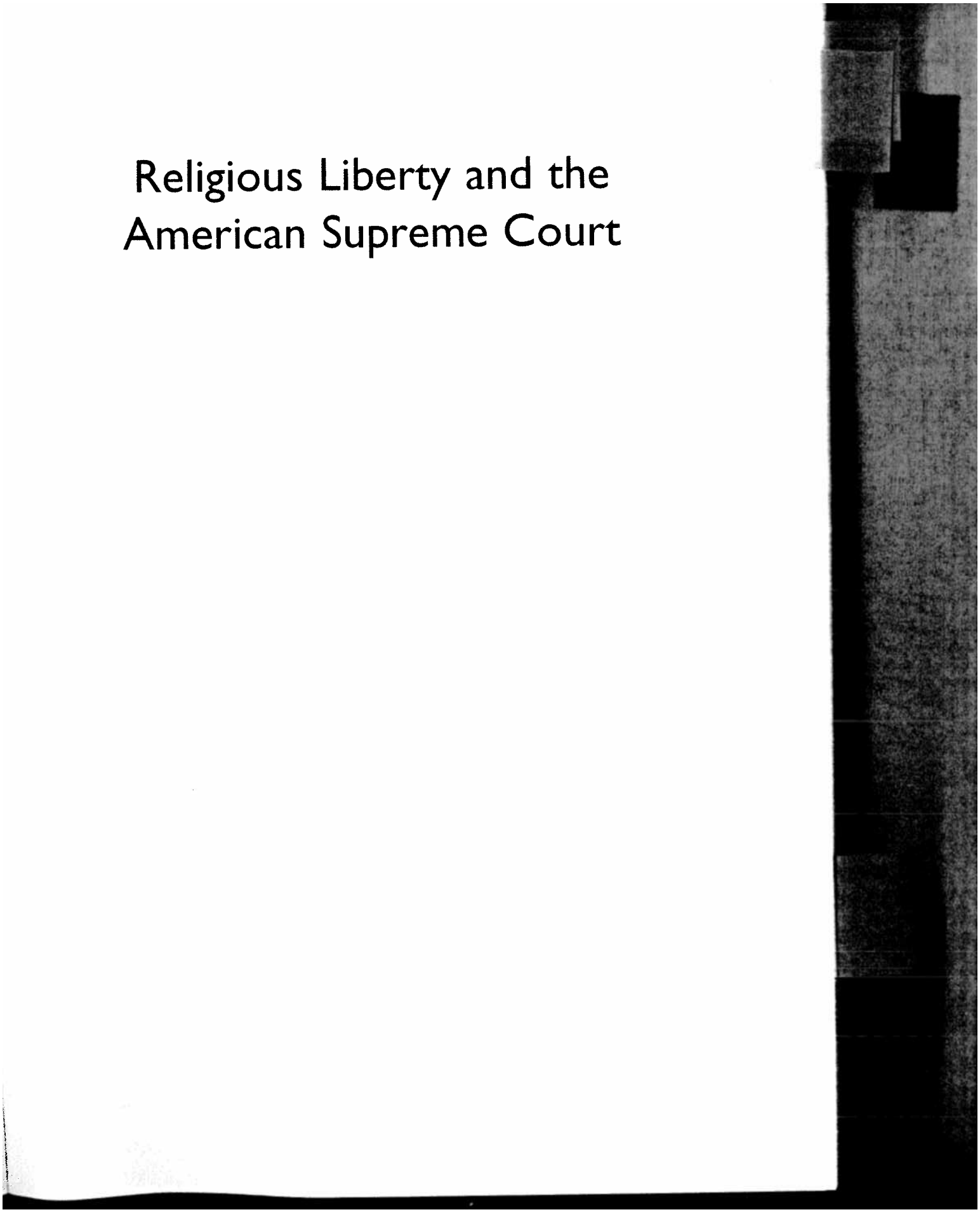
Religious Liberty and the American Supreme Court



Introduction

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

—First Amendment, Constitution of the United States of America

In June 2002, a divided three-judge panel of the Ninth Circuit Federal Court of Appeals ruled public school teacher-led recitations of the Pledge of Allegiance unconstitutional. Public reaction was swift and severe. Senator Robert Byrd (D-WV) called the judge who authored the opinion "stupid." House Speaker Dennis Hastert (R-IL) concluded, "Obviously, the liberal court in San Francisco has gotten this one wrong." Senator Majority Leader Tom Daschle (D-SD) summed up the general sentiment of Congress in a more nonpartisan tone: "This decision is nuts." The president agreed. According to his White House spokesman, George W. Bush's reaction was, "This is ridiculous."

The Ninth Circuit's ruling might have been surprising, even shocking, but it is not quite right to call it "stupid" or "ridiculous"—at least not if you are knowledgeable about the history of the Supreme Court's church-state jurisprudence. The opinion by the allegedly liberal San Francisco judge (who was appointed by Ronald Reagan) was solidly within existing Supreme Court precedents. In fact, Justice Antonin Scalia (another Reagan appointee) had suggested ten years earlier that if pushed to its logical outcome, the Court's Establishment Clause jurisprudence rendered the Pledge of Allegiance unconstitutional.[1] The real story behind the pledge case was not how an unmoored and irresponsible judge abused his power; rather, it was how a federal circuit court, respectful of its duty to follow established Supreme Court precedents, found itself obliged to rule the phrase "under God" in the Pledge of Allegiance unconstitutional if recited in the nation's public schools.

The Ninth Circuit's decision eventually was set aside on a technicality, but the Supreme Court precedents that guided the circuit court's original three-judge panel remain in effect. Understanding those precedents requires that we return to the Supreme Court's first significant Establishment Clause decision, *Everson v. Board of Education* (1947). And understanding *Everson* requires a return to the Court's first significant free exercise decision, *Reynolds v. United States* (1879). To comprehend where the Court is now and how it arrived there, we have to return to the commencement of its church-state doctrinal

1. *Lee v. Weisman*, 505 U.S. 577, 639 (1992).

journey. This introduction, accordingly, proceeds historically. By focusing on landmark decisions, key opinions, and leading dissents, it aims to explain how the Supreme Court has created America's current church-state constitutional law. Understanding the paths taken and doctrines adopted by the Supreme Court, which have not always been consistent and perhaps not even coherent, is the first step for students, citizens, and judges to evaluate whether America's highest court has accurately, intelligently, and prudently interpreted the First Amendment's protections of religious freedom.

The Turn to the Founders and the Establishment of a "Wall of Separation"

The First Amendment's protection of religious freedom is usually divided into two parts: the Establishment Clause ("Congress shall make no law respecting an establishment of religion") and the Free Exercise Clause ("or prohibiting the free exercise thereof"). The Court handed down its most influential Establishment Clause decision in *Everson v. Board of Education* (1947), the landmark case in which the Court invoked Thomas Jefferson and James Madison to rule that the First Amendment erected a "wall of separation" between church and state. In turning to the Founders for guidance, *Everson* followed the precedent established in *Reynolds v. United States* (1879), the Court's first significant free exercise decision. With *Reynolds*, accordingly, we begin.

Reynolds arrived at the Supreme Court through a challenge to a federal statute that criminalized bigamy and polygamy. George Reynolds, a practicing member of the Church of Jesus Christ of Latter-Day Saints (commonly known as the Mormon Church), was convicted of having married two women, sentenced to two years at hard labor, and fined $500. At the time, the Mormon Church encouraged polygamy (it has since disavowed the practice), and Reynolds, Brigham Young's secretary, was a church member in good standing. Reynolds's appeal contended that the First Amendment's Free Exercise Clause shielded him from the antipolygamy law. The Supreme Court, not persuaded, unanimously upheld Reynolds's conviction, in the process interpreting the First Amendment's Free Exercise Clause for the first time.

In a move that still influences church-state jurisprudence, the Court cited Thomas Jefferson to reach its decision. Recognizing that the word "religion" is not defined in the Constitution, Chief Justice Morrison Waite stated that it would be most appropriate to turn to "the history of the times in the midst of which the provision was adopted" to ascertain the First Amendment's meaning.[2] The Founders' efforts to protect religious freedom, Waite contended, culminated in Virginia with the adoption of Jefferson's Bill for Establishing Religious Freedom. "In the preamble of this act religious freedom is defined," the chief justice wrote.

> After a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.[3]

2. *Reynolds v. United States*, 98 U.S. 145, 162 (1879).
3. *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

According to the Court, the Free Exercise Clause was intended to protect beliefs and not actions. Thus, the First Amendment did not protect George Reynolds's bigamy.

Reynolds was a Free Exercise Clause case, but its most dramatic impact on church-state law would be felt nearly seventy years later in *Everson v. Board of Education* (1947), the Court's first significant Establishment Clause case. *Everson* involved a challenge to a New Jersey school district's policy that reimbursed parents for costs associated with transporting their children to and from public and Catholic schools. The Court used the case to apply the Establishment Clause against the states and to implement what has come to be known as the separationist approach to the First Amendment.[4]

The issue of incorporating the Establishment Clause could (and probably should) have been thoroughly considered, debated, and evaluated. The text's awkward phrase "respecting an establishment" could have been interpreted in a jurisdictional manner. So viewed, "respecting" would have indicated that the national government lacked jurisdiction over religious establishments and therefore could not make its own establishment or interfere with state authority over religious establishments. This interpretation would have recognized federalism as a central tenet of the Establishment Clause. Just like the Tenth Amendment, the Establishment Clause would have been understood to resist application against state governments.

Justice Hugo Black, author of *Everson*'s majority opinion, bypassed the entire incorporation issue with the wave of his pen. In one sentence, he simply said that the Fourteenth Amendment had already made the First Amendment applicable to the states. For authority he cited *Murdock v. Pennsylvania* (1943).[5] *Murdock*, however, was a Free Exercise Clause case. In this way, Black quietly and efficiently managed to eliminate the possible federalism component of the Establishment Clause without making a substantive legal argument. Although the case was decided 5–4, no justices disagreed with him on this point.

The Court's nine justices also all agreed that the Establishment Clause erected a wall of separation between church and state. As set forth by Black's majority opinion, that meant at least the following:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to 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. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[6]

While pathbreaking, Justice Black's opinion obscured the originality of his doctrinal creation. Just before the above-cited passage, he stated matter-of-factly that the Court had previously recognized that the First Amendment's terms "had the same objective and were intended to provide the same protection against governmental intrusion on

4. The Bill of Rights originally only imposed restrictions against the national government. In the twentieth century, the Supreme Court applied aspects of the Bill of Rights against the states through a process of "incorporation." The textual vehicle for incorporation has been the Fourteenth Amendment.

5. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

6. *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947).

religious liberty as the Virginia statute."[7] To substantiate the point, he cited three previous cases. But none of those cases actually said what Justice Black implied they did.[8] Without calling attention to his enterprise, Justice Black effectively created out of whole cloth the modern-day Establishment Clause. Ever since, most Establishment Clause Supreme Court decisions have turned on the question of how high the "wall" stands, not whether the Founders built it. While his specific doctrine has not decided each and every case, Black's *Everson* opinion established the parameters within which subsequent Courts have approached the text.

Justice Black and the Court added more bricks to the wall in *McCollum v. Board of Education* (1948), a case decided one year after *Everson*. Like many Establishment Clause disputes, *McCollum* concerned religion in public schools—specifically, whether Protestant, Catholic, and Jewish teachers could, under the approval and supervision of school authorities, conduct voluntary religion classes during the school day on public school grounds. At the time, such instruction was widespread, involving more the two million school children throughout the nation. Without detailed argumentation or a precise account of how it reached its decision, the Court terminated such programs on the grounds that they violated the wall of separation between church and state.

The Court's next significant case, *Zorach v. Clauson* (1952), brought into question the wall's strength. In response to *McCollum*, New York City permitted its public schools to release students during the school day, on written request from their parents, so that they could leave school grounds to attend religious instruction or devotional exercises at local religious centers. Justices Black, Felix Frankfurter, and Robert Jackson viewed the case as another straightforward violation of the requirements of separationism. But a six-member majority upheld the released-time program, in part because it involved neither religious instruction in public school classrooms nor the expenditure of public funds. In an often-quoted passage, the Court's majority declared, "We are a religious people whose institutions presuppose a Supreme Being."[9]

Clauson, however, would turn out to be a relatively small setback in the separationist construction project. In two bold and controversial school prayer decisions in the early 1960s, the Court rededicated itself to building the wall and thoroughly separating state institutions from religion. In *Engel v. Vitale* (1962), the Court found public school teacher-led recitation of the "Regents' prayer" unconstitutional. The New York State Board of Regents, the government agency in charge of the New York public school system, had composed the following prayer and prescribed its use at the beginning of the public school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." The Court held 6–1 that the prayer violated the Establishment Clause, even if the state did not force students to recite it.

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7. *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

8. On page 13 of his *Everson* opinion, Black offered the following citation: "*Reynolds v. United States*, 98 U.S. at page 164; *Watson v. Jones*, 13 Wall. 679; *Davis v. Beason*, 133 U.S. 333." *Watson v. Jones* lacks a single reference to the Virginia statute. *Beason*, similarly, references neither the Virginia statute nor its relationship to the First Amendment. Justice Field's majority opinion in the case quotes Justice Waite's opinion in *Reynolds* at length, but it does not refer to Jefferson's Virginia statute. *Davis*, 133 U.S. 333, 343–44 (1890) (quoting *Reynolds*, 98 U.S. 145, 165–66 (1879)). In *Reynolds*, the Court did say that "the controversy upon this general subject [of religious establishment] . . . seemed at last to culminate in Virginia" and the passing of Jefferson's Virginia statute (*Reynolds v. United States*, 98 U.S. 145, 163 (1879)). *Reynolds* then said that Jefferson's letter to the Danbury Baptist Association—not the Virginia statute—"may be accepted almost as an authoritative declaration of the scope and effect of the [First] [A]mendment." But, more importantly, that "scope and effect," according to the *Reynolds* Court, was that the state could regulate beliefs but not actions. Under the cover of *Reynolds*, Justice Black took a different phrase from Jefferson's Danbury letter and made it the cornerstone of Establishment Clause jurisprudence.

9. *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

The following year, in *Abington School District v. Schempp* (1963), the Court struck down school-administered daily Bible readings and recitations of the Lord's Prayer in public schools. Pennsylvania law required that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." The law allowed children to be excused from reading the Bible or from being present when it was read upon the written request of a parent or guardian. Maryland's public schools were governed by a similar law, which was also examined in the case. According to Justice Potter Stewart, *Schempp*'s lone dissenter, to disallow such religious activities in the public school would amount to "the establishment of a religion of secularism."[10] An eight-member majority disagreed. Citing *Everson*, the majority found state-sponsored Bible reading and prayer in public school to violate the "wholesome [state] neutrality" toward religion mandated by the Establishment Clause.[11]

Whether the Court's separationist wall is neutral toward religion and whether the First Amendment even requires state neutrality toward religion remain topics of significant dispute. To further complicate matters, the same year the Court decided *Schempp* it also embarked on an approach to the Free Exercise Clause that appears to favor religious over nonreligious individuals. To this line of cases we now turn.

The Free Exercise Clause and Religious Exemptions

While implementing its separationist Establishment Clause jurisprudence, the Court developed a seemingly more accommodationist approach to the Free Exercise Clause. As noted above, in *Reynolds* the Court interpreted the Free Exercise Clause to protect beliefs but not actions. After incorporating the clause to apply against the states in *Cantwell v. State of Connecticut* (1940), the Court applied *Reynolds*'s belief-action dichotomy against Jehovah's Witnesses in *Minersville School District v. Gobitis* (1940). The World War II–era case involved Jehovah's Witness children expelled from their public school for refusing to participate in daily salutations to the American flag and recitations of the Pledge of Allegiance.[12] An eight-member majority ruled in favor of the school district, unsympathetic to the children's religious objections to worshipping, in their view, a graven image.

Just two years later, however, a new court majority seemed to take a different tack. Following the *Gobitis* decision, a West Virginia school district implemented a new state law by requiring daily recitations of the Pledge of Allegiance and the corresponding flag salute. Soon thereafter, several Jehovah's Witness children were expelled from West Virginia public schools. When their case reached the Supreme Court in *West Virginia State Board of Education v. Barnette* (1943), the Court struck down the school district policy. Writing for a six-member majority, Justice Jackson concluded that "compelling the flag salute and pledge transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[13]

Some think *Barnette* reversed *Gobitis* by granting Jehovah's Witness children religious exemptions from the school district's policy. A more precise reading of the Court's

10. *Abington School District v. Schempp*, 374 U.S. 203, 313 (1963).
11. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).
12. At the time, the recited text of the Pledge of Allegiance was as follows: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." While the words were spoken, teachers and pupils extended their right hands in salute to the flag.
13. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

opinion, however, reveals that the majority struck down mandatory flag salutes and pledge recitations for all school children, not just those who held religious objections to the exercises. The majority made clear that while religious beliefs did provide the Jehovah's Witnesses' motivation in the case, its decision did not "turn on one's possession of particular religious views or the sincerity with which they are held."[14] And as the quotation above shows, the Court majority invoked the First Amendment as a whole, not just the Free Exercise Clause, to render its decision. After *Barnette*, no government entity could compel any child to say the Pledge of Allegiance or salute the flag.[15]

Twenty years later, in *Sherbert v. Verner* (1963), the Court did adopt the exemption approach to free exercise. The case presented perhaps one of the most sympathetic litigants in church-state legal history. Adell Sherbert was fired from her textile job of thirty-five years when she refused to accept a six-day-a-week schedule that included Saturdays. A Seventh-Day Adventist, Sherbert considered Saturday her sabbath. For years she had had an agreement to work five days a week and not on Saturdays. Unable to find a new job because of her unwillingness to work on her sabbath, Sherbert applied for state unemployment benefits. South Carolina officials denied her application, however, on the grounds that alternative work (which required Saturday labor) was in fact available.

In a precedent-setting decision, the Supreme Court found that South Carolina violated the Free Exercise Clause when it denied Sherbert unemployment benefits. Writing for the Court, Justice William Brennan explained the judgment:

> The ruling [by the South Carolina Employment Security Commission] forces her [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[16]

Under what would become known as the *Sherbert* test, the Court ruled that the Free Exercise Clause requires the state to have "a compelling state interest" and to use the "least restrictive means" possible when enacting or enforcing legislation that burdens an individual's religion. As implemented by the Court, it did not matter if government action burdened religion directly or indirectly or if the state intended to burden religion. Under *Sherbert*, religious individuals possessed a presumptive constitutional right to exemptions from burdensome laws, save only the "compelling state interest" and "least restrictive means" conditions.

Sherbert's exemption approach to free exercise went unchallenged for nearly thirty years until the Court, shockingly, overthrew the doctrine for most cases in *Employment Division v. Smith* (1990). All the more surprisingly to some, Justice Scalia authored the change. *Smith* involved claims for unemployment compensation by two drug-rehabilitation counselors. The state employment division found that the counselors had been fired with cause (they had tested positive for using a hallucinogenic) and accordingly denied their applications for state unemployment benefits. The counselors did not contest the results of their positive drug tests, but in their legal appeal, they explained that they had used peyote while participating in a Native American Church ritual. That practice, they contended, was protected by the Free Exercise Clause.

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14. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 634 (1943).
15. It should be noted that in their concurring opinion in *Barnette*, Justices Black and Douglas focused on the religious element of the case and suggested that the school district policy trespassed the Constitution in its application against "conscientious objectors."
16. *Sherbert v. Verner*, 374 U.S. 398, 405 (1963).

Rather than requiring Oregon to show a "compelling state interest" to justify its burden on the counselors' religious practices, the Supreme Court dramatically narrowed the *Sherbert* test. In a complicated (and, to many, unpersuasive) majority opinion that cited *Reynolds* and *Gobitis*, Justice Scalia wrote that the Court had only applied *Sherbert*'s exemption standard in "hybrid" situations that involved more than one constitutional right. For most cases, the Court held, the state had no constitutional obligation to grant religious exemptions from laws that indirectly burdened religious beliefs or exercises. The *Smith* approach to the Free Exercise Clause permitted neutral laws of general applicability to impose indirect burdens on religion.

The *Lemon* Test, the Endorsement Test, and Critiques of Separationism

Scalia's narrowing of the *Sherbert* test helped to alleviate a striking tension in the Court's church-state jurisprudence. More than one critic had noted that the Court's exemption-granting free exercise rule adopted in *Sherbert* did not easily square with its separationist approach to the Establishment Clause. The *Sherbert* test required the government to extend to religious individuals special consideration for exemptions when they felt burdened by state action. At the same time, the Establishment Clause prohibited the government from preferring or advancing religion over nonreligion. The Court's Establishment Clause seemed to prohibit the preferential action demanded by the Court's Free Exercise Clause. As Justice Stewart noted in his concurring opinion in *Sherbert*, "There are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's . . . construction of the Establishment Clause."[17]

Stewart was referring to *Vitale* and *Schempp*, the public school prayer cases discussed above. About a decade after these decisions were handed down, the Court attempted to articulate a systematic approach to the Establishment Clause in *Lemon v. Kurtzman* (1971). The case involved various types of government aid to private religious schools, a large majority of which were Catholic. The Court set forth what came to be known as the *Lemon* test, a three-part analytical tool to evaluate state action. In order to pass constitutional muster, governmental practices must do the following:

1. have a secular legislative purpose,
2. not have the primary effect of either advancing or inhibiting religion, and
3. not result in an "excessive government entanglement" with religion.

A violation of any of the test's prongs would render state action unconstitutional.

The Court's decision to strike down the state aid challenged in *Lemon* rested on the "excessive entanglement" prong, the *Lemon* test's most novel feature. Also new in *Lemon* was the Court's justification for why "excessive entanglement" between church and state violated the Constitution. According to Chief Justice Warren Burger's majority opinion, "One of the principal evils against which the First Amendment was intended to protect" was "political division along religious lines."[18] Government funding of religious schools, Burger said, threatened to divide the community. On one side, he said, would stand "partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools"; on the other side would be "those who oppose state aid, whether for

17. *Sherbert v. Verner*, 374 U.S. 398, 414 (1963).
18. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

constitutional, religious, or fiscal reasons." One side would "promote political action to achieve their goals," and in response their opponents would "employ all of the usual political campaign techniques to prevail." Candidates for political office would then "be forced to declare and voters to choose." This might sound like the ordinary functioning of a representative democracy, but according to Burger such political activity posed an existential danger: "Many people confronted with issues of this kind will find their votes aligned with their faith," and "the potential divisiveness of such conflict is a threat to the normal political process."[19] Policies and politics likely to align religious faith with voting patterns, Burger reasoned, could cause political division along religious lines and would therefore unconstitutionally entangle church and state.

The *Lemon* test remains a standing precedent often identified as the benchmark for Establishment Clause analysis. A majority opinion by Justice David Souter in *McCreary County v. American Civil Liberties Union of Kentucky* (2005) employed it to strike down a pair of Ten Commandments displays in county courthouses. Yet *Lemon* has never lacked critics. Perhaps Burger himself, the test's formulator, implicitly levied the most telling censure. In *Marsh v. Chambers* (1983), the chief justice authored a majority opinion upholding the state of Nebraska's legislative chaplaincy. His opinion turned to history, noting that government-funded legislative chaplains date back to the American founding and that the same Congress that drafted the First Amendment also approved of a chaplain. What Burger did not say, however, spoke loudest: nowhere in his opinion did he invoke or cite the *Lemon* test. He likely avoided it because, in the words of Justice Brennan's dissent, that legislative prayer has a "pre-eminently religious" purpose would seem to be "self-evident."[20] Brennan did not level the charge directly, but Burger apparently abandoned the *Lemon* test because it failed to reach the outcome he thought proper. Given the history that Burger did present, his opinion implicitly (and maybe unwittingly) suggested that the *Lemon* test was inconsistent with the Founders' practices and original intentions.

Perhaps because of *Lemon*'s perceived shortcoming, Justice Sandra Day O'Connor moved to modify the approach during the following term. In her first church-state opinion, the newly appointed associate justice advanced her "endorsement test" in a concurrence in *Lynch v. Donnelly* (1984). Under O'Connor's approach, judicial inquiry would ask whether a state action "intends to convey a message of endorsement or disapproval of religion."[21] By focusing on and striking down state endorsements of religion, O'Connor suggested that the Court would no longer have to attempt to measure the effects of any state action on religion, thereby clarifying Establishment Clause adjudication.

O'Connor's long tenure as the fifth and decisive vote in Establishment Clause disputes ensured that the "endorsement test" remained at the center of church-state jurisprudence for over two decades. This does not mean the approach was necessarily well regarded or enthusiastically embraced. Critics were quick to point out that evaluating a legislator's intentions is hardly a matter of hard science. It is not always possible to know what a single legislator (not to mention a legislative body as a whole) intended in drafting or passing a particular law. Moreover, if legislators know that their intentions might be evaluated later by a court, they have an incentive to deliberately plant constitutionally acceptable intentions in the legislative record. These problems and others would lead to a host of criticisms of the endorsement test and proposals for alternative approaches.

Perhaps the boldest critique came from then–Associate Justice William Rehnquist in *Wallace v. Jaffree* (1985). Rehnquist aimed to uproot the wall of separation with a histori-

19. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).
20. *Lemon v. Kurtzman*, 403 U.S. 602, 797 (1971).
21. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984).

cal pickax. The case evaluated a law that mandated a moment of silence "for prayer or voluntary meditation" in Alabama's public elementary schools. Citing *Lemon* and the endorsement test, a six-member majority struck down the practice. Rehnquist dissented, rejecting the entire foundation upon which the majority had constructed its opinion. "It is impossible to build sound constitutional doctrine," he declared, "upon a mistaken understanding of constitutional history." *Everson*'s first mistake, he said, was to turn to Jefferson. The author of the letter to the Danbury Baptist Association, from which Justice Black took the phrase "a wall of separation," was in Paris at the time of the adoption of the First Amendment; accordingly, Rehnquist suggested, Jefferson had nothing to do with its drafting and should not be consulted on its interpretation. Moreover, the records of the Establishment Clause in the First Congress, Rehnquist continued, reveal not separationism but rather the idea that government should not prefer one religion over others. Numerous official political acts by various Founding Fathers, he said, confirmed nonpreferentialism, including official presidential proclamations of days of prayer and thanksgiving; the reenactment in 1789 of the Northwest Ordinance of 1787, which declared, "[Religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged"; land grants to support religion; and early commentaries on the Constitution by leading jurists, including Joseph Story.

Since Rehnquist's dissent in *Jaffree*, nonpreferentialism has often been considered the main alternative to separationism. Other justices, however, have not firmly embraced the approach, including those often sympathetic to Rehnquist's judgments. Instead, *Everson*'s other critics have tended to offer their own alternative doctrines and Establishment Clause tests.

In *County of Allegheny v. American Civil Liberties Union* (1989), Justice Anthony Kennedy blasted O'Connor's endorsement test and offered his own approach to the Establishment Clause. The case involved holiday displays in two downtown Pittsburgh government buildings. The first display, located at the top of the Grand Staircase of the Allegheny County Courthouse, consisted of a crèche depicting the Christian nativity scene. The second display, which was down the street outside the city-county building, included an eighteen-foot Chanukah menorah, or candelabra, and a forty-five-foot, decorated Christmas tree. In a split 5–4 decision, the Court found the nativity scene unconstitutional but held the joint menorah/Christmas tree display constitutional. According to Justice O'Connor, who cast the decisive fifth vote, the nativity display endorsed religion, whereas the menorah/Christmas tree display did not.

Kennedy issued a three-part critique of the endorsement test. He said it failed to accord with history, especially with the founding, which was full of governmental actions endorsing religion. Next, he claimed that the endorsement test embraced a "jurisprudence of minutiae" because it required judges to determine whether a disclaimer sign or inclusion of a secular figurine offset the religious elements in a display, thereby neutralizing possible governmental endorsement of religion.[22] Perhaps his most vigorous critique, however, regarded the endorsement test's callous indifference to religion:

> If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality,

22. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 674 (1989).

> that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious.[23]

To replace the endorsement test, Kennedy advocated his own two-part approach. The Establishment Clause, he said, should prevent the government from the following:

1. coercing anyone to support or participate in any religion or its exercise, and
2. granting direct benefits in such a way that establishes a religion or tends to do so.

It should not prevent, Kennedy emphasized, government recognition or acknowledgment of religion.

Justice Scalia signed on to Justice Kennedy's *Allegheny County* opinion, but three years later Scalia wrote his own fiery critique of the Court's Establishment Clause jurisprudence, with Kennedy as one of his targets. The occasion for Scalia's colorful opinion was *Lee v. Weisman* (1992), a public school prayer case from Rhode Island in which a public junior high school invited a Jewish rabbi to offer prayers at its eighth-grade graduation. The Supreme Court ruled, 5–4, that the school's invitation, coupled with its instruction to the rabbi to compose nondenominational prayers, violated the Establishment Clause.

Justice Kennedy wrote the majority opinion (joined by Justice O'Connor), explaining, "The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion."[24]

Justice Scalia's irate dissenting opinion mocked Kennedy's "psychological coercion" test. "The Court's notion," Scalia wrote,

> that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite "subtle coercive pressures") the free will to sit, there is absolutely no basis for the Court's decision.[25]

Scalia then noted that right before the students were asked to stand for the rabbi's prayer, they were asked to stand for the Pledge of Allegiance. Given that the First Amendment prohibits students from being coerced to say the pledge (*West Virginia State Board of Education v. Barnette*), he pointed out that public school–directed Pledge of Allegiance recitations would also be unconstitutional under Kennedy's coercion standard.[26]

As an alternative, Scalia advanced his own approach to the Establishment Clause, which might be deemed "legal coercion": "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by

23. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 663–664 (1989).
24. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).
25. *Lee v. Weisman*, 505 U.S. 577, 637–638 (1992). Emphasis in the original.
26. *Lee v. Weisman*, 505 U.S. 577, 638–639 (1992).

force of law and threat of penalty."[27] Under Scalia's Establishment Clause, only government actions such as forced attendance of state religious services, direct regulation of religious practices as such, and civil disabilities imposed on religious dissenters amount to constitutional violations. Other than Justice Clarence Thomas, he persuaded no justices to sign on to his "legal coercion" standard. And in time, Thomas issued his own caveat.

The criticisms of *Everson* and its progeny by Rehnquist, Kennedy, and Scalia accepted *Everson*'s underlying assumption that the Establishment Clause could unproblematically by applied against the states. In a series of short but provocative passages across multiple opinions, Justice Thomas expressed doubts about this modern-day Establishment Clause orthodoxy. He initially raised eyebrows in *Zelman v. Simmons-Harris* (2002), a school voucher case. Thomas's concurring opinion noted that the Establishment Clause originally applied only to the federal government and "on its face . . . places no limit on the States with regard to religion." He equivocated about incorporation. After recognizing that the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States," Thomas said that "it may well be that state action [in the context of the Establishment Clause] should be evaluated on different terms than similar action by the Federal Government." Quoting *Walz v. Tax Commission* (1970), he seemed to suggest that those terms were "strict neutrality," but then he concluded, "Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest."[28] This last sentence seemed to suggest that in his view the Establishment Clause ought not apply against the states.

Thomas made that exact argument more explicitly two years later in *Elk Grove Unified School District v. Newdow* (2004), the Pledge of Allegiance case with which this chapter began. In his *Newdow* concurrence, Thomas wrote, "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments." The Framers, he continued, "made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." Unlike the Free Exercise Clause, "the Establishment Clause does not purport to protect individual rights"; thus, Thomas concluded, "it makes little sense to incorporate [it]."[29]

One year later, he reasserted his federalism interpretation in *Van Orden v. Perry* (2005), one of the two Ten Commandments cases decided by the Court on the last day of its 2004 term.[30] Thomas insisted that "this case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause." The case would have been "easy" because "if the Establishment Clause does not restrain the states, then it has no application here, where only state action is at issue." Thomas did not, however, conclude his analysis by recognizing every state's right to establish a religion and, therefore, to post the Ten Commandments. Instead, he suggested that "even if the [Establishment] Clause is incorporated, or if the Free Exercise Clause limits the power of State to establish religion," the Court should return to the original meaning of the word

27. *Lee v. Weisman*, 505 U.S. 577, 640 (1992).
28. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–679 (2002).
29. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 49–50 (2004).
30. On the same day that the Court handed down its decision in *Van Orden*, it also handed down its decision in *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005). Both cases involved Ten Commandments displays on government property.

"establishment." "The Framers understood an establishment," he claimed, "necessarily to involve actual legal coercion."[31] Citing Justice Scalia's opinion in *Lee v. Weisman* (1992), he then defined legal coercion as "coercion of religious orthodoxy *by force of law and threat of penalty*."[32] It should be noted that Justice Thomas did not contend that a return to the original meaning of the word "establishment" amounted to a return to the original meaning of the Establishment Clause. He left it ambiguous regarding whether the prohibition against legal coercion, precisely speaking, was a product of the incorporated Establishment Clause or the Free Exercise Clause.

Non-Establishment and Free Exercise Today

This introduction has attempted to make clear that the Establishment Clause remains a matter of significant dispute. On the current Supreme Court, four justices appear to embrace some version of separationism (Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor). Two justices (Scalia and Thomas) have embraced a "legal coercion" standard, although they do not reach that point in the same manner. Justice Kennedy has advanced a "psychological coercion" approach. Chief Justice John Roberts and Justice Samuel Alito have not articulated their understanding of the Establishment Clause, although, given their judicial philosophies, they likely fall somewhere in the coercion zone between Scalia and Kennedy.

Free exercise jurisprudence is a bit less murky but by no means clear. As discussed above, *Employment Division v. Smith* (1990) severely truncated the exemption approach adopted in *Sherbert v. Verner* (1963). Despite congressional efforts effectively to overturn *Smith* legislatively with the Religious Freedom Restoration Act (1993) (struck down as applied to state governments in *City of Boerne v. Flores* [1997]), *Smith* remains the guiding precedent for most free exercise cases. How many justices agree with *Smith* and would vote to uphold it, however, is unclear.

The current unsettled status of First Amendment church-state law suggests the necessity and advisability of a thorough and critical study of the Supreme Court's religious liberty jurisprudence. Only by grasping how different justices conceive the underlying purposes of the First Amendment's religion clauses and by evaluating the adequacy of their corresponding doctrinal interpretations can students and citizens understand how their constitutional rights are judicially protected and judge whether those protections adequately safeguard their fundamental freedom of religious liberty.

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31. *Van Orden v. Perry*, 545 U.S. 677, 692–693 (2005).
32. *Van Orden v. Perry*, 545 U.S. 677, 693 (2005). Emphasis in the original. Quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).