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CONSTITUTIONAL LAW—FIRST AMENDMENT—RELIGION CLAUSES—STATE REGULATION OF RELIGIOUS ORGANIZATIONS—The United States Supreme Court held that a state's nondiscriminatory imposition of sales and use tax of religious on religious organization's sales of religious materials did not violate the Free Exercise or Establishment Clauses.

Jimmy Swaggart Ministries v Board of Equalization of California, 493 US ___, 110 S Ct 688 (1990).

Jimmy Swaggart Ministries ("Ministries") sold religous books, cassette tapes, records and nonreligious merchandise worth $1,943,502 to residents of California between 1974 and 1981.[1] Approximately 12% of the sales of religious and nonreligious merchandise[2] were made to residents of California during 23 evangelistic crusades held during the seven year period.[3] The balance[4] of the merchandise was sold to residents of California through mail orders and was shipped from Ministries' headquarters in Baton Rouge, Louisiana.[5] At the time of the sales, Ministries was a religious organization affiliated with the Assemblies of God Church[6] and was recognized as a nonprofit religious organization under Louisiana laws and by the Internal Revenue Service.[7]

In 1980, the Board of Equalization of California[8] ("Board") advised Ministries that its sales of merchandise to residents of California were subject to California sales and use tax.[9] California imposes a sales tax on all retailers selling tangible personal property

1. *Jimmy Swaggart Ministries v Board of Equalization of California*, 493 US ___, 110 S Ct 688, 692 (1990).

2. The actual amount was $240,560.00. *Swaggart*, 110 S Ct at 692.

3. Id at 691.

4. The actual balance was $1,702,942.00. *Swaggart*, 110 S Ct at 692.

5. Id. Merchandise was advertised through Ministries' monthly magazine, *The Evangelist*. Id.

6. *Jimmy Swaggart Ministries v Board of Equalization of California*, 204 Cal App 3d 1269, 250 Cal Rptr 891 (1988).

7. *Swaggart*, 110 S Ct at 691. Ministries applied in 1980 to change its federal tax exemption from a religious organization to a church, based on holding church services at its headquarters in Baton Rouge, Louisiana. The Internal Revenue Service granted the change in 1982, making it retroactive to 1980. *Ministries*, 250 Cal Rptr at 893, n.1.

8. The Board of Equalization is responsible for overseeing imposition of sales, use and property taxes by tax officials of the state, county and city. Cal Govt Code § 15606 (West 1990). It also hears appeals by taxpayers regarding the imposition of those taxes.

9. *Swaggart*, 110 S Ct at 692.

in the state.[10] A tax is also imposed on out of state purchases of tangible personal property made by California residents for use, consumption or storage in California.[11] Religious organizations are not exempted from these taxes under either the California Constitution or the Sales and Use Tax law.[12]

The Board notified Ministries of its responsibility to register as a retailer for reporting and paying the sales and use tax.[13] Ministries asserted that the First Amendment of the Constitution of the United States[14] exempted it from imposition of the tax.[15] The Board advised Ministries that there was no exemption from sales taxes on religious materials.[16] In 1981 an audit conducted by the Board resulted in an assessment of $118,294.54 in sales and use tax.[17] Ministries petitioned the Board for a redetermination based on its alleged exemption from the tax.[18] After a hearing and an appeal to the Board, the penalty was removed but the taxes and interest were not adjusted.[19] Ministries paid the taxes and interest and filed for redetermination and a refund.[20] The Board denied this petition.[21]

In an appeal of the Board's decision before Superior Court, San Diego County, California, Ministries was denied a refund and Ministries appealed.[22] The California Court of Appeal, Fourth District, Division 1 affirmed, holding that the taxes did not violate the Free Exercise or Establishment Clauses of the First Amendment of the

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10. Id. "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers . . . [on] the gross receipts of any retailer from the sale of all tangible property sold at retail in this state. . . " Cal Rev & Tax Code § 6051 (West 1987).

11. *Swaggart*, 110 S Ct at 691. "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer. . . " Cal Rev & Tax Code § 6201 (West 1987).

12. *Swaggart*, 110 S Ct at 691.

13. Id at 692. The Board also adopted the position that Ministries had a sufficient nexus with the State of California for the state to require Ministries to collect and report use tax on its mail-order sales to California purchasers. Id.

14. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." US Const, Amend I.

15. *Swaggart*, 110 S Ct at 692.

16. *Ministries*, 250 Cal Rptr at 894.

17. Id. Interest of $36,021.11 and penalties of $11,829.45 were also assessed. Id.

18. Id. Ministries and the Board stipulated that Ministries could eliminate its contest of the taxability of items which Ministries said did not have specific religious-message content. *Ministries*, 250 Cal Rptr at 893, n.3.

19. *Swaggart*, 110 S Ct at 692.

20. Id.

21. Id.

22. *Ministries*, 250 Cal Rptr at 894.

U.S. Constitution.[23] The California Supreme Court refused to grant a discretionary review.[24] The Supreme Court of the United States noted probable jurisdiction[25] under 28 USC section 1257(2).[26]

A unanimous Supreme Court, in an opinion delivered by Justice O'Connor, concluded that the sales and use tax imposed on Ministries did not violate either the Free Exercise Clause or the Establishment Clause.[27] The Court declined to review the merits of Ministries' claim that the use tax violated the Commerce Clause and the Due Process Clauses because the lower courts had ruled the claim was procedurally barred.[28]

In determining whether the California tax violated the Free Exercise Clause of the First Amendment as applied to the States through the Fourteenth Amendment,[29] the Court stated that its Free Exercise inquiry would be guided by *Hernandez v Commissioner of Internal Revenue*.[30] In *Hernandez* the Supreme Court applied a balancing test in which a regulation's "substantial burden" on a central religious belief or practice is weighed against the strength of the government interest.[31] The state action could be found not to violate the Free Exercise Clause if the action involved a compelling government interest.[32]

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23. Id at 891.

24. *Swaggart*, 110 S Ct at 692.

25. Id.

26. Id. 28 USC section 1257(2) provides in pertinent part that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 USC § 1257(2). This paragraph was removed by the Supreme Court Selections Act enacted on June 27, 1988, with the effective date being September 25, 1988. Supreme Court Selections Act, Pub L No 100-352, 102 Stat 662 (1988). Any judgment previously appealable under paragraph (2) that had been entered before the effective date could still be heard by the Supreme Court. Since the California Court of Appeal entered judgment on the instant case on August 29, 1988, the Supreme Court of the United States allowed the appeal notwithstanding the Supreme Court Selections Act.

27. *Swaggart*, 110 S Ct at 699. See note 14 for text of First Amendment.

28. *Ministries*, 250 Cal Rptr at 906-07. The lower courts found that Ministries had failed to preserve this claim in its initial appeal of the Board's decision. Id.

29. *Swaggart*, 110 S Ct at 693. ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ." US Const, Amend XIV §1.

30. 490 US___, 109 S Ct 2136 (1989).

31.. *Swaggart*, 110 S Ct at 693.

32. Id. This balancing test had its origins in *Braunfeld v Brown*, 366 US 599 (1961). See note 101.

In its free exercise argument, Ministries relied on *Murdock v Pennsylvania*[33] and *Follett v McCormick*.[34] These cases arose from challenges by Jehovah's Witnesses of license fees on all persons canvassing or soliciting within a city.[35] The United States Supreme Court held the taxes in *Murdock* and *Follett* to be unconstitutional violations of the Free Exercise Clause.[36] Ministries argued that these decisions extended to the California sales and use tax as burdens on the "evangelical distribution of religious materials."[37]

The Supreme Court determined that the application of the *Murdock* and *Follett* decisions was limited to flat license taxes which served as prior restraints on the free exercise of religious liberty.[38] The California sales and use tax, under the Court's analysis, was not a flat tax, represented only a small proportion of the sale price of the merchandise, and was nondiscriminatory in application to all retail sales.[39] In addition, the sales and use tax was found not to act as a prior restraint because there was no fee charged to register as a retailer. The tax also posed no prior restraint because it was imposed regardless of registration or failure to register and the tax was collected after the sale, and not as a condition of being allowed to deliver a religious message.[40] The Court thus distinguished the California tax from the taxes in *Murdock* and *Follett*.[41]

With no evidence to show that paying the taxes would violate Ministries' sincerely held religious beliefs,[42] the Court also rejected the claim raised by Ministries under *Sherbert v Verner*[43] that the

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33. 319 US 105 (1943).

34. 321 US 573 (1944).

35. *Swaggart*, 110 S Ct at 693. In 1942, one year before *Murdock*, the Supreme Court in *Jones v Opelika*, 316 US 584 (1942) had upheld the constitutionality of license fees similar to the ones in *Murdock*. When the Court heard *Murdock*, *Opelika* was reargued, because of its precedential effect on *Murdock*. In its original decision in *Opelika*, the Supreme Court concluded that a state could charge a license fee for canvassing because the Jehovah's Witnesses had used commercial means to raise funds for evangelical use. The Court, upon rehearing, vacated its previous decision, stating, "the mere fact that religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. *Murdock v Pennsylvania*, 319 US 110." *Ministries*, 250 Cal Rptr at 895-896.

36. *Swaggart*, 110 S Ct at 693-694.

37. Id at 693. Ministries argued that paying the tax would place an economic burden on its ability to spread its religious message. *Ministries*, 250 Cal Rptr at 897.

38. *Swaggart*, 110 S Ct at 694.

39. Id at 695.

40. Id at 696.

41. Id at 695.

42. Id at 696.

43. 374 US 398 (1963).

tax would place Ministries under substantial pressure to modify its behavior.[44] The Court compared the effect of a "generally applicable" sales and use tax to other "generally applicable" laws and regulations, such as health and safety, which religious organizations were obliged to observe.[45] The Court concluded that the general nature of the tax prevented violation of the Free Exercise Clause.[46]

In considering whether the tax violated the Establishment Clause, the Supreme Court applied the standard developed in *Lemon v Kurtzman*.[47] The Court noted that the Establishment Clause prohibits excessive involvement of government in religion, and, therefore, reviewed Ministries' contention that the application of California's sales and use tax fostered excessive government entanglement.[48] The government entanglement questioned involved the inspections of the Ministries' crusades, audits, examination of books, and administrative and judicial proceedings.[49] The Court examined the application of the tax using the three prong test of *Lemon*,[50] and concluded that the sales and use tax met all three prongs without violating the Establishment Clause.[51]

The Court found no excessive entanglement. The tax did not impose any burdens on Ministries' accounting systems and, even if it did, the burdens would not be constitutionally significant.[52] The routine "administration of neutral tax laws"[53] was not so invasive as to constitute excessive entanglement.[54] The application of the tax to all sales of items regardless of the motive for selling them or their content avoided the types of decisions most likely to foster excessive entanglement.[55]

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44. *Swaggart*, 110 S Ct at 697.
45. Id.
46. Id.
47. 403 US 602 (1971). Frequently referred to as the "Lemon test."
48. *Swaggart*, 110 S Ct at 698.
49. Id at 697.
50. The three prong test is that the state action should: have a secular purpose; neither advance nor inhibit religion; and not foster excessive government entanglement in religion. *Lemon*, 403 US at 612-13.
51. Id at 698.
52. *Swaggart*, 110 S Ct at 698. "[W]e have held that generally applicable administrative and record keeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause." Id (referring to *Hernandez*, 109 S Ct at 2147).
53. *Swaggart*, 110 S Ct at 699.
54. Id. In the previous term of the Court in *Texas Monthly, Inc. v Bullock*, 489 US___, 109 S Ct 890 (1989), a plurality of the Court held that a state's sales tax exemption for religious publications was a violation of the Establishment Clause. Id.
55. *Swaggart*, 110 S Ct at 695. "From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question

Ministries asserted that donations often were mixed with payments for religious items and that the separation of sales receipts from donations would be burdensome.[56] However, the Court reasoned that Ministries' use of order forms and prices made separation possible and necessary for other purposes.[57] Thus, the Court found no basis for determining that there was excessive government entanglement as Ministries claimed.[58]

The Supreme Court held that the California sales and use tax did not impose a constitutionally significant burden on Ministries' religious practices and beliefs. The Free Exercise Clause did not require California to grant an exemption to Ministries.[59] Having found no excessive government entanglement, the Court held that the tax did not violate the Establishment Clause.[60] Ministries' appeal for refund of the tax was denied and the judgment of the California Court of Appeal was affirmed.[61]

The language of the Religion Clauses has been described as, "at best opaque."[62] This reputed opaqueness may explain why Chief Justice Warren Burger characterized the history of the Supreme Court's opinions on the Religion Clauses as internally inconsistent because general principles have been formulated on a case by case basis.[63] The internal inconsistency has been reflected in a vacillation between principles of neutrality,[64] and preferred position.[65]

The Free Exercise and Establishment Clauses, although intertwined, are frequently considered separately by the Supreme

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which involves only a secular determination." Id.

56. Id.

57. Id at 698.

58. Id at 699. "Ironically, appellant's theory, under which government may not tax 'religious core' activities, but may tax 'nonreligious' activities, would require government to do precisely what appellant asserts the Religion Clauses prohibit: 'determine which expenditures are religious and which are secular.' *Lemon*, 403 US at 621-622, 91 S Ct at 2115-2116." Id.

59. Id at 697.

60. Id at 695.

61. Id at 701.

62. *Lemon*, 403 US at 612.

63. *Walz v Tax Commission of City of New York*, 397 US 664, 668 (1970). This characterization is supported by Philip B. Kurland, who said that there is no consistency in the Court's opinions regarding the Religion Clauses. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U Chi L Rev 1, 96 (Autumn 1961).

64. "The principle of strict neutrality assumes that all aspects of religion that are appropriately subject to governmental regulation or support will always fall within some larger secular category. . . ." Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 Harv L Rev 513, 527 (January, 1968).

65. See note 75.

Court. Different standards have been developed for each Clause. Vacillation between neutrality and preferred position has contributed to erratic development of the standards. The result has been three standards for the Free Exercise Clause: 1) absolute immunity for religious beliefs and no immunity for conduct; 2) preferred position for religion with immunity for some forms of religious conduct; 3) balancing test in which a compelling state interest can justify infringement on religious liberty.

Initially the Court distinguished religious beliefs and conduct, however, it later adopted the preferred position standard. Almost 50 years have been spent trying to limit and redefine this standard. Without explicitly rejecting the preferred position standard, a balancing test was developed in 1961 which takes into account the burden which state action imposes on religious liberty and whether the state has a compelling interest in such regulation. While diverging from the preferred position standard, the balancing test has reflected preferred position to some extent through factors such as reasonable accommodation of religious conduct.

The standard used for Establishment Clause purposes emerged from a neutrality principle. As the Supreme Court attempted to inject more flexibility for religious organizations utilizing a doctrine of benevolent neutrality, that standard was modified to the current *Lemon* test. Recently, members of the Court have questioned whether the modification has reduced the flexibility of the standard.

Free Exercise: Distinction Between Belief and Conduct

Almost 100 years after the adoption of the Bill of Rights, the Supreme Court issued its first opinion regarding the Free Exercise Clause in *Reynolds v United States*.[66] In that case, the protection under the First Amendment for free exercise of religion was held to extend only to religious belief while conduct which violated social norms or threatened public order could still be regulated by acts of Congress.[67] The absolute immunity for beliefs and the deference accorded regulation of conduct prevailed until 1940 when *Cantwell v Connecticut*[68] presented the Court's conclusion that the Free Exercise Clause applied to state action through the Four-

66. 98 US 145 (1878). A member of the Mormon Church challenged his conviction for polygamy on free exercise grounds. *Reynolds*, 98 US at 145.

67. Id at 164. At this time the Free Exercise Clause was not applied to state action.

68. 310 US 296 (1940). A member of the Jehovah's Witnesses arrested while going door to door soliciting contributions in return for literature challenged his conviction for breach of the peace on free exercise grounds. *Cantwell*, 310 US at 296.

teenth Amendment and that the Free Exercise Clause limited the state's ability to regulate conduct which was based on religious belief.[69] State regulation of religious conduct could not unduly infringe upon religious beliefs.[70] Blurring the distinction made in *Reynolds* between religious beliefs and conduct, the Court in *Cantwell* took the first step in development of a standard for constitutionally protected religious conduct.

Shortly after the decision in *Cantwell*, a Jehovah's Witness challenged his conviction for selling books without a license in *Jones v Opelika*.[71] The City of Opelika required a license and charged a fee of $5.00 per year for transient book agents or distributors.[72] A distinction was made by the Court between a nondiscriminatory regulation and tax as compared to those which might be imposed on religious rites.[73] A majority of five justices held that a nondiscriminatory regulation of this type did not unduly infringe upon religious beliefs and, therefore, was not a violation of free exercise.[74] Protection against undue infringement was based on a neutrality principle of nondiscriminatory regulation. However, that position was not to prevail. Chief Justice Stone in his dissent, proposed that the First Amendment placed the freedom of religion in a "preferred position" which should exempt religious activity from even a nondiscriminatory regulation.[75] Chief Justice Stone's position was to prevail a year later when *Opelika* was reconsidered by the Supreme Court.[76]

One year later in *Murdock v Pennsylvania*,[77] Jehovah's Wit-

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69. Id at 303-04.

70. Id. A Connecticut statute which regulated solicitations for religious or charitable causes was held to be unconstitutional. The statute required prior approval of a cause as religious or charitable before solicitation would be allowed. Id at 301-05.

71. 316 US 584 (1942).

72. Id at 586.

73. Id at 596.

74. Id. "To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that the money is earned by the sale of articles." Id at 596-97.

75. Id at 608 (Stone dissenting). "The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position." Id. When the Supreme Court heard *Murdock* in 1943, the approval of nondiscriminatory regulations in *Opelika* would have been controlling because of the similarity of the licensing regulations in these cases. However, the Court decided to rehear arguments in *Opelika*, vacated its judgment and determined that the licensing fees violated the Free Exercise Clause.

76. See note 35 regarding rehearing of *Opelika* when *Murdock* was heard.

77. 319 US 105 (1943).

nesses, going door to door in Jeanette, Pennsylvania, distributing literature and soliciting payments for the literature, were convicted for violating an ordinance requiring a license.[78] *Murdock* raised the same issue as *Opelika* regarding the constitutionality of a license fee as applied to the Witnesses' free exercise rights. The canvassing was characterized as religious activity occupying, "the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."[79] Thus, Justice Douglas, writing for the majority, found the regulation of the activity to be an undue infringement on religious freedom[80] and the Court held that it violated the Witnesses' free exercise rights.[81]

This adoption of the preferred position standard which Chief Justice Stone had advocated was not meant to preclude all opportunities for the state to impose taxes on religious groups.[82] The distinction was drawn between a tax imposed *for the privilege* of exercising a protected freedom such as relgious beliefs and a nondiscriminatory tax imposed on a religious group's general activities, such as on the income and property of a minister.[83] In his dissent, Justice Frankfurter described the holding as offending the First Amendment requirement of separation of church and state, which the majority opinion sought to protect by requiring the state to subsidize religious activity.[84]

Subsequently, Follett, a Jehovah's Witness and resident of the town of McCormick, South Carolina, challenged his conviction for distribution of literature under a licensing ordinance similar to that in *Murdock*.[85] The South Carolina Supreme Court distinguished *Follett* from *Murdock* finding that *Murdock* referred to itinerant evangelists and Follett, on the other hand, was distributing literature in McCormick where he resided.[86] The Supreme Court of the United States found in *Follett* the same issue as in *Murdock*: whether the license tax unduly infringed on religious beliefs.[87] The *Murdock* precedent was determined to be controlling

78. *Murdock*, 319 US at 106. The fee for the license was $1.50 per day to $20.00 for three weeks. Id.

79. Id at 109.

80. Id at 112.

81. Id at 117.

82. Id at 112.

83. Id at 112-13.

84. Id at 139-40 (Frankfurter dissenting).

85. *Follett v Town of McCormick*, 321 US 573, 574-575 (1944).

86. *Follet*, 321 US at 574-75.

87. Id at 577.

and the licensing ordinance in *Follett* was held to be in violation of the Free Exercise Clause.[88]

Justice Murphy's concurrence in *Follett* presented further argument for religion's preferred position. He questioned the difference between taxes on commercial activity and taxes "on an activity that is essentially religious in nature."[89] The power to levy taxes in the second situation invested the state with the power "to suppress freedoms and destroy religion."[90]

Opelika, Murdock and *Follett* made flat license fees or taxes unconstitutional because they were or could become burdens on the free exercise of religion.[91] These decisions extended the *Cantwell* position that the state could not unduly infringe upon conduct based on religious beliefs. The three cases established that the First Amendment conferred a preferred position on some forms of religious activity, providing them with immunity even from nondiscriminatory regulation, regardless of whether they took on the appearance of commercial activity.[92] The limited immunity which *Cantwell* provided for religious conduct had expanded under *Murdock* almost to the absolute immunity which had been accorded to beliefs. The preferred position standard conveyed protection for religious conduct elevating it above private property rights.

In 1945, the Court heard the argument of a Jehovah's Witness who claimed that her free exercise rights had been violated by an Alabama statute making it a crime to be on the premises of another after being warned to stay off.[93] The Witness had been arrested and convicted under the statute while she was distributing religious literature on the streets of a town owned by the Gulf Shipbuilding Corporation.[94] Following *Murdock*, the Court determined that the statute violated the Free Exercise Clause when applied to this person[95] despite the private ownership of the property.[96] Justice Frankfurter, in a concurring opinion, emphasized

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88. Id at 578. "[T]o say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." Id.

89. Id at 579 (Murphy concurring).

90. Id.

91. Freedom of speech and press were also at issue in the three cases, but the Supreme Court's discussion of the free exercise issue predominated the opinions.

92. *Murdock*, 319 US at 115; *Follett*, 321 US at 575.

93. *Marsh v Alabama*, 326 US 501 (1946).

94. *Marsh*, 326 US at 502-03.

95. Id at 504, n.1.

96. Id at 509.

the preferred position principle of *Murdock* as justification for placing the Witness' free exercise rights over the protection of private property.[97]

Free Exercise: Religious Liberty and Compelling State Interests

In 1961 the Supreme Court presented a balancing test for Free Exercise which limited the virtual immunity that preferred position had given to religious conduct. Members of the Orthodox Jewish faith challenged the constitutionality of Pennsylvania's Sunday Closing Law on free exercise grounds.[98] Returning to the limited immunity which *Cantwell* provided for conduct, the Supreme Court considered whether the Sunday Closing Law unduly infringed on religious liberty.[99] The Court found that the general public interest in one day of rest per week justified the law. Reminiscent of the Court's initial support for nondiscriminatory regulation in *Opelika*, the Court determined that unless the state can achieve its purpose by other non-burdening means, the state may regulate conduct through a general law, secular in nature, even though it may impose an indirect burden on religious activity.[100] The Court was moving away from the principle of preferred position with a balancing test.[101]

The balancing test was explicitly presented in *Sherbert v Verner*[102] when the Court reversed the lower courts in South Carolina in an unemployment compensation case.[103] Sherbert, a member of the Seventh Day Adventist Church had been denied benefits under unemployment compensation because she would not accept jobs which required her to work on Saturday (the Sabbath Day of the Seventh Day Adventist Church).[104] She challenged application of the South Carolina statute to her as abridging the free exercise of

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97. Id at 510 (Frankfurter concurring).

98. *Braunfeld v Brown*, 366 US 599 (1961).

99. *Braunfeld*, 366 US at 603-4.

100. Id at 607.

101. Id at 606. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." Id. In *Braunfeld*, the Court attempted to bring the holdings in *Murdock* and *Follett* within the principle of neutrality by suggesting that the ordinances in those cases were struck down, "because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources." Id at 607, n.4. However, the Court's discussion of the license tax in *Murdock* concentrates on its function as a tax on the exercise of a privilege and does not raise the issue of the state's interest in revenue. *Murdock*, 319 US at 114-15.

102. 374 US 398 (1963).

103. *Sherbert*, 374 US at 410.

104. Id at 399-401.

her religion.[105] Although the situation was similar to that in *Braunfeld*, the Court distinguished the cases on the basis of the strength of the state's interest. The interest in a uniform day of rest was found to be stronger than the interest of the state in unemployment compensation benefits.[106] In articulating the standard for analyzing the statute in *Sherbert*, the Court inquired: does the statute impose a burden on the free exercise of religion[107] and is the burden justified by a compelling state interest.[108] The Supreme Court concluded that a worker's day of rest must be respected in determining eligibility for unemployment compensation.[109] After 20 years of preferred position for religious conduct, the Supreme Court supported its application of the balancing test in *Sherbert* as upholding the "governmental obligation of neutrality in the face of religious differences . . ."[110] The Court presented *Murdock* and *Follett* as standing for protection of religious beliefs (instead of conduct) against government regulation.[111] Thus, the decisions did not have to consider the state's interest in regulating conduct as *Braunfeld* and *Sherbert* had.

Nine years later the Court would characterize *Murdock* as a case standing for freedom of religious conduct in *Wisconsin v Yoder*.[112] In *Yoder*, parents who refused to send their children to school because of their Amish faith were convicted of violating Wisconsin's law requiring school attendance.[113] The parents challenged their convictions on free exercise grounds, claiming their religious beliefs required them to remove their children from school after completion of the eighth grade.[114] Applying the balancing test from *Sherbert*, the Court determined that the Wisconsin law infringed on the parents' free exercise rights.[115] While Wisconsin argued that its interest in compulsory public education was compelling,[116] the Court set that interest aside, citing *Murdock, Cantwell* and *Sherbert* as providing that there are areas of religious conduct which cannot be

105. Id at 401.
106. Id at 408-9.
107. Id at 403.
108. Id.
109. Id at 410.
110. Id at 409.
111. Id at 402.
112. 406 US 205 (1972).
113. *Yoder*, 406 US at 207.
114. Id at 208-09.
115. Id at 215, 218.
116. Id at 221.

regulated even under generally applicable laws.[117] Referring to the effect of accommodating the religious beliefs of the Amish, the Court concluded that the state's interest would not be impaired by accommodation.[118] The Wisconsin law as applied to Amish families was held to be unconstitutional.[119]

The balancing test of compelling government interests in regulating conduct as weighed against their infringement on free exercise of religion was applied in *United States v Lee*.[120] An Old Order Amish employer challenged the imposition of Social Security taxes on him and his Amish employees, arguing that their religious beliefs required them to care for their own poor and elderly without reliance on Social Security.[121] Chief Justice Burger, writing for the majority, inquired whether the Social Security taxes and benefits interfered with the Amish's free exercise rights.[122] After finding an interference, Chief Justice Burger determined the government's interest in a mandatory social security system was "very high."[123] The compelling interest in a comprehensive social security system outweighed the burden imposed on religious beliefs.[124] Finally, the possibility of some accommodation of the religious beliefs which would not interfere with the governmental interest was raised, citing *Braunfeld*.[125] However, accommodation was determined to be impracticable,[126] and the Social Security tax as applied to Amish employers was held to be constitutional.[127]

In 1989, members of the Church of Scientology challenged a determination by the Internal Revenue Service that their payments to the Church for "auditing" and "training" sessions were not deductible contributions.[128] One of their contentions was that the de-

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117. Id at 220.

118. Id at 228-29. Accommodation of religious beliefs in this case meant that the Amish children could be excused from school without doing injury to the purpose of the state's interest. Id.

119. Id at 234.

120. 455 US 252 (1982).

121. *Lee*, 455 US at 255.

122. Id at 256-57.

123. Id at 258-59.

124. Id at 260.

125. Id at 259.

126. Id at 260-61. But the consideration of accommodation seemed to conform to the *Murdock* policy of preferred position.

127. Id at 261.

128. *Hernandez v Commissioner of Internal Revenue*, 490 US ____, 109 S Ct 2136 (1989). Auditing and training are terms applied by church members to a form of spiritual awareness counseling (auditing) and to preparation to become an auditor (training). Id at 2141.

termination of the IRS placed a significant burden on the practice of their religion: the disallowance of the deduction would deter members from involvement in auditing and training.[129] The balancing test from *Sherbert* and *Yoder* was applied and the burden was found to be either not substantial, or even if substantial, the government's interest in a generally applicable tax system was compelling and justified the burden.[130]

Establishment Clause: Separation and Benevolent Neutrality

In *Everson v Board of Education*,[131] a New Jersey taxpayer challenged the validity of that state's statute authorizing reimbursement to parents for public transportation fares of students in private and public schools (including religious schools).[132] Justice Black, in the opinion for the majority, referred to the wall of separation which the First Amendment erected between church and state.[133] He stated that the First Amendment requires the state to take a position of neutrality with regard to religion.[134] This position of neutrality would not, however, require the state to withhold from religious groups benefits which are necessary to the achievement of the state's general interest in public safety, health and welfare.[135] Finding that New Jersey had a general interest in the safety of school children, the Court upheld the statute as not violative of the Establishment Clause.[136]

The next year, the Court was asked to test the wall of separation again when a school system allowed religious teachers to use public school classrooms to teach religious classes during regular school hours.[137] The Court considered this to be a clear example of government aid to religion which was denied under the Establishment Clause of the First Amendment.[138] Justice Frankfurter, in a concurring opinion, underscored the absolute separation called for in the First Amendment.[139]

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129. Id at 2148. Establishment Clause arguments in the case will be discussed below.
130. Id at 2148-49.
131. 330 US 1 (1947).
132. *Everson*, 330 US at 3.
133. Id at 16 (citing *Reynolds*, 98 US at 164).
134. *Everson*, 330 US at 18.
135. Id at 16-7.
136. Id.
137. *McCollum v Board of Education*, 333 US 203 (1948).
138. *McCollum*, 333 US at 210.
139. Id at 231 (Frankfurter concurring). Separation means separation, not something less." Id.

In *Zorach v Clauson*[140] four years later, the Court held as constitutional a New York City released time program which allowed school children to leave the public schools during regular hours for religious instruction.[141] Unlike *McCollum*, *Zorach* did not involve direct government aid to religion. There was neither religious instruction in the schools nor expenditures of public funds for religious purposes.[142] Justice Frankfurter, in his dissent, pointed out the indirect use of the compulsory public education program as coercion to secure children's attendance for religious instruction.[143]

Neutrality was further supported by the decision in *Abington School District v Schempp*[144] Therein, a Pennsylvania law requiring the reading of at least 10 verses from the Bible at opening exercises at school was challenged under the Establishment Clause.[145] Following *Everson* and *Zorach* as standing for a neutral position, the Court further described how the First Amendment called for neutrality.[146] The opinion went on to formulate a test which would be the basis for determining the outcome in *Schempp* and from which later tests would be developed: "what are the purpose and the primary effect of the enactment?"[147] The purpose must be secular and the primary effect must neither advance nor inhibit religion for the regulation to comport with the Establishment Clause.[148] Applying this test to the required Bible reading, the Court found the Pennsylvania law to have a religious purpose and to advance religion.[149] Thus, the statute was held to be in violation

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140. 343 US 306 (1952).

141. *Zorach*, 343 US at 314. Justice Douglas delivered the opinion for the majority (as he had in *Murdock* and *Follett*) stating, "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion. . . ." Id.

142. Id at 308-09.

143. Id at 322-23 (Franfurter dissenting).

144. 374 US 203 (1963).

145. *Schempp*, 374 US at 205.

146. Id at 222.

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state.

Id.

147. Id.

148. Id.

149. Id at 224.

of the Establishment Clause.[150]

In 1970 the Supreme Court moved away from the neutrality principle in *Walz v Tax Commission of City of New York*, wherein a New York statute which exempted church property from real estate tax was challenged as violating the Establishment Clause.[151] Chief Justice Burger, writing for the majority, raised the long history of property tax exemptions for churches.[152] He summed up the history of the First Amendment as having no toleration for governmental establishment of religion nor for governmental interference with religion.[153] From this summary, Chief Justice Burger presented the concept of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[154]

Stating that benevolent neutrality would operate within the policy of neutrality, Chief Justice Burger examined the wall of separation argument in *Everson* where the state had nevertheless been allowed to pay transportation expenses for children in religious schools.[155] He discussed *Zorach* where the compulsory attendance laws could be used to support children attending religious classes held off school grounds during school hours.[156] These cases more closely reflected a benevolent neutrality than a strict neutrality, according to the Chief Justice.[157]

Benevolent neutrality, which allowed, "room for play in the joints,"[158] a history of real estate tax exemptions for religious groups dating from 1800,[159] and tax exemptions of this type in each of the 50 states,[160] provided support for the conclusion that the exemptions passed the *Schempp* test - that the exemption fosters a secular purpose and that its effect neither advances nor inhibits religion.[161] Chief Justice Burger added to the test a third prong: that the regulation should not result in "excessive government en-

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150. Id at 225.

151. 397 US 664 (1970). The exemption required that the property be owned by a religious association exclusively for religious purposes and be used exclusively for carrying out such purposes. *Walz*, 397 US at 666.

152. Id at 677-69.

153. Id at 669.

154. Id.

155. Id at 669-71.

156. Id at 672.

157. Id.

158. Id at 669.

159. Id at 677.

160. Id at 676.

161. Id at 672.

tanglement with religion."[162] Finding that the exemption created a minimal involvement and reinforced the separation sought under the First Amendment,[163] the exemption was upheld.[164]

After adding the excessive entanglement prong to the secular purpose and primary effect prongs from *Schempp*, Chief Justice Burger applied this test when he delivered the opinion for the Court in *Lemon v Kurtzman*.[165] A Pennsylvania law which allowed reimbursement for the costs of private (including religious) schools in teaching certain secular subjects had been challenged as violating the Establishment Clause.[166] The statute was analyzed under the three prong test.[167]

Deference was given to the state legislature's express statement of a secular purpose.[168] The precautions taken under the statute to avoid advancing or inhibiting religion were noted,[169] but the nature of the precautions brought the statutory program into conflict with the excessive entanglement prong.[170] The Pennsylvania statute fostered excessive entanglement through the limits which it sought to impose on any religious teaching being done in the reimbursed subjects, the accounting required of the religious schools, and the requirement that materials be approved by state officials.[171] Because of this excessive entanglement, the Court did not need to examine the primary effect. The statute was held to violate the Establishment Clause.[172]

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162. Id at 674.

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Id at 674-75.

163. Id at 676.

164. Id at 680.

165. 403 US 602 (1971).

166. *Lemon*, 403 US at 609-10. Reimbursable costs included teachers' salaries, instructional materials and textbooks. Id.

167. Id at 612-13.

168. Id at 613.

169. Id.

170. Id at 620-21.

171. Id at 621. The entanglement prong became an integral part of the test for state action challenged under the Establishment Clause. It came to be so widely used without leaving any room for play in the joints that Chief Justice Burger became critical of the Court's, "obsession with the criteria identified in *Lemon v Kurtzman*." *Aguilar v Felton*, 473 US 402, 419 (1985) (Burger dissenting). See also *Wallace v Jaffree*, 472 US 38, 84-90 (1985) (Burger dissenting).

172. Id at 625. The inconsistency between the primary effect prong and the excessive

In *Aguilar v Felton*,[173] the *Lemon* test was applied to New York City's publicly funded program of remedial education for children in private schools, many of which were religiously affiliated.[174] The program included a supervisory system designed to prevent the use of public funds to advance religion.[175] However, the supervision brought the program into conflict with the Establishment Clause because the extent of the supervision created excessive entanglement.[176] The supervision included agents of the City visiting and inspecting religious schools regularly. Repeated contacts occurred between the religious school teachers and the remedial education teachers. Administrative personnel in the two systems had to work together to coordinate schedules and resolve problems.[177] Excessive entanglement meant the program was unconstitutional.[178]

With *Lemon* and *Aguilar* setting the threshhold for excessive entanglement, *Hernandez* suggested what is not excessive. The members of the Church of Scientology claimed that the distinction between charitable gifts to religious organizations and payments for services, which the Internal Revenue Service had made, involved excessive entanglement. Entanglement would occur in distinguishing between gifts and payments as well as in placing values on the religious services purchased.[179] Acknowledging that the IRS would have to make some determinations about value, the Court said such involvement was not excessive.[180]

Also in 1989, the Court held in *Texas Monthly, Inc. v Bullock*[181] that a state sales tax exemption for religious publications violated

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entanglement prong has received attention within the Court. The problem arises because a state's good faith efforts to avoid advancement of religion may result in excessive entanglement. *Aguilar*, 473 US at 429-431 (O'Connor dissent).

173. 473 US 402 (1985).

174. *Aguilar*, 473 US at 409.

175. Id.

176. Id.

177. Id at 413.

178. Id at 410.

179. *Hernandez*, 490 US ___, 109 S Ct at 2146. Justice O,Connor in dissent pointed out other quid pro quo arrangements which the IRS treated as charitable gifts - pew rents, Mass stipends, synagogue tickets for seats on Jewish High Holy Days. *Hernandez*, 109 S Ct at 2154 (O'Connor dissenting).

180. Id at 2147. "But routine regulatory interaction which involves no inquiries into religious doctrine [citation omitted], no delegation of state power to a religious body [citation omitted], and no detailed monitoring and close administrative contact between secular and religious bodies [citation omitted], does not of itself violate the nonentanglement command." Id.

181. ___ U.S. ___, 109 S Ct 890 (1989).

the Establishment Clause.[182] The sales tax exemption had been challenged by a nonreligious publication. The state of Texas contended that the exemption was supported by *Murdock* and *Follett* (on free exercise grounds) and by *Walz* (on avoidance of excessive entanglement).[183]

The risk that removing the exemption would violate the Free Exercise Clause based on *Murdock* was addressed by the Court through another effort to limit *Murdock*. Pointing out, "some unnecessarily sweeping statements,"[184] in *Murdock* and *Follett*, the Court disavowed those statements.[185] In so doing, the Court presented a neutrality principle as guiding its decisions instead of the *Murdock* principle of preferred position. The Court distinguished the license tax in *Murdock* and *Follett* as a "facially neutral" tax which might still be violative of the Free Exercise Clause because of its function as a precondition for engaging in religious activity.[186]

The property tax exemption in *Walz* was distinguished from the Texas sales tax exemption, not on the basis of benevolent neutrality, but on a neutrality argument that the benefits of the property tax exemption extended to a large number of nonreligious organizations as well.[187] Finally, the excessive entanglement which might result with the lifting of the Texas exemption was found not to impede evangelical activities of religious groups because it did not require the continuing surveillance with which *Walz* was concerned.[188] Justice Scalia, joined in dissent by Justice Kennedy and Chief Justice Rehnquist, stated that the holding in *Texas Monthly, Inc.* repudiated *Walz* and moved away from benevolent neutrality and reasonable accommodation of religion for which *Walz* and its successors stood.[189]

Jimmy Swaggart Ministries depended upon the sweeping state-

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182. *Texas Monthly, Inc.*, 109 S Ct at 903.

183. Id.

184. Id.

185. Id. "To the extent that our opinions in *Murdock* and *Follett* might be read, however, to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta." Id at 904.

186. Id.

187. Id at 897. Chief Justice Burger had gone to considerable effort in the opinion in *Walz* to disclaim the need, "to justify the tax exemption on the social welfare services or 'good works' that some churches perform." *Walz*, 397 US at 674.

188. *Texas Monthly, Inc.*, 109 S Ct at 903.

189. Id at 912 (Scalia dissenting). Scalia included *Sherbert*, *Yoder*, and *Zorach* as cases standing for reasonable accommodation. Id. Scalia acknowledged that *Murdock* and *Follett* were "narrowly distinguishable." Id at 914 (Scalia dissenting).

ments of *Murdock* and *Follett* regarding protection of religious freedom to make its case for exemption from California's sales and use tax. Those cases did not address sales taxes and had excluded from their prohibition nondiscriminatory taxes on religious groups' general activities. However, the preferred position of religion principle for which *Murdock* and *Follett* stand, as well as the Supreme Court's subsequent diversion into benevolent neutrality and reasonable accommodation gave Ministries reason to expect that it was exempt from the taxes.

What was overlooked by Ministries was that the Supreme Court in 1961 with *Braunfeld* and in 1963 with *Sherbert*, tried to redefine those sweeping statements from *Murdock* and *Follett*. Not until 1989, after Ministries was involved in its appeal from the judgment of the California Court of Appeal, did the Court finally disavow those sweeping statements. After almost 50 years of drifting away from the neutrality principle, the Court abandoned the arguments of preferred position. The Court also tried to redefine its decision in *Walz* to move away from benevolent neutrality. Almost without warning, the Supeme Court embraced neutrality as regards "generally applicable regulations" with *Texas Monthly, Inc.* followed soon by *Hernandez* and *Swaggart*.

This inconsistent redefining of such a fundamental principle poses problems for legislatures which seek to enact laws that are constitutional. Likewise, it leaves religious organizations uncertain as to their rights and obligations. If one purpose of legal systems is to permit people to know with reasonable certainty if their actions conform to the law, then the vacillation of the Court on the Religion Clauses marks a failure to provide reasonable certainty.

Under a neutrality principle which allows generally applicable laws to apply to religious and non-religious organizations, alike, certainty exists because decisions are independent from the nature of the organization. Under a preferred position principle such certainty does not exist because the courts must always determine if the regulated organization is religious and, therefore, deserving of some special protection. Making such a determination raises questions about sincerely held religious beliefs and the prospect of discrimination between mainstream religions and unorthodox beliefs.[190] Thus, the Supreme Court may become engaged in the same

190. Gianella, 80 Harv L Rev at 1381, (cited in note 64).

One of the drawbacks of the balancing approach is that it complicates the role of the courts in dealing with religious liberty. Conversely, one of the virtues of the strict neutrality approach is that neither the sincerity nor the importance of the individ-

types of analysis which it has characterized as excessive government entanglement in religion.

Had the neutrality principle which was applied in *Opelika*, before that case was heard for reargument, been applied to *Murdock* and *Follett*, the excursion of the Court onto the path of preferred position, benevolent neutrality and reasonable accommodation might have been avoided. As a result of that excursion and the abrupt return to neutrality, 50 years of reliance by legislatures and religious organizations on special tax exemptions may not stand up to constitutional challenges.

In 1971 (one year after the Supreme Court upheld property tax exemptions for religious organizations in *Walz*), the General Assembly of the Commonwealth of Pennsylvania amended its sales and use tax law. The amendments preserved the provisions of the 1963 statute granting an exemption from sales and use tax on "[t]he sale at retail or use of religious publications sold by religious groups and Bibles and religious articles."[191] This same type of exemption was held to be unconstitutional in *Texas Monthly, Inc.* Following this precedent, the Pennsylvania exemption would be viewed as unconstitutional.

Texas Monthly, Inc. suggests that exemptions which states have given to religious organizations may violate the Establishment Clause unless they can be justified on grounds of general public benefit. By the Court's redefining of its position in *Walz*, property tax exemptions to religious organizations may be subject to reconsideration if the use does not produce a general public benefit. In the absence of such benefit, a policy question arises as to whether religious organizations should be subject to the same economic circumstances and resultant decision making as nonreligious organizations. For example, should small, poor churches be forced to close because they cannot pay property taxes? The likely result of *Swaggart, Texas Monthly, Inc.* and *Hernandez* is more litigation to determine the strength of this revitalized principle of neutrality. With Chief Justice Rehnquist and Justices Scalia and Kennedy dissenting in *Texas Monthly, Inc.* and raising reasonable accommodation as an argument, the unanimous decision in *Swaggart* does not close the door on the preferred position principle. *Swag-*

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ual's religious beliefs need to be considered by the court; the constitutionality of government action turns entirely on its own character rather than on a comparative evaluation of the competing religious and public interests.

Id at 1388-89.

191. 72 Pa Cons Stat § 7204(28) (Purdon 1990).

gart can be distinguished from *Texas Monthly, Inc.* The former provides that generally applicable taxes on religious organizations do not violate the Religion Clauses when there is no state exemption for religious organizations, such as Pennsylvania has adopted. The latter challenges the constitutionality of exemptions such as Pennsylvania has promulgated. The three dissenters in *Texas Monthly, Inc.* may continue to raise preferred position arguments when exemptions such as Pennsylvania's are reviewed by the Court. Religious organizations and legislatures are left waiting for challenges which may result in striking down exemptions which have been relied upon for decades. Indeed, when local and state governments are stretched to their financial limits, the prospect of collecting sales taxes and property taxes from religious organizations instead of raising tax rates may be politically popular. This has been the case with hospitals and other charitable organizations which are being subjected to challenges to their exemptions from property taxes.

The seemingly inconsequential, unanimous decision in *Swaggart* is potentially the turning point for a new articulation of the principle of neutrality in the Religion Clauses. If the Supreme Court continues to move away from preferred position and reasonable accommodation for religion, then legislatures and religious organizations will have reasonable certainty to guide their decisions. However, given the Court's history in this area, there may well be a lurking fear of more change.

Stephen Paul Paschall