KEY UNITED STATES SUPREME COURT RELIGION DECISIONS

With a Special Introduction
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A Publication of The Rutherford Institute™

INTRODUCTION

The framers of the United States Constitution wisely foresaw the potential danger of governmental interference with the freedoms of the American people. Therefore, in order to limit the federal government's power, they added the Bill of Rights to the original Constitution. These basic rights included, among others, the freedoms enunciated in the First Amendment: religion, speech, press, and assembly. It was natural to include religion among these rights. The framers understood it to be such an indispensable freedom that, in the words of James Madison, "[t]here is not a shadow of right in the general [federal] government to intermeddle with religion."[1] Madison insisted that "[t]his subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."[2]

It was recognized early in the history of the United States that if religious liberty were impaired, civil liberties would also suffer. This recognition is based on the unity and mutual dependence of basic First Amendment rights. The renowned 19th century jurist James Kent remarked:

> The *free exercise and enjoyment of religious profession and worship* may be considered as one of the absolute rights of individuals, recognized in our ... law. Civil and religious liberty generally go hand in hand, and the suppression of either one of them, for any length of time, will terminate the existence of the other.[3]

More recently, historian Roland Bainton has observed:

> [A]ll freedoms hang together. Civil liberties scarcely thrive when religious liberties are disregarded, and the reverse is equally true. Beneath them all is a philosophy of liberty which assumes a measure of variety in human behavior, honors integrity, respects the dignity of man, and seeks to exemplify the compassion of God.[4]

Bainton argued that only by operating within a framework of belief in "universal right, integrity, law, and humanity, if not in the Christian God," can people preserve the

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1 5 *The Writings of James Madison, 1787-1790* (Hunt, ed.) (G.P. Putnam's Sons, 1904).
2 *Id*. at 132.
3 Kent, 2 *Commentaries on American Law* (Little, Brown, 1858), pp. 35-36 (emphasis in original).
4 Bainton, *The Travail of Religious Liberty* (Shoestring Press, 1971), p. 260.

Western world's noblest achievement; that is, "the conduct of controversy without acrimony, of strife without bitterness, of criticism without loss of self-respect."[5]

To ensure religious freedom, the Religion Clauses were included in the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[6]

The Religion Clauses were meant specifically to restrain the federal government from establishing an official religion and from restricting the free exercise of religion by individuals. In its final wording, the First Amendment provided a broad range of protection from governmental intrusion.

It wasn't until nearly a century after the ratification of the First Amendment that the United States Supreme Court decided its first case on the Religion Clauses. Since then, the Court has ruled in numerous cases regarding the Clauses, some with mixed results.[7]

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5 *Id*. at 259.

6 U.S. Const., amend. I. When ratified, the First Amendment, as well as the entire Bill of Rights, applied only to the federal government. However, the First Amendment was made applicable to the states through the Fourteenth Amendment and the process of "selective incorporation" of the Bill of Rights provisions as binding on the states. *See, for example, Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

7 *See* Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 Temple Political & Civil Rights Law Review (1997).

KEY UNITED STATES SUPREME COURT RELIGION DECISIONS

Presented below are the salient facts, key holdings, and significance of the major religion cases decided by the United States Supreme Court. The cases are discussed in chronological order, beginning with the oldest, to provide context for the evolution of the law. Included are Free Exercise and Establishment Clause cases and Free Speech cases that concerned religious speech (for example, Rosenberger v. Rector *and* Wooley v. Maynard*).*

***Reynolds v. United States*, 98 U.S. 145 (1878)**

Reynolds, a Mormon, was convicted of violating a federal law prohibiting bigamy. He appealed, challenging the conviction on the basis of the Free Exercise Clause. At the time the lawsuit was filed, the Mormon Church overtly encouraged its faithful to practice polygamy. Reynolds claimed that his practice of polygamy was a sincere exercise of his Mormon faith and that, consequently, the First Amendment entitled him to an exemption from the federal anti-polygamy law. The Court, however, held that Reynolds' devout religious belief did not exempt him from criminal laws targeted at immoral conduct, especially not criminal laws that have such a distinguished and long-standing history in Western jurisprudence as those condemning polygamy.

Reynolds is often cited for the proposition that although religious belief is "sacrosanct" under the Free Exercise Clause of the First Amendment, religious action may be proscribed by the state if that action is deemed immoral. In the words of the Court: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."

***Cantwell v. Connecticut*, 310 U.S. 296 (1940)**

Three Jehovah's Witnesses were arrested and charged with disorderly conduct and unlawful solicitation after their efforts at proclaiming their faith on public sidewalks—using a phonograph to play an anti-Catholic message in a predominantly Catholic community—were met with an extreme, near-physical response by the public. The solicitation ordinance under which the Witnesses were charged provided that all persons aiming to solicit funds from the community were to apply for a solicitation license from the state. In *Cantwell*, the Court struck down this ordinance, holding that while the state is free to regulate the time and manner of solicitation generally, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license ... is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

In drawing a distinction between proper time and manner restraints on solicitation, which promote the general welfare of the community, and improper license-based

restraints, which leave the protection of First Amendment speech in the hands of a government-employed licensing official, the Court in *Cantwell* articulated the framework for the modern doctrine of prior restraint, which generally prohibits states from establishing prefabricated legislative conditions upon what may be protected speech. *Cantwell* is also significant as the first case to hold that the religion clauses of the First Amendment are fundamental rights applied to the states via the Fourteenth Amendment.

***Minersville School District v. Gobitis*, 310 U.S. 586 (1940)**

Parents of Jehovah's Witness children brought suit to enjoin the school district of Minersville, Pennsylvania, from expelling their children for refusing to say the Pledge of Allegiance, arguing that their religious beliefs prohibited them from reciting the pledge. The Court vacated the injunction in favor of the children, ruling that the guarantee of the free exercise of religion under the First and Fourteenth Amendments did not relieve the children of compliance with a neutral law of general application.

Using sweeping language, the Court wrote that "national unity is the basis of national security," and that state authorities must have "the right to select appropriate means for its attainment." To the Court in *Gobitis*, the state requirement that all public school students salute the American flag was a sufficiently innocuous and efficacious method of fostering essential national unity.

***West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)**

Parents of Jehovah's Witness children facing expulsion again brought suit challenging forced flag salutes in West Virginia public schools. Overruling *Gobitis*, the Court held that the freedom of conscience guaranteed by the Free Speech and Free Exercise clauses of the First and Fourteenth Amendments precluded state and local school boards from promoting national unity by means of compulsion. "[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

Justice Frank Murphy's concurrence in *Barnette* emphasized that constitutional liberties include the right to profess or refrain from professing belief: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all." Justice Robert Jackson's majority opinion echoed this reasoning with distinctive eloquence: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

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

A taxpayer brought suit challenging a state legislature's authorization of reimbursement to parents of bus fares paid for transporting their children to schools other than public schools. The Court held broadly that any aid to sectarian organizations, whether direct or indirect, violated the Establishment Clause. In often-quoted language, the Court stated:

> 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 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. 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," ... [and] that wall must be kept high and impregnable.

Everson is virtually without precedent in its articulation of strict separationism, with the possible exception of *Santa Fe v. Doe* (2000, discussed below). Ironically, despite the breadth of its language, the Court held that the government could provide benefits to religious and non-religious students alike, as long as the distributional rubric remained content-neutral. Writing for the majority, Justice Black concluded his exposition of the Establishment Clause neutrality doctrine with the following statement: "The [First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

***McCollum v. Board of Education*, 333 U.S. 203 (1948)**

A parent of a public school student in Champaign, Illinois, challenged the Board of Education's policy of releasing students during school hours to attend a privately organized religious education program. The program was taught in classrooms by members of the Jewish, Roman Catholic and Protestant faiths, each of whom was subject to the approval

of the superintendent. A local council on religious education was also permitted to determine which religious faiths should participate in the program. Students who did not participate in the program were required to go to another part of the school building to continue their secular education.

The Court held that releasing students from their legal duty to attend classes so that they could receive religious instruction was "beyond all question a utilization of the tax-established and tax-supported school system to aid religious groups to spread their faith … [falling] squarely under the ban of the First Amendment." The Court held that the state gave religious groups an "invaluable aid" in providing the students for the religious classes through the compulsory public school machinery. The Court also said that its holding that the First and Fourteenth Amendments forbade a state from using its school buildings to aid religious groups in the dissemination of their beliefs did not manifest a "governmental hostility to religion or religious teachings," but assured that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

***Niemotko v. Maryland*, 340 U.S. 268 (1951)**

A group of Jehovah's Witnesses in Havre de Grace, Maryland, challenged their conviction for disorderly conduct for failing to obtain a permit to hold a religious meeting in a public park. Although there was no law requiring the acquisition of a permit, the custom of the city of Havre de Grace strongly encouraged any group wishing to use a public park for an organized gathering to obtain one. Before holding their meeting, plaintiff Witnesses filed for a permit with the city but were denied. At this point, they determined to ignore the citywide custom and convene their meeting.

The Supreme Court reconsidered the factual findings of the Maryland trial court and found that there was no evidence in the record that any of the Witnesses' conduct deserved the "disorderly" classification. Further, the Court held that in the absence of any narrowly drawn and clear standards for officials to follow in granting or denying permits, the city's custom of requiring any group wishing to use a public park for an organized gathering to obtain a permit was a violation of the Witnesses' right to the equal protection of the laws in the exercise of their freedoms of speech and religion. The Court also held that the city had no objective reason to deny the Witnesses a permit and had discriminated against the Witnesses because of their viewpoint, in violation of both the Free Speech Clause of the First Amendment and the Fourteenth Amendment guarantee of equal protection of the law. Two years later, in *Fowler v. Rhode Island* (discussed below), the Court considered an actual ordinance requiring the acquisition of a permit from the city to use a public park for a religious service and struck it down on the same grounds.

***Zorach v. Clauson*, 343 U.S. 306 (1952)**

Parents of New York City public school students challenged a school-sponsored released time program, arguing that it violated the Establishment Clause. New York City permitted its public schools to release students to attend religious classes off campus during what would otherwise be instructional time. Recognizing the content-neutrality of the program, the Court found for the city and distinguished *McCollum v. Board of Education* (1948, discussed above), which had struck down a released time program conducted on school grounds due to its coercive nature. In *Zorach*, the Court stated that minimal involvement by school officials in monitoring attendance and readjusting schedules for religious classes did not amount to coercion of students into a religious exercise.

In a strict sense, *Zorach* set a legal template for acceptable released time programs that has lasted to the present day. In a broader doctrinal sense, *Zorach* substantially tempered the strict separationist zeal of *Everson* (1947, discussed above). Writing for the majority, Justice William Douglas affirmed America's undeniable and deeply historical national respect for religion with these words:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each group flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government showed a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Almost without exception, in Establishment Clause litigation subsequent to *Zorach*, the courts have faced an obligatory exchange of *Everson* and *Zorach* slogans. Despite the rhetorical distance between the decisions, however, the doctrine of content-neutrality articulated by both remains a fundamental element of the standard for evaluating the constitutionality of church-state relations to this day.

***Fowler v. Rhode Island*, 345 U.S. 67 (1953)**

Fowler, a Jehovah's Witness, was convicted of leading a religious meeting in a public park without a permit. The Court overturned his conviction, holding that the city ordinance violated the Free Speech Clause of the First Amendment as applied to the states by the Fourteenth Amendment. Examining the language of the ordinance and the state's concession in oral argument that Catholics and Protestants could hold their services in the parks without violating the ordinance, the Court held that, through the veil of a semantic nuance, the law permitted more orthodox religious groups access to the park for religious ceremonies, while simultaneously barring access to Jehovah's Witnesses. In striking down the law, the Court said:

> To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. That would be precisely the effect here if we affirmed this conviction.... Baptist, Methodist, Presbyterian, or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function.

Fowler and *Niemotko* (1951, discussed above) both applied the nascent forum analysis relating to traditional public forums, enunciated in *Hague v. CIO*, 307 U.S. 496 (1939), to religious speech and made it clear that the government's need to administer public places does not justify content-specific regulation of religious speech.

***Torcaso v. Watkins*, 367 U.S. 488 (1961)**

In *Torcaso*, the Court struck down a provision of the Maryland constitution requiring all office holders to declare a belief in the existence of God. The Court's decision was grounded neither in the Free Speech Clause nor in the U.S. Constitution's Article VI prohibition of religious test oaths in the assignment of public offices. Instead, the Court found that Maryland's "religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." The Court stated:

> We repeat and again reaffirm that neither 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.

***Engel v. Vitale,* 370 U.S. 421 (1962)**

The parents of ten New York schoolchildren sued the New York Board of Education, challenging a law directing students to begin each day with the prayer, "Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessings upon us, our parents, our teachers and our country." No student was required to participate in the prayer reading. The Court held that state officials' drafting and leading a prayer in the public schools violated the Establishment Clause. The Court did, however, take pains to describe its holding as neutral and respectful toward religious belief in general. Writing for the majority, Justice Hugo Black explained:

> The history of man is inseparable from the history of religion. And perhaps it is not too much to say that, since the beginning of that history, many people have devoutly believed that, "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew, rather, that it was written to quiet well justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

In broader scope, the Court's decision in *Engel* laid the philosophical groundwork for the modern Establishment Clause "endorsement" test, which probes any state-sponsored relationship with religion and asks whether in creating such a relationship the state is effectively endorsing religion. Moreover, *Engel* first elucidated the concept of psychological "coercion," which courts have regularly used to strike down laws that are facially voluntary, but which the courts reason are, in effect, coercive due to the psychological pressure to conform.

***Abington School District v. Schempp*, 374 U.S. 203 (1963)**

In a case very similar to *Engel*, the parents of two Pennsylvania public high school students brought suit against the school district, challenging a Pennsylvania law that required the reading of at least ten Bible verses without comment at the opening of each school day. The law permitted a student to be excused from this reading upon parental request, but, as in *Engel*, this opt-out provision did not sway the Court. The Court said, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect, coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Again, as it had in *Engel*, the Court affirmed its respect for the power and dignity of religious belief, while overturning a law it found inimical to the First Amendment protection against the state establishment of religion. Once again articulating the doctrine of state neutrality toward religion, Justice Tom C. Clark wrote for the majority:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion the State is firmly committed to a position of neutrality.

***Sherbert v. Verner*, 374 U.S. 398 (1963)**

The state of South Carolina denied unemployment compensation to a Seventh-day Adventist because she declined to seek work on Saturday, her Sabbath. The Court held that the denial unconstitutionally infringed upon her free exercise of religion because she was required to forego the exercise of her faith in order to obtain a government benefit to which she was otherwise entitled. In the words of the Court:

> Here, not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The [lower court] ruling forces her 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.

The Court also held that South Carolina's policy of freely granting waivers to any state worker claiming a religious objection to working on Sunday while denying the waiver to one with a religious objection to working on Saturday violated the equal protection clause. "The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's statutory scheme necessarily effects."

***Epperson v. Arkansas*, 393 U.S. 97 (1968)**

An Arkansas statute prohibited "the teaching in its public schools and universities the theory that man evolved from other species of life." A teacher challenged the law, arguing that it violated the Establishment Clause. The Court said that through the law, "Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." According to the Court, "no suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens." Although recognizing the "State's undoubted right to prescribe the curriculum for its public schools," the Court held that the law violated the Establishment Clause because it "selects from a body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine." The Court said, "[The] First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

***Walz v. Tax Commission*, 397 U.S. 664 (1970)**

A property owner sued to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. The plaintiff contended that the exemptions indirectly required the plaintiff to make a contribution to religious bodies and thereby violated the religion clauses of the First Amendment. The Court upheld the constitutionality of the tax exemptions. The Court held that because the exemptions were granted to all houses of religious worship within a broad class of property owned by both religious and secular nonprofit organizations, the legislative purpose was thus not aimed at establishing, sponsoring or supporting religion. The Court also held that the exemptions did not create an excessive government entanglement with religion because the exemptions for religious organizations created far less of an involvement between church and state than would be created by the taxation of churches. The Court wrote:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

Walz is still the seminal case on the constitutionality of tax exemptions for religious organizations; however, the Court has subsequently clarified that *Walz* does not stand for the proposition that tax exemptions are *required* for religious organizations.

***Lemon v. Kurtzman*, 403 U.S. 602 (1971)**

The Court reviewed Pennsylvania and Rhode Island parochial aid statutes that provided public school teachers to parochial schools and subsidized their pay and provided parochial schools with various financial aids for textbooks and other non-religious instructional materials. The Court struck down most aspects of the plans, holding that the aid programs represented government participation in religious indoctrination of schoolchildren and that the state's need to monitor expenses for "religious" and "non-religious" purposes and to monitor teachers to ensure they were respecting their role as neutral on religion created an unconstitutional government entanglement with religion.

In *Lemon*, the Court first stated the most commonly applied test for a violation of the Establishment Clause. For a law to withstand the *Lemon* test, it (1) must have a legitimate secular purpose, (2) cannot have the primary effect of promoting or restricting

religion, and (3) cannot promote excessive government entanglement with religion. Applying this test to the facts in *Lemon*, the Court wrote:

> The merit and benefits of [parochial] schools ... are not the issue before us in [this case]. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn.

In recent years, the "primary effects" and "excessive entanglement" prongs of the *Lemon* test have been conflated and the *Lemon* test reduced to two prongs. However, the all-or-nothing standard applied by the early articulation of the test remains valid under the new articulation. Failure to satisfy a single prong of the test will render the law unconstitutional. See, for example, *Stone v. Graham* (1980), below (posting Ten Commandments did not have a secular purpose).

***Wisconsin v. Yoder*, 406 U.S. 205 (1972)**

Members of the Old Order Amish and the Conservative Amish Mennonite Church were convicted of violating Wisconsin's compulsory school attendance law (which required children to attend school until age 16) by declining to send their children to public or private school beyond the eighth grade. The Court reversed the convictions and affirmed the right of the Amish and Old Order Mennonites to provide a separate system of "continuing informal vocational education to their children designed to prepare them for life in the rural Amish community." The Court found that the state's interest in uniform compulsory school attendance did not override the rights of parents in the religious communities to direct and control the moral and religious upbringing of their children. See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) and *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (upholding "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it").

Heeding testimony that public high school education would threaten the very beliefs and way of life of the Amish and Mennonite families because it would inexorably alienate the children from their parents' religious and cultural views, the Court held that

"accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education [would] not impair the physical or mental health of the child or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."

Yoder is arguably at the shining zenith of Supreme Court religion cases. Since then, the Court has cast *Yoder* in a narrower light, limiting its scope to articulate respect for discrete and insular minorities only and not as a general right of all religious persons to be free from compulsory education laws or similar health and welfare statutes.

***Wooley v. Maynard*, 430 U.S. 705 (1977)**

After covering over the New Hampshire state motto, "Live Free or Die," on his vehicle license plate in an attempt to uphold his religious objection to symbolic idolatry, Mr. Maynard, a Jehovah's Witness, was charged with defacing the plate under New Hampshire criminal law and fined accordingly. Maynard was arrested two more times on the same charge. After his third citation, Maynard sought injunctive relief under federal law against any further state action. The Court held that the law forbidding persons from obscuring the motto violated the Free Speech Clause of the First Amendment. In the words of the Court:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so. We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.

***McDaniel v. Paty*, 435 U.S. 618 (1978)**

McDaniel was the converse case to *Torcaso v. Watkins* (1961, discussed above). The state of Tennessee, by statute, prevented ordained ministers from running for elective office. The Court unanimously struck down the law, finding that it violated the ministers' right to free exercise because it conditioned the right to seek public office upon giving up the right to exercise one's religious beliefs and vocation. Quoting the writings of James Madison and the Court's holding in *Sherbert v. Verner* (1963, discussed above), the Court held:

> The State is punishing a religious profession with the privation of a civil right. In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. [To] condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties…. The Free Exercise Clause categorically prohibits government from regulating, prohibiting or rewarding religious beliefs as such.

***Stone v. Graham*, 449 U.S. 39 (1980)**

The Court struck down a Kentucky statute mandating the posting of the Ten Commandments on every classroom wall, ostensibly for the purpose of "moral instruction." The issue before the Court was not the funding of the plaques containing the Ten Commandments—they were donated by private organizations—but rather the display of a text carrying such profound religious meanings in public schools. Applying the three-part *Lemon* test, the Court found that the Ten Commandments were primarily a religious document and that the posting of the Commandments separately and without context lacked a legitimate secular legislative purpose. In the words of the Court:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like…. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

***Widmar v. Vincent*, 454 U.S. 263 (1981)**

The members of a Bible club challenged the University of Missouri's exclusion of the club from the use of university facilities on the basis of the club's involvement in prayer, praise and Bible teaching. The Court held that the club could not be excluded. The Court reasoned that because the student meeting facilities were opened broadly to many diverse student organizations, a "limited public forum" had been created. The Bible club could not be excluded from the forum, the Court said, because 1) to do so would be to discriminate on the basis of the religious content of the club members' speech, and 2) no principled distinction could be made between religious worship, religious instruction and other forms

of religious speech. Writing for the Court, Justice Louis Powell, Jr., delineated the boundaries of the *Widmar* decision:

> The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

***Larson v. Valente,* 456 U.S. 228 (1982)**

A Minnesota tax statute purported to regulate and tax only charitable solicitations made by religious groups more than 50 percent of whose income was derived from nonmembers. The Unification Church brought suit, arguing that the statute was targeted at it alone. The Court agreed and struck down the statute, holding that it was a denominational preference enacted in violation of the Establishment Clause. The Court held:

> No state can pass laws which aid one religion or that prefer one religion over another. The government must be neutral when it comes to competition between sects. The First Amendment mandates governmental neutrality between religion and religion. The state may not adopt programs or practices which aid or oppose any religion. This prohibition is absolute.

***United States v. Lee*, 455 U.S. 252 (1982)**

An Old Order Amish employer sued the Internal Revenue Service, claiming that because his religious convictions prohibited him from accepting Social Security benefits or contributing to the Social Security system, he, and other Amish employers, were entitled to an exemption from the Social Security Act, which requires that employers register and withhold a percentage of income from all employees. The Court held that the government interest in administering the Social Security and tax programs was sufficiently compelling to override the free exercise right of the Amish. As the Court noted:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a

> matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

After the Court handed down its decision in *Lee*, Congress enacted an amendment to the Social Security Act providing an exemption from the Social Security Act for Old Order Amish and Mennonite believers.

***Marsh v. Chambers*, 463 U.S. 783 (1983)**

Citizens challenged the Nebraska legislature's practice of beginning each legislative session with an invocation by a state-employed chaplain. Declining to apply the *Lemon* test, the Court voted to uphold the practice, reasoning that opening legislative sessions with prayer is a historic tradition that is part of the civic culture of the nation. The Court noted that the First Congress hired a chaplain in 1789, only three days before it reached final agreement on the language of the First Amendment. Chief Justice Warren Burger wrote for the majority:

> [Historical] evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed [in *Zorach v. Clauson*], "[w]e are a religious people whose institutions presuppose a Supreme Being."

***Lynch v. Donnelly*, 465 U.S. 668 (1984)**

Pawtucket, Rhode Island, residents challenged the City of Pawtucket's inclusion of a crèche, or nativity scene, in the city's Christmas display. The display was located in a park, owned by a nonprofit organization, in the heart of the shopping district. Applying the *Lemon* test, the Court held that the city's inclusion of the nativity scene in its annual Christmas display did not violate the Establishment Clause. The Court reasoned that the crèche, when placed in immediate proximity to other secular symbols of the holiday season,

did not tend to endorse religion over non-religion. Justice Warren Burger wrote for the Court:

> Of course the crèche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause. It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution. . . . Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

***Wallace v. Jaffree*, 472 U.S. 38 (1985)**

The father of three elementary-school children challenged an Alabama statute authorizing schools to set aside one minute at the start of each school day "for meditation or voluntary prayer." The statute amended an earlier statute that had authorized a moment of silence "for meditation." The Court held that the statute failed the *Lemon* test because it served no "secular purpose" not already served by the meditation statute. The Court noted that the bill's sponsor stated that the bill was "an 'effort to return voluntary prayer' to the public schools." The Court also held that the bill was not a permissible accommodation of religion because "there was no governmental practice impeding students from silently praying for one minute at the beginning of the school day." Justice Sandra Day O'Connor wrote a concurrence in which she argued that simple "moment of silence" statutes were constitutional because "a moment of silence is not inherently religious [and because] a pupil who participates in a moment of silence need not compromise his or her belief."

***Aguilar v. Felton*, 473 U.S. 402 (1985)**

In Title I of the Elementary and Secondary School Act of 1965, Congress authorized financial assistance to both public and private schools to meet the educational needs of students living in low-income areas. New York provided these Title I services,

including guidance counseling and remedial reading and math courses, by permitting public school employees to volunteer to teach in the parochial schools. The teachers were "directed to avoid involvement with religious activities [and] to bar religious materials" from their classrooms. The teachers were supervised by a system of unannounced visits by public school officials.

The Court held that the program violated the Establishment Clause. The Court reasoned that because "the aid is provided in a pervasively sectarian environment [and] because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." However, the Court held that this very inspection "inevitably results in the excessive entanglement of church and state." Justice William H. Rehnquist dissented, writing that the Court "[took] advantage of the 'Catch-22' paradox of its own creation, whereby aid must be supervised to ensure no entanglement, but the supervision itself is held to cause an entanglement." This decision was overturned twelve years later in *Agostini v. Felton* (discussed below).

***Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)**

The state of Washington provided vouchers to blind residents who wished to pursue post-secondary vocational education. However, the state refused to provide a voucher to Witters because he intended to use the voucher to attend a Christian college and become a minister. Washington argued that the Establishment Clause forbade it from paying for Witters' religious education. The Court held that the Establishment Clause would not be violated by the provision of the scholarship to Witters. The Court reasoned that because the payments would be made "directly to the student, who transmits it to the educational institution of his or her choice, … any aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." The Court said that this was a generally available program that:

> creates no financial incentive for students to undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals

> means that the decision to support religious education is made by the individual, not by the State.

Importantly however, the Court's decision in *Witters* was not final. The Court remanded the case to Washington's Supreme Court to determine whether the voucher could survive the "far stricter dictates" of the Washington constitution. A provision of the Washington constitution required that "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." On remand, the Washington Supreme Court held that the use of state funds to subsidize Witters' seminary education was a violation of the Washington constitution.

***Bowen v. Roy*, 476 U.S. 693 (1986)**

The Court held that the Free Exercise Clause did not require the government to provide a Native American father with an exemption from a federal statute requiring applicants for certain welfare benefits to provide the states with Social Security numbers and requiring the use of the numbers in administering the programs. The father contended that taking a Social Security number for his daughter, "Little Bird of the Snow," and the use of that number by the government violated his religious beliefs. The Court held that the Free Exercise Clause was not infringed by the government's use of a Social Security number for "Little Bird of the Snow." The Court explained:

> Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter [to obtain welfare benefits] than he could on a sincere religious objection to the size or color of the Government's filing cabinets. Never to our knowledge has the Court interpreted the First Amendment to require the government *itself* to behave in ways that the individual believes will further his or her spiritual development. The Free Exercise Clause affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

The Court was not faced with the question of whether or not a person could be required to apply for a Social Security number, but a majority of the Court indicated that they would have held that the Free Exercise Clause required that persons could not be forced to apply for the numbers.

***Goldman v. Weinberger*, 475 U.S. 503 (1986)**

A Jewish airman challenged an Air Force regulation prohibiting the wearing of headgear indoors, arguing that as applied to his wearing of a yarmulke the regulation violated the Free Exercise Clause. The Court held that the regulation was constitutional because it was justified by the military's interest in uniformity and discipline. The Court reasoned:

> Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

After the Supreme Court released the *Goldman* decision, Congress passed a law granting a religious exemption to the Air Force regulation in question.

***Edwards v. Aguillard*, 482 U.S. 578 (1987)**

A Louisiana statute required public schools to teach "creation science" whenever they taught the theory of evolution, and vice versa. Applying the *Lemon* test, the Court held that the law violated the Establishment Clause because Louisiana had identified "no clear secular purpose" for the statute. Rather the Court concluded that "the preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." The Court rejected the argument that the statute protected academic freedom because it did not enhance "the freedom of teachers to teach what they will." Moreover, the Court quoted the statements of the sponsor of the bill stating that his "preference would be that neither [creationism nor evolution] be taught."

The Court also said that Louisiana's stated goal of insuring "fairness" in the curriculum was not furthered by the statute because it established a "discriminatory preference for the teaching of creation science and against the teaching of evolution." The Court noted that the statute required the development of curriculum guides for creation science and supplied resources for the teaching of creation science, but did not provide similar resources for evolution. Moreover, the statute said that only "creation scientists"

could serve on the panel charged with supplying the resource services, and it prohibited school boards from discriminating against those who taught creation science, but did not provide similar protection for those who taught evolution.

***Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987)**

A janitor at a gymnasium operated by the Mormon Church was fired when he failed to qualify for a certificate stating that he was a member of the church qualified to attend its temples because he observed the church's standards involving church attendance, tithing and abstinence from coffee, tea, alcohol and tobacco. He challenged his termination under Title VII, arguing that Title VII's exemption of religious organizations from its prohibition against discrimination in employment on the basis of religion violated the Establishment Clause. The Court held that the Title VII exemption for religious organizations was constitutional, because the exemption was a permissible accommodation of religion. Although the Court said that the religious organization exemption was not required by the Free Exercise Clause, the exemption for religious organizations served the secular legislative purpose of minimizing governmental interference in the decision-making process of religions. The Court also held that the exemption did not have the principal or primary effect of advancing religion. The Court said:

> [A] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz* [1970, discussed above], "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

The Court concluded that any advancement of religion was attributable to the church, and not to the government. The Court also said that the fact that the exemption singled out religious organizations for special consideration did not make it invalid. "[Where], as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."

***Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989)**

Frazee challenged the Illinois Department of Employment Security's refusal of unemployment compensation to him because he refused to work on Sunday. Frazee asserted that "as a Christian, he could not work on the Lord's Day," but he did not claim to be a member of any particular church, one of whose tenets was a prohibition on Sunday work. The sincerity of Frazee's beliefs was not questioned. The Court held that religious adherents did not need to have cognizable affiliation with any particular religious group or tradition to obtain protection under the Free Exercise Clause. Justice Byron White, writing for the majority, articulated the extent of free exercise protection for individuals:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

***County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)**

The Court addressed the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a crèche depicting the Christian nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse. The second was an 18-foot Hanukkah menorah or candelabrum, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. At the foot of the tree was a sign bearing the mayor's name and containing text declaring the city's "salute to liberty." The ACLU and local residents sued to enjoin the displays, arguing that they violated the Establishment Clause.

The Court held that the nativity display was an unconstitutional endorsement of religion, but the outdoor display of the menorah and Christmas tree passed constitutional muster. The Court reasoned that the display of the menorah alongside the Christmas tree, which the Court considered a secular symbol, eliminated any perceivable endorsement of religion, but that the nativity scene, displayed with a sign promoting the traditional Christian understanding of Christmas ("Glory to God in the Highest"), constituted an unconstitutional endorsement. The Court wrote:

> [G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch* [1984, discussed above] and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the crèche in this context, therefore, must be permanently enjoined.

***Hernandez v. Commissioner*, 490 U.S. 680 (1989)**

Three members of the Church of Scientology sued the IRS, claiming that the Church of Scientology's practice of "auditing" an individual's psyche for negative energy did not constitute a legally cognizable *quid pro quo* when considering the taxable status of private contributions to religious organizations. The Court ruled against petitioners, holding:

> [T]hese payments were part of a quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions. The Church established fixed price schedules for auditing and training sessions in each branch church; it calibrated particular prices to auditing or training sessions of particular lengths and levels of sophistication; it returned a refund if auditing and training services went unperformed; it distributed "account cards" on which persons who had paid money to the Church could monitor what prepaid services they had not yet claimed; and it categorically barred provision of auditing or training sessions for free. Each of these practices reveals the inherently reciprocal nature of the exchange.

The Court also dismissed petitioners' argument that the practice of auditing was inherently religious and thus subject to protection from excessive entanglement with government under the Establishment Clause. The Court wrote:

> It may be that a consequence of the *quid pro quo* orientation of the "contribution or gift" requirement is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fundraising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions.

***Texas Monthly v. Bullock*, 489 U.S. 1 (1989)**

Texas Monthly Magazine, a secular publication, challenged a Texas statute that granted a sales tax exemption to religious publications alone, arguing that it violated the Establishment Clause. In a deeply divided opinion, the Court held that the statute violated the Establishment Clause. Justice William Brennan, Jr., wrote for the plurality:

> Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community. This is particularly true where, as here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths. It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors.

***Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)**

Relying on the Equal Access Act, a group of high school students challenged the high school's policy of forbidding their Bible club to meet on campus after instructional time. The Equal Access Act prohibited any public secondary school that receives federal financial assistance and that permits one or more noncurriculum-related student groups to meet on school premises from denying equal access to students who wish to conduct such meetings because of the religious, political, philosophical or other content of their speech. The Court held that the Equal Access Act did not violate the Establishment Clause and that the Act guaranteed the Bible club equal access to school facilities with other extracurricular clubs. The Court rejected the notion that school districts would engage in promoting religion by allowing Bible club students to promote their club on campus. Justice Sandra Day O'Connor wrote for the plurality that "the logic of *Widmar* [1981, discussed above] applies" to the Equal Access Act. O'Connor reasoned that prohibiting discrimination based

on the content of speech was a permissible secular purpose under the *Lemon* test and that it was unlikely that the Equal Access Act would cause students to perceive a government endorsement of religion:

> There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis…. The proposition that schools do not endorse everything they fail to censor is not complicated.

***Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990)**

Smith was a member of the Native American Church, which has as a part of its religious ritual the consumption of peyote. Peyote was a controlled substance under Oregon law, and its possession was a criminal offense. Smith was fired from his job at a private drug rehabilitation clinic because he ingested peyote as part of his church's ritual. He was then denied unemployment benefits because he had been discharged for work-related misconduct. Smith argued that the criminal ban on peyote consumption was unconstitutional as applied to his religious consumption and that he was therefore entitled to unemployment compensation. The Court, per Justice Antonin Scalia, reassessed its history of Free Exercise Clause jurisprudence and concluded that the Free Exercise Clause does not require the government to provide religious adherents with exemptions from religion-neutral laws of general application. The Court held that religion-neutral laws of general application need not be narrowly tailored to achieve some compelling state interest, but rather are constitutional so long as they bear a rational relationship to some legitimate government interest. [See *City of Boerne v. Flores*, 1997, discussed below, where the Court addressed an attempt by Congress to overturn this decision.]

The Court distinguished between laws affecting "belief and profession" on the one hand and those affecting "the performance of (or abstention from) physical acts" on the other, holding that although laws "cannot interfere with mere religious beliefs or opinions, they may with practices" [*Reynolds*, 1878, discussed above]. The Court gave as examples of physical acts often related to the exercise of one's religion: "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." It held that although a state could not ban such actions or abstentions only when they were engaged in for religious

reasons, a neutral and generally applicable law that has the incidental effect of requiring an act or abstention forbidden by a person's religious beliefs was not prohibited by the Free Exercise Clause.

Distinguishing *Sherbert v. Verner* (1963, discussed above), Justice Scalia said that, unlike the present case, *Sherbert* did not involve a law that was generally applicable, but rather one that involved a system of "generalized exceptions" to be applied by an unemployment hearings officer. Distinguishing *Wisconsin v. Yoder* (1972, discussed above), Scalia said that *Yoder* involved a "hybrid right"—the right of parents to direct the religious upbringing of their children as well as the right to the free exercise of religion—that may only be overcome by a compelling government interest. After the *Smith* decision was released, Congress enacted the "Religious Freedom Restoration Act" (RFRA), requiring courts to uphold government actions that substantially burdened the free exercise of religion only if those actions were "the least restrictive means" available to achieve a "compelling government interest." The Court held that RFRA was unconstitutional as applied to state and local government actions in *City of Boerne v. Flores* (1997, discussed below).

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

Parents of a middle school student challenged the school district's practice of inviting a member of the local clergy to offer invocation and benedictory prayers at the school's annual commencement ceremony. The Court held that the practice was unconstitutional. Justice Anthony Kennedy, writing for the Court, stated that the school's practice constituted "coercion" into a group religious exercise. Although the school did not condition receipt of a diploma upon graduation attendance, the Court held that because of subtle coercive pressures in the secondary school environment, student participation in commencement ceremonies was "in a fair and real sense, obligatory." The Court reasoned:

> [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.... [For] many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.... What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. [We] think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.

***Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)**

A Hialeah, Florida, ordinance banned the "ritual slaughter" of animals but exempted virtually all forms of animal slaughter, including those for kosher purposes, except those practiced by members of the Santeria religion. Members of a Santeria church sued the city, arguing that the law targeted their animal sacrifices in violation of the Free Exercise Clause. Quoting pejorative comments made by numerous city officials during the legislative proceedings before the enactment of the ordinance suggesting that the Santeria sacrifices were the object of the ordinances, and citing the use of the terms "ritual" and "sacrifice" in the ordinance, as well as evidence that the law had no appreciable applicability beyond proscribing Santeria sacrifices, the Court agreed that the City of Hialeah had intended Santeria worshippers to bear the prohibitive weight of the ordinance. Thus, the Court held that the law was neither neutral nor generally applicable and that it therefore was only constitutionally permissible if it was narrowly tailored to achieve a compelling state interest. The Court said that the ordinance was not supported by a compelling state interest or narrowly tailored to achieve those interests because it restricted only conduct protected by the First Amendment while leaving unrestricted other conduct producing the same types of alleged harm. Thus, the Court held that the ordinance violated the Free Exercise Clause.

***Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993)**

The parents of a deaf child who attended a Catholic school challenged their local public school district's refusal to allocate funds to provide the child an interpreter under the Individuals with Disabilities in Education Act (IDEA). The school district reasoned that the provision of an interpreter to a parochial school student would be an endorsement of religion and thus violate the Establishment Clause. Citing the neutral application of the IDEA and its general interest in benefiting all disabled students, the Court held that the Establishment Clause would not be violated by the school district's provision of the interpreter. Chief Justice William H. Rehnquist, writing for the majority, stated:

> The service in this case is part of a general government program that distributes benefits neutrally to any child qualifying as disabled under the IDEA, without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of individual parents' private decisions.

***Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)**

An evangelical church group that had been excluded from showing a "Focus on the Family" film series on Christian parenting on public school property sued the school district on free speech grounds, arguing that the Free Speech Clause of the First Amendment required that their group should be granted equal access to facilities that the district had made generally available to other community groups. The school district argued that a New York law forbidding the use of educational facilities for "religious purposes" required it to exclude the church group, but the Court disagreed. In an unusual display of solidarity, the Court unanimously held that the district's exclusionary policy targeted the church group's religious viewpoint and therefore violated the Free Speech Clause. In so holding, the Court discounted the school district's claim that permitting the church group to use its facilities violated the Establishment Clause:

> We have no ... trouble ... disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property has repeatedly been used by a wide variety of private organizations. Under these

> circumstances ... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

***Board of Education of Kiryas Joel School District v. Grument*, 512 U.S. 687 (1994)**

The village of Kiryas Joel in New York is an enclave of Satmar Hasidim, a type of Orthodox Judaism whose members "make few concessions to the modern world and go to great lengths to avoid assimilation." The village fell within a nearby school district until the New York legislature created a special school district along village lines. The Court held that the law creating the special school district violated the Establishment Clause. The Court recognized that a state could "accommodate religious needs by alleviating special burdens" on a religious group. However, the majority said that its concern was that Kiryas Joel had not received its authority "simply as one of many communities eligible for equal treatment under a general law." Thus, the Court held that the creation of the separate school district violated the Establishment Clause because it "singles out a particular religious sect for special treatment" in violation of the principle that "neutrality as among religions must be honored."

***Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995)**

The University of Virginia provided funds to third party contractors to cover the printing costs of student publications. However, the university refused to fund a Christian student publication because of its religious content. The Court held that the University of Virginia violated the viewpoint neutrality requirement of the Free Speech Clause by refusing to fund a Christian student publication on the same basis as other secular publications. The Court's majority held that religion is not a discrete, separate subject matter that could be excluded from a limited public forum, but a viewpoint from which a number of different topics could be addressed. The Court said:

> We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse…. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.

Later in the opinion, the Court continued:

> To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.

***Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753 (1995)**

The Ku Klux Klan erected a bare Latin cross in the public square fronting the seat of government in Columbus, Ohio, taking advantage of the public forum the city had established. A citizen challenged the presence of the cross as a violation of the Establishment Clause. The Court held that permitting the Klan to place the cross on the public square did not violate the Establishment Clause because the square was a traditional public forum and the placement of the cross constituted purely private speech. Justices Sandra Day O'Connor, John Paul Stevens and Stephen Breyer said that even purely private displays on public property could violate the Establishment Clause if "the community would think that the [State] was endorsing religion." However, they concluded that this cross, at whose base the Klan had posted a sign claiming the religious symbol as an expression of their private faith, would not result in a perception of endorsement.

***City of Boerne v. Flores,* 521 U.S. 507 (1997)**

Boerne involved a challenge to the constitutionality of the Religious Freedom Restoration Act (RFRA), which had been passed by Congress in response to the Supreme Court's *Employment Division v. Smith* decision [1990, discussed above]. RFRA sought to reinstate the "least restrictive means" to accomplish a "compelling state interest" standard to justify government actions that substantially burdened the free exercise of religion. The Court struck down RFRA as it applied to state and local government actions on the basis of the separation of powers doctrine. The Court held that it was a bald attempt by Congress to impermissibly "overrule" the Court on a matter within the Court's exclusive authority, the standard of review for a constitutional violation. Further, the Court said, the

Fourteenth Amendment was not enacted to protect religious minorities, and thus a law in furtherance of Congress's power under that amendment to secure equal protection was beyond Congress's authority.

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

***Agostini v. Felton*, 521 U.S. 203 (1997)**

In *Agostini*, the Court reviewed a New York program that permitted public school teachers to assist in teaching Title I remedial classes in religious schools. In *Aguilar v. Felton*, decided in 1985, the Court had previously held that this program violated the Establishment Clause. In *Agostini*, the Court said that in the twelve years since *Aguilar* was decided it had abandoned the presumption that public school employees placed on parochial school grounds would inevitably inculcate religion or that their presence would create a symbolic union between the government and religion. The Court also recognized that in *Witters* (1986) and *Zobrest* (1993) (both discussed above), it had departed from its rule that all government aid that directly aids the educational functions of religious schools violates the Establishment Clause. Furthermore, because the Court had abandoned the presumption that public school employees would impermissibly inculcate religion simply because they taught in a parochial school, the Court held that pervasive monitoring of the public school employees was not required. The Court stated:

> To summarize, New York City's [school aid] program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program

> containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.

In evaluating the program under the *Lemon* test, the Court also combined the "excessive entanglement" and "effect" prongs of the test, saying that the inquiry into whether a statute caused an excessive entanglement between government and religion was "an aspect of the inquiry into a statute's effect."

***Mitchell v. Helms*, 530 U.S. 793 (2000)**

Chapter 2 of the Education Consolidation and Improvement Act provided funds to the states, which in turn provided funds to local education agencies that then lent educational materials and equipment to both public and private schools to be used in "secular, neutral, and nonideological programs." Justice Clarence Thomas, writing for the plurality, distinguished between government-sponsored religious indoctrination and private religious indoctrination supported by government via a neutral and broadly applicable program that included many beneficiaries, both religious and secular. Moreover, Justice Thomas emphasized that the program provided no incentive to undertake religious indoctrination because the aid was made available on the basis of neutral, secular criteria that neither favor nor disfavor religion.

Justices Sandra Day O'Connor and Stephen Breyer concurred in the judgment but expressed alarm at the breadth of the plurality's reasoning. They characterized the plurality's rule as stating that government aid to religious schools, whether direct or indirect, "does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content." Although they agreed that neutrality was important to the Establishment Clause analysis, they criticized the plurality for promoting neutrality "to a single and sufficient test for the establishment constitutionality of school aid." Nevertheless, they concurred in the result, arguing that the program was similar in all important respects to that in *Agostini* (1997, discussed above). In addition to the factors relied upon by the plurality, O'Connor and Breyer noted that "no Chapter 2 funds ever reach the coffers of religious schools," "any evidence of actual diversion [of the materials for religious indoctrination] is *de minimis*," and "the program includes adequate safeguards."

***Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)**

A Texas school district permitted the student body of each high school to vote on whether to "solemnize" football games with a "message and/or invocation." If the student body voted to have such a message or invocation, it would then hold a separate election to select the student who would deliver the message or invocation. The Court held that the scheme was in fact designed to perpetuate the football game prayers that had been traditional before *Lee v. Weisman* (1992, discussed above) and that the level of school involvement both in affording the students the decision to pray and in the provision of a platform for that prayer was constitutionally impermissible. The majority wrote:

> Th[e] policy [cannot] survive ... because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. [T]he election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently non-governmental subject of religion to a majoritarian vote, a constitutional violation has occurred.

The Court also held that the policy resulted in an unconstitutional endorsement of religion. The Court reasoned that in the context in which the message was delivered, a reasonable observer would perceive it as expressing the views of the majority of the student body, delivered with the approval of the school administration. Moreover, the Court held that the policy coerced at least those students who were required to attend the games, such as football players, band members and cheerleaders, into participating in the religious practice.

***Good News Club v. Milford Central School*, 533 U.S. 98 (2001)**

A New York school district permitted various organizations to meet in school facilities after school hours and conceded that, in doing so, it had created a limited public forum. Nevertheless, the school refused to permit the Good News Club, a Christian youth club for children between 6 and 12 years old, from meeting on school premises, saying that

the decision was justified by the need to avoid an appearance of endorsing religion pursuant to the Establishment Clause. The Court held that the school district's exclusion of the Good News Club based on its religious nature was unconstitutional viewpoint discrimination. The Court said, "[W]e can see no logical difference in kind between the invocation of Christianity by the [Good News] Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons [about morals and character development]." Thus, the Court rejected the argument that something that is "quintessentially religious ... cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."

The Court also held that the Establishment Clause did not require the school district to prevent the Good News Club from meeting on school grounds during after-school hours. The Court noted that the club was one of many organizations allowed to use the facilities. The Court also said that although it had previously expressed concern about the impressionability of elementary age children, such a concern would not "foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."

***Watchtower Bible and Tract Society of New York v. Village of Stratton*, 122 S.Ct. 2080 (2002)**

The Village of Stratton, New York, promulgated an ordinance making it a misdemeanor for "canvassers" to "[go] in and upon" private residential property to promote any "cause" without obtaining a permit from the mayor by filling out a registration form including the canvasser's name, address, employer or organization and purpose. The Watchtower Bible and Tract Society, a group of Jehovah's Witnesses which publishes and distributes religious materials, alleged that the ordinance violated their First Amendment rights to freedom of speech, freedom of religion, and freedom of the press.

The Supreme Court held that the ordinance was unconstitutional as applied to religious proselytizing, anonymous political speech, and the distribution of literature. The Court recognized that the village had an important interest in preventing fraud and burglary and protecting residents' privacy. The Court indicated that the village's interest in preventing fraud might justify the ordinance if it applied only to commercial activities and to the solicitation of funds. However, the Court held that the village's interest in preventing fraud did not support the ordinance's application to religious proselytizing, the distribution of literature, and anonymous political speech. The Court also held that the village's stated interest in preventing crime could not realistically be advanced by requiring canvassers to pre-register. Moreover, the village's interest in protecting residents' privacy was already achieved by an unchallenged portion of the ordinance permitting residents to place "No Soliciting" signs in front of their homes.

***Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002)**

Cleveland's public schools were among the worst performing schools in the nation. The state of Ohio responded to this crisis by creating a voucher program granting parents who could establish financial need a monetary stipend to be used to enroll their children in any participating private school in the Cleveland area. Eighty-two percent of the participating private schools were religiously affiliated, and 96 percent of the parents who received the state stipend used the state aid to send their children to religiously affiliated schools. A group of Ohio taxpayers sought to enjoin the program, arguing that it provided religious schools with direct financial support in violation of the Establishment Clause. The Court upheld the voucher program. It was undisputed that the program was enacted for a valid secular purpose—providing educational assistance to children in a demonstrably failing public school system. The Court held that the "effects" prong of the *Lemon* test was also satisfied because the program gave the parents of qualifying students a genuine choice independent from government interference or preference. The Court reasoned:

> Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.
>
> If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.

Further, the fact that the vast preponderance of parents elected to send their children to religious schools did not bother the Court's majority. Because both secular and religious schools were included in the pool of participating schools, and because Ohio made available to parents other secular options for state educational aid outside the voucher system, the Court held that the program did not violate the Establishment Clause. Chief Justice William H. Rehnquist wrote for the majority, "The constitutionality of a neutral

educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."

***Locke v. Davey*, 124 S.Ct. 1307 (2004)**

The state of Washington created a "Promise Scholarship" program intended to assist high-achieving students with limited financial resources to attend college. Although recipients could use the scholarship to attend private religious colleges as well as public institutions, the scholarship program specifically prohibited students from using the scholarship to seek a degree in theology.

The Supreme Court held that the state of Washington would not violate the Establishment Clause if it permitted Davey to use the scholarship to pursue a degree in theology. However, in response to Davey's First Amendment claims, the Supreme Court said that the state did not violate Davey's rights under the Free Exercise, Free Speech or Equal Protection Clauses when it prohibited him from using the scholarship for this purpose. A provision of the Washington state constitution provided:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

The Supreme Court held that the state of Washington had the right to impose stricter limitations on the use of government funds for religious purposes than those imposed by the Establishment Clause of the federal Constitution so long as it was not "hostile" to religion. The Court held that the mere denial of the use of the scholarship for religious training was not hostile toward religion but was simply the state's choice "not to fund a distinct category of instruction."

The Court was careful to note that the Washington constitutional amendment at issue was not a "Blaine Amendment," the term for a number of late nineteenth century state constitutional amendments banning aid to religion that followed a failed attempt to place such an amendment in the federal Constitution. Critics of these "Blaine Amendments" have charged that they were blatantly anti-Catholic.