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ABSTRACT

Title of Dissertation: The Legal Definition of Religion: judges, statutory interpretation and neutrality.

Julia K. Stronks, Doctor of Philosophy, 1995

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First Amendment religious freedom jurisprudence has been criticized for its entire 200 year history. The premise of this project is that much of our confusion about the parameters of religious freedom stems from our failure to carefully examine our various assumptions about the definition of religion.

This project examines three public policy areas to determine the assumptions that federal court justices bring to their cases when they are asked to define religion as they interpret religious freedom issues that arise under the Constitution and federal or state statutes:

Regulation of employment decisions by religious institutions. Title VII of the Civil Rights Act, 1964--under an exemption from this act a religious Christian institution does not have to hire a Muslim, but how do the courts determine which belief systems are adequately "religious" to qualify?

Public aid to private institutions: when federal money goes to social service institutions, how do courts separate what is permissibly political or charitable from what is impermissibly religious?

Curriculum wars--what assumptions do judges bring to their cases when they try to determine which public school courses have an inappropriately "religious" (as opposed to moral, philosophical or ideological) foundation.

Initially, I hypothesized that judges used definitions of religion that discriminated against small, unpopular groups of faith communities. However, I quickly found that this was not consistently true. In fact, there are many judges who bend over backwards to treat unpopular groups with special consideration. I did, however, find three glaring inconsistencies in the way that judges perceive religious belief. First, some judges say that religion means belief in extratemporal reality; others say religion is any "belief system." Second, some judges believe they can clearly separate religious activity from secular activity; other judges believe that what might look like secular activity becomes religious activity for religious adherents. Finally, some judges believe religion is private and can be kept out of the public arena; others believe that faith necessarily defines public, social activity.

Judges' different views of religion result in inconsistent, troublesome case law. The definitional issues are at the crux of the perceived tensions in First Amendment religious freedom jurisprudence.

THE LEGAL DEFINITION OF RELIGION: JUDGES, STATUTORY INTERPRETATION AND NEUTRALITY

by

Julia K. Stronks

Dissertation submitted to the Faculty of the Graduate School
of the University of Maryland in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
1995

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For Matthew. He was born the same year that this project began, and I was grateful for his cheery disposition and long naps. I also express my thanks to my colleagues at the University of Maryland. Their unflagging support and encouragement over the past years will not soon be forgotten.

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Chapter I: Defining Religion: the project

Introduction

In 1993, the United States Supreme Court handed down three religious freedom cases that found in favor of the parties asserting the need for protection of their faiths.[1] The outcome of these cases was somewhat of a surprise in academic and legal circles because in 1990 the Court had issued a sweeping opinion that undercut 30 years of developing "religious freedom" protection.[2] The surprise and unease of the legal community grew during the summer of 1994 as the Court handed down a decision that not only found against the arguments of a religious community, but seemed to contradict one of the 1993 decisions.[3]

On one hand, this wavering of the Court has been unusual. On the other hand, for decades scholars have characterized the Supreme Court's religious freedom jurisprudence as inconsistent, claiming that by fashioning Constitutional tests that have little grounding in history and give little guidance to legislatures, the Court has politicized the religion clauses of the First Amendment in a way that results in discrimination to particular groups of

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[1] Church of the Lukumi Babelu Aye, Inc. v City of Hialeah, Florida, 113 S.Ct. 2217 (1993); Lamb's Chapel v Center Meriches, 113 S.Ct. 2141 (1993); Zobrest v Catalina Foothills School District, 113 S.Ct. 2462 (1993).

[2] Employment Division, Dept. of Human Resources of Oregon v Smith, 485 U.S. 660 (1990), holding that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.

[3] Kiryas Joel Village School District v Grumet, 114 S.Ct. 2481 (1994)

people.[4] Even the judges themselves criticize their own decisions. Justice Antonin Scalia has scathingly observed,

> [o]ur cases interpreting and applying the [religion clauses] have made such a maze...that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.[5]

It is undisputed that our courts are inconsistent in their treatment of religion, but, the question is, why has this occurred? Are the judges simply capricious in their decisions, or is there a flaw in the approach that they take in their decision-making?

The premise of this project is that part of the confusion surrounding religious freedom jurisprudence in this country stems from confusion about the nature or definition of religion. This project examines federal court opinions in three policy areas, employment law, government aid to social service agencies and public school curriculum, to determine how judges define

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[4] Douglas Laycock, "A Survey of Religious Liberty in the United States" Ohio State Law Journal (1986) 47:409-451. See also works by Michael McConnell, MaryAnn Glendon, Mark Tushnet, Carl Esbeck.

[5] Edwards v. Aguillard, 482 U.S. 578, 610 (1987) (Scalia, A., dissenting)

religion as they decide which activities or beliefs get protected under the First Amendment. What assumptions do judges bring to their definitions? Do the definitions reveal a cultural bias that hurts some groups of people, or is the problem deeper than this?

Religion in America

Religion in the United States is an emotion packed topic. It affects public policy matters from public schools to medical research to taxes. Recent analyses indicate that American churches are experiencing a "return to religion" in record numbers, and the growth of New Age spirituality suggests that Americans are seeking something that addresses fundamental questions in life.[6]

However, with this new interest in the religious aspect of life comes a heightened awareness of a particular problem. The First Amendment religious protection policies of the United States government, particularly as expressed by the Supreme Court, have not given Americans sufficient guidance in resolving conflicts that involve freedom of religion claims. What do we do if all doctors in a public hospital refuse to administer abortions because the procedures conflict with their religion? How do we handle the rights of families to control the medical aspects of their children's lives when the children are dangerously ill? Does

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[6] "Keepers of the Flock," Time Magazine, (May 1992) 139:20; see also Stephen Carter, The Culture of Disbelief: how American law and politics trivialize religious devotion, (Harper Collins, 1993).

the war on drugs justify the prohibition of hallucinogenic substances used in religious sacraments?

Americans believe that we tolerate great religious diversity. We boast of religious pluralism as evidenced by the more than 1200 different religious bodies that co-exist in the United States.[7] We hold the concepts "freedom of religion," "governmental neutrality toward religion" and the "separation of church and state" as examples for the world to follow.[8] However, despite Americans' belief that tolerance and government neutrality toward religions dominate the political arena, First Amendment jurisprudence is in flux and is constantly under attack.[9] Constitutional scholars decry the incoherence and instability of First Amendment theory, and, despite 200 years of First Amendment jurisprudence, many groups still claim to be discriminated against on the basis of their religion.[10] Although the United States Supreme Court has made numerous decisions concerning the implication and application of the First Amendment, these decisions have been of little help in answering

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[7] See James Melton, A Directory of Religious Bodies in the United States (1977), as cited in Note, "Developments--Religion and the State." Harvard Law Review (1987) 100:1606-1743 [hereinafter referred to as Harvard Note].

[8] The American excitement over the 1990 Freedom of Conscience laws of Central and Eastern Europe illustrates this point.

[9] Works by the following scholars, among others, illustrate this point best: Michael McConnell; Douglas Laycock; Mark Tushnet; Philip Kurland.

[10] For a comprehensive survey of religious groups that claim to be discriminated against by the policies of the United States, see Laycock, supra. Laycock sets forth the case law that has developed from the claims of Jews, Mormons, Jehovah's Witnesses, Christian Scientists, Native Americans and other groups.

the questions: what is religious activity, and how far will we as a nation go to protect it?

This project explores the assumptions that judges bring to their decisions as they define religion. It tests the hypothesis suggested by many that judges use their own belief systems as a reference for "true religion," thus, discriminating against small faiths.[11] Another hypothesis of this project is that the reason the courts have not been able to resolve the difficult issues that face Americans is that they make their decisions in the historical context of dilemmas and ambiguities about the definition of religion that they, themselves, do not see.

Exploring Judicial Assumptions

Scholars and judges admit that the judicial treatment of religion is "inconsistent", "unworkable" and "not grounded in history."[12] This chapter identifies the problems and tensions that permeate American religious freedom jurisprudence. It describes judicial and scholarly attempts to resolve the tension

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[11] Although this hypothesis has never been tested systematically, it makes its way into much of the criticism of religious freedom jurisprudence in this country. See Harvard Note, supra; Laycock, supra; Mark Tushnet, "Of Church and State and the Supreme Court," 1989 Supreme Court Review 373; Ira Lupu, "Reconstructing the Establishment Clause," 140 U. Pa. L. Rev. 555 (1971).

[12] See Wallace v. Jaffree, 472 U.S. 644, 668 (1970)(Rehnquist, W., dissenting); Michael McConnell, "The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?" 32 Cath. Law 187 (1989); Mark Tushnet, "The Constitution of Religion" 18 Conn. L. Rev. 701 (1986); MaryAnn Glendon "Structural Free Exercise" 90 Mich. L. Rev. 477 (1991); Lawrence Tribe, American Constitutional Law (1988); Walz v Tax Comm., 397 U.S. 644, 668 (1970)(Burger, C.J.).

between the free exercise clause and the establishment clause of the First Amendment, and it sets forth the nature of the religious freedom debate as it existed when the Constitution was drafted.

Chapter two outlines the U.S. Supreme Court's definition of religion. It illustrates the way the definition has affected development of judicial tests that determine the application of the free exercise and establishment clauses of the First Amendment.

The judicial system's role in defining "protected religious activity" has developed in two phases. Some courts attempt to determine what is and what is not "religion." Other courts skirt this question and assume that a litigant asserts a legitimate First Amendment issue. They then focus on whether the state interest standing in the way of the religious expression is sufficient to override the constitutional protection. The Supreme Court has attempted to give lower courts guidance in these endeavors, but, as chapter two makes clear, the judicial treatment of religion is determined by the assumptions made about what religion really is.

Chapters three, four and five take specific policy issues and trace the definition of religion used by federal court judges as they develop case law or interpret statutes under the First Amendment. Chapter three examines the nature of the "religious exemption" to the 1964 Civil Rights Act that prohibits

discrimination in employment.[13] Chapter four explicates judicial rulings that determine the legitimacy of government regulation and funding of religious social service agencies.[14] Chapter five delves into the "curriculum wars" that have plagued public schools as parents disagree with school administrators with regard to the religious nature of science and social studies classes.[15]

The final chapter pulls together the findings to answer the following question: what are the assumptions of federal court judges as they define religion under the First Amendment? Then, the attempts of scholars to correct the judges' definitions are

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[13] The definition of religion as presented in these cases has not been explored by legal scholars or social scientists. Scholars have written about the implication of the First Amendment for this statute. However, the writings are confined to how the clauses ought to be interpreted. See Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy" 81 Colum. L. Rev. 1373 (1981).

[14] Again, the writings of scholars have been limited to a discussion of how the clauses ought to be applied. See Carl Esbeck, "Establishment Clause Limits on Governmental Interference with Religious Organization" 41 Wash & Lee L. Rev. 347 (1984); Note, "Having One's Cake and Eating it Too: Government Funding and Religious Exemptions for Religiously Affiliated College and Universities" 1989 Wisconsin Law Review 1061.

[15] Stanley Ingber, in his attempt to distinguish between religion and ideology has worked with some of the major appellate court cases in this area. Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses," 41 Stanford Law Review 233 (1989). Others have also criticized the opinions of judges who have had to decide whether or not evolution is a religion. This chapter takes a different approach, asking, "what, overall, have the judges done" and "what is their rationale?"

examined and critiqued.[16] Finally, implications and suggestions for further research are presented.

Data Collection:

The extent to which religious freedom is protected in a society is more than just a legal problem. Religious tolerance is achieved only when all segments of society-- employers, landlords, schools and so forth--acknowledge it as important. However, the definition of "religion" is something that has been left up to the courts in this country. Even when legislation specifically endorses religious tolerance, the questions "What is religion, and which religions are protected?" are addressed primarily by the judicial process.

In the United States, we look to the Supreme Court for guidance on Constitutional issues. Therefore, I have relied on the United States Supreme Court decisions to outline the Constitutional parameters of the "religious freedom" question. However, lower federal courts have played an active role in defining religion for their particular jurisdictions. These decisions will be used to explore the religious freedom definitions in the three policy areas.[17]

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[16] As notes 13, 14 and 15 suggest, the definition of religion has not been examined systematically. This, however, has not stopped scholars from coming up with advice and directives for judges.

[17] This project examines federal courts, only. However, state, county and even city judges are also involved in First Amendment policy making. See William Ball, "Accountability: A View from the Trial Courtroom," 60 George Wash. Law Review

The three policy areas, employment law, government partnership with religious social service agencies, and curriculum, were selected because these issues have two things in common. First, all three are areas of continuous debate in the United States' legal circles. All three have been the topic of Supreme Court decisions over the last ten years, and new cases continue to be filed and considered by courts in every jurisdiction, every year.

Second, the type of debate in all these areas involves the same tension between the religion clauses of the First Amendment.

The Tension

The religion clauses of the First Amendment seem to require or assume an understanding of what religion is. The establishment clause says: "Congress shall make no law respecting an establishment of religion"; the free exercise clause states: "Congress shall make no law . . .prohibiting the free exercise thereof." Religion appears to be protected specifically, and differently, than other speech or association. Presumably, religion is different from philosophy or political belief. But, any definition of religion runs the risk of leaving some groups out.

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809 (1992) for the argument that it is the lowest court levels that really influence American lives the most.

So, in their decisions, judges have tried to apply these clauses without asking "what is religion" and "what is religious activity."

In order to determine whether an impermissible establishment of religion has taken place, courts evaluate the following:

> the statute must have a secular legislative purpose--did legislators have a nonreligious, secular purpose in mind or were they motivated by religious, sectarian goals?
>
> the statute's principal or primary effect must be one that neither advances nor inhibits religion--does it have a secular effect; is it neutral in regard to religion, neither helping nor hindering it?
>
> the statute must not foster an excessive government entanglement with religion--entanglement is often administrative: does the statute involve a continuing relationship between the church and government?[18]

The problem is that this test, itself, assumes that we know what we mean by "neutral," "secular" and "religion."

With respect to the free exercise clause, courts have specifically recognized the dangers inherent in trying to define religion. Therefore, they concentrate on evaluating the government interest in regulating religious activity, asking

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[18] Lemon v. Kurtzman, 403 U.S. 602 (1971)

whether or not it is "compelling."[19] Again, in order to even begin the use of this test, a court has to be persuaded that it is dealing with a truly religious belief--this assumes that the judges have some criteria by which to measure "religion."

Because the free exercise clause gives exemptions from otherwise valid laws to religious interests, people who want exemption try to have their beliefs recognized as "religious." However, because the establishment clause seems to forbid government involvement with the religious, groups--sometimes the same groups--argue that their beliefs are not religious. As chapter two will illustrate, the Court's tests can be manipulated, depending on the position of the litigants. The jurisprudence that has resulted has been, at best, confusing.

The tension is further exacerbated by the fact that the clauses seem to contradict each other. Deference to free exercise leads to government protection of religion which can be construed as establishment. Justice Sandra Day O'Connor realized this when she observed the following.

> On the one hand, a rigid application of the Lemon test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to

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[19] See chapter two for detailed analysis of the Court's application of the test.

religion can be viewed as an "accommodation" of free exercise rights.[20]

Some scholars have asserted that the cause for the tension is inherent in the reading of the First Amendment, even that it is an acceptable way to balance citizens' rights.[21] Others argue that the confusion stems from the piecemeal way in which the clauses were incorporated into the 14th Amendment.[22] However, most work critical of religious freedom jurisprudence simply assumes that the tension would disappear if only judges would adhere to the correct legal theory or constitutional interpretation.

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[20] Wallace v. Jaffree, 472 U.S. 602, 682 (1985)

[21] George Freeman, "The Misguided Search for the Definition of Religion," 71 Georgetown Law Journal 1519 (1983); see also chapter six, infra, for further discussion of this position.

[22] Glendon, supra.

Prevailing Theories

There are two classic analyses that inform most First Amendment jurisprudence: the "separationist" perspective, which is also called "strict separationism" or "strict neutrality", and the "accommodationist" perspective, which includes "non-preferentialism" and a variety of other "neutrality" variations. In general, each of the theories selects one of the religion clauses and elevates it to a priority higher than the other. Separationists stress the establishment clause; accommodationists stress the free exercise clause.

The separationists invoke the Jeffersonian metaphor "wall of separation" to illustrate their understanding of the appropriate relationship between the church and the state. They focus on the establishment clause, but scholars who fall into this category do not all use the clause in the same way. Some argue that the establishment clause forbids Congress to provide any form of legitimation or economic assistance to religious or religiously affiliated organizations.[23] Expression of faith is allowed, but it is private and ought not to involve public funds or public support. Others argue that separation means the government must

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[23] See Ellis West, "The Case Against a Right to Religion-Based Exemptions" 4 Notre Dame Journal of Law, Ethics & Public Policy 591 (1990); Leo Pfeffer, Religion, State and the Burger Court, (Prometheus Books, 1984).

maintain a "hands off" approach to religious institutions.[24] Again, faith is private, and in order to practice their faith, people must be free from government scrutiny.

Separationism has great appeal to Americans, probably because Jefferson's "wall" metaphor has become an easy way to communicate the value of religious freedom. However, the separationists and the judges that apply separationism to their cases face two significant problems. First, even if you believe that faith is private and should be kept out of the public arena, the fact is that issues relating to religious expression unavoidably involve the public domain. Rearing and schooling of children involves family and education law; eating and drinking in sacraments involves the Food and Drug Administration; hiring and firing of employees involves U.S. labor law. Second, historically there has been both enormous financial support of religious institutions, and support in all three government branches for public acknowledgment of religion. Churches receive tax breaks even while they benefit from the government services (fire department, police protection) that are supposed to be paid for by those taxes. Christian universities receive federal support. In the book Private Churches and Public Money, Paul Weber documents hundreds of ways in which religious institutions

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[24] This is the argument of many religious organizations of faiths that have been discriminated against in the past. See The Journal of Law and Religion VIII, 1990, for several articles referring to this argument.

benefit financially from the government.[25] Faith, government and religious institutions are intertwined--the important thing is to figure out how the law should define their legal parameters.

Accommodationists, on the other hand, believe that the establishment clause is subordinate to the free exercise clause.[26] Government must not just allow people to practice their faiths, but government has a specific duty to accommodate religious belief. This occurs through financial assistance and through exemptions to the laws that require people to act in ways contrary to their religious faiths. The establishment clause was designed only to prohibit discrimination between religions.

Accommodationists argue for a very broad protection of religion, but they do not press themselves on the definitional issue. For example, what is a religious institution? Is there a difference between a church that wants to hire only Christians and a Christian business that will not hire Jews? What about a white supremacist political organization that that uses God as its justification for existance and refuses to hire blacks? Is there a difference between conscientious objectors who will not go to war because they are Mennonite pacifists, because they just do not like war, because they are morally opposed to war, or because they believe in a Christian just war theory and this

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[25] Paul Weber, Private Churches and Public Money, (Greenwood Press, 1981).
[26] Michael McConnell, "Free Exercise Revisionism and the Smith Decision", 57 U. Chi. L. Rev. 1109 (1990); Michael McConnell, "Neutrality Under the Religion Clauses", 81 Nw. U. L. Rev. 146 (1986).

particular war does not fit in? Why does "religion" get special treatment but political philosophy or feminist approaches to life do not? The idea that only religious belief gets protection leads into a tangled thicket when accommodationists have to explain why one belief is religious and another is not.

Over the history of religious freedom jurisprudence, the Supreme Court decisions have reflected both the separationist and the accommodationist perspectives. Probably the best example of strict separationist language came at the time when the Supreme Court judges incorporated the establishment clause into the Fourteenth Amendment, making it binding on the states as well as the federal government.[27]

In her examination of separationist language, Harvard law professor MaryAnn Glendon explains that prior to the 1940's, the Supreme Court heard very few religious freedom cases. Although Jefferson's wall of separation was referred to in the opinions, "separation of church and state" did not guide the decisions. However, in Everson v Board of Education, the Court adopted phrases like "the most important of all aspects of religious freedom in this country, [is] that of the separation of church and state."[28]

In Everson, the Court had to determine whether the First Amendment allowed New Jersey to use tax payer money to pay for

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[27] Everson v. Board of Education, 330 U.S. 1 (1947)

[28] Glendon, supra at pg. 481, citing 330 US 1. Previously, phrases this dogmatic had appeared only in dissents.

the transportation by public bus of children to church-run schools. Justice Black's majority opinion claimed that all government laws or expenditures that aid religion in any way are invalid, but, at the same time, he admitted that this assertion could not be taken literally. So, despite his claims that separationism had to define jurisprudence, he allowed the reimbursements to the parents of sectarian school children.

The dissenters argued that the "undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[29] Further, Justice Rutledge claimed that the purpose of the First Amendment was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[30] Glendon observes that Rutledge's opinion

> affords an instructive glimpse of an influential assumption at the heart of much separationist thinking about the establishment language: the assumption that religion is or ought to be a wholly "private" matter. Rutledge took it as self-evident that "the realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual man and his God," and that "it should be kept inviolably private." This theme was to recur frequently in church-state opinions over the years. For many Justices, the only constitutionally cognizable religious experiences

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[29] 330 U.S. at 19

[30] 330 U.S. at 44, (emphasis added)

> were those that implicated the solitary individual. A subtheme was that religious experience is separable from the rest of human life and activity.[31]

The problem that the judges were to face as they decided more and more cases was foreshadowed by the discussion in Everson. Separation was desired by the judges, but the fact was, religion had an unavoidable impact on public life. As Black admitted, complete separation was not possible, so how should the balance be made?

For the following fifty years, the judges went back and forth. Separationism dominated in the 1940's. Then, a language of non-hostility, or "neutrality" developed. In Everson, Black had commented that despite the need for separation, government did not have to be hostile to religion. Later cases picked up on this language, arguing that religion could even be accommodated.

The most specific judicial argument for accommodation of religion was articulated by Justice William Rehnquist in his dissent in the school prayer case Wallace v. Jaffree.[32] After reviewing the problems that the Court had faced over the years, Rehnquist claimed that much of the separation language the Court had used had no foundation in constitutional history. His argument was that the language of the First Amendment, even the establishment clause, was drafted to protect religion. Therefore,

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[31] Glendon, supra at 485, citing 330 U.S. 1 (emphasis added)
[32] Wallace v. Jaffree, 472 U.S. 38 (1970)

separation was not a goal in and of itself. It was legitimate only to the extent that it actually served to protect religious belief.

> The Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in Everson.[33]

Over the past decades, the Court has struck down government policies that directly supported religious ritual like prayer in schools, but prayer and chaplains in legislative sessions were upheld.[34] Public assistance to disabled students of sectarian schools was struck down, but public assistance to sectarian social service agencies was accepted.[35] Despite its separation language, the Court has upheld state laws that required stores to close on the Sabbath despite the appearance of support to Christians at the expense of Jews, and despite the appearance of establishment of religion at the expense of non-religious belief.[36] Government holiday displays of Christian artifacts have been denied, but some displays of Jewish artifacts

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[33] Ibid, at 106

[34] Jaffree, supra; Marsh v Chambers, 463 U.S. 783 (1983)

[35] Aguilar v Felton, 473 U.S. 402 (1985); Bowen v Kendrick, 487 U.S. 589 (1988).

[36] Braunfeld v Brown, 366 U.S. 599 (1961)

have been accepted.[37] Tax exemptions for religious institutions have also been upheld.[38]

In all of these cases, separationist language competed with accommodationist language. The Jeffersonian "wall" metaphor was held up against the willingness of the Framers to emphasize religious protections to the extent that they dedicated two clauses of an amendment to it.

But, if the debate between the accommodationists and separationists depends on the intent of the Framers of the Constitution, the debate will not be solved. Historians have written volumes that defend different versions of what happened and what was meant two hundred years ago. This project will not cover this ground. Rather, this project focuses on something that scholars seem to ignore in their discussion of what the First Amendment means--and that is, what does "religion" mean? My hypothesis is that if judges have been using the term "religion" and "religious activity" to mean different things, it may possible to reframe the current separationist/accommodationist debate. Perhaps we have been asking the wrong questions.

Historical Context

Commentators have made much of the Court's inconsistency and waffling between and among different First Amendment

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[37] Allegheny County v ACLU, 492 U.S. 573 (1989)
[38] Walz, supra

theories, but, few commentators have explored what "religion" means to the judges. That is the task of this project. However, to fully understand federal courts' definition of religion and religious activity, the historical context in which the definition of religion developed must be examined.

The history of the church in early America sheds light on the assumptions that frame judicial reasoning today.[39] In Pre-revolutionary Virginia, the Church of England was established as the state's formal religion. Support for the church was mandatory, and laws were passed to punish Quakers and other heretics.

After the American Revolution, however, Virginian politicians were involved in reconsideration of church/state relations. Three groups defined this debate over religion freedom: the traditionalists, the enlightenment rationalists and the evangelical pietists. The traditionalists believed that public virtue would occur only with the establishment of a religion by the state.

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[39] This account of early American influence is developed from the following sources: Rockne McCarthy, James Skillen and William Harper, Disestablishment a Second Time: Genuine Pluralism for American Schools (1982); James Hunter, "Pluralism: Past and Present" 8 Journal of Law and Religion 273, (1990); Robert Alley, The Supreme Court on Church and State, (1988); Stephen Arons, The Separation of Church and State, 46 Harv. Educ. Rev. 97 (1976); Elwyn Smith, Religious Liberty in the United States (Fortress Press, 1972); Sidney Mead, The Lively Experiment (Harper & Row, 1965); Cf. William Miller, The First Liberty: Religion and the American Republic (Knopf, 1987).

The evangelical pietists, on the other hand, included many of the dissenting groups arising out of the Great Awakening. These men stood in the tradition of Roger Williams who claimed that the involvement of the state in religious affairs would sully the churches' ability to guide individuals in the pursuit of a relationship with God. Williams called for a wall of separation between the garden of the church and the wilderness of the world.[40] This reference of separation, also attributed to Jefferson, illustrates the pietists concern for their church if it mixed with the evils of the world.

The third group, the rationalists, also argued for a separation of church and state. They were deists entrenched in the Enlightenment tradition. The two key figures in this group were Madison and Jefferson. Madison was a member of the Virginia government and a delegate to the Convention that drew up the Declaration of Rights in 1776. His argument for separation of church and state is set forth in his "Memorial and Remonstrance" written against the passage of the Assessment Bill which was designed to use state funds to support Christian teachers. The Memorial stated that no one should be taxed to support any sort of religious activity nor should citizenship in any way be impaired because of religious views. Madison argued that religion was a private matter.

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[40] Mark Howe, The Garden and the Wilderness (U. of Chicago Press, 1965)

Jefferson furthered Madison's perspective. He was responsible for drafting the "Bill for Establishing Religious Freedom." He agreed with Madison that religion was a natural right and essentially a private, personal matter. The morals necessary for the maintenance of a good society were determined by reason, and were communicated to others by the educational system. In Jefferson's letter to the Danbury Baptist Association in 1802, Jefferson articulates his conviction that separation of church and state was essential:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative power of government reach actions only, and not opinions, I contemplate with sovereign reverence that this legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state. [41]

In 1779, Jefferson's bill for religious liberty had been ignored by the Virginia legislature. In 1785, however, Madison reintroduced Jefferson's bill, and it passed in the House by a majority of 74-20. Many people attribute this switch to the number of supportive letters sent by various evangelical pietists to the legislature that year.[42] Despite their different views of

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[41] Referenced in Thomas Buckley. Church and State in Revolutionary Virginia. (U. Press of Virginia, 1977)

[42] Mead, supra; Buckley, supra.

life, the rationalists and evangelical pietists both had an interest in the dis-establishment of the Church of England.

The interesting thing for the definition of religion, however, was that the pietists accepted a dualistic view of a private faith that was not a public matter. If Christianity was a private matter, it did not define the morality on which the political order should to be based. The irony was that although the rationalists used this distinction to their benefit, the rationalists, themselves, were not dualistic.[43] By working with the pietists and encouraging them to keep their organized religions to the private, personal domain, Jefferson was able to move into the public order vacuum and define a political order based on his own personal, philosophical commitment to rationalism. This order was not considered to be religious because it was public, and not private. However, this order did provide a particular view of life and man's responsibility in that life. But, was Jefferson's moral order as religious as was the pietists? It depends on what you mean by religion. The significant difference was that it was not called a religion, and it was allowed to define public policy.

The place and meaning of religion in Jefferson's thought must be understood in two respects.[44] It is true that he was not a Christian and he had disdain for sects. His morality was

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[43] McCarthy, et al, at p. 29
[44] Ibid, at p. 27

determined by his reason. But, he believed that everyone had this same common morality. Nature's God gave common sense to all, and this common sense could be counted on to provide consensus about what the public order should look like. As long as "sectarians" kept their beliefs out of the public order, everything was fine. Freedom of religion meant that they could believe what they wanted, but the public order would be defined only by that morality on which all could, with their common sense, agree. In a letter written in 1809 Jefferson makes the following statement:

> Reading, reflection and time have convinced me that the interests of society require the observation of those moral precepts only in which all religions agree . . . and that we should not intermeddle with the particular dogmas in which all religions differ, and which are totally unconnected with morality...The practice of morality being necessary for the well-being of society, he [the Creator] has taken care to impress its precepts so indelibly on our hearts that they shall not be effaced by the subtleties of our brain.[45]

Jefferson believed that religion could improve society, saying that this, really, was the only purpose for religion. Religion ought to be utilitarian. People could believe what they wanted, but the only belief that passed the test of utility was the universal belief set forth by common sense.

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[45] Letter to James Fishback, Sept. 27, 1809, referenced in McCarthy, et al, supra, at pg. 22.

Jefferson's faith in the universal was rooted in the tradition of the Stoics, in the Enlightenment, in the Scottish common sense moral philosophers. But, not everyone agreed with him, and Jefferson knew it. The problem was that the Christian groups were fighting among themselves about truth, and Jefferson believed that his vision of universal truth would bring people together in a moral community based on what they had in common.[46]

The churches did not object. Most of the churches saw that they were losing the establishment battle, and if they were to keep a real hold on their following without watering down their messages, it would be to their benefit to relinquish a hold on all citizens through the state. They, themselves, came to believe that God involved the personal, and the public, political arena did not involve God. Jefferson's universal view was acceptable for the public realm as long as the churches could claim the true religion for themselves in private.

This suited Jefferson. He was concerned with the public realm.[47] He wanted to have his perspective "accepted as the public, moral philosophy"; due to their own perspective, the churches and sects did not understand that Jefferson's moral philosophy could act as a religion in the broad sense.[48] Then, because Jefferson's perspective was not called a religion,

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[46] McCarthy, et al, at p. 24
[47] Ibid.
[48] Ibid.

separation of church and state came to mean church faith is private, but morality of the public order, based on a vision of common sense, was not faith.

By the end of the nineteenth century, the United States had developed a public commitment to Jefferson's version of the separation of church and state.[49] This commitment included a consensus that religion was related to churches and to personal, private faith. Religious freedom was freedom of "personal conviction" and freedom of "ecclesiastical association."[50] Churches and private beliefs were not to be limited or encouraged by government; the government was "neutral" toward religion. The role of the government was to serve the "secular interest" as defined by a neutral, majoritarian consensus.

Now, is it this public/private split, the idea that what is public is "non-religious" or neutral, that is at the foundation of American courts' confusion in addressing the question "what is religion?" There are some significant problems with the assumption that religion is merely private.

One problem is that the rhetoric of government "neutrality" obscures the ways in which the state and other public entities reflect a particular religious outlook. Government institutions offer public acknowledgment of the importance of religion in presidential inaugurations and speeches, courtroom proceedings

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[49] Ibid.
[50] Ibid, at p. 83, 86

and legislative sessions. Prayers, blessings or oaths invoking God's name are common to each branch of government. This, along with the belief that what is "religious" is private but what is public may be controlled by the majority, has led some to conclude that a "religiosity", a civil religion, defines the nation's public life. Civil religion is a "shared public statement of beliefs and symbols" which indicates an "accepted religious legitimation of political authority."[51] In the words of historian Sidney Mead, American culture exhibits

> the religion of the democratic society and nation. This was rooted in the rationalism of the Enlightenment . . . and was articulated in terms of the destiny of America, under God, to be fulfilled by perfecting the democratic way of life for the example and betterment of all mankind.[52]

This civil religion results in unexamined societal assumptions about legitimate state interests or appropriate behavior of individuals. It is a 'cultural bias' which undermines equal treatment of the religious and the non-religious. Judges come to their cases as part of this cultural or majoritarian consensus--this is evident in their approach to what is and what is not religious activity.

Secondly, judicial beliefs that religion can be and must be excluded from the public sphere ignore the all encompassing nature of religion. Many faiths articulate a worldview in which

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[51] Harvard Note, at p. 1620
[52] Mead, supra, at p. 135

their religion has a necessary impact on the public arena--including schooling of children, employment decisions, and the use of money such as tax funds. This approach highlights the relationship between the free exercise clause and the establishment clause in that sometimes when people are prohibited by government from exercising their religion they are coerced into participating in what they view as an established government religion. For example, when employers believe that their religion prohibits them from hiring people from outside their faith, the government's insistence on non-discrimination becomes a religious statement for those employers. The government's position also reflects a fundamental belief sanctioned by majoritarian consensus. Critics of this argument will say that government endorsement of nondiscrimination in employment is "neutral" toward religion, but if a person believes that all of life is religious, can the government endorsement really be neutral?

Scholars have attributed the confusion that dominates religious freedom jurisprudence to a tension in the clauses of the First Amendment, or to incorrect constitutional adjudication. But, is it really a tension between the clauses or could the problem be related to our vision of what "religion" really is? If you examine the cases carefully, the issue of definitions becomes critical. The next chapter demonstrates this problem.

Chapter 2: The Supreme Court's Guidance

Introduction

The Supreme Court has handed down four religious freedom cases in the past two years, but in only one of these cases did the judges address the nature of religion.[1] In Church of the Lukumi Babalu Aye v Hialeah, the Court had to assess the constitutionality of a Florida city's statute that prohibited the sacrifice of animals.[2] The Court's decision focused on the intent of the statute, simply assuming that the Santarian petitioners were religious. The Santarian faith teaches that every person has a destiny which is fulfilled with the "aid and energy of the orishas [spirits]"[3] The foundation of the faith is the development of a personal relationship with the spirits which is accomplished, in part, through animal sacrifice. The Court assumed that this was religious activity, saying only

> [t]he city does not argue that Santaria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[4]

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[1] Church of the Lukumi Babelu Aye, supra; Lamb's Chapel, supra; Zobrest,supra; Kiryas, supra.

[2] 1113 S.Ct. 2217

[3] Ibid., at pg. 2230

[4] Ibid., at pg 2234, citing Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981).

The Court's summary treatment of this issue foundational to the holding of the case suggests that the definition of religion is not really a question anymore. This chapter examines the Supreme Court decisions that have asked the question, "What is and what is not religious activity?" The first section illustrates how the Court's definition of religion developed. The second section shows the changes in the way the Court used its definition to balance people's right to practice a religion against the government's interest in limiting their activity. These are free exercise cases. The third section traces religion as it is used in establishment clause cases.

Defining Religion

Over the course of religious freedom jurisprudence, the Supreme Court claims to have recognized that people's ability to act in accordance with their belief underlies the fundamental right of religious freedom. The Court's decisions have acknowledged that the right to religious freedom extends to conduct as well as belief. But, it is the legal definition of religion that first determines when the First Amendment is invoked; if a litigant's perspective is not religious, the First Amendment protections do not apply. Therefore, the definition of religion is fundamental to the jurisprudence. This definition can be substantive, or it can be functional. Both approaches have troublesome aspects.

Substantive, or content-based, definitions declare persons religious or nonreligious on the basis of the substance of their beliefs. Unfortunately, attempts to define religion by reference to deities in which the adherent believes result in disputes about 'truth' which cannot be verified by a court. Because content-based definitions exclude beliefs that are unfamiliar to judges, not only can they exclude certain faiths, but they can also allow judges to second-guess the centrality or particular tenets of a faith. Nonmainstream religions may suffer discrimination because of their unorthodoxy, but adherents to mainstream religions that interpret sections of the Bible or the Talmud differently than do the judges may also be left out.

Functional definitions, on the other hand, avoid inquiry into the content of belief. People are religious or nonreligious based on how their beliefs function in their life. However, such an all-encompassing definition has problems of its own. As the following cases illustrate, if religion is that which deals with fundamental questions or ultimate values, all perspectives are arguably religious.

Despite the debate and the compromises that surrounded the religion clauses of the First Amendment prior to its ratification, very little litigation developed the Amendment until the twentieth century. The religion clauses were not made incumbent on the states until the mid-1940's, so it is not surprising that

until 1950 only three or four cases offered any guidance as to what religion is and what it is not.

The earliest Supreme Court cases suggest that the definition of religion should be substantive. In 1890, in Davis v. Beason the Court required that religion refer to belief in and worship of a deity:

> The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to this will...The first amendment...was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker.[5]

The Court's traditional definition of religion involved a belief in a Maker, or a relationship with God.

Several decades later the Court said that the essence of religion is a "belief in a relation to God involving duties superior to those arising from any human relation."[6] Then, the Court held that a judge should refrain from commenting on the truth of a defendant's religion because the First Amendment allowed people to "maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faith."[7]

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[5] 133 U.S. 333 (1890). A version of this section and the next appeared first in a chapter I contributed to Religion, Public Life, and the American Polity, edited by Luis Lugo. Parts of this chapter are set forth here with the permission of the University of Tennessee Press.

[6] U.S. v Macintosh, 283 US 605, 606 (1931), overruled on other grounds, 328 U.S. 61 (1946).

[7] U.S. v Ballard, 322 US 78, 85 (1944).

By the 1960's the judicial definition of religion was altered so that the focus was no longer on the substance of belief, but rather on the life of the believer: in what way does the belief effect the life led by the believer?

This transition is illustrated most clearly by the 1961 case Torcaso v. Watkins when the Court invalidated a provision of the Maryland Declaration of Rights that required public officials to declare a belief in God. [8] The Court spoke of religion based on other than a belief in God holding that

> [n]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. [9]

In a footnote the Court added that among "religions" which do not teach what would generally be considered a belief in God were Buddhism, Taoism, Ethical Culture and Secular Humanism. Implied is a comprehensive view of religion. The ground work is laid for the view that religion is a commitment to a particular definition of reality, the nature of humanity and people's place in the world. The distinction between secular and religious begins to blur.

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[8] 367 U.S. 488 (1961).
[9] 367 U.S. at 495

By 1965, the Court turned away from a substantive approach to defining religion in order to advocate a functional approach. In United States v Seeger, the Court criticized the congressional exemptions set forth in the Universal Military Training and Service Act.[10] The Act called for belief in "a Supreme Being" as a prerequisite to conscientious objector status. According to the Court, the only legitimate issue to be considered when assessing religious belief was "whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious."[11] In addressing the issue of a Supreme Being the Court said that some people believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in peace. All these approaches were to be considered religions. The courts were not allowed to determine the validity of a claimant's vision of truth or to question the existence of his or her Supreme Being.

However, at the same time, the Court said that those beliefs which were based on a "merely personal moral code" were not allowed exemption from the draft. The only definition of moral code the Court gave was that which was not related to a Supreme Being. The Court then further confused the issue by citing approvingly Paul Tillich's assertion that if the word "God"

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[10] 380 U.S. 163 (1965).
[11] 380 U.S. at pg. 168

has no meaning for an individual, "God" could be the same as that belief which an individual had regarding the "source of your being, of your ultimate concern, of what you take seriously without any reservation."[12] The difference between this and a moral, personal code was never made clear.

Unfortunately, this distinction becomes critical to both free exercise and establishment clause jurisprudence as the next sections illustrate. Moreover, the Seeger standard suggests that if religion is a way of life, it defines a person's approach to life. Does this mean that in a broad sense, all of this person's activity becomes religious? As chapters three, four and five illustrate, the distinction between religious and nonreligious or secular belief is critical, but the distinction between religious and secular activity also becomes critical to developing jurisprudence.

Despite the unanswered questions that the Seeger test engendered, in Welsh v United States the Court affirmed the functional approach by citing its Seeger test, noting

> [t]he reference to the registrant's own scheme of things was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life. [13]

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[12] Ibid.

[13] 398 U.S. 333, 339(1970)

In both Welsh and Seeger the Court permitted exemption from the draft for free exercise claimants after the Court determined that their beliefs were religious in nature. The Court did this despite the fact that several claimants maintained their objections were not, to them, "religiously" based. Then, in 1971, the Court upheld a federal law that arguably favored pacifistic religions over those that distinguished between wars. In Gillette v United States the Court determined as constitutional the section of the Universal Military Training and Service Act that exempted those who opposed all wars from military service.[14] It withheld the exemption from those who opposed only unjust wars or those that analyzed individual conflicts case by case determining the morality of each.

Together, these cases raise difficult issues: does the First Amendment permit legislators to distinguish between religious and nonreligious persons, what is a "nonreligious" person, may law-makers create laws that distinguish between different religions, and what of those laws that appear to apply to all persons equally but have a disparate effect on persons of a particular religion? Immediately problems emerge. Despite the broad definition of religion in Seeger, the Court's insistence on the possibility of 'nonreligion,' and the distinction between morals and religion forces other courts to draw lines in

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[14] 401 U.S. 437 (1971)

constitutional jurisprudence. Which types of beliefs will the First Amendment protect?

The Court has not advanced further discussion of the nature of religion since the days of the military conscientious objector cases. However, since the 1960's, several lower federal courts have picked up where the Supreme Court left off. These cases are presented here.

Several of these cases illustrate the lengths to which a court will go to protect minority groups from a majoritarian perspective of religion. However, at the same time, they illustrate that the definition of religion involves not just determining what groups to include, but also what type of activity is religious rather than secular.

In the first case the court used the Seeger test to declare a group's belief to be religious, despite the argument of the group that it had a secular perspective. In the next case, the same circuit court judge relied on the Seeger definition but declared the claimant's perspective on life to be non-religious. The third case shows a judge admitting that the claimants were religious but declaring that their particular activity was not an important part of their religion. In the last case the court assumed the neutrality of the public school system and refused to deal with the claimant's argument that the activity of the government was religious in character.

Transcendental Meditation

The judge most active in developing the Supreme Court's definition of religion is Judge Adams of the Third Circuit Court of Appeals. In 1979, the Third Circuit held that Transcendental Meditation (TM) was a religion, and therefore could not be taught in the public schools.[15] This ruling was over the express objection of the defendants who claimed that their teaching was a secular mental exercise.

Judge Adams concurred with the majority opinion, but he took the opportunity to develop a definition of religion that drew from Seeger and Torcaso. Adams said that religion existed when a belief system was one of ultimate concerns which addressed issues like life and death, and man's role in the universe. The belief system also had to be comprehensive. And, if it had the traditional cloak of religion (prayer, ritual and so forth) the case for religious activity was made. Adams cautioned that the traditional elements of religion did not have to exist, but their presence was determinative.

When applied to TM and the Science of Creative Intelligence, the test resulted in a finding of religion:

> Creative Intelligence, according to the textbook in the record, is "at the basis of all growth and progress" and is, indeed, "the basis of everything." Transcendental Meditation

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[15] Malnak v Yogi, 592 F.2d 197 (3rd Cir. 1979)

> is presented as a means for contacting this "impelling life force" so as to achieve "inner contentment." Creative Intelligence can provide such "contentment" because it is "a field of unlimited happiness," which is at work everywhere and visible in such diverse places as in "the changing of the seasons" and "the wings of a butterfly."[16]

On the issue of comprehensiveness, the court said

> The Science of Creative Intelligence provides answers to questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness. Although it is not as comprehensive as some religions--for example, it does not appear to include a complete or absolute moral code--it is nonetheless sufficiently comprehensive to avoid the suggestion of an isolated theory unconnected with any particular world view or basic belief system.[17]

Judge Adams found the mantra of TM to be sufficiently ceremonial to clinch the definitional issue.

Judge Adams is to be commended for his effort to deal carefully with the difficult issue of definition. However, within five years he amended his approach.

MOVE

In 1981, in the case Africa v Pennsylvania, the Third Circuit Court of Appeals tried to implement the functionalist approach of the Seeger court, and the defined approach of Judge Adams in Malnak.[18]

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[16] 592 F.2d at 213
[17] 592 F.2d at 213
[18] 662 F.2d 1025 (3rd Cir. 1981)

Frank Africa was a "Naturalist Minister" of a group named MOVE. At the time of the suit he was a prisoner claiming that the state violated his right to religious freedom because it refused to provide him with the special diet of raw food required by his religion. The District Court and the Court of Appeals both held that the group MOVE was not a religion, and thus, Africa was not entitled to any First Amendment consideration for his claim. The courts relied on the broad, subjective approach to defining religion set forth in Seeger, but the judges' preconceptions about religion are revealed in their application of Seeger standards.[19]

The MOVE religion was characterized by Africa and other witnesses as involving the following:

--MOVE's goals were to bring about absolute peace, to stop violence and all that is corrupt

--there was no governing hierarchy because all members were equal

--adherents were committed to a natural, moving, generating way of life and thus, to eat anything other than raw food would be in violation of the Religion. The power that commands the flow of life would bring more force to members if they ate raw food. This diet of raw food was provided by God.

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[19] The Africa case is often cited as an example of a court's refusal to acknowledge a religion. See Note, "Developments--Religion and the State." Harvard Law Review, Vol 100:1606 (1987)[hereinafter referred to as Note, Developments] for the most thorough explication of this case. This discussion draws from that application.

--there were no distinct ceremonies or rituals because every act of life was invested with religious meaning or significance; every time a MOVE person opened his or her mouth, church was held.

The court determined that it had to find three conditions for a religion to exist. The beliefs would be religious in nature if they addressed "fundamental and ultimate" questions having to do with "deep and imponderable matters." Second, a religion is comprehensive in nature; it consists of a "belief-system" as opposed to an "isolated teaching." Third, a religion could be recognized by external signs. However, an undefined amendment to Judge Adams' Malnak definition is at work here. Adams says

> the free exercise clause does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however, all-encompassing their scope.[20]

This case is troublesome because the three conditions reflect a particular cultural approach which defines "religion" as that which contains elements found in mainstream American religions. Moreover, in finding that MOVE did not meet the three conditions, the court gave little credence to testimony that addressed these issues in concepts unfamiliar to the justices.

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[20] 662 F.2d at 1034

For example, the court first ruled that MOVE did not address deep and imponderable matters despite the uncontradicted claim that the perspective gave the adherents a system by which to determine right from wrong and good from evil.

> MOVE is absolutely opposed to all that is wrong...we believe in using things [but] not misusing things...the air is first, but pollution is second, Water is first, but poison is second. The food is first, but the chemicals that hurt the food are second...We believe in the first education, the first government, the first law. [21]

The court also said that MOVE was not a belief system in that it was not comprehensive. Adherents had testified that the MOVE religion was "total"; it encompassed every aspect of MOVE members' lives; there was "nothing that is left out." However, in the court's opinion this was not sufficiently life encompassing.

Finally, the court listed signs by which a religion could be recognized: services, ceremonies, clergy, proselytizing, observance of holidays and other similar manifestations associated with the traditional religions. The court held that MOVE failed to exhibit any of these elements even though the court's description of MOVE included the group's perspective of its holidays, ceremonies and hierarchical structure, and the group testified that one goal was to revolutionize the world to its view. The court focused on MOVE's lack of specific holidays or scriptures. These factors exclude new or developing religions.

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[21] 662 F.2d at 1025

All of this is troublesome because it means that the ability of future religions to emerge hinges on the "breadth of judicial imagination."[22]

In sum, the court's finding that MOVE was not a religion hinged on the factors which indicated MOVE was unlike mainstream American religions.[23] The fact that any definition of religion involves the preconception of those creating the definition is illustrated in Africa. This is problematic not only because it opens the door to judicial bias, but also because it results in inconsistent decisions.

The religious adherents will not always lose out. Over the past fifteen years, lower courts have used Judge Adams' approach or the Seeger approach to find Scientology, witchcraft and Krishna Consciousness to be religions.[24] Unfortunately, the courts' decisions are very conclusiory. For example, in Dettmer v. Landon, the court said that witchcraft was a religion because the adherents believed in another world and had a concern for improving the life of others. Its ceremonies paralleled other traditional religions. Therefore, witchcraft was religious. The problem is that we still do not really know what religion is. Was

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[22] Note, Developments, at 1631

[23] Note, Developments, at 1633

[24] Founding Church of Scientology of Washington v U.S., 409 F.2d 1146 (D.C. Cir,) cert. denied, 396 U.S. 963 (1969); Dettmer v Landon, 799 F.2d 929 (4th Cir. 1986); International Society for Krishna Consciousness, Inc. v Barber, 650 F.2d 430 (2d Cir, 1981).

there really such a difference in the "religiousity" of the MOVE adherents and the TM or witchcraft adherents?

Mixing races

The effect that Civil Rights statutes have on sectarian schools is an area of the law that is in flux. One federal court has held that 42 USC sec 1981 prohibits private schools from excluding children because of their race. In Brown v. Dade Christian School, Inc., parents brought suit under section 1981 against a church operated school after being informed that their children were refused admission because they were black.[25] The Fifth Circuit Court of Appeals was faced with a free exercise claim when the school asserted that intermingling of races was in violation of its religious tenets.

The court considered whether the school's defense was actually based on a religious belief and concluded that free exercise was not an issue because the religion did not really include separating the races as an element. This conclusion was based on the court's perception that the school as an institution and the church it was affiliated with did not have a clearly articulated policy of segregation. The court said that it did not require the school to have the policy in writing, but the fact that the policy was not included in the literature about the school seemed determinative. However, the principal and pastor had

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[25] 556 F.2d 310 (5th Cir. 1977)

testified that enrolling blacks would constitute disobedience to the Bible. Testimony showed that the church believed integration of races was against Biblical authority as set forth in the stories of the Tower of Babel, the confusion of tongues in Acts and God's dealing with the nation of Israel. Despite this, the court found that segregation was not a religious belief and refused to allow even a hearing on the First Amendment issue. In the court's opinion, the belief was one of social policy or philosophy, not religion.

One of the concurring judges, Justice Goldberg, wrote a separate opinion cautioning the court against judicial policy that discriminates against small groups that have yet to articulate their beliefs fully. He said that the plurality opinion of the Court illustrated how "findings of fact" on religious issues may hide a value-laden assumption about what religion really is. Judge Goldberg believed that the discriminatory admissions policy was based on religious conviction, but he then went on to say that this particular tenet of the faith was "not central to their faith."[26] Moreover, this judge believed that integration of the races, "although constituting disobedience to God, would not endanger salvation."[27] Thus, it was a minor element. He concurred with the court's decision that the school should be enjoined from barring other races.

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[26] 556 F.2d at 321
[27] Ibid.

When courts assess the sincerity of a claimant's religious belief the inquiries can become a tool to impose a majoritarian view of what a religious practice is or should be.

Creation-Science

In 1982, an Arkansas "equal time" statute mandated that "Public schools within this State shall give balanced treatment to creation-science and to evolution-science."[28] The constitutionality of the statute was successfully challenged on the theory that by teaching creation science the law established a religion in the school.[29] The federal district court hearing the case in Arkansas focused its analysis on the allegation that creation-science is a religious belief.

Proponents of the equal time statute had argued that two positions exist which attempt to explain the origins and development of the earth and life: creation and evolution. Evolutionary theory is, like scientific creationism, an explanation of the origin of humanity. It is based upon presupposed naturalistic processes, such as mutation and natural selection. Both scientific creationism and evolutionary theories can be considered "scientific" in that they explore natural phenomena. But, both can be called "religious" because they entail a foundational or pre-theoretical commitment--a commitment

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[28] McLean v Arkansas Board of Education, 529 F.Supp. 1255 (E.D.Ark.1982)
[29] Ibid.

without the benefit of conclusive scientific evidence--to assumptions concerning the development of life.[30] Because evolution expressed a religious perspective, excluding creation science from the classroom violated both the establishment clause and the free exercise rights of those who rejected evolution. The statute was an attempt to balance the score.

The Seeger definition of religion lends support to the proponents' argument. Evolution arguably provides a comprehensive explanation of life and reality, and what it means to be human. However, the court dismissed the argument that evolution could be a religion in one paragraph concluding that the argument had no legal merit.

> [I]t is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment Clause.[31]

Is the court's refusal to consider the religious aspect of evolution reflective of a majoritarian consensus? Is there a religious aspect not only to evolutionary theory, but to any scientific theory? In one analysis of the McLean case, law professor David Caudill explains that philosophers of science have consistently recognized that natural science is founded on

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[30] For a more thorough analysis of the creation science cases see David Caudill, "Law and Worldview: Problems in the Creation-Science Controversy," 3 Journal of Law and Religion 1 (1985). This section draws from his analysis.

[31] 529 F.Supp at 1274

an aspect of faith or a belief in certain presuppositions--belief in the scientific enterprise itself.[32] He cites Michael Polanyi, who in Science, Faith and Society said:

> The premises of science on which all scientific teaching and research rests are the beliefs held by scientists on the general nature of things.
>
> The influence of these premises on the pursuit of discovery is great and indispensable. They indicate to scientists the kind of questions which seem reasonable and interesting to explore, and the kind of conceptions and relations that should be upheld as possible, even when some evidence seems to contradict them, or that, on the contrary, should be rejected as unlikely, even though there was evidence which would favour them.
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> The premises of science are subject to continuous modifications . . . Every established proposition of science enters into the current premises of science and affects the scientist's decision to accept an observation as a fact or to disregard it as probably unfounded. [The history of Physics] refutes the widely-held view that scientists necessarily abandon a scientific proposition if a new observation conflicts with it
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> ...Stephen Toulmin has shown systematically that the framework of scientific theory contains general suppositions which cannot be put directly to an experimental test of truth or falsity. [33]

As Caudill points out, this pre-theoretical commitment among scientists to a framework or paradigm led Thomas Kuhn to

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[32] Caudill at p. 17

[33] Michael Polanyi, Science, Faith and Society (U. of Chicago Press, 1946), p. 11,12.

speak of the "faith" aspect of science. Although a commitment among scientists to the Christian scriptures does not exist, other presuppositional frameworks do guide the work of contemporary scientists. In Caudill's words, "to the extent that a set of unproved assumptions provides unity and guidance to a scientific discipline, one may speak of the religious or ideological character of science."[34] Evolutionary theory does present a religious perspective equal to that of creationism.

Caudill explains that the court's decision in this case was determined at the beginning by the presumption that creationism was religious and the presumption that evolution was not. The court emphasized the creationists' belief in supernatural intervention and their reliance on a spiritual, Biblical account of the history of the world and man. By contrast, the court characterized evolutionary science's emphasis on natural law as an empirical, falsifiable explanation. However, creation scientists affirm natural laws, and they do empirical, falsifiable research.[35] Moreover, both perspectives have foundational questions that they hope to verify. The court emphasized those of the creation scientist Biblical account but was unable to recognize the equally religious approach of evolution. In support of this position, Caudill refers to Carl Sagan's television special "Cosmos." In this program scientists with an evolutionary

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[34] Caudill, supra, at p. 34
[35] Ibid.

outlook say that the "cosmos is all that is or ever will be," and it "is the universe that made us." The program is often shown in public schools where the students also learn that it is science that gives reliable knowledge, while religion is associated with narrowness of mind and bigotry.[36]

This identification of foundational beliefs as "religious" parallels the subjective, functionalist view of religion articulated in Seeger, but the court ignored it, failing even to address the issue. Moreover, the justices refused to consider the possibility that what to them was clearly a non-religious, neutral teaching, to others could be a governmental establishment of religion. For the justices to dismiss this possibility as flying in the face of "common sense" illustrates an insensitivity to the difficulties inherent in First Amendment jurisprudence. However, it also illustrates another problem. Is non-religious really the same as neutral toward religion?

All of these cases indicate that there are two major problems in articulating a definition of religion. First, in distinguishing the religious from the nonreligious, those who most need protection, like Africa, might be left out because their views are not understood. Judges' own perspectives concerning religion may affect their decisions to the detriment of certain

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[36] Ibid, at p. 42, citing Richard Baer, "They are Teaching Religion in the Public Schools" Christianity Today, Feb 17, 1984 p. 12.

groups. In Dade Schools and McLean the court was dealing with a mainstream faith, Christianity, but believed that it knew better than the claimants what constituted the important elements of that faith.

Secondly, the courts continue to insist on the possibility of neutrality by the judiciary. But, the word neutrality means different things to different people--and, it means different things in different types of cases.

For example, in the free exercise cases that have come before the Supreme Court since Seeger, the emphasis has been on the tension between an admittedly religious practice and a competing regulatory interest of the state, such as the health or safety of citizens. Neutrality seems to mean treating foundational commitments equally. But, even if a court simply assumes an asserted religious practice to be religious, it still has to determine when governmental interests will override an individual's right to practice his or her religion. The problem is that a judge's approach to what religion is will affect his or her approach to when activity is to be protected.

In the establishment clause cases, on the other hand, neutrality seems to mean getting the religious out of the public sphere. Schools may not teach courses from a religious or foundational, ultimate concern, point of view.

The next section examines the cases that develop each arm of religious freedom jurisprudence--free exercise and

establishment clause. The point of these sections is not to argue the wisdom of the judges' decisions, but rather to illustrate the unstated assumptions of the judges' decisions. The sections also illustrate the connection between the definition of religion and the application of the constitutional tests that the judges have developed.

Confusion in the Free Exercise Compelling Interest Standard

In 1878, a man named George Reynolds was convicted of polygamy. Reynolds v. United States.[37] He defended his action as protected by the First Amendment, and this case is widely recognized as the beginning of free exercise jurisprudence. As a Mormon, Reynolds argued that polygamy was a religious doctrine, and to convict him amounted to a violation of the free exercise clause. The Court, however, assumed that it was possible to separate religious belief and action. It concluded that even though polygamy may be based in religion, it was belief, not behavior, that was protected by the First Amendment. By prohibiting polygamy, Congress was protecting a "valid" societal interest.

The importance of this decision is two-fold. First, it reveals the Court's understanding of religion as a matter of "private belief." As soon as a person acts on his or her belief in a way that does not conform to the will of the public, the public

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[37] 98 U.S. 145 (1878)

interest may control individuals' behavior by legally prohibiting it.[38] Actions are under the authority of the government even if they are required by a belief system. Although the Court never questioned the "religiousity" of Mormonism, the assumption that private belief can be separated from public behavior reveals an approach to religion that can be traced through most of the Supreme Court cases.

Second, the Reynolds case is the first of a line of cases in which the Supreme Court has tried to determine the difference between religious activity in general and protected religious activity. It is the beginning of what Douglas Laycock has called "conscientious objector" law. Given the political process in this country, it often happens that "neutral" legislation, legislation that does not specify any particular religion, still has the effect of limiting people's expression of religion--prohibiting the sale or consumption of alcohol in the 1920's affected Catholic and other groups' participation in Communion; criminalizing drug use affects the Native American groups that ingest the cactus peyote in their sacraments; requiring autopsies affects groups that believe the body must be buried in a particular fashion after death; child labor laws affect children's participation in some groups' proselytizing requirements.

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[38] This understanding of the belief/action dichotomy is articulated in Rockne McCarthy, James W. Skillen and William A. Harper, Disestablishment a Second Time: Genuine Pluralism for American Schools (Grand Rapids, Mich: Christian Univ. Press, 1982), 94.

In certain cases, the state or federal legislators exercise sensitivity to religious groups and create exemptions from the law which accommodate the beliefs. Communion services were exempt from the Prohibition laws of the early 20th century; some states exempt peyote use from illegal drug prosecutions. However, when the legislators refuse to accommodate religious beliefs, and individuals "conscientiously object" to the law, the courts step in to determine whether or not the state has the Constitutional obligation to exempt the religious objector from the law.

In making this decision the Supreme Court has fashioned a series of balancing tests. Today, whenever a state infringes on an individual's activity, the legislation is subject to one of the following tests: the rational relationship test (often referred to as a 'reasonableness' standard) or the strict scrutiny test (referred to as the 'compelling interest' standard).[39] If a right asserted by an individual is clearly protected in the Bill of Rights, such as free speech, the Court subjects the legislation to strict scrutiny: is the state interest a "compelling" interest, and is the legislation the "least restrictive alternative" to achieve that interest. In other circumstances the Court defers to the legislators asking only if the legislation has a "legitimate" state

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[39] This is a somewhat simplistic presentation of the development of balancing tests. Constitutional analysis often uses tests that fall somewhere between the two, i.e. the intermediate test for equal protection of gender.

interest and if the legislation is "rationally or reasonably related" to achieving the state's goal.

These tests may appear straightforward, but in theory and in practice their development has been fraught with confusion. The confusion stems from unanswered questions about the nature of religion. Although the Supreme Court's free exercise decisions have increasingly recognized that Constitutional analysis must be controlled by the effect of a religion in a person's life, traditionally, the Court deferred to the legislature in free exercise challenges. Much later, the Court applied strict scrutiny, but only when the challenged regulation interfered directly with religious practices by criminalizing them. Then, the Court applied strict scrutiny to regulations that indirectly burdened religious practices--the activities were not criminalized but it was more difficult or expensive for litigants to practice their religion. This increased the scope of free exercise protection. However, beginning in 1980 and culminating with the 1990 Smith case, the Court has come full circle in its jurisprudence, returning to legislative deference.[40]

In Reynolds, the polygamy case, the Court began its First Amendment analysis by balancing individual and state interests with one eye toward the will of the majority, not protection of minority rights.

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[40] Employment Division v. Smith, supra.

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. [41]

The test was deferential--judges looked only to their view or the majorities' view of the good social order to determine whether or not legislation was "valid".[42] The primary concern was that to do otherwise, to protect religious practices contrary to those recognized by the majority would be to

> make professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[43]

This language is important because it surfaces over and over as the Court applies its tests and as the tests change.

After Reynolds, the Court began to grapple with the nature of religion as it necessarily affects public life. In the 1892 case of Church of the Holy Trinity v. United States, the Court had to balance a conflict between the free exercise of religion and a congressional statute prohibiting the importation of foreigners as laborers.[44] The Church wanted to hire a rector from Great Britain. This violated the law. In finding for the church, the Court recognized that while church and state may be separated, religion could not be separated from the people. In this case the

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[41] 98 U.S. at 164
[42] 98 U.S. at 164
[43] 98 U.S. at 167
[44] 143 U.S. 226 (1892)

Court acknowledged that religion is more than private belief; it may, of necessity, be related to business or employment practices.[45]

Then, in 1925 the Court ruled in favor of several private schools and against the state. In Pierce v. Society of Sisters, Oregon required that all students attend public schools, but when the law was challenged under the First Amendment, the Supreme Court said that although a state may require education, it may not force children into public schools.[46] The Free Exercise Clause prohibits this violation of the rights of parents. Again, if religion comes to expression in the way parents choose schools then religion has an unavoidable impact in the public arena.[47] Religion is more than personal belief.

The test that the Court set forth in this case lays the ground work for the reasonableness or rational relationship test articulated later. The Court said that

> rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children...
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> [The] injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable and unlawful interference with

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[45] McCarthy, et al, at 94
[46] 268 U.S. 510 (1925)
[47] McCarthy, et al, at 94

their patrons and the consequent destruction of their business and property. [48]

In Cantwell v. Connecticut, the Court clearly articulated a balancing test with regard to First Amendment claims.[49] Cantwell, a Jehovah's Witness was charged with violating a statute which prohibited the solicitation of money for religious ends without approval from the Secretary of Public Welfare. The Court said that when state officials are allowed to determine whether a cause is religious they are able to censor religion. The Court pointed out that the First Amendment involved both the freedom to believe and freedom to act. But, although the first concept was absolute, the second was protected only under certain circumstances. Freedom to act was subject to a two part test: does the government action in question limit religious belief or activity, and if so, is the government action necessary to protect the peace, good order and comfort of the community. The assumption that the will of the majority created a valid state interest in Reynolds is no longer sufficient. Although the public order and comfort of the community as a whole still takes precedence over the individual's expression of religion, the test requires that the legislation be necessary, not just desirable, to the protection of the community.

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[48] 268 U.S. at 573
[49] 310 U.S. 296 (1940)

In 1963, the Court appeared to reject the distinction between private belief and action, and it changed the test once more, employing the "strict scrutiny standard." In Sherbert v. Verner the plaintiff was a Seventh-Day Adventist working a five-day week in a textile mill.[50] However, when the mill changed its schedule to a six-day work week which conflicted with her worship on Saturdays, Sherbert refused to work on Saturdays and was fired. When she applied for unemployment compensation, she was denied benefits. The Supreme Court ruled that Sherbert was entitled to unemployment compensation since her right to the free exercise of her religion could not be infringed by the government agency. It was true that the government agency had not tried to criminalize her religious expression, but when government policy made her religious expression more difficult it violated the free exercise clause.

In Sherbert, Justice Brennen's analysis specifically shifted the burden of proof from the religious objector to the state: after an initial showing by the objector that a religious interest was impaired, the state must assert a "compelling government interest" and show that there was no "less restrictive" means to further this interest.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area only the gravest

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[50] 374 U.S 398 (1963)

abuses, endangering paramount interest, give occasion for permissible limitation. [51]

The state asserted as its interest the fact that, to allow a claim to receive unemployment insurance under these circumstances, would give rise to an unmanageable number of lawless people fraudulently claiming that they quit their jobs because of religious reasons. This concern parallels the Court's concern in Reynolds, that to allow one exemption would permit citizens to become laws unto themselves. While this possibility was determinative in Reynolds, it failed in Sherbert. The Supreme Court easily dismissed the state's concern by saying that there was no specific evidence that this lawlessness would happen.

The compelling interest test was developed further in Wisconsin v. Yoder.[52] In this case the Amish fought the Wisconsin law requiring school attendance for all children. In holding that the regulation burdened the free exercise of religion, the Court carefully examined the interests of both the Amish and the state. It analyzed the arguments set forth by each side, and it articulated the strengths and weaknesses of each. The Court concluded that the state interests in preparing children to be independent in the world could be met with alternatives other than compulsory education by state certified schools. Thus, the

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[51] 374 U.S. at 406, citing Thomas v Collins, 323 U.S. 516, 530 (1949)
[52] 406 U.S. 205 (1972)

"less restrictive alternative" arm of the strict scrutiny test was not met.

But, although the interests of the Amish were protected in this case, Yoder illustrates the significance of the definitional issue. Chief Justice Burger did seem to eliminate the belief/action dichotomy. He said that the failure of Amish parents to send their children to public high school was not just illegal public "action" subject to the criminal law. The action was an expression of faith. In this case "belief and action cannot be neatly confined in logic-tight compartments."[53]

However, Burger also said that the Amish could be protected only because they adhered to a truly "religious" belief.

> A way of life, however, virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.[54]

Burger's assumptions reveal his preconception about religion, and they lead to confusion about the purpose and the breadth of protection that the First Amendment entails. First, he believes it is possible to distinguish those people whose lives are determined by religion from those who are guided by secular considerations.[55] The weakness of this assumption is illustrated by the cases in which federal courts have tried to make the

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[53] 406 U.S. at 220
[54] 406 U.S. at 215
[55] McCarthy, et al, at 86

distinction. Religion cannot be clearly distinguished from secularity or irreligion.

Burger also assumes that the First Amendment defines religion in a way that is sufficient to keep it from protecting irreligious or nonreligious persons.[56] And, he is convinced that it is legitimate for these irreligious people to be subject to the majoritarian educational requirements that are imposed on citizens.[57] As in the cases of military conscientious objectors and Africa, those people who assert a world view that is a "moral code" rather than a "religion" do not escape the requirement of the law. Although this may be discrimination, it is not "religious" discrimination. An analysis of Burger's next statement shows how tenuous Burger's perspective is. Burger said that the concept of ordered liberty

> precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[58]

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[56] McCarthy, et al, at 87
[57] Ibid.
[58] 406 U.S. at 216 (emphasis supplied)

When Burger says that the "secular values of the majority" have moral authority over "society as a whole" he expresses his own philosophy. Only if people can appeal to the religion clauses with a private religion may they be exempt from the rules of the majority.[59] What Burger cannot do is to demonstrate why the Amish way of life is religious while others are not religious. Why are Thoreau's beliefs nonreligious when, in fact, Thoreau may well have believed that his life was a religious commitment.[60]

Over the next ten years the Court continued to protect religious interests, but was not able to clear up the confusion about religious versus moral or philosophical beliefs. In the following two cases lower courts had sustained government action, arguing that the claimant's objection to the regulation was philosophical rather than religious. The Supreme Court overruled. In Wooley v Maynard a New Hampshire statute required that all passenger vehicle license plates display the state motto "Live Free or Die."[61] The petitioner, a Jehovah's Witness, covered the motto on this license plate, claiming that its message was repugnant to his moral, religious and political beliefs. The state alleged that the display of the motto served to facilitate the differentiation of passenger vehicles from other types of vehicles and promoted an appreciation of history, state pride and individualism. The Court did not address whether the motto was

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[59] McCarthy, et al, at 87
[60] Ibid.
[61] 430 U.S. 705 (1977)

truly antithetical to the Jehovah's Witness religion, nor did it determine whether a state promoted individualism was "neutral" with regard to other religions. Rather, using the strict scrutiny test, the Court simply asserted that the state interest was not compelling enough, nor was the least restrictive alternative used to achieve the state interest.

In the 1981 case Thomas v Indiana Employment Security Division the Supreme Court, citing Yoder and Sherbert, reversed a lower court ruling that denied a Jehovah's Witness unemployment compensation after he had refused to work for religious reasons.[62] Thomas had objected to a transfer within his steel processing plant that would have involved him more directly in the production of munitions. Other Jehovah's Witnesses did work in the plant, and this led the lower court to determine that it was Thomas' personal philosophy, not religion, that kept him from his work. The Supreme Court rejected the lower court's determination that Thomas had made a personal philosophical choice rather than a religious one.

> [A]lthough the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was." In that court's view, Thomas had made a merely "personal philosophical choice rather than a religious choice."[63]

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[62] 450 U.S. 707 (1981)

[63] 450 U.S. at 737, citing 391 NE2d at 1131

As in Sherbert, even though Thomas' religious activity was not criminalized by the government activity, the government made his religious expression more difficult with its policy. This violated the First Amendment.

Unfortunately, although the Court did protect Thomas' religious expression it still failed to show how religious claims ought to be examined. Even though Thomas' religion was recognized by the Court, the opinion stated

> Intrafaith differences of [this] kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause... [64]

However, as Africa illustrates, what is bizarre to a court may well be religious to a litigant.

The dissent in Thomas was written by William Rehnquist who is today the Chief Justice of the Supreme Court. The dissent is important because Rehnquist's concerns foreshadow a major change in First Amendment protection. He says:

> Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. [65]

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[64] Ibid., at 738 (emphasis supplied)
[65] Ibid., at 741

Rehnquist's assumption is that government interests are obviously different from religious interests in that they are "secular." But, he makes this statement without clearly articulating what he means by religion. Although Rehnquist claims that he is moving the Court away from the problems experienced when it tries to define religion, his own assumption reflects a particular cultural bias about the ability of a government to be truly neutral toward "religious" interests. He further confuses the issue by stating in a footnote that this case is distinguishable from Sherbert because Thomas left his job for purely personal reasons, whereas Sherbert left for religious reasons.

In addition, Rehnquist's willingness to defer to legislatures in determining when religion should be protected calls up the analysis of the 1878 Reynolds case. Rehnquist's reliance on Reynolds is even more evident when he expresses his fear:

> The [Court] ...suggests that a person who leaves his job for purely "personal philosophical choices" will be constitutionally entitled to unemployment benefits. If that is true, the implications of today's decision are enormous. Persons will then be able to quit their jobs, assert they did so for personal reasons, and collect unemployment insurance. We could surely expect the State's limited funds allotted for unemployment insurance to be quickly depleted.[66]

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[66] Ibid., at 742, footnote 1

This is the same fear the Reynolds court expressed when it said exceptions to the law brought lawlessness, and it is the same fear that the Sherbert court rejected saying no evidence supported this type of concern.

Beginning in the 1980's the Supreme Court developed Rehnquist's dissent in Thomas and began to deny claims by religious objectors seeking relief from regulations that appeared to be neutral but, in fact, limited their religious expression. In United States v. Lee the Court rejected an Amish farmer's request to be exempt from social security taxes. [67] The Court acknowledged the sincerity of Lee's religious objection to mandatory social security payments, but said that the government interest in collecting taxes was compelling. The Court did not explain why the federal interest in collecting taxes was more compelling than a state interest in educating children (Yoder) or the federal interest in regulating unemployment (Sherbert and Thomas). This case and those following can be explained by a change in the political persuasion of the Court, but they also indicate that the Supreme Court's approach to religious protection is both flexible and confused. The various tests and the varied ways in which they are applied allow the Court to justify any result it wishes. Moreover, they illustrate the Court's inability to develop a comprehensive theory about religious

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[67] 455 U.S. 252 (1982)

protection. An inability that stems in part from the confusion about what religion is and what it is not.

In Bowen v Roy the Court faced a free exercise challenge brought on behalf of a Native American child. The argument was that statutory requirements conditioning welfare benefits on parents' willingness to use the Social Security number of their child violated the family's religious freedom.[68] The parents' objection was that the use of the number would rob the child of her spirit. A plurality of the Court denied Roy's claim, distinguishing between those claims that involved the mere denial of a government benefit and those that imposed criminal sanctions on conduct that had religious implications. This distinction was what Sherbert and Thomas, both government benefits cases, had denied.

Another significant aspect of this case is that three concurring members of the Court advocated a lower standard of review than the strict scrutiny test. Applying this lower standard, these three determined that the Social Security number requirement was a "reasonable" means of promoting the "legitimate" public interest to prevent proliferation of fraud. Because a lower test was used, this interest outweighed the parents' free exercise interest. The previous cases which claimed clear evidence had to exist that fraud actually would occur were not controlling because they were determined with a

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[68] 476 U.S. 693 (1986)

more strict test. Although an opinion by three members of the Court does not by itself change precedent, the case lay the ground work for future decisions.

During the same period that Lee and Roy were decided, the Court decided three free exercise cases in which the majority of the justices applied the lower "reasonableness" test rather than the strict scrutiny test. In each case the Court articulated a reason why the particular facts warranted an exception to the strict scrutiny standard, but by 1990 it became clear that these cases are the beginning of a new First Amendment era. In Goldman v Weinberger the Court upheld an Air Force regulation prohibiting indoor headgear.[69] Goldman, a captain in the Air Force, wore a yarmulke. When he refused to remove it during a court proceeding, he was told that it violated military regulations. He sued claiming infringement of First Amendment rights. In analyzing the case, the Supreme Court declined to apply the standard of strict scrutiny developed in Sherbert, requiring only that the regulation advance "legitimate" military ends.

Justice Rehnquist wrote the Court's opinion and, given his dissent in Thomas, it is not surprising that the Court subjected the military interest to no examination at all. The Court specifically rejected Goldman's argument that the military should justify its concern that allowing an exemption to the regulation would effect discipline. Rather, citing the importance of

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[69] 475 U.S. 503 (1986)

deference to the professional judgment of military authorities, the Court accepted without discussion the military's justification for its regulation--the need for uniformity in the military.

An second exception to the rule of strict scrutiny was set forth in Lyng v Northwest Indian Cemetery Protection Assn.[70] In this case Native Americans objected to the government's plan to build a highway on government land that ran through sacred ground. The ground was used by the group in religious ceremonies, and the road would preclude the worship because no other land had the same religious significance. The Court held that government was not barred from constructing a road. It stated that the Free Exercise Clause does not give individuals the right to dictate to the government how to conduct its internal affairs or how to use its own land. The government was not required to show a compelling justification for its actions when the burden on a claimant was simply the "incidental effect" of a government program. In the Court's opinion the government's program may have rendered the religious activity more difficult, but it did not force the Native Americans to act in ways contrary to their beliefs. In this case the Court covertly concluded that it knew better than the Native American which elements of the faith were significant and which were incidental. The fact that

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[70] 485 U.S. 439 (1988)

Indian ceremony relates to sacred, site specific land was not recognized.

In the third case the free exercise rights of prisoners were addressed.[71] Muslim prisoners' worship at Friday prayer services were denied because prison regulations required those who worked outside the prison to return at specific hours. The Court held that because of the special situation of prisons, the regulations which burdened Constitutional rights were to be judged by a "reasonableness" test rather than the strict scrutiny test.

Although there may be legitimate reasons for prison officials to limit religious expression by inmates, the Court's deference to administrative decisions, its refusal to question legislative authority and its willingness to lower the balancing test in all three of these cases is significant.

In 1990 when the Supreme Court handed down Smith, Constitutional scholars across the nation decried the case as a disaster in First Amendment jurisprudence.[72] Justice Scalia wrote the opinion which held that the right of free exercise does

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[71] O'Lone v Estate of Shabazz, 482 U.S. 342 (1987)

[72] Employment Division, Dept. of Human Resources of Oregon v Smith, 485 U.S. 660 (1990). The petition for rehearing of the Smith case included a coalition of over 100 Constitutional law scholars as well as a broad spectrum of interest groups. The petition was denied. However, concern about the Court's ruling in Smith caused the Religious Freedom Restoration Act to be proposed and eventually passed by Congress in 1994. This Act restores the compelling interest test to free exercise cases; however, its constitutionality has yet to be tested by the Supreme Court.

not relieve an individual of the obligation to comply with a valid and neutral law of general applicability just because he or she thinks the law constricts activity that a religion requires.

In Smith two Native American men claimed that an EEOC decision denying their plea for unemployment insurance discriminated against them on the basis of their religion. The EEOC denied the claim because the men were fired from their jobs for ingesting peyote, a hallucinogenic cactus, during religious ceremonies. The men were fired from their jobs for participating in wrongful conduct. This precluded them from collecting unemployment insurance.

The facts and result in Smith are relatively insignificant in terms of free exercise claims. Over the years in cases like Roy many litigants have been denied governmental benefits because the state interest was compelling and outweighed their right to religious expression. The importance of Smith lies in the Court's specific rejection of the compelling interest test.[73] A plurality of the Court, four justices, said that an individual's religious beliefs do not excuse him from compliance with an otherwise "valid" law. In determining whether or not the legislation was "valid" the Court asked if it was "reasonable."

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[73] In rejecting the test for this case, the Court went to great lengths to distinguish Smith from other free exercise cases. It said that Smith was different because it was not a "hybrid" case involving First Amendment issues in addition to the religion clause. See Michael McConnell, "Free Exercise Revisionism: The Smith Decision," University of Chicago Law Review 57 (1990):1109-54 for an excellent discussion of the case as a whole.

Furthermore, the Court acknowledged that leaving accommodation of religious expression to the legislative, political process could place minority religions at a disadvantage. Calling this the unavoidable consequence of democratic government, the Court stated that it was preferred to a system in which each conscience is a law unto itself. Note the similarity of this case to Reynolds, the 1878 polygamy case. A state statute must be "valid," and it is assumed that when the majority agrees on a statute, validity occurs. And, the primary reason for refusing exemption for those claimants who say the law violates their religious freedom is that to do otherwise would bring on a lawless society. In the span of 120 years, the Supreme Court has come full circle in applying its First Amendment test. Beliefs, but not actions are protected.

Throughout the free exercise cases, the definition of religion that judges use affects the application of the balancing tests employed. The same thing is true in establishment clause cases. The tests the judges apply to determine whether or not religious freedom has been violated require an understanding of what religion is and what it is not.

Definition of Religion in Establishment Clause Cases

Precedent for the establishment clause of the First Amendment begins with an analysis of the Everson case of 1947.[74] In this case, New Jersey parents received local tax grants to reimburse them for the bus trips of their children to Catholic schools. By a 5-4 decision, the justices determined that tax supported bus rides to sectarian Catholic schools were "secular." Justice Black, in delivering the opinion of the Court said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can it pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can it force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between Church and State." [75]

This decision assumed the legitimacy of interpreting the Amendment in Jeffersonian terms. Black articulated the standard of "separation of church and state" which stems from the general

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74 Everson v Board of Education 330 U.S. 1 (1947)

75 330 U.S. at 15,16(emphasis supplied)

propositions of Jefferson and Madison.[76] Since the state should do nothing to aid sectarian religion, it should be prohibited from giving any aid to nonpublic, religious institutions, including schools. In Everson, however, the Court did allow New Jersey to reimburse parents of nonpublic school children for the costs of busing their children to school. The reason for the decision, however, reinforced the confusion about what it meant to be religious. The Court said that because the aid had a neutral public purpose which was to benefit children, it was not religious. It was not religious because it did not directly support religion.

The merit of this argument depends on the acceptance of a religious/secular dichotomy. Parents and children can receive support for secular activities like education. Because religion is private belief, what they do with that money is up to them. But, not everyone accepts this dichotomy, and not everyone agreed with Justice Black's jurisprudence. Several years later, a new "neutrality" standard was proposed.

In 1963, Schempp v. District of Abington focused on the use of Bible reading and recitation of the Lord's Prayer as part of the opening exercises in a public school. [77] In declaring the use of the Bible and prayer to be unconstitutional, the Court said "They are religious exercises, required by the state in violation of the

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[76] See Chapter 1, supra. For this and the following argument that Everson, Schempp and Lemon were decided on the assumption that religion is private belief, see McCarthy, et al, supra, and Glendon, supra.

[77] 374 U.S. 203 (1963)

command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."[78] According to this principle, the government must be neutral in religious matters. The definition of neutrality was as follows: If the advancement or inhibition of religion is the primary legislative purpose or effect of a law, it violates the establishment clause because it is not neutral. This test is developed further a few years later in Lemon v. Kurtzman.[79] In Lemon, the Court ruled as unconstitutional a government funding project that allowed the teaching of "secular" courses in private elementary and secondary schools. The significance of Lemon is that it articulated a test for determining when a government action established religion:

> the action must have a secular legislative purpose;
>
> the action's principal or primary effect must be one that neither advances nor inhibits religion;
>
> the action must not foster an excessive government entanglement with religion.

But, the test assumes a common understanding of what it means to be secular, rather than religious. The very same year that the Lemon Court said government cannot fund secular subjects at sectarian schools, Tilton held that government could fund

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[78] 374 U.S. at 217 (emphasis added)

[79] 403 U.S. 602 (1971). The Lemon test is currently under attack even by the Supreme Court Justices. See chapter six, infra, for this discussion.

buildings at sectarian universities.[80] Colleges could receive government aid but aid was restricted at lower levels. Chief Justice Burger's reconciliation of these cases hinged on his finding that in the Tilton case the aid was for buildings and services which were religiously "neutral whereas in the Lemon case the aid subsidized teachers, who are not necessarily religiously neutral."[81] He acknowledged the difficulty of this distinction when he said "the line of separation between church and state far from being a 'wall', is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[82] Burger's acknowledgment is critical because he sets the Court up for years of discussion about the nature of religion. Much of the discussion about religious activity, in turn, hinges on whether religion is private or public.

Conclusion

The assumption that private religion can be separated from the public domain and that it is different from personal morality leads the courts into a tangled thicket when they try to decide when state interest should override religious interest. The fact is that issues relating to religious expression unavoidably involve the public domain. Rearing and schooling of children relate to family

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80 Tilton v Richardson, 403 U.S. 672 (1971)
81 403 U.S. at 614
82 Ibid.

and education laws, ingestion of any substance during a sacrament involved Food and Drug Administration regulations. If we do not encourage judges to acknowledge and focus on the relationship between the public and the private spheres, we cannot hope for coherence in their decisions.

What does this mean for religious freedom today? The very confusion about what is moral and what is religious relates back to the separation of Jefferson's morality from the churches' faith. Was Jefferson's morality any less religious than that of the churches? If we do not tackle the question "what is religion" at its root, we cannot solve the dilemmas that court's face.

The following three chapters illustrate the confusion that courts experience when they ask what religion is, while they assume that faith must be private, and public morality is not faith.

Chapter 3 Employment Practices of Religious Institutions

Introduction

The legal relationship between the state as an institution and churches as institutions is fraught with confusion in the United States. The First Amendment says that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." But, what does this mean about government's relationship to churches, to schools that claim to have a religious foundation, or to Catholic hospitals that choose to not perform abortions. Clearly, Christians and others who identify themselves with the religious community believe that they ought to be allowed to define their religious institutions in a manner that best reflects their faith. However, does this mean that the government has no interest in or authority over those institutions? Is freedom of religion the same thing as government "hands-off" all institutions that claim a religious foundation? Is it possible for government to be "neutral" with respect to religion? When and how is it legitimate for a state to regulate the employment decisions of a religious institution?

This chapter examines Title VII employment discrimination cases to explore the assumptions that federal judges bring to

their decisions as they try to define what it means to be religious in the context of employment law. [1]

The Law as it Stands

Title VII of the United States Civil Rights Act makes it unlawful for employers to make employment decisions that are based on an individual's race, color, religion, sex, or national origin. With this statute Congress tried to eliminate forms of what the legislators considered to be unjustified discrimination.

To alleviate the tension between the religion clauses and Title VII, Congress enacted a special exemption from Title VII for religious organizations.[2] The statute as originally drafted in 1963 provided that the Civil Rights chapter regarding employment decisions would not apply to "an employer with respect to ... a religious corporation, association, or society."[3] The provision was very broad. Religious institutions were completely exempt from regulation. However, the exemption that ultimately passed both houses of Congress provided that the chapter would not apply to "a religious corporation, association, or society with respect

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[1] I have examined all of the cases under Title VII that have been handed down by federal courts since the 1972 amendments (see next section). Only those cases that include some discussion of the nature of religion or religious activity have been included here. One group of cases, those relating to employment decisions of religious colleges and universities, is discussed in the next chapter. These cases turn on the definition of "pervasively sectarian"--which is the focus of chapter four.

[2] Title VII of the Civil Rights Act of 1964, ss702, 42 USC ss 2000.

[3] H.R. Rep. No 914, 88th Cong., 1st sess. 10 (1963).

to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities ..."[4] In 1972 the exemption was amended to apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[5] This exemption has been upheld by the United States Supreme Court despite the favoritism that, arguably, it shows toward religion.

However, although the amendment purports to protect religion, courts still face numerous questions in their interpretation of the statute. Does a religious organization's free exercise right allow it to select individuals on the basis of not religion but sex, race and other criteria forbidden by Title VII? Lower courts have answered this question in different ways depending on whether the employment decision involved pastoral staff or other types of employees. At this point there is little or no guidance on questions like the following: what is employment? If I hire a male and a female but my religion says males are the head of the family, may I pay him more? Which activities are covered? Is there a difference between religious

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[4] Section 702 of Title VII, 42 U.S.C. ss 20003-1 (1964)(emphasis added).
[5] Section 702 of Title VII, 42 U.S.C. ss2000e-1 (1972)(emphasis added).

and secular activities? What about the difference between profit and non-profit activities? Which institutions are covered? Can seminaries, elementary schools, day care centers, printing centers, bowling alleys and coffee houses all be considered religious institutions?

The significant thing about this legislation is that it assumes a common understanding of religion in three respects:

What is a religious institution as opposed to a political or philosophical institution?

What is religious activity as opposed to philosophical, moral or even secular activity? And,

What is religious discrimination as opposed to sexual, racial or just general discrimination?

However, the phrase "religious institution" is not defined in the statute, and the word "religion" receives only this cursory treatment: "The term "religion" includes all aspects of religious observance and practice, as well as belief..."[6]

This chapter explores the assumptions that federal court judges have brought to their analysis when they are required to define the meaning of religion under this statute and the First Amendment.

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6 42 U.S.C. ss2000e(j).

Constitutionality of the Statute

In 1987 the United States Supreme Court was faced with a case in which an employee of a gymnasium associated with the Church of Jesus Christ of Latter-day Saints had been fired.[7]

The Deseret Gymnasium in Salt Lake City, Utah was a nonprofit facility open to the public, run by the Mormon church. Appellee Mayson had been an assistant building engineer at the gymnasium for 16 years. He was discharged in 1981 after failing to qualify for his annual "temple recommend," a certificate stating that he was a member of the Church and eligible to attend its temples.

The plaintiff argued that ss702 as applied to "nonreligious jobs" violated the establishment clause because it favored religious organizations over non-religious ones. However, the court ruled that government was allowed to accommodate religious practices in this way. Stressing the non-profit characteristic of the gymnasium, the Court found unpersuasive the district court's reliance on the fact that ss702 singled out religious entities for a benefit. Moreover, the Court found that it was too significant a burden on a religious organization to require it, on "pain of substantial liability, to predict which of its activities a secular court will consider religious."[8]

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7 Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints et al v. Amos et al, 483 U.S. 327 (1986).

8 483 U.S. at 336

9 483 U.S. at 343

10 483 U.S. 343

Therefore, under this statute, all of a church's activities were to be considered religious. Note the differences and the parallels between the Court's approach here and the approach of the courts from chapter two. The Court is unwilling to declare some types of activities to be nonreligious when they are performed by a church. Church activity, even if it is janitorial work, is religious activity. But, what is the nature of this relationship? Is it religious only because it is a church? A private activity by a private group of believers? If so, when does the activity become regulated by the state--when it is public? When it is non-religious? What does this say about the employment decisions of a non-profit group of religious adherents who are not associated with a church? Can they be a religious institution?

In a concurring opinion written to stress the constitutionality of ss702 with respect to non-profit organizations only, Justice William Brennan emphasized the nature of a community of faith. His opinion illustrates the difficulty inherent in a philosophy that assumes religion can be separated from public life.

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a

> religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[9]

Brennan says that if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities. However, religious organizations should be able to discriminate on the basis of religion only, and with respect to religious activities only. In a perfect world a determination would be made in each case as to whether an activity is religious or secular.

> This is because the infringement on religious liberty that results from conditioning performance of secular activity upon religious belief cannot be defended as necessary for the community's self-definition. Furthermore, the authorization of discrimination in such circumstances is not an accommodation that simply enables a church to gain members by the normal means of prescribing the terms of membership for those who seek to participate in furthering the mission of the community. Rather, it puts at the disposal of religion the added advantages of economic leverage in the secular realm.[10]

Brennan states that the character of an activity is not self-evident. But, he says that as a result, "determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government

entanglement in religious affairs."[11] Therefore, non profit institutions should be completely exempt from Title VII.

> The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. It makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose.[12]

But, what about profit-making institutions? And what about institutions that are not a church but still claim to be religious? They are subject to public regulation because Brennan believes that the economic/public realm is "secular." Religion must be kept "private."

Here, Brennan illustrates his acceptance of the public/private dichotomy that began in the days of Jefferson. However, what are the consequences of this assumption when courts try to determine the appropriate way for government to limit other employment decisions? As a practical matter, Brennan will not require courts to separate the religious from secular activity because to do so would involve entanglement. However, this distinction plagues lower federal courts as they work out the application of the exemption.

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[11] 483 U.S. at 344
[12] 483 U.S. at 344

Churches and Employment

As federal courts attempt to apply Title VII of the Civil Rights Act they must determine whether they are dealing with a religious institution; they must determine whether they are faced with religious discrimination, and, pre-Amos, they had to determine whether the activity of the institution was a religious activity. In doing so, courts looked to developments at the Supreme Court level, mostly to no avail. These questions have not been fully explicated at the Supreme Court level.

The one area of employment law that seems clear to courts is the relationship between a church and its clergy. Courts consistently maintain a hands-off approach to the hiring of pastoral staff, refusing even to consider whether or not a particular church actually has a theological or "religious" reason for its decision.

Carole Rayburn was a white, female Seventh-day Adventist with seminary training.[13] In her church, although women are eligible for associate positions in pastoral care, they are not eligible for ministerial internships which require ordination. Rayburn applied for a position as an associate but was turned down. She sued claiming that she had been discriminated against on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations and her

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[13] Rayburn v General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

vocal opposition to church practices which she believed to be in conflict with Title VII.

Undisputed evidence showed that the church position in question involved teaching baptismal and Bible classes, pastoring groups, and involved occasional preaching. Therefore, the court found the position to be the equivalent of a pastor, and granted summary judgment in favor of the church's claim that it was allowed to discriminate.[14]

The striking thing about this case is the length to which the court was willing to go to protect the church in its selection of its pastor. Despite the ambiguity of parts of Title VII, the law suit was not even allowed. In its decision, the court affirmed past decisions that held that the language of ss702 made clear that religious institutions may base relevant hiring decisions on religious preferences. However it is said that Title VII did not confer upon religious organizations a license to make those same decisions on the basis of race, sex or national origin (non-religious grounds). If Title VII were the only consideration, even the religious exemption would not protect the church's action.

However, the court also found that although Title VII would prohibit any racial or sexual discrimination, the First Amendment would still bar the suit because the state's scrutiny of the choice for pastor would infringe on the church's free exercise of religion

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[14] Summary judgment occurs when a court believes that the issue presented to it is so clear on the law, presenting no material question of fact, so that it can dispose of the case without a trial on the merits.

and would constitute impermissible government entanglement with church authority.

The court basically held Title VII to be unconstitutional as applied to pastors because it violated the institutional rights of the church. In its analysis the court described the individual's freedom to believe as he or she wishes and stressed that that right applied to churches in their collective capacities which

> must have power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Ecclesiastical decisions are generally inviolate... civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law...The right to choose ministers without government restriction underlies the well-being of religious community.....for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.[15]

The court said that the role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that <u>any</u> state intervention in the appointment process would excessively inhibit religious liberty.

> While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had

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[15] 772 F.2d at 1167

> some explicit grounding in theological belief...in "quintessentially religious" matters...the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.[16]

Even if the theology was complete subterfuge for gender bias, even if the church's theology did not exclude women, the court would not question the church's hiring decision.

The court stated that although an "unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs."[17] However, the court also said that

> Of course churches are not--and should not be-above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual function.[18]

This is the crux of the matter. What is the dividing line between a church's spiritual function and its non-spiritual function? It depends on one's definition of religion.

The approach that the court took in Rayburn has been confirmed by the Eighth Circuit as recently as 1991. In Scharon v.

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[16] Ibid. at 1169
[17] Ibid. at 1170
[18] Ibid. (emphasis added)

St. Luke's Hospitals, a female priest was employed by the hospital as a chaplain.[19] When a new supervisor came on board, she was fired because the supervisor believed that she was violating canonical laws. The woman sued the hospital claiming that even if her position was a religious position, and even if the hospital was a religious institution, the accusation regarding canonical laws was pretext for the real motive behind her dismissal.

The court refused to even consider her charge of pretext, dismissing the case on summary judgment. It said that any personnel decisions by church-affiliated institutions affecting clergy are per se religious matters which can not, under any circumstances, by reviewed by a civil court.

The courts' attempts to recognize and be sensitive to the identity of the church as an institution indicates that they see the inappropriateness of a court telling a group of adherents what it ought to believe and how it ought to act on that belief. But, in applying a complete hands-off approach, the courts fall into a trap. Are there never circumstances in which government should regulate employment of a pastor? You can see the public/private split of the judges in these situations. Religion is private; religious decisions (like hiring a pastor) ought to be private. But, if the decision is not religious (committing non-religious discrimination, getting involved in profit activities) regulation can occur because the circumstances are "public."

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[19] 929 F.2d. 360 (8th Cir. 1991)

The problem is that when judges sense an injustice in what a religious institution has done, all they have to do is characterize the institution as "non-religious" or characterize the activity as "non-religious" and regulation is appropriate. Unfortunately, not only does this result in inconsistency in the decisions, but it allows judges to decide for themselves what definition of "religion" they want to use. This is the very thing they are trying to avoid when they defer to churches on the hiring of pastor issue.

When are employees engaged in religion?

The clear deference that courts give to church hiring decisions for clergy dissolves when courts are faced with other types of employees. In addition, Title VII and its religious freedom exemption can be invoked only after a litigant persuades a court that it has a "religious belief" or an institution persuades a court that it is "religious." This presents two questions: whose definition of religion will courts use, and do courts have a clear understanding of the difference between the secular and the religious?

In McClure v. The Salvation Army, a federal district court found not only that the Salvation Army engages in religious activities, but also that the Salvation Army itself is a "religion."[20] This finding was based upon the following: "the mission of the organization is to seek the unsaved" and to "secure the commitment of those who are determined to live a Christian life"; the Army has major ceremonies that involve marriage, burial and dedication of children; religious services are held on Sundays. In short

> [t]hey have all the elements of a Christian witness service. They have a preaching part, congregational singing, scripture reading, prayer and the invitation to the unsaved.[21]

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[20] 323 F.Supp. 1100 (N.D. Georgia,1971); aff'd 460 F.2d. 553 (5th Cir. 1972)
[21] 323 F.Supp at 1102

Billie McClure worked for the Salvation Army in the late 1960's and her employment was terminated in 1970. She had undergone spiritual leadership training within the church, had become a commissioned officer, and she also performed secretarial duties. McClure claimed that the Salvation Army had employment and personnel practices which violated Title VII's prohibition against gender discrimination. In deciding whether to hear her case the court had to first determine whether or not her activities were religious activities.

In its analysis the court demonstrated some sensitivity to the nature of a religion as expressed by its adherents. The court asked the question

> is welfare work, clerical work, and other normally secular work religious because it is done under the auspices of the religious corporation, i.e., The Salvation Army? Is a religious activity limited to ceremonial or ritualistic functions? Or, does it include support operations which people perform every day in the world of business?[22]

The court decided that all of McClure's work fell under the rubric of "religious activity;" in fact, any work that employees did for the Salvation Army was religious because although some things like secretarial work, or welfare work, might seem "secular", the Salvation Army takes its message "to the people, whether in

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[22] Ibid. at 1106

welfare work, on the street, in a social services building or in a small church."[23]

This case illustrates a broad definition of religion and a broad definition of religious activity. The judge made some effort to explain to his decision. Most courts, however, draft a holding without analysis.

In one of the first cases to be decided by a federal court after the 1972 amendments, the district court in Virginia found that the Ku Klux Klan was not a religion. In Bellamy v. Mason's Stores, Inc. it was undisputed that John Bellamy was fired from his job at a private Virginia corporation solely because he was a member of the United Klans of America.[24] Bellamy filed suit under Title VII claiming, among other things, that he was the victim of religious discrimination. He stressed the fact that the KKK had ritual, pomp and rites similar to those of various churches, and that it had a specific membership requirement and a specific ideology that functioned as the equivalent of a theology.

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[23] Ibid. The appellate court in McClure supported the district court's ruling but on entirely different grounds. It said that the religious freedom exemption of Title VII allowed only discrimination based on religion, not on gender or other factors. Therefore, McClure might have had a claim. However, the court also found that Title VII would be unconstitutional if it were to be applied to the relationship between clergy and a church; because McClure had a position of leadership similar to that of clergy, the First Amendment, not the Title VII exemption protected the Salvation Army.

[24] 308 F.Supp. 1025 (1973); aff'd 508 F.2d 504 (4th Cir. 1974).

Bellamy's argument was rejected out of hand by the court. It dismissed his claim without a hearing on the merits. The court's analysis of the "religion" issue consisted of one sentence.

> [T]he proclaimed racist and anti-semitic ideology of the organization to which Bellamy belongs takes on, as advanced by that organization, a narrow, temporal and political character inconsistent with the meaning of "religion" as used in ss2000e.[25]

Can eating cat food be an element of a religion? Plaintiff Stanley Oscar Brown brought a suit against the director of the Equal Employment Opportunity Commission (EEOC) when the director dismissed, without hearing, his claim that he had been discriminated against in his employment for exercising his religion.[26] Brown asserted that his "personal religious creed" required that he eat a particular brand of cat food; this consumption would contribute to his state of well-being and to his overall work performance by increasing his energy. The EEOC dismissed the case because it failed to establish a religious belief "generally accepted" as a religion.

When the case was brought to the federal court the judges cited approvingly the approach taken by the Supreme Court in Seeger, emphasizing the fact that there was a difference between a "moral code" and a religion which included a place for a Supreme Being. The court found it significant that throughout case law

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[25] 308 F.Supp. at 1026

[26] Brown v Pena, 441 F Supp 1382 (S.D. Florida 1977).

unique personal moral preferences were excluded from the characterization of religious beliefs. The only finding of fact that the court made or referred to was that

> Plaintiff's personal religious creed concerning Kozy Kitten Cat Food can only be described as ... a mere personal preference, therefore, it is beyond the parameters of the concept of religion as protected by the constitution.[27]

There was no discussion, no hearing, no testimony. There was no evidence to dispute the "religious" base of Brown's claim other than the justices' own beliefs. The court simply relied on its own perspective and on the conclusions of the EEOC director--conclusions also reached without a hearing on the merits of the claim.

The problem with this case is not so much that Stanley Brown was unsuccessful in seeking protection of his religion. Without knowing the circumstances of his employment or termination it is impossible to determine whether injustice was done. However, the fact that the court assumed that the difference between a religion and a moral code is self-explanatory is problematic. For all of these cases, to the extent that a court assumes there is universal agreement on the definition of "religion," the cases exemplify bias in what is offered as "neutral" judicial reasoning.

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[27] 441 F.Supp at 1385 (emphasis supplied)

The following three cases further illustrate judges' willingness to assume that their approach to religion is universal.

In Hawaii, a Protestant missionary named Bernice Bishop left money for the establishment of a school that would hire Protestant teachers to provide children with a good education. That education was to include teaching in morals and in "such useful knowledge as may tend to make good and industrious men and women." One hundred years after the Kamehameha Schools were established they faced lawsuits under Title VII by non-Protestants who claimed that the religious freedom exemption to Title VII did not protect the schools' hiring practices because Protestantism in general was not a religion.[28]

The schools stipulated that there was nothing specific about the subject matter like English, science or mathematics that would make a teacher's Protestantism a necessary qualification for the position. But, despite the admission that there was nothing about Protestantism that affected the content of the teaching, the court found the schools to be religious institutions. The finding that the court made about the "religiosity" of the school was based on the fact that prayers occurred and a general "Protestant" religion course was required

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[28] E.E.O.C. v. Kamehameha School/Bishop Estate, 780 F.Supp. 1317 (D.Hawaii 1991)(reversed on other grounds).

for graduation from the school; the donor desired for the children to be instructed in morals by Protestants, and the schools were affiliated with the Bishop Memorial Church which had been established at the time of Mrs. Bishop's death.

This case turned on the finding of religious traditions familiar to the judges. There was no discussion whatsoever about whether or not Protestantism is a religion. But, is "Protestant presence" a religious basis or more of a cultural basis for distinction?

Patricia Wessling was a Confraternity teacher in her Catholic church.[29] Two months prior to Christmas she informed her employer, defendant Kroger Co, a meat packing company, that she would require part of December 24th off in order to fulfill her duty to prepare a special Christmas Mass. She was to transport children to and from the mass, set up the church for the program and assist the children during the program. Although she was given permission to have the day off, later the permission was revoked. She left her job early on December 24th to fulfill her church duties and she was fired. It was undisputed that had she not shown up for work at all on December 24th or had she come to work several hours late, she would have been disciplined but not fired by her employer.

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[29] Wessling v. Kroger Co. 554 F. Supp. 548 (E.D. Michigan 1982).

When Wessling sued Kroger for religious discrimination, Kroger defended itself by arguing that although Wessling was a religious person, her activity on December 24th was not religious activity. This argument prevailed when the court held that Wessling

> felt that it was her duty to assist her child's, and other children's education. This sense of duty was important to her and it is important to all mothers who work at developing a close relationship with their children in a moral and religious environment.[30]

However, because her activity on December 24th was voluntary, social and

> far more extensive in time than necessary for religion...[i]t was family oriented, a family obligation, not a religious obligation.[31]

This statement was the sum total of the court's analysis of the nature of religious activity.

In September, 1984 two employees of the Rapides Regional Medical Center were fired because their extra-marital affairs with co-workers were "disruptive" to other workers. The plaintiffs sued the Medical Center claiming that they were Baptists, the Medical Center's director was of a different denomination, and that they had been fired because their behavior

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[30] 554 F.Supp at 552
[31] 554 F.Supp at 552

conflicted with the director's religious views of how personal lives ought to be conducted.

The court took judicial notice of the fact that the Baptist faith embraces the Holy Bible including the Ten Commandments--one of which states: "Thou shalt not commit adultery."

> This being so it would be more than absurd to find that the Baptist faith condones the commission of adultery, much less embraces such a notion as a deep-seated institutional standard. The Court is convinced that plaintiffs could not assert such a thing with even the slightest hint of sincerity.[32]

The court not only ruled in favor of the Medical Center, but it ruled on summary judgment. Moreover, it assessed attorney's fees, costs and a nominal sanction against the plaintiffs for bringing a case so "frivolous" and "unreasonable" on the facts. The court said that under Yoder, religious belief was clearly more than personal preference, and it cited approvingly a Fifth Circuit case that required a showing of a "theory of man's nature or his place in the Universe," "sincerity" and an "institutional quality" before a religion existed.[33] In addition, the court cited Pena as an "enlightening opinion"--had the plaintiffs only understood this case they would never have brought their claim.

However, are Yoder and Pena cases that clearly distinguish between the religious and the personal? While it is true that

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[32] McCrory v. Rapides Regional Medical Center, 635 F.Supp. 975 (W.D.La.1986).
[33] Brown v Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977)

Baptists are Christian, is it incomprehensible that some Christian groups take adultery more seriously than others? Isn't it possible that the manager was discriminating against these employees for failing to live out their faith in the way that he believed they ought to?

The last two cases of this section involve government agencies and their chaplains. Although at first glance it seems obvious that government agency chaplains invoke the prohibition against government establishment of religion, the U.S. Supreme Court has held otherwise.[34] These cases, however, illustrate the difficulty that the agencies and courts run into when they try to keep a chaplain but weed out anything "too religious" that the chaplain might say or do.

In Voswinkel v. City of Charlotte the city and a Baptist Church had entered into an agreement by which the Church would furnish the city with the services of a minister to serve as a full time police chaplain.[35] As defendants, the city and the church argued that the arrangement had a secular purpose and a predominantly neutral affect in accord with the Lemon test. However, the plaintiffs, a city taxpayer and a society known as the "American Atheists" were successful in their argument that

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[34] Marsh v. Chambers, 463 U.S. 783 (1983)

[35] 495 F.Supp. 588 (W.D. North Carolina 1980)

the city's arrangement gave a preferred position to the Baptist church and resulted in entanglement of religion and the state.

The contract between the church and the city of Charlotte was easily dismissed as unconstitutional; however, the case is interesting because the court ruled as unconstitutional only that part of the agreement that restricted the position to one provided by the church. To have a chaplain was legitimate. For that chaplain to discuss the spiritual and the moral in the performance of his secular duties was legitimate. But for the police force to accept a chaplain appointed by a church and then monitor the chaplain's performance with regard to the "religiously-moral" (as opposed to the "secularly-moral") was unconstitutional entanglement.

For example, the contract provided that the police chaplain would:

> I. Serve as advisor to the Chief in any matter pertaining to the moral, spiritual and mental welfare of police
> 2. Counsel individual police officers and/or their family members in times of personal crisis, sickness, job-related stress, injury or death.
> 3. Assist officers and family members as necessary in obtaining appropriate outside professional services such as marriage counselors, psychologists, psychiatrists and financial planning counselors.
> 4. Assist police officers and/or medical or rescue personnel in emergencies, disasters or other crisis situations;
> 5. Visit sick or injured police officers at home or in the hospital.

> 6. Provide non-religious instruction at the Police Academy or at recruit orientation on areas of stress, crisis-handling and services of the chaplain.
> 7. Notification of the family of a police officer or employee of the death of or serious injury to the officer or employee;
> 8. Appearances at civic clubs, churches or other groups as a public relations representative of the Police Department...
> The Police Chaplain shall not engage in religious instruction nor conduct any service of religious worship while wearing the uniform of his office or while acting in his capacity as Police Chaplain. The Chaplain may provide religious guidance to any police officer or other person he is counseling when he is specifically requested to do so by the officer of other person being counseled....[36]

The court held number one to be unconstitutional and the last paragraph to be unconstitutional, but felt that the chaplain could perform the rest of the "secular" duties.

The chaplain provided by the church was an ordained minister with substantial background in emergency counseling. He testified as to his understanding of his duties under the contract by stating that while the chaplain was "not to engage in religious instruction nor conduct any service of religious worship," he "may provide religious guidance to any police officer or other person he is counseling when he is specifically requested to do so by the officer or other person counseled."[37]

The defendants argued that provision for "spiritual" and "moral" needs is not inconsistent with a "purely secular"

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[36] 495 F.Supp. at 590, 591
[37] 495 F.Supp. at 591, 592

counseling function. The court accepted this argument stating that concern for such matters "is not the exclusive province of the religious; it may be that even atheists have spiritual interests."[38] So the spiritual and the moral are not religious.

The court was troubled by the fact that although the city sincerely tried to secularize the police chaplaincy it was unable to do so. The chaplain was free to give religious guidance when requested but was not to engage in religious instruction. The court said that without the limiting clause the contract was direct establishment of the Baptist creed in the police department. However, with the prohibition, the contract created the potential for entanglement in religious matters that the Supreme Court cautions against:

> if the Police Chief is to see to it that the prohibition on religious activity is honored, then he must make the Solomonic distinctions between the religious instruction that the contract forbids and the moral and spiritual advice that the chaplain was hired to provide...he must decide if the resulting advice was religiously moral rather than secularly moral in content.[39]

But, the solution, for the court, was to remove the governing function of the police chief (the state) and to allow a chaplain to be moral but not too religious.

Can the chaplain's morality be religiously neutral? The court acknowledged that the establishment clause requires

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[38] 495 F.Supp at 596 (emphasis added)
[39] 495 F. Supp at 596

neutrality between competing religions and between religion and nonreligion. However, in its attempt to define what it meant to be neutral it used its own understanding of "religion" and "secularity" which involved assumptions that might violate others' understanding of these terms. Unfortunately, even in its effort to be sensitive to the issue, the court was not even able to see its own assumption.

Franklin Baz was hired as a chaplain for the V.A. medical center in Danville, Illinois. He was in charge of various activities for the center's patients, including the Sunday evening "sung service." Baz was fired from his job because he conducted his activities with too much Christian evangelism which was interpreted by his boss to be proselytizing.

Baz's argument at trial was that he had been hired so that he might practice his religion in the service of a secular employer and was fired when his employer did not approve of his doing exactly that. In addition, Baz argued that the V.A., through its rules and regulations governing the conduct of V.A. chaplains, has impermissibly established an institutional theology at V.A. facilities. The V.A. violated the establishment clause of the First Amendment when it took steps to limit and restrict the manner in which Baz "could pray with patients, preach, and also limited the content of his sermons."[40] Baz said that he was fired because he

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40 Baz v.Walters, 782 F.2d. 701,703 (7th Cir. 1986)

would not conform his ministry to the dictates of the V.A.-sanctioned institutional theology.

The appellate court found that there was no evidence that the V.A. had an institutionalized theology at Danville, but rather, it had instituted an "ecumenical approach" to its chaplaincy with special attention to the needs of its patient population.

As the lower court had described it,

> [t]he plaintiff saw himself as an active, evangelistic, charismatic preacher while the chaplain service and the medical staff saw his purpose as a quiescent, passive listener and cautious counselor. This divergence in approach is illustrated by the plaintiff's listing "twenty-nine decisions for Christ" in his quarterly report of activities of the Veterans Administration. It was one of the matters pointed out to the plaintiff by [his boss] as unacceptable conduct on the part of the Veterans Administration chaplain.[41]

The case could have been resolved simply as a failure to perform duties in the manner required by a superior, but the appeals court went further, claiming that Baz had no right to impose his religious perspective on patients who did not want to listen to him. He was to perform his chaplain duties in a secular manner. The court tried to be sensitive to the idea that a government facility does not have to be hostile to religious in order to be neutral; thus, having a chaplain was allowed. However, in its attempt to be neutral the court allowed the

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[41] Ibid, citing 599 F.Supp. 614,617 (C.D.Ill.1984)

facility to describe its own ecumenical approach as non-sectarian but Baz's approach as religious.

All of these cases illustrate that the definition of religion involves more than simply deciding which faiths ought to be covered under the First Amendment. In addition, courts determine which types of activities are religious and which are secular. This, too, involves a definition of religion but the definitional issue is a subtle one. If my definition of religion suggests that counseling is a secular activity, then the definition of religion is even more limiting than if I said Santarianism is not a protected faith.

Claiming counseling to be a secular activity brings us right back to the belief-action dichotomy. Does this mean that a religious adherent may believe what he or she chooses, but when he or she counsels, even as a chaplain, it is secular behavior which is regulated outside the parameters of the First Amendment? It is a complicated question.

Religiously affiliated institutions:

Courts believe that churches are obviously religious institutions. But, what about their ancillary functions? And, what about those institutions that are not owned by a church but claim to be religious? When an institution is owned and controlled by a church, particularly when it is a school, courts are willing to concede "religiousity" quite easily. However,

courts are still inconsistent in their willingness to allow these religious institutions the right to define their own employment practices. Courts bend over backwards to achieve the employment equity goals of Title VII despite the religious freedom exemption, and they do this by using the secular/religious activity distinction. In light of Amos, the secular/religious activity distinction may seem to be no longer relevant; however, if one looks carefully at the rationale of lower courts, it is clear that courts can achieve the same result by claiming an institution to be "non-religious" or by focusing on the difference between religious discrimination and other types of discrimination like race or sex.

When is an institution a "religious" institution? Plaintiff Fike was a Methodist layman hired by the United Methodist Children's Home (UMCH) as an executive director.[42] It is undisputed that he was discharged from his job solely so that the Home could replace him with a Methodist minister. Fike claimed that this was religious discrimination and that it violated Title VII. The Home claimed that it was a religious institution, and therefore, all of its employment decisions were exempt from Title VII scrutiny.

The court held that the institution was not a religious institution and that the employment action was not religious

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[42] Fike v. United Methodist Children's Home of Virginia, Inc. 709 F.2d 284 (4th Cir. 1983).

discrimination because it involved two persons of the same denomination.

In its analysis the court found the following facts: historically, UMCH had been a home for orphans. It was founded by the Methodist church, and, prior to Fike's appointment, all directors had been ordained Methodist ministers. In the 1970's, the need for an orphans' home diminished. Therefore, the Board of Trustees adopted a shift in its policy to include children who had gotten into trouble at home. During the period that Fike was director, the number of children in the Home placed by the State increased. UMCH received funds from the State, and it was subject to regulations by the agencies placing the children.

After these changes, criticism began to develop within the United Methodist Church suggesting that the Home was moving in a "non-sectarian" direction. Therefore, in 1978, the governing body of the Church recommended that Fike be dismissed and that a Methodist minister be hired as director "in order to bring the Home back to the Church structure."[43]

UMCH argued that it was an integral part of the United Methodist Church in Virginia. It was originally organized to "carry on the Church's function of caring, supporting, and nurturing children and inculcating in them the Christian beliefs and tenets."[44] During Fike's tenure, the Board of Trustees had

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[43] 709 F.2d at 288
[44] 709 F.2d at 289

drafted a statement of "church relatedness" to pronounce officially its ties with the Church. Trustees of the Home had to be confirmed by the Virginia Methodist Annual Conference. A trustee had to be a member in good standing of the Methodist Church.

The court, however, found that while the Home may have operated as a sectarian organization in its early years, this course had been abandoned. The chapel was not used for religious services. There were few religious symbols on campus. While a Bible was made available to any child who asked for one, Bibles are not provided as a matter of course to all children. Attendance at religious services was voluntary. Religious instruction was conducted by the chaplain and involves various perspectives and concepts including "without any normative teaching, atheism."[45]

> While the original mission of the United Methodist Children's Home may have been to provide a Christian home for orphans and other children, that mission has not remained unchanged. The facts show that as far as the direction given the day to day life for the children at the Home is concerned, it is practically devoid of religious content or training, as such. While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and charitable one, it is not necessarily a religious one....it is a secular organization.[46]

However, although the court found that the institution was not a religious institution, it still protected the hiring decision

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[45] 709 F.2d at 290

[46] 709 F.2d at 290 (emphasis added)

by finding that the discrimination was not "religious" discrimination. Fike claimed that he was dismissed because he was not a minister, not because he was not a Methodist. The court stated,

> the difference between their respective status as laymen or minister is not a religious difference...The Home had experimented with program changes beginning in 1973 including retention of Fike who had experience working with the new type of children sheltered by the Home. The governing board of the Methodist Church who sponsored the Home subsequently felt that the experiment was unsuccessful and that one of the remedies required was the retention of a minister trained in the administrative affairs of the Church. The Home, after all, received a majority of its funds from the Church and private endowments, and a minister trained in the ways of the Church and its affiliates and having the confidence of its various functionaries, might well be in a better position to administer the affairs of the Home. It is thus apparent that Ward was not hired for the religious influence he might exert over the children or the Home's employees, but for the administrative advantage of his experience and contacts with the Church. In short, we agree with the district court that in this instance the difference is not a religious difference.[47]

But, how is this different from a church deciding the course of ecclesiastical decisions? Does the fact that a minister is doing fundraising make him any less religious?

In the following three cases the court had to decide whether it could regulate an institution's hiring practice when the employment decision appeared to have little to do with any specific religious tenet.

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[47] 709 F.2d at 291 (emphasis added)

Lorna Tobler was an editorial secretary to the editor of Signs of the Times, a monthly magazine published by Pacific Press Publishing company. Her position was secretarial and administrative. She was involved in a successful suit against the Press claiming that the Press had deprived her of equal employment opportunities and that it had illegally retaliated against her when she chose to pursue her case through the government rather than through denomination proceedings as required by church order.[48]

The Press claimed that it was a nonprofit corporation affiliated with the Seventh Day Adventist Church, operating as a publishing house engaged in "the business of publishing, printing, advertising and selling religious and religiously oriented material for purpose of carrying out the church denomination's work." Thus, Title VII did not apply to its employment decisions or to those decisions regarding employees after they were hired.

The court not only allowed the suit, but it found in favor of the woman's case on both grounds.

The Press admitted that until July 1, 1973, it paid Tobler, as a married female employee, a smaller rental allowance than it would have had she been a married male employee. This basis of compensation had been recommended by the church's General Conference which differentiated among employees on the basis of sex and marital status.

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[48] EEOC v Pacific Press Publishing, 482 F.Supp. 1291 (N.D. California 1979)

The court distinguished this situation from cases involving clergy or the hiring of teachers in church affiliated schools because Tobler's clerical duties were not "intimately connected to the institution's religious mission."[49] The court held that the language as well as the legislative history of ss702 were clear. Under Title VII the Press can exercise only a preference for coreligionists, and Title VII does grant to the EEOC jurisdiction over charges of sexually based discrimination arising from an employer-employee relationship. In addition, the court focused on the defendant's admission that the doctrine of the Seventh-day Adventist Church incorporated the principle of equal pay. Therefore, the court said that the Press could not rely on an "alleged exercise of any specific religious belief to immunize its head-of-household compensation practices form EEOC scrutiny." [50]

The court was concerned about allowing discrimination for other related "secular" activities.

> To allow a free exercise defense to the retaliation and discriminatory pay practices alleged in this case would mean that no regulation of employment conditions by any governmental agency will be effective at any of the Seventh-day Adventist affiliated institutions nationwide which engage in printing; lumber, wood products, and furniture manufacturing; food processing; and other diverse activities which may have a secular component or which

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[49] 482 F.Supp at 1293
[50] 482 F.Supp at 1294

may employ individuals performing purely secular functions such as those Tobler was assigned.[51]

However, the court found that the Press was not so "pervasively sectarian" as to prevent separation of its "secular and sectarian employment functions." In this case, only the secular activities were regulated.

In a similar case, the court assessed the sincerity of the Christian school belief that males, as head of the household, were entitled to certain benefits that females were not entitled to. In granting a motion of summary judgment for the female teacher, the court found the school's belief to be insincere.

Fremont Christian School was owned and operated by the First Assembly of God Church. The curriculum emphasized religious training, but also includes "secular education such as math, science, history, English, home economics, and other course available to students in nonsectarian schools." [52]

Since March, 1975 the school had provided health insurance coverage to its full time teachers and other employees but it was limited to employees who are the "head of the household," a role the Church believed, citing Scripture, could only be performed by the husband. The School argued that Title VII could not apply to a policy grounded in religious belief. Not only did the Civil Rights

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[51] 482 F.Supp at 1295

[52] E.E.O.C. v Fremont Christian School, 609 F.Supp. 344,346 (N.D. California 1984).

Act itself exempt the school from compliance but the First Amendment prohibited court overview of the religious school's employment decisions.

In finding that the free exercise clause was not violated in this case the court sidestepped any constitutional discussion by finding that the school's belief was not sincere. Because married female employees received other benefits, and received wages comparable to married male employees, the court said that giving health coverage also would not undermine any real religious belief. With respect to the free exercise clause, the

> [s]chool's policy of providing comparable wages to male and female employees, an implicit nondiscriminatory policy, coupled with female eligibility for group life and disability insurance, renders meritless the School's allegation of interference with its religious-based health insurance plan.[53]

On the establishment clause argument the court relied on earlier cases to say that entanglement would not occur because of the dominance of secular activity. The

> [s]chool, although operated as a sectarian educational institution, offers a range of courses resembling other nonsectarian private and public schools. Thus, the School's character is arguably less sectarian than the ...seminary, which is devoted exclusively to training ministers...[and] a publishing house involved solely in producing religiously-oriented materials is somewhat less sectarian than..a seminary...Compared, then, to a seminary for theological ministers, a school with secular as well as sectarian

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[53] Ibid., at 348

> training, or a religiously-oriented publishing house, is as free of burdensome entanglement as is a wholly sectarian seminary.[54]

Then the court gave further explanation as to its understanding of the ss702 exemption. The exemption was simply a means of acknowledging the right of religious institutions to employ individuals who share common religious beliefs. The school could hire only members of its faith for teaching positions, but it could not discriminate against its employees thereafter.

However, in a 1991 case the Third Circuit Court of Appeals supported the perspective of the court in Amos. Susan Long Little was a Protestant teacher in a Roman Catholic school whose contract was not renewed when she remarried after a divorce. She had been married when she was hired by the school, she divorced a few years later without losing her job. However, seven years after she divorced she remarried and was faced with non-renewal for "just cause" because her remarriage occurred "without pursuing the proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage."[55] She sued claiming that Title VII prohibited this type of religious discrimination but the court held that Title VII did not apply.

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[54] Ibid., at 349

[55] Little v. Wuerl, 929 F.2d. 944 (3rd Cir. 1991)

The primary difficulty in this case was that Little was a Protestant when she was hired. The exemption to Title VII allows religious institutions to discriminate in their hiring of employees "of a particular religion to perform work connected with the carrying on by such [an organization] of its activities."[56] Little's point was that her lack of Catholicism had not been a problem when she was hired, nor was her divorce. Therefore, whether she was "of a particular religion" could not have been the factor by which she was fired, so the exemption did not apply. Why was it possible for the school to use violation of certain of the Catholic Church's teachings for just cause dismissal but not others?

In addressing these concerns the court showed great sensitivity to both the public and the private aspects of religion. It said

> [a]lthough the legislative history never directly addresses the question of whether being "of a particular religion" applies to conduct as well as formal affiliation, it suggests that the sponsors of the broadened exemption were solicitous of religious organizations' desire to create communities faithful to their religious principles...We recognize that Congress intended Title VII to free individual workers from religious prejudice. But we are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to the doctrinal practices, whether or not every individual plays a direct role in the organization's "religious activities."..We conclude that the permission to employ

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[56] See this chapter, note 5, supra.

> persons of a particular religion" includes permissions to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.[57]

However, this is not what had happened. In the court's effort to accommodate the religious institution it assumed that it had to have a complete hand-off approach, even though the institution may have been applying its theology in an inconsistent or unfair manner. Again, religion is private, so we do not examine any part of the process.

In a similar case the district court in Washington D.C. found that a church affiliated retirement home could control the religious expression of its Muslim employees even though the institution did not make adherence to Christian precepts a requirement of employment.

The Exeter House Retirement Home, operated by the Presbyterian Ministries corporation, hired a Muslim woman, Jacqueline Brooks as a receptionist. When she was interviewed and hired for the job no one spoke to her of her religious affiliation. She was asked if she could honor and support the Christian principles of the House and comply with the provisions of its manual. She said that she could.

In accordance with her own faith, Brooks was required to wear a headcovering. She wore a wig during most of her employment; however, on certain days she wore a colorful scarf

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[57] 929 F.2d at 950,951

or the traditional Muslim headdress which covered her head and neck leaving only her face exposed. She was repeatedly asked to remove the covering; eventually, she resigned her position and sued under Title VII claiming that she had been constructively discharged.

In holding that the retirement home was a religious institution and was allowed to discriminate, the court said

> [c]ertainly, PMI may determine for itself what environment it seeks to provide in its agencies such as Exeter House. The employees' action, attitudes, and appearances are obviously an important element in creating that environment. The receptionist position is important in conveying an initial first impression, and Exeter House must be free to determine the impression it wishes to convey; the receptionist may not dictate to PMI in this regard. Plaintiff is free to exercise her religion, but she may not do so on PMI premises in a way that PMI deems is contrary to its interest.[58]

Brooks argued that because PMI did not discriminate on the basis of religion, i.e. that it did not limit employees to co-religionists', it may not take advantage of the limited exemption to Title VII. However, the court said that such an argument

> would result in intolerable intrusions into the operation of a religious entity's own agencies....Plaintiff describes the receptionist position as secular in nature, but such description is beside the point. The receptionist position is one located on PMI premises with a pervading theme of Christian mission...The exemption merely allows PMI to

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[58] E.E.O.C. v Presbyterian Ministries, Inc, 788 F.Supp 1155, 1156 (W.D. Washington, 1992).

> operate its retirement home as it sees fit without any conflicting religion by symbol or otherwise garbling its message of Christianity.[59]

The court is obviously trying to be sensitive to the desire of an institution to define itself by its precepts. However, in bending over backwards to recognize that "private beliefs" affect the public world of employment, and that for many people a belief system affects all of life, it walks away from the questions "what is religion" and "what are the legitimate limits government may impose?" Isn't it reasonable for a court to require that an institution claiming a religiously based exemption at least give an explanation as to why it has taken the action that it did? Can't a court at least require an institution to adhere to its own stated theology? Furthermore, the court emphasizes the idea that religion is private when it refuses to consider the obligation of the religious institution to accommodate the beliefs of its employees. All other businesses, under Title VII, have to at least try to accommodate other religious perspectives. But if you believe that most businesses are secular, and the public may regulate the secular, the private religious institutions clearly get a benefit denied to others.

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[59] Ibid., at 1156,1157

Businesses as Religious Organizations

If courts are inconsistent in their willingness to grant church affiliated institutions the right to define themselves through their employment practices, courts are even less clear when faced with an institution that claims to be religious but functions in the business world.

King's Garden was a non-profit interdenominational religious and charitable organization. Its activities include a number of ministries whose basic goal is to "share Christ world wide." However, as a licensee of a radio station it was under the jurisdiction of the Federal Communications Commission. When the FCC required King's Garden to submit a report of its hiring policies, King's Garden filed for a judicial review of the agency's order.[60]

In 1974, ten years prior to the U.S. Supreme Court's rulings in Amos, the D.C. Court of Appeals held that the exemption was unconstitutional under the establishment clause because it gave religious organizations too great a preference. Although Amos ultimately ruled the exemption as constitutional, the concerns of the court in King's Garden shed light on the difficulties with this statute.

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[60] King's Garden, Inc. v. F.C.C. 498 F.2d. 51 (D.C.Cir. 1974)

The court said that in covering all of the activities of any religious corporation association, education institution, or society,

> the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act. If owned and operated by a nonreligious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a bona fide occupational qualification of a religious character.[61]

The court said that it could not conceive what secular purpose was served by the "unbounded exemption enacted in 1972. As for primary effect, the exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, <u>having nothing to do with the exercise of religion</u>."[62]

Because the First Amendment demands neutrality of treatment between religious and non-religious groups.

> [i]t is conceivable that there are many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism <u>but it hardly follows that the state may favor religious groups when they themselves</u>

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[61] 498 F.2d at 54

[62] 498 F.2d at 54 (emphasis added)

choose to be submerged, for profit or power, in the all-embracing secularism of the corporate economy.[63]

The court also commented on the public aspect of this business.

> As Congress is fully aware, broadcasting under the Communications Act is not an altogether private industry. Federally licensed broadcasters as are public trustees. The premise of the ...argument is that King's Garden's radio station is an integral part of the sect's missionary structure. From this premise King's Garden concludes that the Commission's fair employment rules tamper unconstitutionally with the sect's hierarchy, membership policy, and administration. The conclusion is based on the recognized doctrine, noted earlier, that the internal affairs of a church are immune from public regulation under the Free Exercise Clause. But the argument's premise is defective. A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligation.[64]

These sections highlight troubling questions. What is it about the character of a church that makes it different from a business? If you acknowledge that all of life is religious, including business life, for some groups, then where do you begin to draw lines between what activity should or should not be protected? Is economic life public, and thus, always secular?

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[63] 498 F.2d at 57 (emphasis added)
[64] 498 F.2d at 57

Two years after Amos was handed down, the Ninth Circuit Court of Appeals issued an injunction prohibiting an employer from requiring that all employees attend a devotional service during the work week.[65] Although the Townley Engineering Company paid the employees for their attendance, and made it clear to the employees before hiring them that attendance would be mandatory, the court found that the practice violated Title VII.

In making its determination, the court conceded several facts: Jack and Helen Townley, in founding their company, made a covenant with God that their business would be a "Christian, faith-operated business." They were "born again believers in the Lord Jesus Christ" who were "unable to separate God from any portion of their daily lives, including their activities at the Townley company"[66] The company reflected this commitment by enclosing a Gospel tract in all outgoing mail, printing Biblical verses on all company invoices and other documents, giving financial support to churches and missionaries and holding devotional services once a week during office hours.

However, the court found without discussion that Title VII was not intended to protect religious institutions in the business world. The court said that the Civil Rights statutes required corporate owners to excuse employees with religious objections from attending devotional services at work, and the court held

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[65] E.E.O.C. v. Townley Engineering, Inc, 859 F.2d 610 (9th Cir. 1988).
[66] 859 F.2d at 612

that this did not unduly burden the owners' free exercise rights. The corporation was "secular" in that it was not affiliated with a church, and therefore, was not "religious." Moreover, Townley's accommodation of employees who objected to the services would not cause undue hardship to the company because in the court's opinion, spiritual hardship did not have an adverse impact on the conduct of the business. Townley argued that releasing employees from devotions would have a chilling effect on his mandate to share with all of his employees the spiritual aspects of the company. This argument failed because to the court "chilling" was irrelevant if it had no effect on the company's "economic well-being."[67] Finally, the court concluded that even if ending mandatory attendance at devotional services would have an impact on the Townley's religious practice, it would not be an unreasonable or extreme impact.

In the last paragraph of the decision, the court confused the issue by amending the decision of the lower district court. The lower court had enjoined mandatory services for all employees, whether or not the objections to the services were "religious" in nature. The appellate court said that the goal of the Civil Rights statutes was to end religious discrimination and that therefore, the Townleys had only to excuse those employees who made religious objection to the services. Unfortunately, the court failed to explain how litigants were to distinguish between

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[67] 859 F.2d at 616

religious objections and those objections based merely on conscience or moral codes.

The problem here is that courts' efforts to distinguish between religious and nonreligious practice is foreign to communities that perceive life as an integral whole. The Townleys viewed all of life in religious terms, rather than divided into areas clearly religious or nonreligious. The dissenting judge, Justice Noonan, recognized this when he said the following:

> The ...court appear[s] to assume that there must be a sharp division between secular activity and religious activity. Such a sharp division...such a dichotomy, is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time. Such a split is attractive to some religious persons. It is repudiated by many, especially those who seek to integrate their lives and to integrate their activities. Among those who repudiate this theology is the Townley Manufacturing Company. [68]

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[68] 859 F.2d at 625

Conclusion

This chapter illustrates that the definition of religion is even more complex than simply determining whether a minority group's view is religious. In addition, judges distinguish between religious and secular activity, religious and secular discrimination, and religious and secular institutions. The assumption that religion is a private belief results in the conclusion that public activity is, and must be, secular. If the public sphere is secular, it can be regulated, but this violates the Supreme Court's desire to be sensitive to the fact that belief and action are intertwined. Decisions like Amos illustrate this sensitivity, but they do not resolve the definitional issue. And, the questions that Amos leaves open are critical.

Chapter 4: Regulation and Funding of Social Service Organizations

Introduction

Agencies that provide social services to citizens of the United States are subject to a wide variety of governmental regulatory law. Employment practices are regulated by civil rights laws and labor laws, health and safety standards protect employees and consumers of the agencies, tax codes determine which agencies must contribute to the public coffer and zoning ordinances determine where the agencies may set up shop. But, what is the difference between the government's regulation of a charitable organization and the regulation of a religious, charitable organization? If a religious, non-profit group provides social services to society, should it be exempt from regulatory law? May it receive funding from the government? Does the law distinguish between the "religious" activity of a religious organization and its "secular" activity? If so, what makes up the basis for this distinction?

This chapter examines the assumptions about religion that federal courts bring to their decisions as they apply the First Amendment to government policies that regulate or fund social service agencies. The first section of this chapter focuses on the licensing requirements and regulations affecting day care centers as a tool for exploring the definition of religion as it affects one type of social service agency.

The second section focuses on the courts' use of the phrase "pervasively sectarian." More and more, government welfare reform proposals are taking into account the role that nongovernmental organizations have played in helping people to fulfill their own, varied responsibilities in life. Churches, soup kitchens, homeless shelters, day care centers, domestic violence safehouses, federal, state and city funded agencies that serve low-income citizens in a variety of ways are all considered to be an important part of our social fabric. But, if government chooses to fund these agencies, may it (must it) differentiate between religious and non-religious agencies? Does government establish a religion if it includes religious agencies in its proposed social welfare reforms? If so, how do courts determine which agencies are religious and which are merely charitable or moral?

Licensing Requirements and Regulation: *Forest Hills Early Learning Center v Grace Baptist Church and the State of Virginia*--a decade of conflict

Since 1948 the state of Virginia, like many states, has required all child care center operators to obtain licenses and to comply with specific health and safety regulations. For years, the standards were fairly limited in scope. Until the 1970's there was almost no litigation in this country regarding either the free exercise argument that sectarian day care centers must be

exempt from regulation or the establishment argument that arguably forbids exemption.

Throughout the 1970's, however, women entered the work force in larger numbers, and more and more children began to be brought up in single parent homes. The demand for safe, regulated child care increased, and states responded by setting detailed, mandatory standards that covered health and safety, but also discipline of children, parental involvement or control over the center, and sometimes even curricular programs.

In 1976 the Virginia Department of Welfare passed comprehensive child care regulations.[1] Area churches responded by stating that their religious beliefs would not permit them to apply for licensing or accept regulations. The licensing usurped the authority of God over the church, and regulations interfered with a function (child care) which was an integral part of the church's religious ministry. The Virginia legislature then passed an exception to the regulations, saying that any child care operation offered by a religious institution would be exempt from both the licensing requirement and all but the most basic safety requirements.[2]

When the exemption was passed, nonsectarian child care centers sued the state claiming that the statute violated the establishment clause. Because the nonsectarian centers suffered

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[1] Virginia Code 1950, ss63.1-195 to 63.1-219

[2] Ibid.

financially in the market place as they competed with sectarian centers that did not have to make expensive adjustments to comply with the regulation, the state sponsorship of the sectarian centers amounted to state establishment of religion. The nonsectarian centers perceived state support of sectarian centers based on the following:

> --the sectarian centers were completely relieved of official state regulation in the areas of licensing, program, insurance, financial resources and management, staff qualification, and internal administration following licensing, while the nonsectarian centers are subject to extensive regulation in these areas, enforceable by state agency inspection and legal sanctions...
>
> --sectarian centers have "only limited disclosure and certification requirements and no sanctions exist for violation"...
>
> --in the areas of health and safety, "sectarian centers are also relieved of a wide range of regulatory standards which apply to nonsectarian centers. Sectarian centers are subject only to those health and safety standards already applicable to the general population through local and state fire, safety and sanitation codes. Nonsectarian centers are subject to state level inspection and enforcement mechanisms while sectarian centers are subject only to the inspection and enforcement powers of local health, welfare and the fire departments acting on complaints of parents."[3]

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[3] Forest Hills Early Learning Center v. Grace Baptist Church et al, 846 F.2d 260,262 (4th Cir. 1988)

This case was litigated from 1979 through 1989.[4] Initially, the lowest federal court held that as a matter of law the statutory exemption was constitutional because the First Amendment permitted, and may have even required, that the religious freedom of these religious organizations be protected. Religious freedom meant government "hands-off" the religious institution.

On appeal, however, the Fourth Circuit Court of Appeals held that there was nothing wrong with general regulation of religious institutions. If the center wanted to put forth a free exercise claim it had to show that the exempt activities themselves were sufficiently "central" to the organization's faith identity. The court said that the fact that an activity was a "good work" of a religious institution did not make it a "religious" activity. Core religious practices like prayer, worship and ritual were entitled to protection, but if an organization wanted exemption from licensing and general regulations, it would have to show that the licensing process itself and the regulations interfered with its core religious identity. At that point, the state would still have the chance to deny religious exemption based on a compelling state interest. The circuit court sent the case back down to the district court for findings regarding the "religious" versus the "secular" activities of the sectarian child care centers.

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[4] Forest Hills, 487 F.Supp. 1378 (E.D.Va.1979), reversed and remanded, 642 F.2d 448; 540 F.Supp. 1046, affirmed in part, vacated in part and remanded, 728 F.2d 230; 661 F.Supp. 300, reversed 846 F.2d 260; rehearing denied, cert. denied 109 S.Ct. 837 (1989).

The district court's 1987 decision phrased the new issue as follows:

> whether and to what extent free exercise rights expressed in exempt activities would be burdened by the application of the state's minimum standards for licensed child care centers to church-run centers and, if so, whether that burden is nevertheless justified by a compelling state interest.[5]

Its attempt to draw a line between religious and secular activities was summarized in one paragraph:

> Regarding the issue of whether the operation of child care centers by class members is a part of their respective ministries, this Court concludes that while the class members may characterize this activity as a part of their ministries, the Court is not bound to accept this characterization. Applying the tests set forth by the Fourth Circuit, the Court concludes that the operation of child care centers by these sectarian institutions is a secular, and not religious, activity. Therefore, the operation of such centers is not entitled per se to free exercise protection. The operation of a child care center is not an "active expression" of the churches' particular beliefs regarding their ministering to their children but is merely incident to such "active expression." [6]

The court's analysis rested on the observation that some religious child care agencies had no resistance to the state licensing regulation which was "probative" of whether or not child care

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[5] 661 F. Supp. 300 (E.D.Va. 1987)

[6] 661 F. Supp. 300,309 (E.D.Va. 1987)(emphasis added)

centers were an expression of "centrally held religious beliefs." Furthermore, because the church child care centers developed in the 1970's, the court said that their existence was a response to the growing number of women in the work force, which was a "secular," not at "religious," need.

Here, the court adopts a vision of religion that indicates that faith is private, core belief. As soon as that belief affects the public realm, the economic realm, it is not religious, but rather becomes secular.

However, the court then proceeded to cover all bases. It said that even if the operation of a child care center was a religious activity, the compelling state interest in protecting the health and safety of children justified the licensing requirement. Moreover, the licensing request was the least restrictive means for protecting this interest. For example, the information requested by the state on its one page financial disclosure form "represents a minimal intrusion into the financial affairs of one secular activity conducted by a church--its child care center--while serving the purpose of assuring a center's financial ability to comply with the standards."[7] Because the intrusion was limited, and the state concern significant, religious interests must bow to the government.

Then, the court went on to apply this rationale to the way in which the centers were run. The churches objected that the

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[7] 661 F. Supp. at 330

minimum curricular standards would permit the state to impose program content requirements that reflect a "secular humanism philosophy" incompatible with their religious beliefs. Without discussion of the content of secular humanism versus the churches' belief systems, the court concluded that the curricular requirements did not regulate substantive content but rather emphasized physical and mental development of children by "encouraging centers to provide a broad range of activities, without directing the content or substance of such activities."[8] The churches disagreed, saying that the requirement to include rhythm, music and dancing in the daily activities of its program, and the requirement to promote "positive self-concept" could conflict with their vision of dancing as sinful, and man as depraved. However, the court asserted that there was no basis to conclude that the state would interpret its regulations in such a way as to conflict with the programs of the church-run institutions.

The churches also argued that the "good moral character" hiring regulation enabled the state to compel a church-affiliated child care center to hire someone the church felt lacked good moral character. For example, given the fact that the state had a policy against discrimination against homosexuals in public school employment, could the state compel a church to hire a homosexual? The court said that because the day care received

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[8] Ibid.

no public funding, its hiring practices were protected; this point should not be of concern.

Finally, the state also required that the child care center refrain from corporal punishment. The churches argued that they should be in charge of meting out discipline in accord with their teaching. The court said that

> [b]ecause the operation of a child care center is a secular activity even when conducted by a church, the state may require a church-affiliated child care center to refrain from corporal punishment. Even if the activity were religious, the state had a compelling state interest in protecting young children in care away from home from physical and emotional harm.
>
> Where religious practices risk or endanger the health and well-being of members of society, the state may regulate such practices to avoid the adverse health consequences. [9]

However, this quote illustrates the problems faced here. If the state can regulate to protect "health" and "well-being" of society using the compelling interest test, it can easily substitute its vision of the good society for that of any given religion or faith community. It is precisely this majoritarian regulation of faith commitments that the First Amendment was designed to protect against. There may well be limits to what religious organizations may do to children, but when a court first claims that child care is not religious in nature, its second claim that

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[9] 661 F. Supp at 311

even if it were religious, the compelling interest of the state justified regulation is a foregone conclusion.

One year after the district court held the licensing and regulatory provisions applicable to religious day care despite the legislated exemption, the Supreme Court handed down Amos, the employment case decision that upheld as constitutional a federal statute that gave religious institutions an exemption from civil rights employment laws.[10] The rationale of this case hinged on the Court's recognition that the separation of "religious" activities from "secular" activities of a church-related institution did damage to the self-definition of a religious organization.[11]

The Amos case was handed down just as the federal district court set forth its condemnation of the Virginia exemption for religious day care centers. Within weeks the Virginia case was appealed once again to the Fourth Circuit asking the appellate court judges to use Amos to claim the exemption to be constitutional. In a two page decision, the circuit court did exactly that. Ten years after the litigation had begun, the church run day care centers were free from governmental regulation.

Since the decisions of Amos and Forest Hills, numerous other federal courts have upheld state laws that exempt from

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[10]Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327(1987).

[11] see chapter three,supra.

regulation child care agencies integrally related to a church. Courts do this easily, without analysis. For example, in Forte v. Coler, the court granted summary judgment in favor of religious child care centers, holding without discussion that "[although church related facilities] still must comply with minimum local health, sanitation, and safety ordinances and Florida's personnel screening requirements, they are not subject to the broad ranging regulations other child care facilities must conform to."[12] The assumption is that church activities are religious, so they may be exempt from the law.

However, there are still unanswered questions that effect the identity of religious institutions. First, what does it mean to be a religious organization? In the arena of day care agencies, the relevant legislation involves sectarian centers. There is little legislation that relates to a center that is not sectarian but wants to be considered religious, qualifying under these exemptions. This does not mean, however, that these cases will not develop. As chapter three illustrated, in the area of employment rights the nature of "religious institution" has been litigated for years, and courts still fluctuate between being willing to create this definition themselves versus letting institutions define their "religiousity."

Also, although the courts determine that the First Amendment establishment clause analysis does not prohibit

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[12] 725 F.Supp. 488, 490 (M.D.Fla. 1989)

states from exempting religious institutions from generally applicable law, will courts require states to grant exemptions if the legislators are not inclined to do so voluntarily? It depends.

Given the concerns in Amos, that issue by issue free exercise litigation would entangle the courts in "religion" and would threaten the self-identity of the religious mission of an institution, it would seem reasonable to conclude that the courts would require states to grant some general "religiously" based exemption to individuals and groups claiming that state laws caused them to violate their faith. In the past, courts have done exactly that, using the "compelling state interest" standard as the test for legitimate state regulation. However, at this point, in 1994, the law and the standards to be used are somewhat unsettled. In the recent Smith case, the United States Supreme Court determined that in some cases the compelling state interest standard was inappropriate when an individual or group asserted a claim based solely on the free exercise clause of the First Amendment.[13]

Recall that in Smith, Scalia wrote that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability just because he or she thinks the law constricts activity that a religion requires. In determining whether or not the legislation was

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[13] Employment Division, Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660 (1990)

"valid" the Court asked not if it was "compelling," but if it was "reasonable." Furthermore, the Court acknowledged that leaving accommodation of religious expression to the legislative, political process could place minority religions at a disadvantage. As long as the law was "neutral", not distinguishing between religions, it was legal. Calling this the unavoidable consequence of democratic government, the Court stated that it was preferred to a system in which each conscience is a law unto itself.

The critical point here is that laws are religiously neutral if they do not specify a particular religion. Neutrality comes as long as government does not distinguish between religions. Neutrality exists when all organizations, whether or not religious, are treated the same. However, this returns us to the belief/action dichotomy. Beliefs are protected; actions are protected only if the majority agrees to it.

Smith Applied:

When the Salvation Army sought an exemption from state requirements regulating boarding houses, the Third Circuit Court of Appeals determined that the religion clauses of the First Amendment did not protect this religious agency from state regulation.[14]

The Salvation Army has been recognized as a church by federal courts since 1971.[15] In 1979, New Jersey enacted a Rooming and Boarding House Act ("Act", hereinafter) in response to public outcry regarding the unsafe conditions of these institutions. [16] The Act regulated physical safety of the residents, but it also instituted a bill of rights for people living in these rooms. The bill of rights particularly emphasized the privacy and the freedom of the residents.

The Salvation Army ran voluntary rehabilitation centers designed to renew and rehabilitate homeless and socially troubled men through spiritual teaching, counseling and work therapy. These centers fell under the jurisdiction of the Act. The centers consisted of mandatory "work therapy" in the Salvation Army's

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[14] Salvation Army v. New Jersey Department of Community Affairs, 919 F.2d 183 (3rd Cir. 1990) This regulation affected boarding homes, not day care centers, but the analysis is the same, and it is reasonable to believe that day care cases will follow this line of reasoning in the future.

[15] McClure v. The Salvation Army, 323 F.Supp. 1100(1971); aff'd 460 F.2d 553 (1972)

[16] New Jersey Rooming and Boarding House Act of 1979, N.J.S.A.55:13B-1 et seq

Thrift Stores which funded the centers but also served as a means of helping the residents take a place in society. The residents did not receive salaries but did receive a gratuity. They were required to engage in "spiritual activities" including religious services and spiritual counseling. In addition, visitors were restricted, and meals and other activities were part of the communal nature of the center so socialization was regulated. The residents were free to leave at any time, but this structure still violated the Act's bill of rights.

When the Act was passed, the Salvation Army asked for exemption from all parts of the Act other than those related to the physical safety of residents. The reason for the exemption request was that these centers were not "secular" or "social," but rather they were central to the religious mission of The Salvation Army.

The court, relying on Smith, found that because the Act was not directed toward religious activity, and thus was "neutral" toward religion, regulation was not subject to a free exercise clause challenge. The court would not require the state to grant exemptions for religious organizations.

Salvation Army was not a day care case, but if day care cases prior to Salvation Army and Smith are examined, the position judges will take in the future seems clear. Even before Smith, judges found in favor of the state when sectarian day care schools challenged state regulations that interfered with them.

The courts used compelling state interest to justify the regulation. Post-Smith, the test moves from "compelling" to the lower threshold of the "reasonableness" of the state's concern. The following case, using the compelling standard, illustrates the difficulty religious institutions will have in arguing that the First Amendment means government "hands-off" religious agencies.

In North Valley Baptist Church v. McMahon a religious group that operated a child care center challenged a state law that refused to exempt it from licensing or state regulations.[17] The court held that the California Child Care Facilities Act did not foster excessive governmental entanglement with religion even though it did regulate the agency. Moreover, the regulations did not affect religious objectives of groups operating child care centers because "the licensing scheme left unregulated every aspect of the preschool's operations which was religious in nature."[18] Here, again, you see a separation of the religious from the secular, without discussion of what that means.

The primary issues in this case were the licensing requirement and the state's concern about the nature of discipline in the center. The Act prohibited corporal punishment, which conflicted with the teachings of the Baptist church. The preschool operated consistently with the principles and beliefs of

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[17] 696 F.Supp. 518 (E.D.Cal. 1988)
[18] 696 F.Supp. at 520

the church. Preschool staff had to be members of the Church, and they were expected to conduct themselves in an appropriate "Christian manner." Teachers were to integrate Biblical teachings into all aspects of instruction. Although the church believed "that the primary responsibility for the upbringing of children lies with parents," in order to instill "learning and self-control", the center implemented a structured discipline policy including spankings.[19]

The discipline policy was set forth in the center's handbook, and all parents of children at the school signed authorization forms indicating that they supported the school in its discipline policy.

When the center opened, it applied for and received a license from the state. However, over the period of a decade the pastor of the church along with the Board of Deacons began to believe that the state government had "crossed the invisible line" between church and state and had begun to "eliminate the historical and constitutional right of the church to minister to the needs of the people without interference from government."[20] Accordingly, he claimed that "renewing of our preschool license is a clear violation of the lordship of the Lord Jesus Christ over our church."[21] The center operated without a license from 1981 to 1988, refusing to file compliance reports with the Department

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[19] Ibid.
[20] Ibid.
[21] Ibid., at 521

of Social Services; in fact, it refused to allow Social Services on its premises to inspect the facility. The center did agree to follow on a "voluntary basis" the requirements for fire, health and safety concerns.

The court recognized the sincerity of the church's belief system, but said that even though the practice of religion was severely burdened by the licensing requirement, the compelling interest standard sustained the requirement. There was no other reasonable way to provide for the welfare and safety of children than to require licensing and inspection for things like the financial stability of the institution, the code compliance for building structure and safety mechanisms, for teacher-student ratios and for program requirements that reflected modern day theories of good pedagogy and theories of optimal learning environments.

With respect to the discipline issue, the court elicited testimony that illustrated the fact that the school activities were permitted by the faith but were not required by the faith. This distinction was critical to the court's holding that to sustain a free exercise claim

> plaintiffs must demonstrate not only that the subject conduct is religiously permitted, but further that the conduct is religiously mandated or otherwise so central to belief that its prohibition would impose a genuine burden on religious expression. [22]

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[22] Ibid., at 531

Corporal punishment was not mandated, so the free exercise issue did not apply.

These cases illustrate an important thing. The compelling state interest test and now the reasonableness standard can be easily used to justify a broad range of government regulation. This may or may not be a bad thing, but the application of the tests rests on a judge's assumption that regulation is legitimate because the activity really is not very religious in nature. The analysis in North Valley is the same as the analysis of the district court in Forest Hills on remand. However, this approach conflicts with the Supreme Court's perspective of the nature of religious activity in Amos. There, the Court said that separating the religious from the secular activity of a church was not within the courts discretion. Here, this separation is done by judges, and it determines the outcome of the case. The courts are ignoring the relationship between faith and the public sphere, ignoring the fact that for many people, faith defines the way children are reared and schooled. Faith defines the pedagogy to be used in schools. Faith is, for many, both private and necessarily public.

In the next section, the Supreme Court faces a similar dilemma and handles it differently than it did in Amos.

Funding Private Social Service Agencies

Traditionally, much of the welfare in this country was a private, voluntary action rather than a governmental one. Accordingly, churches and church-related institutions were at the forefront of the "social work" charitable activity in the United States.

The twentieth century brought government involvement into the social service arena, but because the private agency network was so entrenched, most of the government contribution came in the form of aid to agencies already functioning. Because so many of the welfare or charitable agencies had a religious tie, the government opened itself to charges that its financial contribution to religious institutions violated the establishment clause of the First Amendment. The interesting thing is that although the parallel issue of government aid to religious schools spawned a tremendous amount of litigation at state and federal levels, government aid to "religious social welfare" agencies has been litigated with vigor only over the past ten years.

This section of this chapter examines the jurisprudence that defines the limits of government aid to religious social service agencies. Again, what is the difference between a religious organization and a charitable one? Is there a difference between government aid to a church-run soup kitchen and aid given to a soup kitchen run by people who happen to believe that

God wants them to help the poor? What about a group that believes it is its moral duty to feed the poor, but has no common faith tying it together? How do courts make this decision, and what are the implications of the courts' distinctions?

Bowen v. Kendrick: again, a decade of conflict

In this case the Supreme Court determined that the government may fund social service agencies with religious ties as long as those agencies are not "pervasively sectarian."[23] However, after ten years of litigation that continues today, answers to the following questions are still uncertain: what does it mean to be pervasively sectarian; how do institutions get funding to fulfill their charitable mission while still maintaining enough religious identity to claim exemption from state laws that do damage to their belief systems?

Legal analysis of the relationship between government and religious social service agencies became important in 1981 when Congress passed the Adolescent Family Life Act (AFLA).[24] The AFLA was passed by Congress in response to the "severe adverse health, social and economic consequences" that often follow pregnancy and childbirth among unmarried adolescents.[25] It is an act with several purposes:

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[23] Bowen v. Kendrick, 657 F.Supp. 1547, reversed and remanded 487 U.S. 589 (1988)

[24] Pub.L. 97-35, Stat. 578, 42 U.S.C. ss300z et seq.

[25] 42 U.S.C. ss300z(a)(5) (1982 ed., Supp.IV)

to promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations;

to promote adoption as an alternative for adolescent parents;

to establish new approaches to the delivery of care services for pregnant teenagers;

to support research concerning social causes and consequences of teenage premarital sexual involvement.

Grant recipients are to provide care services for pregnant teens and to provide prevention services, including

> pregnancy testing, maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services, educational services relating to family life and problems associated with adolescent premarital sexual relations. [26]

In creating the AFLA, Congress recognized that certain social problems were so complex that government action alone would be insufficient. Therefore, some problems should be addressed "through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services

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[26] Ibid.

provided by publicly sponsored initiatives."[27] Congress is recognizing the role that non-governmental organizations play in the social fabric of our society; it is also recognizing the public sphere role of religious organization that we often call "private."

Since the passage of the Act, grant money has gone to private and public hospitals, private and public health care agencies, private community centers, private and public educational agencies and charitable organizations. Many of these agencies have formal ties to churches, and many of them consider themselves to be religious whether or not they are formally owned by a church.

In 1984, a lawsuit was filed by a group of tax-payers, the American Jewish Congress, the ACLU and three Methodist ministers claiming that the AFLA was unconstitutional because it violated the establishment clause of the First Amendment. Accordingly, the district court found the AFLA unconstitutional because "religion" was integrated into the goals of the Act and because religious organizations actually received money. Specifically, the court applied the three-part Lemon test concluding that the AFLA had a valid secular purpose which was to "prevent social and economic injury" caused by teenage pregnancy. However, the court said that the AFLA had the direct effect of advancing religion because it expressly required grant

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[27] 42 U.S.C. ss300z(a)(8)(B)(emphasis added)

applicants to describe how they would involve religious organizations in the provisions of services.

When the case was appealed, the United States Supreme Court found that there was *nothing necessarily religious about education or counseling services, even if those services were provided by a sectarian agency*. Applying the Lemon test, the Court rejected the assumption of the district court that religiously affiliated grantees under the ALFA were unable to fulfill their functions in a secular manner. It agreed with the lower court that because the reduction of social and economic problems was the primary purpose of the Act, the legislative purpose was secular. However, the Supreme Court said that an "impermissible effect" did not exist simply because Congress recognized the role religious organizations play in solving secular problems. The Court distinguished between institutions that are pervasively sectarian and those that are merely religious, saying that only aid to organizations that could not separate their religious teaching from their service was unconstitutional.[28]

The Court also found that the statute's grant monitoring provision did not violate the third prong of Lemon because there was no excessive entanglement. The monitoring of AFLA grants is necessary to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the establishment clause. However, there is no reason to assume that

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[28] 487 U.S. at 608-615

the religious organizations which may receive AFLA grants are "pervasively sectarian" in the same sense as are, for example, parochial schools.

Bowen applied:

The Supreme Court was obviously trying to salvage the partnership between government and churches, a partnership that has done great service to citizens of this country with respect to serving the needy. But, the Court's jurisprudence and its definition of religion put it in an untenable position. Separation of church and state that equates neutrality and nonreligious prohibits church/state partnership. To preserve the partnership the Court had to find a way to define the church activity as nonreligious.

The difficulty presented by the analysis of Bowen becomes clear when one examines the litigation that Bowen spawned. Three years after the Supreme Court handed down its position on the funding of social service institution, a group of plaintiffs again represented by Kendrick sued Louis Sullivan, the secretary of the Department of Health and Human Services, for continuing to fund "pervasively sectarian" organizations like A Woman's Choice, Catholic Social Services and so forth.[29]

The Bowen lawsuit was reactivated in federal district court with a plea for summary judgment on the issue of the sectarian nature of several organizations. After examining more than 1750

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[29] Kendrick v. Sullivan, 766 F.Supp. 1180(D.D.C.1991)

documents supporting the defendants' claims that their organizations were religious, but not pervasively so, the court concluded that summary judgment was not appropriate and that the organizations would have to engage in a series of trials to determine the level of sectarian-ness of each.

Although the court did not give specific guidance for the judges who would be presiding over those trials, its approach to the nature of religion is enlightening. The court held that the "pervasively sectarian" standard was a factual issue that could be determined based on the individual situations of each institution separately. It cautioned that judges should limit their trials to whether a grantee's secular purposes and religious mission are inextricably intertwined, emphasizing that it would not be enough to show that the recipient of a challenged grant was affiliated with a religious institution or that it was religiously inspired. The questions is: is religion so pervasive that a substantial portion of the institutions functions are subsumed in the religious mission?

The facts surrounding the organizations at issue were disputed, and the evidence that the defendants used to show their lack of "pervasive sectarianism" illustrate the difficult position that judges will be in when they have to make factual rulings.

The plaintiffs argued that the religious missions of the organizations was wrapped up with the dissemination of services that the organization rendered to its clients. In support of this

position they argued that the religious organizations had policies which prohibited deviation from religious doctrine or which required employees to abide by religious principles. Religious leaders were on the Board of Directors of the organizations, and many of the organizations discriminated on the basis of religion in their hiring decisions.

The defendants argued that even if this was true, pervasive sectarianism did not exist because the organizations created separate divisions to carry out the tasks for which they received AFLA funding. These separate divisions provided "secular services" excising any religious references in their literature, and instructing staff to keep "personal convictions (religious, political, prejudiced or social)" to themselves.

How are judges to resolve this dispute? One problem is that the debate over the religious nature of materials used by the sectarian organizations involved discussion about the "religiousness" of phrases like "morality," "values," "religion" and "spirituality." The Supreme Court suggests that institutions can do moral or good deeds, be religiously identified, but still not do those deeds in a religious way. In deciding these cases under the AFLA, will the fact finder have to determine whether there is a moral, value-neutral way for religious organizations to teach about sexuality?

In 1990, a district court in Minnesota compiled a list of factors that members of the Supreme Court had used to determine the "pervasively sectarian" nature of institutions.

1. The institution operates under supervision of a religious order
2. The employees are members of religious order, diocese or church
3. Religious symbols can be found on the institution's premises
4. Religious instruction occurs
5. Non-church affiliated students or clients are not required to attend the religious (or moral) instruction
6. Religion is not required in the "secular" teaching or servicing of clientele
7. Employees must adhere to a specific set of tenets
8. Most of the students or clientele are of a particular faith.
9. Preference is given to students or clientele of a particular faith.
10. Governing church elects board of trustees
11. Governing church has power over financial issues of organization
12. Governing church can amend the charter of the institution.
13. Handbooks of institutions refer to God, Christianity or faith
14. The students or clientele are of an impressionable age
15. The institution subscribes to a statement of principles on academic freedom or freedom of conscience for its employees
16. Restrictions exist on what employees may advise or teach (and the level at which these restrictions are or are

not enforced)
17. The level of institutional autonomy
18. Whether or not the institution makes a report to an affiliated church
19. Whether or not church affiliated clergy have a role in the institution
20. Whether or not church affiliated services are held at the institution
21. Encouragement of spiritual devotion (is it allowed, or required, or advocated?)
22. Existence of religious indoctrination
23. Do religious courses or discussion supplement curriculum; if so, are they separated from secular courses?
24. Does prayer exist at the institution
25. Does talk of theology cover the broad range of human experience or only religion?
26. Are decisions regarding hiring (except in theology courses) made without regard to religion
27. Can institution document that it protects clients from proselytizing
28. Are any required activities presided over by clergy or rabbis? Do they wear clerical garb?[30]

Although the district court cautioned that the list should be used only as a guide, not a litmus test, it is difficult to determine how anyone could make this judgment without saying "19 of the factors exist; therefore, the institution is pervasively sectarian."

The Bowen cases, ironically, have placed religious institutions in the role of arguing that their instruction is religiously neutral. In Nelson, even though the catalogs of

[30] Minnesota Federation of Teachers v. Nelson, 740 F.Supp. 694 (D. Minn. 1990)

colleges claimed that "there can be no division between sacred and secular subjects" or "considering education in the light of Christ, there can be no division between sacred and secular subjects," the court found the institutions to be not pervasively sectarian.

It is possible that when the post-Bowen cases get back up to the Supreme Court, the Court will separate social service agencies into different categories. This would be disastrous. Would the Court decide that agencies distributing physical services are not pervasively sectarian, but those distributing advice are?

The Forest Hills, Amos, Smith and Bowen cases suggest that religious institutions are between a rock and a hard place:

the government may grant religious institutions exemptions from laws that other institutions must adhere to, but the government is not bound by the Constitution to do so;

without legislative exemption, an institution may adhere to its religious identity, but not if it conflicts with a compelling interest of the state. This rule may be even further limited depending on the development of Smith: adhere to your religious identity, but not if it conflicts with a valid, neutral state law of general applicability;

in order to invoke the above right, the institution must establish that it is truly religious. Prior to Amos, this was done

by arguing that there was no difference between the secular and religious activity of the institution. Today, the Court recognizes that this separation is almost impossible. This grants extra freedom regarding the regulation issue

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if you are a religious institution, you cannot receive government funding unless and until you establish the difference between the secular and the religious activity of your institution.

The main problem here is that the judicial division between religious and secular that Amos stepped away from was reactivated by the Court in Bowen with the pervasively sectarian category. To understand the conflict that this presents, the cases that straddle both the pervasively sectarian issue and the employment issue must be considered.

Government Funding of Religious Universities that Discriminate in Hiring Practices

In a trilogy of case in the 1970's, the Supreme Court approved government funding for religiously affiliated colleges and universities.[31] During this same time, the Court handed down the Lemon decision which prohibited funding to religiously affiliated elementary and secondary schools. The Court said that

[31] Tilton v Richardson, 403 U.S. 672 (1971); Hunt v McNair, 413 U.S. 734 (1973); Roemer v Board of Public Works of Maryland, 426 U.S. 736 (1976).

institutions of higher learning were different from those of lower grades because the colleges and universities had accepted principles of academic freedom developed by the 1940 Statement on Academic Freedom and Tenure of the American Association of University Professors (AAUP). Because colleges adhered to principles of academic freedom, religious indoctrination was probably not a substantial purpose of the institutions. Adherence to generally accepted academic standards provided the monitoring necessary to ensure the absence of pervasive sectarianism.

Many of the cases involving religiously affiliated colleges turned on whether or not government funding of construction on the campuses entangled the government in religion.[32] However, in Roemer v Board of Public Works of Maryland, the government funding was in the form of annual grants to be used by the colleges as they saw fit. In this case, the Court held that the four Catholic colleges involved were not pervasively sectarian and that the effect of the funding was secular. The characterization of the colleges as not pervasively sectarian was based on the fact that although mandatory theology courses were part of the curriculum, the colleges followed the academic freedom principles of the AAUP.

The striking thing about the Roemer case is that in their employment decisions, the colleges involved used the religious freedom exemption available to religious institutions under Title

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[32] Tilton, Hunt, supra.

VII of the 1964 Civil Rights Law.[33] Several years after Roemer was handed down, Mount St. Mary's College, one of the Roemer Catholic colleges, was sued for refusing tenure to a female professor. The college's defense to the age and sex discrimination claims was that the college was a religious institution, and the First Amendment protected its autonomy. The federal age and sex discrimination claims should be summarily dismissed. In this case, the judge did dismiss most of the discrimination claims, based on the religious institution's autonomy, and Ritter lost her case on the few claims that remained.

The significance of the case is that it illustrates the tight spot courts place themselves in when they create different sets of rights for religious, non-religious, and religious but non-sectarian institutions. Definitions are critical if rights depend on them. Courts have a hard time distinguishing between sectarian, non-sectarian, and sectarian but not pervasively so institutions. This point is illustrated by courts' differing characterizations of Catholic Jesuit institutions. In Pime v Loyola University of Chicago, the school was not eligible for Title VII's religious control of education exemption because it was not owned, supported, controlled or managed by a particular religion.[34] Loyola was a non-profit corporation under Illinois

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[33] See Chapter 3, supra.

[34] 803 F.2d 351 (7th Cir. 1986)

law and it received federal money. However, in interpreting the same section of Title VII during the same year, another federal court held that Marquette University was eligible for the Title VII exemption.[35] Marquette is a Jesuit school with an organization the same as Loyola's.

Conclusion

The crux of the problem is that courts and legislature will regulate the activity of religious organization, but not all such regulation is considered legitimate either by the regulated institutions or under the First Amendment. The critical question is now to determine what type of activity should be within the regulatory jurisdiction of the government. If the courts approach this question with a scheme in which religious activity is shielded from regulation but secular activity is not, then the definitions of religious and secular are important.

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[35] Maguire v Marquette University, 627 F.Supp. 1499 (E.D. Wis. 1986).

Unfortunately, it appears that courts employ a distinction between "religious" or "sectarian" and "secular" activities that is at odds with the way some faiths understand reality. In some cases, judges assume that the distinction between the sacred and the secular activity of a religious institution is self-evident. In other cases, judges acknowledge that "religion" is not simply an added factor which an organization can embrace or reject at will. Instead, it constitutes the manner or direction in which all of the institution's activities are carried out. Lacking a consistent understanding of religious activities and institutions, judicial decisions themselves are inconsistent.

Chapter 5: Curriculum Wars

Introduction

Religious freedom conflicts affect employment issues and the distribution of government funds, but nowhere is the conflict between "freedom of religion" and "freedom from religion" debated more vigorously than in the nation's schools. Cases defending or attacking the legitimacy of prayer in the public school, financing of church schools and the meetings of faith based groups on public school grounds continue to work their way through state and federal courts every year at every level. For one debate in particular, however, the definition of religion is critical: curriculum.

The curriculum that school children are exposed to is so sensitive because it hits at the tension between parents' desire to be the primary influence on their children and the government's need to influence its citizens. Because school attendance is compulsory, because young students cannot critically evaluate what their teachers tell them and because teachers are authority figures who reward children according to how well they learn their lessons, schools can be used as a tool to indoctrinate students.[1]

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[1]Stanely Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses," 41 Stanford Law Review 233, note 26, citing Shiffren, "Government Speech", 27 UCLA L. Rev. 565 (1980) and Yudof, "When Governments Speak," 57 Tex. L. Rev. 863 (1979). See also Justice Stephen O. Douglas,

> While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it had

Curriculum issues highlight the need for deciding whether the political or philosophical is ever the equivalent of the religious. Can a school be religiously neutral?

Throughout the 1960's and 1970's the Supreme Court heard a series of "school cases" that, while they served to secure for parents the right to educate children as they saw fit, the cases also firmly entrenched the idea that the state school system had to be devoid of religious activity and assistance to religious interests in order to maintain religious "neutrality."[2] However, at the same time, the public school systems throughout the country were coming to grips with the fact that families could no longer be depended on to provide the moral foundation necessary for students to become fully responsible citizens. In the 1970's, "values clarification" courses were introduced in the public schools to respond to what some perceived to be a gap in students' ethical development. Today courses encouraging "critical thinking" of traditional liberal arts subject matters like history are popular; critical thinking curriculum also molds high school units on sexuality and civics. For First Amendment purposes, the question is this: can courses emphasizing values or morality be taught in a religiously neutral manner? It depends on what you mean by "religious."

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disadvantages. The main one is that a state system may attempt to mold all students alike according to the views of the dominant groups and to discourage the emergence of individual idiosyncrasies. Lemon v. Kurtzman, 403 U.S. 602, 630 (1979).

[2]See Yoder, Lemon, Aguilar, McCollum, Schemp, supra.

This chapter examines federal court curriculum decisions to uncover the judicial definition of religion as it effects the public schools. Most of the cases have developed from a debate between the religious right and people who believe that "non-religious" is the same as "religiously neutral." The argument of those that identify themselves as religious is two-fold. Initially, parents claimed that if you take God out of the classroom, you are hostile toward religion, and this violates a child's free exercise rights. This perspective, for some, then developed into an establishment clause argument: you do not have to teach about God or Christian moral absolutes in the public school, but then, you must also refrain from teaching moral absolutes of another belief system--in fact, even moral relativism violates the establishment clause.[3]

These arguments require analysis of the character and definition of religion; judges face these arguments with trepidation, preferring to decide cases on any ground other than this definitional one.[4] When the debate centers on the religious nature of beliefs like scientific creationism, evolution and

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[3]See Forest E. Baird and Dale E. Soden, "Cartesian Values and the Critical Thinking Movement." Faculty Dialogue, Winter 1993, pp. 77-90 for the argument that critical thinking as offered in the public school system is founded in a belief system that parallels, but contradicts, the belief system of Christianity.

[4]In 1993, the Supreme Court decided a case in which lower courts had debated whether a sign language interpreter for a deaf student in a Catholic school was more similar to a computer, in which case the signer would be "religiously neutral," or more similar to a teacher, in which case the signer would be a "religious" instrument. Ironically, in its decision, the Court never addressed the nature of religion or religious-ness of the activity; the case turned on the fact that government money had gone to a family, not directly to a Catholic school, so it was a legitimate distribution of government funds. Zobrest, supra.

secular humanism, however, the political climate in some states has forced the judges to confront these questions head on.[5]

Creation Science and Evolution: belief systems as religion?

Throughout the nineteenth and early twentieth centuries, many state school systems refused to teach evolution. In fact, numerous states made it a crime for teachers to introduce Darwinism to the students. Science, particularly the study of the beginning of man, was based on Judeo-Christian precepts which included some concept of creation.

However, as the study of evolutionary process became more sophisticated and more accepted by scientists, some schools introduced evolution into their curriculum, often in violation of the law.[6] The ensuing conflict developed into litigation that eventually reached the Supreme Court.[7] For example, in the 1920's fundamentalist Christian revivalism lead the state of Arkansas to adopt the "monkey laws" prohibiting the teaching of the theory that man evolved from other species of life. The constitutionality of this law was upheld by the Tennessee

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[5]See Wayne MacIntosh, "Litigating Scientific Creationism, or Scopes II, III ..." Law and Policy, Vol. 7, No. 3 July 1985, for interest groups' willingness to use the court system as a political tool.

[6]In the early 1900's some states removed the laws criminalizing the teaching of evolution from their books, but others did not.

[7]See Blinderman, "Unnatural Selection: Creationism and Evolutionism," 24 J. Church & State, 73 (1982); Edward Larson, Trial and Error: The American Legal Controversy Over Creation and Evolution (1985); and Caudill, supra, for this history.

Supreme Court in the Scopes trials of 1927.[8] From 1927 until the early 1960's, the public high schools of Tennessee complied with the law. However, in 1964, Susan Epperson, a high school teacher, was given a biology textbook for use in the coming school year. The textbook contained references to Darwinism, and Epperson petitioned the state court for a declaration stating that the state statute criminalizing her use of the textbook violated the establishment clause of the First Amendment. The state courts of Tennessee refused to void the statute, but the case was appealed to the U.S. Supreme Court. The Supreme Court held that because the statute's purpose was to "blot out" theories that conflicted with the Bible, its purpose was religious, not secular.[9] Therefore, the statute was void.

In response, the state passed a law stating that if schools were going to teach courses that referred to the origin of man, they had to use a balanced approach. If evolution was taught by teachers like Susan Epperson, then, in the name of the students' religious and academic freedom, alternative views like scientific creationism must also be presented. In McLean v. Arkansas, a federal court found this statute to be unconstitutional because it, too, had no secular purpose.[10]

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[8]Scopes v. State, 154 Tenn 105, 289 S.W. 363 (1927)

[9]Epperson v. Arkansas, 393 U.S. 97 (1968)

[10]See chapter 2 for criticism of the court's willingness to assume a definition of religion that excluded evolutionary belief but included creationism simply because creationism involved biblical teaching.

A few years later, the U.S. Supreme Court handed down a decision supporting the federal court in McLean. In Edwards v. Aguillard, the lower court had found without discussion that whether or not creation science was supported by scientific evidence, it was a religious belief. The case then turned on the purpose of the Louisiana Balanced Treatment Act. The court found that the Act violated the First Amendment because it had no secular purpose--the belief it protected was religious, so the Act had a religious purpose.[11] On appeal, the state legislature pointed out that it had gone to great lengths to establish its secular purpose, the academic freedom of students, but the Supreme Court found this to be a sham and sustained the lower federal court's summary judgment overturning the state statute.

What is the issue?

The Supreme Court has held that the government may not establish a religion, nor may it establish a religion of "secularism."[12] However, the meaning of this directive is not clear unless "religion" and "secularism" are defined. In many cases, courts seem to indicate that secularism exists when hostility to religion is exhibited. However, in curriculum cases another approach comes to light. Some litigants do argue that schools violate their First Amendment religious freedom rights

[11]482 U.S. 578 (1987).
[12]School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

when books or curriculum present ideas that conflict with their religious beliefs. But, other litigants take the argument in a different direction. They say that secularism, itself, is a faith. As such, if it is part of a curriculum in a public school, it violates the First Amendment. The first argument is based on the free exercise clause, the second on the establishment clause.

The arguments can be demonstrated by examining the following statements:

1. Salvation comes from Mohammed, not Jesus.
2. There is no such thing as salvation.
3. I'm OK, you're OK, only you can determine what is right and what is wrong.

Which of these statements, if presented in a public school, would be considered establishing a religion?

From the following cases, it seems that the first statement is clearly a religious statement and cannot be part of the school curriculum. The second statement is hostile to religion, and many judges would find it also to be violative of the First Amendment. But, is the third statement religious? Is it non-religious because it does not mention God, salvation, sin, prayer or other concepts that we traditionally associate with formal religion? Or, using the Seeger definition of religion, does it reflect an ultimate value about humanity?

Throughout the 1970's, federal courts took their cue from McLean and Epperson, striking down a variety of state methods to

force inclusion of alternative explanations of life where evolution was taught.[13] Because the judges in McLean and Epperson had focused on the purpose of the statute, the claim that both evolution and creation science were based on belief systems received little analysis. However, although the nature of religion was not specifically addressed, judges were hard pressed to get away from the argument that students were indeed being indoctrinated into one particular way of thinking. Some courts acknowledged this, others did not.

In Wright v. Houston, a federal court dismissed a case in which parents sought to enjoin a school district from teaching evolution exclusively and uncritically.[14] In arguing for balanced treatment of creation science, the parents presented two arguments. First, evolution contradicted their religious beliefs. The school's role in discouraging students' belief in creation was a restraint on the free exercise of religion for those students. Second, evolution was part of a religion of secularism. Thus, if taught in public schools, it was establishment of religion. The court refused to accept either argument, saying that, obviously, there was no connection between evolution and religion. The interesting thing, though, is that the court used the definition of religion presented by the Supreme Court in the 1890 case Davis. v.

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[13]See Wright v. Houston Independent School District, 366 F.Supp. 1208 (S.D. Texas 1978) aff'd 486 F.2d 137 (5th Cir. 1973) cert. denied 417 U.S. 969 (1974); Daniel v. Waters, 515 F.2d 485 (1975); Willoughby v. Stever, no 15574-75 (D.D.C. May 18, 1973)(aff'd D.C.Cir, 1974) cert. denied 420 U.S. 927 (1975).
[14]366 F.Supp 1208 (1978)

Beason.[15] Religion means relationship to a Creator. Evolution does not mention a Creator; thus, evolution is not a religion.

Despite the reference to an old Supreme Court definition of religion, the court's decision seems to have been molded mainly by pragmatic problems. The judge was particularly troubled by the practical ramifications of holding in any other way. He said that although the equal time approach advocated by the plaintiffs did seem fair,

> virtually every religion known to man holds its own peculiar view of human origins. Within the scientific community itself, there is much debate over the details of the theory of evolution. This Court is hardly qualified to select from among the available theories those which merit attention in a public school biology class.[16]

But, this is exactly the point. There is debate about the origin of man. And, one's point of view about the origin of man depends on what one holds to be ultimately true. According to the Seeger case, this ultimate truth is religion. Even in the scientific community there is no cohesive body of knowledge that all scientists accept as fact regarding how man came to be. Evolutionists must accept some "facts" on faith. So, if one perspective is taught to the exclusion of others, are children receiving "neutral" education? Is the perspective they learn devoid of religion if you use the Seeger definition of religion

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[15]133 U.S. 333 (1890), see Chapter 2, supra.
[16]366 F.Supp. 1208, 1211 (1972)

rather than the Davis definition? No doubt it would be onerous for the public school system to teach all alternative views of the origin of man, but this difficulty does not change the fact that evolution is based on fundamental assumptions about the world that must be accepted on faith, just as is creation science.

The Wright case was not unique in its reliance on the Davis definition of religion. As recently as 1992, judges used Davis as justification for holding that evolution could not be considered based in religion.[17] The significance of these decisions, however, is that judges are using a definition of religion that relies on the existence of a Creator--a definition rejected by the Supreme Court in 1965.

Secular Humanism

The argument that evolution is based on a theory of life that is foundational, or religious, has never been persuasive to judges. However, soon after the deluge of creation-science cases swept the federal courts, the interest of some judges was piqued by the argument that religion did not necessarily mean "relating to God." So, although evolution might not be religion, there could still be other types of curriculum approaches that did reflect religious commitment.[18]

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[17]Peloza v. Capistrano Unified School District, 782 F.Supp 1412 (C.D. California 1992).

[18]Recall from chapter 2 that in 1979 Transcendental Meditation was determined to be a religion, and thus, not allowed as curriculum in the public school.

There are two lines of federal court cases that explored this concept throughout the 1980's. Although appellate courts in each line of cases ultimately found that "secular humanism" was not religion, the careful analysis that some of the judges went through to define religion and religious belief is very instructive.

In 1984, a group of children and their parents brought suit against a Tennessee school district, claiming that the textbooks used to teach reading to elementary school students violated the free exercise rights of Christian students. The claim was that the Holt Basic Readings series did the following:

1. taught witchcraft and other forms of magic and occult activity;
2. taught that values are relative;
3. taught disrespect and disobedience to parents;
4. depicted prayer to idols;
5. taught that faith in the supernatural was acceptable for salvation;
6. depicted children who were disrespectful during bible study;
7. implied that Jesus was illiterate;
8. taught that people and apes had common ancestors;
9. taught humanistic values.[19]

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[19]Mozert v. Hawkins County Public Schools, 579 F.Supp. 1051,1053 (E.D. Tenn. 1984), 582 F.Supp 201 (1984), reversed and remanded 765 F.2d 75 (6th Cir. 1985).

Initially, the court found against the parents, saying that the First Amendment did not protect the plaintiffs from mere exposure to offensive value systems or antithetical religious ideas.

> Only if the plaintiffs can prove that the books at issue are teaching a particular religious faith as true (rather than as a cultural phenomenon), or teaching that the students must be saved through some religious pathway, or that no salvation is required, can it be said the mere exposure to these books is a violation of free exercise rights.[20]

So, all counts except number five were thrown out of the case. Then, the court found that the case should be dismissed as to count number five, also, because the poems and stories that the plaintiffs complained about met the court's test of neutrality. The Holt Basic Readings neither advocated a particular religious belief nor expressed hostility to religion. Although the stories, which included Hindu fables and Anne Frank's discussion of religion as believing in "something", did discuss religion, they did not tell the students to believe particular things.

> The plaintiffs correctly reach the obvious conclusion that this poem [the Hindu elephant fable stating as its moral that in theology disputants are often partly right and wrong] meant that each religion described God from its own limited vantage point, based on its incomplete revelation, and that all are only partly right and partly wrong. While that is no doubt the meaning of the poem, there is nothing in the book

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[20]579 F.Supp. at 1053

> to suggest that all should subscribe to this way of thinking. The poem is presented for what it is worth. In the context of the readers taken as a whole, however, it does indeed illustrate the type of religious tolerance presumably requisite to the ideal "world citizen."[21]

Here, the court's vision of neutrality is clear. Value neutrality occurs when religious belief is not advocated, nor is hostility presented. The school superintendent defended his decision to use the Holt books on the ground that they enhanced reading skills. No proselytizing occurred.

The appellate court overturned the lower court's summary judgment and remanded the case for a decision on the merits. The most significant problem for the appellate court was that the school district had not even tried to accommodate the free exercise rights of the plaintiffs. The least restrictive alternative test had not necessarily been met; a trial on this issue was required.

The problem is, however, that both courts missed the point of the plaintiffs' arguments. The plaintiffs stated that not only is the reading material hostile to their religious belief (a free exercise issue) but that the school is teaching an alternative belief system (an establishment issue). Neutrality toward religion does not come about merely by eliminating negative connotation of religion, but neutrality requires recognition of the fact that any teaching of ethical values stems from a foundational commitment that parallels a religious commitment.

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[21]582 F.Supp. at 202 (emphasis added)

Religion involves salvation and prayer and ritual, certainly, but it is also an ethical system, and alternative ethical systems are not neutral; they replace Christianity. As such, they constitute establishment of religion just as much as does the teaching of creationism or Biblical mandates.

The judges in the Mozert cases did not develop an answer to this argument.[22] However, at the same time that these cases were decided, Judge William Brevard Hand in Alabama was persuaded that the parallel between secular humanism and theistic religion deserved serious judicial attention.

In May, 1982, Ishamel Jaffree sued the Mobile Alabama County School Board seeking a judgment declaring prayer activities in the public school system to be violative of the First Amendment. Douglas Smith and others intervened in the Jaffree suit claiming that if prayer were eliminated, their religious free exercise rights would be violated. In addition, they claimed that if an injunction were set forth against the Christian activities in the schools, then an injunction should also be imposed against the

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[22]The approach of these judges was duplicated in other districts as well, with the same confusion about what it means to be religious. In fact, in Grove v. Mead School District the federal judge chastized the Christian plaintiffs who brought suit against the public school district for forcing their daughter to read the book The Learning Tree. The plaintiffs had said that the book hindered their daughter's own religion, and it encouraged the religion of secularism. The judge found that the plaintiffs were misusing the word "secular"; they were not dealing in the same "linguistic currency" as the Supreme Court decisions. Secular, to this judge, meant neutral, which was the same as non-religious. So, secularism--even if it were a religion--was a neutral belief system and thus, not violative of the establishment clause. Grove v. Mead School Dist. No 354, 753 F.2d 1528 (9th Cir. 1985).

religions of secularism, humanism, evolution, materialism, agnosticism and atheism.[23] This complicated case was bifurcated into a school prayer argument, which was taken up first, and a curriculum argument, which never reached the Supreme Court. On the issue of prayer in the schools, the Supreme Court upheld the circuit court's decision finding that prayer violated the establishment clause. The vigor of the litigation, however, and the vehemence of Justice William Rehnquist's dissent shed light on several aspects of the definition of religion and neutrality toward religion.

Initially, the district court had found that the Supreme Court had erred in its earlier decisions that made the establishment clause incumbent on the states. Judge Hand, in a decision that he knew would be overturned, found that historical evidence made it clear that the Framers of the Constitution intended the establishment clause of the First Amendment to apply only to the establishment of a national church. Not only did most of the states have established churches during the 1700's, but the framers of the Constitution themselves, when placed in roles of federal governmental authority, used federal money to

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[23]Jaffree v. Board of School Comm'rs, 554 F.Supp. 1104 (S.D. Ala. 1983), aff'd in part, rev'sd in part, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), cert. denied sub nom. Board of School Comm'rs v. Jaffree, 466 U.S. 926 (1984); Jaffree v. James, 554 F.Supp. 1130 (1983) aff'd in part, rev'd in part sub nom. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983) aff'd, 472 U.S. 38 (1985). This was the prayer case. The curriculum case continued as Smith v. Board of School Comm'rs of Mobile Coun ty, 655 F.Supp. 939 (S.D. Ala. 1987), reversed 827 F.2d 684 (11th Cir. 1987).

subsidize religious activity. Therefore, in keeping with the doctrine of original intent for Constitutional interpretation, state institutions like schools should be allowed to establish religion.[24]

However, given that the case would likely be overturned, Hand cautioned the appellate courts to carefully consider the arguments of the interveners. He said,

> case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism--all without opposition from any other ethic--to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a deity.[25]

The Jaffree case was successfully appealed on the issue of school prayer when the circuit court and the Supreme Court both ignored Hand's historical perspective. The appellate courts used the Lemon case to hold that prayer violated the establishment clause

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[24]This perspective also dominated Justice Rehnquist's scathing dissent. After a lengthy presentation of historical evidence and analysis, Rehnquist declared that there was no historical evidence for the notion that the government may not aid religious belief. The only mandate of the establishment clause was that which required government to treat all religions similarly.

[25]554 F.Supp at 1129 n. 41 (emphasis added)

because it fostered religion. Then, a new line of cases began on the curriculum issue (referred to as the Smith cases). Hand's decision in Jaffree lay the ground work for his careful and lengthy analysis of the nature of religion in the Smith cases.

In Smith, Judge Hand had to determine whether or not secular humanism was a religion, and, if so, whether it was established in the public school in its philosophy and through the use of certain textbooks.

The complainants said that secular humanism existed in the schools in the following manner:

God was left out of all discussions of the origin of the universe and out of all discussion of right and wrong;

teachers and students were required to use books that took the Lord's name in vain;

students were encouraged to question the authority of parents, and "people in charge" were depicted as those who would use students for their own personal gain;

students were taught that there were no moral absolutes and that humans were merely a result of a biological process.

The school district defended its approach saying that it was religiously neutral in that it was not hostile toward religion.

Secular humanism is not a religion, and even if it is, it is established by the Constitution itself.[26]

The two sides are not merely at cross-purposes, but they are using different perspectives of what religious neutrality is: one argues that religious neutrality occurs when hostility is eliminated; the other argues that neutrality cannot occur until it is recognized that all ethical systems are based in religion of one type or another. These perspectives on religious neutrality stem from different definitions of religion. If religion is purely private faith in God and does not necessarily have implications for all of life, then employment and schooling can be done in a religiously neutral manner as long as God is kept out of them. If, however, one has an integrated view of life, if one believes all decisions in life including employment and schooling issues stem from a foundational belief system, then keeping God out of these decisions rejects theistic religion, but it does not escape being "religious" in a broad sense of the word.

Professor Richard Baer, one of the witnesses in the Smith case, explains

> [i]t is incorrect to assume that one can divide the world neatly into the realm of the religious and the realm of the nonreligious or secular. In a narrow sense of the term religious, this is possible. It is not difficult, for instance, to distinguish between a baptismal service or a bar mitzvah

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[26]This point was never fully developed, but it is an interesting one. Some scholars claim that a "civil religion" does permeate American government. See Sidney Mead, supra.

> as cultic practices on the one hand and the secular activities of repairing a washing machine or teaching mathematics. But many theologian and sociologists argue that in a broader sense religion is that dimension of human culture along with metaphysics which is concerned about questions of the meaning of life and humanity's place in the universe. In this sense Marxist philosophy and other specially secular and humanistic philosophies speak to questions that are religious. I do not mean by this the patronizing view that even atheists secretly believe in God. There are bona fide atheists just as there are bonafide theists. Rather, I refer to the fact that human beings live out their lives in relation to certain basic values that provide meaning and purpose to life. These values function in the life of the atheist in a way that is functionally similar to the way belief in God functions in the life of the theist.[27]

Judge Hand seemed to recognize this problem.

In his decision, Judge Hand took testimony from groups of experts to determine answers to the following questions:

what is the nature of education and the learning process?

what is a religion?

is secular humanism a religion?

is secular humanism exhibited in the public schools?

Hand was persuaded by witnesses for both the plaintiffs and the defendants that schooling in the United States involved much more than the mere transmittal of information to students. Teachers and education psychology experts testified that schools

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[27]Richard Baer, in Democracy and the Renewal of Public Education, R. Neuhaus, ed. (1988) at pg. 127

were concerned with interpreting facts for students, going so far as to say that the purpose of a school was to develop citizens for a "just world, to develop a humane being."[28] Teachers and textbooks are a significant part of this development; therefore, the testimony of people who deciphered the philosophies outlined in the texts became important to Hand. If the philosophies were religious, they violated the First Amendment. Hand, unlike other judges, recognized that before he could address this question, he had to come to grips with a working definition of "religious."

Referring to the Seeger definition of religion, Hand found that under the First Amendment government may not define religion by reference to the validity of the beliefs or practices involved. Content-based definitions result in showing favoritism to some religions. Rather,

> the state must instead look to factors common to all religious movements to decide how to distinguish those ideologies worthy of the protection of the religion clauses from those which must seek refuge under other constitutional provision.[29]

Only after you have done this can you distinguish between people's right to define their religious belief and government's right to regulate activities to protect other rights and privileges that are "unrelated to religion." In a footnote, Hand qualified this

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[28]655 F.Supp. at 953

[29]655 F.Supp. at 978, (emphasis added)

phrase by saying that if some faiths do not separate actions that are determined by faith and actions that are "unrelated" to religion, government still has the right to supersede religious freedom in order to protect the things that are necessary to have religious freedom: "life, an orderly civilization, peace, protection of the material means for preserving life."[30]

Hand then defined religion as systems of belief that encompassed "fundamental assumptions" about such things as the existence of transcendent reality; the nature of man or the goal of man's existence, and the purpose and nature of the universe. He said that in some belief systems these assumptions were less explicit than in others, but it was important to realize that what often masquerades as "neutral" thought is, in fact, based in foundational belief. This foundational belief is the functional equivalent of religion.

> Whenever a belief system deals with fundamental questions of the nature of reality and man's relationship to reality, it deals with essentially religious questions. A religion need not posit a belief in a deity, or a belief in supernatural existence. A religious person adheres to some position on whether supernatural and/or transcendent reality exists at all, and if so, how, and if not, why.[31]

But, only belief that addresses these ultimate values should be protected by the First Amendment.

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[30]655 F.Supp. 979 n. 39

[31]655 F.Supp.at 979 (emphasis added)

> A mere "comprehensive world-view" or "way of life" is not by itself enough to identify a belief system as religious. A world-view may be merely economic, or sociological, and a person might choose to follow a "way of life" that ignores ultimate issues addressed by religions. Describing a belief as comprehensive is too vague to be an effective definition under the religion clauses: some religious persons may consider some issues as peripheral that others find central to their beliefs. Diet is one example of this. Another is the devotion of some religions to a non-technological life-style, such as the Amish. A person can be religious for first amendment purposes without having rules and regulations governing every aspect of every day conduct. Equating comprehensiveness with religion results in an overinclusive definition.[32]

Using this definition of religion, Christianity is a religion. But, to Hand, so is secular humanism. Experts at the trial defined secular humanism as a

> creed or world view which holds that we have no reason to believe in a creator, that the world is self existing, that there is no transcendent power at work in the world, that we should not turn to traditional religion for wisdom; rather that we should develop a new ethics [sic] and a new method of moral order founded upon the teachings of modern naturalism and physical science.[33]

The experts explained that secular humanists were not pious, did not believe in transcendent beings, nor did they pray. The belief system was not a dogma, nor a doctrine, but it did express moral values.

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[32]655 F.Supp. at 979
[33]655 F.Supp. at 961

Based on the testimony, Hand found that the belief system made statements about the existence of supernatural existence; it sets goals for human existence, and it defined the nature of the universe. The substance of the belief system was that all of reality can be known by the human intellect "aided only by the devices of man's creation or discovery... By the force of logic, the universe is self-existing, knowable... Moreover, man is the product of biology with no spiritual dimension."[34]

When Hand applied his definition of religion to the perspective of the textbooks, he found that the books did establish humanism. The home economics textbooks used by the students required them to accept as true the fact that people use the same process in deciding a moral issue that they use in "choosing one pair of shoes over another" and that "the student must determine right and wrong based only on his own experience, feelings and [internal] values."[35]

In support of his finding, Hand gave several examples. The home economics textbook Teen Guide stated: "Nothing was meant to be. You are the designer of your life. If you want something, you can plan and work for it. Nothing is easy, but nothing is impossible, either. When you recognize that you are the one in charge of your life, you will be way ahead of where you would be if you think of your life as something that just happens to you."[36]

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[34]655 F.Supp. at 985
[35]655 F.Supp. at 986
[36]Cited in 655 F.Supp. at 973

Hand pointed out that this encouraged students to believe that only they could decide what is right and wrong.

> [It] is to be contrasted to telling a student that he is responsible for choosing between right and wrong. The latter promotes responsibility ... The point made is that such teaching leaves out the distinction that must be drawn between what moral values are to be freely chosen and the personal decision involved in applying these values. [37]

Furthermore, another book stated that although six and seven year olds are content to be their mother's daughters or their father's sons, older children probably do not feel this way. "In adolescence people begin defining the world for themselves in their own way. They no longer want to be just someone's son or daughter. They want to be a unique person. They want to discover life and themselves on their own." Today's Teen.[38] Judge Hand accepted the testimony of witnesses who explained that this perspective was evidence of a belief system that taught human responsibility was self-directed. This competed with those belief systems that taught there was a divine source for determining the way life ought to be lived.

When texts taught students that they could prepare themselves to make the "right decisions" by working on their self-concept and accepting themselves and believing in themselves, students were indoctrinated into "individualism" to

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[37] 655 F.Supp. at 973
[38] Cited in 655 F.Supp at 974

the exclusion of other belief systems. The argument that validity of moral choice is determined by the individual is not religiously neutral. Not only does it undermine traditional religious faiths, but it, itself, is a belief system that competes with faith.

According to Hand, "[t]he emphasis and overall approach [of the books implies] and would cause any reasonable thinking student to infer, that the book[s are] teaching that moral choices are just a matter of preferences, because, as the books say 'you are the most important person in your life.'"[39] Issues of moral choice stem from a person's view of man and humanity's place in the universe. They are solved by belief systems. If schools teach that these choices are to be solved in an individualistic manner, this is a functional substitute for saying that moral choice ought to be solved by reference to the Bible.

Hand stated that "[t]he highly relativistic and individualistic approach constitutes the promotion of a fundamental faith claim" and "assumes that self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man's action, and that these results, alone, determine the morality of an action."[40] This belief "strikes at the heart of many theistic religions' beliefs that certain actions are in and of themselves immoral, whatever the

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[39]655 F.Supp. at 986
[40]655 F.Supp. at 986,987

consequences, and that, in addition, actions will have extratemporal consequences."[41] Therefore, it is hostile to many religions. "Some religious beliefs are so fundamental that the act of denying them will completely undermine that religion."[42] But, more importantly, "denial of that belief will result in the affirmance of a contrary belief and result in the establishment of an opposing religion."[43] While the state may teach certain moral values, such as that lying is wrong, "if, in so doing it advances a reason for the rule, the possible different reasons must be explained evenhandedly" and "the state may not promote one particular reason over another in the public schools."[44]

On appeal, the circuit court treated Hand's analysis with the same summary dismissal that it employed when it ignored his examination of constitutional history in the Jaffree case. The appellate court held that even if secular humanism were a religion, the mere presentation of religious belief did not constitute establishment of religion. Moreover, the books were used to promote critical thinking, independent thought, tolerance of diverse views, self-respect and maturity. Furthermore, one of the major objectives of public education was to inculcate fundamental values necessary to maintain democracy. This was

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[41]655 F.Supp. at 987
[42]655 F.Supp. at 987
[43]655 F.Supp. at 987
[44]655 F.Supp. at 988

all, obviously, "an entirely appropriate secular effect."[45] This court clearly missed the point of the lower court's discussion when it stated the following:

> The public schools in this country are organized "on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.[46]

Why can't it be neutral?

Judge Hand's recognition of secular humanism as a religion seems to be based on his belief that all knowledge transmitted in the schools is of social construction. Steven Tipton writes that the meaning of "mutuality, civil spirit, and justice", or the content of our values, are not uniformly self-evident to everyone.[47] This is because our interests conflict, certainly, but it is also because everyone construes meaning within different cultural and moral conditions.[48] Value neutrality does not exist because people are not objective. Our meaning is determined by our experience and our belief.

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[45]827 F.2d at 692

[46]827 F.2d at 695, quoting Abington, 374 U.S. at 218, which was a reference to Everson, 330 U.S. at 23,24.

[47]Stephen Tipton, "Republic and Liberal State: The Place of Religion in an Ambiguous Polity." 39 Emory Law Journal 191,201(1990)

[48]Tipton, ibid.

Even if you say that you want to achieve value neutrality by even handedly presenting all points of view, you miss the point. The whole concept of value neutrality is, itself, biased towards value systems that are tolerant or based on consensual arrangement. Law professor Stanley Ingber points out that value neutrality

> posits individual criticism and moral choice as values unto themselves. Consequently, a "value-neutral" education would oppose perspectives, such as fundamental Christianity, that advocates imposing values.[49]

Moreover, even though value neutrality or ethical subjectivism sound like the kind of tolerance that schools in democratic society should foster, they contradict themselves. Richard Baer has written that these systems claim that they tell no one what is good or right for them.

> [E]ach individual will have to choose on his or her own individual values. But this is misleading. To be specific, if all values are subjective, matters of personal feeling, then we can place no absolute values on things as justice, tolerance of people who hold dissenting views, freedom and equality, or even democracy itself.[50]

The fact is that most Americans do believe that values rest on some foundation greater than simple consensus. There are some things that are fundamentally true and good; we possess certain inalienable rights in addition to whatever those in power

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[49]Ingber, supra, at p. 239

[50]Baer, supra, at p. 130 (emphasis added)

might believe or however they might act at any given point in time.[51] What is this foundational truth other than an equivalent to the moral foundation of Christianity, Judaism or Buddhism?

As Baer suggests, moral values come from a worldview. The problem is that when a state school tries to teach students about how they should act, the "should" will always come from some fundamental perspective of what humanity ought to be.

The most strident advocates of the humanist philosophy, like Sidney Hook, argue that even if what Baer says is true, humanist ethics should be taught in public schools because they are rational, based in reason, not religious, based in dogma and revelation. Baer counters this, however, by pointing out that both approaches rest on unprovable assumptions.

> A growing number of philosophers today argue that our use of the terms rational and reasonable are culturally conditioned in a manner that is not altogether different from our use of terms such as good and right. When humanists such as Hook point to the rationality of their own position and to the dogmatic quality of Christian belief, they tend to use the terms rational and reasonable as ideological weapons, making their meanings as much bound to a particular time and place as are our conceptions of the good.[52]

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[51] Ingber, supra, at 239

[52] Baer, supra. In addition, he points out that this problem extends not just to discussion about ethics and values, but also the hard sciences. Building on Thomas Kuhn's analysis of knowledge bound by paradigms, Baer says

> perhaps ethics is not as totally different from natural science and social studies as is often assumed. Both science and ethics typically start with certain basic assumptions about the nature of the world, the functioning of the human mind, and so forth. Both ways of thinking assume the law of

Conclusion--Jefferson revisited

Richard Baer has made the argument that even if values clarification and morality issues like sex education were taken out of the public schools, schools still would not be religiously neutral. All knowledge, even "secular knowledge", is based in foundational belief.

But, what accounts for the tenacity with which Americans cling to the belief that "secular" equals "neutral?" Baer and other scholars point to Jefferson.[53]

Remember that Jefferson believed that his own nonsectarian morality and values were a legitimate foundation for the public life of the nation. He was adamant that sectarian religion, the religion of the traditional Christian, should be practiced only in private, not in the public arena that affected civic life.[54] He did support religious freedom, but he expected members of these sects to "behave themselves, to keep to

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noncontradiction and depend for their success on the prior commitment of practitioners to truth telling. Neither can make any progress at all if it starts with initial skepticism and doubt. Ibid.

[53]Baer, supra; Harold Berman, "Religious Freedom and the Challenge of the Modern State," 39 Emory Law Journal 149-165 (1990); McCarthy, et al, supra.; Richard Neuhaus, ed. Democracy and the Renewal of Public Education (1987); Gordon Spykman, et al. Society, State & Schools: A Case for Structural and Confessional Pluralism (1981); Charles Glenn, The Myth of the Common School (1988).

[54]Baer, supra. See also McCarthy, et al, for this argument.

themselves and to stop short of intruding their beliefs and values into the public square."[55]

But, says Baer,

> Jefferson's position is more self-serving than self-evident...His Enlightenment faith was just that--a faith commitment, a metaphysical and religious worldview that is no more obviously based on reason than are the beliefs of Christians. Both positions involve convictions that could not be derived from reason as such. They rest on basic assumptions about the nature of reality that can be described as reasonable but that cannot be proven by reason. They rather constitute the foundation for all subsequent reasoning.[56]

It is true, however, that Jefferson did not specifically claim that no religion should affect public life. He was willing to allow the universal religion, the nonsectarian religion, some leeway. In fact, his own university was an example of the kind of moral order that he considered to be acceptable to impose on all citizens.[57] However, over time, Jefferson's distinction between sectarian and nonsectarian religion has become, for modern Americans, a parallel distinction between the "religious" and the "secular."[58] This transition occurred throughout the nineteenth century and became solidified with respect to schooling during the Great School Wars of the 1800's.

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[55]Baer, supra.

[56]Baer, supra, at 133.

[57]At its inception the University of Virginia held chapel and theology classes. Scholars have also noted Jefferson's willingness to use federal funds for missionary services to the native population.

[58]Baer, supra; McCarthy, et al, supra.

In the 1840's and 1850's, in New York City and Boston, government schools were accepted by the Protestant majority as public, common and non-sectarian institutions. In these schools, however, the training of students was under the supervision of parents. The supervision included training in values and moral responsibility, as well as Protestant religious training. Because the majority of parents believed, as did Jefferson, that their view was common and universal, they did not consider themselves to be "sects" or "sectarian."[59] They thought they were religiously neutral. Other groups, the minority Catholics, for example, were left out of the perspective of the public schools. They were, however, allowed to have their own, sectarian institutions.

As the century wore on, secularization affected many institutions, and God-language was removed from schools. However, although specific references to deity were removed, the schools were still dominated by a pervasive morality that had a distinctly Protestant character. Throughout this whole transition, the schools were considered to be public, religiously neutral, institutions. Minority communities began to bring law suits to continue to remove elements of Protestantism from the schools, but did the removal of references to a Christian God

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[59]See chapter two for discussion of this distinction. Also, see James Skillen, "Religion and Education Policy: Where Do We Go From Here?" 6 Journal of Law and Politics 503 (1990), Charles Glenn The Myth of the Common School (1988), Baer, supra, and McCarthy et al, supra, for this history.

truly bring neutrality?[60] Many public schools in this nation continue to look like Protestant schools, while others now look like the belief system of those who replaced the Protestants. The litigants in cases like Smith were willing to admit that the schools were not religiously neutral when under Protestant control, but, they assert, the schools are also not religiously neutral while under the control of secular belief.

Today, there is still conflict between Christians, Jews, atheists and those who claim to be simply "secularists." But, of all of these belief systems, are any, really, religiously neutral? It depends on what you mean by religion.

The problem is that the conflict and the litigation continues every day, every where. Federal courts continue to hand down decisions stating that the use of folk tales, myths, the world of make-believe and witches and goblins does not foster religion in the public schools.[61] However, schools are entitled to prohibit students from singing "proselytizing songs" in oral communications class even as other students were allowed to make presentations involving explanations of the use of a menorah in the same class.[62] Ceremonial references to deity in

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[60]These law suits centered around issues like allowing children to refrain from saying the pledge of allegiance, which contained references to God, and changing the celebration of holidays, which often contained references to Jesus as Savior. Some suits were more successful than others. See note 61 for the judges continued protection of "ceremonial diesm."

[61]Fleischfresser v. Directors of School District, 805 F.Supp 585 (N.D. Ill. 1992)

[62]DeNooyer v. Livonia Public Schools, 799 F.Supp 744 (E.D. Mich, 1992)(the court's holding makes reference to the fact that the proselytizing song was on

civic life, like the pledge of allegiance, are still considered mere "ceremonial deism," not true religion.[63] And, the phrase "In God We Trust" on coins as well as on schools seals or mottos is considered by the courts to serve a secular, not a religious, purpose.[64] Because we do not agree on what "religion" is, confusion reigns.

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video tape which did not serve the purposes of the oral communications class, but the emphasis on the religious freedom issue throughout the case, and the fact that the teacher did not refuse to allow the video until after she had determined that the content might be offensive to some children or their parents, indicate that the First Amendment issue was critical to the holding).

[63]Sherman v. Community Consolidated District, 980 F.2d 437 (7th Cir 1992)

[64]980 F.2d at 447, citing Lynch v. Donnelly 465 U.S. 668 (1984), claiming that the phrase serves to solemnize public occasions encouraging the recognition of what is "worthy of appreciation in society."

Chapter 6 Religion Defined: conclusion

Introduction

This project began with the hypothesis that federal court judges defined religion in different ways when they interpreted the First Amendment as applied to specific policy disputes. The hypothesis is supported. An assessment across the policy areas curriculum, employment decisions of religious institutions, and government partnership with social service agencies reveals a number of themes. Both "religion" and "religious activity" mean different things to different judges. Even more diverse, however, are the judges' perceptions about the implication of religion for the rest of life. Some judges believe that religion can be separated from public life. Religion is private; government policy must be non-religious or neutral. Other judges suggest that belief systems, including religion, necessarily define adherents' economic, family and educational lives. Religion can not be separated from the rest of life. Still others are completely unaware of their assumptions which makes for decisions that contain internally inconsistent holdings.

The first part of this chapter pulls together the cases from the three policy areas to illustrate the different categories that judicial decisions fall into. The second section of the chapter considers and critiques the efforts of the major scholars in the field who have come up with a definition of religion in an attempt

to impose consistency on the judges. It concludes with consideration of research that will take this project to another level. If judges are inconsistent, and scholars have not come up with a satisfactory definition of religion that solves the problems that the judges face in making their decisions, what do we do next?

The Cases and the Judges

In all three policy areas, employment law, government regulation and funding of social service organizations, and curriculum, judicial decision making reveals a variety of different definitions or assumptions about religion.

First, many judges believe that religion means church, prayer and belief in a transcendent God. This approach parallels the "subjective" definition of religion used by the Supreme Court in Reynolds and Davis, prior to the "ultimate meaning" approach articulated in the 1965 Seeger case. Protestantism is religion.[1] Proselytizing the Christian faith is religion.[2] Belief in creation is religion.[3] Baptists are religious.[4] Ministers and pastors of Christian churches are religious.[5]

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[1]Kamehemaha, supra.
[2]Voswinkel, supra; Baz, supra.
[3]McLean, supra.
[4]McCrory, supra.
[5]Rayburn, supra.

Not all judges, however, articulate their assumptions about religion very clearly. In many of the decisions, the judges' assumptions are hidden in their statements about what religion is or is not--statements that receive no explanation or clarification because the judges believe that their approach is unanimous. For example, in the McClean creation science case, the judge held without discussion that evolution was obviously not a religion. In Pena, a belief in eating cat food did not even receive cursory examination as a religion. In Bellamy, the judge dismissed the idea that the ritual and ceremony of the KKK could provide a foundation for religious belief. In all of these cases, the judges passed over the argument of those claiming that the belief system was a religion by appealing to the "obvious" and to "common sense."[6]

Contrast these decisions to those of the judges who consciously examine the role that a belief system plays in an adherent's life. In Africa, although the judge found that the belief system was not a religion, he went to great lengths to explain that his finding was not based on the fact that the MOVE organization did not believe in God. Rather, MOVE was not a religion because it did not address fundamental and ultimate questions.[7] By focusing on the role that a belief system plays in an adherent's life, judges have found witchcraft and

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[6]McClean, supra; Bellamy, supra, and Pena, supra.
[7]Africa, supra.

Transcendental Meditation to be religions.[8] Furthermore, in the curriculum cases, this examination played a critical role in determining whether or not public schools established religion by teaching morality or belief systems of any sort. Judge Brevard Hand held that government school teachings of civic morality can constitute a religion that parallels the belief system of conservative Christians.[9]

However, the definition of religion involves more than the categorizing of belief systems. Judges do not very often face either the circumstances presented to them in the Kozy Kitten Cat Food case or the argument that the KKK is a church. Most of the decisions that judges make involve consideration of what is and what is not religious activity. Some judges think religious activity can be easily separated from secular activity. On the other hand, for some judges, the distinction is not so clear.

This is the debate that defines the conflict in the employment cases and in the social service cases. Child care, education of children, profit making business and janitorial work seem to be clearly secular endeavors to some judges, even when they are performed by people who perceive the acts to be religious.[10] Therefore, government regulation of these acts is legitimate.

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[8]Dettner, supra; Malnak, supra.

[9]Smith v County Board of Supervisors, supra.

[10]See Townley, Forest Hills, Pacific Press, Wessling, the lower court decisions in Amos, supra.

However, other judges recognize that for some faiths, the belief system defines all activity. So, secretarial work, raising and educating children and janitorial work are just as much religious activity as is church attendance.[11] Government may not regulate these activities unless it establishes that the regulation is compelled by concern for something important like the safety of citizens.

Just what is the problem here? First, there is incoherence in the definition of religion which allows judges to impose their own view of religion on the litigants. Second, depending on your definition of religion, the government can be accused of imposing a faith on groups in society by refusing to recognize that the belief system that supports government policies parallels the role that religion plays in peoples' lives. Only secular subjects are taught in schools, and only non-sectarian social service agencies receive government funding. However, "secular" seems to mean "non-religious" and therefore, the definition of religion is critical. If religion is that which involves God, then, in some cases, government is advancing belief systems that reject God at the expense of those that accept God. In other cases, by exempting churches and other religious institutions from employment discrimination law, government arguably favors belief systems that accept God.

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[11]See dissent in Townley, majority opinion of Supreme Court in Amos, Salvation Army, Forest Hills appellate court decision.

On the other hand, if religion means the same as "belief system," then as government regulates curriculum, employment and the structure of discipline at church related day care centers, it imposes a set of belief systems which is the equivalent of imposing religion.

At the root of these problems is the inherent conflict between an idea and a reality:

an idea that if something is religious it ought to be beyond the reach of any government control--government must keep its hands off the inner heart and direction of life,

and the reality that religious things are not simply inner realities but have a social presence.[12]

We do acknowledge that government must pay attention to that social side, but some judges do this by concluding that government regulation is legitimate because the public realm is secular. This creates a problem when the inner heart directs public, social action. Government regulation might well be needed, but judges walk into a trap when they say government may not regulate religion, but government may regulate the public. This forces them to conclude that religion is private. Then, when religion directs public life, they have no way to articulate a rule for legitimate government regulation. They apply the compelling interest test, but this test is applied from

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[12]I am indebted to Stanley Carlson-Thiess, projects director at the Center for Public Justice in Washington D.C. for help in articulating this tension.

the prior assumption that religion is private. Economics, caring for children, writing newspapers, making profit--these are of the public, secular, realm.[13] The compelling interest test is designed to answer the question: how do we regulate faith when it affects the public realm? But, we beg the question. We have already decided that many things, because they are public, are secular.

The problem is not just the judges, but involves the assumptions that we all make about faith, and its role in both society and the lives of individuals. At times the courts, churches and faith-based organizations other than churches have all argued that religion is an "added" quality or activity, and that institutions shaped by religion are uniquely moral, whereas other institutions are neutral or value free. Therefore, government should keep its hands off these religious institutions. But, this "hands off" approach has problems of its own. Why should the curricular choices and disciplining practices of a Christian daycare or school be singled out for special control or for special exemption from regulation? What is it about religious faith that separates it from other worldviews? What separates religious activity from activity that is directed by other "inner realities?"

The free exercise clause and the establishment clause of the First Amendment assume an understanding of what religion is, but our jurisprudence illustrates that there is anything but agreement on the definition of religion or religious activity.

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[13]See Pacific Press, Townley, Forest Hills, Salvation Army, supra.

The cases discussed in this project illustrate that before we can apply the First Amendment, we must consider more carefully the issue of definitions. What is religion?

However, a solution to the religion problem does not rest in merely choosing a definition of religion. To solve the conflicts reflected in the employment cases, the social service cases and the curriculum cases, a solution must include consideration of what is and what is not religious activity. And, it must include consideration of the relationship between faith and the rest of life.

Scholars' Solutions

First Amendment jurisprudence has been in flux and criticized severely for 200 years.[14] Interestingly, however, little of the debate has centered around the definition of religion. Most of the criticism falls into one of two categories: explanation as to why one of the two religious clauses in the First Amendment should take precedence over the other, or explanation as to how a particular value like "neutrality" or "religious freedom" or "separation between church and state" should influence case law.

This section examines these criticisms in light of the definitional problems highlighted in chapters two, three, four and

[14]See chapters one and two.

five. Do the scholars' solutions to the "religion" problem solve the definition questions?

Criticizing the tests:

Chapters one and two illustrated the Supreme Court's application of both the accommodationist stance and the separationist approach at different points in history. This application has involved the development of different tests to be applied to cases: the compelling interest test developed for application of the free exercise clause, and the three prong secular purpose test developed for application of the establishment clause. The problem is that both tests assume that we have an understanding of what "religion" is. Neither approach grapples with the definitional problems. The broad definition of religion applied in accordance with free exercise cases fails to distinguish between religion and other viewpoints; however, the separationist establishment clause cases fail to assert a consistent difference between a secular state interest and a religious interest.

The confusion created by these different approaches has led scholars to criticize the clauses and the tests applied. Even the judges join in the criticism. The Smith Court exhibited a clear step away from the compelling interest test, and six members of the current Court have stated that they are dissatisfied with the

Lemon test.[15] Both Justice Kennedy and Justice O'Connor have offered substitutes. Kennedy suggests that the Lemon test be replaced with a "deference standard."[16] The government should be forbidden to coerce people into accepting religious belief or acting in religious ways, and the government should be forbidden to proselytize. O'Connor suggests that the proper test ought to focus on prohibiting government from "endorsing" religion.[17] The problem is, however, that even these new tests assume an understanding of what religion is before they can be applied.

Does criticizing the tests help? Is the problem in the tests themselves, or in the confusion about what religion and religious activity really are?

The irony is that the first amendment language appears to compel courts to distinguish between religion and philosophies, but the very act of distinguishing the difference requires a definition of religion and involves the Court in determining religious orthodoxy.[18] The problem with defining religion rests on the purpose of the religion clauses themselves--defining religion will limit the protection of religion to those beliefs that the judges deem to be real. Therefore, some of the scholars who have addressed the definitional problem solve it by coming up with ways to apply the First Amendment while avoiding the need

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[15]See Smith, supra; Lemon, supra.
[16]County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).
[17]Lynch v Donnelly, 465 U.S. 668 (1984).
[18]Ingber, supra.

to define the term. Others believe that they have a definition that is "true religion."

Tension between the clauses revisited:

Although religious freedom seems to call for accommodation of religion, the separation principle imbedded in the establishment clause holds this governmental accommodation to be suspect. The tension stems from the fact that the

> principle of religious liberty has an expanding dynamic built into it, calling for a positive and active legal attitude towards claims to have one's religious requirements respected through legal accommodation, exemption, privileges, subsidies. This very dynamic threatens to undermine the disengagement of the state from religious matters demanded by the principle of separation.[19]

Separatists argue that most forms of government support for religion are prohibited by the establishment clause and its principle of strict separation of church and state. Accommodationists or nonpreferentialists argue that government support for religion is required by the free exercise clause and its principle of state accommodation of religion and the church.

Law professor John Witte suggests that the persistence of this separatist/accommodationist dialectic is not accidental, but that the dialectic is inherent in the religion clauses

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[19]Wojciech Sadursky, Law and Religion. (New York Univ. Press, 1982) at pg. 4.

themselves.[20] The religion clauses are the product of both enlightenment politics and evangelical theology.[21] They reflect the concerns of enlightenment politicians to protect politics and the state from the intrusions of religion and the church. They also reflect the desire of evangelical theologians to protect religion and the church from the intrusions of politics and the state. The clauses are a result of the give and take of a pluralistic democracy. Competing or conflicting values are to be expected, given the compromises that were necessary at the time.

Law professor MaryAnn Glendon, however, suggests that much of the tension is not inherent in the clauses, but was caused by the history of the incorporation of the clauses.[22] The free exercise clause was made applicable to the states by the Supreme Court prior to the 1940's. In its interpretation of the clause in Cantwell, the Court began the development of what became the compelling interest test.

In early cases, the Court employed a balancing approach, that weighed the infringement on an individual's interests in being free of state interference, against the burden that an

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[20]Witte, John. "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism" 39 Emory Law Journal 41 (1990). See also The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses (1988); James Hitchcock "Church, State and Moral Values: The Limits of American Pluralism" 44 Law and Contemporary Problems 3 (1981)

[21]See chapter one, supra.

[22]Glendon, supra.

exemption would place on the state's regulatory interests.[23] The definition of religion in these cases was not critical. The emphasis was on the balance. Glendon explains that the cases never examined the effect of both clauses on activity, so the nature of the establishment of religion was not considered.

But, because the Court had, at this point, spent many years acting as if free exercise and establishment were not related, "the Court became susceptible to the argument that the establishment provision represented its own independent set of values."[24] When the question of the incorporation of the establishment provision reached the Court in the 1947 Everson case, "the stage was set for the Justices to adopt a controversial and ahistorical interpretation of that language."[25]

In Everson, the Court accepted one particular view of the essential purpose of the Constitution's religion language. In doing so, the Court adopted a perspective that had been articulated by Justice Felix Frankfurter in earlier dissents. In 1943, Justice Frankfurter dissented when the Court found that a state may not tax the sale of religious literature by Jehovah's Witnesses.[26]

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[23]In Barnette, supra,the free exercise and speech interests of Jehovah's Witnesses students prevailed over the state interest in mandated recital of the pledge of Allegiance. But, in Prince, supra, the Court found that child protection laws outweighed the free exercise and family autonomy interests asserted by a Jehovah's Witness who wanted to be allowed to include children in the selling of religious leaflets.

[24]Glendon, supra, at 481

[25]Everson, supra; Glendon, ibid; see also, Wallace, Rehnquist dissent, supra.

[26]Murdock v Pennsylvania, 319 U.S. 105 (1943)

Frankfurter claimed that to exempt the proselytizers from taxation offended "the most important of all aspects of religious freedom in this country, namely that of the separation of church and state."[27] Therefore, the free exercise clause should fail in the face of "separationism." Though the Court had thus far never allowed separationism to govern its interpretation of the free exercise clause, it did make separationism central to its establishment interpretation.[28]

> In doing so, the Court elevated the separation of church and state to the status of a constitutional end in itself. This historic move was as unreflective as it was fateful. The various opinion writers in Everson seemed unaware of the free exercise implications of their acceptance of separation as an independent constitutional value.[29]

Glendon says that by setting the interpretation of establishment on a "different course" from that of free exercise, the Justices created an appearance of conflict between two provisions that "history and text suggest were meant to work together in the service of religious liberty."[30]

Scholars' approaches to First Amendment jurisprudence are determined by their interpretation of First Amendment history. For example, scholars that accept Witte's interpretation of First Amendment history suggest resolution by arguing for the priority

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[27]319 U.S. at 140
[28]Glendon, supra.
[29]Glendon, ibid.
[30]Glendon, ibid, at 482.

of one clause over the other. One argument is that the free exercise of religion principle should take precedence over the non-establishment principle.[31] The justification for this comes from the framers' concern for religious liberty, and their lack of concern about established churches in the states in the 18th century.

One problem with this approach, however, is that constitutional interpretation rarely allows subordination of one clause to another without clear textual support.[32] Furthermore, subordinating the establishment clause to free exercise concerns can threaten the liberty of the non-religious or the ir-religious. Alternatively, subordinating the free exercise clause to the non-establishment clause would put in jeopardy the very thing, religious freedom, that the First Amendment purports to protect.[33]

A different resolution is to show that the principles expressed in both clauses are subordinate to a higher value like religious liberty, or alternatively, religious neutrality.

The problem here is that religion still is not defined. Furthermore, the elevation of religious liberty as the highest value does not solve the conflicts that arise. Justice Stewart, in Schempp, explained that even recognizing religious freedom as the central value served by both clauses would not make the

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[31]Sadursky, supra. See also Justice Rehnquist's dissent in Wallace, supra.
[32]Sadursky, supra.
[33]Glendon, supra.

religion cases easy to decide. School prayer cases, for example, are so difficult precisely because conflicting religious liberty claims are involved--those of parents and children who wanted religion to be part of the school day, and those of parents and children who were offended by the practice of prayer.[34] As Glendon explains, the argument that the religious litigants should keep religion private during after school hours was not acceptable to Stewart.

> For a compulsory state education system so structures children's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light,...a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least a government support of the beliefs of those who think that religious exercises should be conducted only in private.[35]

Some scholars argue that the concern for "neutrality" should dominate First Amendment jurisprudence. This approach parallels existing Supreme Court religious freedom jurisprudence in that almost all of the cases over the last 50 years speak in some way about "neutrality." However, the definition of neutrality is critical, and it is tied to the definition of religion. Does neutrality mean evenhandedness between and among religions? Or, does neutrality mean evenhandedness between religion and non-religion? Or, does neutrality mean the same

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[34]Glendon, supra.

[35]Schempp, supra, at pg 313, referenced in Glendon, supra, at 498

thing as secular? These three different approaches all require a definition of religion, and they will all result in radically different theoretical and practical results.[36]

For example, Sidney Hook, an advocate of separation between church and state, suggests that in a democracy, government neutrality means staying out of private life, which is the domain of faith life. If faith affects public life, it is no longer private, and government is justified in regulating it. Government policies, by definition public acts, are also, by definition, secular and neutral.

On the other hand, the neutrality principle advanced by law professor Phillip Kurland suggests that religion not be used "as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties and obligation."[37] Judicial efforts to define religion are improper. This approach suggests that by accepting all legislative impact upon religion unless religion is used as a classification basis, the need to identify the meaning of religion is eliminated. But, the definition of religion is avoided only at the expense of the free exercise clause. Religious exemptions are, for Kurland, illegitimate. Furthermore, it is questionable whether the need to define religion is really

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[36]Audi, Robert. "The Separation of Church and State and the Obligations of Citizenship," Philosophy and Public Affairs 18 (1989) pp. 259.

[37]Kurland, Phillip. "Of Church and State and the Supreme Court" 29 U.Chi. L. Rev. 1 (1961):5. See also James Weiss, "Privilege, Posture and Protection: Religion in the Law" 73 Yale Law Journal 593 (1964).

obviated. Even if one accepts the prohibition of all classifications based on religion, one must still define religion to determine what is and what is not a legitimate classification.

This problem is exacerbated by the neutrality approaches put forth by legal scholars David Richards and Robert Audi. Audi says that the principle of "secular rationale" demands that only those governmental laws and policies that can be supported by secular reasons are legitimate. Richards says that neutrality requires strict separation of church and state. This neutrality reflects important underlying values of tolerance, liberty and respect for all, even the religious--but neither scholar defines

what is meant by secular or religious. The assumption is that we all know what religion is.

Critics of these neutrality approaches rely on two assertions to suggest that neutrality can not solve the religion problem. First, neutrality masks hostility toward religion. Georgetown law professor Mark Tushnet has coined the phrase "marginalization of religion" to summarize the approach of the strict separationists.[38] Yale law scholar Stephen Carter says that separationists and, actually, Americans as a whole, treat religion as a hobby.[39]

Second, critics suggest that neutrality is not possible. Evenhandedness of religions and evenhandedness between religion and non-religion is possible. But, other ideas of neutrality presuppose a neutral starting point, and this can never exist. One has only to look at abortion, sex education, polygamy--any choice the government makes is founded on a moral belief system. Judges' moral belief systems are shaped by

> current conventional acceptance of a particular distribution of advantages and disadvantages, benefits and burdens. Change this baseline and your conclusions about the neutrality of a given policy will change.[40]

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

[39]Carter, Stephen. "Evolutionism, Creationism, and Treating Religion as a Hobby," 1987 Duke Law Journal 977 (1987)

[40]Sadurski, supra, at p. 6; see also Hitchcock, James, supra, and Johnson, Phillip. "Concepts and Compromise in First Amendment Religious Doctrine" 72 California Law Reivew 817 (1984).

Critics of neutrality approaches rely on these two observations; this probject presents a third criticism of this solution to the religion clause problem. All of these solutions to the "First Amendment religion problem" have at least one thing in common. They assume a common understanding of what it means to be religious and what it means to engage in religious activity. The problem is that the case law illustrates that a common understanding does not exist.

Is there a way to apply the First Amendment without defining religion? Some scholars have suggested that because judicial definition of religion will necessarily involve exclusion of some belief systems, we ought to apply the First Amendment in a way that does not require a definitional finding.

Religion as Free Speech--the reduction principle:

The First Amendment protections of speech and association have the added effect of protecting the beliefs that the speech and association relate to. Many Supreme Court cases acknowledge this, protecting activities like worship, prayer and religious conscience by referring to freedom of expression.[41]

The benefit of this approach is that religious beliefs are examined in the same way as any other belief. Thus, there is no need to distinguish between religious and other beliefs--the

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[41]Widmar v Vincent, 454 U.S. 263 (1981); Heffron v International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Martin v Struthers, 319 U.S. 141 (1943).

definitions are not critical. Freedom of association in the First Amendment and the Fourteenth Amendment's equal protection clause require that government's treatment of beliefs be evenhanded. Religious groups are protected in the same way that any minority belief system is protected.[42] This is referred to as the "reduction principle." The reduction principle erases the distinction between and among the moral, the social, the political and the religious.

However, commentators have pointed out flaws associated with the reduction principle.[43] First, to the extent that the Framers' intent is still relevant, the First Amendment's language suggests that there is a substantive difference between religion and other belief systems.

> The framers' obvious intent to single out that specific type of belief system for special attention and protection dictates that religion be defined and that the religion clauses add some level of protection beyond what the free speech and association guarantees offer belief systems generally.[44]

Second, free speech and free exercise of religion claims can compete with each other. Furthermore, the claims are not always

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[42]See Communist Party v Witcome, 414 U.S. 441 (1974); U.S. v Robel, 389 U.S. 258 (1967).

[43]The strongest defense of the reduction principle is found in Marshall, "Solving the Free Exercise Dilemma: Free Exercise as Expression." 67 Minn. L. Rev. 545 (1983); Stanley Ingber, supra, has provided the most complete critique of the reduction princple. The points that follow are his.

[44]Ingber, supra, at p. 243

equally compelling. Law professor Stanley Ingber says that the more broad a right's scope, the more likely it is to be weak, or more easily "overborne" by competing social interests.[45] So, "religious rituals, while often protected as symbolic conduct under the broad auspices of free speech claims, may be defeated by state interests insufficient to defeat claimed couched in narrower free exercise terms."[46] This means that the compelling interest test will probably protect a broader range of religious claims than of speech claims.

It is hard to substantiate this criticism by looking at the case law, because we do not have parallel "before and after" data. However, given the Smith Court's assertion that the compelling interest test ought to attach to free exercise religion claims only when they are attached to speech claims also, litigators now invoke both segments of the First Amendment whenever possible.[47]

A related concern is that free speech jurisprudence rarely compels exemptions from otherwise valid laws. The compelling interest test of the free exercise clause does justify such exemptions. In fact, according to Ingber, because of the equal protection clause, the assimilation of free exercise into free

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[45]Ibid., at 244
[46]Ibid.
[47]McConnell, supra.

speech would lead to a denial of exemptions like the Amish school case.[48]

Bifurcated definitions:

Other commentators have argued for a two-pronged or bifurcated definition of religion: a functional definition for free exercise cases; a substantive definition for establishment clause cases.[49]

In free exercise cases, religion would be self-defining. Any adherent who claimed to be religious would be considered religious. Any activity that the adherent claimed to be religious activity would be accepted as religious activity. The compelling interest test would, presumably, be the only limit on religious freedom. The need for a court accepted definition is eliminated, but, is it possible for religion to be a self-defining entity?

Two problems arise. First, in free exercise cases, application for exemption from general laws would probably increase exponentially. Anyone with a disagreement over tax policy, criminal law and so forth could argue that their beliefs were faith-based. Justice Antonin Scalia has argued that the fabric of government would come unraveled if generally

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[48]Yoder, supra.

[49]Sadursky, Wojciech, "On Legal Defintions of Religion" 1987 Australian Law Journal, 63, pp. 834.

applicable laws with incidental effect on religious exercise were deemed to be presumptively unconstitutional.[50]

Second, if the self-defining principle were invoked, judges could still assess the sincerity of a belief. Judges are more likely to accept the sincerity of a belief if they find that belief to be reasonable.[51]

A final problem with the bifurcated definition is that in establishment clause cases, a substantive definition of religion still results in government's imposition of a set of beliefs on a religious group. Government policies are not neutral in their effect on groups. They also are not neutral in substance. A substantive definition of religion for establishment clause cases fails to solve the curriculum cases or the tension between the funding and regulation of faith based groups. Many will still argue that government's regulations about employment discrimination, day care discipline policies and public school curricula are faith based, themselves. Furthermore, funding the sectarian institutions but not the pervasively sectarian institutions requires yet another level of definitions.

Adherents of traditional religions will, ironically, lose out under this scheme. Faiths that are unquestionably religious will be free from government interference and will not receive government support. Those that are unquestionably nonreligious

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[50]See Smith, supra.

[51]See Dade Schools, Rapides Medical Center, and Freemont, supra, in chapter three.

will receive government money but will be subject to government regulation. But, those that are arguably religious and arguably non religious will be considered religious for free exercise purposes but not religious for establishment clause purposes. They will be free from government regulation, and they will also receive government support.[52]

Ultimate Concerns:

One scholarly definition of religion that receives much attention derives from the "ultimate concern" test used in the Seeger case.[53] This definition explicates the judges' perspective in Seeger by suggesting that the core value underlying the free exercise clause is the inviolability of conscience. Therefore, with respect to the free exercise clause only, ultimate concerns should be the defining criteria. Ultimate concerns are those acts

> of the total personality, not a movement of a special and discrete part of the total being...the single most important interest in [an individual's] life...the free exercise clause demands that any concern deemed to be ultimate be protected, regardless of how 'secular' that concern might seem to be.[54]

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[52]This observation is made by Ingber, supra; Freeman, supra, and Sadursky, supra.

[53]This approach to the definition is found in a student Note, "Toward a Constitutional Definition of Religion" 91 Harvard Law Review 1056 (1978)(referred to as Harvard Note (1978)); it is critiqued by Ingber, supra, and Freeman, supra.

[54]Harvard Note (1978) at 1072, 1075, 1076, citing Paul Tillich, The Dynamics of Faith (1958).

The Note points out that ultimate concerns cannot be superseded, and adherents must be willing to disregard self-interest and to accept martyrdom in preference to violating the beliefs.

This definition seems to be fairly flexible; it can encompass non-traditional religions. However, its standards are so strict that it would exclude many people who claim to be religious but are not articulate at identifying their fundamental ultimate concerns.[55] Ingber criticizes the definition as being so demanding that it protects a limited few and also so broad that it leaves no distinction between religion and any other value system; thus, it becomes meaningless. How many people are conscious of their one true belief? How many of us are willing to martyr ourselves? The definition also discriminates against people who do not have one ultimate concern, but who do live a life committed to a set of fundamental principles.[56]

Others have used the same approach articulated by the Note, but expand the test to include "cardinal concerns."[57] Professor John Mansfield advocates that religion at its foundational level must provide answers to the ultimate questions of life: human existence, the origin of being, the meaning of suffering and death and the existence of a spiritual reality. But, how do you identify

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[55]Ingber, supra.
[56]Ingber, supra.; Freeman, supra.
[57]Mansfield, John, "Conscientious Objection--1964 Term," Religion & Public Order 9 (1966). Mansfield's position is critiqued by Ingber and Freeman.

the most important questions? Must belief systems answer all of them or just some of them to qualify as religious? Even if religions always possess underlying theories about human nature or humanity's place in the world, so do other "moral" beliefs. Are these also religious?

Another approach parallel to "ultimate concerns" is expressed by legal scholar Dean Choper.[58] He believes that a substantive definition of religion is necessary in order to severely restrict the beliefs that qualify for protection under the First Amendment. He says that for beliefs to be protected, the violation of those beliefs must hold extratemporal consequences for the adherent. Stanley Ingber criticizes this approach saying that it is underinclusive in that it excludes non-western faiths. However, he sets Choper's approach in historical context when he explains that the foundation of a substantive definition of religion is set in the desire to protect the Constitution. Ideology, or general belief systems, should not receive as much protection as religion because "if the Constitution is to have any significance, all conflicting ideologies must defer to it and to those laws promulgated according to its mandates."[59]

Religious conscience, on the other hand, should be protected because the First Amendment asserts this one concession for pre-Enlightenment belief. The Enlightenment embodied

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[58]Choper, Dean. "Defining Religion in the First Amendment" 1982 U. Ill. L. Rev. 579 (1982)
[59]Ingber, supra, at pg 285

individualistic liberalism. Those who live under the Constitution abide by individualistic precepts; however, those who answer to a higher, transcendent order face different obligations. "The obligations imposed by religion are of a different, high nature than those derived from human relationships...they are not part of the agenda of public debate."[60] So, to receive accommodation of your faith, you must show that you have an inconsistent duty that is imposed on you from a higher or divine source.

All of these substantive definitions of religion suffer from a common problem. Even if we agreed on one of the definitions, we still have not addressed the nature of religious activity or the implications of religion for the rest of life.

Reasoning by analogy:

A final, proposed solution to the definition problem rests in "reasoning by analogy." This approach suggests that not all belief systems are religious. However, courts can not define religion. So, let belief systems receive the label "religious" if they can show that they align with the factors that have historically and traditionally been considered religious. Kent Greenawalt and George Freeman are the advocates of this perspective. In their analyses of the definition problem, they come, separately, to the same conclusion.[61]

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[60]Ibid.

[61]Freeman, supra, at 1553; see also Greenawalt, Kent. "Religion as a Concept in Constitutional Law" 72 California Law Review 753 (1984)

Freeman points out that Eastern and Western religions have common features; these common features should be the starting point for the determination of the "religiousity" of a belief system:

1. A belief in a Supreme Being
2. A belief in a transcendent reality
3. A moral code
4. A world view that provides an account of man's role in the universe and around which an individual organizes his life
5. Sacred rituals and holy days
6. Worship and prayer
7. A sacred text or scripture
8. Membership in a social organization that promotes a religious belief system.[62]

These features are not necessary or sufficient, standing alone. But, in totality, the list describes a paradigm for religion. A paradigm for ir-religion is developed by turning each factor on its head: no belief in morality, no rituals, and so forth.

Freeman applies the paradigms by focusing not on the activity that could be determined as religious or secular, but rather on the government activity. Does the government support of an activity promote a paradigmatic religious belief system? If so, the support is unconstitutional. If government support

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[62]Ibid.

promotes a belief system that is the opposite of the paradigm, then the support is irreligious and is also unconstitutional. However, if the government support is just as likely to promote either type of belief system, it is nonreligious and is constitutional.

Freeman and Greenawalt propose a solution that neglects to address the nature of religious activity or the implication for religion on the rest of life. This neglect is common to all the scholars' views assessed in this section. But, the interesting thing about this perspective is that it focuses on the government action, not the belief system of the adherents.

Michael McConnell, law professor at the University of Chicago, has suggested that part of our religious freedom jurisprudence must be directed in this fashion, forcing the government to examine its activity. Government should ask not "will this advance religion?" Rather, government should ask "will this advance pluralism? Will government action suppress expression of religious differences?"[63]

Glendon agrees with McConnell, saying that the major interpretive challenge for the future, "will be to accord as much scope as possible to the constitutional guarantee of free exercise in its personal, associational and institutional dimensions while

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[63]McConnell, Michael. Round table discussion on Religious Freedom, American Political Science Association meeting, Washington D.C., 1991.

respecting the freedom of conscience of nonbelievers and without preferring one religion to another."[64]

This is true. But, we cannot hope to do so without re-examination of our assumptions about religion.

Where Do We Go From Here?

First Amendment religious freedom jurisprudence has been criticized for its entire 200 year history. The premise of this project has been that much of our confusion about the parameters of religious freedom stems from our failure to carefully examine our various assumptions about the definition of religion.

There are three glaring inconsistencies in the way that judges perceive religious belief. First, some judges say that religion means belief in extratemporal reality; others say religion is any "belief system." Second, some judges believe they can clearly separate religious activity from secular activity; other judges believe that what might look like secular activity becomes religious activity for religious adherents. Finally, some judges believe religion is private and can be kept out of the public arena; others believe that faith necessarily defines public, social activity.

Judges' different views of religion result in inconsistent, troublesome jurisprudence.

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[64]Glendon, supra, at 549

It seems clear, however, from close reading of the cases and the scholars' solutions, that we will never be able to come to agreement about the nature of religion by focusing on our own inconsistent case law. At this point, I suggest cross-national research to examine the approach that other democratic nations take to religious freedom protection. My own work has now expanded to consider the Netherlands as a country of comparison because the Dutch history of "sociaal pluralisme" reflects a unique approach to legal toleration of religious and cultural diversity. "Sociaal pluralisme" or "pluriformiteit" describes a social pluralism in which the political system reflects two or more complete social systems with their own networks of social institutions. These institutions are established on the basis of religion or ideological "weltanschauung" (world-view). This is not pluralism as it is known in the United States, where cultural diversity may be reflected in different interests that compete in the political arena; rather, it involves recognizable, legally tolerated patterns of segmentation in formal institutions or associational memberships like schools, the media, health care establishments, political parties and so forth. The Dutch government's recognition that varied religious interests necessarily define a group of people's approach to public arena issues like education of children, life and death questions facing the terminally ill has led the government to make "religious

freedom" public policy pronouncements that differ from those of the US government.

Cross-national research can lead to new perspectives on areas of public policy that are troubling to Americans.

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