-326 (1980).

After discussing the excessive entanglement doctrine and the *Catholic Bishop* case, the authors examine the validity of other government regulations of employment by churches.

Earle, Henry III, and James R. McPherson, "Religious Discrimination in Employment: Employer's Duty to Accommodate Employee's Refusal to Work Scheduled Hours," 1987 *Detroit College of Law Review* 765-95 (1987).

The authors discuss problems related to when and how to accommodate employees' religious needs.

Gregory, David L., "The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term," 31 *New York Law School Law Review* 1-36 (1986).

In examining the religion clauses in light of *Thornton* and *Alamo Foundation*, the author argues that the Court's message with respect to labor and employment law is that the constitutional scope of operations is defined primarily by the establishment clause. He concludes that the two cases were "highly principled first amendment decisions."

Grosch, Carla A., "Church Related Schools and the Section 504 Mandate of Nondiscrimination in Employment on the Basis of Handicap," 31 *DePaul Law Review* 69-113 (1981).

The author argues that section 504 of the Rehabilitation Act of 1973 should be narrowly interpreted to exclude church-related schools.

Laycock, Douglas, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 *Columbia Law Review* 1373-1417 (1981).

The author asserts that the religion clauses serve distinct purposes, "[g]overnment support is an element of every establishment clause claim, just as a burden of restriction on religion is an element of every free exercise claim." He proposes that a court "consider the internal or external nature and religious intensity of the matter regulated, the nature and extent of the interference, and perhaps other factors not yet identified[.]" in applying a compelling state interest balancing test.

Rogers, W. Sherman, "Constitutional Aspects of Extending Section 701(j) of Title VII and Section 19 of the NLRA to Religious Objections to Union Dues," 11 *Thurgood Marshall Law Review* 1-46 (1985).

The author argues that Section 19 of the National Labor Relations Act is unconstitutional because, like the statute in *Estate of Thornton v. Caldor, Inc.*, it grants an absolute exemption to members of certain religious bodies, but that Title VII's section 701(j) passes constitutional muster and can be applied to cover religious objection to paying union dues.

#### d. *Miscellaneous*

Freed, Mayer G. and Daniel D. Polsby, "Race, Religion and Public Policy," 1983 *Supreme Court Review* 1-31 (1984).

The authors argue that while the Court's result in *Bob Jones University v. United States*, 461 U.S. 574 (1983), may be correct, its reasoning will not withstand future scrutiny.

Goldberg, Charlotte K., "Choosing Life After Death: Respecting Religious Beliefs and Moral Convictions in Near Death Decisions," 39 *Syracuse Law Review* 1197-1260 (1988).

The author argues that an individual's right to self-determination in making decisions about medical care extends beyond a brain death determination and proposes ways to protect religiously based preferences.

Ingram, John Dwight, "State Interference with Religiously Motivated Decisions on Medical Treatment," 93 *Dickinson Law Review* 41-66 (1988).

In examining the role of the state in regulating medical treatment decisions of adults or of parents on behalf of their children, the author urges that constitutional protections prohibit the state from interfering with religiously motivated decisions about medical care.

Kushner, James A., "Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited," 35 *Southwestern Law Journal* 557-84 (1981).

The author argues that the Court should accord free exercise superior status when church/state separation issues arise, and that it should reevaluate the Sunday closing cases as a means of protecting religious liberty.

Leedes, Gary C., "Court-Ordered Exemptions to Secure Religious Liberty," 21 *University of Richmond Law Review* 335-89 (1987).

The author focuses on the type issue in which the claimant relies on the free exercise clause to seek a judicial exemption while the government opposes the claim based partly on the establishment clause.

McAninch, William Shepard, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court," 55 *University of Cincinnati Law Review* 997-1077 (1987).

This article examines reasons for the Jehovah's Witnesses' impact on the development of first amendment law by numerous cases and the Witnesses' view of law and society.

Ogletree, Charles J., "Reverend Moon and the Black Hebrews: Constitutional Protection of a Defendant's Religion in Criminal Cases," 22 *Harvard Civil Rights-Civil Liberties Law Review* 191-229 (1987).



In this article assessing the appellate court reviews of the Rev. Sun Myung Moon's criminal conspiracy conviction and of Edward Lemon's sentence based on his association with the religious group, the Black Hebrews, the author urges greater scrutiny of trial court discretion where a defendant's religion is implicated.

Peterson, Walfred H., "The Thwarted Opportunity for Judicial Activism in Church-State Relations: Separation and Accommodation in Precarious Balance," 22 *Journal of Church and State* 437-58 (1980).

The author, a political scientist, analyzes the Burger Court's decisions on aid to religious schools and colleges to show that factionalism on a multimember court affects the level of activism or restraint. He posits that alteration of an established policy may take place through activism when a legislature opens the door to a novel legal interpretation. He provides three tables to illustrate voting blocs on the Burger Court aid cases.

Sciarrino, Alfred J., "United States v. Sun Myung Moon: Precedent for Tax Fraud Prosecution of Local Pastors?" 1984 *Southern Illinois University Law Journal* 237-81.

After tracing the facts and lower court opinions in the *Moon* case, the author discusses issues raised among the sixteen amici briefs filed in it and concludes that the second circuit's decision "allows the government to intrude dangerously into the affairs of a church's organizational infrastructure."

*e. Native Americans*

Barsh, Russel Lawrence, "The Illusion of Religious Freedom for Indigenous Americans," 65 *Oregon Law Review* 363-412 (1986).

This article explores aspects of native religion and concludes that despite the American Indian Religious Freedom Act, courts will probably not provide necessary protections for native religion because of their inability to deal with conceptions of religion which differ from those familiar to Europeans and because of an unwillingness to give up profitable economic opportunities when the only bar to them is the misunderstood, but vital aspects of indigenous faiths.

Stambor, Howard, "Manifest Destiny and American Indian Religious Freedom: *Sequoyah*, *Badoni*, and the Drowned Gods," 10 *American Indian Law Review* 59-89 (1983).

In discussing two appellate court decisions affecting two Indian nations, the author argues that the courts failed to address the religious claims in a constitutionally defensible manner and concludes that the American Indian Religious Freedom Act of 1978 is an "impotent statement of good intentions."

Suagee, Dean B., "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers," 10 *American Indian Law Review* 1-58 (1983).

The author argues that infringements of Native Americans' religious freedom occurs as part of an ongoing conflict between the nation's dominant culture and tribal cultures. He suggests that conflicts regarding religious freedom are more likely to be reconciled where they are asserted early in planning stages.

*f. New Religions*

Delgado, Richard, "Cults and Conversion: The Case for Informed Consent," 16 *Georgia Law Review* 533-74 (1982).

The author argues for a type of informed consent similar to that required in medicine as a means of balancing the interests of potential converts as against religious organizations. Private suits for damages would provide enforcement.

Delgado, Richard, "When Religious Exercise is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief," 37 *Vanderbilt Law Review* 1071-1115 (1984).

The author argues for a "discursive model" of deprogramming, which begins with conversational exchange designed to restore volitional capacity.

Sciarrino, Alfred J., "Free Exercise Footsteps in the Defamation Forest: Are New Religions Lost?" 7 *American Journal of Trial Advocacy* 57-121, 307-46, 517-65 (1984).

Published in three issues, this extensive theoretical work reviews defamation law in the context of religious parties, and concludes that an action for defamation is an inappropriate context for raising a free exercise claim or defense.

*g. Regulations*

Albert, James A., "Federal Investigation of Video Evangelism: The FCC Probes the PTL Club," 33 *Oklahoma Law Review* 782-823 (1980).

Written well before Jim Bakker's downfall, this article examines the question of whether the FCC has jurisdiction over

matters involving fraudulent fund-raising charges against religious broadcasters and concludes that it does.

Esbeck, Carl H., "Establishment Clause Limits on Governmental Interference with Religious Organizations," 41 *Washington and Lee Law Review* 347-420 (1984).

The author argues that the establishment clause acts to regiment involvement between government and religious associations. He concludes that the courts adhere to separation where "the religious organization is safeguarded to the same degree as the state against interference by the other."

Esbeck, Carl H., "State Regulation of Social Services Ministries of Religious Organizations," 16 *Valparaiso University Law Review* 1-56 (1981).

From the federal constitution perspective, the author suggests an eight point approach to solving problems which arise under state licensing and regulatory schemes.

Hardy, Ashton R. and Lawrence W. Secrest III, "Religious Freedom and the Federal Communications Commission," 16 *Valparaiso University Law Review* 57-101 (1981).

Former FCC officials discuss cases involving religious broadcasters to show that despite government regulation, the broadcasters' unique position under the first amendment protects them more often than not.

Lacey, Linda J., "*Gay Rights Coalition v. Georgetown University: Constitutional Values on a Collision Course*," 64 *Oregon Law Review* 409-55 (1985-86).

The author offers a categorical approach focusing on the nature of the institution rather than the nature of the regulated activity in determining whether freedom of religion should prevail over the state's interest in prohibiting sex discrimination. She concludes that the danger of religious freedom claims infringing upon individual rights compels resolution in favor of the individual.

Lacey, Linda J., "The Struggle Over Deregulation of Religiously-Affiliated Institutions: A Classic Internal First Amendment Conflict," 26 *Arizona Law Review* 615-60 (1984).

In examining churches' free exercise arguments against regulation of institutions, the author concludes that compelling state interests in health, safety and welfare of children and in uniform regulation outweigh claims of religious liberty. She argues that the establishment clause prohibits exemptions for religious groups since the exemptions aid religious groups through symbolic support.

Marshall, William P. and Douglas C. Blomgren, "Regulating Religious Organizations Under the Establishment Clause," 47 *Ohio State Law Journal* 293-331 (1986).

Noting that usually the free exercise clause provides protection against government infringement upon religious liberty, the authors examine the contention that the establishment clause protects religious institutions from regulation by the state. They conclude that the free exercise and free speech clauses are more suitably applied to issues of regulating religious institutions.

Miles, Judith C., "Beyond *Bob Jones*: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions," 8 *Harvard Women's Law Journal* 31-58 (1985).

In an effort to alleviate the conflict between the principles of religious liberty and of racial and sexual equality and to eliminate unconstitutional governmental support of discrimination, the author proposes denying preferential tax status to all religious organizations. In her conclusion, however, she concedes that her proposal would have a harsh impact on religious institutions already in financial trouble and is "eminently unrealistic," and therefore only a "theoretical" solution.

Reynolds, Laurie, "Zoning the Church: The Police Power Versus the First Amendment," 64 *Boston University Law Review* 767-819 (1984).

The author explores the conflicts posed by the expansive role of religion in modern society and the concurrent expansion of zoning. She examines the first amendment implications of exclusionary zoning ordinances and special use permits and proposes a constitutional framework for analyzing such zoning conflicts.

#### *h. Religious Symbols*

Crabb, Kelly C., "Religious Symbols, American Traditions and the Constitution," 1984 *Brigham Young University Law Review* 509-63.

The author argues that the framers did not intend absolute removal of all religious symbols from public institutions and proposes a test which distinguishes between commemoration and promotion. The author argues for the presumptive constitutionality of religious symbols employed by state or local governments that have the same characteristics as has an established national tradition.

Devins, Neal, "Religious Symbols and the Establishment Clause," 27 *Journal of Church and State* 19-46 (1985).

Though dominated by a discussion of *Lynch*, this article discusses the mixed results in case law in areas of postings of the Ten Commandments, displays of the cross, celebration of religious events and recognition of America's religious heritage. He suggests a need for resolution of the symbol issue.

Dolgin, Janet L., "Religious Symbols and the Establishment of a National 'Religion'," 39 *Mercer Law Review* 495-516 (1988).

In discussing *Lynch* and *Goldman* in the context of religion, symbols and identity, the author finds that the two cases suggest a move toward a unified national identity, a type of civil religion, which "unite[s] the collective interests of the 'insider' with those of the state, and [as in *Goldman*] preclude[s] all who disagree."

Dorsen, Norman and Charles Sims, "The Nativity Scene Case: An Error of Judgment," 1985 *University of Illinois Law Review* 837-68 (1985).

The authors argue that *Lynch* is both wrong in principle and inconsistent with precedent. They propose a two-track scheme for establishment cases wherein strict scrutiny would be applied to government action where some religious distinction is at the center, and a *Lemon*-inspired balancing test would be used where government involvement with religion is a by-product of secular activity.

Meyers, Richard S., "The Establishment Clause and the Nativity Scenes: A Reassessment of *Lynch v. Donnelly*," 77 *Kentucky Law Journal* 61-115 (1988).

In this article about lower court rulings after *Lynch* but before *Allegheny County*, the author argues that the Court should reassess *Lynch* but under his approach, "governmental involvement with a Nativity scene will rarely violate the establishment clause."

#### i. Torts

Buzzard, Lynn, "Scarlet Letter Lawsuits: Private Affairs and Public Judgments," 10 *Campbell Law Review* 1-68 (1987-88),

The author examines the constitutional bases for church rights of internal control and discipline and concludes that "proper judicial control will not bar recovery in deserving cases, but will assure that such tort actions do not become vehicles for either indirect control of internal church affairs or

unwarranted and intrusive financial penalties against unpopular religious beliefs[.]”

Ericsson, Samuel, “Clergyman Malpractice: Ramifications of a New Theory,” 16 *Valparaiso University Law Review* 163-84 (1981).

The author examines constitutional difficulties associated with a theory of clergy malpractice and he concludes that except where “actual malice” is alleged, courts should not recognize the theory.

Esbeck, Carl H., “Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations,” 89 *West Virginia Law Review* 1-114 (1986-87).

In this expansive article the author argues that the needs of the religious community must be balanced with the protection of citizens from tortious injury. He concludes that with respect to emerging tort theories, churches are advantaged by the First Amendment, but that they are disadvantaged because courts are insensitive to claims of church purity.

## APPENDICES

*Appendix A*

## Symposia

See the following symposia for additional articles related to the religion clauses of the first amendment:

*Church and State Symposium*, 24 ST. LOUIS UNIVERSITY LAW JOURNAL 183-468 (1980).

*Colloquium - Alternative Religions: Government Control and the First Amendment*, 9 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 1-124 (1980).

*Harvard Symposium on Religion, Law, and the Political Process, September 1981*, 1 JOURNAL OF LAW AND RELIGION 170-240 (1983).

*Religion*, 44 LAW AND CONTEMPORARY PROBLEMS 1-184 (Spring 1981).

*Religion and the Law Symposium*, 18 CONNECTICUT LAW REVIEW 697-853 (1986).

*The Religion Clauses*, 72 CALIFORNIA LAW REVIEW 753-907 (1984).

*The Religious Leader and Public Policy*, 2 JOURNAL OF LAW AND RELIGION 367-91 (1984).

*The Secularization of the Law*, 31 MERCER LAW REVIEW 401-476 (1980).

*Special Report: Church Activism and Corporate America*, 1985 BUSINESS & SOCIETY REVIEW 4-44.

*Special Section - Religion and American Public Life*, 2 JOURNAL OF LAW AND RELIGION 221-366 (1984).

*Symposium: Church and State*, 16 VALPARAISO UNIVERSITY LAW REVIEW 1-214 (1981).

*Symposium: Church, Family, State, and Education*, 1 JOURNAL OF CHRISTIAN JURISPRUDENCE 1-245 (1982).

*Symposium on Law & Morality*, 1 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 1-155 (1984).

*Symposium on the Religious Foundations of Civil Rights Law*, 5 JOURNAL OF LAW AND RELIGION 3-240 (1987).

*Symposium on Values in Education*, 3 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 519-692 (1988).

*Symposium: Religion and the State*, 27 WILLIAM AND MARY LAW REVIEW 833-1109 (1986).

*Symposium: The Tension Between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO STATE LAW JOURNAL 289-499 (1986).



*Appendix B*

**Organizations**

The following organizations publish newsletters, maintain libraries and/or speakers' bureaus, litigate or participate as amici in cases involving the religion clauses.

**American Civil Liberties Union**

132 West 43rd St.

New York, NY 10036

(212) 944-9800

Ira Glasser, Executive Director

**American Coalition of Unregistered Churches**

P.O. Box 1224

Indianapolis, Indiana 46206

(317) 787-0830

Dr. Greg Dixon, Chairman

**American Jewish Committee**

c/o Institute of Human Relations

165 E. 56th St. New York, NY 10022

(212) 751-4000

Ira Silverman, Exec. V. President

**American Jewish Congress**

15 E. 84th St.

New York, NY 10028

(212) 879-4500

Henry Siegman, Executive Director

**Americans For God**

P.O. Box 124

Gaithersburg, MD 20877

John C. "Rufus" Webb, Jr., President

**Americans for Religious Liberty**

Post Office Box 6656

Silver Spring, Maryland 20906

Edd Doer, Executive Director

**Americans United for the Separation of Church and State**

8120 Fenton Street

Silver Spring, MD 20910

(301) 589-3707

Rev. Robert L. Maddox, Executive Director

Anti-Defamation League of B'nai B'rith  
823 United Nations Plaza  
New York, New York 10017  
(212) 490-2525  
Abraham H. Foxman, Director

Appeal of Conscience Foundation  
119 W. 57th St.  
New York, NY 10019  
(212) 535-5800  
Rabbi Arthur Schneider, President

Association of American Law Schools  
Section on Law and Religion  
Suite 370  
One Dupont Circle  
Washington, DC 20036  
(202) 296-8851  
Jonathon Van Patten, Chairperson

Atheists United  
14542 Ventura Blvd., #211  
Sherman Oaks, CA 91403  
(818) 986-5288  
Herbert Livingston, President

Baptist Joint Committee on Public Affairs  
200 Maryland Ave., N.E.  
Washington, DC 20002  
(202) 544-4226  
Dr. James M. Dunn, Executive Director

Catholic League For Religious and Civil Rights  
1100 W. Wells St.  
Milwaukee, WI 53233  
(414) 289-0170  
Rev. Virgil C. Blum, S.J., President

Center For Church-State Studies  
DePaul University College of Law  
25 E. Jackson Blvd.  
Chicago, IL 60604  
(312) 341-8818  
Sue Bernstein, Administrative Director  
Donna Krier Ioppolo, Program Director

**Center For Law and Religious Freedom**

P.O. Box 1492

Merrifield, VA 22116

(703) 642-1070

Michael J. Woodruff, Director

**Center for the Study of New Religious Movements**

Graduate Theological Union

2465 LeConte Avenue

Berkeley, California 94709

(415) 841-9811

**Christian Law Association**

P.O. Box 30

Conneaut, OH 44030

(216) 599-8900

Dr. Earl Little, President

**Christian Law Institute**

c/o Herbert J. Porras, Jr., Secretary

1138 First City National Bank Building

Southwest Center

El Paso, Texas 79901

(915) 533-8948

**Christian Legal Society**

P.O. Box 1492

Merrifield, VA 22116

(703) 642-1070

Samuel Ericsson, Executive Director

**Christian Solidarity International, U.S.A.**

P.O. Box 24042

Washington, DC 20024

(301) 989-0298

Steven L. Snyder, President

**Coalition For Religious Freedom**

515 Wythe St., Suite 201

Alexandria, VA 22314

(703) 684-9010

Dr. Donald N. Sills, President

**Council On Religion And Law (CORAL)**

Melick and Porter

11 Arlington St.

Boston, MA 02116

(617) 267-7502

Thomas W. Porter, President

- Cult Awareness Network  
2421 W. Pratt Boulevard, Suite 1473  
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Cynthia S. Kissler, Executive Director
- Decalogue Society of Lawyers  
180 W. Washington St.  
Suite 304  
Chicago, IL 60602  
(312) 263-6493  
Joyce Juron, Executive Director
- Freedom From Religion Foundation  
P.O. Box 750  
Madison, WI 53701  
(608) 256-8900  
Anne Gaylor, President
- Free Thought Association (Atheist)  
P.O. Box 4996  
Culver City, California 90231  
(213) 396-7414  
Dr. Gordon Stein, President
- Friends Committee on National Legislation  
245 Second Street, N.E.  
Washington, DC 20002  
(202) 547-6000  
Edward F. Snyder, Executive Secretary
- Home School Legal Defense Association  
731 Walker Road, Suite E-2  
Great Falls, VA 22066  
Michael P. Farris, President
- Institute on Religion and Public Life  
156 Fifth Ave., Room 400  
New York, NY 10010  
(212) 627-2288  
Pastor Richard J. Neuhaus, Director
- International Association For Religious Freedom  
United States Chapter  
25 Beacon Street  
Boston, MA 02108  
(617) 742-2100  
Dr. Jay Atkinson, President

International Religious Liberty Association  
6840 Eastern Ave., N.W.  
Washington, DC 20012  
B.B. Beach, Secretary General

Mercer University  
Center for Constitutional Studies  
1400 Coleman Avenue  
Macon, Georgia 31207 (912) 744-2774

National Association of Evangelicals  
P.O. Box 28  
Wheaton, IL 60189  
(708) 665-0500  
Billy A. Melvin, Executive Director

National Coalition for Public Education and Religious Liberty  
(PEARL)  
1201 16th Street, N.W., Room 624  
Washington, DC 20036  
(202) 822-7309  
Art Must, Jr., Executive Director

National Committee for AMISH Religious Freedom  
30650 Six Mile Road  
Livonia, MI 48152  
(313) 427-1414  
Rev. William C. Lindholm, Chairman

National Council of the Churches of Christ in the U.S.A.  
475 Riverside Dr.  
New York, NY 10115  
(212) 870-2227

People For The American Way  
2000 M. St., N.W., Suite 400  
Washington, DC 20036  
(202) 467-4999  
Arthur J. Kropp, Executive Director

Project on Church and State  
Department of Religion  
Princeton University  
Princeton, NJ 08544-1006  
(609) 258-4494  
John F. Wilson, Director

Religious Freedom Subcommittee  
American Bar Association Section on Individual Rights and  
Responsibilities  
2049 Century Park E., Suite 3160  
Los Angeles, CA 90067-E-62  
Barry A. Fisher, Subcommittee Chairperson

Research Center for Religion and Human Rights in Closed  
Societies  
475 Riverside Dr., Suite 448  
New York, NY 10115  
(212) 870-2481  
Rev. Blahoslav S. Hruby, Executive Director

Rockford Institute Center on Religion and Society  
Trinity Evangelical Divinity School  
2065 Half Day Road  
Deerfield, IL 60015  
(312) 945-8800  
Harold O.J. Brown, Director

Rutherford Institute  
1465 E. Rio Rd.  
P.O. Box 7482  
Charlottesville, VA 22906-7482  
(804) 978-3888  
John W. Whitehead, President

Spiritual Counterfeits Project  
P.O. Box 4308  
Berkeley, CA 94704  
(415) 540-0300  
Robert Burrows, Editor

Synagogue Council of America  
327 Lexington Ave.  
New York, NY 10016  
(212) 686-8670  
Rabbi Henry D. Michelman, Executive Vice President

Thomas J. White Center on Law & Government  
Notre Dame Law School  
Notre Dame, IN 46556  
(219) 239-5913  
John Robinson, Director

United States Catholic Conference  
3211 Fourth St., N.E.  
Washington, DC 20017  
(202) 541-3000  
Fr. Robert Lynch, General Secretary