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The Constitution of Religious Liberty:
Religion, Power, and the Birth of the Secular Purpose Test, 1844-1971

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Abstract

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By Justin J. Latterell

This dissertation analyzes antecedent forms of a legal doctrine known as the "secular purpose test" as a case study in secularization theory. The primary focus is on cases argued in the U.S. Supreme Court and lower courts of constitutional review between 1844 and 1971. Constitutional law contributes to the process of separating the social spheres of government and religion, and specifying distinct forms of organization, moral understanding, reasoning, and imagination for each sphere. The secular purpose test is a controversial standard of constitutional review that U.S. courts presently use to evaluate religious liberty claims pursued under the First Amendment's Establishment Clause. This dissertation describes the test's historical and conceptual underpinnings, its implications for the differentiation of religious and legislative spheres, and its potential effects on the forms and functions of religious expression in legislative spheres. The secular purpose test was first introduced in 1963. It conflated the Supreme Court's conclusion, in previous cases, that "secular education" served legitimate "public purposes" into a blunt requirement that laws must have a "secular legislative purpose" in order to pass constitutional review under the Establishment Clause. The secular purpose test subsequently displaced longstanding methods of constitutional review by which courts had measured the purposes of contested laws not in terms of their secularity, as such, but in terms of the specific powers of legislative bodies to promote a range of social goods, or legislative ends. This innovation yields a novel form of functional and institutional differentiation between religious and legislative spheres via constitutional law, rendering legislative spheres definitively secular, and implicitly privatizing religious moral norms and idioms. As such, the secular purpose test forestalls potentially valuable forms of legislative and moral discourse between religiously and non-religiously diverse constituencies.

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J. Latterell
September 25, 2014
Atlanta, GA
Ps. 28: 6-7

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Preface

Notes on an Address from David Josiah Brewer[1]

In 1897, David Josiah Brewer, a U.S. Supreme Court Justice, delivered an address to the graduating class of Yale Divinity School. Brewer's speech was entitled, "The Pew to the Pulpit," and it offered a layperson's perspective on the changing forms and functions of the clergy and of religion in American society. Brewer is better known among scholars of religion and law for his description of the United States as a "Christian nation" in the Supreme Court's ruling in *Holy Trinity v. United States* (1892). In his address to the Yale Divinity School, however, Brewer sounds much like a contemporary theorist of secularization describing a rapidly changing society to the nation's newest clergymen. "[T]he great law of labor and business and professional life to-day is specialty," he declared:

> The specialist is the successful man. And this law of specialization affects the ministry. No longer can the minister pose as one possessed of all information and entitled to control outside the limits of his special work. The moment he steps into the domain of education, and says 'I know what is best therein, I can decree the limits beyond which science may not go, and no man must be permitted to teach unless he has passed through the gateway of the divinity school'; the moment he enters the arena of business life and says, 'I understand all about bonds and stocks and railroads, and I have a right to determine what is right and what is not'; the moment he presents himself in city hall, or where the legislature of a state is convened, or beneath the great dome of the Capitol where Congress meets to determine the welfare of the nation, and assumes to say that 'because I am a minister I have a right to prescribe the terms, the limits and the character of legislation, city, state or national,' *that* moment the common sense of the community says to him most emphatically, 'go back to your pulpit and leave matters of education and business and legislation to those who are trained therefor.' […] And if in the future the ministry is to remain a welcome and acknowledged power it can do so only as it stays in the pulpit. The moment it

[1] As adapted from opening remarks delivered by the author at the dissertation defense, Sept. 25, 2014.

> goes outside of that, it jostles with everybody, and has no right to complain if everybody gives it a kick.[2]

Brewer's address is relevant to this study because it highlights important questions about the differentiation of religious and other social spheres, and about how the boundaries between those spheres are defined and enforced. Brewer suggested the clergy shouldn't venture beyond the pulpit into other spheres of social life, and that they should expect a kick if they did. One of the main goals of my dissertation is to think about whether, and to what extent such a kick has had the force of law behind it, not just with respect to the Christian clergy, but with respect to other religions and other aspects of religion, as well. Because the extent to which constitutional law allows or disallows, encourages or discourages, validates or invalidates certain forms of religious expression in legislative spheres affects not only the substance of laws, but also the manner in which citizens and legislators debate about the social and moral goods that are at stake therein.

One of the fundamental premises of this dissertation is that constitutional law functions as a carrier of secularization, and not merely as a static model of church-state separation and unfettered religious liberty. Constitutional law is not simply a set of legal texts. It is also a semi-choreographed, semi-scripted manner of performing, and inquiring into the nation's basic legal norms and narratives. To say that constitutional law is a carrier of secularization, then, is to say that it contributes its own dynamic to the processes of separating and defining the spheres of government and religion, and specifying distinct forms of organization, moral understanding, reasoning, and

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[2] David Josiah Brewer, *The Pew to the Pulpit: Suggestions to the Ministry from the Viewpoint of a Layman* (New York: Fleming H. Revell, 1897).

imagination for each sphere.[3] Whether American courts have discovered, as it were, or merely constructed the implications of the Constitution for how Americans act and interact in society, constitutional law, as a matter of fact, has done more than merely enforce a "wall of separation" between church and state. Very rarely in the field of religious studies do we find scholarship that carefully attends to the ways in which law, and the interpretation of law, shapes religious beliefs, practices and institutional forms. This dissertation is an attempt to look beyond the weighty, but relatively superficial questions about things like whether prayer should be allowed in public schools, or whether Sunday laws violate the Establishment Clause. Instead, I focus on understanding the Court's basic premises and methods for differentiating religious and legislative spheres, and for mediating practical and conceptual relationships between those spheres.

So, constitutional law is a part and a product of the differentiation, specialization, *and* re-integration of social spheres in modern societies. In the United States, we can look to courts as agents in these processes; we can also look to courts' rulings and opinions for evidence that such processes are occurring – both in the law and in pockets, at least, of society at large. Constitutional law shapes religious and legislative spheres by defining and delimiting what people may and may not do under the auspices of religion, and in their capacity as lawmakers. The first six chapters of the dissertation provide snapshots of American courts doing just that.

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[3] This conception of constitutional law as a "carrier" of secularization builds on the work of José Casanova. See José Casanova, *Public Religions in the Modern World* (Chicago and London: The University of Chicago Press, 1994). The term "carrier" typically refers, in the field of sociology, to classes or groups of persons whose distinctive acts, ideas and institutions constitute (or catalyze) the emergence of particular social forms. One might say, therefore, that the various litigants, litigators and judges (and perhaps others) who participate in constitutional case law function as a carrier of secularization. But it is hard to imagine that such a hodgepodge collection of otherwise unrelated persons – especially the litigants themselves– can be described even very roughly as a discrete social class or strata.

What we see in early cases like *Vidal v. Girard's Executors* (1844)*, Hennington v. Georgia* (1892)*, and Bradfield v. Roberts* (1899) is a basic conception of the legislative sphere as functionally and institutionally differentiated from the sphere of religion – or at least from the sphere of sectarian religion. But we also find that the law in these cases allowed for a considerable degree of moral integration between religious and legislative spheres, such that legislatures could legitimately pursue only a limited set of legislative ends, by a limited set of legislative means, but could do so on the basis of religious or non-religious moral premises and rationales. At the heart of the courts' method in these cases was, first, to inquire into the enumerated or presumed powers of specific legislative bodies – powers that were often defined in terms of a limited set of legislative ends – and second, to apply an evolving set of religious liberty norms as limits on those powers.

It's important to acknowledge that legislatures in these early cases typically had no power to "do" religion proper – or, at least, to do more than recognize or acknowledge the religion(s) of the people in non-sectarian ways. But the law did allow citizens and legislators to bring their "religious" beliefs, identities, idioms and values into the legislative sphere, such that extra-political norms could be engrafted into laws and public policies so long as such laws did not impose overtly religious duties. This approach presented its fair share of problems, especially given the disproportionate representation of certain demographic groups in most legislatures. But this early method for differentiating religious and legislative spheres was noteworthy for the fact that, at least in theory, it allowed for the normative and critical integration of citizens' religious and political identities, and for the normative regulation of religious beliefs and practices, even as it protected the sphere of religion, in limited ways, from legislative intrusion.

There are a lot of moving parts, here. Part of what I'm trying to get at is that the law protected a private sphere of religion from legislative interference, even as it allowed for the participation of religious persons, *qua* religious persons, in legislative discourse.

This is what changes, or at least becomes more muddled, with the introduction of the secular purpose test in the 1960s. Whereas before the cases of *Abington v. Schempp* and *Lemon v. Kurtzman,* American courts conceived of legitimate legislative purposes primarily in terms of the limited set of legislative ends specific to a given legislative body, after *Abington* and *Lemon* courts increasingly conceived of legitimate legislative purposes in terms of secularity, as such. This means that, instead of asking whether a law serves public health purposes, for example, courts first ask whether a law challenged under the Establishment Clause serves a "secular" purpose. Some forms of the secular purpose test overlap significantly with earlier courts' methods for evaluating legislative purposes. And the different forms of the secular purpose test, of course, have different implications for the forms and functions of religion in legislative discourse. Taken together, however, the different versions of the secular purpose test that courts have used in recent years reconceive of legislative spheres in significant ways – namely as a definitively secular sphere in which legislators' religious motives and moral rationales are irrelevant at best, and constitutionally suspect at worst.

Of course, the great majority of my dissertation is devoted to the antecedent forms of legislative purpose inquiries that were applied in early cases, and to the jurisprudential shifts that led to the introduction of the secular purpose test – not to the secular purpose test directly. It is to these cases that we now turn.

Introduction

Secularization and the Constitution of Religious Liberty

> *The theory of secularization should also be complex enough to account for the historical 'contingency' that there may be legitimate forms of 'public' religion in the modern world, which have a political role to play which is not necessarily that of 'positive' societal integration; that there may be forms of 'public' religion which do not necessarily endanger modern functional differentiation; and that there may be forms of 'public' religion which allow for the privatization of religion and for the pluralism of subjective religious beliefs…Indeed, it is only by questioning the liberal private-public distinction as it relates to religion, and by elaborating alternative conceptualizations of the public sphere, that one can disentangle the thesis of privatization from the thesis of differentiation and thus begin to ascertain the conditions of possibility for modern public religions.*[1]
>
> – José Casanova

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§1 When Spheres Collide: Religion and American Law

Secularization does not merely happen to a society: it is not just an accident of social forces and historical events. Rather, secularization is a constellation of processes, worldviews, and norms that are sometimes catalyzed, enforced, or exemplified by law. Religious change, stability, reform, and division are not solely the result of law.[2] Nor is secularization a one-way stream: a society's laws reflect changes in the religions of its people as often as they affect such changes. But legal processes, norms and institutions play pivotal roles in defining the form, substance, and boundaries between religious and other social spheres. Law at once hems religion in, and holds it up. In order to understand why people believe and behave in certain "religious" ways – or why they

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[1] Ibid., 39.

[2] E. Brooks Holifield, "Why Do Americans Seem So Religious?" *Sacred Matters: Religious Currents in Culture*. 1 January 2014. (Last accessed: 17 August 2014.) See: https://scholarblogs.emory.edu/sacredmatters/2014/01/21/why-do-americans-seem-so-religious/

don't – one needs to understand how law constructs "religion" as a legal and moral category, and how law regulates society's coinciding beliefs, practices, and institutions.

The observation that law affects religious beliefs, practices, and institutions is not new or controversial. Would anyone argue that Constantine's adoption of Christianity as the religion of the Roman Empire left earlier forms of Christian piety fully intact? Were the effects of law upon church polity negligible in John Calvin's Geneva, or in Henry VIII's England? Scholars in the field of religious studies readily acknowledge law's influence on religion in such contexts. In their analyses of religion in the United States, however, many scholars of religion wrongly presume that religion is free to develop as it will. Scholars carefully document how eruptions of religious charisma, refined theological debates, and immigration patterns affect religious faith and practice. But how could *law* shape religion in a society where religious liberty for all is guaranteed by the Constitution itself? Thus, scholars like Roger Finke and Rodney Stark contend that the First Amendment once-and-for-all de-monopolized religious establishments in America, and created a "free market religious environment."[3] Religion in America, under this view, is a *laissez faire* economy of religious producers and consumers in which the most efficient suppliers of religious demand flourish, while the rest wither on the vine. Even Jose Casanova, in his brilliant comparative analysis of secularization in U.S. and international contexts, describes American constitutional law in terms of four competing interpretations of church-state separation that can be summarized in a single paragraph.[4] The Constitution's religious liberty clauses can be read in terms of "strict" or

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[3] Roger Finke and Rodney Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy* (New Brunswick, NJ: Rutgers University Press, 2005), 2.

[4] Casanova, *Public Religions in the Modern World*, 56.

"benevolent" separationist principles, Casanova explains; others attribute "secularist" or "statist" meanings to the constitutional text. But where did these interpretations come from? How are they applied in practice? In these and other works, scholars' reliance on popular tropes and legal catch-phrases obscures how law specifically conceptualizes and structures religious phenomena in the United States. Such oversimplifications also forestall meaningful comparisons with other nations and contexts. What, specifically, does "religious liberty" entail? How is this liberty *enforced*?

It may be that religion in America is born free, but everywhere it is in chains. Consider the extent to which religion is legally "free" in matters of marriage, organizational structure, and political participation. For early members of the Church of Jesus Christ of Latter Day Saints, plural marriage was a non-trivial religious duty. Official Mormon doctrine taught that polygamy "was an appropriate and biblical form of communal living…[that] also increased the opportunities for women to enjoy the spiritual benefits of marriage and motherhood."[5] In the late 1800s, however, the United States Congress passed a series of progressively heavy-handed statutes prohibiting polygamy and punishing those who practiced or advocated it. Affected parties challenged these laws on constitutional grounds, arguing that the First Amendment protected their right to marry in accordance with their religious beliefs. But American courts offered no relief. In one such case, the U.S. Supreme Court concluded, "Congress was deprived [by the First Amendment] of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of social duties and subversive of good

[5] John Witte, Joel Nichols, *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press, 2011), 140-41.

order."[6] In another case the Court ruled, "The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."[7] Americans were free to exercise their religion, that is, but only to the extent that they did not offend nine judges' notions of "good order" and the "enlightened sentiment of mankind." Partly in response to these rulings, Mormons altered the church's doctrines and abandoned the practice of polygamy, ultimately making it (in 1905) grounds for excommunication from the church. These new policies brought further change, as "fundamentalist" Mormon groups consequently splintered off from the mainline Mormon (or LDS) Church, and continue to practice polygamy to this day.

The legal chains that bind religion are not always so obvious or restrictive. Sometimes the law holds religion up as much as it hems religion in. Scholars of religion generally take it for granted, for example, that Americans are free to associate with like-minded others for religious purposes. With the exception of public nuisance laws, there is little to prevent large or small groups of co-religionists from gathering to worship, meditate or perform the rites of their respective communities and traditions. With the exception of building codes and zoning laws, there is little to prevent such groups from buying land and constructing a church, temple, or mosque according to their own specifications. And, such groups are otherwise free to choose their leadership and organizational structures in ways that embody their communities' beliefs and values. But,

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[6] *Reynolds V. United States*, 98 U.S. 145 164 (1878).

[7] *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*, 136 U.S. 1 50 (1890).

the widely accepted legal norms governing religious corporations in the United States are historically unique, and were not uncontroversial in the decades after the Constitution was drafted. Is it merely a coincidence that virtually every mature congregation of virtually every major religious tradition in the United States holds a legal charter defining its corporate powers, rights, and basic bylaws? Do the teachings of every religious group in the United States just happen to agree on the need for congregations to be governed or otherwise overseen by boards of laypersons and trustees? Religious communities' diverse constituencies and modes of spiritual discernment undoubtedly affect such patterns. Yet law plays an important and unacknowledged role in defining and regulating the structure of religious institutions and hierarchies. Constitutional law is clearly a factor, for example, in the tendency of American clergy to function as "pastoral directors" of churches that operate like non-profit corporations.[8] Consider the following passage from Carl Zollmann's treatise on *American Civil Church Law.*[9] Zollmann's description of religious organizations' legal status cogently illustrates how popular truisms can obscure the nuanced relationships between religious organizations and American government. He writes:

> The well known fact that state and church are separated in the United States does not imply that the American governments, state or national, have no functions to perform in relation to the various denominations within their territorial jurisdictions. While by the letter and spirit of their respective constitutions they are stringently prohibited from establishing any church, they are also, by the express and implied terms of the same instruments, solemnly obligated equally to protect all the churches. Their relations with all the various denominations are therefore strictly analogous to those which exist between the governments and non-religious private organizations and are without a parallel in Christendom. These relations do not rest on antagonism or indifference but on cordial

[8] H. Richard Niebuhr, *The Purpose of the Church and Its Ministry: Reflection on the Aims of Theological Education* (New York: Harper, 1956).

[9] Carl Zollmann, *American Civil Church Law* (New York: Columbia University, 1917).

> coöperation. While the state by its legislative, judicial, and executive powers creates, guards, and enforces the civil, contract, and property rights of all the various denominations, these in turn, by their charitable, religious, and moral influences, save, protect, and preserve the state from an overgrowth of pauperism, delinquency, and crime. These mutually advantageous relations have grown out of the very life of the American people as a nation and have crystallized one of the fundamental principles of their political philosophy into concrete form.[10]

This analysis, published in 1917, is a contestable interpretation of the symbiotic relationship between religious organizations and American government. Yet Zollmann's description of how deeply embedded religious organizations are in corporate law is accurate; and, it highlights how religion in America is not simply a matter of church-state separation or unfettered religious liberty. The disestablishment of religion in America was not a once-and-for-all achievement. It entailed the legal definition and ongoing mediation of religious, legislative, economic and other social spheres – not a simplistic "separation of church and state." As Sarah Barringer Gordon has argued, "The decision to disestablish [the church/religion] represented an end in some ways but a beginning in many others…Ironically…disestablishment set the stage for extensive legislative and judicial oversight of churches and other religious organizations."[11] Law trains religion into an evolving set of virtues and norms, and channels religion into institutional forms that courts, legislatures and religious communities themselves have developed over the past two centuries. How did these norms and organizational patterns come to be? To what extent do they overlap or vary with the norms and patterns of religious communities in other nations and contexts?

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[10] Ibid., 1.

[11] Sarah Barringer-Gordon, "The First Disestablishment: Limits on Church Power and Property before the Civil War," *University of Pennsylvania Law Review* 162(2013-2014): 311.

Finally, consider the central focus of this study: the legally structured roles of religion in American legislative discourse. Legislative discourse, as I use the term here, refers to the individual and communal processes by which legislation is drafted, debated, amended, and/or enacted by specific legislative bodies. Over the past fifty years, innumerable scholars in the fields of sociology, law, theology and political philosophy have debated the prevalence and appropriate scope of religious arguments, idioms, and norms in such processes. Sociologists and other theorists of "secularization" have analyzed how social factors – such as growing levels of pluralism, advances in scientific knowledge and technology, and so on – affect the plausibility and popular appeal of religious norms and narratives in legislative discourse.[12] Legal scholars have evaluated whether the First Amendment's religion clauses require that laws have a "secular" legislative purpose or rationale in order to pass constitutional muster.[13] Theologians and political philosophers have debated whether citizens of liberal democracies have a duty to draft laws and public policies – and the language they use to discuss and defend them – on the basis of religiously-neutral norms that maximize individual autonomy for all, regardless of one's religious affiliations or beliefs.[14] Few have argued that American law explicitly prohibits citizens from relying on religious norms in the voting booth, or from opining on the will of God in legislative discourse. Such acts may be impolitic, or even immoral, but they are not criminal or unconstitutional. If American law does not overtly

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[12] E.g. Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (New York: Anchor Books, 1990). Robert Bellah, Richard Madsen, William Sullivan, Ann Swidler, Steven Tipton, *The Good Society* (New York: Knopf, 1992).

[13] E.g. Andrew Koppelman, "Secular Purpose," *Virginia Law Review* 88, no. 1 (2002). Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge, UK; New York: Cambridge University Press, 2003).

[14] E.g. John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005). Seyla Benhabib, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996). Jeffrey Stout, *Democracy and Tradition* (USA: Princeton University Press, 2004). Eduardo M. Peñalver, "Is Public Reason Counterproductive," *West Virginia Law Review* 110(2007-2008).

prohibit religious speech in legislative discourse, though, does it otherwise structure the exercise of religion in the legislative sphere, or shape popular conceptions about the roles of religion in legislative discourse?

This dissertation analyzes antecedent forms of a legal doctrine known as the "secular purpose test," with the goal of understanding the test's historical and conceptual underpinnings, its functions within American jurisprudence, and its effects on the quantities and qualities of religious argumentation in legislative discourse. The secular purpose test, in place since 1963, is a highly controversial component of American courts' Establishment Clause jurisprudence – the judicial case law arising under the First Amendment command that "Congress shall make no law respecting an establishment of religion."[15] In its basic form, the test functions as a legal requirement that laws and government actions that have been challenged under the federal constitution's Establishment Clause have a "secular legislative purpose." Applying this test, however, has been complex and sometimes confounding. In practice, the test has many forms. When judges apply the secular purpose test they are often interpreting the meanings of religious symbols, motives, and actions; making assumptions about the moral and religious compositions of legislatures, local communities, and specific social settings; and applying competing legal philosophies, norms, and conceptions of religion and non-religion. I analyze these variables in the final three chapters of this dissertation. The first seven chapters, however, focus on the test's historical antecedents.

I argue that the secular purpose test replaced alternative methods of constitutional review that were prevalent between 1844 and 1963. During that early

[15] "The Constitution of the United States," Amendment 1.

period of American legal history, American courts enforced more-or-less strict forms of functional differentiation between religious and legislative spheres, and relegated the "sectarian" beliefs of various Christian denominations (and other religious groups) to a private religious sphere. At the same time, American courts portrayed "general Christianity" as an overarching civilizational identity that was consistent with, and expressive of the nation's political morality. In other words, the differentiation of religious and legislative spheres in American law did not imply, or coincide with the privatization of religious worldviews or norms, per se. The courts' methods for defining the boundaries between religious and legislative spheres were key to this arrangement. Prior to the secular purpose test, courts emphasized the limited and enumerated powers of specific legislatures alongside the "public" purposes of challenged legislation. Although "sectarian" legislation was legally suspect during much of this period, the courts generally did not view "religious" motives or legislative rationales as inherently problematic for religious liberty.

Next, I argue that secular purpose test emerged between 1947 and 1971 as a conflation of earlier legal doctrines developed in the Supreme Court's Fourteenth and First Amendment jurisprudence. The Court's early affirmation of the "public purpose" of "secular education" in *Everson v. Board of Education* (1947) morphed into a general requirement that all legislation challenged under the Establishment Clause must have a "secular legislative purpose" in *Lemon v. Kurtzman* (1971). American courts have subsequently attributed to the secular purpose test multiple meanings: In some cases it has been used to evaluate the character of legislators motives or reasons for enacting a statute; in other cases it has been used to evaluate the legislative end-purposes (or the

social goods) that a statute or government action ostensibly served; in still other cases the secular purpose test has been used to evaluate the symbolic meanings of religious artifacts displayed on government property – objects like Christmas trees and menorahs. These diverse forms of the secular purpose test often draw upon long-standing constitutional norms. Methodologically, however, the secular purpose test marks a departure from previous emphases on specific legislative powers and the "public" purposes of legislation.

Finally, I argue that the secular purpose test – or at least the threat of its application in processes of judicial review – forestalls the candid expression of religious arguments and motives in American politics in ways that earlier methods of constitutional review did not. On one hand, the test implicitly fosters a "naked" legislative sphere by delegitimizing religious modes of argumentation in legislative discourse;[16] on the other hand, it fosters a cloaked legislative sphere characterized by discursive "smuggling"[17] of religious and other moral norms into the process, often through strategic rhetorical obfuscation. Thus, much as American law structures the exercise of religion in matters of marriage and corporate organization, the secular purpose test structures the exercise of religion in legislative discourse. Understanding the test, and evaluating how it relates to earlier methods of constitutional review leads to important insights relevant to the fields of religious studies and constitutional law, alike.

§2 Theories and Methods

[16] Richard Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1984).

[17] Steven Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA: Harvard University Press, 2010), 34ff.

A. The narrow scope of this research

This dissertation uses theories and methods from the field of religious studies to analyze legal data. I treat constitutional law as a case study in secularization, focusing primarily on the development of constitutional jurisprudence in a selection of historical legal cases in which litigants challenged the validity of legislation in ways that implicated religious liberty norms. My primary data set includes public records of trials, litigants' legal arguments (presented orally and in written briefs), historical treatises on American law, and legal opinions of judges in local, state and federal courts. I focus on cases argued in the U.S. Supreme Court between 1844 and 1971. This range of years reflects the filters that I used to select a certain types of cases, implicating certain types of legal questions. I do not, in this dissertation, address all of the U.S. Supreme Court's cases dealing with religion since the founding. Rather, I have identified early cases in which the Supreme Court evaluated the scope of legislature's powers with respect to religion and legislative purposes, motives and/or ends. This means that important early cases like *Terrett v. Taylor* (1815), which did not deal directly with legislative powers, fall outside the scope of this study. The year 1844, however, marks two of the Court's earliest rulings in cases that are relevant to this study: *Vidal v. Girard's Executors,* and *Permoli v. First Municipality of New Orleans*.[18] The year 1971 marks the Court's ruling in *Lemon v. Kurtzman* – an influential case in which the Court designated the secular purpose test as the first "prong" of a three-part method (commonly known as the *Lemon* test) for evaluating laws challenged under the federal Establishment Clause.[19]

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[18] *Bernard Permoli, Plaintiff in Error, V. Municipality No. 1 of the City of New Orleans, Defendant in Error*, 44 U.S. 589 (1845).

[19] *Lemon V. Kurtzman*, 403 U.S. 602 (1971).

This study focuses on the development of legal doctrines and methods. The United States underwent profound changes between 1844 and 1971. Civil and international wars, economic cycles, waves of immigration, constitutional amendments, political movements and religious revivals, among other things, helped reshape the nation's demographics, cultures, and institutions. Such developments are deeply relevant for understanding concurrent changes in American law. However, I address these broad developments secondarily, and only to the extent that they are implicated in specific cases. One could hardly argue that the Civil War had no effects on constitutional law (or *vice versa*). In order to understand how the Civil War affected American courts' religious liberty jurisprudence, however, one must look to particular cases in which litigants pressed specific legal arguments against specific statutes. Only by analyzing how the courts interpreted such cases can one begin understand how, when, and why broader social trends and events shaped the law. This dissertation is not, therefore, a social history of the United States between 1844 and 1971, but an analysis of how one area of constitutional law evolved during that period. As scholars of religion and religious history come to understand these legal developments more fully, we will be better equipped to analyze how they relate to Americans' evolving religious beliefs, practices and institutions.

B. Constitutional law functions as a carrier of secularization

A central premise of this dissertation is that *constitutional law functions as a carrier of secularization.* I outline the meaning of this premise below.

Constitutional law defined. Constitutional law refers in this study to the symbolic texts of state and federal constitutions; to the institutionalized processes of debating the

meanings of those texts in relation to the laws under constitutional review, and the circumstances (or "fact patterns") of particular cases; and to the "thick" interpretations of legal norms and narratives expressed in courts' rulings.[20] I outline the basic legal processes with which this study is concerned in the Introduction to Section 1. Presently, I wish to emphasize only that constitutional law is not simply a list of rules, but an "active, living human process."[21] In a word, constitutional law is a social "sphere."

Social spheres are distinguishable categories of social activity; they consist in the physical spaces, materials, acts and patterned symbols and norms that constitute a given area of social life.[22] One can speak of scientific spheres, for example, or of religious, economic, legislative, and various other spheres. A person, group or other social entity acts within a given sphere when they perform certain types of actions – actions that 1) issue from a specific source or sources, 2) take specific, socially meaningful forms, 3) advance specific, practical ends or outcomes, and 4) express or adhere to the specific social identities, norms and narratives that define a given sphere. Actions that do not meet these criteria for a given sphere might belong to a different social sphere(s). On the other hand, such actions might represent corrupt, antagonistic, or reformative actions

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[20] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994).

[21] Harold Berman, *The Interaction of Law and Religion* (Nashville; New York: Abington Press, 1974), 31.

[22] This conception of spheres overlaps with other authors' conceptions of "institutions" and "culture systems." See, e.g. Bellah, *The Good Society*, 287ff. Also see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); *Thick and Thin: Moral Argument at Home and Abroad*; Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures* (New York, NY: Basic Books, 1973); "Religion as a Cultural System," in *The Interpretation of Cultures* (New York, NY: Basic Books, 1973). Also see Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2 ed. (Notre Dame, IN: University of Notre Dame Press, 1984), 205-06. Also see Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*. Also see: Roger Friedland, Robert Alford, "Bringing Society Back In: Symbols, Practices, and Institutional Contradictions," in *The New Institutionalism in Organizational Analysis*, ed. Walter Powell, Paul DiMaggio (Chicago: University of Chicago Press, 1991), 232. Friedland and Alford conceive of institutions as both "supraorganizational patterns of activity through which humans conduct their material life in time and space, and symbolic systems through which they categorize that activity and infuse it with meaning."

within a given sphere. The differentiation and internal rationalization of such spheres in modern societies is a central feature of the theories of secularization I describe below.

"Religion" and analogous terms are defined inductively in this study. Readers should note that this study works toward, rather than from, working definitions of several important terms and concepts. For example, I do not define, here at the outset, what I think "religion" is, or what I think belongs properly to religious or legislative social spheres. My aim is not to see where and how my own ideas about what religion is show up in the law. Rather, I aim to understand how American courts themselves define and differentiate between "religious" and other social spheres, and describe patterns in the ways that courts have, over time, sorted various acts, ideas, institutions and artifacts into different legal categories that correspond with different social spheres and, therefore, with distinctive sets of legal norms.

Secularization defined. The term "secularization" denotes processes of religious and social change in modernizing societies.[23] Secularization theorists use diverse theoretical frameworks to analyze how changing socio-economic conditions affect the practices, perceived plausibility, and political authority of "religion" – especially the traditions, worldviews and institutions of Western Christianity (and other analogous traditions). Thus, theories of secularization vary widely. Debates about secularization have often

[23] Unfortunately, the term "secularization" suggests a linear historical path between discrete social forms. In using the term here, I do not mean to suggest that the United States is progressing from an unambiguously religious past toward an unambiguously secular future. Processes of religious and social change are rarely, if ever, linear. And, as numerous scholars have demonstrated in recent years, "secular" and "religious" phenomena are rarely as conceptually discrete as they sometimes seem. See, e.g., Robert A. Yelle Winnifred Fallers Sullivan, Mateo Taussig-Rubbo, ed. *After Secular Law* (Stanford, CA: Stanford University Press, 2011). Jonathan Vanantwerpen Michael Warner, Craig Calhoun, ed. *Varieties of Secularism in a Secular Age* (USA: Harvard University Press, 2010). Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003). Mark Juergensmeyer Craig Calhoun, Jonathan VanAntwerpen, ed. *Rethinking Secularism* (New York: Oxford University Press, 2011).

centered, however, on the observed and/or anticipated decline of religious adherence, the differentiation and rationalization of "religious" and "secular" social spheres, and the privatization and/or transformation of religious worldviews and institutions in modern societies.[24]

Jose Casanova's theory of secularization in *Public Religions in the Modern World* (1994) serves a touchstone for my analysis of secularization and constitutional law. Published in 1994, *Public Religions* responded to critics of leading secularization theories who argued that widespread religious adherence, and resurgent political-religious movements around the world indicated that the central premises of those theories were mistaken. Religious adherence was neither dwindling, nor receding from "public" spheres. Whereas many in the fields of sociology and religious studies moved to abandon secularization theory, Casanova sought to refine it by studying secularization in its component parts. "The main fallacy in the theory of secularization," he argued, "is the confusion of historical processes of secularization proper with the alleged and anticipated consequences which those processes were supposed to have on religion."[25]

In Casanova's view, secularization *proper* refers to 1) "the conceptualization of the process of societal modernization as a process of functional differentiation and emancipation of the secular spheres – primarily the state, the economy, and science –

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[24] See Frank Lechner, "The Case against Secularization: A Rebuttal," *Social Forces* 69, no. 4 (1991): 1104. "Specifically, where official churches used to control substantial economic resources, the relative wealth and capital of these churches has declined; where authority was once legitimated mainly in religious terms and major political conflicts crucially involved religious motives, bureaucratized states now exercise rational-legal authority and separate civil and ecclesiastical spheres; where full membership in the societal community used to depend on one's religious identity and religiously motivated exclusiveness was common, inclusion on the basis of citizenship has transformed the meaning of membership; where religious institutions and elites maintained clear standards of transcendent belief relevant to all spheres of cultural activity, these institutions have lost their hold on the definition of the societal situation, and science, art, and morality no longer require any religious grounding.[24]

[25] Casanova, *Public Religions in the Modern World*, 19.

from the religious sphere," and 2) "the concomitant differentiation and specialization of religion within its own newly found religious sphere."[26] As a prime example, the Catholic Church and the monarchical governments of medieval Europe were administratively, ideologically, and functionally interdependent. In contrast, modern states and the religious institutions in their territories had become relatively autonomous relative to one another, with "religion" and "government" each serving distinctive social functions, and operating according to their own internal rules and logic. Because the division and specialization (or rationalization) of "religious" and "secular" spheres remains typical of modernizing societies, Casanova contends, such processes represent the valid core and object of secularization theory, as a whole.

In contrast, Casanova describes two hypotheses as the contingent sub-theses of secularization theory: 1) religious adherence inevitably *declines* in modernizing contexts, and 2) religious worldviews similarly lose their "public" character and relevance. On one hand, international studies published around the time that Casanova wrote *Public Religions* indicated that "most religious traditions in most parts of the world" had either grown or held steady since World War II, despite "rapid increases in industrialization, urbanization, education, and so forth."[27] Such statistics implied that declining religious adherence was not a simple function of modernization. Instead, religious decline and growth were partly determined by variables in the patterns of differentiation between religious and political spheres. Based on a comparative study of church-state relations in Spain, Poland, Brazil, and the United States, Casanova argued that religious institutions'

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[26] Ibid.

[27] Ibid., 26. Casanova here cites to: Frank Wahling, ed., *Religion in Today's World: The Religious Situation of the World from 1945 to the Present Day* (Edinburgh: T&T Clark, 1987).

resistance to church-state separation was a key variable in predicting declining religious adherence. The autonomy of the state relative to religious institutions in places like the United States coincided with higher levels of religious adherence. On the other hand, "It was the caesaropapist embrace of throne and altar under absolutism that perhaps more than anything else determined the decline of church religion in Europe."[28]

The second sub-thesis – secularization-as-religious-*privatization* – was similarly contingent on patterns in the differentiation of religious and governmental spheres. Religious "privatization" describes not only the withdrawal of religious institutions and actors from the "public" sphere, but also the diminishing social relevance of religious worldviews and institutions. Whereas pre-Modern societies treated certain "religious" beliefs as expressions of common or objective knowledge, religion is privatized when such beliefs are progressively marginalized subjective opinions that are decreasingly relevant to other spheres of social life. Religious identity thus becomes a "part-time role" of individuals rather than a transcendent identity of society as a whole. Political and economic spheres "no longer need or are interested in maintaining a sacred cosmos or a public religious worldview."[29] Two passages from Charles Taylor's recent book, *A Secular Age,* helpfully illustrate this concept of "privatization."

> …as we function within various spheres of activity—economic, political, cultural, educational, professional, recreational—the norms and principles we follow, the deliberations we engage in, generally don't refer us to God or to any religious beliefs; the considerations we act on are internal to the "rationality" of each sphere—maximum gain within the economy, the greatest benefit to the greatest number in the political arena, and so on. This is in striking contrast to earlier periods, when Christian faith laid down authoritative prescriptions, often through

[28] Ibid., 29.

[29] Ibid., 37.

> the mouths of clergy, which could not be easily ignored in any of these domains, such as the ban on usury, or the obligation to enforce orthodoxy.[30]

Coinciding with the differentiation and specialization of religious and secular spheres, then, the privatization of religion refers to the confinement and/or withdrawal of religious worldviews and norms into a "private" religious sphere. At the same time, such worldviews and norms are increasingly understood and experienced as subjective. Taylor again explains such shifts in modern "social imaginaries" in theological terms:

> The shift to secularity in this sense consists, among other things, of a move from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it [the belief in God] is understood to be one option among others, and frequently not the easiest to embrace.[31]

The *privatization* thesis of secularization, in short, posits that "religious" identities and norms become increasingly private in modernizing societies, and that the social significance of "religion" wanes as the autonomy of "secular" spheres including the modern state, economy, and science wax. Casanova's case studies showed, however, that particular patterns of religious privatization, like patterns of religious decline, were contingent upon general structural patterns of differentiation between religious and governmental spheres. The social relevance and functions of religion were not simple functions of modernization. As a matter of fact, religious institutions and symbols played influential public roles in several modern contexts – especially in nations with highly differentiated religious and governmental spheres.

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[30] Charles Taylor, *A Secular Age* (Cambridge, Massachusetts, and London, England: The Belknap Press of Harvard University, 2007), 2. Taylor and Casanova offer different but overlapping typologies of "secularization" and "secularism." The passage quoted here is part of Taylor's discussion of the emptying of references to God and ultimate reality from "public spaces" – which has useful parallels with Casanova's discussion of institutional differentiation, even though it nominally coincides more closely with Casanova's discussion of religious privatization.

[31] Ibid., 3.

If religious decline and privatization are contingent sub-theses of secularization proper, however, on which factors are the differentiation and specialization of religious and other social spheres contingent? Is the separation of religious and governmental institutions merely a function of political conflict between political leaders and the clergy? Is such differentiation inevitable? Is re-integration of religious and secular spheres possible? How might constitutional law function in such processes?

What does it mean to function as a "carrier" of secularization? The claim that constitutional law functions as a *carrier* of secularization does not mean that the Constitution is causing Americans or their institutions to be increasingly secular, at least in the sense of being less religious. Rather, I contend that constitutional law is a mediating and contributing factor in the differentiation, specialization, and re-integration of religious and other social spheres, and in the privatization of religious worldviews and norms.[32]

Carriers of secularization, in José Casanova's use of the term, function as something between a cause and catalyst of secularizing processes. Casanova emphasizes, for example, four key carriers of secularization in the modern West: the Protestant Reformation; the formation of modern states; the growth of capitalism; and the early modern scientific revolution. "Each of the four developments contributed its own dynamic to modern processes of secularization," he writes.[33] The Protestant Reformation undermined the unity of the Roman Catholic Church, while providing a theological

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[32] This conception of "carriers" differs from other scholars' usage of that term. See, for example, Max Weber, "The Social Psychology of World Religions," in *From Max Weber: Essays in Sociology*, ed. H.H. Geerth and C. Wright Mills (New York: Oxford University Press, 1946), 268ff. Weber conceives of the "carriers" (of religions) in terms of "those *social strata* which have most strongly influenced the practical ethic of their respective religions." (Emphasis added.)

[33] Casanova, *Public Religions in the Modern World*, 21. Emphasis added.

interpretation legitimizing "the rise of bourgeois man and of the new entrepreneurial classes, the rise of the modern sovereign state against the universal Christian monarchy, and the triumph of the new science against Catholic scholasticism."[34] Modern secular states, meanwhile, monopolized the means of legal violence and coercion within given territories, but did so at a time when coercing religious uniformity became less and less feasible given the growing numbers of religious dissenters in many regions. At the same time, industrialization, changing property laws and evolving mechanisms of economic exchange – such as shifts from the medieval logics of "just prices" to the modern logics of "market prices" – rendered capitalist markets less susceptible to clerical oversight and theological norms. Finally, scientific methods of inquiry offered alternative paths by which persons could pursue and verify causal relationships in physical phenomena – paths that were received in some contexts as complementary to traditional theological methods and worldviews, and, in other contexts, as radical challenges to religious orthodoxy.

One of Casanova's key observations is that secularization theorists, convinced that the days of "religion" were numbered, had failed to account for the ways in which the carriers of secularization "developed different dynamics in different places and at different times."[35] This oversight left analysts poorly equipped to understand the reemergence of "public" religions in the 1980s:

> Only if secularization is conceived as a universal teleological process whose eventual final outcome one already knows, is it understandable that social scientists may not be particularly interested in studying the different paths different societies may take getting there…Only the conviction that religion was

[34] Ibid., 22.

[35] Ibid., 25.

> going to disappear may explain the fact that the overwhelming evidence showing that different modern societies evince significantly different patterns of secularization could have been ignored or found irrelevant for so long.[36]

Casanova's textured analysis of institutional church-state dynamics in multiple nations, even twenty years after its publication, provides compelling and relevant evidence that patterns of secularization *do* vary depending on the carriers at play in particular contexts. He convincingly demonstrates that the decline and/or privatization of "religion" are not necessary or inevitable correlates of the differentiation of religious and political spheres.[37] And, he cogently argues that the differentiation of religious and secular spheres – and especially the institutional differentiation of church and state – did not necessarily imply a moral discordance between each sphere's internal rationalities. In several instances, religious interjections into "public" spheres including modern states and economies were wholly appropriate. Casanova is better than most social scientists in treating the *legal relationships* between religious and political institutions as complex and potent variables affecting the vitality and societal relevance of religious worldviews and institutions. Still, like so many other scholars of religion and secularization, Casanova insufficiently accounts for the ways in which law itself functions as a carrier of secularizing and counter-secularizing processes.

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[36] Ibid.

[37] Casanova identifies three instances in which "the deprivatization of religion can be justified" in modern contexts. See ibid., 57-58. Namely, "a) When religion enters the public sphere to protect not only its own freedom of religion but all modern freedoms and rights, and the very right of a democratic civil society to exist against an absolutist, authoritarian state…b) When religion enters the public sphere to question and contest the absolute lawful autonomy of the secular spheres and their claims to be organized in accordance with principles of functional differentiation without regard to extraneous ethical or moral considerations…c) when religion enters the public sphere to protect the traditional life-world from administrative or juridical state penetration, and in the process opens up issues of norm and will formation to the public and collective self-reflection of modern discursive ethics."

Constitutional law is a semi-choreographed, semi-scripted performance of the nation's basic legal norms and narratives. It constitutes and communicates a higher law by which American citizens and their laws are governed. It is one of the ways – one of the most important ways, perhaps – that Americans come to understand what is "really real" in law and politics.[38] Constitutional law not only helps to define the boundaries between, and the substance of differentiated social spheres in American society, it also helps to reintegrate them.

By analyzing American courts' evolving methods for interpreting constitutional religious liberty provisions, we can begin to better understand how and why American law structures religious and other social spheres in certain ways. As previously noted, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By interpreting and enforcing these clauses, however, American courts invariably – though sometimes incoherently – establish legally structured "religious" and "legislative" social spheres. Constitutional law structures religious spheres in the United States, for example, by interpreting and imposing legal norms and narratives that govern how persons and institutions may (or may not) act under the auspices of "religion." Similarly, constitutional law structures "legislative" spheres (and mediates between religious and legislative spheres) by defining and limiting governmental powers of "legislation."

§3 Summary of Chapters

[38] See Geertz, "Mr. Webster's Argument on the Girard Will Case: United States Supreme Court," *The New York Herald*, Feb. 19, 1844 1844.

This dissertation is divided into three sections, each containing three chapters. The first and second sections consist of in-depth case studies of cases argued before the U.S. Supreme Court between the years of 1844 and 1900. "Section 1" analyses three cases that presented legal questions related to Establishment Clause norms. This means that litigants challenged various statutes and government actions on the grounds that established, promoted, aided or otherwise prescribed religion in inappropriate ways. "Section 2" analyses two individual cases, and one group of cases that presented legal questions related to Free Exercise norms. This means that litigants in these cases challenged statutes or government actions on the grounds that they inappropriately infringed upon their rights to freely exercise religion. Sections 1 and 2 provide relatively detailed accounts of the arguments and decisions in the Supreme Court and in lower courts. Several of these case studies incorporate newly available, or previously ignored source materials. Following the legal arguments all the way through appeals processes is important for understanding how constitutional law not merely as a set of abstract rules, but as a social sphere in which the boundaries between religious and legislative spheres are contested, defined, and enforced. Section three takes a broader view of legal developments. Rather than analyzing in detail litigants' arguments and multiple courts' rulings in individuals, each chapter in section three analyzes broad trends in constitutional law.

Section 1:

Chapter 1, "Orphans, Education and Infidelity" analyzes the case of *Vidal v. Girard's Executors* (1844) – a case involving a privately endowed, but publicly administered school for orphans. Litigants in *Girard* challenged the validity of a controversial trust that

a wealthy citizen bequeathed to the City of Philadelphia, arguing that it was anti-Christian, and promoted religious infidelity. Chapter 2, "Remembering the Sabbath (without keeping it Holy)" analyzes *Hennington v. Georgia* (1896) – a case in which a train operator challenged the validity of Georgia's Sabbath regulations after being convicted of illegally running freight on a Sunday. Chapter 3, "The Sisters of Charity and their Secular Hospital" analyzes *Bradfield v. Roberts* (1899) – a case involving a District of Columbia resident and taxpayer who challenged a federal appropriation for the construction and operation of a new hospital building on the grounds of a private hospital that was owned and operated by Catholic nuns.

Section 2:

Chapter 4, "The Police, the Parishioners, and the Police Powers" analyzes *Permoli v. First Municipality of New Orleans* (1844) – a case in which a Roman Catholic priest challenged a law that limited open-casket funerals to a single funeral parlor, and banned such funerals in a local municipality's churches. Chapter 5, "Polygamy and the Enlightened Sentiment of Mankind" analyzes a group of polygamy cases argued before the Supreme Court between 1879 and 1890.

Chapter 6, "The Foreign Preacher and His 'Labor'" analyzes *Church of the Holy Trinity v. United States* (1892) – a case in which a prominent New York City church was fined for hiring a British minister, in violation of a federal law that prohibited the importation of foreign laborers under contract to work in the United States.

Section 3:

Chapter 7, "An Inter-state Tradition: Religious Liberty in American Legal Thought, circa 1900," analyzes legal treatises published around the turn of the century.

Chapter 8, "Incorporating Religious Liberty" tracks the Supreme Court's "incorporation" of the First Amendment's religion clauses between 1900 and 1947. Chapter 9, "The Birth of the Secular Purpose Test" documents the introduction of the secular purpose test as part of the Supreme Court's Establishment Clause jurisprudence between 1947 and 1971. The concluding chapter, "Here Comes the Post-Secular Purpose Test" details the various forms in which the secular purpose test has been applied, and considers its implications for the privatization of religion in American legislative discourse.

Section One

Legislative Powers and Disestablishment Norms

§ I Introduction to *Section One*

The chapters in this section address three legal questions related to the differentiation of religious and legislative spheres, and to the roles of religion in legislative discourse. In *Vidal v. Girard's Executors* (1843) the U.S. Supreme Court evaluated whether a publicly administered school could exclude religious instruction from its curriculum, and clergy from its campus.[42] In *Hennington v. Georgia* (1896) the Georgia and U.S. Supreme Courts considered whether the state legislature could enforce religious duties – namely, Sabbath rest.[43] Finally, in *Bradfield v. Roberts* (1899) the U.S. Supreme Court and lower federal courts evaluated whether Congress could contract with religious institutions to provide public services.[44]

These issues are Establishment Clause issues insofar as they are related to the limits of governmental power to prescribe, support and otherwise "establish" religion(s). But not all of the arguments or decisions in these cases directly interpreted or applied federal Establishment Clause jurisprudence. Plaintiffs in *Vidal,* for example, argued that a city-administered trust establishing an orphans' college in Philadelphia violated state law because it was anti-Christian, and promoted religious infidelity. The central legal question in *Hennington* was not whether Georgia's Sabbath laws violated the First Amendment, but whether they conflicted with the federal Constitution's "Commerce Clause." Only in *Bradfield* did the Supreme Court explicitly interpret the meaning and legal force of the Establishment Clause. Thus, the Court's engagement with disestablishment norms in these cases often takes the form of "dicta" rather than formal precedent. Nonetheless,

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[42] *Vidal Et Al. V. Girard's Executors*, 43 U.S. 127 (1844).

[43] *Hennington V. Georgia*, 163 U.S. 299 (1896).

[44] *Bradfield V. Roberts*, 175 U.S. 291 (1899).

the arguments and rulings in these cases illustrate how nineteenth-century American courts conceived of "religion," and applied religious liberty norms in a period of legal flux. Long before the Supreme Court formally incorporated the Establishment Clause in 1947, American jurists were marking out boundaries between religious and legislative spheres using methods and norms that transcended state borders. What were these norms? How were they applied? How did they differ from contemporary law? And what did they imply about the roles of religion in American law and politics?

Jurists in each of the cases in this section evaluated the purposes of legislation in ways that overlap with, but conceptually differ from contemporary applications of the Secular Purpose Test. State and federal courts *did* evaluate and impose limits on the purposes of statutes under their review. Courts did not, however, require that contested statutes advance *secular* purposes, as such. Instead, they considered the extent to which statutes advanced purposes consistent with the specific powers of the legislative bodies that enacted them. These powers, especially the power to enact "police" regulations, were largely defined in terms of the ends they advanced – goals like public health and safety. While these ends are arguably, if not unambiguously "secular" by today's standards, the significance of measuring legislative purposes in terms of the enumerated powers rather than secularity, *per se,* is not merely semantic. Whereas the Secular Purpose Test selectively enforces the privatization of religious idioms, norms, and motives from legislative decision-making, jurists in these early cases viewed legislators' religious rationales and motives as neither problematic nor sufficient for determining the validity of statutes under review. Laws had to express specific legislative powers – not the will of God, or even the unvarnished will of the people – and respect a specific set of individual

and corporate religious rights in order to be valid. In short, the courts imposed a functional differentiation of religious and legislative spheres and institutions, without simultaneously privatizing religious worldviews and norms.

Chapter 1
Orphans, Education, and Infidelity

> *But if the purposes of the trust be germane to the objects of the incorporation [of the city of Philadelphia]; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a state where the statutes of mortmain do not exist, (as they do not in Pennsylvania,) the corporation itself having a legal capacity to take the estate as well by devise as otherwise?*[1]
>
> – Justice Joseph Story

§ 1 Introduction

If Christianity is part of the law, can a publicly administered school exclude religious instruction from its curriculum, and ban clergy from its campus? The case of *Vidal v. Girard's Executors* (1844) represents one of the Supreme Court's earliest interpretations of boundaries between religious and legislative spheres. In post-1960's cases involving religion in public schools, the Court evaluated whether the purposes of things like teacher-led prayers were "secular" enough to pass constitutional muster. The Court in *Vidal,* however, asked a different question – namely, whether the apparent absence of religious instruction in a publicly administered school's curriculum, and the exclusion of clergy from its campus, violated the widely accepted maxim that Christianity was part of the common law in Pennsylvania.[2] I analyze the *Vidal* case below by describing the facts and context of the lawsuit; reviewing the legal arguments and rulings

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[1] *Vidal Et Al. V. Girard's Executors*, 189.

[2] The Court's ruling is especially noteworthy since the author of the Court's opinion, Joseph Story, was a vocal defender of this maxim. See Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York, NY: Oxford University Press, 2010).

in the case; and assessing the Court's methods and norms for construing boundaries between legislative and religious spheres. The Supreme Court's ruling illustrates an early method for evaluating legislative purposes in relation to religious liberty norms. In a ruling authored by Justice Joseph Story, the Court emphasized that the school and its curriculum were consistent with the city corporation's enumerated powers, and the end-purposes that the city's powers were intended to serve.

§ 2 The Texts and Context of Girard's Will

When Stephen Girard died in 1831, he was among the wealthiest men in the United States. Girard amassed his fortune as a merchant and banker, but died childless and a widower.[3] His will allotted part of his estate to acquaintances and relatives, and designated large sums for public infrastructure projects in his native Philadelphia. Girard's largest bequest, however, was also his most controversial: He left more than two-million dollars in trust to the City of Philadelphia in order to establish a "college" for poor, white, male orphans.[4] Girard's will set forth meticulous instructions for the college's architecture and admissions procedures. Most controversially, however, it prescribed a curriculum that included moral, but not religious instruction; and it banned members of the clergy from campus. The will stated:

> And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more

[3] Harry Emerson Wildes, *Lonely Midas: The Story of Stephen Girard* (New York: J. J. Little and Ives Company, 1943).

[4] These racially biased admissions policies became increasingly controversial in the 1960s, and the college eventually opened its doors to students of all racial and ethnic backgrounds.

comfortable maintenance, than they usually receive from the application of the public funds: and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate, (the real estate in Pennsylvania charged aforesaid,) unto 'the Mayor, Aldermen, and Citizens of Philadelphia,' their successors and assigns, in trust, to and for the several uses, intents, and purposes herein after mentioned…

The orphans admitted into the college shall be there fed with plain but wholesome food, clothed with plain but decent apparel, (no distinctive dress ever to be worn,) and lodged in a plain but safe manner: due regard shall he paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammer [sic], arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Greek and Latin languages,)—and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars…

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the mayor, aldermen, and citizens of Philadelphia, and their successors; and I do so with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow-citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their city councils, and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely:—First, I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of or pledged to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively: Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

> In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil [sic] into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.[5]

Girard thus sought to train young orphans in practical and intellectual virtues; but was his plan for the college itself virtuous? Newspapers in Philadelphia and elsewhere published excerpts of Girard's will shortly after his death. The provisions for the orphans' college elicited a mixed response. One editorialist in the *New York Evangelist*, for example, described the will as "an insult to the *christian* [sic] part of the community," and declared that, "Voltaire could not have showed his malignity to the gospel, more plainly than Mons. G[irard] has done."[6] Another editorialist praised the proposed curriculum as an act of Christian charity, while mocking the "Calvinistic clergy" for becoming "exceedingly mad" that Girard had not consulted them before drafting his will, and for scheming to infiltrate the college with specially trained teachers who were not formally ordained into the clergy.[7]

The controversial provisions of the trust became the focal point of a lawsuit that Girard's heirs filed to challenge his will, and to gain possession of the funds bequeathed to the orphans' college. The heirs were French nationals who hired the aging-but-renowned statesman and constitutional lawyer, Daniel Webster, as their lead attorney.

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[5] *Vidal Et Al. V. Girard's Executors*, 132-33.

[6] A Citizen, "Stephen Girard's College," *New York Evangelist*, Jan. 21 1832. See also a critical response to this editorial in: A Liberal Professor of Christianity, "Girard's Will," *Workingman's Advocate*, Feb. 11 1832.

[7] "Mr. Girard's Will," *Universalist Watchman, Repository and Chronicle*, Feb. 18 1832, 3, 43.

Together with Walter Jones,[8] Webster argued that the trust was invalid and illegal, and should thus be awarded to the heirs: The trust's beneficiaries were too vaguely defined; the city corporation lacked enumerated powers to administer the trust; and, finally, its curriculum and rules derogated Christianity, which was widely acknowledged as part of the common law in Pennsylvania. For these reasons, they argued, Girard's bequest failed, and should fall to his next of kin.

§ 3 Oral Arguments

Oral arguments before the Supreme Court lasted more than a week, and the hearings had become a public spectacle by the time Daniel Webster delivered his closing arguments. Justice Joseph Story wrote about the case in a letter to his wife, explaining:

> …the arguments have been contested with increasing public interest, and Mr. Sergeant and Mr. Binney [attorneys representing Girard's estate and the City of Philadelphia] concluded their arguments yesterday. A vast concourse of ladies and gentlemen attended with unabated zeal, and earnest curiosity through their speeches, which occupied four days. Mr. Webster began his reply to them to-day, and the Court-room was crowded, almost to suffocation, with ladies and gentlemen to hear him. Even the space behind the Judges, close home to their chairs, presented a dense mass of listeners…The curious part of the case is, that the whole discussion has assumed a semi-theological character. Mr. Girard excluded ministers of all sects from being admitted into his college as instructors or visitors; but he required the scholars to be taught the love of truth, morality, and benevolence, to their fellow-men. Mr. Jones and Mr. Webster contended, that these restrictions were anti-Christian, and illegal. Mr. Binney and Mr. Sergeant contended, that they were valid, and Christian, founded upon the great difficulty, of making ministers cease to be controversialists, and forbearing to teach the doctrines of their sect. I was not a little amused, with the manner in which, on each side, the language of the Scriptures, and the doctrines of Christianity, were brought in to point the argument; and to find the Court

[8] See Roger K. Newman, ed. *The Yale Biographical Dictionary of American Law* (New Haven, CT: Yale University Press, 2009), 302.

> engaged in hearing homilies of faith, and expositions of Christianity, with almost the formality of lectures from the pulpit…[9]

Story represented an authoritative audience for these amusing courtroom homilies. He had already authored two of the Supreme Court's earliest decisions involving religious legal disputes; published an influential analysis of religion and law in his *Commentaries on the Constitution of the United States* (1933);[10] and publicly argued that Christianity was part of American law, refuting a posthumously published essay by Thomas Jefferson that argued the opposite point.[11] Given Story's longtime affinity with Massachusetts-style religious liberty norms, Daniel Webster undoubtedly hoped for a sympathetic hearing in Story's court. Story did write the Court's opinion in *Vidal,* but ruled in favor of Girard's executors and the City of Philadelphia; privately, he described Webster's argument as "altogether, an address to the prejudices of the clergy."[12]

The Court's ruling turned on two main questions. First, did the administration of Girard's trust fall within the city corporation's enumerated powers? Second, did the administration of Girard's trust exceed those powers, given that Christianity was part of the common law in Pennsylvania? This pair of questions answered the specific complaints of Girard's aggrieved heirs; at the same time, the Court's treatment of these

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[9] Joseph Story, *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University*, ed. William W. Story, vol. II (Boston: Charles C. Little and James Brown, 1851).

[10] *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution.*, 3 vols., vol. 3 (Boston: Hilliard, Gray, and Company. Cambridge: Brown, Shattuck, and Co., 1833).

[11] Thomas Jefferson, ""Whether Christianity Is Part of the Common Law?" " in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York and London: G.P. Putnam's Sons, 1904). Originally drafted ca. 1764. Also see: Jay Alan Sekulow and Jeremy Tedesco, "The Story Behind Vidal V. Girard's Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty," *Pepperdine Law Review* 32, no. 3 (2012).

[12] Story, *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University*, II, 469."Letter of Aug. 31, 1844 to the Hon. James Kent."

questions illustrated a broader method for evaluating legislative purposes in relation to religion and the city government's enumerated powers.

First question: The City's corporate powers

Did the City of Philadelphia possess powers to administer charitable trusts? Webster and Jones argued for a narrow interpretation of the city corporation's powers. On one hand, they cited a complex body of statutory and common law in England and Pennsylvania that prohibited corporations from taking property in trust.[13] On the other hand, they insisted that, the city could not administer the trust because its corporate charter did not specifically enumerate the power "to administer trusts of this legacy."[14] Binney and Sergeant proffered a more liberal interpretation of the city's corporate powers. They admitted that corporations previously could not hold property in trust under the "old doctrine" of British common law.[15] But they emphasized that the city's charter explicitly authorized it to receive, hold, and alienate numerous forms of property; moreover, recently settled legal principles allowed corporations to hold property in trust, especially when the trust was "for the welfare of the corporation."[16] Finally, Binney and Sergeant argued that the city could administer Girard's trust because it advanced the stated "objects" of the city's corporate charter.[17] Binney explained:

> The trusts of Mr. Girard's Will have a particular relation to the corporate powers and interests of the city. They directly and immediately promote the objects of the corporation; and therefore the power of executing them cannot be denied,

[13] *Vidal Et Al. V. Girard's Executors*, 145-48.

[14] Ibid., 143.Also see ibid. at 182-183.

[15] Ibid., 148.

[16] Ibid., 148.

[17] Ibid., 148. The U.S. Reports include a significantly truncated account of Binney's argument on this point, reporting only that, "The charter of Philadelphia, (page 73 of the city ordinances,) in the 16th section, grants a general power to make laws for the welfare of the people."

> whatever may be the general rule. The City of Philadelphia is a great Commonwealth; and the powers of the Corporation, for her good and the good of her citizens, are under no restraint but that of not violating the constitution and laws of the State…This power extends to all the declared objects of the charter, [citing the charter's preamble:] 'the suppression of vice and immorality, the advancement of health and order, and the promotion of trade, industry and happiness.' The maintenance and education of her poor orphans, is an object entirely cognate to all the recited purposes. It is the duty of every such city.[18]

In other words, the city's corporate charter authorized its officials to pursue a defined set of "objects" (or end-purposes) using an unspecified range of legislative means. Girard's trust was "cognate" to the city corporation's declared "purposes." It was an effective means to the ends set forth by the city's charter, and thus fell within the city's corporate powers.

Second Question: The scope of the City's corporate powers in relation to religion

But, did the controversial provisions in Girard's will violate Pennsylvania law with respect to religious liberty? Could a school that arguably excluded Christianity, that is, really be considered a charity? In order for Girard's aggrieved heirs to prevail on this question, Webster and Jones had to convince the Court that Girard's trust was overtly hostile to Christianity. The Pennsylvania Supreme Court had previously upheld statutes prohibiting blasphemous speech on the grounds that Christianity – albeit "general" Christianity "without the spiritual artillery of European countries" – was part of the state's common law.[19] The Pennsylvania court had defined the scope and limits of religious liberty under the state's constitution as follows:

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[18] Horace Binney, "Argument of the Defendants' Counsel, and Judgment of the Supreme Court, U.S. In the Case of Vidal and Another, Complainants and Appellants, Versus the Mayor, &C. Of Philadelphia, the Executors of S. Girard, and Others, Defendants & Appellees," (Philadelphia 1844), 60.

[19] See *Updegraph v. Commonwealth*, 11 Serg. & Rawle, 394 Pa. 1824, at 400. Also available in WestLaw as, *Updegraph v. Commonwealth,* 1824 WL 2393 (Pa. 1824).

> While our own free constitution secures liberty of conscience and freedom of religious worship to all, it is not necessary to maintain that any man should have the right publicly to vilify the religion of his neighbors and of the country; these two privileges are directly opposed. It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace of the country by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience; but licentiousness, endangering the public peace, when tending to corrupt society, is considered as a breach of the peace, and punishable by indictment. Every immoral act is not indictable, but when it is destructive of morality generally, it is, because it weakens the bonds by which society is held together, and government is nothing more than public order.[20]

Blasphemy was surely an offense against God, under this view. But for legal purposes, blasphemy was punishable because it threatened peace and order. Drawing from this and other precedents, Webster and Jones argued that Girard's trust was illegal because it vilified Christianity and undercut the social order.

Webster described Christianity as the pervasive religion of the nation. As he used the term, however, "Christianity" did not refer primarily to a form of worship or a distinctive set of theological beliefs. Instead, it described the nation's collective moral identity. America was a Christian nation with Christian laws in much the same way that it was a republican nation with republican laws. The same was true of Pennsylvania: "Pennsylvania is a free and independent state," he exhorted the Court:

> She has a popular government, a system of trial by jury, of free suffrage, of vote by ballot, of alienability of property. All these form part of the general public policy of Pennsylvania….These great principles have always been recognized; and these are no more parts of and parcels of the public law of Pennsylvania than is the Christian religion.[21]

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[20] Ibid., 408-409.

[21] Daniel Webster, *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will* (Buffalo, NY: William S. Hein & Co, 1844), 65-66. For a redacted account of this portion of Webster's argument, also see *Vidal Et Al. V. Girard's Executors*, 177-78.

To support this claim, Webster cited historical and legal documents that named Christianity as a source and goal of civic life. For example, the original charter of Pennsylvania declared (in Webster's words), "that the preservation of Christianity is one of the great and leading ends of government."[22] State laws prohibiting blasphemy and enforcing Sunday laws were based on the same principle;[23] the "system of oaths in all our courts" rested "on Christianity and a religious belief."[24] Webster finally appealed to the architecture dotting the nation's towns and villages as evidence that Christianity was part of the law by general consent:

> This was the case among the Puritans of England, the Episcopalians of the Southern States, the Pennsylvania Quakers, the Baptists, the mass of followers of Whitefield and Wesley, and the Presbyterians—all—all brought and all adopted this great truth—and all have sustained it. And where there is any religious sentiment amongst men at all, this sentiment incorporates itself with the law. *Everything declares it!* The massive Cathedral of the Catholic; the Episcopalian Church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials around and about us—the grave yards—their tombstones and epitaphs—their silent vaults—their mouldering contents—all attest it. *The dead prove it as well as the living!* The generation that is gone before speak to it, and pronounce it from the tomb! We feel it! All, all, proclaim that Christianity—general, tolerant Christianity—Christianity independent of sects and parties—that Christianity to which the sword and the fagot [sic] are unknown—general, tolerant Christianity, is the law of the land![25]

This general and tolerant Christianity was the object of an overlapping consensus among a denominationally diverse population. The substance of "general Christianity" was specific but broad; it was theological, but not sectarian; and, it was grafted into the nation's public institutions, laws, and culture. Webster proclaimed,

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[22] *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 66.

[23] Ibid.

[24] Ibid., 67.

[25] Ibid., 68-69. Italics in original.

> …there are certain great religious truths which are admitted and believed by all Christians. All believe in the existence of a God. All believe in the immortality of the soul. All believe in the responsibility, in another world, for our conduct in this. All believe in the divine authority of the New Testament.[26]

"Christianity" – the term, and the social forms to which it pointed – was a thin symbol of American law and society: a vague, but powerful and pregnant concept functionally analogous to other symbolic terms like "justice" or "equality."[27] Excising Christianity from a public institution was like excluding democracy or liberty from the state. These "great religious truths," in Webster's view, were the necessary and actual foundations of social order, and could surely be taught to children "without their minds being perplexed with clashing doctrines and sectarian controversies."[28] But Girard's will, Webster and Jones argued, proscribed religious instruction altogether from the orphans' college – including instruction in the "great religious truths" upon which American civilization rested. The exclusion of ministers from the campus was similarly "opprobrious to the whole clergy."[29] And where the clergy were excluded and derogated, Webster impugned, so, too, was Christianity. "Ministers are the usual and appointed agents of Christ," he explained. "In human affairs, where the ordinary means of attaining an object are

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[26] Ibid., 46.

[27] I'm trying to show here how the debate assumes and treats general Christianity as a "civil religion" – but only in the same sense that "freedom" and other concepts are also a civil religion. Christianity is one important symbol of American moral identity, expressed in law and laws; this shifts in later cases to an assumption that we are a "religious" nation, or a "diverse" nation with "secular" laws; the debate migrates to a new set of terms, and the terms are injected into an old debate; the norms at stake – i.e. objective, public "religious" or "secular" knowledge and values that make up a legitimate part of the social/legal imaginary vs. subjective beliefs and values that are normatively privatizes. For background, see: Walzer, *Thick and Thin: Moral Argument at Home and Abroad*. Robert Bellah, "Civil Religion in America," in *Beyond Belief: Essays on Religion in a Post-Traditional World* (Berkeley and Los Angeles, CA: University of California Press, 1991).

[28] Webster, *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 46.

[29] *Vidal Et Al. V. Girard's Executors*, 173.

rejected, the object is understood to be rejected also; much more is this the case when the means are divine authority."[30]

Webster also argued this point in reverse, insisting that Girard's stated objectives precluded any school policies that might subvert those objectives. Laymen could not provide religious instruction at the college in the place of clergy, for example, because they were more prone to fiery sectarianism than the more learned and liberal clergy. Similarly, students were not free to leave campus to participate in religious activities because Girard wanted to keep their minds free from religious controversies:

> …it would be just as much opposed to Mr. Girard's whole scheme to allow these children to go out and attend places of public worship on the Sabbath day, as it would be to have ministers of religion to preach to them within the walls; because if they go out to hear preaching, they will hear just as much about religious controversies, and clashing doctrines, and more, than if appointed preachers officiated in the college. His [Girard's] object, as he states, was to keep their minds free from all religious doctrines and sects—and he would just as much defeat his ends by sending them out as by having religious instruction within.[31]

This interpretation of Girard's trust implied that the college was not religiously neutral, but directly hostile to Christianity. "The first step of infidelity," Webster lampooned, "is to clamour against the multitude of sects."[32] And, the next step toward infidelity was inevitable:

> Now, in order to a right understanding of what was Mr. Girard's real intention, and original design, we have only to read carefully the words of the clause I have referred to. He enjoins that no ministers of religion, of any sects, shall be allowed to enter his college, on any pretence whatever. Now, it is obvious, that by *sects,* he means *Christian* sects. Any of the followers of Voltaire or D'Alembert may have admission into this school whenever they please, because they are not usually

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[30] Ibid., 175.

[31] *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 38.

[32] *Vidal Et Al. V. Girard's Executors*, 175-76. Also see *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 42-43.

> spoken of as "sects." The doors are to be opened to the opposers and revilers of Christianity, in every form and shape, and shut to its supporters. While the voice of the upholders of Christianity is never to be heard within the walls, the voices of those who impugn Christianity may be raised high and loud, till they shake the marble roof of the building.[33]

In other words, an institution from which Christianity was excluded would inevitably become an institution in which Christianity was excoriated. Girard's curriculum welcomed the disciples of Voltaire and Jean le Rond d'Alembert. Moreover, it directly applied the teachings of another controversial Enlightenment thinker: Thomas Paine. The "fundamental doctrine" underlying the curriculum, Webster argued, was that "the youthful heart is not a proper receptacle for religion."[34]

> The intention of the will is, that the boys shall choose their own religion when they grow up. The idea was drawn from Paine's Age of Reason, 211, where it is said "let us propagate morality unfettered by superstition." Girard had no secrets, and therefore used the words which he considered synonymous with "superstition," viz.: "religious tenets."[35]

In Webster's view, raising children without religious tenets would squander the most impressionable period of their lives. Girard's college was "a cruel experiment…made upon these orphans, to ascertain whether they cannot be brought up without religion."[36] It was an experiment, moreover, that would subvert virtually the entire social order and every good thing about it. Webster's speech here reached a *crescendo* that a courtroom reporter described as "electric."

> Why, sir, it is vain to talk about the destructive tendency of such a system—to argue upon it is to insult the understanding of every man; *it is mere, sheer, ribald, low, vulgar Deism and Infidelity!* [Here the effect was almost electric, and some one broke out with applause, which was stopped.] It opposes all that is in Heaven,

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[33] *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 24.

[34] *Vidal Et Al. V. Girard's Executors*, 176.

[35] Ibid., 174-75.

[36] Ibid., 174.

> and all on earth, that is worth being on earth. It destroys the connecting link between the creature and the Creator; it opposes that great system of universal benevolence and goodness that binds man to his Maker. *No religion till he is eighteen!* What would be the condition of all your families—of all our children—if religious fathers and religious mothers were to teach their sons and daughters no religious tenets till they were eighteen? What would become of their morals, their excellence, their purity of heart and life, their hope for time and eternity! What would become of all those thousand ties of sweetness, benevolence, love, and Christian feeling, that now render our young men and young maidens like comely plants growing up by a streamlet's side—the graces and the grace of opening manhood—of blossoming womanhood? What would become of all that now renders the social circle lovely and beloved? What would become of society itself? How could it exist? And is that to be considered a charity which strikes at the root of all this; which subverts all the excellence and the charms of social life; which tends to destroy the very foundation frame-work of society, both in its practices and its opinions? That subverts the whole decency, the whole morality, as well as the whole Christianity and government of society? No, sir; no, sir![37]

This was surely an inflated view of the college's malignant potential to destroy society as Webster knew it. In his view, however, the precedent it set would be a court-approved attack on American civilization. Girard, in his lifetime, could have lawfully spoken against Christianity, but "if the aid of a court be asked to carry on these attacks [by upholding the trust], it will be refused."[38] Webster closed his oral arguments with a typically dramatic flourish:

> I believe that this plan – this *scheme* – was unblessed in all its purposes, and in all its original plans! Unwise in all its frame and theory, while it lives, it will lead an annoyed and troubled life, and leave an unblessed memory when it dies! If I could persuade myself that this Court would come to such a decision as, in my opinion, the public good and the law require, and if I could believe that any humble efforts of my own had contributed in the least to lead to such a result, I should deem it the crowning mercy of my professional life.[39]

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[37] *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 55-56. The commentary about the "electric" effect is included in the original.

[38] *Vidal Et Al. V. Girard's Executors*, 177.

[39] *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 70. Also see *Vidal Et Al. V. Girard's Executors*, 183.

Of course, the fifty-thousand dollar commission Webster stood rumored to gain for winning the case would surely add some sparkle to this crowning mercy of his career.[40]

Horace Binney admitted that, if Webster's interpretation of Girard's will was correct, then the trust "would deserve all that can be said against it."[41] He used his own colorful language, however, to describe the aggrieved heirs' construction of the will's meaning: "They all demand of counsel, that they shall impregnate this clause of the Will with dark and deadly poison, and then re-distil each word by their own fires, to drop a darker and deadlier poison over every clause and member of the whole instrument."[42] The antidote to this poison was a more charitable interpretation of Girard's will, and a more expansive interpretation of religious liberty under Pennsylvania and U.S. law. Binney and Sergeant affirmed that Christianity was part of Pennsylvania law. They insisted, however, that Girard's trust, at most, omitted to provide for religious instruction at the school. More likely, it positively enjoined lay instructors to teach pupils the basic truths of Christianity, and to allow for a wide range of religious practices within and without the college's walls. Binney and Sergeant's oral arguments and briefs used constitutional religious liberty provisions to displace "Christianity" as the definitive symbols of religion in American law.

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[40] Daniel Webster is clearly a genius of American constitutional law and rhetoric. Reading the transcripts of his arguments in *Vidal* is a delight. His flourishing prose in this case, however, often tends toward melodrama, to the extent that it would be hard to imagine him asking someone to pass the salt without rising from the dinner table to declaim its great superiority to pepper.

[41] Binney, "Argument of the Defendants' Counsel," 93.

[42] Ibid., 92.

Horace Binney acknowledged that Girard's exclusion of clergy from his college might seem "uncourteous, disrespectful, [or] inexpedient."[43] Girard's reasons for the policy, however, were evident and benign:

> [Girard] declares, that in making this restriction, he does not mean to cast any reflection upon any sect or person whatever; but as there are such a multitude of sects, and such a diversity of opinion among them, he desires to keep the tender minds of the orphans…free from the excitement which clashing doctrines and sectarian controversy are so apt to produce. The motive was therefore to keep the minds of the pupils free from the influence of clashing opinions and sectarian controversy. The means adopted, were the exclusion of ministers of every sect from the College…Here is express affirmative declaration of motive, in addition to express affirmative appointment of means. He excludes ministers of all sects—he excludes nothing else.[44]

The legal question at stake was not whether the clergy were justified in taking offence at the clause, Binney insisted, but whether they were legally entitled to hold an office at the college, or to visit its campus against Girard's will. Here, Binney took direct aim at Daniel Webster, scoffing:

> But we cannot think—no one on the responsibility of his professional character will say—that what it [the will] thus plainly means to enjoin, is unlawful. In other words, no man will say that any ecclesiastic, missionary, or minister, of any sect whatever, has *a lawful* right to hold or exercise any station or duty in such a college, or to admission for any purpose, or as a visiter [sic] within the premises, *against the will or injunction of the founder of it.* If this exclusion be its meaning and end, and its whole meaning and end, there never was, and never can be, a more lawful injunction by the founder of a school or college, be the consequences as they may.[45]

Girard's categorical exclusion of clergy did not imply a corollary ban on all things religious, Binney continued. Here, Binney contrasted the text of the clause prescribing the school's curriculum with the text proscribing the clergy. While the latter explicitly banned the clergy from college premises, the former merely listed the subjects and goals

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[43] Ibid., 94. Also see ibid., 97.

[44] Ibid., 95.

[45] Ibid., 94-95.

for the orphans' education. This distinction implied that Girard wanted the college's administrators to choose appropriate means for instructing students in the designated subjects. "Had [Girard] meant to exclude religion from his school," Binney reasoned, "he would have done so as distinctly and emphatically, as he has excluded the ministers of religion."[46] Girard could have prohibited everything except "profane or secular learning,"[47] for example, but he didn't. He left teachers "without any such restraint."[48]

In fact, the text of Girard's will implied that lay teachers *should* provide religious instruction at the college. Binney's argument on this point illustrates how general Christianity was viewed as objectively true – something religious but non-sectarian in nature. Girard's will urged that instructors at the college,

> …take pains to instill into the minds of the scholars the *purest principles of morality,* so that on their entrance into active life, they may evince benevolence to their fellow-creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.[49]

Girard must have assumed, Binney continued, that learning the general principles of Christianity was a necessary and effective means for acquiring these pure principles of morality:

> Interpreting these expressions with any the least candour, can they be understood to prohibit the Bible, from which the purest morality is drawn, or the evidences of Christianity, or such systems of Christian morals, as place them upon the sure and only sure basis of Christianity? I answer no…Mr. Girard has enjoined instruction in the *purest morality*. He has given no statement on the basis on which he requires it to be taught. He has not said a word in opposition to the universal scheme of all Christian countries and seminaries, of uniting ethics with Christian

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[46] Ibid., 97.

[47] Ibid., 98.

[48] Ibid.

[49] Ibid.

> theology, since nothing is to be made of morality without their union. He has left the basis of the science to the selection of his trustees.[50]

This meant that college administrators were free, under Girard's will, to choose and adopt efficient methods of moral instruction. Christian theology and ethics were the obvious choice. Furthermore, teaching the students the broad principles of Christianity would prepare students to choose their own religious "tenets" upon graduation – just as Girard wished. For Girard had surely presumed,

> …that the great truths of Christianity, in which all Christian denominations concur, will be taught in the College. From these [great truths] he expects them to obtain the purest system of morality. Their religious *tenets*—the dogmas, doctrines, principles, which by different interpretations, different sects derive from the Scriptures—such of these as they may prefer, he desires them to adopt by the aid of their matured reason. By religious *tenets* he does not mean religion generally. It is neither accurate nor the popular understanding of the words. An inquiry concerning any man's religious tenets, could not be accurately or pertinently answered by saying, "he believes the Bible to be the word of God," or "he is a believer in the Christian religion." The rejoinder to such an answer would be, I wish to know his *tenets;* and the only pertinent answer would be—he is a Catholic, a Protestant Episcopalian, a Presbyterian, a Baptist. Mr. Girard used the words in this sense only.[51]

Far from establishing a bastion of Enlightenment heresy and infidelity, then, Binney and Sergeant contended that Girard's college would train students in the values and virtues of the republic. They rejected the idea that laymen could not teach religion, and dismissed "as equally extravagant" the assertion that "any Protestant denomination in this country prohibits lay teaching of religion—lay teaching in schools."[52] The trust did not prohibit "the institution of a Sunday school" taught by laymen upon the premises of the college, they added. Nor did it prohibit the trustees from "sending the pupils to their respective churches, if they or their friends have any, without the walls" of the college. Finally, there

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[50] Ibid.

[51] Ibid., 99.

[52] Ibid., 103.

was "nothing even in the suggestion" that sick and dying students would be denied pastoral care, for the trustees could "erect an infirmary without the walls" of the college where clergy could visit the students.[53]

Binney's distinction between religious tenets, dogmas, and doctrines, on the one hand, and the great truths of Christianity, on the other, is significant. The former represented religious "opinions" upon which different pupils were bound to disagree. The latter were objective truths not subject to serious debate; matters that were religious, but not "sectarian." Here was a social imaginary, then, that presumed the Christian Bible, Christian morality, and the "evidences" of Christianity's veracity to be matters of common sense. One could hardly speak of morality in this context, Binney's argument suggests, without implicit reference to the Bible and Christian mythology. Conversely, one could presumably read the Bible or discuss basic matters of the faith without ever wandering into the realm of mere "opinion." Certain religious topics were simply presumed given and true. In other words, the trappings and tropes of general Christianity (with a Protestant and democratic bent) were "public" knowledge, while the doctrines and dogmas of particular Christian denominations represented "private" opinions. Society and its collective imaginary were ecumenically Christian – not secular or sectarian. A curriculum rooted in general Christianity, this argument implied, was comparable to a prototypical 19th century "public school." Girard's college just happened to be privately funded by legacy, rather than publicly funded through the collection of taxes.[54]

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[53] Ibid., 104.

[54] I am indebted to John Witte, Jr. for bringing this last point to my attention.

Binney and Sergeant couched this interpretation of Girard's will within a relatively liberal interpretation of religious liberty norms under Pennsylvania and American law. They affirmed that Christianity was part of Pennsylvania law, not to be "vilified, profaned or exposed to ridicule." Binney emphasized, however, that the law also protected the conscientious rights of non-Christians: "It is Christianity for the defence and protection of those who believe, not for the persecution of those who do not."[55] Indeed, imposing Christian faith on non-believers would violate Christian and constitutional norms, alike:

> The Constitution is at the remotest distance possible, from doing the mischief to Christianity, of imposing its faith upon anyone. It stands, and will stand, by its own principles and sanctions. The Constitution removes and prohibits restraints. It imposes none. [Quoting the Pennsylvania Constitution:] "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent. No human authority can in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Art. IX. sec. 3.[56]

That the state constitution granted these freedoms without imposing correlative "restraints" was significant. On one hand, it meant that the law did not (and could not) require Christianity to be taught in all schools. "There is no law that says Christianity will be taught in our schools, by Christian ministers," Binney pointed out. "Is there any law that says it shall be taught at all?"[57]

> If the teaching of Christianity is enjoined by the law, what are the principles, what the creed? What has the Legislature of Pennsylvania done for our public

[55] Binney, "Argument of the Defendants' Counsel," 103.

[56] Ibid., 102-03. Binney also quoted Article IX. sec. 4, which reads: "No person who acknowledges the being of a God, and a future state of rewards and punishments, shall on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." Also see *Vidal Et Al. V. Girard's Executors*, 154.

[57] "Argument of the Defendants' Counsel," 102.

> schools—what can it do? We may lament this, and we may be wise or unwise in lamenting it; but we have formed our political community, upon principles that do not permit us to do any thing but lament it.[58]

While acknowledging that Christianity was a public religion, Binney emphasized that it was public primarily at the level of civil society. Popular religion infused the law. But the law did not, and could not impose religion upon the general public – even if it merely involved spending someone else's money or implementing the terms of their private last will and testament.

These limits were central to Binney's defense of the "charitable" character of Girard's trust. Daniel Webster had cited a British legal principle that deemed trusts established for "superstitious" uses legally invalid. Trusts were superstitious to the extent they propagated religious doctrines that were not officially tolerated under British law – e.g. Roman Catholicism, Judaism, etc. Binney cited the same body of law but emphasized that, even under British law, trusts established for the maintenance and education of persons belonging to non-conformist sects were valid.[59] British law distinguished between "charities for propagating the doctrines of religion, and charities for education and other objects, with which the doctrines of religion have no necessary connexion."[60] Even if the British rule applied to Girard's trust, the trust would still be valid because it advanced non-religious, charitable objectives. Ultimately, British law did not apply, and the question of whether Girard's trust was a "superstitious" use was "more suitable for a

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[58] Ibid., 103. For more on this point, see: Tedesco, "The Story Behind Vidal V. Girard's Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty."

[59] See *Vidal Et Al. V. Girard's Executors*, 176. Also see Binney, "Argument of the Defendants' Counsel," 104-05. "A charity school for Jews would upon this principle be illegal; whereas it is perfectly settled in England, that although a legacy to propagate the Jewish religion is invalid, a charity for the maintenance and education of poor Jews, is good…"

[60] "Argument of the Defendants' Counsel," 105.

theological board than a court," Binney mocked. If a Pennsylvania judge took it upon himself to determine whether a trust was "superstitious,"

> He would find liberty of conscience established by the constitution; that in the constitution of the United States it is provided that Congress shall make no law affecting religion; and that Mr. [James] Madison once affixed his veto to a bill incorporating a church under an apprehension that it trenched upon this delicate ground. It was never held that a charitable devise [trust] must make provision for religious education…Does any one desire that the old times in religion should return, when a man was allowed to do good only in a particular way, and in no other?[61]

Binney thus linked Girard's proposed curriculum to national debates about the meanings of religious liberty, and the scope Christianity's role in American law. Those who sought to invalidate Girard's trust based on its inadequate or unorthodox provisions for religious instruction faced multiple layers of law affirming the equal rights of religious and non-religious minorities. The "old times in religion" were not worth revisiting, and Americans should be allowed to "do good" in accordance with their individual consciences, however close to, or distant from traditionally established forms of religious practice. Rebutting Webster's suggestion that Girard's will threatened the religious liberties of students at the college, Binney asked: "And have the founders of schools no conscience to be respected? Is the conscience of the giver to pass for nothing? Can those who may refuse the bounty altogether, on the terms on which it is given, set up their conscience to destroy the gift?"[62]

In sum, Binney argued that Girard's motives for excluding the clergy from the college were benign; that the college's curriculum allowed for, and even enjoined lay instruction in the general principles of Christianity; that nothing in the will was intended

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[61] *Vidal Et Al. V. Girard's Executors*, 170.

[62] "Argument of the Defendants' Counsel," 106.

to prevent students from individually professing or exercising their own religious tenets; and that nothing in state (or federal) law required charitable benefactors to include religious instruction in their bequests. As such, Girard's trust was valid under state law, and the city could lawfully administer it.

§ 4 Supreme Court Ruling

The Supreme Court upheld the trust for Girard's college, ruling that the city of Philadelphia had power to administer charitable trusts, and that the controversial religious provisions in the trust were not inconsistent with state law. Joseph Story affirmed virtually every aspect of Horace Binney's argument on behalf of Girard's estate. His written opinion acknowledged that general Christianity was a pervasive and public religion at the level of civil society. The implications of this fact for the differentiation of religious and legislative institutions were less than clear, however, when viewed in light of Pennsylvania's religious liberty norms. The city could administer Girard's trust because it advanced the legislative ends enumerated in the city's corporate charter, Story reasoned; and because it did not exclude or derogate Christianity. The open questions that remained were whether the city could administer similar trusts that did exclude Christianity, and whether trusts for the propagation of non-Christian religions were valid under Pennsylvania law. While these questions were not at issue in the case, Story briefly noted them in order to guide the lower courts in the subsequent cases.

Story approached the arguments in *Vidal* in light of the enumerated powers and purposes of the corporation of the City of Philadelphia. He first evaluated the city's power to administer charitable trusts. Philadelphia's charter was a legislative act

conveying specific powers from the state legislature to the city corporation, Story reasoned. The charter's text empowered city officials to administer trusts that advanced specific purposes. Namely, it granted city officials corporate power to "have, purchase, take, receive, possess, and enjoy" various types of property, and listed no "limitation whatsoever as to the value or amount thereof, or as to the purpose to which the same were to be applied, except so far as they [the limitations] may be gathered from the preamble of the act."[63] Importantly, the charter's preamble listed the legislature's official reasons and goals for incorporating a new city government. The previous city government, it stated, was

> …inadequate to the suppression of vice and immorality, to the advancement of public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established.[64]

Story reasoned that these two factors – the city's corporate property rights, and the declared purposes of its charter – implied that the city corporation could receive and administer trusts that promoted purposes germane to those listed in the charter.

> In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the state. We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is competent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.[65]

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[63] *Vidal Et Al. V. Girard's Executors*, 187.

[64] Ibid.

[65] Ibid., 190.

Thus, before considering whether Girard's trust violated Pennsylvania law with respect to religion, Story identified a set of purpose-based powers specific to the city corporation. These powers functioned as a benchmark for determining whether the city could administer Girard's trust. That is, administering the trust would be consistent with the city's enumerated powers insofar as it effectively suppressed vice and immorality, advanced health and public order, and/or promoted trade, industry, and happiness. Such ends were broad, but not unlimited. Subsequent courts would describe and theorize these purposes variously in terms of "police" power, "public policy" power to promote the "common good," or in terms of state's power to promote the health, safety, welfare and morality of the community. The Court in *Vidal* described them in terms of "charitable" purposes, and purposes "beneficial to the city or the public."

Thus, in order for Girard's trust to fall within the city's enumerated powers, it had to 1) advance "charitable" purposes, without 2) violating legal norms in relation to religion.[66] Story reasoned that schools for orphans obviously advanced charitable purposes. "Not only are charities for the relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars."[67] But did Girard's college, in particular, cease to be a charity when it excluded Christianity and banned the clergy, as Webster had alleged? Did such trusts, in order to respect the maxim that Christianity was part of the common law,

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[66] Justice Story framed this legal question in *Girard* as follows: "Secondly, whether [the trusts'] uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania." Ibid., 186.

[67] Ibid., 191-92. Story examines the issue of *cestui que trusts* raised by Webster and Jones on pages 192-197 of the decision.

and in order to respect the religious liberties of pupils and clergy, necessarily have the "fragrance" of Christianity about them?[68]

Story addressed these questions separately. On one hand, he affirmed Horace Binney's construction of the will: Girard's trust did not, in fact, prohibit instruction in the general principles of Christianity. Story's written opinion belied a view of Christianity that was colored by American-Protestant theology and ecclesiology. Christianity was profoundly democratic in character, he reasoned. Divine revelation was universally accessible, and independent of clerical authority and religious institutions: "Why may not laymen instruct in the general principles of Christianity as well as ecclesiastics?" Story asked.[69]

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon general evidences of Christianity, from being read and taught in the college by lay-teachers?[70]

Pious laypersons could teach at the college because the trust had no restrictions "as to the religious opinions of the instructors and officers."[71] Teachers could offer non-sectarian religious instruction because the trust did not expressly proscribe it. But Girard's trust did not merely allow religious instruction; his proposed curriculum, with its emphases on morality and virtue, strongly commended the teaching of Christianity's

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[68] Webster had stated: "If it becomes an unbeliever, it is no longer a charity. There is no example in the books of a charity where Christianity is excluded. There may be a charity for a school without a positive provision for Christian teachers; but where they are expressly excluded, it cannot be such a charity as is entitled to the special favour and protection of a court…No fault can be found with Girard for wishing a marble college to bear his name for ever, but it is not valuable unless it has a fragrance of Christianity about it." Ibid., 173-74. Also see Webster, *Webster's Speech: A Defence of the Christian Religion, and of the Religious Instruction of the Young: Delivered in the Supreme Court of the United States, February 10, 1844, in the Case of Stephen Girard's Will*, 41.

[69] *Vidal Et Al. V. Girard's Executors*, 200.

[70] Ibid.

[71] Ibid.

general precepts. "Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?" Story asked.

> Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator [Girard] has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality…by all appropriate means; and of course including the best, the surest, and the most impressive.[72]

Story thus interpreted Girard's last will and trust to be neither hostile to, nor inconsistent with Christianity. The proposed curriculum did not omit religious instruction, or preclude discussion of the general truths of Christianity. Therefore, the city could administer the trust without violating the maxim that Christianity was part of the common law in Pennsylvania.

> Looking to the objection therefore in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the state of Pennsylvania.[73]

Story was more reticent about the legal status of non-Christian charitable trusts. Story had been a vocal proponent of the maxim that Christianity was part of the common law,[74] and had argued in his *Commentaries on the Constitution of the United States* (1933) that it was "the especial duty of government to foster, and encourage it [Christianity] among all the citizens and subjects."[75] Already in the *Commentaries,* however,

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[72] Ibid.

[73] Ibid., 201.

[74] See: Tedesco, "The Story Behind Vidal V. Girard's Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty." Also see: Green, *The Second Disestablishment: Church and State in Nineteenth-Century America.*

[75] Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution.*, 3, 722ff.

Story circumscribed the power of governments to support and foster religion among the people: "But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires."[76] He applied a similar logic in *Girard*. "It is also said, and truly," he explained, "that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government."[77] He continued, "Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used, and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels."[78] Christianity was, therefore, part of Pennsylvania law only in the "qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."[79] The maxim did not preclude, however, the equal rights of those who practiced different religious traditions, or those "infidels" who professed no religious faith whatsoever.

While affirming the equal rights of "all sects," Story stopped short of affirming the validity of overtly non-Christian trusts. Indeed, the existence of trusts for the "propagation of Judaism, or Deism, or any other form of infidelity" was purely

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[76] Ibid., 727.

[77] *Vidal Et Al. V. Girard's Executors*, 198.

[78] Ibid.

[79] Ibid.

hypothetical, and unnecessary to consider in the abstract. Such a trust was simply not "to be presumed to exist in a Christian country."[80] Story's presumption that trusts propagating non-Christian forms of "infidelity" did not exist in the United States perhaps belied Story's own biases. Story left open the possibility that such trusts could be consistent with Pennsylvania law, including the maxim that Christianity was part of the law. He cautioned that "remote inferences" should not be drawn such trusts, and asserted that, in order to violate the maxim that Christianity was part of the state's common law, "There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated."[81]

§5 Conclusion

The arguments and the final ruling in *Girard* illustrate the role of constitutional law in the differentiation (and re-integration) of social spheres. Recall that social spheres refer to distinguishable categories of social activity that 1) issue from specific sources, 2) take specific, socially meaningful forms, 3) advance specific, practical ends or outcomes, and 4) adhere to the specific identities (or roles), norms and narratives that define a given sphere. In *Girard*, the Court defined and mediated between multiple social spheres – including the spheres of legislation and religion. Justice Story's opinion defined the (local) legislative sphere by evaluating the city corporation's legislative powers. The Court defined the sphere of religion, on the other hand, by evaluating how various parties in the case were entitled to act under the auspices of, or in relation to "religion." The Court's ruling was not merely an abstract pronouncement about the meanings of law and

[80] Ibid.

[81] Ibid., 199.

religion: it enforced a specific conception of religious and legislative spheres in this case, and influenced subsequent rulings in other cases.

The legal questions at issue in *Girard* differ in significant ways from most contemporary Establishment Clause cases. The *Girard* Court evaluated whether a city government could administer a trust that was donated by a private citizen. The central issue in Girard was not whether administering the trust violated the federal Establishment Clause, but whether it was consistent with the maxim that Christianity was part of the common law in Pennsylvania, and with state constitutional provisions for the free exercise of religion. The *Girard* Court, therefore, evaluated the extent to which religion (specifically, Christianity) *must* be part of publicly administered education; in contrast, the Supreme Court in more recent cases has evaluated the extent to which religion *may* be part of public school curricula. The *Girard* ruling does not, therefore, offer an explicit standard of constitutional review that could be easily incorporated in modern Establishment Clause jurisprudence.

The methods and legal norms that the Court applied in *Girard* do, however, shed light on contemporary debates about the secular purpose test, and about role of constitutional law in the differentiation of religious and legislative spheres and institutions. Like more recent Establishment Clause jurisprudence, the Court's ruling in *Girard* evaluated the extent to which religious and legislative spheres overlapped. The *Girard* Court enforced a specific interpretation of the city's corporate powers by identifying the sources from which those powers issued, the forms of action such powers could take, and the practical ends toward which such actions could be applied. In other words the *Girard* Court defined and enforced a specific conception of the legislative

sphere as it related to the sphere of religion – it enforced a (partial) differentiation religious and legislative spheres.

Justice Story's method for evaluating the city's powers in relation to Girard's trust – call it the "*Girard* method" – has important parallels to the modern *Lemon* test. Like the *Lemon* test, the *Girard* method begins with an evaluation of legislative "purposes." Whereas the *Lemon* test requires such purposes to be "secular," however, the *Girard* method requires legislative purposes to be consistent with the goals or end-purposes listed in the city's corporate charter: the suppression of vice and immorality, the advancement of health and order, and the promotion of trade, industry and happiness. Alongside the other forms of legislative action that the city's charter specifically listed – such as the power to receive, hold and alienate property – these end-purposes defined a limited set of legislative powers that constituted the positive content of city's legislative sphere. The precise scope of each and all of these powers with respect to religion was a central point of contention in *Girard*.

By conceiving of the legislature's powers in terms of the city corporation's enumerated powers and ends, the *Girard* method ascribed to the legislative sphere a definitive set of functions and social goods. The legislative sphere was free to develop its own form of autonomy, as it were. But constitutional law restricted this development: The legal functions of the legislative sphere were the suppression of vice, the advancement of health, and so on.

Although none of these functions expressly implicated Christianity, the maxim that Christianity was part of the common law in Pennsylvania functioned almost like an enumerated legislative power in Justice Story's ruling. Because Christianity was part of

the common law, promoting and protecting the Christian faith was one function of the legislative sphere. The Court's close association of Christianity and public morality indicated another point of overlap between the spheres of legislation and Christianity. The claim that "moral" education necessarily implied training in the general truths of Christianity indicated the extent of this overlap. City officials could administer a trust that promoted "general Christianity" without exceeding the boundaries of the legislative sphere.

The Court enforced a stricter form of differentiation, however, between legislation and "sectarian" religion. The sphere of "general Christianity" was defined in terms of common theological knowledge, universal moral norms, and mutually affirmed acts of religious piety. In contrast, the sphere of "sectarian" religion was defined in terms of private theological "tenets," membership in a narrow subset of society, and acts of religious piety that coincided with only a narrow subset of Christianity. Legislative actions could be "religious" or even "Christian" without exceeding the boundaries of the legislative sphere. But "sectarian" actions presumably corrupted the substance of, and/or exceeded the limits of the legislative powers.

Finally, the Court's *Girard* ruling also defined the substance and boundaries of "religious" spheres, though less directly. Story's view of religion, and especially of Christianity, was shot through with democratic and Protestant ideals. Admitting that Christianity was part of the common law did not imply, in Story's view, that the church was part of the state; that public institutions were or should be overtly Christian in character or form; or that the clergy were the primary (or even necessary) media for propagating the Gospel. Religious faith issued from God to the individual conscience –

the seat of religious authority. Obedience to this authority was voluntary, and beyond the rightful power of legislators (or anyone else, for that matter) to coerce. If religion was most often expressed in creeds, sects and denominational forms, it was ultimately anchored in the hearts and minds of individual believers.

The Court's ruling in *Girard* did not settle the constitutional boundaries between religious and legislative spheres. Changing demographics, technologies, public institutions and numerous other factors forced American courts to evaluate the implications of state and federal constitutions that prohibited religious establishments. In the next chapter, I analyze one such case: *Hennington v. Georgia* (1896). Like the *Girard* Court, state and federal courts in Hennington would not define constitutionally valid legislative purposes in terms of secularity, but in terms of the enumerated powers of specific legislatures.

Chapter 2
Remember the Sabbath (without Keeping it Holy).

> *Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within the legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in anywise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious rather than by the civil aspect of the measure. Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty…The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated, it is valid law.*[1]
>
> – Justice Wm. Bleckley, Georgia Supreme Court

§ 1 Introduction

Can a state legislature force its residents to observe the Sabbath? In *Hennington v. Georgia* (1896) the Georgia Supreme Court and the U.S. Supreme Court evaluated the constitutionality of a state law prohibiting most trains from operating on Sunday. The plaintiff in *Hennington* challenged the law primarily on "Commerce Clause" grounds – not as a violation of state or federal provisions for religious liberty.[2] Both courts' rulings, however, engaged an emerging debate among state-level courts about the scope and limits of legislatures' power to enforce religious duties. Both rulings in *Hennington* differentiated the functions of legislative and religious spheres, without privatizing legislators' religious moral norms and motives. Georgia legislators had probably enacted the state's Sabbath laws for religious reasons, they concluded; moreover, many Georgia

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[1] *Hennington V. The State*, 90 Ga. 396 397 (1892).

[2] The Commerce Clause states: "Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." See "The Constitution of the United States," Article 1, Section 8, Clause 3. Also see further discussion below.

residents undoubtedly observed the Sabbath out of a sense of religious duty. Nonetheless, Sabbath laws were legitimate expressions of the state legislature's police powers because they imposed only "civil" duties, and effectively advanced the mental, moral, and physical health of Georgia residents. But how could it be that mandatory rest on the Christian Sabbath was merely a civil duty, and not a religious one?[3]

§ 2 Facts and Arguments

L.F. Hennington was the superintendent in charge of freight transportation for the Alabama Great Southern Railroad (AGSR). AGSR operated a line carrying freight and passengers from Meridian, Mississippi to Chattanooga, Tennessee – one segment of a longer line that ran from New Orleans to Cincinnati. Compared to neighboring states, Georgia imposed relatively strict limits on train travel. Specifically, the state's Criminal Code prohibited the running of most freight trains on Sundays, thus putting AGSR at a competitive disadvantage to other companies whose lines skirted the state. Georgia officials convicted Hennington for running a freight train on Sunday, March 15, 1891.

Hennington challenged his conviction on the grounds that Georgia's Sabbath law violated the federal Constitution's Commerce Clause, which states: "Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Interpretations of this clause have evolved over time, but courts by this point had consistently portrayed this clause as granting the federal Congress power to regulate commercial activities that crossed state lines. In some cases, courts

[3] I have benefitted from and incorporated into this chapter some of the themes discussed in Steven K. Green's helpful analysis of Sabbath laws and their relation to the maxim that Christianity was part of the common law. See: Green, *The Second Disestablishment: Church and State in Nineteenth-Century America*, 182-90, 231-47. Also see John Witte, Jr.'s discussion of more recent Sabbath law cases argued in the U.S. Supreme Court. Witte, *Religion and the American Constitutional Experiment*.

have ruled that the clause also prohibits state legislatures (or other regulatory bodies) from regulating such commerce, at least in ways that conflict with federal regulations.[4] Hennington's attorneys interpreted the Commerce Clause broadly, arguing that it prohibited state legislatures from passing any laws the effects of which restricted interstate commerce: "It would seem an axiom that where a subject is placed, by the constitution, which is the supreme law of the land, under the regulation of Congress, all other interferences and control are excluded."[5] Insofar as Georgia's Sabbath laws blocked commercial train traffic from moving through the state on Sundays, Hennington contended that those laws violated the Commerce Clause.

Hennington's attorneys also argued that Georgia's statute was at odds with federal policy. Congress had not passed any laws that explicitly guaranteed uninhibited freight travel between states on Sundays. Congress had, however, removed "trammels upon transportation between different states."[6] Furthermore, Congressional silence about Sunday legislation supposedly indicated a desire to avoid regulations of the sort that got Hennington in trouble. "The non-action of Congress on the subject," his attorneys explained,

> …is evidence that it [Congress] intends there should be no interference with interstate commerce for the sake of Sabbath observance. Should the time ever come when it shall be expedient to hold in suspense all the interior interstate commerce of the United States during Sundays, Congress will so declare; but until such declaration is made, the intention of Congress is that there shall be no

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[4] Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems* (USA: West, 2009), 232-72; 364-411.

[5] Brief for Plaintiff in Error at 4 and 7, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150).

[6] Brief for Plaintiff in Error at 12, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150). (Quoting *Railroad Co. v. Richmond,* 19 Wall., at p. 589.)

> interruption to interstate commerce on that account. Such intention of Congress is supreme.[7]

Hennington's lawyers did not address the implications of such a law under the Establishment Clause. Their argument implied that the federal legislature could, in theory under the Commerce Clause, uniformly regulate interstate train traffic on Sundays. At the same time, Hennington's attorneys attacked the state's central claim that Sabbath regulations represented a valid exercise of the state legislature's regulatory powers. "The usual claim is made by the state of Georgia in this case that this legislation is nothing more than police regulation. The answer to that seems simple. The state of Georgia has no right to adopt any police regulation the effect of which would be to obstruct interstate commerce. It makes no difference what the purpose of the statute is. We look only to its effect."[8]

Attorneys for the state of Georgia turned this argument on its head: Georgia's Sabbath law, they urged, was valid *precisely because* it expressed the legislature's police powers, and only coincidentally affected interstate commerce. The long history of Sabbath laws in Georgia demonstrated that the train regulations were merely part of a long-standing policy to enhance the health and wellbeing of Georgia residents – not an attempt to restrict commerce between states. The regulations dated back to 1762, they pointed out, when the colonial legislature first prescribed that,

> No tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity or charity only excepted)…And that no person or persons whatsoever shall publicly cry, show

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[7] Brief for Plaintiff in Error at 15, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150). Internal citations omitted.

[8] Brief for Plaintiff in Error at 16, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150). Emphasis added.

> forth, or expose to sale, any wares, merchandises, fruit, herbs, goods, or chattels whatsoever, upon the Lord's day, or any part thereof.[9]

The Georgia legislature later passed a law in 1850 specifically limiting freight traffic.[10] And, the more recent amendment to the law, under which Hennington had been charged, simply specified that the train superintendent alone was punishable for Sunday violations. In light of this legislative history, the state argued the law advanced legitimate ends that were consistent with the state's well-established "police" powers:

> It is obvious from the above history of this legislation, as well as from the statute itself, that nothing could have been more foreign to the authority enacting this Sunday law than an intention to regulate interstate commerce. Its origin not only antedates the act of the General Assembly authorizing the construction and operation of this road within the State, but it existed as the law of the Province of Georgia before the Constitution was dreamed of by the patriots of the Revolution. *It was enacted for the sole purpose of promoting the mental, moral and physical well being of the people of Georgia by providing that they should obey one of nature's laws and rest at regular intervals from labor.* This statute…is nothing more than a police regulation.[11]

Though cloaked in an historical argument, this interpretation of the Sabbath laws reflected nineteenth-century tendencies to defend such legislation by appealing to natural law and the supposed benefits of enforcing a uniform day of rest. These benefits were legitimate objects of the state's police powers. But the colonial Sabbath law of 1762 had overtly religious purposes. After all, it was entitled, "An Act for preventing an punishing Vice, Profaneness, and Immorality, and for keeping holy the Lord's Day, commonly called Sunday."[12] In addition to prohibiting a variety of commercial and recreational

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[9] As quoted in Brief and Argument of Counsel for Defendant in Error at 3-4, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150).

[10] Thomas Read Rootes Cobb, *A Digest of the Statute Laws of the State of Georgia, in Force Prior to the Session of the General Assemply of 1851, with Explanatory Notes and References*, vol. 1 (Athens, GA1851), 299.

[11] As quoted in Brief and Argument of Counsel for Defendant in Error at 6, Hennington v. Georgia, 163 U.S. 299 (1896) (No. 150). Emphasis added.

[12] Cobb, *A Digest of the Statute Laws of the State of Georgia, in Force Prior to the Session of the General Assemply of 1851, with Explanatory Notes and References*, 1, 299.

activities, the earliest Sabbath laws also compelled "all persons" to attend worship. Its preamble stated the legislature's purpose for enacting its provisions as follows:

> *Whereas,* there is nothing more acceptable to God than the true and sincere worship and service of him, according to his Holy will, and that the keeping holy [of] the Lord's day is a principal part of the true service of God, which in this Province is too much neglected by many…"[13]

The eighteenth-century authorities in Georgia thus wanted to foster "true service of God" and enforce Sabbath behavior that was "acceptable to God." Later lawmakers may have still hoped to encourage godly behavior. Like other states, however, the Georgia legislature and courts had subsequently jettisoned the theological framing and compulsory religious observances, while leaving intact many of the original restrictions on "ordinary" Sunday activities. The limited duties that state-level Sabbath laws imposed reflected evolving religious liberty norms in Georgia and elsewhere. Without an enumerated power to establish religion, and in light of the free exercise rights that were expressly guaranteed in most state constitutions, legislatures could enforce only a fraction of earlier Sabbath laws – and, then, only on the grounds that such regulations actually advanced police purposes like health and public welfare. Legislatures could prohibit unnecessary work and other "secular" activities. But they could not require church attendance, tithe-payments, or allegiance to the established faith, which were the historical concomitants of Sabbath laws.

In any case, attorneys for the state argued that Georgia's Sabbath law conflicted with no federal laws regulating commerce between states. It also did not single out railroad companies or workers for special burdens not shared by those employed in

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[13] Ibid., 2: 853.

other trades. Thus, the Sabbath law did not invade any of Hennington's fundamental rights under either the state or the federal constitution.

§ 3 Court rulings

The Georgia and U.S. Supreme Courts both upheld Hennington's conviction. Chief Justice William Bleckley (for the Georgia Supreme Court) and Justice John Marshall Harlan (for the U.S. Supreme Court) authored the courts' decisions. Echoing the state's attorneys' argument, they concluded that Georgia's train regulations were a legitimate expression of the state legislature's police powers, and only coincidentally affected interstate commerce. The purposes of the statute were central factors in both rulings. On one hand, the courts considered whether the law practically advanced end-purposes consistent with the state's police powers. On the other hand, they considered whether the statute was directly intended to restrict interstate commerce. Even though Hennington had not challenged the law on religious liberty grounds,[14] both courts evaluated, in considerable detail, the boundaries between religious and legislative spheres. The courts' rulings considered the possible religious motives of Georgia legislators, and the extent to which the state's Sabbath laws enforced "religious duties." Multiple layers of the courts' rulings in *Hennington*, therefore, functioned as analogues or antecedents to later applications of the secular purpose test. Taken together, they show how the courts conceived of and enforced a form of functional differentiation between legislative and religious spheres, without privatizing religious idioms, worldviews, or moral norms from legislative discourse.

[14] Records of the arguments proffered in the lower courts (in Georgia) are not extant. Hennington, in fact, may have argued on the basis of religious liberty claims, but there is no direct evidence showing that he did.

Georgia Supreme Court

Chief Justice Bleckley cited the legislative history, practical scope, and apparent wisdom of Georgia's Sabbath laws as evidence that they did not violate the Commerce Clause. "If the sanction of time can ever be invoked to justify the exercise of governmental authority over a particular subject matter," he wrote, "this can certainly be done in respect to setting aside one day in each week for rest and the cessation of all unnecessary labor."[15] Bleckley acknowledged that the Commerce Clause imposed certain limits on the legislature's regulatory powers. It did not, however, prohibit states from passing generally applicable police regulations that indirectly affected the flow of commerce. Georgia's Sabbath laws were police regulations, he reasoned, because a day of uniformly enforced rest effectively advanced the health and wellbeing of the public. Bleckley waxed philosophical on this point, describing leisure as a necessary condition of, and a resource for, human flourishing:

> There can be no doubt of its being a police regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent and total suspension of the toils, cares and strain of mind or muscle incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large, the general public. Leisure is no less essential than labor to the wellbeing of man. Short intervals of leisure at stated periods reduce wear and tear, promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection and retrospection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be, and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun; it could never advance or be completed; people would be mere machines of labor or business – nothing more.[16]

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[15] *Hennington V. The State.*

[16] Ibid., 401.

Bleckley's defense of enforced leisure stood in sharp contrast to a totalizing industrial ethic that affirmed only the value of work and individuals' "liberty to contract."[17] State law was not, in this view, a minimalist system of rules and procedures for enforcing private contracts. Rather, one function of the legislative sphere was to structure individual and social life in ways that fostered specific human virtues and the development of moral character. To be sure, the legislature could not mandate precisely how residents should use their leisure time. But the state's police powers were, nonetheless, robust, and steeped in a relatively detailed account of morality and human flourishing. It is difficult to imagine a contemporary court opining, for example, that a state legislature has the power and the duty to help citizens "learn how to be, and come to realize that being is quite as important as doing." In Bleckley's view, however, the state had a perfect right to coerce its people to observe a weekly rhythm of work and rest for just those purposes:

> If a law which, in essential respects, betters for all the people the conditions, sanitary, social and individual, under which their daily life is carried on, and which contributes to insure for each, *even against his own will,* his minimum allowance of leisure, cannot be rightly classed as a police regulation, it would be difficult to imagine any law that could.[18]

Bleckley downplayed the religious significance of Georgia's Sabbath laws as forcefully as he asserted their "moral" uses and benefits. Records do not indicate that Hennington challenged his conviction on religious liberty grounds in the Georgia Supreme Court. Nonetheless, Bleckley preemptively rebutted two arguments about the limits of the legislature's power in relation to religion. First, he challenged the idea that Georgia's Sabbath laws were *merely* religious – remnants of a bygone era with no rational

[17] *Lochner V. New York*, 198 U.S. 45 (1905).

[18] *Hennington V. The State*, 397. Emphasis added.

link to the state's police powers (see the passages above). Second, he refuted the idea that Georgia's Sabbath laws imposed duties that were *too* religious, and thereby exceeded the state's legislative powers.[19]

On this second point, Bleckley distinguished between "civil" duties (which the legislature could legitimately prescribe and enforce), and "religious" duties (which the legislature could not legitimately prescribe or enforce). Duties were civil or religious by virtue of the relationships they mediated. Civil duties consisted primarily of citizens moral obligations toward themselves and/or other members of society. Civil duties took the form of actions, and were fulfilled in human-to-human relationships. Religious duties, on the other hand, consisted of an individual's obligations to God. These were primarily expressions of theological opinions and individuals' beliefs about what human beings owed to God. Religious duties, therefore, governed, and were fulfilled in divine-human relationships rather than human-to-human relationships.

Religious and civil duties were not mutually exclusive. Indeed, natural law, divine law, and positive law each prescribed (or implied) a whole range of civil duties. The simple fact that religiously-prescribed civil duties overlapped with legally prescribed civil duties did not make such duties inherently religious. Again, duties were "religious" or "civil," under this view, by virtue of the relationship they governed or mediated – not merely by virtue of the moral tradition from which they were derived.

This logic had two important implications for the Georgia Supreme Court's differentiation of religious and legislative spheres. First, it limited the legislature's police powers to the enforcement of *civil* duties. Second, it implied that the legislature could

[19] See Melvin B. Hill, *The Georgia State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1994), 36ff. (This text was re-published by Oxford University Press in 2011.)

prescribe civil duties under the auspices of its police powers, even if these duties expressed religiously-prescribed moral norms. Bleckley, therefore, dismissed legislators' religious motives as irrelevant to the statute's police character:

> With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force.[20]

Having established that "religious views and feelings" likely played a role in the enactment of Georgia's Sabbath laws, Bleckley re-emphasized the irrelevance of such factors to the statute's constitutionality:

> Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious rather than by the civil aspect of the measure.[21]

Under this standard of review, the purpose of a law was not to be measured in terms of the conceivable ends that it served, and the types of duties it imposed. This standard was willfully blind to the legislative mind, so to speak. Instead, it was attentive to the practical implications of the statute as it was applied and enforced. "There is a wide difference between keeping a day holy as a religious observance," Bleckley asserted, "and merely

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[20] *Hennington V. The State*, 398.

[21] Ibid.

forbearing to labor on that day in one's ordinary vocation or business pursuit."[22] The statute's proscription of ordinary labor was not inherently religious: it merely imposed a day of rest, without enforcing ancillary religious duties such as church attendance or overt expressions of piety. "Doubtless it is a religious duty to pay debts," Bleckley continued:

> …but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the ten commandments. Those of them which are purely and exclusively religious in their nature, cannot be or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated, it is a valid law.[23]

U.S. Supreme Court

The U.S. Supreme Court followed a similar logic to the same conclusion. A majority of the Court ruled that the Commerce Clause did not restrict state legislatures' power to enact generally applicable police regulations that coincidentally affected interstate commerce. The U.S. Supreme Court's ruling is noteworthy for this study, however, because it articulated a method for evaluating statutory purposes in relation to religion and legislative powers. Namely, the Court 1) measured the stated objectives of Georgia's Sabbath laws against the enumerated police powers of the state legislature; and 2) analyzed whether the statute's means (i.e. its actual prescriptions and prohibitions) had a "real" and "substantial" relation to those objectives. Under this standard of review, legislators' religious motives and reasons for enacting the statute had no bearing on its

[22] Ibid., 399.

[23] Ibid., 398-99.

"civil" or "religious" character. Like the Georgia Supreme Court, therefore, the U.S. Supreme Court imposed a form of functional differentiation between legislative and religious spheres, without excluding religion from the sphere of legislative discourse.

Justice Harlan described the specific legislative powers at stake in *Hennington* early and often in the Court's ruling. He defined the state legislature's police powers in terms of the legislative objectives or ends that such powers advanced. In his words, these powers included:

- the "general power to protect the health and morals, and to promote the welfare, of its people."[24]
- the "power to enact laws that promote the order and to secure the comfort, happiness and health of the people,"[25]
- the powers "having a real relation to the domestic peace, order, health and safety,"[26]
- and "the powers…of providing for the public health, the public morals and the public safety."[27]

Terms like peace, order, morals and happiness were obviously subject to a range of judicial interpretations. Defining the legislature's police powers in relation to these ends, however, was not to grant the legislature unlimited powers.

The *Hennington* Court weighed the supposed police purposes of Georgia's Sabbath laws against structural limits, Commerce Clause norms, and religious liberty norms. Justice Harlan described the Court's approach as follows:

> In what light is the statute of Georgia to be regarded? The well settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those

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[24] *Hennington V. Georgia*, 302, 08.

[25] Ibid., 304.

[26] Ibid., 317.

[27] Ibid.

> objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.[28]

This standard required the purported "objects" of Georgia's Sabbath law to line up with its practical effects, thus imposing a structural limit on the state's police powers. At the same time, the Court forbade the legislature to invade Hennington's constitutional rights under the Commerce Clause, thus imposing rights-based limits on the legislature's police powers. If the statute under which Hennington was charged had no "real or substantial relation" to public health, morals or safety; or, if it palpably invaded his constitutional rights, then Georgia's Sabbath laws would fail the Court's constitutional review.

But, what was the purpose of the prohibiting trains from running on Sundays, anyway? And what role did religious liberty norms play in the Court's decision? After noting that Georgia's Sabbath laws were filed under the heading, "'Offences against public morality, health, police,' etc."[29] in the state's Criminal Code, Justice Harlan deduced that the state legislature must have enacted the law for the same reasons that William Blackstone had defended British Sabbath laws in his *Commentaries on the Laws of England*.[30] "The legislature of Georgia no doubt acted upon the view," Harlan wrote, "that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State considered merely as a civil institution.' 4 Bl. Com. *63."[31] Harlan cited numerous state-level court rulings from California, Ohio, Pennsylvania, Massachusetts, West Virginia, Arkansas, Missouri and Tennessee as evidence that Georgia's Sabbath laws

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[28] Ibid., 303.

[29] Ibid.

[30] See William Blackstone, *Commentaries on the Laws of England: In Four Books; with an Analysis of the Work.* , ed. Chitty Christian, Lee, Hovenden, and Ryland, From the Nineteenth London Edition ed., 2 vols., vol. 2 (Philadelphia: J.B. Lippincott Company, 1908).

[31] *Hennington V. Georgia*, 304.

imposed merely "civil" duties. The prudence and natural wisdom of periodic rest was a pervasive theme throughout these lower court opinions. Harlan quoted with approval the Ohio Supreme Court Justice Allen G. Thurman, for example, who had concluded:

> Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest.[32]

Harlan also quoted a dissenting opinion from a California Sabbath law case to similar effect. In that case, Justice Stephen Field, who was now serving on the U.S. Supreme Court with Justice Harlan, had argued that the scientifically confirmed benefits of rest, and the narrow scope of the state's Sabbath laws bespoke its "police" character:

> Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science…The prohibition of secular business is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted.[33]

In this passage, Justice Field emphasized the non-religious and non-theological justifications for enforcing weekly rest. His defense of California's Sabbath laws did not, however, require that statutes must advance a "secular" purpose, as such, in order to pass constitutional review. Rather, the noted consensus among (unnamed) philosophers, moralists, statesmen and scientists simply demonstrated that California's Sabbath laws had a real and substantial relation to the end-purposes by which the legislature's police powers were defined. Not just theologians and clergy, that is, but *everyone* agreed that

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[32] Ibid., 305.

[33] Ibid.

periodic rest promoted the health and wellbeing of society. To determine whether the California law cleared the state constitution's religious liberty provisions, Field looked to its practical provisions, and weighed them against religious liberty norms: Did the law improperly impose "religious" duties? No. It merely required a "cessation from labor" and prohibited "secular business" on Sundays. Such acts were not inherently religious, even if some people observed such rest for religious reasons. Justice Harlan endorsed this view by quoting Field's dissent, thereby implying that police powers did not include the power to enforce narrowly religious duties.

Finally, Justice Harlan quoted, without qualification, nearly all of Justice Bleckley's analysis of the Georgia legislature's religious motives, and the reasonable overlap of religious and civil duties in the Criminal Code.[34] The implications of this citation were clear: enforced leisure effectively advanced police purposes; the religious views of legislators were mostly irrelevant to the character of a statute; nearly all of the Ten Commandments could be enforced via the legislature's police powers; but these police powers did not include the power to enforce "purely and exclusively religious" duties pertaining to "operations of mind or states of the affections."

In Harlan's view, these state-level decisions, in which litigants had challenged Sabbath laws on religious liberty grounds, proved that Georgia's Sabbath laws were, "in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people."[35] The train provision was valid because it merely classified the running of freight together with

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[34] Ibid., 305-07.

[35] Ibid., 307.

other "secular" businesses. "It simply declares," Justice Harlan concluded, "that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their callings, the transportation of freight shall be suspended."[36] The incidental effects of such a law on interstate commerce were not substantial enough to invalidate it.

§ 4 Conclusion

Although *Hennington* was not officially an Establishment Clause case, Georgia's Sabbath laws, and the legal rulings in this case illustrate legal differentiation of religious and legislative spheres through constitutional law. In addition, the courts' methods in Hennington shed light on subsequent developments leading up to the secular purpose test.

First, the history of Georgia's Sabbath regulations in the century leading up to *Hennington* highlights the functional differentiation and specialization of the state's legislative sphere. Early iterations of Georgia's Sabbath laws were framed in theological terms, and conceived of Sabbath laws as means of encouraging (with force, if necessary) citizens to render "true and sincere worship and service" to God. Such worship represented a social good that fell within the sphere of legislative powers. In subsequent years, however, Georgia's legislatures and courts had jettisoned these religious functions from the legislative sphere, and reconceived of them in terms of a private (and voluntary) religious sphere. By the time Hennington was convicted of running a freight train on Sunday, society's members were required to stop their ordinary labors for one day.

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[36] Ibid., 318.

Sunday remained a day set apart. But no one could be punished for missing church services. And, what remained of the state's previous Sabbath laws were conceptually rooted in the legislature's police powers: the state could enforce leisure because doing so was beneficial for public health – one of the key functions of the legislative sphere. Indeed, the state legislature could still enforce virtually all of the Ten Commandments. But – and this is critical – it could not enforce all of them, and the ones it could enforce were valid because they were consistent with the legislatures enumerated and presumed "police" powers. This meant that when such laws were challenged in court, judges would look to the state's constitution rather than to Exodus or Deuteronomy to determine whether the legislature was authorized to enact such a law.

The courts' rulings in *Hennington* also marked out rough boundaries around the spheres of religion and religious liberty. Both courts conceived of religion primarily as a matter of subjective theological knowledge, or "operations of the mind" that issued in the actions by which individuals related to God. Justice Bleckley never clarified which of religious duties prescribed in the Ten Commandments were "purely and exclusively religious in their nature." What was important in the courts' broader logic, however, was that such duties were purely voluntary, and fell within a protected sphere of religious liberty. One's formal legal standing and membership in the community – which is not to say one's standing within the community in all other respects – was not a function of the theological views one professed to believe, or of one's membership in a specific "religious" society or church, or of one's fulfillment of religious duties, narrowly conceived. People's actions were subject to regulation – their beliefs were not.

Interestingly, the Georgia Supreme Court and the U.S. Supreme Court treated the religious views of the state legislature with similar indifference. Legislators' religious "motives" and "reasons" for enacting the state's Sabbath laws, both courts concluded, were far less important than the practical implications of the laws themselves. What mattered was what a law actually accomplished, and how it was enforced; its constitutionality was a measured by its form and function – not the subjective motives that led to its enactment. Georgia's Sabbath law may have been passed by Christians who wanted to promote church attendance, boost Sunday alms-giving, or encourage acts of religious piety. But as long as the law did not actually enforce such "religious duties," and as long as the law actually affected public health and wellbeing for the better, then the law fell within the sphere of the legislature's legitimate powers. It performed an appropriate legislative function.

The courts' distinction between religious and civil duties, combined with their functionalist, end-purpose based analysis of the state legislature's police powers, theoretically allowed for a wide range of overtly religious participation in Georgia's legislative sphere. The legislature had limited powers, and could pursue a limited range of coinciding legislative purposes. But the law was not definitively "secular." It was inevitably infused with the religious energies and normative commitments of its members – whatever religion they might happen to believe.

The logic of the Hennington rulings carried through subsequent Sabbath law cases until the 1960s, when the U.S. Supreme Court ruled on a bevy of new challenges to

states' Sabbath regulations.[37] But, did the courts' rulings in *Hennington* shape the practice of religion(s) in legislative discourse? Did the *Hennington* decisions encourage, discourage, prohibit or allow certain modes of argumentation that employed religious symbols, stories, or norms? Did they affect the quantities and qualities of participation in legislative discourse by religious and/or non-religious constituencies and interest groups? Finally, did the courts' rulings in *Hennington* affect the practice of religion in Georgia outside of the legislative sphere? How, for example, did Georgians' observance of the Sabbath in the 1890s differ from that of their predecessors in the 1790s?

Uncovering nuanced answers to such questions will require further research.[38] Here, I simply wish to emphasize that the legal norms and methods that the *Hennington* courts used to interpret the boundaries between religious and legislative spheres enforced a form of functional differentiation between those spheres without imposing a "secular purpose" requirement. By conceiving of the legislative sphere in terms of "police" purposes, the *Hennington* courts attributed to the state legislature a limited set of functions; these functions did not include the direct promotion or enforcement of "religious" duties. The performance of such duties fell to the voluntary and private sphere of "religion." The sphere of religion, however, was not strictly or wholly confined to citizens' private lives. To the extent that religious beliefs and issued in social acts,

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[37] See Chapter 9 of this work, below. The relevant cases are: *Mcgowan Et Al V. Maryland*, 366 U.S. 420 (1961). *Two Guys from Harrison-Allentown, Inc. V. Mcginley District Attorney, Lehigh County, Pennsylvanaia, Et Al*, 366 U.S. 582 (1961). *Braunfeld V. Brown*, 366 U.S. 599 (1961). *Gallagher V. Crown Kosher Super Market of Massachusetts*, 366 U.S. 617 (1961). *Arlan's Department Store V. Kentucky*, 371 U.S. 218 (1962).

[38] Causal relationships between such rulings and other phenomena are easier to hypothesize than they are to prove. Numerous questions and hypotheses could be tested. For example: Did Georgia residents attend church services (on Sundays or on other days) more frequently or less frequently as the state's Sabbath laws evolved? Did legislators employ theological or other religious tradition-specific modes of argumentation in different ways after the courts ruled that religious motives were not constitutionally suspect? Did religious groups and organizations, or analogues to modern "para-church" groups become more or less (or differently) involved in legislative discourse after the *Hennington* decisions?

religion was "public" in the sense of being subject to regulation. Religion was also public in the sense that religious beliefs animated participation in legislative discourse, and moral norms that were rooted in religious beliefs and traditions informed such discourse.

Chapter 3
The Sisters of Charity and their Secular Hospital

> *It is not contended that Congress has no power in the District to appropriate money for the purpose expressed in the appropriation, and it is not doubted that it has power to authorize the Commissioners of the District of Columbia to enter into a contract with the trustees of an incorporated hospital for the purposes mentioned in the agreement in this case, and the only objection set up is the alleged 'sectarian character of the hospital and the specific and limited object of its creation.'…The act of Congress [incorporating the hospital], however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation. To make the agreement was within the discretion of the commissioners, and was a fair exercise thereof.*[1]
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> – Justice Rufus Peckham

§ 1 Introduction

Does the Establishment Clause prohibit Congress from partnering with religious organizations to provide public health care services? The case of *Bradfield v. Roberts* (1899) pitted Joseph Bradfield, a resident of the District of Columbia, against the United States Treasury and a board of D.C. commissioners who sought to construct a building on the grounds of a Catholic-run hospital, and thereafter pay the hospital to care for poor District residents. *Bradfield* presented a muddled set of legal questions. At the heart of the case, however, were competing interpretations of the religious liberty norms expressed in federal policy and constitutional law. Two lower federal courts and the U.S. Supreme Court issued widely variant rulings in the case. All three courts, however, applied a familiar method for interpreting the scope of legislative power in relation to religion. First, they considered whether the contested government action advanced purposes consistent with the specific powers of the federal legislature. Next, they considered

[1] *Bradfield V. Roberts*, 299-300.

whether the action conflicted with a set of competing religious liberty norms. The courts in *Bradfield* did not just disagree about whether federal policy and constitutional law proscribed government contracts with religious organizations, however. They also disagreed about whether the hospital in the case, which was owned by a convent, and operated primarily by Roman Catholic nuns, was a "religious" or "secular" institution. *Bradfield*, thus, provides an especially interesting case study for understanding how American courts at the turn of the century conceived of and enforced boundaries between religious and legislative spheres.

§ 2 Arguments in the Case

A federal appropriations bill enacted on March 3, 1897 included, among many other provisions, an earmark for the construction of two hospital buildings to treat contagious diseases in the District of Columbia. The appropriation was concise: it simply listed the amount of money designated for the hospital, and delegated the choice of where to construct the buildings to local commissioners: "For two isolating buildings, to be constructed, in the discretion of the Commissioners of the District of Columbia, on the grounds of two hospitals and to be operated as a part of such hospitals, thirty thousand dollars."[2]

Following passage of the act, several neighborhoods in the District balked at the idea of bringing a hospital for contagious diseases into their midst. The commissioners finally found a willing partner in Providence Hospital. Providence was operated, and built on property owned by the Sisters of Charity – a convent of Roman Catholic nuns

[2] See Act of March 3, 1897, Chapter 387, 29 Stat. 665, at 679.

based in Emmitsburg, Maryland. The agreement authorized the construction of an isolating ward on hospital grounds; reserved two-thirds of its beds for poor patients sent to the hospital by the commissioners; outlined the rates that the commissioners would pay to the hospital for the care of those patients; and listed conditions for the hospital's collection of payments from other patients who sought care there.[3]

After news of the agreement became public, Joseph Bradfield filed a lawsuit in the District of Columbia's Court of Equity No. 2 to prevent the United States Treasurer, Ellis H. Roberts, from issuing payments to fulfill it. Bradfield represented himself in court, and claimed standing as a citizen and taxpayer of the United States.[4] He was motivated, at least in part, by his suspicion of the Roman Catholic hierarchy, and by an avowed commitment to religious liberty.[5] Bradfield saw his disregard for the Catholic

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[3] The contract stated: "That they [the directors of Providence hospital] will erect on the grounds of said hospital an isolating building or ward for the treatment of minor contagious diseases, said building or ward to be erected without expense to said hospital, except such as it may elect, but to be paid out of an appropriation for that purpose contained in the District appropriation bill, approved March 3, 1897, on plans to be furnished by the said Commissioners, and approved by the health officer of the District of Columbia, and that when the said building or ward is fully completed, it shall be turned over to the officers of Providence hospital, subject to the following provisions: First. That two-thirds of the entire capacity of said isolating building or ward shall be reserved for the use of such poor patients as shall be sent there by the Commissioners of the District from time to time through the proper officers. For each such patient, said Commissioners and their successors in office are to pay at the rate of two hundred and fifty dollars ($250) per annum, for such a time as may be in the hospital, subject to annual appropriations by Congress. Second. That persons able to pay for treatment may make such arrangements for entering the said building or ward as shall be determined by those in charge thereof, and such persons will pay to said Providence hospital reasonable compensation for such treatment, to be fixed by the hospital authorities, but such persons shall have the privilege of selecting their own physicians and nurses, and in case physicians and nurses are selected other than those assigned by the hospital, it shall be at the expense of the patient making the request. And said Providence hospital agrees to always maintain a neutral zone of forty (40) feet around said isolating building or ward and grounds connected therewith to which patients of said ward have access." See *Bradfield V. Roberts*, 293-94.

[4] Court documents show that Bradfield represented himself on account of his limited resources. He swore before the equity court that "because of my poverty I am unable to pay the costs of this suit which I am now about to commence or to give security for the same…" Transcript of Record at 3, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). Bradfield hired attorneys for his appeals.

[5] Bradfield expressed grave concerns about Catholic priests, in particular. He published an editorial in the *Washington Post,* for example, in which he warned: "It is not the Sisters of Charity that the framers of our laws and institutions would have us resist, but the priests who control them. 'He that will be proud and refuse to obey the commandment of the priest, that man shall die, and thou shalt take away the evil from Israel; and all the people hearing it shall fear, that no one afterward swell with pride.' These words, showing the doctrine of the Church of Rome respecting the power of the priests and the method of compelling obedience, I quote

Church as a form of constitutional and cultural originalism – a commitment to democratic ideals that stood in contrast to "the more liberal sentiment lately developed toward the Catholic Church."[6] In any case, he argued that the commissioners' contract with Providence Hospital violated federal policy and the Establishment Clause. Furthermore, it put the nation on a slippery slope toward "giving to religious societies a

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from "De Harbe's Full Catechism of the Catholic Religion," which bears the imprimatur of Cardinals Wiseman and McCloskey. The words are approvingly quoted by De Harbe from Deuteronomy xvii:12-13. The Douay Bible contains a note on these verses, which claims for the Roman Church absolute supremacy over the civil authorities and absolute infallibility for the judgment of its priests. Our law repudiates this doctrine, and continuously guards against everything tending to recognize any ecclesiastical institution as a political or administrative agency in our system." Bradfield also objected to the president of Providence hospital signing the contract using her religious name, Sister Beatrice: "It is not the legal, but the ecclesiastical designation of the excellent lady to whom it is applied. If she is recognized a party capable in law of making a contract concerning land by that title, then, 'His Grace, the Archbishop of St. Paul,' may do the same, not as John Ireland, the citizen, but as a prince of the church, in a country whose Constitution prohibits titles of nobility. Whether 'Sister Beatrice' is a title of nobility or a title of humility, any legal sanction of it would undermine our organic law. 'Humility is young ambition's ladder,' &c." See: Joseph Bradfield, "Law in the Hospital Case.: President Madison's Attituded Regarding Sectarian Appropriations Recalled.," *The Washington Post*, September 2, 1897. In the brief Bradfield submitted to the Supreme Court, he further decried the influence of the Catholic hierarchy in enacting the Quebec Act, "This act had its inception in the Vatican, and is a shocking instance of the insidious methods and perpetual intermeddling of the Pontiff in the political affairs even of Protestant nations." Transcript of Record: Appellant's Brief at 22, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). In the same Brief, Bradfield further contrasted the American scheme of religious liberty with Roman Catholicism as follows: "The kernel of the whole [American] scheme is that Almighty God has created the mind free. In order to see the importance of it, it must be contrasted with the monastic theory which is the kernel of the greatest religious establishment in the world, a theory whose peculiarities are soul-slavery, mind-slavery, body-slavery, absolute poverty and perpetual barrenness." Transcript of Record: Appellant's Brief at 37, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76)

[6] See Transcript of Record: Appellant's Brief at 25-27, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). Bradfield wrote: "Did the people of North Carolina intended to nullify these articles of their state Constitution? If not, Congress could not appropriate one penny contributed in taxes by a citizen of North Carolina for the direct or indirect support 'of any one religious church or denomination whatever.' Certainly not for the advancement of the monastic system. For in judging of this matter the rule laid down by Chief Justice Taney in the Dred Scott case (19 Howard 394) is to be our guide; and the more liberal sentiment lately developed towards the Catholic Church cannot be taken into account. Chief Justice Tanney [sic] said: 'The change in public opinion and feeling in relation to the African race, which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now according to its meaning and intention when it was framed and adopted.' There is no difference between a race and a religious system in respect to this principle. If it is true of one, it is true of the other…[After quoting Machiavelli on the importance of looking to future problems] How essential this prudent jealousy is, in respect to the subtle and fatal encroachments of monastic influence and power, was fully appreciated by all the statesmen of the Revolutionary period…and hence they sought to avoid the consequences of that principle by erecting in their Constitution of Civil Government a wall of separation between Church and State. Would such men have conferred upon Congress the power to make permanent improvements upon the lands of a monastic order, upon the lands of the Sisters of Charity, of Emmetsburg, Maryland, if such a proposition had been brought before the First Congress? The answer to this question will settle the Constitutional principle involved in this case." Also see ibid., at 37, contrasting the American system of religious liberty to the "the monastic theory which is the kernel of the greatest religious establishment in the world, a theory whose peculiarities [sic] are soul-slavery, mind-slavery, body-slavery, absolute poverty and perpetual barrenness."

legal agency in carrying into effect a public and civil duty which would, if once established, speedily obliterate the essential distinction between civil and religious functions."[7]

First, Bradfield contended that the commissioners' agreement with Providence Hospital violated a federal policy set forth in the appropriations act of which it was a part. One section of the Act of March 3, 1897 stated:

> It is hereby declared to be the policy of the Government of the United States, to make no appropriation of money or property, for the purpose of founding, maintaining, or aiding, by payment for services, expenses or otherwise, any church or religious denomination or any institution or society which is under sectarian or ecclesiastical control; and it is hereby enacted that from and after the 30th day of June, 1898, no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or ecclesiastical control.[8]

The legal force of this policy was contestable, but its categorical stance against funding religious organizations of all kinds, even for "charitable purposes," was clear. Bradfield argued that Providence Hospital fit unambiguously into the category of proscribed institutions: it was "composed of members of a monastic order or sisterhood of the Roman Catholic church"; it was "conducted under the auspices" of the Church; and the "title to its property is vested in the 'Sisters of Charity of Emmitsburg, Maryland.'"[9] Thus, Providence Hospital was emphatically "a religious place, a religious establishment,

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[7] Transcript of Record at 2, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). Bradfield's complaint also alleged that a related contract between the Commissioners and the Surgeon General of the Army was invalid on the same grounds. However, as the U.S. Supreme Court pointed out in its decision, "The contract, if any, between the directors and the Surgeon general of the Army is not set forth in the bill, and the contents or conditions thereof do not in any way appear." *Bradfield V. Roberts*, 294.

[8] Transcript of Record: Appellant's Brief at 32, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). See Act of March 3, 1897, 29 Stat. 665, at 683. I plan to include in subsequent drafts a more thorough discussion of the Blaine Amendment and its relation to this case.

[9] *Bradfield V. Roberts*, 293.

a religious house, an institution under sectarian and ecclesiastical control."[10] As such, it was ineligible to receive moneys appropriated in the Act of March 3, 1897.[11] Congress had given the commissioners considerable discretion in choosing where to construct the isolating buildings, he said. Their agreement with the hospital, however, exceeded the discretionary powers Congress had conferred upon them.

Bradfield also argued that the contract was invalid under the Establishment Clause. The federal courts' Establishment Clause jurisprudence was still underdeveloped at this point, so Bradfield recommended that state-level religious liberty norms should guide the federal courts' interpretation of the First Amendment:

> The category of things prohibited [by the Establishment Clause] is more comprehensive than similar categories in the State Constitutions. And while the subject has not heretofore been brought for direct adjudication before this Court, yet what Congress would be restrained from doing under the First Amendment can best be conjectured from a comparison of the numerous cases which have arisen under similar prohibitions in State Constitutions. The language of these Constitutions, though often much more explicit in forbidding aid to sectarian institutions, could not cover any more ground than the general words of the Federal Constitution. As the State courts have almost always been very strict in condemning any sort of State aid to a school or charity under the control of any religious sect, so also it seems likely that the Federal Courts, if occasion shall arise, will be strict in applying the prohibitions of the First Amendment.[12]

In other words, the broad phrasing of the Establishment Clause prohibited federal aid to "sectarian institutions" *at least* as strictly as did the states' constitutions. Forestalling such aid served the important purpose of checking the political and economic power of religious groups. The First Amendment, Bradfield explained, "was intended to fix in our jurisprudence the principles of the law of charitable uses, including the law of mortmain,

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[10] Transcript of Record: Appellant's Brief at 11, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76).

[11] Transcript of Record at 10, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76).

[12] Transcript of Record: Appellant's Brief at 8-9, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76)

as the chief guarantee of those primordial rights which the Anglo-Saxon race had inherited and defended since the times of the Magna Charta."[13] As he saw it, the Establishment Clause was grouped together with the other First Amendment rights because religious establishments directly threatened those rights. It was absurd, he insisted,

> …to hope for freedom of thought, or of speech, or of the press, or of assembly; if the clergy were allowed to influence legislation in their own special interest; or to accumulate and hold in perpetuity, either in their own right or as beneficiaries, such vast estates as might enable them to control the channels of information and the minds of the multitude.[14]

Appropriating funds for a religious institution like Providence hospital would ultimately, if not immediately, undermine core liberties guaranteed by the First Amendment. Furthermore, distributing tax funds to religious organizations implicated free exercise norms by compelling taxpayers "to contribute their money for the propagation of opinions which they disbelieve."[15]

From which authorities did Bradfield draw these religious liberty norms? In addition to state-level precedents, Bradfield tethered his interpretation of the Establishment Clause to its purported author: James Madison.[16] On the one hand, he cited Madison's relatively well-known *Memorial and Remonstrance* of 1785, which had been delivered as part of his joint effort with Thomas Jefferson to root out religious

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[13] Transcript of Record: Appellant's Brief at 11, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). Also see ibid., at 57: "My contention is that the power to grant licenses in mortmain was not delegated to Congress, but was denied to it by the first clause of the First Amendment…"

[14] Transcript of Record: Appellant's Brief at 11, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76)

[15] Transcript of Record: Appellant's Brief at 14, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). Bradfield later cited the 1785 Act for Establishing Religious Freedom in Virginia on this point, ibid. at 17: "To compel a man to make contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

[16] Bradfield attributed authorship of the First Amendment's religion clauses to Madison. See Transcript of Record: Appellant's Brief at 10, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76).

assessments from Virginia law.[17] Especially in his lower court arguments, however, Bradfield emphasized two lesser-known letters that Madison sent to the House of Representatives in 1811, during his tenure as President of the United States. These letters outlined Madison's reasons for vetoing legislative acts that he believed violated the Establishment Clause.[18] First, Madison had objected to "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia" in a letter dated February 21, 1811. The act was unremarkable as corporate charters go: it outlined the church's corporate powers, set forth the basic structure of its bylaws, and recognized the corporation's legal capacity to administer charity to the poor:

> Sec. 8. *And be it further enacted,* That it shall and may be lawful for the said vestry to make such provision for the support of the poor of the said church, as shall be by them be thought proper; and to provide also, in such a manner as to them shall appear proper, for the education of the poor children of the said church.[19]

Madison vetoed this seemingly benign act, however, because it exceeded the federal legislature's powers in relation to religion. His letter misquoted the actual phrasing of the Establishment Clause:

> Having examined and considered the bill…I now return the bill to the House of Representatives, in which it originated, with the following objections:
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> [First,] Because the bill exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States which declares, that "Congress shall make no law respecting a *religious establishment* [sic, emphasis added]." The bill enacts into, and establishes by law, sundry rules and

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[17] Transcript of Record: Appellant's Brief at 26, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). See: James Madison, *A Memorial and Remonstrance, Presented to the General Assembly of the State of Virginia, at Their Session in 1785, in Consequence of a Bill Brought into That Assembly for the Establishment of Religion by Law.* (1785).

[18] See Transcript of Record: Appellant's Brief at 14, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76). For Madison's letter, see: 22 Annals of Congress. 982-983 (1810-1811); or see "Veto Message of February 21, 1811," in *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (New York, NY: Bureau of National Literature, 1811), 474-75.

[19] 22 Annals of Congress, 997 (1811-1812). This act contained eleven sections, the text of which can be found *ibid.* at 995-997.

> proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law; a legal force and sanction being given to certain articles of its constitution and administration…
>
> [Second,] Because the bill vests in the said incorporated church an authority to provide for the support of the poor, and the education of poor children of the same; an authority which being altogether superfluous, if the provision is to be the result of pious charity, would be a precedent for giving to religious societies, as such, a legal agency in carrying into effect a public and civil duty.[20]

Madison's letter thus posited two relatively strict boundaries between religious and legislative spheres. First, it defined a sphere of institutional autonomy for religion that was protected from governmental intrusions. The rules, proceedings, and the selection of ministers were internal church matters that fell outside the scope of Congress' power. Churches were subject in such affairs solely to their own, recognized religious authorities. Conversely, Madison reasoned that the act gave the church's charitable work an inappropriate legal imprimatur. Churches' service to the poor, in his view, ought to flow freely from religious piety alone, and should have no formal legal status or state subsidies. If the first boundary placed religious institutions largely outside the scope of Congressional control, this second boundary denied "legal agency" to the church's

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[20] 22 Annals of Congress, 983 (1811-1812). The record of the debate among members of the House following receipt of Madison's veto letter provides a fascinating window into the legal questions at stake in the act. Rep. Benjamin Pickman, Jr., for example, thought the matter was unimportant and unworthy of lengthy deliberation, while his fellow Massachusettsan, Rep. Laban Wheaton, thought the implications were "of very great consequence" (*ibid.* at 984). In Laban's view, incorporating the church was no less constitutional than hiring chaplains to serve members of Congress. If it was, in fact, unconstitutional, then "both branches of the Legislature, since the commencement of the Government, had been guilty of such infringement. It could not be said, indeed, that they [Congress] had been guilty of doing much about religion; but they had at every session appointed Chaplains, to be of different denominations, to interchange weekly between the two Houses. Now, if a bill for regulating the funds of a religious society could be an infringement of the Constitution, the two Houses had so far infringed it by electing, paying or contracting with their Chaplains; for so far it established two different denominations of religion." (*ibid. at 984)*

support and education of the poor.[21] Whether Madison's logic implied that Congress had no power to incorporate religious societies under different circumstances or conditions was not clear. However, in this particular case Congress upheld Madison's veto by a wide margin. Bradfield thus cited the veto as evidence that the Establishment Clause required a strict differentiation of religious and legislative institutions and functions.

Congress upheld a similar veto later that same year. One week after sending the letter described above, Madison sent a second missive to Congress explaining why he was vetoing an act that appropriated five acres of land and a "meeting-house" to a Baptist church in Mississippi Territory.[22] Here, Madison explained that the Establishment Clause categorically prohibited Congress from financially supporting "religious societies." Again, his letter botched the phrasing of the First Amendment:

> Because the bill, in reserving a certain parcel of land of the United States, for the use of said Baptist Church, comprises a principle and precedent for the Appropriation of funds of the United States, for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a *religious establishment* [sic]."[23]

Building on the principles in Madison's letters, Bradfield insisted that the federal government, "like a municipal corporation, is possessed only of delegated powers."[24] Although Congress had "ample powers" to provide medical care for the District's underprivileged residents, Bradfield insisted that "such provision, where made, must be

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[21] These forms of differentiation between religious and legislative spheres directly contrasted the prevailing model of church-state relations in Britain. British law, for example, required all property-holding religious bodies to procure Parliamentary approval in order to alter their official doctrines or method of organization. See: J. Howard B. Masterman, *A History of the British Constitution* (London: MacMillan and Co., Ltd., 1912), 281. Also see John Jr Witte, "Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?," *Southern California Law Review* 64(1990-1991).

[22] See: James Madison, "Veto Message of February 28, 1811," in *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (New York, NY: Bureau of National Literature, 1897-1911).

[23] As quoted in 22 Annals of Congress, p. 366 (1810-1811). Or, see: ibid., 475.

[24] Transcript of Record: Appellant's Brief at 11, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76).

wholly under the control and supervision of its own officers and agents" – not delegated to religious corporations.[25] The Establishment Clause prohibited not only laws respecting *an* establishment of religion, but laws respecting any and all "religious establishments," as Madison had called them:

> No law shall be made, therefore, respecting one single establishment of religion, or any number of such establishments. Religion shall not be established by Congress in one single corporation or in many. If it can be established in many, why not in one – many includes one; and would cost less for its support than many.[26]

The functions, and certainly the finances of the legislature and religious institutions were necessarily discrete. Although Congress could pass laws for public health purposes in the District, Bradfield argued that Congressional policy and constitutional law precluded the commissioners from partnering with Providence Hospital. In short, Congress could not use religious means to achieve an otherwise legitimate legislative purpose.

§ 3 Court Rulings

District of Columbia, Court of Equity #2

Bradfield handily won his original suit in the District's Court of Equity No. 2. Justice Alexander B. Hagner ruled that the commissioners' agreement with Providence Hospital violated Congressional policy *and* the Establishment Clause. Like the other rulings discussed in this chapter, Hagner weighed the contract against Congress' powers, and against an emerging set of religious liberty norms. In his view, the Establishment Clause imposed a strict form of administrative differentiation between the federal

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[25] Ibid.

[26] Transcript of Record: Appellant's Brief at 36, Bradfield v. Roberts, 175 U.S. 291 (1899) (No 76).

government and institutions under sectarian control, regardless of the circumstances that might otherwise recommend institutional collaboration.

First, the commissioners' contract with Providence hospital violated federal policy. Although Congress had authorized the commissioners to choose an appropriate site for the isolating buildings, Hagner reasoned that nothing in the Act of March 3, 1897 implied that Congress intended to construct the buildings at a religious hospital. In addition, the act's declared policy indicated "that Congress could have had no such purpose."[27] Hagner proffered a "purposive"[28] construction of the statute:

> No one reading these two paragraphs [(1)appropriating funds for the isolating buildings and (2) declaring the policy against funding religious institutions] of the act as though incorporated into one, could possibly conclude that Congress had directed or expected the $30,000 appropriated should be expended within the grounds of any hospital under sectarian control, whether Lutheran, Methodist, or Roman Catholic. For when Congress, after making the appropriation, had made the foregoing declaration of the policy of the Government as to the appropriations of money or property to sectarian institutions, it would seem to have closed the discussion of the question.[29]

In Hagner's view, the hospital was undoubtedly under sectarian control; even the defendants' attorneys had conceded that the corporation was "composed of members of a monastic order or sisterhood of the Roman Catholic Church, and that the title to its property is vested in the Sisters of Charity."[30] As such, contracting with the hospital was beyond the scope of the discretionary powers conferred to the commissioners by the Act of March 3, 1897.

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[27] *Joseph Bradfield V. Ellis H. Roberts, Treasurer, Etc.*, 26 Washington Law Reporter 84 86 (1898). Readers who wish to review this opinion can find this journal (Wash. Law Reporter) in the online Google Books database.

[28] On "purposive" methods of statutory and constitutional interpretation, see: Shanor, *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems*, 41.

[29] *Joseph Bradfield V. Ellis H. Roberts, Treasurer, Etc.*, 86.

[30] Ibid., 86-87.

Congress' policy was ultimately redundant, however, insofar as the Establishment Clause already prohibited Congress and its agents from funding joint endeavors with religious institutions. Hagner read the Establishment Clause as a strict structural limitation on Congressional powers. Congress would never intentionally pass a law in "direct and palpable opposition" to the religion clauses, he reasoned.[31] But Congress might carelessly pass laws that, "in effect, tend…to foster or encourage religious societies or churches in general or any one in particular."[32] Under this view, then, any law the effect of which was to "foster or encourage" religious societies was invalid under the Establishment Clause.

Like Bradfield, Hagner relied heavily on James Madison's "sedate and carefully considered" veto letters to support this interpretation of the Constitution.[33] Madison's letters proved that the Establishment Clause prohibited entangling partnerships between Congress and religious institutions, no matter how "harmless or beneficial" they might seem to be.[34] After all, apart from violating Establishment Clause principles, the acts Madison had vetoed were unobjectionable. Referring to the land that was supposed to be granted to the Baptist congregation in Mississippi Territory, for example, Hagner explained:

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[31] Hagner stated: "It is scarcely supposable that Congress would ever pass a law in direct and palpable opposition to the prohibitions of the [religion clauses in the First] amendment. Probably the only instances where such violation would ever occur would be where some provision might be passed into the form of law without sufficient consideration and in the hast of legislation, which, though unobjectionable on its face, would yet in effect, tend on the one hand, to foster or encourage religious societies or churches in general or any one in particular; or, on the other, to "prohibit the free exercise of religion" on the part of any one or of all such societies or churches." Ibid., 85.

[32] Ibid.

[33] Ibid.

[34] Ibid.

> It certainly seemed to be but a harmless act for the Government to grant to this impoverished church a few acres of wild land on the margin of a great wilderness; and probably this was the argument of those members of Congress who opposed the veto; either one of whom might probably have paid the full price of the land out of his pay for one day. But there would have been exhibited in making that insignificant gift the same contempt of the spirit of the First Amendment that would have been evinced if Congress had granted a donation of half a million of acres, sufficient to endow a vast cathedral establishment or a great hospital under sectarian control. The difference would have been only one of degree.[35]

In the same way that the Establishment Clause proscribed federal grants of real property to Baptist churches, it also proscribed the appropriation of public funds to Roman Catholic hospitals. Congress simply had no power to appropriate funds or property to religious societies or institutions. Whereas the court rulings in *Hennington* (and numerous other cases) strongly deferred to legislatures' discretion in their application of police powers, Hagner insisted that the Establishment Clause functioned as an impermeable boundary between public funds and religious institutions:

> Whatever authority the Commissioners of the District of Columbia possessed with reference to the subject [of the appropriation], they could only have acquired from Congress, which of course could communicate to them no powers it did not constitutionally possess. Whatever acts were forbidden by the Constitution to Congress with respect to the assistance of religious establishments, were of course forbidden to its agents the Commissioners.[36]

Equally important, Madison's veto of the congressional act incorporating the Episcopal church in Alexandria implied that the Congress could not give "legal force and sanction" to the rules governing a religious society's organization and polity, or enter into entangling partnerships with religious institutions. The commissioners' agreement with Providence Hospital failed both of these high standards:

> Whatever title the United States might claim in a building constructed by it upon the grounds of Providence Hospital, would be a species of continuing joint

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[35] Ibid., 86.

[36] Ibid.

> ownership or co-partnership between the government on the one part, and a sectarian corporation having its habitat in the State of Maryland, on the other. However incongruous such a joint ownership may be where the other party is nonsectarian in its character, I conceive it would also be an unlawful one, as against the spirit and purpose of the First Amendment, when such contracting party is a sectarian sisterhood or order under the auspices of a church or religious society…I conceive the agreement before me undertakes in behalf of the public authorities to give "legal force and sanction" to articles in the administration of the hospital which "so far, would be a religious establishment by law," [quoting Madison's letter] and for that reason illegal.[37]

Hagner made passing reference to the circumstances surrounding the commissioners' arrangements with Providence Hospital. He noted the "difficulty experienced by the Commissioners in obtaining suitable places for hospitals for contagious and infectious diseases,"[38] and acknowledged that the hospital's staff provided competent and humane care. These factors likely informed the commissioners' decision, he said, but they could not justify a contract that was categorically prohibited by the Constitution. "The Commissioners were doubtless of the opinion that the requirements as to space and air could be best fulfilled by placing the new building with the grounds of Providence Hospital," Hagner explained. "But this consideration cannot prevail against the grave objection to the location of the proposed building on the grounds of a hospital under sectarian management."[39]

D.C. Court of Appeals:

Bradfield's victory in Hagner's court was short-lived. Ellis Roberts, the U.S. Treasurer, appealed to the District of Columbia's Court of Appeals. In a sharp reversal of the lower court's decision, Judge Seth Shepard ruled that the commissioners' contract

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[37] Ibid., 87.

[38] Ibid.

[39] Ibid.

with Providence Hospital was consistent with the Act of March 3, 1897, and valid under the Establishment Clause. Whereas Justice Hagner had ruled that Congress could not contract with religious hospitals under any circumstances, or for any purposes, the Appeals Court ruled that religious organizations could compete alongside every other qualified corporation for government contracts that advanced legitimate legislative purposes, including those that fostered the health, safety, and welfare of the community.

One of the first steps in Justice Shepard's opinion was to identify the legislative powers at stake in the case.[40] "We do not understand it to be denied [by Bradfield] that Congress, in legislating for the District of Columbia, possesses the combined powers of the general government and that of a State;" Shepard wrote, "nor that appropriations of money for the necessary care of the public health and the maintenance of proper public charities are within those powers."[41] This logic affirmed Congress's power to enact police-type laws within the District. His logic on this point was rooted in long-standing practice rather than specifically enumerated powers.

> It seems to have been the practice of Congress for many years to provide, in part at least, for the care of the sick, and other objects of charity, through appropriations of money to private institutions and associations, in consideration of actual services in these regards, or upon special contracts therefor. This practice seems, also, to have prevailed unquestioned in respect of the power, though not always as regards its policy or expediency. And we do not understand the complainant [Bradfield] as denying the power to authorize contracts of this nature made with private persons, or with associations of persons, not sectarian, or under the control of an organized church. It is expressly admitted in the opinion of the learned justice who rendered the decree appealed from.[42]

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[40] The Appeals Court noted several procedural defects in Bradfield's lawsuit – most notably, his failure to name the proper parties of the suit. Nonetheless, the court decided "to treat the case as if all the interested parties were sufficiently represented by the appellant, and thus speed the final settlement of the question, which is one affecting important public interests." Roberts v. Bradfield, 12 App. D.C. 453 (1898), at 459.

[41] *Roberts V. Bradfield*, 12 App. D.C. 453 463 (1898).

[42] Ibid.

Under this view, Congress unambiguously possessed power to legislate for public health purposes in the District, and to contract with non-sectarian institutions and persons as a means for achieving those ends.

Shepard summarily dismissed Bradfield's claim that the contract violated the policy against funding religious institutions set forth in the Act of March 3, 1897. The policy had provided that "from and after the thirteenth day of June, 1898, no money appropriated for charitable purposes…shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or ecclesiastical control."[43] Shepard pointed out that this policy was a departure from previous enactments. In fact, the policy was not directly attached to the appropriation for the isolating buildings at issue in *Bradfield,* but to a subsequent list of appropriations awarded to "many charitable institutions and societies" that were listed by name and overtly "under church supervision, control and ownership."[44] Whatever the policy might have implied about the views or intentions of Congress, and however it might have affected subsequent appropriations for religious "charities," it did not limit or control the commissioners' agreement with Providence Hospital. "Clearly it can not affect appropriations of money that will be exhausted before it takes effect; and it can not bind the succeeding Congress when it comes to enact an appropriation bill for the year beginning July 1, 1898," Shepard explained. "It seems to be nothing more than a mere declaration of an abstract view of public policy that was not permitted to effect the operation of the act of which it was made a part."[45] This strictly textual interpretation of

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[43] Ibid., 475-76.

[44] Ibid., 475.

[45] Ibid., 476.

the statute stood in contrast to Justice Hagner's purposive methods, and carried through to other aspects of the Appeals Court's ruling. The letter of the law outweighed it supposed spirit.

Justice Shepard also dismissed Bradfield's claim that Providence Hospital was a "religious" or "sectarian" organization. Shepard did not rely on the policy statement's definition of religious institutions set forth in the Act of March 3, 1897 in order to determine whether Providence was, in fact, such an institution. Instead, he ruled that the hospital's corporate charter was the sole indicator of its legal character. This meant that the religious beliefs, identities, and affiliations of the hospital's staff and leadership were irrelevant to the case. The hospital's charter showed it to be an "ordinary private corporation" vested with a typical set of rights and powers. It was formally independent of the Catholic Church. While resources may have flowed *from* the Church to the hospital, they did not flow the other way:

> [Providence Hospital] is not declared the trustee of any church or religious society. Its property is to be acquired in its own name and for its own purposes. That property and its business are to be managed in its own way, subject to no visitation, supervision or control by an ecclesiastical authority whatever, but only to that of the government which created it. In respect, then, of its creation, organization, management and ownership of property, it is an ordinary private corporation, whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry.[46]

This depiction of the hospital's corporate character, and Shepard's closing reference to the "religious opinions" of the corporation's members was significant. Shepard's ruling implied that religious opinions were legally private – i.e. outside the scope of legitimate judicial (and presumably legislative) inquiry or evaluation. This model of religious

[46] Ibid., 464.

"privatization" did not circumscribe the participation of religious persons in public institutions, or proscribe religious motives and norms from legislative decision-making. Instead, it limited the power of public officials to probe or evaluate the sphere of individuals' religious conscience. It removed persons' religious beliefs from the sphere of legitimate legislative power, making such beliefs a non-factor in the legislature's dealings with the public. Although the legislature had power to appropriate funds for specific purposes, "free exercise" principles precluded the courts, and presumably the legislature, from evaluating the religious beliefs of the persons or corporations with whom the legislature contracted. These free exercise principles outweighed disestablishment norms that would have imposed an absolute differentiation of religious and legislative institutions and spheres:

> Conceding the power of Congress to appropriate money for a given purpose, and to contract for the execution of that purpose with a natural person, or an association of persons, not subject to the authority and control of an organized church, it is clear that no court would undertake, in such a case, to inquire into the religious beliefs of the single individual, or of the natural persons composing the association or corporation; for such an inquiry, or a law requiring it, would be an interference with the *free exercise of religion*.[47]

Shepard took this logic one (huge) step further, ruling that the Establishment Clause did not prohibit Congress or its agents from contracting with Providence Hospital, even if it *was* an overtly religious corporation operated directly by the Catholic Church. According to Shepard, authoritative legal thinkers, the long-standing practices of Congress, and an emerging consensus among state-level courts all contradicted and outweighed James Madison's "strange" phrasing and misinterpretations of the

[47] Ibid. Emphasis added.

Establishment Clause.[48] The U.S. Supreme Court in the case of *Terrett v. Taylor* (1815), for example, had affirmed the Virginia legislature's power to incorporate religious societies. Justice Joseph Story there wrote for the Court,

> But the free exercise of religion can not be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers can not be doubted by any person who has attended to the difficulties which surround all voluntary associations.[49]

Shepard also cited Thomas Jefferson's vaunted letter to the Danbury Baptist Association, and several contemporary treatises on constitutional law as evidence that the federal religion clauses were "intended to secure nothing more than complete religious liberty to all persons, and the absolute separation of the church from the State, by the prohibition of any preference, by law, in favor of any one religious persuasion or mode of worship."[50] Here, the means for securing religious liberty and church-state separation – i.e. the prohibition of preferences for a single "religious persuasion or mode of worship" – was itself constitutive of religious liberty.

The Establishment Clause, therefore, mediated between religious and legislative spheres and institutions by giving all religions equal legal status. But it did not impose an absolute differentiation of religious and legislative institutions or functions. Congress had power to incorporate religious societies, and to contract with those corporations in order to advance legitimate legislative purposes. The central norm governing the legislature's interactions with different members of society was a sort of virtue – even-handedness

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[48] Ibid., 466.

[49] *Terrett V. Taylor*, 13 U.S. 43 49 (1815). As quoted in *Roberts V. Bradfield*, 469.

[50] *Roberts V. Bradfield*, 467.

toward all comers, irrespective of their religious opinions or affiliations. Such principles were not limited to the federal constitution, Shepard pointed out:

> The principle conserved by the First Amendment is found, in one form or another, in the Constitution of the States of the Union; and yet the practice has been common in them all—unquestioned, so far as we are advised – to admit religious establishments, and societies for religious purposes, to incorporation both by special law and under general incorporation acts.[51]

Viewed alongside the federal Congress' practice of enacting corporate charters, Shepard concluded that the Court "could not…justify ourselves in holding that Congress has not the power to incorporate, within the District of Columbia, a religious establishment or an association or society under the express control of a church or sect."[52] And if Congress could incorporate a religious establishment or association, then Congress could certainly contract with such corporations for services that advanced legitimate legislative purposes, and could authorize the District's commissioners to do so. The main condition limiting such contracts was that they be administered even-handedly:

> If, then, such a corporation may be lawfully created, why may not Providence Hospital, though as alleged, owned and conducted by 'a monastic order or sisterhood of the Roman Catholic Church,' contract with the duly authorized agents of the Government to receive, not a subsidy or a gift of money, but compensation for actual services to be rendered? If the United States were engaged in war, would they be denied the power, no matter how advantageous or necessary it might be in some instances, to contract with religious societies or associations for hospital supplies, or for nursing their sick and wounded soldiers in their own or in private hospitals?... In our opinion a law authorizing a contract to be made without discrimination or preference, or a contract made under general discretion reposed in authorized agents, for the rendition of actual services in nursing the sick or preventing contagion, with a corporation that may be under the control of a church, can not be declared void as 'a law' or an act authorized by law, 'respecting an establishment of religion.'[53]

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[51] Ibid., 471. See 472-73 for Shepard's citations of relevant state-level court rulings.

[52] Ibid.

[53] Roberts v. Bradfield, 12 App. D.C. 453 (1898), at 471-472.

U.S. Supreme Court:

The U.S. Supreme Court heard Bradfield's case the following year. Justice Rufus W. Peckham wrote the Court's decision, which upheld the Appeals Court's ruling while tempering Judge Shepard's sweeping conclusions about Congress' power to partner with religious, or "sectarian" organizations. Like the lower courts, Peckham evaluated the commissioners' contract with Providence Hospital against Congress' defined powers to legislate for certain purposes in the District, and considered the extent to which those powers were limited by religious liberty norms.

Like both of the lower Courts, Peckham asserted that Congress possessed power to appropriate funds for the construction of isolating buildings for contagious diseases, and to authorize the commissioners to enter a contract with an incorporated hospital. He defined these powers in terms of legislative "purposes," stating: "It is not contended that Congress has no power in the District to appropriate money for the purpose expressed in the appropriation, and it is not doubted that that it has power to authorize the Commissioners of the District of Columbia to enter into a contract with the trustees of an incorporated hospital for the purposes mentioned in the agreement in this case."[54] Importantly, Peckham did not assert that the appropriation or the contract must express or possess "secular" purposes, as such. Instead, his ruling assumed that the purposes of the appropriation must be consistent with the defined powers of the legislature to enact laws in the District of Columbia.

Although Congress undoubtedly possessed power to legislate for certain purposes in the District, these powers were subject to limitations imposed by the

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[54] *Bradfield V. Roberts*, 299.

Establishment Clause. The essential question in Bradfield, according to Justice Peckham, was whether the Establishment Clause prohibited Congress and its agents from building on the property of, or contracting with "sectarian" organizations.[55] In order to address this question, the Court had to evaluate whether the Establishment Clause prohibited contractual partnerships with religious or sectarian organizations; and, whether the corporation was, in fact, "religious" or "sectarian" in nature.

Peckham curtly noted that Madison's rephrasing of the Establishment Clause was "not synonymous" with the actual text of the First Amendment. However, he tempered Justice Shepard's sweeping claim that Congress could contract (on a non-discriminatory basis) with overtly religious organizations. Peckham suggested that contracts with religious corporations *might* exceed the scope of Congress' power to legislate in the District of Columbia. "If we were to assume, for the purpose of this question only," he wrote, "that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant [Bradfield] in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."[56] Peckham thus avoided ruling on the limits of Congress' power to partner with religious corporations. Unlike the lower courts, he offered no explicit interpretation of those limits. Peckham's conclusion that Providence was not a "sectarian" or "religious" corporation, however, was rooted in a subtle interpretation of multiple religious liberty norms.

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[55] Ibid., 297. "…the only objection set up is the alleged 'sectarian character of the hospital and the specific and limited object of its creation.'"

[56] Ibid.

Justice Peckham concluded that Providence Hospital was not a sectarian corporation, in part, because its members' religious beliefs were not subject to judicial review. Echoing the Appeals Court, Justice Peckham reasoned that the hospital's religious character was determined solely by the legislative act by which it was incorporated. The hospital's charter established its legal powers and rights, Peckham noted, but made no provisions whatsoever regarding religion or the "religious faith of the incorporators."[57] That Providence was operated primarily by nuns; that the title to its property was owned by a convent; and that it was conducted under the auspices of the Roman Catholic Church were immaterial to the corporation's legal character. The hospital had a distinct corporate identity that was not contingent upon the private beliefs of its individual members. Moreover, implicit religious liberty norms prohibited the Court from even inquiring into such beliefs:

> The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a *purely secular* one as constituted by the law of its being. Whether the individuals who compose the corporation happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.[58]

Providence Hospital was, therefore, a "purely secular" corporation by virtue of the powers and rights set forth in its corporate charter. Even if it was owned and operated by individual Catholics, or by the Catholic Church itself, the hospital was incorporated independently of any religious beliefs or institutions, and it served a limited (non-religious) function within the community. "That the influence of any particular church

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[57] Ibid.

[58] Ibid., 298. Emphasis added.

may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body."[59]

If the hospital was "non-sectarian and secular" in its legal form and function, it was also non-sectarian in its provision of medical care to District residents: Providence served the entire community, not just Catholics. Like Justice Shepard, Peckham noted that the hospital was not the trustee of a religious society. Federal appropriations, therefore, would be used to provide medical care – not to finance the church's religious functions. Equally important, however, was the fact that the hospital did not limit its care to Roman Catholics; doing so would violate conditions set forth in the hospital's charter:

> There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary those powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution.[60]

One reason that the contract did not violate the Establishment Clause, then, was that the hospital provided a genuinely public service: it treated and cared for the general public, as opposed to the members of a specific religious sect.

The Court stopped far short of affirming Congress' power to contract with religious corporations, even on a non-preferential basis. However, because Providence was a "secular" corporation, in the Court's view, rather than a "religious" or "sectarian"

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[59] Ibid.

[60] Ibid., 298-99.

one, Bradfield's Establishment Clause claims were ultimately dismissed. The Court upheld the contract, concluding:

> The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation. To make the agreement was within the discretion of the commissioners, and was a fair exercise thereof.[61]

§ 4 Conclusion

The constitutional boundaries between legislative and religious institutions in *Bradfield* were ultimately obscured by the Supreme Court's determination that the hospital was a "purely secular" corporation. All three courts in *Bradfield* agreed that providing healthcare to indigent D.C. residents was a legitimate "purpose" that fell within the scope of Congress' legislative powers. Facilitating such care (at least in the District of Columbia) was a valid function of the (federal) legislative sphere. Judges Hagner and Shepard, speaking for their respective courts, disagreed sharply about the extent to which Congress (and its agents) could collaborate with "religious" or "sectarian" corporations in the pursuit of such ends. Hagner emphasized the importance of church-state separation – or the administrative differentiation and impermeable financial barriers between religious and governmental institutions. According to Hagner, the federal Establishment Clause, and the policy statement in the Act of March 3, 1897 had more or less the same meaning: the government could not fund, or co-own property with a religious organization under any circumstances. The commissioner's contract with Providence Hospital amounted to a joint venture between two institutions that were

[61] Ibid., 299-300.

categorically forbidden to work together. The functions and interests of the (sectarian) hospital and the legislature clearly overlapped. But, even when religious and legislative institutions pursued common ends, the Establishment Clause required them to do so on parallel paths that did not cross or overlap.

In contrast, Judge Shepard emphasized the importance of formal legislative neutrality toward religion, and the protective boundaries that constitutional norms put in place around religious beliefs and affiliations. The religious beliefs of the hospital's employees and owners had no more bearing on its legal character or functions. It was significant that the contract was a fee-for-service agreement, and that the services provided advanced ends consistent with Congress' enumerated powers. But, even if the hospital had been a religious or sectarian institution, Shepard reasoned that it was not, thereby, excluded from competing for Contracts with the federal government. Just as Congress could contract with an individual without first considering his or her religious affiliations, so, too, could Congress contract with a corporation in exchange for services without first considering its religious affiliations.

The U.S. Supreme Court affirmed Judge Shepard's description of the hospital corporation's "secular" character, but avoided the bigger question of whether Congress could contract with sectarian corporations. Like Shepard, Peckham reasoned that the hospital's legal character was a function of its corporate charter. The religious beliefs and affiliations of the Sisters of Charity did not make the hospital a "religious" corporation, legally speaking; nor did the pervasive influence of the Catholic Church in the hospital's administration. The hospital, after all, had to be operated in accordance with its charter, or risk losing it. At the same time, Justice Peckham's opinion implied that federal

contracts with religious corporations were at least potentially problematic under the Establishment Clause. The high Court thus walked back Shepard's sweeping claims about religious corporations' legal right to compete for government contracts on an equal basis with non-religious corporations. If Congress was necessarily blind to the religious affiliations of a secular corporation's members, Peckham's ruling suggested, it need not be so blind when it came to overtly religious corporations.

What do these rulings teach us about the role of constitutional law in the differentiation and specialization of religious and legislative spheres? As with all of the cases discussed in this book, one key observation is simply that constitutional law helped mediate the processes by which the functions of, and boundaries between religious and legislative spheres were defined. *Bradfield* shows that enforcing boundaries between religious and legislative spheres, even a century after the First Amendment was passed, was often conceptually ambiguous: it depended on competing interpretations of multiple legal norms, and alternative notions of what made a legal entity "secular" or "religious."

Although the three courts in Bradfield reached starkly different conclusions, their methods had much in common. First, all three courts evaluated whether the "purposes" of the hospital appropriation were consistent with the powers of the federal legislature. These purpose inquiries functioned as a sort of precursor the courts' subsequent Establishment Clause inquiries. That is, the courts were not trying to determine whether the legislature's purposes were "religious" or "secular." Instead, they were trying to determine whether the appropriation expressed a legislative power – or served a legislative function – that actually belonged to Congress. That Congress exercised its typical (enumerated) powers, and the type of plenary police powers typical of state

governments over the District of Columbia makes *Bradfield* a unique case. But, again, the courts' purpose inquiries evaluated the practical link between the appropriation and the established powers of Congress.

Second, having established the legitimate purposes of the appropriation, all three courts proceeded to evaluate the appropriation against competing religious liberty norms. It is here, in this second phase of the courts' rulings, that Judges Hagner and Shepard emphasized different Establishment Clause standards, and thus came to such striking divergent conclusions about the scope of Congress' power. Hagner emphasized a strict form of institutional differentiation, while Shepard emphasized a strict form of religious neutrality that treated the religious identities and beliefs of corporations, and their members with formal indifference. As I show in subsequent chapters, competing interpretations of both of these norms, and a few others, would continue to animate debates about the scope and meanings of the religion clause for years to come. Subsequent cases would also see the introduction of a new form of purpose inquiry – the secular purpose test – that was less tethered to the specific powers of legislative bodies than the legislative purpose tests imposed in *Bradfield* and the other cases discussed in Section 1.

Before turning to the birth of the secular purpose test in the 1960s, however, the next section evaluates American courts' methods for reviewing laws that were challenged as violations of the First Amendment's Free Exercise Clause. In the cases discussed in the foregoing chapters, court's evaluated the limits of legislatures' power to prescribe, support, or otherwise "establish" religion. In the following three chapters, I evaluate the methods that courts used to evaluate legislature's powers to proscribe, punish, or

otherwise prohibit the "free exercise" of religion. These cases add a new layer of complexity to the Supreme Court's religion jurisprudence. But they have an important feature in common with the cases discussed above: the Court's method for evaluating legislative purposes.

Section Two

Legislative Powers and the Free Exercise of Religion

The martyr at the stake glories in his tortures,
and proves that human laws may punish but cannot convince.[1]
- St. George Tucker

- Chapter 4: The Priest, the Parishioners, and the Police Powers
- Chapter 5: Polygamy and the Enlightened Sentiment of Mankind
- Chapter 6: The Foreign Preacher and His 'Labor'

[1] *1 Tucker's Blackstone, Appendix, 296-7 (As quoted in Davis v. Beason, Transcript 1a)*

§ I Introduction to *Section Two*

A review of the previous section. In Section One we examined American courts' methods for evaluating establishment-type claims under constitutional review. Not all of the cases in Chapters 1-3 directly implicated the federal Establishment Clause. But the Supreme Court (and lower courts) in *Girard, Hennington* and *Bradfield* evaluated the extent to which legislatures could establish, fund, or otherwise promote religious beliefs, practices, and institutions. In the terminology of secularization theory, the courts articulated and enforced boundaries between, and substantive conceptions of, religious and legislative spheres by defining the extent to which legislative bodies could 1) function as religious agents; 2) function as agents of religion; and 3) employ religious institutions as the agents and/or objects of legislative actions.[2] Unlike more recent cases, in which courts have measured evaluated legislative purpose in terms of their "secular" character, the *Girard, Hennington* and *Bradfield* courts measured such purposes in terms of legislatures' enumerated powers, and the ends by which those powers were often defined. The courts also interpreted the meaning(s) of "religion" in each of these cases, and applied multiple religious liberty norms to determine such limits.

This approach had important implications for the differentiation of religious and legislative spheres. For one, it ascribed a limited and definite set of functions to the legislative sphere. Legislation was valid under Establishment Clause norms, at least in part, by virtue of the social goods or legislative ends that it advanced. For example, the promotion of "police" purposes – such as public health, safety and morality – was a

[2] The difference between #1 and #2 in this list is as follows: to function as a religious agent (#1) is to function in a religious role or identity (e.g. when Christianity is part of the common law); to function as an agent of religion, on the other hand, is to make religion the object or indirect object of legislative action (e.g. promoting religious beliefs, or funding religious institutions).

proper function of the legislative sphere. Courts knew that such functions belonged to the legislative sphere because the documents that conveyed legislatures' powers – state constitutions and city charters – typically said so. Second, the courts' method of review generally affirmed the public character of religion in legislative discourse, and allowed legislatures to impose "civil" duties that coincided with the dictates of a religious tradition. While disestablishment norms excised religious functions from legislative spheres, religious and non-religious citizens and legislators could participate in legislative discourse on formally equal terms, and could infuse such discourse with as much, or as little, religion as they chose. Public religion, in this limited sense, was perfectly valid under constitutional religious liberty norms. As Justice William Bleckley explained: "Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within the legislative competency."[3] This meant that religious persons and institutions were not merely subject to the legislative powers, but also the subject of legislative powers.

Looking forward to the next section. "Section 2" examines the differentiation of religious and legislative spheres via constitutional law from a different angle, by examining American courts' methods for evaluating Free Exercise claims.[4] Each chapter in this section analyzes a case, or set of cases, in which litigants challenged legislative acts that, they claimed, infringed on their right(s) to freely exercise religion. In *Permoli v. Municipality No. 1 of New Orleans* (1845), for example, the Court considered whether an ordinance prohibiting the open display of corpses in churches violated the rights of a

[3] *Hennington V. The State*, 397.

[4] The Free Exercise Clause is the second clause in the First Amendment's religious liberty provisions, printed here in italics: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*" See "Constitution of the United States of America," Amendment I.

Catholic priest who had been fined for presiding over the funeral of his deceased friend. In the polygamy cases discussed in Chapter Five, Mormon litigants claimed that the Free Exercise Clause protected their right to practice or otherwise promote polygamy, in keeping with the official teachings of the Mormon Church. Finally, in *Church of the Holy Trinity v. United States* (1892), the Court considered whether a law prohibiting the "importation" of foreign laborers under contract to work in the United States violated the Free Exercise rights of an Episcopal Church that had been fined under the law after it called an English clergyman to serve as its pastor.

Each of the cases discussed in this section, therefore, presents a new set of legal questions about scope and substance of the First Amendment's religion clauses. However, the courts in these cases used a familiar method for evaluating litigants Free Exercise arguments. Much as they did in the establishment-type cases covered in Section One, the courts involved in these free exercise cases weighed legislatures' enumerated powers – and the "purposes" by which those powers were often defined – against an evolving set of religious liberty norms. Whereas the Supreme Court's jurisprudence in the late 1900s used different forms of legislative purpose inquiries for Establishment and Free Exercise cases, courts in these nineteenth-century cases used the same approach for both clauses.

Chapter Four

The Priest, the Parishioners and the Police Powers

> *The power to regulate matters of police, necessarily includes every thing which relates to public health, a free passage through the streets, their cleanliness, and the prevention of every act which may tend to disturb the peace, or affect, injuriously, the moral feelings of the community, or any part thereof. And if this power is to be so understood, it cannot be doubted, that the municipalities have a right to regulate the manner and place of funeral processions and ceremonies, for this this is not only important to the salubrity of the city, but also may have, particularly in times of epidemics, a direct and dangerous effect upon the mental condition of the inhabitants.*[1]
>
> – Judge Robert Preaux, City Court of New Orleans

§ 1 Introduction

May state and local governments prohibit or regulate the performance of religious rituals, and issue fines against those who defy such regulations? In *Permoli v. First Municipality of New Orleans* (1845) the Supreme Court heard a case involving the Reverend Bernard Permoli – a Catholic priest who was convicted of violating a municipal ordinance that banned the open display of corpses in churches, and required funeral rites to be performed in a designated obituary chapel near the city's edge. Permoli challenged his conviction on the grounds that the ordinance violated his First Amendment free exercise rights, and reflected an unfair legislative bias related to an ongoing dispute between the Catholic hierarchy and a group of lay churchwardens in New Orleans. The Supreme Court ultimately ruled that the Free Exercise Clause did not limit the power of state or local legislatures in Louisiana to restrict religious beliefs and practices within

[1] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, U.S. Supreme Court Records and Briefs, 1832-1978, 18 (1845).

their respective jurisdictions. This conclusion, however, followed a pair of contentious lower court rulings in which judges proffered competing interpretations of Permoli's religious rights, and of the Municipality's legislative powers.

§ 2 Case and Arguments

The City Council of New Orleans' First Municipality altered its funeral regulations twice in the weeks before Reverend Permoli was charged with presiding over an illegal funeral at the Roman Catholic Church of St. Augustin – the first predominantly African-American Catholic Congregation in the United States.[2] On October 31, 1842, the council passed an ordinance making it "unlawful to carry to, and expose in, any of the Catholic churches of this Municipality any corpses."[3] An earlier version of this ordinance dated back to 1827, and had banned such displays in the Church of St. Louis, which at the time was the only Catholic church in the municipality. The new ordinance levied a fifty-dollar fine against anyone "who may have carried into or exposed" a corpse into a Catholic church, and against any priest "who may celebrate any funeral at any of

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[2] See: Michael W. McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," in *First Amendment Stories*, ed. Richard W. Garnett and Andrew Koppelman (New York: Foundation Press, 2012), 53. McConnell argues: "Surprisingly, one aspect of antebellum New Orleans society that was not central to the dispute was race. In general, the Catholic Church in the antebellum South supported slavery. The French Creole elite, who embraced the French Revolution and Free Masonry but had deep economic ties to the slavery-dominated economy of the South, may have been more ambivalent about the peculiar institution. One might therefore expect this dispute over control of the Church to connect with a deeper divide over race and slavery, but in New Orleans this was not the case…Many mixed-race 'free persons of color' attained positions of wealth and power in New Orleans. Indeed, some of them owned slaves—the only place in the United States where descendants of Africans were slaveowners. Catholic church life reflected this unusual racial heterogeneity. For example, Pere Antoine [a central, early figure in New Orleans' Catholic community] insisted upon non-segregated worship services. As one historian has put it: 'In Creole New Orleans, an intermediate class of free people of color had gained a measure of acceptance under Latin European influences. Until the 1830s, the city's liberal religious culture helped to delay the imposition of a sharply-defined, two-tiered racial hierarchy.'" (McConnell here quotes: Caryn Cosse Bell, *Revolution, Romanticism, and the Afro-Creole Tradition in Louisiana, 1718-1868* (Louisiana State University Press, 2004), 150.)

[3] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 9.

the aforesaid churches."[4] It further stipulated that, "all the corpses shall be brought to the obituary chapel, situated in Rempart street, wherein all funeral rites shall be performed as heretofore."[5] Then, on November 7, 1842, the council once again amended the ordinance, this time by limiting its fines to the priests who officiated at the banned funerals, and by prohibiting, more broadly, "any funerals made in any other church than the obituary chapel."[6] Rev. Permoli was charged with violating this ordinance four days later. He was convicted shortly thereafter and paid a fifty-dollar fine, having admitted at his trial that he and two assistant priests officiated over the body of his deceased friend, Louis Le Roy, "by blessing it, by reciting on it all the other funeral prayers and solemnity *on it,* all the usual funeral ceremonies prescribed by the rites of the Roman Catholic religion."[7]

Passage of the municipality's funeral ordinances marked one of many flashpoints in a protracted ecclesiastical and legal battle between Bishop Antoine Blanc, a French priest who was appointed Bishop of New Orleans in 1835, and a group of churchwardens who 1) held the title to the Church of St. Louis, 2) owned the obituary chapel, and 3) claimed the right to approve and/or appoint parish priests in the Church of St. Louis.[8] After decades of relatively lax ecclesiastical oversight by his predecessors,

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[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid., 3.

[8] See: McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," 44-45. "As Catholic immigrants swarmed into the United States from Germany, France, and especially Ireland in the early part of the nineteenth century, they did not wait for the central church authorities to establish churches for them, as canon law might seem to require. They did this for themselves. And as they founded churches, Catholic Americans understandably borrowed from the legal frameworks available to the churches in their states, which were based on a Protestant model of church governance. In this model, the temporal affairs of the church and often the powers of appointment of clergy

Blanc had attempted on several occasions to reassert episcopal control of the diocese, specifically with regard to the appointment of priests. The churchwardens, however, resisted his efforts at every step. Whereas Blanc sought to emplace and exercise a traditional, European model of Church hierarchy, the wardens preferred (and had long practiced) an Americanized model of governance commonly referred to as "trusteeism." Trusteeism describes,

> …a form of ecclesiastical democracy that asserted the rights of an American National church vis-à-vis the Roman Church, a separation of spiritual and temporal roles within the church itself, ultimate lay control over ecclesiastical temporalities, lay participation in the selection of the clergy, the rights of the local clergy to due process in the church, and the establishment of some written constitutional instrument that would define and limit the relative prerogatives and duties of all individuals within the ecclesiastical community.[9]

Michael McConnell has carefully documented the series of conflicts between Blanc and the churchwardens that led up to the passage of the funeral ordinances at issue in *Permoli*.[10] For our purposes, I will simply note that 1) the churchwardens exercised considerable sway over the City Council that enacted the funeral ordinances, and 2) the Church of St. Augustin Church – where Rev. Permoli, at the instruction of Bishop Blanc, performed the illegal funeral – was dedicated[11] just twelve days before the funeral ordinance was amended on October 31, 1842; and 3) the new Church of St. Augustin threatened to undermine the churchwardens' leverage in church affairs, and to interrupt

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are vested in a board of laypersons elected by the congregation, called variously a board of elders, wardens, trustees, or vestry."

[9] See: Patrick W. Carey, *People, Priests, and Prelates: Ecclesiastical Democracy and the Tensions of Trusteeism* (Notre Dame, IN: University of Notre Dame Press, 1987). As quoted in McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," 45.

[10] "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case." Also see: Alfonso Comeau, "A Study of the Trustee Problem in St. Louis Cathedral of New Orleans, Louisiana, 1842-1844," *Louisiana Historical Quraterly* 31(October 1948).

[11] I.e. the church was officially opened and functional.

their revenue from the obituary chapel. For, unlike the Church of St. Louis and the obituary chapel, St. Augustin was fully owned by the broader Catholic Church. McConnell explains:

> Now, for the first time, there was a Catholic church in the First Municipality that the wardens did not control. Now the Catholic hierarchy had a place to conduct funerals without generating revenue for the wardens…The [funeral] ordinance countered Bishop Blanc's plan to gain control over worship services, and especially the 'casual' fee for optional funeral services, by extending the ban on funerals to the church the bishop controlled.[12]

In short, the churchwardens had effectively used their influence over the City Council to help pass the newly amended funeral ordinances, and thereby counter Bishop Blanc's broader attempts to assert control over the diocese.

Rev. Permoli noted the conflict of interest stemming from the churchwardens' close ties to the City Council in his original appeal. His attorneys also decried the notion, in subsequent arguments before the U.S. Supreme Court, that Permoli would be forced to perform funeral rites in "a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself."[13] But little else was mentioned about the ongoing conflict between Bishop Blanc and the churchwardens as the case moved through the appeals process. Instead, Permoli emphasized that the ordinance violated his free exercise rights, as guaranteed by the First Amendment.

Detailed records of Permoli's arguments in the lower courts are not extant. However, available records show that Permoli claimed his participation in the funeral rite was "warranted by the constitution and laws of the United States, which prevent the

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[12] McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," 59.

[13] *Bernard Permoli V. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589 599 (1845).

enactment of any law prohibiting the free exercise of any religion."[14] Permoli's subsequent arguments in the U.S. Supreme Court developed this claim in greater detail. Permoli and his attorneys proffered a sophisticated argument about the nature of American federalism during a time of westward national expansion. Namely, they claimed that the First Amendment limited the powers of new states' legislatures in ways that it did not limit the powers of the original thirteen states' legislatures. The First Amendment provided that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These provisions, they admitted, originally applied only to the federal Congress. The First Amendment, in other words, left the legislatures of the original thirteen states more-or-less free to establish and/or prohibit the free exercise of religion as they saw fit. However, Permoli claimed that the treaties and statutes leading up to Louisiana's statehood had effectively guaranteed the religious liberties of the new state's residents against federal *and* state laws that encroached on those liberties.

Permoli's attorneys framed this argument within a narrative about social and legal progress. The United States had not always been the bastion for religious liberty that it was destined to be, they explained:

> Even these American states, planted as they were by refugees from religious persecution, presented for generations any thing but a land of religious liberty. The government of the Puritans was the very opposite of tolerant; and if they spilled not the lives of their dissentient brethren as freely as others had done, it was because they fled from before their face into the wilderness. The government of Virginia was equally exclusive; and the land of the Calverts was peopled by exiles from both. Even Old Maryland, the primal seat of Christian freedom, has enfranchised the Israelite within our own brief memories. It was but yesterday

[14] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 3, 10, 16. Permoli also argued that the ordinance was "contrary to the provisions of the act of incorporation of the city of New Orleans." But the details of this argument are not available.

> that the Catholic was made eligible to office in North Carolina; and his continued exclusion from it disgraces New Hampshire today.[15]

Despite this mixed history of religious persecution, Permoli's attorneys argued that the nation was progressing toward more expansive and uniform standards of religious liberty. The Northwest Ordinance of 1787, and a series of subsequent legislative acts that applied its provisions to the territory in which New Orleans was situated, played a central role in this narrative.[16] The Northwest Ordinance defined religious liberty as a permanent feature of law in the new territories. Its preamble stated that one of its central purposes was to "fix and establish [the fundamental principles of civil and religious liberty] as the basis of all laws, constitutions, and governments, which for ever hereafter shall be formed in the said territory." The Ordinance further provided:

> It is hereby ordained and declared…that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and for ever remain unalterable unless by common consent, to wit: Art. 1st. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory…[17]

Residents of New Orleans First Municipality remained party to this "compact" even after the territory became a state, Permoli claimed: In 1805, Congress formally extended to the inhabitants of the territory of Orleans "all the rights, privileges, and advantages" enumerated in the Northwest Ordinance; in 1811, Congress granted the same inhabitants power to organize a state-level government and draft a state constitution, specifying that it "should contain the fundamental principles of civil and religious liberty"; then, in 1812, Congress admitted the new territory and its government to the Union as the state of

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[15] *Bernard Permoli V. Municipality No. 1 of the City of New Orleans*, 594-95.

[16] "Ordinance for the Government of the Territory of the United States North-West of the River Ohio," passed July 13, 1787.

[17] *Bernard Permoli V. Municipality No. 1 of the City of New Orleans*, 594.

Louisiana, while explicitly specifying that "all the conditions and terms contained in the third section [of the 1811 act specifying that the state constitution should contain the fundamental principles of civil and religious liberty], should be considered, deemed, and taken as fundamental conditions and terms, upon which the said state is incorporated into the union."[18] These successive laws established a legal agreement between Louisiana's residents and the federal government – one that required the federal judiciary to intervene if and when state or local laws infringed on Louisianans' right to freely and peaceably exercise religion. Unlike the original thirteen states, which retained a constitutional prerogative to establish and/or restrict religion within their respective borders, Permoli's attorneys insisted that Louisiana came "into the national community shorn of this flower, or rather thorn, of prerogative."[19]

Permoli's attorneys wove this federalism argument into another evocative narrative that played on simmering tensions over the status of slavery in the new states. What would become of the nation, they asked, if state legislatures could simply disregard the obligations under which their states were admitted to the Union?

> The argument then is strictly consecutive; that, both under the ordinance of 1787, and the acts for admitting Louisiana into the union, there is a solemn compact between the people of that state and the United States, (which this high conservative tribunal will protect from violation by state authority,) that they shall not be molested on account of their religious belief, or mode of worship; but that they shall for ever enjoy religious liberty in the fullest and most comprehensive acceptation of the term…What avail our anxious compromises, our reluctant concessions, our cautious provisos, if, the instant a new partner is admitted to the national firm, she is at liberty to cast her most solemn obligations behind her? To what a ridiculous condition is one at least of the high contracting parties degraded by these fancies! Is she [the state] sovereign? Oh, no! not "sovereign" till she becomes "a state!" Is she subject? How can subject stipulate with sovereign? She

[18] Ibid., 595.

[19] Ibid.

> is then a nondescript, "tertium quid" – a sort of political redemptioner; with just enough of the slave to submit to humiliating conditions, and just enough of the freeman to count the days the indentures have yet to run, and rejoice in anticipated repudiation of the most formal and explicit engagements.[20]

Permoli's attorneys described the substance of religious liberty in equally vivid terms. In their view, religious beliefs and practices were inherently linked. Therefore, the free exercise of religion entailed more than the right to believe or profess abstract religious opinions without fear of reprisal. It also protected matters of "ecclesiastical discipline" and "church order" from legislative control. The funeral mass was a profoundly important part of Catholic faith and tradition, they insisted.[21] To regulate this rite was to invade the sphere of Permoli's religious beliefs and practices. And, if the City Council could ban Catholics' funerals, what was to prevent it from similarly restricting the religious disciplines of other groups, like the Methodists?

> Now if there be aught [anything] essentially characteristic of religious liberty, it is the exemption of ecclesiastical discipline (defined by the learned Hooker, "church order,") from secular control; and this, because the external forms and practices of religion are all that temporal can directly invade. Faith, doctrine, are beyond its reach; objects of the understanding and the heart. Discipline is the sensible law which regulates the manifestation of our belief or opinion, in our public and social devotional intercourse with our Creator. Faith is the soul of religion; discipline the visible beauty in which she commends herself to our veneration and love. And it may be safely asserted, that there never was an arbitrary change introduced by governments into the religious opinions of a community, which was not masked by a pretended reform of exterior observances. What distinguishes the most numerous sect of Christians, in our country, from the many who agree with them on doctrinal points, but their method; the practical methods established by the founders of their peculiar system of church polity? In fact, they have taken their name from it. Yet what is "method" but another word for "discipline?" And would a member of that society consider himself in the

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[20] Ibid., 595-96.

[21] Ibid., 598. "It is an office in which 'the church of the New Testament is in communion with the church of the Old;' with the Hebrew of three thousand years ago and the Hebrew of to-day. In it the Catholic unites with the Nestorian and the Copt, and the separated Greek, and every liturgist of the sixteenth century; nay, with many of the wise and good, who, half doubting or rejecting it as of revealed authority, still practice it as the instinctive teaching of their own hearts."

> enjoyment of religious liberty, if told "believe what you please of the divinity, the incarnation, the atonement, the influences of the Holy Spirit, baptism; but hold no class-meeting—hold no camp-meeting. These, though perhaps edifying and consolatory to you, are only matters of discipline, and amenable, therefore, to the municipal police?"[22]

Permoli thus interpreted the Free Exercise Clause as a legal boundary protecting the spheres of religious faith and discipline – including the religious rites essential thereto – from interference by "secular" (or "temporal") authorities.

Attorneys for the First Municipality countered this argument by insisting that the funeral ordinance was a legitimate expression of the City Council's corporate powers. No records of the First Municipality's lower court arguments are available. In the Supreme Court, however, the attorney for the First Municipality, one Mr. Barton, emphasized that the City Council possessed enumerated powers to enact police regulations. Barton opened his case by explaining that New Orleans was "visited annually with the yellow fever…and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes."[23] The funeral ordinance was passed in October, well after the summer months when outbreaks were most common. However, Barton insisted that arresting the spread of such diseases was ordinance's sole purpose.

Barton downplayed the conflict between the Catholic churchwardens and Bishop Blanc, portraying the religious liberty questions at stake in the broadest possible terms. Again, the supposed "purpose" of the statute was paramount to its validity: "If that measure had its origin in the mere purpose of infringing upon, and discriminating, to the prejudice of the religious rights of one denomination of Christians," Barton opined, "it is

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[22] Ibid., 599.

[23] Ibid., 600.

not to be defended; but if designed merely as a regulation of sanitary police, for the preservation of the public health, then the law of necessity pleads in its behalf; and all obituary rites and ceremonials which tend to frustrate its objects, or impair its efficacy, must yield to the supremacy of the common good."[24] Barton exploited the Supreme Court's relatively distant vantage point of the case by portraying the First Municipality, and the members of its City Council, as homogenously Catholic. These demographics provided "a clue to the *quo animo*" – the animating spirit, or motive – of the City Council.[25] "The great body of the constituency of that council is Catholic," Barton fibbed:

> …and it is believed, *ab urbe condita* [from its founding], to the present day, a majority, and very frequently the whole, of that council, are such as have been reared up in the Catholic faith, and have continued in that religious persuasion. Hence, if the ordinance complained of abridges the privileges of Catholics, it abridges to a like extent the privileges of those who enacted it. If Catholics are wronged, Catholics have wronged them. This circumstance, indeed, may not lessen the injury, though it weakens the wrong. It may not test the lawfulness, but it defends the motive.[26]

Under this view, the municipality's funeral ordinance was anything but tyrannical. In fact, it was an act of self-sacrifice on the part of the municipality's Catholic residents. Had the ordinance unfairly discriminated against a given sect it would have been indefensible. But, if the ordinance was "designed merely as a regulation of sanitary police, for the preservation of the public health," then the Rev. Permoli was bound to submit his "ceremonials" to the needs of the broader community.[27]

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[24] Ibid., 601.

[25] Ibid.

[26] Ibid., 602.

[27] Ibid., 601.

§ 3 Court rulings

City Court of New Orleans: Judge Gallien Preval

Gallien Preval, the Associate Judge in the City Court of New Orleans where Rev. Permoli first appealed his conviction, ruled in Permoli's favor. Preval's decision was just two pages long; it alluded to Permoli's free exercise rights, but focused primarily on the City Council's limited powers. Preval reasoned that the Municipality did possess general "police" powers under which it could regulate the exposure of corpses in order to protect public health, or "salubrity." But, the act of officiating at a funeral was not inherently dangerous. And without an enumerated power to prohibit benign religious observances, the City Council could not single out priests as the sole objects of the funeral ordinance's penal measures.

Judge Preval scoured the municipality's corporate charter in order to determine which legislative powers the City Council possessed. He concluded that "the city council has a full authority to enact ordinances or resolutions concerning the general police of Municipality No. 1, and its salubrity."[28] In Preval's view, the power to pass laws concerning the city's "salubrity" implied the coinciding power to regulate the transportation and disposal of corpses. In fact, enforcing such regulations was an important duty of government: "It is incumbent on the city council," Preval wrote, "to regulate every police matter respecting the salubrity of the city, and the act of carrying and exposing corpses is one which must have attracted their most particular attention." Because corpses posed a tangible threat to public health, Preval reasoned that the City Council could legitimately limit open-casket funerals to the obituary chapel on the

[28] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 5.

outskirts of town. "The part of the resolution inflicting a fine upon every person carrying or exposing corpses in any other church than the obituary chapel," he explained, "was perfectly legal."[29]

The ordinance's narrowly targeted penal provisions, however, were inconsistent with the City Council's police powers, and violated free exercise norms. Preval expressed doubt about the City Council's power to enforce its original amendment to the funeral ordinance, which banned the display of corpses in Catholic churches, as opposed to all religious buildings. "In this instance," he wrote, "it might be questioned, however, whether the resolution of the 31st October is perfectly legal, it being intended to have its effects against the Catholics alone, leaving aside all the other religious sects."[30] The ordinance of November 7 remedied this problem insofar as it prohibited "any priest" from officiating at "any funerals made in *any other church than the obituary chapel*."[31] But the amended ordinance was still illegal, Preval reasoned, because it only punished members of the clergy. The act of officiating at a funeral mass was inherently religious and, in itself, posed no threat to the broader community. Although the municipality's police powers allowed it to regulate the display of corpses for the purpose of public "salubrity," it had no enumerated powers to punish socially benign religious acts. Referring to the initial ordinance that imposed fines on everyone involved in carrying and exposing corpses in the city's Catholic churches, Preval asked: "…when such a resolution is repealed, how can it stand only against the priests who officiate on those corpses which

[29] Ibid.

[30] Ibid.

[31] Ibid. Emphasis added.

are permitted to be brought in their church without any restriction from the law."[32]

Preval concluded:

> I will simply confine myself in the examination of the powers granted to the corporation of the city of New Orleans as to general laws of police. I have read with the greatest attention all the acts of the legislature relative thereto, and I have been unable to find any which authorize the city council to enact any ordinance or resolutions which may have a tendency to prevent the free exercise of any religion, when in the exercise of the same they commit no act which may be injurious in any way to the community…I am therefore of the opinion that the resolution is illegal, and not supported by the acts of the legislature incorporating the city of New Orleans, from which it derives its authority. It is therefore ordered and decreed, that judgment be entered in favor of defendant [Permoli] against plaintiff, with costs.[33]

Judge Preval thus treated the regulation of non-harmful religious exercises as beyond the sphere of the City Council's legislative powers. Such regulations were simply not one of the council's defined functions, as measured by its corporate charter. Without directly naming the First Amendment's Free Exercise Clause, Preval's decision presumed that citizens were entitled to "the free exercise of any religion."

City Court of New Orleans, on appeal: Judge Robert Preaux

The City Council appealed Judge Preval's ruling, and the case was re-argued under Judge Robert Preaux. Preaux admitted that his initial impressions of the case were consistent with Judge Preval's ruling. Preaux also applied a familiar method to evaluate the ordinance: First, he assessed whether it was consistent with the municipality's enumerated powers; next, he considered whether the ordinance exceeded those powers with respect to religious liberty norms. After extensive oral arguments, however, Preaux reversed the lower court's ruling. The City Council could not, under the auspices of its

[32] Ibid.

[33] Ibid.

police powers, regulate religious "dogmas." But, Preaux reasoned that the City Council *could* regulate religious "disciplines," and punish any (or all) of the people involved in an illegal funeral in order to protect the physical and moral health of the general public.[34]

Judge Preaux carefully outlined the series of legislative acts by which the municipality's powers had been conferred. He pointed, first, to a section of the state constitution, which provided: "The citizens of the town of New Orleans shall have the right of appointing the several public officers necessary for the administration and the police of said city."[35] This language technically only conferred the power to hold elections, but Preaux reasoned that its "intent" was to confer police powers on the city's elected officials: "…for, to will the end [of administration and police] is to will the means [of legislative police powers]."[36] Preaux also cited state and local acts by which the city's police powers had been "considerably enlarged" over time, and had been conveyed to the governing councils of the city's municipal subdivisions. The First Municipality's corporate powers, among other things, included the power to pass ordinances to promote the "cleanness and salubrity" of the city, and to maintain the city's "police, tranquility, and safety."[37]

Preaux defined these powers liberally. "The power to regulate matters of police," he explained, "necessarily includes every thing which relates to public health, a free

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[34] Judge Preaux expressed gratitude in the court's written opinion to the Municipality's attorney, C. Roselius, by openly thanking him for his presentation of the case: "On the part of Municipality No. 1, the case was sustained by the counsel with a degree of reasoning, learning and eloquence, rarely to be heard; and it is the duty of the court to thank him for the candid manner in which he presented the case, and for the light of authority thrown upon it by his researches, facilitating greatly the labor of the court in the discharge of its important and delicate duties. His argument has been to the court a fruitful source of valuable knowledge." Ibid., 12-13.

[35] Ibid., 16.

[36] Ibid.

[37] Ibid., 17.

passage through the streets, their cleanliness, and the prevention of every act which may tend to disturb the peace, or affect, injuriously, the moral feelings of the community, or any part thereof."[38] This meant that the City Council could "regulate" virtually any acts – religious or otherwise – that posed a threat to the physical and/or "moral" wellbeing of the community. Funerals and funeral processions posed a double-threat, in this regard, because of their unique potential to spread both disease[39] and public hysteria:

> And if this power is to be so understood, it cannot be doubted, that the municipalities have a right to regulate the manner and place of funeral processions and ceremonies, for this is not only important to the salubrity of the city, but also may have, particularly in times of epidemics, a direct and dangerous effect upon the mental condition of the inhabitants. Those who have not yet been affected by the epidemic, as well as those who are sick, may be struck with fatal terrors in consequence of such spectacles.[40]

Preaux also considered the extent to which the federal Constitution and the legislative acts leading up to Louisiana's statehood might limit the municipality's power to regulate religion. Preaux concluded that Louisiana had been admitted to the Union on equal terms with the original thirteen states, and under conditions that had already been satisfied. Citing Joseph Story's *Constitutional Commentaries*, he wrote: "It is clear from the terms of the article itself [i.e. the religion clauses of the federal Constitution], that this is a prohibition upon Congress, and not a restriction upon the legislation of the States. If, therefore, the inhibition is upon Congress alone, the power remains with the States or

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[38] Ibid., 18.

[39] See McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," 41. "While today it is known that mosquitoes, not funerals, cause yellow fever, medical experts did not know that in 1842. The prevailing theory for the cause of yellow fever was 'miasmata' or 'atmospherics'—noxious exhalations from putrescent organic matter, emanating from swamps, stagnant water, and decaying plant or animal material. In a world in which comets, sunrays, and other astrological activities were sometimes thought to contribute to the disease, it was not much of a stretch to think that 'exhalation' from a dead human corpse could be a cause of the fever."

[40] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 18.

the People."[41] Preaux rejected the argument that the religious liberty provisions in the Northwest Ordinance obliged the courts to intercede when state or local governments violated citizens' religious liberties. In his view, the Northwest Ordinance "was a constitution that Congress had established for the territories," but one that had "been superseded by the constitution of the State."[42] After all, Congress had reviewed and approved Louisiana's proposed constitution before granting the territory its statehood: "Louisiana was thereby admitted into the Union on an equal footing with the original States," Preaux wrote.[43] "To accede to a contrary doctrine would be to admit that the power of Congress might be perpetuated, notwithstanding this solemn act, contrary to the rights of the States as defined and reserved by the federal compact."[44]

In a fascinating shift, Judge Preaux also examined the ordinance's validity under the state constitution. Records do not indicate that Permoli challenged his conviction on state constitutional grounds. In fact, Louisiana's constitution, at that time, contained no explicit religious liberty provisions. Nonetheless, Preaux reasoned that the state constitution's free speech provisions[45] encompassed a corollary set of religious liberties:

> There is no direct mention made here [in the state constitution] of religion, but so broad a guarantee of liberty in the 'communication of thoughts and opinions,' must necessarily embrace the liberty of speech on matters of religion, and if the privilege of speaking and writing thoughts and opinions on matters of religion is fully secured, does it not necessarily follow that the opinions themselves, the conscience itself, or what is the same thing, the religion itself, is also protected in

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[41] Ibid., 13.

[42] Ibid., 19.

[43] Ibid.

[44] Ibid., 20.

[45] Preaux quotes Article 6, Section 21 of the Louisiana Constitution as follows: "Printing press shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may speak, write and print, on any subject, being responsible for the abuse of that liberty." See ibid., 14.

> the same degree of freedom; for would it not be nugatory to protect the expression of opinion, if the opinion or the religion itself could be attacked, restrained, or subverted? In the opinion of the court, the protection of what is a mere consequence or effect [i.e. speech, the expression of opinions], necessarily embraces a protection of the *cause* [i.e. religious conscience].[46]

This interpretation of the state's free speech provisions was, perhaps, generous for its inclusion of religious liberty. The religious liberties that the free speech provisions implicated, however, were not robust. In Preaux's view, religion was a matter of cognition and belief: it consisted mainly of thoughts and opinions. Religious liberty, therefore, included the expression of such thoughts and opinions, and little else. Individuals and groups were entitled to the performance of benign rituals. But, state and local authorities had a moral and legal duty to weigh individuals' religious liberties against the needs and interests of the broader community. "In my opinion," Preaux wrote, "nothing can be more dangerous, in legislation, than to give a right, independent of the power of regulating its enjoyment."[47] That legislatures possessed power to regulate outward expressions of religion was a matter of consensus among state courts, Preaux explained. The Supreme Court of Louisiana had ruled that, "Freedom does not preclude the idea of subjection to law—indeed, it presupposes the existence of some legislative provisions, the observance of which insures freedom to us, by securing the like observance from others."[48] And courts in several states with stronger, explicit constitutional provisions for religious liberty had ruled that legislative bodies could regulate religious exercises for the sake of the common good: "[A] large number of decisions might be invoked, derived from the supreme tribunals of States whose

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[46] Ibid.

[47] Ibid., 15.

[48] Citing *Martin's Reports,* vol. 11, page 322. See ibid.

constitutions contain the broadest provisions in favor of religious liberty—much broader and much more explicit than the articles of our own State constitution."[49] One relevant precedent was the case of *Terrett v. Taylor* (1815), which had worked its way through the appeals process in Virginia before it was finally settled by the U.S. Supreme Court. Preaux reasoned that Joseph Story's opinion in *Terrett* expressed a high principle of American law:

> Judge Story clearly been guided by the great and well recognised principle, that the regulations of the free exercise of a right, so far from restraining it, is a mode of sustaining and enforcing it. With this decision [*Terrett v. Taylor*], then, placed alongside the constitution of Virginia [the state in which *Terrett* originated, and a state with strong constitutional provisions for religious liberty], can it be pretended that, under the constitution of Louisiana, no law can be passed on religious matters? Certainly not. Such a doctrine finds a sanction under no system of laws.[50]

This logic – that the free exercise of religion was partly contingent upon the prudent regulation of religion – implied that governments could and should intervene to mitigate intra-church conflicts,[51] and to restrict religious practices that were inconsistent with public health and order. On the latter point, Preaux countered Permoli's claim that religious dogmas and disciplines were inseparably linked. Louisiana's free speech provisions, along with the religious liberty norms defined in other states' constitutions, implied that religious "dogmas" were *not* subject to police regulations, but that religious "disciplines" were. The distinction between dogma and discipline was unambiguous, in Preaux's view. Dogmas were the immutable orthodoxies of a religious tradition, whereas

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[49] Ibid.

[50] Ibid., 16.

[51] Ibid., 15. "The priest, as well as the layman," Preaux explained, "has certainly the full advantage of all constitutional protection; but if the priest, abusing his authority, attempts to deprive the layman of his mutual enjoyment of the right, or to restrain it in an arbitrary manner, can it be reasonably pretended that the Legislature could not interfere to regulate the conduct of each party, so that the rights of both may be preserved?"

disciplines were manifestations of religious beliefs that were contingent up the social and legal contexts in which various believers resided. Preaux scoffed:

> It is advanced, on this point, that it was very difficult to trace a line of distinction between dogma and discipline. I think, on the contrary, that nothing is more easy. Dogmas are composed of articles of faith, which are invariable; while discipline, on the other hand, is composed of rules which may change according to times and circumstances, the wants of the church and of society. If this definition, which appears to me correct, is admitted, how can it be said that a law, which touches only upon a point of discipline, can restrain the religious faith of any sect?[52]

In other words, the ordinance was valid because it did not attempt to regulate the "invariable" doctrines of the Catholic Church, but merely prescribed the locations in which funeral ceremonies could (safely) be held. To support this claim, Preaux cited earlier testimony from Bishop Blanc. Blanc had testified that the dogmas of the Catholic Church did not strictly require bodies of the deceased to be brought into a church building in order to perform funeral rites. Blanc also testified that he had authorized the clergy of his diocese to perform funerals outside of the cathedral, if necessary, but not at the obituary chapel. Preaux treated these statements as evidence that regulating the location of funeral services did not impinge upon central matters of religious faith. Preaux also cited the namesake of the Church of St. Augustin,[53] St. Crysostome,[54] and other unnamed "fathers of the church"[55] as evidence that Christian tradition attributed no soteriological significance of funeral rites:

> But if the testimony of the bishop were not sufficient, as it is on this subject, we would find, on examining the authority of the fathers of the church, that a law regulating the pomp of funeral obsequies, with *an apparent view* of the salubrity of

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[52] Ibid., 20.

[53] St. Augustine of Hippo, the fourth-century Christian theologian/philosopher and Bishop of Hippo Regius.

[54] St. John Crysostome, the fourth-century Archbishop of Constantinople.

[55] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 21.

> the municipality, far from being condemned by their authority, would be highly approved. "Why does the ambition of vain show sustain itself in the midst of mourning and tears? Why those sumptuous habiliments in which the dead are enveloped? The flesh of the rich—will it not rot away unless clothed in the same trappings which vainly distinguished them through life?" "The pomp of funerals, said St. Augustin, ostentatious processions, superb mausoleums, may be to the living some source of consolation—they are of no help to the dead; and what boots it to them, said St. Crysostome, all this vain distinction—to their memory, rather than to their dust, we should do honor."[56]

Having determined 1) that corpses posed a substantial threat to public health and tranquility; and 2) that funeral ceremonies were relatively trivial matters of religious "discipline," Judge Preaux finally addressed Permoli's claim that the ordinance unfairly discriminated against the clergy. In Preaux's view, legislation that was tailored to local circumstances was both natural and appropriate. Recall that the ordinance under which Permoli was charged fined the priests who performed the funeral ceremonies, but let anyone else who might have participated in the transportation or display of the corpse go free. Preaux thought this arrangement was perfectly reasonable: "The rituals of the different sects, and the fact that no other temples but those of a certain sect exist within the limits of a corporation," he explained, "may certainly be taken into consideration in making by-laws on these subjects. This is not making partial and arbitrary laws, but it is avoiding to make useless ones."[57] The ordinance had reasonably singled out priests for punishment, in other words, because "the priest is the principal cause of the violation of the law. He says to the citizen, (who has lost a relation or a friend, and who wishes to comply with the customs of society, rather than the requirements of faith, in having the body of the deceased blessed in a church,) you shall not go elsewhere than to the church

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[56] Ibid.

[57] Ibid., 18.

of St. Augustin, though these ceremonies be forbidden at that place." Punishing the clergy,

> …was the only mode of giving a substantial effect to the regulation. Certainly the priest must be free in the exercise of his ministry, but his sacred office must not serve as a cloak to cover violation of the law. This office does not give him a rank higher than another individual in the eye of the law, and if any other citizen can be attained, the priest can be attained, also, by a fine of this nature. Thus the legislator may say to him, follow as you please your mode of worship, but I will not suffer that you abuse that right, disregarding the feelings, rights, and interests of others.[58]

Under this logic, the Municipality could impose fines on everyone and/or anyone who was involved in an illegal funeral ceremony. Enforcing such laws protected the rights and wellbeing of other community members by regulating potentially dangerous religious disciplines. "This cannot be construed into a restriction of the freedom of religious worship," Preaux wrote, "but it is a legal mode of protecting the rights of the whole community."[59]

U.S. Supreme Court ruling:

Despite the thorough arguments presented by both parties in *Permoli*, the U.S. Supreme Court's final ruling in the case focused entirely on the high Court's jurisdiction (or lack thereof). Writing for a unanimous court, Justice John Catron explained that state and local laws were not subject to the First Amendment's guarantee of religious liberty; nor were the religious liberty provisions in the Northwest Ordinance and its corollary statutes binding in the case, for these were superseded by Louisiana's constitution. "The [federal] Constitution makes no provision for protecting the citizens of the respective states in their religious liberties;" Catron wrote, "this is left to the state constitutions and

[58] Ibid., 21.

[59] Ibid., 18.

laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[60] This meant that the federal Constitution provided no relief to citizens who claimed that state legislatures had violated their rights to freely exercise religion. State legislatures were free to invade the sphere of religion – whether to establish religion, or to restrict its free exercise – howsoever they saw fit, and in keeping with their respective states' constitutions.

Justice Catron acknowledged that Congress had granted statehood to Louisiana on the condition that its constitution "contain the fundamental principles of civil and religious liberty." But, he insisted that Congress had not, thereby, given federal courts power to review state laws on such matters after Louisiana was admitted to the Union. "All Congress intended," he wrote,

> …was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain…Having accepted the constitution and admitted the state, 'on an equal footing with the original states in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with.[61]

Thus, with no further discussion of the religious liberty questions at issue in *Permoli*, the Supreme Court concluded that, under the federal Constitution, state and local legislatures in Louisiana were just as free as those in the thirteen original states to establish or prohibit the free exercise of religion:

> It is not possible to maintain that the United States hold in trust, by force of the [Northwest] ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence…In our judgment, the

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[60] *Bernard Permoli V. Municipality No. 1 of the City of New Orleans*, 609.

[61] Ibid., 609-10.

> question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.[62]

§ 4 Conclusion

The arguments and rulings in *Permoli* presented distinctive claims about the scope of constitutional free exercise rights, and about the power of legislatures to regulate religious practices. Specifically, these claims differed in how the conceived of the substance of, and the legal boundaries between, religious and legislative spheres.

For one, the competing arguments in *Permoli* demonstrate how different conceptions of "religion" have different implications for the definition of free exercise rights. Permoli and his attorneys insisted that religion was not simply a matter of internal beliefs. Instead, religious beliefs were integrally related to, and indeed shaped by, outward expressions of religious discipline(s). As they put it: "Faith is the soul of religion; discipline the visible beauty in which she commends herself to our veneration and love."[63] Religious faith, under this view, was not simply exercised in the cathedrals of one's heart and mind; it was also observed in cathedrals of brick and mortar, and communicated via institutionalized rites. If the sphere of religion necessarily included both "faith" and "discipline," then the free exercise of religion necessarily entailed the right to exercise religious disciplines as well as faith. Judge Preaux, in contrast, viewed religious doctrines – or "dogmas" – as the immutable essence of religion. Religious dogma could manifest any number of context-specific religious disciplines, under this view. Such disciplines surely expressed religious dogmas, but they were not constitutive

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[62] Ibid., 610.

[63] Ibid., 599.

of religion-proper. Consequently, legislative bodies could regulate religious disciplines without violating citizens' free exercise rights.

Competing interpretations of the legislative sphere played an equally important role in *Permoli.* As with the cases discussed in Section One of this dissertation, legislative "purpose" inquiries featured centrally in both of the lower courts' interpretations of the City Council's legislative powers. Judge Preval and Judge Preaux both considered whether the funeral ordinance at issue in Permoli advanced end-purposes that were consistent with the City Council's enumerated powers; both also considered whether the ordinance exceeded those powers with respect to free exercise norms. This method represented a sort of balancing act in which the courts weighed Permoli's free exercise rights against the interests (and legislative powers) of the broader community. Preval and Preaux agreed that the ordinance advanced legitimate police purposes: the transportation and display of corpses did, in fact, pose a real threat to public health and order. Thus, the City Council had good reason (and ample authority) to regulate such acts. The lowers courts disagreed sharply, however, about the limits that free exercise norms imposed on the council's police powers. Preval reasoned that the City Council could not penalize a religious functionary for an act that did not, in itself, pose a threat to public safety. Without an enumerated power to do so, how could the ordinance stand "only against the priests who officiate on those corpses which are permitted to be brought in their church without any restriction from the law."[64] In contrast, Judge Preaux viewed the ordinance's penal provisions as an efficient (and perfectly valid) means for achieving the desired ends. The simple fact that Permoli was a priest who was acting under the auspices of

[64] *Permoli V. Municipality No 1 of City of New Orleans, Transcript of Record*, 5.

religion did not, Preaux reasoned, place him beyond the reach of the city's police powers. Public health trumped Rev. Permoli's right to perform what amounted to a mere religious "discipline."[65]

Having ruled in *Permoli* that the First Amendment's religion clauses did not restrict the power of state or local legislatures to enact laws prohibiting the free exercise of religion, the U.S. Supreme Court heard relatively few free exercise cases between 1845 and 1900. Between 1879 and 1900, however, the Court ruled in nine cases involving Mormon claimants and a host of legislative acts that prohibited and otherwise punished the practice of polygamy. Several of these claimants insisted that the Free Exercise clause protected their right to marry in accordance with the teachings of their tradition. Were they right?

[65] Michael McConnell points out that *Permoli* presented multiple legal questions that remain central to contemporary Free Exercise jurisprudence: "How can courts tell whether legislation is neutral and generally applicable? Does it matter? Is it necessarily unconstitutional for a law to mention a particular religious denomination by name? How strong a governmental justification is required to override free exercise rights? Does the existence of major exceptions, or of substantial underenforcement, rebut the government's claim of a compelling interest? Can courts question whether the foundation of the government's asserted interest is empirically valid? Does free exercise protect religiously motivated conduct, or only conduct compelled by religious doctrine?" See: McConnell, "Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case," 43. Modern free exercise claimants will surely rejoice that Judge Preaux's answers to these questions were not uniformly adopted by other states' courts, or by the Supreme Court.

Chapter 5
Polygamy and the Enlightened Sentiment of Mankind

> *One pretense for this obstinate course is that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority. The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.*[1]
>
> – Justice Joseph P. Bradley

§ 1 Introduction

Does the First Amendment's Free Exercise Clause give Americans the right to marry and structure their family relations in accordance with religious teachings? How far may legislatures go to promote uniform marriage standards in a religiously diverse society? In nine cases argued before the U.S. Supreme Court between 1878 and 1900, Mormon litigants challenged laws that were designed to prohibit the practice of polygamy,[2] to punish those who engaged in it, and to prevent religious societies – i.e. the Church of Jesus Christ of Latter-day Saints (LDS), a.k.a. the Mormon Church – from promoting polygamy. Four of these cases are particularly relevant for understanding the

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[1] *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*, 49-50.

[2] Polygamy refers to the practice of having more than one husband or wife at the same time. The statutes in question sometimes referred to "bigamy" (i.e. having two spouses at the same time) in addition to, or instead of "polygamy." All of the cases discusses in this chapter technically involved "polygyny" – i.e. a male who had illegally married more than one female.

Court's methods for differentiating religious and legislative spheres via constitutional law. In *Reynolds v. the United States* (1878), the Court considered whether a polygamist man's sense of religious duty implied that he lacked the criminal motive requisite for conviction under a criminal statute that prohibited persons from marrying multiple spouses. In *Murphy v. Ramsey* (1885), the Court evaluated the constitutionality of a statute that denied voting rights to practicing polygamists. Then, in *Davis v. Beason* (1890), the Court considered whether a law that effectively disenfranchised the members of any organization that promoted polygamy, whether or not those persons actually practiced polygamy – was unconstitutional. Finally, in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* (1890), the Court considered whether Congress could, in light of the Mormon Church's unabated efforts to promote and practice polygamy, revoke the church's corporate charter, seize its assets, and re-direct those assets toward other ends.[3] The Court rejected, in all of these cases, litigants' claims that the Constitution's religious liberty provisions protected their right to practice polygamy in accordance with their religious beliefs and the teachings of the LDS Church. And, the Court defended, just as forcefully, the Congress' power to prohibit and punish polygamy in the U.S. territories. As I show below, legislative purpose inquiries played an important role in the Court's decisions, and contributed to the Court's distinctive conception of religion and legislative spheres as they related to marriage norms.

Please note: This chapter is formatted differently than the previous case studies. Instead of analyzing a single case as it moved through lower courts and into the Supreme

[3] See: *Reynolds V. United States. Murphy V. Ramsey*, 114 U.S. 15 (1885). *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S. Davis V. Beason*, 133 U.S. 333 (1890).

Court, I analyze four separate cases, focusing on the final stage of their appeals in the U.S. Supreme Court.

§ 2 *Reynolds v. the United States* (1878)

Case and context:

George Reynolds was a prominent figure in Salt Lake City's Mormon community when he was convicted of bigamy in 1875.[4] A native of England, Reynolds had lawfully married his first wife, Mary Ann Tuddenham, shortly after immigrating to Utah in 1865. Mary Ann was still living and residing with Reynolds when he married Amelia Jane Schofield in August of 1874. At that time, Salt Lake City was part of the Utah Territory.[5] A federal law known as the Morrill Anti-Bigamy Act of 1862 (hereafter the "Morrill Act") prohibited bigamous and polygamous marriages in the following terms:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.[6]

The Morrill Act had been signed into law by Abraham Lincoln, but federal authorities began to enforce it more aggressively after the passage of a law[7] 1874 that made it easier to prosecute polygamists living in the U.S. territories. After marrying Ms. Schofield, Reynolds was charged with bigamy, indicted in the third district Court of Utah Territory, convicted, and received the maximum sentence under the Morrill Act: $500 and two

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[4] Reynolds was secretary to Brigham Young, and a member of the Salt Lake City Council.

[5] Utah was admitted to the Union in 1896.

[6] See Section 5353 of the Revised Statutes, as quoted in *Reynolds V. United States*, 146. Or see: *An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah,* passed July 1, 1862. Statutes at Large, 37th Congress, 2nd Session, p. 501.

[7] The Poland Act.

years of hard labor.[8] He immediately appealed, and his case was eventually argued before the U.S. Supreme Court. Reynolds' case presented a complex set of legal questions; I focus below on religion-related aspects of Reynolds' argument, and on the Supreme Court's subsequent interpretation of the Free Exercise Clause.

Available records do not indicate that George Reynolds challenged the Morrill Anti-Bigamy Act as a violation of the Free Exercise Clause. In fact, the brief Reynolds submitted to the Supreme Court did not even mention the First Amendment's religion clauses.[9] Reynolds *did* contend that Congress had exceeded its constitutionally enumerated powers – namely, its "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[10] Reynolds' argument on this point touched on religious themes. He acknowledged that Congress could surely make "all needful rules and regulations" to govern the territories, but insisted that Congress had gone too far in regulating what should have been local issues: "There is always an excess of power exercised," he contended, "when the Federal government attempts to provide for more than the assertion and preservation of its rights over such territory, and interferes by positive enactment with the social and domestic life of its inhabitants and their internal police."[11] In his written brief, Reynolds asserted that local and regional laws should reflect local and regional mores:

> Now this government of Territories [by Congress] should be always such as would best subserve the interest of the Territory, looking to its situation as a

[8] This sentence was handed down on December 8, 1875. Transcript of Record at 10, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180). In fact, this was Reynolds' second conviction after a previous case floundered on procedural grounds.

[9] Brief of Plaintiff in Error at 55, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

[10] "Constitution of the United States," Article 4, Section 3.

[11] Argument as quoted in *Reynolds V. United States*, 152. Also see: Brief of Plaintiff in Error at 55, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

> territory, and the number and character of its inhabitants. In regard to all local matters it would be more advisable to commit the powers of self government to the people of the Territory as most competent to determine what was best for their interests.[12]

Even if Congress retained the power to ban actions in the territories that were considered *mala in se*, or evil-in-themselves, Reynolds insisted this did not give Congress unlimited power to regulate polygamy. Polygamy was typically understood to be a crime because it involved the deception of one's spouse. But Mormon men married new wives with the full knowledge and consent of their existing wives, and in keeping with their interpretation of the New Testament and other Mormon scriptures. Reynolds explained:

> The offence prohibited by sect. 5352 [i.e. the Morrill Act] is not a *malum in se*; it is not prohibited by the Decalogue [the Ten Commandments]; and, if it s said that its prohibition is to be found in the teachings of the New Testament, we know that a majority of the people of this territory deny that the Christian law contains any such prohibition.[13]

Reynolds thus argued that Congress had exceeded the limits of its legislative powers – but not (at least directly) with respect to the Free Exercise Clause. Instead, Congress had violated a quasi-federalist ideal of self-government that, according to Reynolds, limited Congress' power over the U.S. territories.[14] Mormon polygamists weren't doing anything

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[12] Brief of Plaintiff in Error at 53 *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

[13] *Reynolds V. United States*, 152-53. Also see: Brief of Plaintiff in Error at 54-55 *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180): "Bigamy is not prohibited by the general moral code. There is no command against it in the Decalogue. Its prohibition may, perhaps, be said to be found in the teachings of the New Testament. Granted, for the purpose of the argument. But a majority of the inhabitants might be persons not recognizing the binding force of this dispensation. In point of fact, we know that a majority of the people of this particular Territory deny that the Christian law makes any such prohibition. We are therefore led to the assertion that as to the people of this Territory the supposed offence is a creature of positive enactment. Had Congress a right to fasten this burthen upon them? We deny that it had, and shall contend that the passage of this statute was beyond its powers."

[14] Also see: Brief of Plaintiff in Error at 53, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180): "For no constitutional lawyer should hesitate to give his assent to the negative proposition that citizens of the United States who migrate to a Territory cannot be ruled as mere colonists, dependent upon the will of the General Government, and be governed by any laws it may think proper to impose."

inherently evil, he contended; they should be left to govern themselves. Again, Reynolds did not explicitly challenge the Morrill Act on Free Exercise grounds.

Reynolds' religious beliefs were central, however, to another part of his argument: his claim that, because he had entered into his second marriage out of his sense of religious duty, his action lacked the criminal motive that was necessary for his conviction. One might call this the not-guilty-by-reason-of-religiosity defense. At his initial trial in the lower court, Reynolds had established that he had married his two wives in accordance with the official teachings of the LDS Church. Multiple witnesses testified that the "accepted doctrine and belief" of the church required male members "circumstances admitting, to practice polygamy."[15] The witnesses explained that this "duty" was enjoined by direct revelation from "Almighty God" to Joseph Smith,[16] and by religious texts that were "believed [by members of the church] to be of divine origin." Failing or refusing to practice polygamy, according to official church teachings, had profound implications: "…the penalty for such failure or refusal would be damnation in the life to come."[17]

Near the end of his trial, Reynolds asked the judge to instruct the jury to return a not-guilty verdict if they believed Reynolds had acted "in pursuance of and in conformity with what he believed at the time to be a religious duty."[18] When the judge refused, Reynolds asked him to charge the jury as follows: "Unless you find that the defendant

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[15] Transcript of Record at 18, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180). "Circumstances admitting," here refers primarily to a male's financial means, and apparently not to the prevailing laws.

[16] Joseph Smith is the founder of the LDS Church.

[17] Transcript of Record at 18, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

[18] *Reynolds V. United States*, 162. Also see: Transcript of Record at 19, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

committed the offense with a criminal intent, the verdict must be 'not guilty.'"

Apparently unimpressed, the judge instead encouraged the jury to, in his words,

> …consider what are to be the consequences to the innocent victims of this delusion [of polygamy]. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.[19]

These instructions became a point of contention in Reynolds' subsequent appeals.[20] What is most important for this study, however, is that Reynolds' attorneys continued to argue, all the way to the Supreme Court, that his religious motives implied a lack of "criminal intent," and that he was, therefore, not guilty of a crime. This argument played on a rule of criminal law that, "the unconscious commission of an act, which if consciously done would be criminal, is not a crime."[21] Reynolds reinterpreted this logic to mean that his second marriage was a criminal act, only to the extent that he consciously believed that he was committing a criminal (i.e. morally wrong) act. Or, as he put it in his brief to the Supreme Court: "So, where an act is done, or left undone, from an honest belief that its commission or omission is not wrong, but positively right, there can be no criminal intent, and of course no commission of crime."[22] Reynolds

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[19] As quoted in ibid., 167-68.

[20] See: Brief of Plaintiff in Error at 57ff, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

[21] Brief of Plaintiff in Error at 55, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180). Inquiries into criminal motives are often categorized under the term, *mens rea* (or "guilty mind"), as opposed to *actus reus* (or "guilty act"). This rule is not universally applicable to all crimes. For example, the following two actions would imply different forms or degrees of criminal liability: 1) someone flips on a light-switch without knowing that doing so will fatally electrocute a repairman who unexpectedly happened to be holding the other end of the wires; vs. 2) someone intentionally flips on a light-switch with the intention of electrocuting and killing the repairman. Same action + same result + different motive = different implications for legal liability.

[22] Brief of Plaintiff in Error at 55, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180). Also see *ibid.* at 55-56, where Reynolds argues: "Let it be conceded that the Act of Congress making the having of two wives at the same tim a criminal offense, is entirely free from constitutional objection. Still in order to make out a

acknowledged that this argument, if carried to its logical ends, would complicate the enforcement of criminal laws. But he insisted that his lack of "criminal intent" should determine his guilt under the Morrill Act: "The line of reasoning may make it difficult to deal criminally with certain (supposed) infractions of the moral law, as it is admittedly difficult to deal with breaches of the religious law, but it is none the less logical and convincing."[23] Unfortunately for Reynolds, however, none of the Supreme Court's nine justices were similarly convinced.

U.S. Supreme Court ruling:

In a unanimous ruling authored by Chief Justice Morrison Waite, the Court delivered what one commentator described as "the hardest blow that Mormon polygamy has yet received."[24] Waite framed Reynolds' "criminal motive" argument with the following question: "Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?"[25] Two factors were central to the Court's evaluation of this question: 1) the power of Congress to "prescribe criminal laws for the Territories," and 2) the limits of these powers relative to the First Amendment's

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conviction under it, you must bring home to the offender *guilty knowledge.* This is the very gist of the offense, as it necessarily is of all crimes. You cannot successfully argue that everyone who consciously commits an act, is to be held responsible for all of its results, criminal or otherwise…One who commits or abstains from an act under a belief that it is God's will that he should do so, is free from guilt. So here, one who contracts the relation forbidden by statute, in the belief that it is not only pleasing to the Almighty, but that it is positively commanded, cannot have the guilty mind which is essential to the commission of a crime. He may make himself CIVILLY responsible for the results of his act, because its effect upon others is altogether independent of motive. But he cannot be CRIMINALLY responsible since guilty intent is not only consciously absent, but there is present a positive belief that the act complained of is lawful, and even acceptable to the Deity."

[23] Brief of Plaintiff in Error at 57, *Reynolds v. United States,* 98 U.S. 145 (1878) (No. 180).

[24] "Polygamy Doomed," *Christian Advocate*, Jan. 23, 1879.

[25] *Reynolds V. United States*, 153. Also see ibid. at 162: "Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Free Exercise Clause. That Congress had power (under Article 4 of the Constitution) to govern the Territories was clear. Equally clear was the applicability of the Free Exercise Clause to federal laws, including the Morrill Act: "Religious freedom is guaranteed everywhere throughout the United States," Waite asserted, "so far as congressional interference is concerned."[26] This freedom was not absolute, however, and the word "religion" was not defined in the Constitution. In order to define the legal substance of, and boundaries between the religious and legislative spheres, the *Reynolds* Court turned to history.[27] The Constitution's framers conceived of the First Amendment's religion clauses in light of a specific set of problems and social ills. In other words, the religion clauses served an historical purpose. Waite explained:

> Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions.[28]

These controversial acts were the bane of the religious liberty. Such practices culminated, according to Waite, in the contest for religious liberty in Virginia, where two of the Free Exercise Clause's chief architects played vocal and leading roles. Drawing from Madison's definition of religion as "the duty we owe the Creator,"[29] and from Thomas Jefferson's subsequent "Bill for Establishing Religious Liberty," Waite

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[26] Ibid., 162. This did not mean that the Free Exercise Clause limited the powers of state legislatures, cf. *Bernard Permoli, Plaintiff in Error, V. Municipality No. 1 of the City of New Orleans, Defendant in Error.*

[27] See *Reynolds V. United States*, 162. "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed."

[28] Ibid., 162-63.

[29] Ibid., 163.

concluded that religious freedom extended principally to the possession and profession of religious beliefs and opinions. The "civil magistrate," in Jefferson's words, had no business intruding "his power into the field of opinion […] it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[30] Chief Justice Waite also cited Jefferson's now-famous letter to the Danbury Baptist Association. Subsequent jurists would emphasize the letter's implications for the so-called "wall of separation between church and State." Waite, however, emphasized the parts of Jefferson's letter affirming the legislature's power to regulate citizens' actions when they were destructive of peace and good order. Jefferson had written, "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that *the legislative powers of the government reach actions only, and not opinions* […] I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, *convinced he has no natural right in opposition to his social duties*."[31] This passage was an "authoritative declaration" of the Free Exercise Clause's "scope and effect," Waite reasoned. In essence, it meant that, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[32]

But did the practice of polygamy, in fact, violate Reynolds' social duties as an American citizen, or subvert good order? What did the Court make of Reynolds' claims that polygamy was neither *mal in se* nor prohibited by the Decalogue, but was rather

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[30] Ibid.

[31] As quoted ibid., 164. Emphasis added.

[32] Ibid.

enjoined by Almighty God himself? Finally, shouldn't laws be made suitably for local conditions and mores?

Chief Justice Waite responded to these questions, in part, by describing the civilizational and racial norms and heritage of the American public. Monogamous marriage was the basic unit of Western civilization, Waite asserted – the first school of virtue for would-be citizens. Although marriage was infused with a "sacred" quality, the state treated it as a "civil contract" with important implications for the commonweal:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be guilt, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles of which the government of the people, to a greater or less extent, rests.[33]

In Waite's estimation, polygamy had always been "odious" to the "northern and Western nations of Europe."[34] Civil courts in England punished polygamy with death. Even more telling was the Virginia legislature's passage of a nearly identical law in 1788, death penalty included, on the grounds that "it hat been doubted whether bigamy or poligamy [sic] be punishable by the laws of this Commonwealth."[35] Beyond Virginia, every other state in the nation punished polygamy as an "offence against society."[36] And for good reason: Polygamy was "almost exclusively a feature of the life of Asiatic and of African people," Waite argued. It inevitably, if not immediately, "leads to the patriarchal principal, and…when applied to large communities, [polygamy] fetters the people in

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[33] Ibid., 165-66.

[34] Ibid., 165. The religious (i.e. Christian) identity and heritage of the United States and Western Europe are conspicuously absent from Waite's account. Cf. Justice Field's subsequent ruling in *Holy Trinity*.

[35] Ibid.

[36] Ibid.

stationary despotism."[37] The implications of this unflattering portrait of polygamy were clear. Even if some polygamous marriages did not overtly harm the parties involved, the widespread practice of polygamy threatened the social order at its core. There could be no doubt, Waite concluded, "that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[38]

Religious norms were conspicuously absent from this unflattering portrait of polygamy and its social effects. In previous cases, the Court had affirmed the maxim that Christianity was part of the common law.[39] In subsequent cases, the Court would describe the United States as a "Christian nation."[40] Thus, in a case like Reynolds, which involved the "sacred obligation" of marriage, one might have expected the Court to allude to, or directly invoke the nation's supposed religious identity and norms. Instead, Waite described marriage norms in terms of civilizational, political, and racial identities. Polygamy was not offensive by the standards of the New Testament, or traditional Christian teachings. Instead, polygamy undermined civil society and ran counter to the longstanding marital practices of northern and western Europeans. This omission of religion from the Court's ruling did not go unnoticed. As one sympathetic commentator

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[37] Ibid., 166.

[38] Ibid. Waite's concession that "every" civil government possessed legislative power to determine "*whether* polygamy *or* monogamy shall be the law of social life under its dominion" has not gone un-noticed. Waite just as easily could have stated that every legislature has the power to prohibit polygamy. I hope to analyze this logic (and its sources, etc.) in more detail in subsequent drafts of the dissertation/book.

[39] See, e.g. *Vidal Et Al. V. Girard's Executors.*

[40] See *Church of the Holy Trinity V. United States*, 143 U.S. 457 (1892). Also see *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*

put it, "Like a wise judge, our Chief-Justice makes no appeal to religion as an authority. He appeals to nature."[41]

The Chief Justice also appealed to the Free Exercise Clause. Having established 1) that Congress had power to prohibit polygamy in the territories, and 2) that the "free exercise" of religion principally included the freedom to hold and profess religious opinions, Chief Justice Waite finally considered whether George Reynolds lacked the "criminal motive" requisite for his conviction under the Morrill Act. Waite admitted that criminal motive (or "intent") was generally considered an "element of crime." The fact that Reynolds had married his second wife on the basis of his religious beliefs, however, did not mean that he lacked such motive. Reynolds knew that his first wife was still living, and that marrying a second time was forbidden by law. Thus, Reynolds intended to break the law. "And the breaking of the law is the crime," Waite explained, dryly. Reynolds may have been entitled to his *belief* that polygamy should not be illegal. But this belief did not justify his intentional *act* of breaking of a legitimate law. "So here, as a law of the organization of society under the exclusive dominion of the United States," Waite explained,

> …it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. [42]

The upshot of Reynolds' argument, in the Court's view, was that certain acts would be considered criminal for members of some sects, but non-criminal for all others. Those who did not make crimes like polygamy "a part of their religion" would be found guilty

[41] "Polygamy Doomed." Christian Advocate; Jan 23, 1879; 54, 4

[42] *Reynolds V. United States*, 166-67.

and punished, whereas those who did make it part of their religion would be acquitted and set free. "This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." Chief Justice Waite reemphasized the legitimate subjection of religious practices to civil laws by citing the examples of human sacrifice, and the ancient Hindu custom of *suttee*.

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

If there was any doubt that polygamy was not a part of the United States' cultural and legal norms, lumping it together with these foreign religious practices made clear that polygamy had no legitimate place in American society. Reynolds could believe whatever he wanted. But he could not act on those beliefs if they threatened society.

In sum, Reynolds' free exercise rights – the sphere of religious liberty into which Congress could not intrude – did not include the right to marry in accordance with religious teachings. Congress possessed enumerated powers to legislate and enforce criminal laws in the territories. Congress, at its discretion, could prohibit and penalize the act of polygamy. The free exercise of religion entailed the right to possess and profess religious beliefs and opinions; it did not include the right to act in ways that violated social duties or subverted the social order. Reynolds had intentionally violated a criminal law. Thus, even if Reynolds *believed* his acts were consistent with divinely-mandated duties, the *act* itself was criminal.

§ 3 Post-Reynolds Polygamy Cases

The Supreme Court extended the logic of its *Reynolds* decision to several subsequent cases involving polygamy and Mormon litigants. In *Murphy v. Ramsey* (1885), *Davis v. Beason* (1890), and *Late Corporation v. United States* (1890), the high Court interpreted legislative powers broadly, reasoning that polygamous marriage posed such a threat to the predominant social order that Congress was justified in enacting a series of progressively heavy-handed laws prohibited and punished the practice of polygamy.[43] The Court reaffirmed, in these cases, that monogamous marriage was a society-building institution – not just a contract between individuals. The Court also continued to construe polygamy as a criminally punishable and barbaric practice. In light of the legislative end-purposes of 1) extirpating polygamy from the territories, 2) establishing monogamous marriage as the basic unit of social organization there, and, 3) thereby preparing the territories and their residents for statehood, the Court upheld laws denying the vote to polygamists, denying the vote to all members of religious groups that promoted or practiced polygamy, and revoking the corporate charter of the Mormon Church (while also seizing and redistributing most of its assets). In all of this, the Court repeatedly rebuked Mormons' claims that polygamous marriage was a religious duty that ought to be protected by the Free Exercise Clause. While the Free Exercise Clause protected only a fraction of the religious sphere – namely, religious beliefs and opinions – from legislative incursions. But religious "acts" including polygamous marriage, and even organized forms of worship were legitimately subject to forceful regulations.

Murphy v. Ramsey (1885)

[43] *Murphy V. Ramsey. Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S. Davis V. Beason.*

Murphy v. Ramsey combined multiple cases involving several alleged polygamists who had been denied the opportunity to register to vote. In the years following the Court's *Reynolds* decision, Congress enacted a series of new laws that were intended to extirpate polygamy from the Territories. One such measure, known as the Edmunds Act, revoked the right to vote or hold public office from anyone who was engaged in polygamy or bigamy, or who cohabited with those who were.[44] These limitations were limited to polygamous *acts* – the law specified that no one was to be denied the franchise on account of their "opinion…on the subject of bigamy or polygamy."[45] Commissioners acting under this law refused to register Jesse J. Murphy and four other Utah residents, contending that their polygamous marriages disqualified them. Murphy and another litigant, James M. Barlow, argued that they should not be disqualified, insofar as they had entered their marriages before the Morrill Act made polygamy illegal in 1862, and had not cohabited with their wives since the Edmunds Act was enacted in 1882.[46] The commissioners' refusal to register Murphy and Barlow as voters, they claimed, punished them for acts that were not illegal at the time they were committed. In other words, to deny Murphy and Barlow the right to vote was to enforce an *ex post facto* law.[47]

Although the Court's ruling in *Murphy* did not directly interpret the Free Exercise Clause, it included two relevant legislative purpose inquiries defining the scope and

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[44] See Act of March 22, 1882, 22 Stat. 30. As quoted in *Murphy V. Ramsey*, 26-30. "Sec. 8. That no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument, in, under, or for any such Territory or place, or under the United States."

[45] Ibid., 29.

[46] See ibid., 39ff.

[47] Ibid., 42.

functions of the legislative sphere. First, the Court sought to determine the "intended meaning" of the statute in question – that is, to construct its legislative purpose in order to see if and how it applied to a specific fact pattern. Here, the Court considered whether the polygamy ban encompassed ongoing polygamous relationships, regardless of when they were initiated, or simply banned subsequent polygamous marriages. In an opinion authored by Justice T. Stanley Matthews, the Court concluded that Congress had intended to define polygamy as a continuous and ongoing act – not one that was limited to the act of entering into more than one marriage. Under this construction, denying the franchise to those who had entered into polygamous marriages prior to the passage of the anti-bigamy laws did not amount to an *ex post facto* law. Rather, the parties of a polygamous marriage were excluded from voting because they were continuously breaking the law by failing to formally dissolve their extra marriages.[48]

Most importantly for this study, the Court defined Congress' power over elections and voting rights in the territories largely in terms of legislative end-purposes. Whereas the *Reynolds* court had described the legislature's power to ban polygamy in terms of its Article 4 powers to "make all needful rules and regulations respecting the territory,"[49] the *Murphy* court described Congress' powers in terms of the people's inherent sovereignty over the territories:

> The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in *the purposes and objects of the power*

[48] Ibid., 43. "The disenfranchisement operates upon the existing state and condition of the person, and not upon a past offence. It is, therefore, not retrospective."

[49] "Constitution of the United States," Article 4, Section 3.

> *itself*…and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it.[50]

The sovereignty of the American people over the territories was, therefore, exercised through the organ of Congress, and subject to the limits of Congressional powers, and to the "purposes and objects of the power itself." But, what was the purpose of the people's power over the territories? In a brief submitted the Supreme Court on behalf of the United States, government attorneys contended that, by enforcing the statute, Congress was "discharging *imperial* duties, such as Congress owes in nursing and rearing *Territories* into STATES."[51] This argument built on *Reynolds* Court's conception of monogamous marriage as the basic unit of American civilization. The *Murphy* Court pushed this logic further still, arguing that the legislative *ends* of establishing monogamous marriage as the social and legal norm in the territories justified the legislative *means* of disenfranchising known polygamists.

> If we concede that this discretion in Congress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the territories to become States in the Union, still the conclusion cannot be avoided that the act of Congress here in question is clearly within that justification. For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in

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[50] *Murphy V. Ramsey*, 44.

[51] Brief for United States at 8 *Murphy v. Ramsey,* 114 U.S. 15 (1885) (No. 127). Emphasis in original. This brief also includes an interesting discussion of marriage as an "institution." "Just as the law regards *marriage* as something more than a contract, *an institution,* so it must any form of *anti-marriage* sought to be substituted therefore: ["EVIL! b*e thou my good*."] Presumably therefore, a statute *entitled* as operating upon *bigamy* might be expected to include both the *act* and the *institution*; the more so when, as here, it is a statute discharging *imperial* duties, such as Congress owes in nursing and rearing *Territories* into States…Indeed, were it not for the strenuous manner in which learned gentlemen have pressed the point now objected to it might have been thought that our history for the last forty years had demonstrated what duties they are when Congress has attempted to meet by the act of 1882, viz, duties as *to individual misdemeanors*, and also duties as to *political misorganization*; and each of these appropriately, and in accordance with *ancient* American *ordinance*." *Ibid.,* at 8. (References omitted; bracketed material in original.)

> the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[52]

Thus, the Court attributed to Congress the power to enact legislation that would prepare residents of the territories for self-government and citizenship in the nation. The "holy estate of matrimony" was the foundation of American civilization, morality and even socio-political progress. Establishing this estate was, therefore, an apt function of the legislative sphere. This function was so compelling, in fact, that Congress was justified in disenfranchising those who practiced a contradictory form of marriage and family organization.

Davis v. Beason (1890)

Davis v. Beason was the first U.S. Supreme Court case in which a litigant explicitly challenged an anti-polygamy statute as a violation of the First Amendment's religion clauses. In *Reynolds*, the Court had considered whether a polygamist's sense of religious duty implied a lack of criminal motive. In *Murphy*, the Court considered whether an anti-polygamy law had been enforced, *ex post facto,* on a man who had married multiple women before the law was passed. Both cases elicited interpretations of the Free Exercise Clause in the Supreme Court's final rulings. Yet *Davis* was the first case in which a litigant claimed that such a law directly violated the Free Exercise Clause, as such. Like *Murphy*, the *Davis* case involved a voter registration law that disenfranchised polygamists. Unlike the law in *Murphy*, however, the law at issue in *Davis* disenfranchised practicing

[52] *Murphy V. Ramsey*, 45.

polygamists, and those who merely belonged to organizations that promoted polygamy.[53] It had been enacted by the Territorial legislature, whose powers had been conferred by the federal Congress.[54]

Samuel Davis was a member of the LDS Church – the main target of the law. Davis had been indicted for a "conspiracy to unlawfully pervert and obstruct the due administration of the laws of the [Idaho] territory." He and group of his fellow Mormons coordinated an effort to illegally register to vote. To do so, they falsely took oath in which they swore:

> …I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the constitution of the United States, and the laws thereof, and the laws of this territory, as interpreted by the courts, as the supreme

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[53] See: Brief for Appellant at 6, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261). Sec. 501 of Rev. Stat. of Idaho. The oath was as follows: 'I do swear (or affirm) that I am a male citizen of the United States, of the age of twenty-one years, (or will be on the 6th day of November, 1888;) that I have (or will have) actually resided in this territory four months, and in this county for thirty days, next preceding the day of the next ensuing election; that I have never been convicted of treason, felony, or bribery; that I am not registered or entitled to vote at any other place in this territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the constitution of the United States, and the laws thereof, and the laws of this territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God." *Davis V. Beason*, 334.

[54] See: Brief for Appellant at 12-13, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261). "This court has held that 'religious freedom is guaranteed everywhere throughout the United States so far as Congressional interference is concerned," (98 U.S., 162,) and that "Congress cannot pass a law for the government of Territories which shall prohibit the free exercise of religion." (Ibid, 162.) It necessarily follows that a Territorial legislature cannot pass such a law. In the language of this court, "Congress could confer no power on any local government established by its authority, to violate the provisions of the Constitution." (19 How, 450.)"

> laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God.[55]

After being convicted and sentenced, Davis obtained a writ of *habeas corpus,* alleging that he had been illegally imprisoned under a law that, among other things, violated the First Amendment's religion clauses.[56]

Samuel Davis did not question the power of the federal or territorial legislatures to ban polygamy; nor did he question their power to disenfranchise known polygamists.[57] Instead, Davis challenged the law under which he was indicted because it disenfranchised him solely on the basis of his membership in a church that affirmed polygamy. Drawing from the Court's own *Reynolds* opinion – and from many of the historical sources upon which *Reynolds* relied), Davis argued that that the First Amendment guaranteed the right to believe *and worship* according to the dictates of an individual's conscience. The free *exercise* of religion, in his view, necessarily extended beyond merely believing (or disbelieving) certain theological tenets. To exercise religion was to make such beliefs manifest in acts of worship and other religious rites. Reynolds' attorneys explained:

> The Constitutional guaranty involves more than mere opinion and belief. It not only protects a man in the enjoyment of his religious opinions, but also in the free exercise of religion. This free exercise of religion must embrace his right to enjoy the benefits of a church, to worship according to its forms and ceremonies, to participate in its ordinances and partake of its sacraments, and this he could not do without being a member of the church organization.[58]

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[55] *Davis V. Beason*, 334.

[56] Ibid., 335-37. Samuel Davis appears to have initially challenged the voting law in this case on Establishment Clause grounds. See ibid., 336-37. In his argument before the Supreme Court, however, Davis focused on the supposed meaning of the Free Exercise Clause, and its implications for the law in question. See Brief for Appellant at 11, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261). Also see ibid., 338-40.. Davis also challenged the law as an illegal "test oath" that violated Article 6 of the Constitution. I plan to include this important line of argument in subsequent drafts of this manuscript.

[57] Brief for Appellant at 1, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261).

[58] Brief for Appellant at 13, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261).

This interpretation of the Free Exercise Clause meant that the free exercise of religion included the legal right to associate with like-minded others in order to perform religious ceremonies and enact other religious duties. In a striking illustration of the individualistic tendencies that often color religious adherence in the United States,[59] Davis' attorneys immediately qualified this claim; they asserted that Davis didn't necessarily believe everything the Mormon Church taught, especially as it related to polygamy:

> It does not necessarily follow from such membership that he must believe all the dogmas or doctrines of the church. He may disbelieve any or even all of them, but its ceremonies, forms, and associations may be of such a character as comport with his ideas of worship and duty to his Creator. No matter what his belief is, if he violates no law, he may freely exercise his religion according to such forms and ceremonies […] He did not practice bigamy or polygamy, nor did he advise anyone else to do so. It does not appear that he even believed in these practices, and certainly he repudiated them by his oath. He simply belonged to the Mormon Church and claimed his right to worship in that church.[60]

Davis thus argued that the free exercise of religion implied something more than the mere freedom to hold religious beliefs. It also included "acts of worship," and the "'cultus' or 'outward expression of the religious sentiment;' it means 'entire freedom of creed, thought and worship' with a restriction upon the government that it 'cannot go behind the *overt act;*' in other words," Davis concluded, "it includes all acts of manifestation or exercise of religion which are not in violation of 'peace and good order.'"[61]

The Court's ruling in *Davis* was authored by Justice Stephen Field, and consisted of two main elements. One element of the Court's ruling evaluated the territorial legislature's power "to prescribe the qualifications of voters and the oath they were

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[59] Robert Bellah, Richard Madsen, William Sullivan, Ann Swidler, Steven Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (New York: Harper & Row, 1986).

[60] Brief for Appellant at 13-14, *Davis v. Beason,* 133 U.S. 333 (1890) (No. 1261).

[61] *Davis V. Beason*, 338.

required to take."[62] Here, Justice Field highlighted two sections of a federal law that conferred power to Territorial legislatures. The first section stated "that, 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.'"[63] Field interpreted this power in extremely broad terms, concluding that securing obedience to the laws was, itself, a valid legislative end that justified the Territorial legislature's chosen means: "Under this general authority it would seem that the territorial legislature was authorized to prescribe any qualifications for voters, calculated to secure obedience to its laws." The second section of the law that Justice Field cited conferred legislative powers in relatively precise terms, giving the territorial legislature power "to prescribe any reasonable qualifications of voters and for holding office not inconsistent with" a series of limitations, none of which applied to Davis' case.[64]

Another core element of the Court's *Davis* ruling focused on the *limits* of the legislature's powers under the Free Exercise Clause. Here, Justice Field re-affirmed earlier rulings that portrayed polygamy as a criminal act, properly subject to legal prohibitions. Like the Court's opinions in *Reynolds* and *Murphy,* Field decried polygamy as a threat to civilization itself. "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries," Field explained.

> They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. […] To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel

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[62] Ibid., 345.

[63] Rev. St. § 1851. As quoted in ibid.

[64] Ibid., 346.

> their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.[65]

This logic represented a significant shift in the Court's jurisprudence, and allowed for a relatively deep incursion of the legislative sphere into the sphere of religion. Not just the act of polygamy, but also the act of advocating polygamy as a religious duty now fell within the scope of the territorial legislature's powers. If there was any doubt that the Mormon Church's religious activities could be monitored and regulated by the Territorial legislature, Field dispelled them by asserting that:

> It is assumed by counsel of the petitioner [i.e. Davis], that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising [sic] them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion.[66]

The Supreme Court thus affirmed the power of the Territorial legislature to disenfranchise Davis on account of his membership in the LDS Church. Congress had conferred to the legislature power to prescribe and enforce voter qualifications. The legislative end-purpose of securing obedience to anti-polygamy laws justified the legislature's chosen means for securing those ends. Membership in a religious organization that advocated criminal actions was sufficient cause for being denied the vote.

The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States (1890)

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[65] Ibid., 341-42.

[66] Ibid., 345.

In 1890 the U.S. Supreme Court went one step further, upholding an act of Congress that dissolved the corporate charter of the LDS Church, seized much of its property, and set forth procedures for redirecting that property to other "charitable" or "public" purposes. The act described above was passed in 1887 as part of Congress' continued efforts to quash polygamy in the Western territories.[67] The Morrill Anti-Polygamy Act of 1862, in addition to banning polygamy, had expressly denied the corporation's right to solemnize polygamous marriages, and limited the LDS Church's property holdings at $50,000.[68] Building on the Morrill Act, the new statute 1) charged the Attorney General of the United States with directing "proceedings to forfeit and escheat to the United States" all of the corporation's property holdings over $50,000 (with exceptions for buildings and parsonages used exclusively for religious purposes); 2) annulled the acts by which the territorial legislature had incorporated the LDS Church, dissolving the church's corporate charter; and 3) provided that "religious societies, sects and congregations" in the territories could hold only "so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations" of such groups; even then, such property was held in the names of court-appointed trustees.[69] The government estimated that the LDS Church possessed approximately three-million dollars in assets at the time.[70]

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[67] Act of February 19th, 1887. 24 State. 635, c. 397. The relevant sections are listed at *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*, 7-8.

[68] See Act of July 1, 1862, 12 Stat. 501, Sec. 3. As quoted in ibid., 5-6.

[69] Ibid., 7-8.

[70] See Paul G. Kauper & Stephen C. Ellis, "Religious Corporations and the Law," *Michigan Law Review* 71(1972-1973): 1517, n. 78. Kauper and Ellis note that the Attorney General, following the *Late Corp.* ruling, seized only $381,812.83, which included $10,000 in "credits due on sheep."

Late Corp. thus presented two main legal questions. First, did the federal legislature possess power to dissolve the corporate charter of the Church of Jesus Christ of Latter-Day Saints? Second, did the Supreme Court of the Territory of Utah possess power to receive and distribute the church's seized assets, as prescribed by the act? In its first divided decision in a polygamy case, the Court ruled in favor of the government on both of these questions. I focus below on the Court's treatment of the first question.

As it had in the other polygamy cases, the Court first evaluated the sources and scope of the federal legislature's power over the territories. Writing for a 6-3 majority, Justice Joseph P. Bradley reasoned that the federal legislature's power over the territories originated basic right to appropriate land as United States territories. Congress' power to legislate in the territories was "general and plenary," Bradley reasoned, "arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations" respecting the Territories and other government-owned properties. Congress' power to acquire territories was, in turn, derived from its "treaty-making power and the power to declare and carry on war."[71] Building on the precedent of Murphy and other cases, Bradley described the scope of Congress' power over the Territories in stark terms. While Congress' powers were constitutionally limited, the national government's sovereignty over the Territories was absolute: "Having rightfully acquired said territories," Bradley explained, "the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete."[72] Under this view, Congress possessed power to

[71] *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*, 42.

[72] Ibid., 44.

"abrogate" laws enacted by the Territorial legislature – including its act incorporating the LDS Church – and to "legislate directly for the local government."[73]

Attorneys for the LDS Church had argued that, although the federal legislature had never formally endorsed the Mormon Church's act of incorporation, Congress' longstanding silence on the matter implied that the charter was good at federal law, and could not be revoked merely on the whim of the legislature.[74] But, the Court ruled otherwise. In Justice Bradley's view, the federal government's sovereign power over the territories and the act of Congress establishing the territorial government in Utah both implied that laws passed by the territorial legislature were subject to the approval of the federal legislature. Although the corporation possessed a valid legal existence under its charter, which had been affirmed by the territorial legislature in 1851 and 1855; and although Congress was limited in its exercise of power by the federal Constitution; the federal legislature's power to alter or revoke territorial legislation, including the Mormon Church's corporate charter, was nearly absolute. It was "too plain for argument," Bradley contended, that the charter was "subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose."[75]

Justice Bradley elaborated on Congress' reasons for revoking the church's charter in the second part of the Court's opinion, which focused on "whether Congress or the court had power to cause" the seizure and redistribution of the LDS Church's property.[76] Here, the Court attributed to Congress the function of *parens patriæ*.[77] Bradley

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[73] Ibid., 43.

[74] Ibid., 33-35.

[75] Ibid., 45.

[76] Ibid., 46.

noted that the "principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity."[78] One prominent legal principle in all such countries was, "that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects."[79] Bradley emphasized that the property of the LDS Church was legally "held for the purpose of religious and charitable uses." This stood in contrast to other types of corporations, such as a "business corporation, instituted for the purposes of gain, or private interest."[80] Whereas property seized from a business corporation could be returned to its shareholders in the event that the corporation was dissolved, the property of a charity was bound to its original purposes. "Where a charitable corporation is dissolved," Bradley reasoned, the "sovereign authority […] necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted, so far as they are lawful and not repugnant to public policy."[81] As a matter of legal fact and public notoriety, however, the "religious and charitable uses" toward which the Mormon Church applied its property were the "inculcation and spread of the doctrines and usages of the Mormon Church […], one of the distinguishing features of which is the practice of polygamy."[82] The church had been relentless in its promotion of

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[77] Ibid., 66.

[78] Ibid., 51.

[79] Ibid.

[80] Ibid., 47.

[81] Ibid., 48.

[82] Ibid.

polygamy, the Court explained, despite the passage of "stringent laws" intended to suppress the practice. When the Mormon Church's corporate charter was dissolved, and its assets, Congress and its agents had a duty to apply these funds toward "charitable" or "religious" ends consistent with their original purposes.[83]

Yet Congress could not – and surely would not – approve of using such funds to promote polygamy. Polygamous marriage was "abhorrent to the sentiments and feelings of the civilized world," Bradley proclaimed.[84] Mormon missionaries' efforts to spread their "nefarious doctrine" internationally represented a "blot on our civilization," he continued. And, the organization of a community "for the spread and practice of polygamy is, in a measure, a return to barbarism." And the notion that religious liberty protected Mormon's right to practice polygamy was a "sophistical plea." Here, the Court once again likened polygamy to ancient and foreign religious practices that would clearly be criminal (and anachronistic) under American law. Assassination by the "Thugs of India," the performance of *suttee* by "Hindu widows," and human sacrifices performed "by our own ancestors in Britain" were "no doubt sanctioned by an equally conscientious impulse," Bradley explained:

> But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority. The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced.[85]

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[83] Ibid., 59. "The State, by its legislature or its judiciary, interposes to preserve them [the funds] from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed."

[84] Ibid., 48.

[85] Ibid., 49-50.

Instead of returning the Mormon Church's seized assets to Mormons themselves,[86] Congress chose to fund the construction and maintenance of "common schools." In the Court's view, this re-appropriation of funds was perfectly consistent with Congress' powers over the territories, and coincided, only in a more lawful manner, with the purposes or "uses" for which the funds were originally donated to the church.[87] After all, "Schools and education were regarded by the Congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality."[88]

§ 4 Conclusion

The Supreme Court cases discussed in this chapter had a relatively obvious and lasting impact on religious practices in the United States. As a new religious tradition that was born in rural New York State, and grew upon on the Western frontier, Mormonism surely responded to, and addressed a wide range of socio-economic and religious factors specific to nineteenth-century America.[89] Mormon polygamy, more than any of its other doctrines and practices, drew the ire and contempt of the broader society, and precipitated in progressively heavy-handed legislation that was designed to extirpate it.

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[86] Ibid., 66.

[87] Ibid., 49-50."…the question arises, whether the government, finding these funds without legal ownership, has or has not, the right […] to cause them to be seized and devoted to objects of undoubted charity and usefulness – such for example as the maintenance of schools – for the benefit of the community whose leaders are now misusing them in the unlawful manner above described."

[88] Ibid., 65.

[89] Fawn Brodie eloquently describes the Book of Mormon – a central text in the LDS Church that was composed (or transcribed, as it were) by Joseph Smith in the early 1800s – as follows: "Any theory of the origin of the Book of Mormon that spotlights the prophet [Joseph Smith] and blacks out the stage on which he performed is certain to be a distortion. For the book can best be explained, not by Joseph's ignorance nor by his delusion, but by his responsiveness to the provincial opinions of his time. He had neither the diligence nor the constancy to master reality, but his mind was open to all intellectual influences, from whatever province they might blow. If his book is monotonous today, it is because the frontier fires are long since dead and the burning questions that the book answered are ashes." As quoted in Sydney E. Ahlstrom, *A Religious History of the American People* (Garden City, NY: Image Books, 1975), 504.

The Supreme Court's affirmation of Congress' power to punish polygamy as a criminal offense, to disenfranchise known polygamists and those who belonged to organizations that promoted polygamy, and, finally, to seize the LDS Church's assets and dissolve its corporate charter undoubtedly contributed to the Church's ultimate decision, in 1890, to revise official church doctrine, and to formally abandon the practice of polygamy. The continued practice of polygamy to this day by self-described Mormon "fundamentalists"[90] (and others) rebuts the notion that constitutional law, Congressional legislation, or even official church doctrine can overpower resilient – some might say recalcitrant – religious convictions. Yet, the Court defined the boundaries between religious and legislative spheres in these cases in such a way that legislative power effectively overwhelmed and transformed the religious beliefs and practices of the Mormon Church as a whole.

Indeed, the Court's rulings in *Reynolds, Murphy, Davis* and *Late Corp.* treated the Free Exercise Clause as a remarkably weak – or perhaps irrelevant – boundary for protecting the sphere of religion from legislative intrusions. The *Reynolds* and *Murphy* decisions defined a relatively broad sphere of religious duties that fell outside the scope of Congressional power. Building on the writings of Thomas Jefferson and James Madison, *Reynolds* and *Murphy* conceived of such duties in terms that at least implied the freedom of association for the purposes of worship, etc. in addition to the freedom to possess and profess diverse and even heretical religious "opinions." Overt acts against peace and good order, and ones that conflicted with accepted "social duties" were not to be tolerated, under this view, even if they were performed under the auspices of religious

[90] See: Todd M. Gillett, "The Absolution of Reynolds: The Constitutionality of Religious Polygamy," *William & Mary Bill of Rights Journal* 8, no. 2 (2000).

faith. As these cases progressed, however, the Court's conception of what constituted an overt act against peace and good order broadened to include mere association with the Mormon Church, whether or not one actually promoted or practiced polygamy. The sphere of religious liberty contracted under the Court's Davis and Late Corp. decisions until it finally formed a noose around the neck of the LDS Church – one that Congress would loosen conditionally upon the Church's reversal of its doctrine.

The sphere of legislative powers, as defined in these cases, expanded in equal proportion to the contracting sphere of religious liberty. The Court attributed to Congress well-nigh unlimited power to extirpate polygamy from the Territories on the grounds that Congress possessed enumerated powers to enforce criminal laws there, to prepare residents of the territories for citizenship, and to prepare institutions in the Territories for statehood. Factors beyond Mormons' practice of polygamy surely informed the Court's general suspicion of the LDS Church's "despotic" tendencies, and shaped other aspects of territories' subsequent legal and political institutions.[91] But polygamy posed a special sort of threat to the American polity, insofar as it replaced the basic unit of American civilization – the monogamous family – with a form of patriarchy that was supposedly foreign to Western Europeans and their American ancestors. Extirpating this threat, therefore, and emplacing monogamous marriage as a legal and cultural norm in the territories were public imperatives – legislative ends that justified a wide range of legislative means, or acts, that might otherwise have been viewed less favorably.

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[91] When Utah was admitted as a state into the Union in 1896, it's constitution explicitly prohibited polygamy, and was the only state constitution before 1947 to explicitly require the separation of church and state, as such. Constitution of Utah (1896), Art. I, Sec. 4, Art. III, as cited in Witte, *Religion and the American Constitutional Experiment*, 142, 64.

The Court's methods for conceptualizing and differentiating between religious and legislative spheres in these cases thus showed remarkable continuity with the methods it applied in the establishment-type cases discussed in Section One. In each of these cases, the Court conceived of the legislative sphere in terms of Congress' constitutionally enumerated powers. Not all of these powers were explicitly defined in terms of legislative end-purposes. Neither Congress' Article 4 powers to "make all needful rules and regulations respecting the territory," nor its Article 1 war powers directly specified particular legislative end-purposes – such as the promotion of public health, safety and morality – that Congress was empowered to pursue. However, the Court interpreted the supposed ends of Congress' anti-polygamy laws as consistent with, and expressive of these broadly defined powers. Like it did in the establishment-type cases discussed in Section One, the Court in these polygamy cases also conceived of the religious sphere in relation to the First Amendment's religion clauses, and an evolving definition of religion that emphasized theological opinions and ritual acts.

The extent to which religion was conceived as a part of the legislative sphere in these polygamy decisions is somewhat ambiguous. On the one hand, the Court occasionally associated American cultural norms with is supposed Christian identity, as when Justice Bradley described principles of the laws of charity that "prevail in all civilized countries pervaded by the spirit of Christianity."[92] On the other hand, the Court carefully avoided justifying Congress' anti-polygamy laws in terms of their coincidence with Christian or blatantly religious norms. Chief Justice Waite explained, polygamy was "odious" to the nations of Western and northern Europe. Justice T. Stanley Matthews

[92] *Late Corporation of the Church of Jesus Christ of Latter-Day Saints V. U.S.*, 51.

contended that monogamy was the "best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." Justice Stephen Field reasoned that polygamy tended "to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man." And Justice Joseph Bradley asserted that polygamy offended "the enlightened sentiment of mankind." None of the rulings, however, directly stated that polygamy was inconsistent with Christianity, per se, or with the teachings of the New Testament. None of the rulings concluded that the enforcement of monogamous marriage norms was a legitimate legislative function by virtue of the maxim that Christianity was part of the common law. Instead, the state could enforce such norms because polygamy was inherently immoral (and thus an appropriate object of criminal law), and because Congress had a duty to train the territories residents and institutions in the virtues of republican self-government.

In the next chapter, I explore another free exercise case in which religious litigants sought an exemption from a generally applicable law. Unlike the Mormon litigants discussed above, the plaintiffs in *Church of the Holy Trinity v. United States* (1892) were not members of a marginal or controversial sect. Nor were their religious practices the obvious target of Congressional legislation. Rather, they were Episcopalians in one of the nation's oldest and most storied congregations. They had hired a star preacher from England. In doing so, however, they were charged with violating an immigration law that prohibited the importation of foreign "laborers" under contract to work in the United States. Was the preacher a laborer in the eyes of the law? And if so, did the immigration law thereby prohibit the free exercise of religion?

Chapter 6
The Foreign Preacher and His "Labor"

> *But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.*[1]
>
> – Justice David Josiah Brewer

§ 1 Introduction

Does a federal law that effectively prohibits religious organizations from hiring the leader of their choice violate the Free Exercise Clause? In *Church of the Holy Trinity v. the United States* (1892), the Supreme Court considered whether a federal law prohibiting the "importation" of foreign workers under contracts to work in the United States applied to a prominent Episcopal Church in New York City, which had hired a popular English pastor to serve as its rector. Nearly everyone involved in the case – including the District Attorney who prosecuted the case, and the lower court judge who enforced a $1000 fine against the church for violating the law – seemed to understand that Congress didn't have the clergy in mind when it passed the law, which was widely seen as a blatant attempt to secure the labor vote.[2] The *New York Times* even suggested that enforcing the law against a church would "be a riotous travesty upon sense and justice," before

[1] *Church of the Holy Trinity V. United States*, 465.

[2] For an interesting and learned debate about the Trinity ruling see: Carol Chomsky, "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," *Columbia Law Review* 100, no. 4 (2000). Also see: Adrian Vermeule, "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church," *Stanford Law Review* 50, no. 6 (1998).

chortling that, "The law is no respecter of *parsons,* and what is sauce for the agricultural and manufacturing goose must be sauce also for the theological gander."[3] The unequivocal language of the law, however, prompted competing claims about its applications, and elicited two legislative purpose inquiries in the U.S. Supreme Court's final ruling that are relevant to our study of the secular purpose test.

§ 2 Case and Context

Holy Trinity began as a test case aimed at challenging the Alien Contract Labor Act (ACLA) – a federal statute that was formally entitled, "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States."[4] Passed in 1885, the ACLA was broad in scope, and banned the "importation" of foreign workers who were under contract to "perform labor or services of any kind" in the United States or its territories.[5] The act provided exemptions for "professional actors, artists, lecturers, or singers…[and] to persons employed strictly as personal or domestic servants." It did not, however, list members of the clergy among its exemptions.[6]

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[3] "A 'Coolie' Clergyman," *New York Times*, Sept. 25, 1887. As quoted in Chomsky, "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," 912.

[4] 23 Stat. 332.

[5] The act stated, in part: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia." As quoted in *Church of the Holy Trinity V. United States*, 458.

[6] Case Record at 7, *The Rector, Church Wardens, and Vestrymen of the Church of the Holy Trinity, Plaintiffs in Error vs. The United States*, 143 U.S. 457 (1891) (No. 13,166).

When a New York resident named Joseph S. Kennedy learned that New York City's Church of the Holy Trinity had hired a new rector from England, Edward Walpole Warren, he initiated a personal campaign to expose what he saw as the flawed principles of the ACLA. Kennedy penned a letter to Daniel Magone, the Collector of U.S. Customs in New York, expressing his concerns. Kennedy had no personal qualms with Rev. Warren. Rather, he was aggrieved by the treatment of his fellow Scotch immigrants under its provisions, and wished to expose this "most obnoxious and unreasonable law" to public scrutiny by having it enforced.[7] The *New York Times* reprinted Kennedy's letter, and added its own approval in an editorial warning (sarcastically) that the "'coolie' clergyman" would soon begin "his unholy work of undermining our institutions" by performing "contract labor."[8] "Seriously, nothing could be better adapted to show the complete absurdity of the law than this proposition to use it against a man who is in all senses a welcome and valuable citizen."[9] Kennedy kept writing letters on the matter, first to the Secretary of the Treasury, and finally to the United States District Attorney Stephen A Walker, whom Kennedy enjoined to file suit against the church. On October 21, 1887, Walker took action, and filed a suit against the church in the United States Circuit Court for the Southern District of New York seeking to recover the $1000 penalty imposed by the ACLA.[10]

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[7] Chomsky, "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," 910-11.

[8] "A 'Coolie' Clergyman." As quoted in: Chomsky "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," 912.

[9] "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," 913.

[10] See: *United States v. Church of the Holy Trinity,* 36 F. 303, 303-04 (C.C.S.D.N.Y. 1888). Also see Chomsky, at 916 (n. 68): "The suit was filed in the circuit court because the Alien Contract Labor Act specified that fines for violation of the Act would be recoverable 'as debts of like amount are now recovered in the circuit courts of the United States.'"

The parties in *Holy Trinity* contested whether the ACLA applied to the church's contract with Rev. Warren; and whether it was, thereby, unconstitutional under the Free Exercise Clause. Seaman Miller, the attorney representing Trinity Church, argued that the ACLA was not meant to prevent ministers from immigrating under contract to serve American churches. Miller cited lower court rulings in cases involving Chinese immigrants as precedents that the terms "labor" and "service of any kind" did not apply to "the professional or mercantile classes, or those engaged in mere mental labor."[11] The ordinary and legally accepted meanings of those terms implied "physical toil" by "persons who work in a menial capacity,"[12] Miller insisted. Such terms did not refer the more cerebral labors of the clergy. Miller also cited the statute's title,[13] congressional reports discussing its language and intended scope,[14] and "the history of the times when this act was passed"[15] as further evidence that the ACLA was not intended to stay the

[11] Brief for Plaintiff in Error at 8-11, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[12] Brief for Plaintiff in Error at 11-12, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[13] Brief for Plaintiff in Error at 17, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[14] A report by the Committee on Labor, for example, explained: "The bill in no measure seeks to restrict free immigration. Such a proposition would be, and justly so, odious to the American people. * * * It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them; they are men whose passage is paid by the importers; they come here under contract to labor for a certain number of years; they are ignorant of our social conditions, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of imported pauper labor." (Page 5359, Congressional Record, 48th Congress.) As quoted in: Brief for Plaintiff in Error at 19-20, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). The Senate Committee on Education and Labor subsequently expressed reservations about using the terms "labor and service" instead of "manual labor" or "manual service," but was nonetheless confident that the bill "will be construed as including only those whose labor or services is manual in character." As quoted in: Brief for Plaintiff in Error at 20-21, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[15] Brief for Plaintiff in Error at 21-23, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). Tens of thousands of single males from the lower-classes of several European nations had allegedly been induced to immigrate in order to work in American iron and coal industries. A U.S. Circuit Court in Michigan had previously ruled that,

immigration of ministers. Rather, each of these factors demonstrated that the ACLA was meant to address a narrowly defined problem: the importation by American capitalists of pauper laborers who debased the body politic and suppressed local wages. Unlike these masses of uncultured workers who threatened labor markets and social mores, Miller insisted that foreign ministers were "ennoblers and elevators of the human race intellectually and professionally."[16] They posed no threat to the economy, and they promised to enrich American culture. As such, they fell outside of the statute's intended scope.[17]

Attorneys for the government countered this interpretation of the ACLA by arguing that the statute's plain meaning – not its supposed purposes – should govern the case. In his arguments in the Circuit Court, District Attorney Walker described Congress' policy as novel, but unambiguous. Even if the new policy contradicted longstanding norms, the courts had a duty to enforce the law as it was written:

> There is no use or necessity for the court to grope for what is called the spirit of the act or the intention of Congress. The meaning is clear. This act is unique. It enacts a new American policy. The whole history of our country has been heretofore but a record of inducement to emigration. A law against the immigration of the perfectly equipped and willing laborer to our country is as much adverse to the general spirit of our legislation as would be an act to check the natural increase of our population, and much more against self-interest, as the

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"The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipments of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while upon the other hand, the laborers agreed to work, after their arrival, for a certain time, at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands or those of their friends to pay their passage." (*U.S. v. Craig,* 28 Fed. Rep., 798.)

[16] Brief for Plaintiff in Error at 16, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[17] Brief for Plaintiff in Error at 23, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

> immigrant adds at once his matured energies to the working force of the community while the newborn infant is a burden on the body politic.[18]

Walker's tongue-in-cheek defense of the statute belied his apparent disregard for the ACLA and the labor organizations that had pushed it through Congress. He wryly assured the court, "The provisions of this act can be justified upon precisely the same grounds as any other tariff act."[19] Foreign ministers were no less valuable to society than the gardeners and other foreign workers who fell within the plain meaning of the ACLA's text, he prodded:

> …but the home supply [of ministers] is abundant. In no department of service has competition been more active than clerical work. Our choicest and most desirable metropolitan pulpits are invaded by the foreign product. Eight of the best-paying and best-attended churches in New-York are at the present time served by imported and now [illegible] clergymen. Meanwhile our theological seminaries, which are infant industries just as much as carding machines or iron mills, are turning out annually enough of this form of labor product to supply the home demand and meet the exigencies of missionary service also. There are more Congregational ministers in the United States not engaged in the work of their profession in proportion to their numbers than there are carpenters or masons out of employment. Of the 4,090 Congregational ministers in the United States in 1887, only 2,852 were engaged in pastoral work. These suggestions might not be without force in maintaining a prohibitory duty on clergymen if it were the duty of counsel to justify a specific rate of duty, prohibitory or otherwise, on a specific commodity.[20]

This argument at once deferred to the legislature's discretion in the use of its enumerated powers, and mocked what Walker clearly viewed as a bad public policy. The government's attorneys adopted a less sarcastic tone in their arguments before the U.S. Supreme Court. Still, they insisted in the Supreme Court, too, that the plain meaning of

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[18] "Parsons Need Protection: Englishmen Taking American Pulpits. District Attorney Walker Lays Down the Law in the Case of the Rev. E. Walpole Warren," *New York Times*, April 24, 1888.

[19] Brief for Plaintiff in Error at 6-7, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[20] "Parsons Need Protection: Englishmen Taking American Pulpits. District Attorney Walker Lays Down the Law in the Case of the Rev. E. Walpole Warren."

the statute necessarily governed the case. Whatever the legislature might have intended, the statutory language they ultimately adopted clearly applied to Rev. Warren's contract.

Attorneys in the case also sparred over the constitutionality of the ACLA under the Free Exercise Clause. Supposing that the act applied to Rev. Warren's contract, did it thereby infringe on his (or the church's) free exercise rights? Did Congress possess power to regulate religious work to the same extent that it could regulate other forms of work and commodities? The Supreme Court's rulings in the recent polygamy cases weighed heavily in the government's favor on these questions. The polygamy cases had established a precedent of judicial deference to the legislature, particularly when Congressional policies expressed a well-established legislative power, and regulated religiously-motivated actions (as opposed to religious beliefs) in a manner that was more or less neutral toward religion. No one suggested that Congress didn't have power under the federal Constitution to regulate immigration or foreign trade. And, even if the ACLA prohibited Rev. Warren's employment, none of its provisions explicitly singled out religious beliefs or practices, as such, for special burdens or benefits that were not shared by other corporations or individuals.

Seaman Miller, the church's attorney, nonetheless urged that the ACLA violated the First Amendment. In his view, the Free Exercise Clause protected a broad sphere of religious acts and activities, especially when they were performed by Christians; it provided "universal freedom in the worship of God, and for extending His kingdom upon earth."[21] Under this view, the religion clauses were intended to unfetter

[21] Brief for Plaintiff in Error at 3, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

Christianity, and foster its spread throughout American society. "The Christian religion forms a part of the very life of our nation," Miller declared,

> …and is the bulwark upon which society and morality rest. To attempt by Federal legislation to cut short its spread, to minimize its influence, to deprive the people of all help that they can receive from whatever source that will aid them in their worship, that will stir them to greater zeal, that will cause them to live holier and purer lives, is in contravention of one of the very things that this amendment was designed to vouchsafe forever to the whole nation.[22]

The "Christian religion" that Miller had in mind was comparable to the type of "general Christianity" lauded in Vidal v. Girard's Executors (1844). This supposedly public religion was rooted in the Christian churches, but it was not narrowly sectarian. Congress could no more prevent Swiss immigrants from sending "to their Fatherland for a pastor," Miller insisted, than it could restrict the Pope from sending a European priest to serve an American parish. In both cases, the legislature would be inappropriately stifling the practice and growth of Christianity. Such restrictions would amount to a form of "paganism" wholly inconsistent with the First Amendment.[23] Miller admitted that some religiously motivated actions were subject to Congress' regulatory powers. The recent "Mormon cases," for example, had proved that "wickedness and vice and immorality are not religion simply because an individual or even sets of individuals may say and claim they are."[24] Nonetheless, he argued that the Court's logic in the Mormon cases implied that Congress could not prohibit Rev. Warren's immigration. Unlike polygamy, which

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[22] Brief for Plaintiff in Error at 3, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[23] Brief for Plaintiff in Error at 5, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). "Take, for example, a colony of naturalized American citizens in our metropolis who came from a province in Switzerland. There is no clergyman in their midst. They have a desire for one, but no divinity school in America teaches in their language. They can not send to their Fatherland for a pastor, for there would naturally be implied, if not an actual, understanding, that if he came here he would at least have his temporal wants supplied while here, and thus the Act under discussion would be violated. Can it for a moment be held, that the Constitution or Amendment I thereof, ever was designed to countenance such paganism?"

[24] Brief for Plaintiff in Error at 5, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

Congress could restrict because it was an immoral and socially deleterious practice, Rev. Warren's ministry promised to strengthen the moral and spiritual fabric of the community. There was nothing in Warren's actions that would threaten peace or social order. Enforcing the ACLA against Rev. Warren, therefore, would "clearly be interfering with the province of the Church in the *'propagation'* of principles acknowledged by all to be in furtherance of 'peace' and 'good order' among mankind and to the honor and glory of God."[25]

In addition to unjustly invading the sphere of religion, the ACLA exceeded Congress' enumerated powers. Miller described as "inapplicable and ridiculous" the government's claim that Congress could restrict the immigration of clergy as "a part of the general scheme of the revenue or tariff legislation of our land."[26] Religion was a unique form of human activity that the courts could not reduce to the status of a commercial product. Nor could the "importation" of clergy be limited, as if ministers were "inherently harmful" goods comparable to opium or "obscene books." That Congress would apply its powers to regulate commerce and trade toward refusing entry to foreign clergymen was an "absurdity…not entitled to judicial approbation."[27] Miller thus closed his Supreme Court brief with an evocative parade of rhetorical questions that appealed to the nation's collective religious identity and sense of pride:

> A nation, with a boasted civilization unsurpassed in the world, closing her ports to the admission of the educated and cultured scholars of foreign lands? A people, whose God is their hope, refusing to permit one of her churches to invite and induce an inspired theologian of our parent country, or of any European nation, to act as its Rector? No! Such a conclusion would be an anomaly. The

[25] Brief for Plaintiff in Error at 6, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). Quoting *Reynolds v. United States*, 98 U.S. 145 (1878).

[26] Brief for Plaintiff in Error at 7, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[27] Brief for Plaintiff in Error at 7, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

> constitution, the Acts themselves, the history of the times, the public welfare, and national pride and dignity forbid such an interpretation.[28]

Attorneys for the government proffered a different interpretation of the ACLA's validity under the First Amendment. Rather than evaluating the ACLA in terms of its effects on religion, William Maury argued that, "no law can be said to restrict religion that has not that *direct object*. To hold laws void because of their indirect effect on the exercise of religion might be attended by very serious consequences."[29] Under this view, Congress could pass any number of laws that coincidentally restricted the exercise of religion, as long as restricting religion was not the legislature's immediate goal. Congress could impose a general property tax, for example, even if it might "break up some religious organizations or compel them to close and sell their churches."[30] Similarly, Congress could "pass laws regulating the subject of immigration" even if such laws coincidentally restricted the immigration of clergymen.[31] Exempting religious persons and organizations from every law that happened to affect their religious activities was simply impractical. The government obviously could not prohibit the free exercise of religion. But, Congress was not prohibited from enforcing laws that might inconvenience citizens in their exercise of religion. "It seems to us," Maury concluded, "that it would be just as reasonable to say that if Mr. Warren had purposely taken passage in an infected ship and been kept in quarantine for a considerable time after his arrival here the law

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[28] Brief for Plaintiff in Error at 26, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[29] Brief for the United States at 10, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). Emphasis added.

[30] Brief for the United States at 9, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[31] Brief for the United States at 8, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). "That Congress has power to pass laws regulating the subject of immigration under its general authority over commerce is perfectly clear."

requiring his detention would be an interference with the free exercise of religion."[32] In other words, religious individuals and corporations were subject to the same laws that were "applicable to everybody."[33]

§ 3 Court Rulings

Circuit Court for the Southern District of New York

The Circuit Court sided with the government in *Trinity*, enforcing the $1,000 fine against Trinity Church.[34] The Circuit Court ruled narrowly on the ACLA's applicability, without explicitly evaluating its constitutionality under the Free Exercise Clause. In an opinion written by Justice William James Wallace, the court acknowledged that there was "no reason to suppose" that Rev. Warren's contract fell "within the evils which the law was designed to suppress." Indeed, Justice Wallace continued, "it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present."[35] The ACLA was obviously not meant to keep pastors out of the country; instead, Congress had intended to stem the tide of menial laborers who were being brought into the United States under contracts with "corporations and capitalists" as part of their efforts to "reduce the rates of wages."[36] Even though Rev. Warren's contract did not fit this description, however, the court ruled that the ACLA's wording was too explicit to circumvent. The court, in other words, had to apply the clear letter of the law, rather than its supposed spirit. "No

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[32] Brief for the United States at 9, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[33] Brief for the United States at 10, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[34] *United States v. Church of the Holy Trinity,* 36 F. 303 (C.C.S.D.N.Y. 1888)

[35] *United States v. Church of the Holy Trinity*, 36 F. 303, 304 (C.C.S.D.N.Y. 1888)

[36] *United States v. Church of the Holy Trinity*, 36 F. 303, 304 (C.C.S.D.N.Y. 1888)

more comprehensive terms could have been employed to include every conceivable kind of labor or avocation," the Court concluded, "whether of the hand or brain, in the class of prohibited contracts."[37] Only those professions that were specifically listed in the statute were entitled to exemptions under the ACLA. Every other foreign laborer, including a "minister of the gospel," was prohibited from immigrating under a contract to work in the United States.

U.S. Supreme Court

Trinity Church appealed to the U.S. Supreme Court to reverse the Circuit Court's ruling, and, in 1892, prevailed. Justice David Josiah Brewer wrote the *Trinity* decision on behalf of a unanimous Court. Newspapers had reported that the Supreme Court's justices seemed poised to side with the government after oral arguments. Brewer and the other justices had questioned Seaman Miller so severely, in fact, that the government's attorney, William Maury, thought the case was already won, and decided to simply submit his written brief instead of making an oral argument.[38] In its final ruling, however, the Supreme Court sided squarely with the church. The Court's decision had two main sections, each of which involved a distinctive form of legislative purpose inquiry. In the first half of the Court's decision, Justice Brewer evaluated whether the ACLA actually applied to Rev. Warren's contract with Trinity Church. Here, he considered whether the contract fell within the intended meaning, or "spirit" of the statute's prohibitions on imported contract labor. In the second half of the Court's Trinity decision, Justice Brewer evaluated the purposes of the ACLA in relation to

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[37] *United States v. Church of the Holy Trinity*, 36 F. 303, 304-305 (C.C.S.D.N.Y. 1888)

[38] "Looks Bad for Trinity," *New York Times*, Jan. 8, 1892, 5. Also see Chomsky, "Unlocking the Mysteries of 'Holy Trinity': Spirit, Letter, and History in Statutory Interpretation," 921.

religion and religious liberty norms. Legal scholars have debated the meaning and significance of this second passage in Brewer's opinion, which I will refer to as his "Christian nation" argument. Many interpret Brewer's reasoning as, in essence, a re-iteration of the maxim that Christianity is legitimate part of American law and government. I argue below, however, that Brewer's Christian nation argument was an attempt to carve out a constitutional loophole for religiously diverse free exercise claimants seeking exemptions from generally applicable laws. This loophole conceived of a relatively expansive sphere of religious liberty within a broader free exercise jurisprudence that, especially in the wake of the Court's polygamy rulings, left little room for such exemptions. In other words, Brewer's "Christian nation" argument was not so much an affirmation of a Christian state, as it was an attempt to place religiously diverse acts and institutions beyond the reach of general legislation.

The first half of the Court's Trinity ruling has become a textbook study in "purposive" methods of statutory construction.[39] Instead of relying strictly on the ACLA's formal text, the Supreme Court relied on a relatively wide range of extrinsic evidence in order to interpret how the ACLA applied to the facts of the case. Justice Brewer acknowledged that the text of the ACLA expressly prohibited a very broad range of contracts with foreign laborers. Interpreted literally, the ACLA would likely even prohibit the Rev. Warren's contract with Trinity Church. The literal meaning of the text was not, however, the only decisive factor in the Court's interpretation of the law. On behalf of the Court's nine justices, Brewer explained: "[W]e cannot think Congress

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[39] See Shanor, *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems*. Vermeule, "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church." Mark DeForrest, "The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light of the Lemon Test's Secular Purpose Requirement," *Regent University Law Review* 20(2007-2008).

intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[40] The Court's evaluation of the "intention" of the ACLA's "makers" – i.e. Congress – represents the first type of legislative purpose inquiry applied in *Trinity*. Brewer insisted that, if the application of a statute's literal text would lead to an "absurd" result, then the Court had a duty to hone its interpretation of the statute in order to reflect the legislature's true purposes. Closely tracking Seaman Miller's argument, Brewer reasoned that the ACLA's official title,[41] the "evil which it was designed to remedy,"[42] and the meanings of the terms "labor" and "service" in their ordinary and legal usage all demonstrated the "mind of the legislature"[43] that had enacted the ACLA. Taken together, these evidences proved that Congress had intended to stay the influx of "cheap unskilled labor."[44] Despite the sarcastic arguments made by the *New York Times'* editorial board, and District Attorney Walker's tongue-in-cheek claims about the "home supply" of preachers in the Circuit Court, no one in Congress ever "suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition."[45] Even if Rev. Warren's contract fell within the letter of the law, then, it did not fall "within its spirit, [or] within

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[40] *Church of the Holy Trinity V. United States*, 459.

[41] Ibid., 463.

[42] Ibid.

[43] Ibid., 464.

[44] Ibid., 465.

[45] Ibid., 464.

the intention of its makers."[46] Thus, the ACLA did not prohibit the "importation" of foreign clergymen under contract to serve in American congregations.[47] Trinity Church was free to hire Rev. Warren, and Rev. Warren was free to immigrate.

This interpretation of the ACLA made Trinity Church's free exercise argument a moot point. Since the ACLA did not even apply to the case – that is, since it did not prohibit the church's contract with Rev. Warren – the statute couldn't possibly violate the free exercise rights of Rev. Warren, the church, or its members. There was no apparent need, therefore, for the Court even to address the issue of religion. Why, then, did Justice Brewer append a seven-page analysis of the nation's religious history – comprising a full half of the Court's written opinion – in which he considered whether the Congress would have intended to prevent religious organizations from hiring a foreign clergyman? Why, having concluded that Warren was a brain toiler and not subject to the ACLA, would Brewer bother to defend, at great length, the premise with which he opened the second half of the Court's opinion: "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[48]

Before answering those questions, we should first examine the substance of Brewer's initial premise. Three initial observations about the above-quoted statement are noteworthy. First, when Brewer writes that "no purpose of action against religion can be imputed to any legislation," it is clear that he is proposing a rule of statutory

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[46] Ibid., 459.

[47] Ibid., 465. "We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor."

[48] Ibid.

construction. To "impute" a "purpose of action" to "legislation" is to construct the intended meaning of a statute's text – i.e. to determine if and how a legislature intended for the statute to apply to a given fact pattern, or in a particular set of circumstances. Brewer, for example, just prior to making this statement, had imputed Congress' purpose of action to the ACLA, and determined that it did not apply to Rev. Warren's contract with Trinity Church. Thus, to say that "no purpose of action against religion can be imputed to any legislation" is to say, in effect, that courts should not interpret statutes in such a way that they apply "against religion." Second, Brewer does not limit this norm of statutory construction to federal courts' interpretations of federal laws: "…no purpose of action against religion can be imputed," he wrote, "to *any legislation, state or national*" (emphasis added). Recall that the ACLA was a federal law, not a state law. The Circuit Court had suggested that "no legislative body in this country" would have passed a law intentionally prohibiting Trinity Church from hiring a foreign minister like Rev. Warren. Justice Brewer turned the lower court's basic observation into a norm of statutory construction: legislative purposes "against religion" were not to be imputed to state or national laws. Third, Brewer bases this norm of statutory construction on the observation that "this is a *religious* people." This initial description of Americans as a "religious" people – rather than, say, a "Christian" people – implied that statutes' purposes should not be interpreted in such a way that they apply against *any* religions. Brewer used this premise to frame his subsequent analysis of the nation's religious heritage. He posited a norm of statutory construction that applied to state and federal laws, alike: statutes should not be interpreted such that they operate against any religion. This norm provided a potential loophole for lower courts to give exemptions to religious

persons and organizations from generally applicable laws, without declaring such exemptions to be a constitutional free exercise right of religious individuals or corporations.

If the opening salvo of Brewer's religious purpose inquiry offered a potential loophole for future free exercise claimants, the evidence he subsequently cited to support his claim that "this is a religious people" has led many commentators to believe that Brewer was, instead, endorsing an normatively Christian nation-state. Brewer cited a diverse swath of historical documents and facts from America's colonial, revolutionary, and post-revolutionary past as evidence of the nation's "religious" character. "From the discovery of this continent to the present hour," he wrote, "there is a single voice making this affirmation."[49] In fact, there were many such voices – including several that were, at best, puzzling reference points for an argument in favor of religious liberty. There was Christopher Columbus' commission to sail, for example, from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," who had expressed their royal hopes "that by God's assistance some of the continents and islands in the ocean will be discovered."[50] Then there were the colonial charters issued by King James I (and other monarchs), expressing his missionary zeal for the propagation of the "Christian Religion to such People, as yet live in Darkness and miserable ignorance of the true Knowledge and Worship of God."[51] The fundamental orders of Connecticut, instituted in 1638-1639, combined a similar zeal with an even greater affinity for creative spelling; it expressed the people of Connecticut's desire to "mayntayne and presearue [maintain and

[49] Ibid.

[50] Ibid., 465-66.

[51] Ibid., 466.

preserve] the liberty and purity of the gospell of our Lord Jesus w^ch^ we now p^r^fesse."[52] The Declaration of Independence, Brewer pointed out, invoked the "Creator," appealed to the "Supreme Judge of the World," and expressed "a firm reliance on the Protection of Divine Providence."[53] Next, contemporary state constitutions included "a constant recognition of religious obligations…which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community."[54] The religiously-themed oaths of office common in many states provided more evidence that Americans were "a religious people." Multiple influential rulings in state and federal courts had affirmed the maxim that Christianity was part of the common law.[55] "Even the Constitution of the United States," Brewer exclaimed, "which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration [of free exercise and disestablishment norms] common to the constitutions of all the States […] And also provides […] that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill."[56] Brewer's analysis here began to narrow in its description of Americans' religious character: America was not merely a "religious" nation, he explained – it was a Christian nation:

> If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty;

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[52] Ibid., 467.

[53] Ibid., 467-68.

[54] Ibid., 468.

[55] See ibid., 470. Brewer specifically cites: *Updegraph* v. *The Commonwealth*, 11 S. & R. 394, 400; *The People* v. *Ruggles*, 8 Johns. 290, 294, 295; and *Vidal* v. *Girard's Executors*, 2 How. 127, 198.

[56] Ibid.

> the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. *These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.*[57]

The vast majority of Brewer's evidence thus highlighted public and legal expressions of Christianity – or, at least the sort of "general Christianity" discussed in other cases. Brewer's "Christian nation" argument had specific reference to the facts of the *Trinity* case. In the very next sentence of the opinion he asked: "In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?"[58] The Court answered this question in the negative. On top of all the other evidence showing that the ACLA was not intended to apply to "brain toilers" like Rev. Warren, the nation's "Christian" character belied the fact that an American legislature would never intentionally prohibit a Christian church from hiring a foreign clergyman.

Brewer's assertion that a "Christian nation" would never prohibit a Christian church from hiring a Christian minister, was an application – not a replacement or clarification – of the Court's previously-stated premise that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious

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[57] Ibid., 471.

[58] Ibid.

people."[59] Indeed, the facts in *Trinity* served as just one example of the type of religious exemptions from general laws that Brewer's proposed norm of statutory construction implied. This norm applied not only to Episcopal churches, nor even to Christian churches alone. It also exempted Jews (and presumably other religious groups) from statutes that would otherwise be applied "against religion." Brewer concluded his opinion as follows:

> Suppose that in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal [Henry Edward] Manning to come to this country and enter into its service as pastor and priest; or any Episcopal church should enter into a like contract with Canon [Frederic William] Farrar; or any Baptist church should make similar arrangements with Rev. Mr. [Charles Haddon] Spurgeon; *or any Jewish synagogue with some eminent Rabbi,* such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore not within the statute.[60]

Brewer's *Trinity* opinion did not, therefore, establish religious exemptions from general laws as a constitutional free exercise right. Moreover, Brewer's recitation of the nation's religious heritage, and his declaration that Americans comprised a "Christian nation" provided fodder for contemporary movements that sought to amend the federal Constitution so that it would recognize Christianity as the official religion of the United

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[59] Ibid., 465., and as quoted above.

[60] Ibid., 472.. Emphasis added.

States government.[61] Yet, Brewer's "Christian nation" argument was sandwiched between two passages that, rather than defending the privileged status of Christianity, implied a broader sort of "religious" liberty for all. American courts, the Trinity decision suggested, should not interpret state or federal laws in ways that functioned "against religion."[62]

§ 4 Conclusion

[61] E.g. the National Reform Association.

[62] I plan to explore in subsequent drafts of this dissertation, or in an article, how this interpretation of Brewer's ruling in *Trinity* relates to two other public addresses Brewer gave (not in his capacity as a Supreme Court Justice). First, see: David Josiah Brewer, *The United States a Christian Nation* (Philadelphia: The John C. Winston Company, 1905). Here, Brewer offers a progressive vision for the future nation, animated by interwoven themes of faith and patriotism. "But in what sense can it be called a Christian nation? Not in the sense that Christianity is the established religion or that the people are in any manner compelled to support it. […] Neither is it Christian in the sense that all its citizens are either in fact or name Christians. On the contrary, all religious have free scope within our borders. Numbers of our people profess other religions, and many reject all. Nor is it Christian in the sense that a profession of Christianity is a condition of holding office or otherwise engaging in the public service, or essential to recognition either politically or socially. In fact the government as a legal organization is independent of all religions." (12) "In view of the multitude of expressions in its favor, the avowed separation of church and state is a most satisfactory testimonial that it is the religion of this country, for a peculiar thought of Christianity is of a personal relation between man and his Maker, uncontrolled by and independent of human government." (32) "Christianity has entered into and become part of the life of this republic; it came with its beginnings and prompted them; has been identified with its toils and trials, shared in its victories, cheered in the hour of darkness and gloom, and stands to-day prophetic of untold blessings in the future." (53-54). Next, see *The Pew to the Pulpit: Suggestions to the Ministry from the Viewpoint of a Layman*. In this pithy and humorous address to the graduating class of Yale Divinity School in 1897, which he delivered five years after the *Trinity* case, Brewer advised the new clergy to make themselves useful to a changing American society. Brewer here shows himself to be theologically liberal, as deeply indebted to his Congregationalist upbringing and lifelong practice in that church as he was to contemporary trends in biblical criticism and political thought. His advice to the young clergy reads like a case study in secularization theory. "The pulpit," he admitted, was declining in both prestige and authority, and it increasingly consisted of men with second-class intellects. Why? Brewer cites several reasons: the clergy of the nation's colonial past were deeply learned relative to most of their parishioners; now specialists in every field of science far surpassed clergy in their level of knowledge. Similarly, industrialization coincided with highly complex divisions of labor that left business relations far beyond the scope of theological training: "No longer can the minister pose as one possessed of all information and entitled to control outside the limits of his special work," Brewer urged. When a minister stepped out of the religious sphere, "the common sense of the community says to him most emphatically, 'go back to your pulpit and leave matters of education and business and legislation to those who are trained therefore.'… The moment it [the clergy] goes outside of [the pulpit] it jostles with everybody and has no right to complain if everybody gives it a kick." Democratic and anti-hierocratic social impulses further eclipsed the clergy's power. The ministry was now a "profession" like any other, and was not automatically entitled to deference. (See *ibid.* at 9, 23-25, 28, 30-31.)

The Supreme Court's *Trinity* decision has been cited in more than one-thousand subsequent rulings in state and federal courts.[63] Further analysis of these cases, and their practical outcomes, are needed in order to determine if, and how these courts applied the *Trinity* ruling, and how those rulings, in turn, affected the practice of religion in the United States. Did other courts and judges heed Justice Brewer's advice that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[64] If so, under which circumstances did they exempt religious persons or organizations from generally applicable laws? And, did they apply this standard equally to members of different religious traditions? These questions remain unanswered.

We can be more certain of the fact that Justice Brewer's written opinion at least conceived of a protective boundary around religious actions that might otherwise be threatened by generally applicable legislation. This boundary was implicit rather than explicit – it was rooted in the notion that a "religious" body politic would never intentionally act "against religion." It relied on a proposed norm of statutory construction, and did not have the force of a formal, constitutional right. In the wake of the Court's polygamy decisions, however, in which the Court had portrayed the regulation of religiously-motivated *actions* as broadly permissible, and consistent with both Congress' limited powers and citizens' religious rights, *Trinity* offered a glimpse of what a more robust interpretation of the Free Exercise Clause might look like. It

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[63] An initial search on Westlaw returned 302 state-level cases and 764 federal cases that cite *Trinity* in one way or another. It is unlikely that all of these cases are related to religious liberty claims.

[64] *Church of the Holy Trinity V. United States*, 465.

suggested the existence of a religious sphere in which diversely religious citizens could *act* individually and collectively without being subject to incidentally prohibitive legislation.

The Court's Trinity decision also had implications for the public roles of religion in legislative discourse. Brewer did not go so far as to suggest that legislative purposes "against religion" were unconstitutional under the Free Exercise Clause. On the other hand, even though some of the historical examples he cited in his "Christian nation" argument suggested otherwise, Brewer did not maintain that legislation serving narrowly religious purposes fell within the scope of American legislatures' legitimate powers and functions. Rather, Brewer treated the maintenance of a social sphere in which citizens could exercise their various religions as a basic public good. Because Americans were religious, broadly speaking, they would not impose legislation that functioned "against religion." By implication, courts should not interpret or apply legislation in ways that so functioned.

Having now explored a series of nineteenth-century free exercise and disestablishment cases, we will now turn to subsequent legal developments that gave rise to the secular purpose test. We have seen that the Supreme Court (and lower courts) in both types of cases used similar methods to evaluate and enforce boundaries between religious and legislative spheres. Instead of evaluating the secularity of legislative purposes, the courts evaluated legislative purposes in terms of legislative bodies enumerated powers and the public purposes they advanced. These powers were subject to an evolving set of religious liberty norms that emphasized, to varying degrees, principles including religious voluntarism, non-coercion, freedom of religious belief and

expression, institutional differentiation, and more. The sphere(s) of religious liberty in America were, in turn, subject to a range of limits imposed by the legislative spheres.

Section Three

The Birth of the Secular Purpose Test

§ I Introduction to *Section Three*

The first two Sections of this dissertation provided in-depth analyses of individual cases in which American courts conceived of and enforced boundaries between religious and legislative spheres. While the precise form and substance of these boundaries differed somewhat in each case, jurists' methods for defining the limits of legislative powers in these cases showed remarkable consistency. Legislative purpose inquiries were a staple of courts' analyses of religious liberty claims. Whereas subsequent courts, as I show in the forthcoming section, would evaluate legislative purposes in Establishment Clause cases in terms of their secularity, earlier courts evaluated such purposes in terms of the enumerated powers they expressed, and the "public" ends they were supposed to advance.

Section Three takes a broader view of American law. In the following three chapters, I examine the U.S. Supreme Court's evolving methods for enforcing boundaries between religious and legislative spheres in the decades leading up to 1) the "incorporation" of the First Amendment's religion clauses in the 1940s, and 2) the introduction of the secular purpose test as a staple of Establishment Clause review in the case of *Lemon v. Kurtzman* (1971). *Chapter 7* is entitled, "An Emerging National Tradition: Religious Liberty in American Legal Thought, circa 1900." This chapter provides a snapshot, or overview, of American religious liberty jurisprudence at the turn of the century, as it was viewed through the eyes of leading legal theorists and analysts of the day. Instead of analyzing specific cases and legal rulings as previous chapters did, this chapter describes what influential thinkers thought religious liberty in America meant, based on *their* analyses of state and federal case law. *Chapter 8,* "The Centralization of

Religious Liberty Law, 1900-1947" returns to specific case studies, and U.S. Supreme Court rulings in the years leading up to the incorporation of the Free Exercise Clause in *Cantwell v. Connecticut* (1940), and the incorporation of the Establishment Clause in *Everson v. Board of Education* (1947).[1] I describe the meaning of incorporation in greater detail below; here, we must simply note that "incorporating" the religion clauses, in practice, means applying them to state and local laws, instead of to federal laws alone, in contrast to the Supreme Court's ruling in *Permoli v. Municipality No. 1 of New Orleans* (1945), which held that the religion clauses only limited the power of the federal Congress to establish religion, or prohibit the free exercise thereof.[2] Finally, *Chapter 9,* "The Birth of the Secular Purpose Test, 1947-1971" traces the advent of the secular purpose test in the Supreme Court's Establishment Clause jurisprudence. I show how three lines of cases transformed the Supreme Court's affirmation of the "public purpose" of "secular education" in Everson evolved into the subsequent requirement that all laws challenged under the Establishment Clause must evince a "secular legislative purpose" in order to pass constitutional muster.

The most important shifts in the Supreme Court's religion jurisprudence between 1900 and 1971 were not the incorporation of the religion clauses, or the alternating levels of strictness with which the Court enforced long-standing religious liberty norms, such as religious voluntarism, neutrality, and institutional differentiation. Incorporation shifted the locus of lawmaking from the states' courts to the Supreme Court, resulting in a religious liberty jurisprudence that was dictated from the top rather than one that

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[1] See *Cantwell V. Connecticut*, 310 U.S. 296 (1940). *Everson V. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

[2] *Bernard Permoli V. Municipality No. 1 of the City of New Orleans.* Also see Chapter 4, above.

emerged from an inter- and intra-state dialogue among local, state and federal courts. And, the lack of constancy with which the Court applied various religious liberty norms surely affected American jurisprudence, public policy, and religious practices. Even more than these important developments, however, the secular purpose test represented a methodological shift with profound theoretical and practical implications for the differentiation of religious and legislative spheres, especially with regard to the structured (and perceived) roles of religion in legislative discourse. I analyze the implications of the secular purpose test in the Conclusion. First, however, let us explore how the secular purpose test came to be.

Chapter 7

An Emerging National Tradition: Religious Liberty in American Legal Thought, circa 1900

> *An express guaranty of the freedom of religion is found in every American constitution. Congress is forbidden to make any law respecting an establishment of religion, or prohibiting the free exercise thereof, and in substance the same limitation of power restrains every state legislature. The provision of the constitution of Illinois may be quoted as comprehensive and typical…*[1]
>
> – Ernst Freund

§ 1 Introduction

As previous chapters have shown, American courts were conceptualizing and enforcing the legal boundaries between, and the substance of religious and legislative spheres throughout the nineteenth century. Jurists in state and federal courts judged cases according to the statutes and laws governing their respective jurisdictions. The same courts also drew upon legal norms and narratives developed outside their own jurisdictions. To what extent, then, did state and federal laws establish common boundaries between religious and legislative spheres, or enforce common principles of religious liberty? Did the distinctive phrasing of the states' constitution imply a polyglot legal system for the governance of religion?

[1] Ernst Freund, *Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan & Company, 1904), 489.

One way to answer these questions is to study legal treatises published around the turn of the century. In the late 1800s and early 1900s, scholars including Ernst Freund,[2] Thomas Cooley[3] and others collated and analyzed cases on numerous legal topics, including constitutional law and religious liberty. These treatises assessed cases and trends within states' and federal law, while also describing the broader relationships between state and federal law. Their authors were sometimes normative in tone and substance, presenting arguments about what the law should be, as opposed to merely stating what the law was. But the authors treated in this chapter were primarily descriptive, and became (to varying degrees) authoritative sources who were subsequently cited in numerous legal rulings.

I argue in this chapter that leading legal treatises published near the turn of the century portrayed religious liberty as a progressive and national tradition – an emerging cluster of shared legal norms upon which state and federal courts largely agreed. These norms were subject to interpretation, and the emerging tradition of religious liberty in the United States did not reflect a perfect consensus, or lead to uniform results. Nor did the transcendent character of these norms give courts authority to judge cases outside of their own jurisdictions. The federal religion clauses, for example, still applied only to federal laws; and, many states' courts were working through problems unique to the

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[2] Ernst Freund (1864-1932). Freund was a prolific and influential scholar who served as a professor at the University of Chicago, first teaching in the political science department, before accepting a full professorship in law. "His major contributions concerned the making and application of law." *The Police Power: Public Policy and Constitutional Rights* (1904) was his first major work. "Freund was concerned with the problems of legislative regulation, not only questioning its limits but also seeking to identify elements of sound legislation." Newman, *The Yale Biographical Dictionary of American Law*, 206.

[3] Thomas M. Cooley (1824-1898). Cooley was a treatise writer, law professor, and Justice on Michigan's Supreme Court. His *Treatise on Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union,* originally published in 1868, had been published in six editions by 1890, and was cited more frequently than any other legal text in the late nineteenth century. Ibid., 127-28.

socio-economic dynamics of their own regions. According to leading analysts at the turn of the century, however, the broad contours of American religious liberty jurisprudence – the methods, values, and norms by which courts differentiated and enforced boundaries between religious and legislative spheres – were stable and relatively uniform throughout most of the nation. This jurisprudence was not reducible to a single legal principle or metaphor against which courts could measure every statute that was challenged under state or federal constitutions. There were no simple three-prong tests that every court in the nation applied to every establishment or free exercise case, and there was certainly no secular purpose test, *per se*. Instead, courts weighed legislative acts against the enumerated and presumed powers of specific legislatures; against the perceived values and interests of particular communities; and against the natural and positively enumerated rights of individuals and groups within their jurisdictions. According to the legal thinkers evaluated in this chapter, this jurisprudence led American courts to 1) enforce strict, but not absolute forms of functional (and financial) differentiation of religious and legislative spheres; 2) treat citizens' religious opinions and practices as private matters beyond the scope of legislative police powers; 3) defend individuals' natural freedom of conscience in matters of religious belief and practice; 4) acknowledge legislature's police powers, under which authorities could punish licentious and dangerous behavior, regardless of the religious auspices under which it was engaged; 5) affirm that state and federal governments altogether lacked constitutional powers to "establish" religion, while reasoning that legislatures could "recognize" in non-sectarian ways the symbiotic relationships between religion, morality, and public order; and 6)

presume that the nation's legislatures did (and could) wield law and public policy on the basis of, and in service of predominant religious moral norms.

§ 2 Interstate Consensus before Incorporation

Several of the earliest and most influential treatises on American law described religious liberty in the United States in terms of a progressive and widening inter-state consensus about the limits of legislative powers in matters relating to religion. In 1833 Joseph Story opined that the American states must settle the problem of "whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape."[4] Already by 1848, however, James Kent noted that the states were addressing this problem through a shared set of similar legal language and norms. Kent explained that the "same principle" of the First Amendment's religion clauses "appears in all the state constitutions. The principle is generally announced in them without any kind of qualification or limitation annexed, and with the exclusion of every species of religious test."[5] There were important differences among the states, of course, and Kent immediately qualified his claim with the observation that New Hampshire, Massachusetts, New Jersey, Maryland, North Carolina, Tennessee and Mississippi still retained religious tests "to a certain extent."[6] Despite these remnants of a bygone era, Kent maintained that state and federal law were unified in their defense of religious liberty.

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[4] Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution.*, 3, 727.

[5] James Kent, *Commentaries on American Law*, 6th ed. (New York: The Principal Law Booksellers, 1848), 35.

[6] Ibid.

Legal treatises published closer to the turn of the 20th century amplified this narrative of national progress. Thomas Cooley, for example, wrote in his influential 1903 treatise on constitutional law:

> A careful examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief.[7]

Henry Black's handbook on constitutional law, published in 1910, was typical in emphasizing the limits of federal courts' jurisdiction: "If any state chose to establish a religion," he wrote, "it would not be contrary to the federal constitution. Whatever regulations the several states may see fit to make, either in extension or abridgment of the freedom of religion, they cannot be annulled by the national government or its courts." Like Cooley, however, Black argued that state and federal courts applied overlapping principles in cases involving religious liberty claims: "But, as we have stated above, the constitutions of all states make such provision on this subject as to secure the full measure of religious liberty which is deemed essential under American institutions and ideas."[8] The libertarian-leaning theorist Christopher G. Tiedeman more explicitly (and hyperbolically) portrayed the federal constitution's religion clauses as a direct catalyst for subsequent developments in states' laws. In his 1886 *Treatise on the Limitations of Police Power,* Tiedeman wrote:

> Congress was therefore denied by the first amendment to the Constitution of the United States the power to make any law respecting an establishment of religion

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[7] Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 7th ed. (Boston: Little, Brown, and Company, 1903), 659.

[8] Henry Campbell Black, *Handbook of American Constitutional Law* (St. Paul, MN: West Publishing Company, 1910), 527-28.

> or prohibiting the free exercise thereof…Proceeding from this limitation upon the power of the national government to regulate religion, there was ultimately incorporated into the constitutions of almost all of the States a prohibition of all State interference in matters of religion, thus laying the foundation for that development of a complete and universal religious liberty, a liberty enjoyed alike by all, whatever may be their faith or creed. Thus and then, for the first time in the history of the world, was there a complete divorce of church and State.[9]

The "divorce" of church and state was more ambiguous than Tiedeman suggested. Yet the perceived consensus among state and federal courts about the basic principles of religious liberty was real. Ernst Freund, likely the most influential thinker treated in this chapter, argued in a 1904 treatise that state and federal laws imposed the same basic limits on legislative powers in relation to religion:

> An express guaranty of the freedom of religion is found in every American constitution. [The federal] Congress is forbidden to make any law respecting an establishment of religion, or prohibiting the free exercise thereof, and in substance the same limitation of power restrains every state legislature.[10]

Leading legal minds, therefore, agreed that state and federal courts applied similar constitutional provisions and norms in their respective jurisdictions. Freund referred to state and federal laws collectively as "the constitutional guaranty" of "freedom of religion" "religious liberty."[11] Tiedeman wrote: "The exact phraseology varies with each constitution, but the practical effect is believed in the main to be the same in all of

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[9] Christopher Gustavus Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint* (St. Louis: The F.H. Thomas Law Book Co.), 158-59. Tiedeman echoed the narrative of cultural progress elsewhere in his writings. See, for example, 175, where he argues that public opinion was increasingly against religious tests for legal testimony: "The growth of public opinion towards the complete recognition of religious liberty is exerting its influence upon this rule, and in many of the State constitutions there are provisions which abolish this and every other religious qualification of witnesses." Tiedeman cites such provisions in Arkansas, California, Florida, Indiana, Iowwa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, Ohio, Oregon, and Wisconsin.

[10] Freund, *Police Power: Public Policy and Constitutional Rights*, 489. For more on Freund, see: Oscar Kraines, *The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law*. (University, AL: University of Alabama Press, 1974).

[11] Freund, *Police Power: Public Policy and Constitutional Rights*, 490, 97.

them."[12] Cooley claimed that "[c]onsiderable differences" existed between state constitutions; nonetheless, he compiled a detailed list of "things which are not lawful under any of the American constitutions."[13] In an earlier treatise, Cooley presciently suggested that, "The fourteenth amendment is perhaps broad enough to give some securities [to the religious liberties of the people of the States against the action of their respective state governments] if they should be needful."[14] Well before his prediction was realized, however, American courts were reviewing state and federal laws using shared legal principles. What, then, was the substance of American religious liberty at the turn of the century?

§ 3 Differentiating Spheres and Defining Religious Liberty

The Free Exercise of Religion

The free exercise provisions of state constitutions generally protected citizens' rights to believe, worship, and express religious *opinions* of their choice in ways that were consistent with public safety and order. Christopher Tiedeman summarized free exercise rights as the liberty of "each individual…to worship God in his own way, and to give free expression to his religious views."[15] Willis Bierly defined it as an "absolute freedom of choice as to religious beliefs."[16] Thomas Cooley reasoned that state and federal

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[12] Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 159.

[13] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 662ff.

[14] *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, and Company, 1880), 213.

[15] Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 160.

[16] Willis Reed Bierly, *Police Power: State and Federal Definitions and Distinctions* (Philadelphia: Rees Welsh & Company, 1907), 38.

constitutions protected citizens' rights to relate to the "Infinite" through worship and public professions of faith without interference from authorities:

> No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object…An earnest believer [also] usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.[17]

Based on an extensive survey of state and federal constitutions and cases, Ernst Freund concluded that the relatively detailed list of principles enumerated in Illinois' constitution was "comprehensive and typical" of religious liberty provisions implicit in other jurisdictions. Illinois law stated:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.[18]

This language defined the substance *and* limits of the legislature's powers, as well as the substance and limits of state residents' free exercise rights: the legislature could *not* lawfully discriminate against or in favor of persons on the basis of their religious views, or coerce persons to support or attend a place of worship against their will; but it *could* punish acts of licentiousness and other behaviors that threatened public safety and order.

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[17] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 665. Elsewhere, Cooley similarly wrote: "They [state and federal constitutions] forbid restraints upon the free exercise of religion according to the dictates of conscience, or upon the free expression of religious opinions." See: *The General Principles of Constitutional Law in the United States of America*, 215.

[18] Constitution of Illinois, Art. II. § 3. As quoted in Freund, *Police Power: Public Policy and Constitutional Rights*, 489.

Individuals *could* lawfully hold and profess religious opinions of their choosing, and perform coinciding acts of worship; but, individuals' religious opinions did not exempt them from criminal laws or requisite legal duties. The language of Illinois' constitution was, therefore, defined religious liberty relatively thoroughly, but not expansively. Freund nonetheless concluded that state and federal laws protected a sphere of "religious" activities broader than mere opinions and formal acts of worship:

> The constitutional guaranty of religious liberty covers above all the two cardinal points of worship and doctrine, the two forms in which the uncontrollable facts of faith and opinion find their principal outward expression: it includes secondarily also customs, practices and ceremonies, which, even where they do not form directly a part of worship, are prescribed by religion.[19]

While legislatures were forbidden to coerce or intercede in relationships between persons and God, legislators were duty-bound to uphold social order and enforce uniform standards of justice when persons' actions threatened the community. This principle was explicit in some state constitutions, including the provision in Illinois' constitution that the liberty of conscience "shall not be construed to…excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state."[20] In others, it was implicit in the legislatures' enumerated police powers, and in the very idea of republican

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[19] Ibid., 497. Freund also noted that American courts had not articulated the extent of the citizens' rights to associate for religious purposes, but argued that laws hampering such associations were likely unconstitutional. "Whether freedom of religion requires freedom of association for religious purposes, apart from the holding of property, is a question upon which the courts have not passed. The right of association is enjoyed and exercised to the fullest extent without any attempt at legislative restraint or interference. It may be safely asserted that legislative restraint on the right of association for religious purposes, which would in any material respect hamper the free exercise of religion, or favor one denomination against the other, or make the right to associate dependent upon the arbitrary discretion of administrative officers, would be unconstitutional." See ibid, 496-497. Freund elsewhere stated: The essence and value of the constitutional guaranty lies in two points: first, that religious belief as such, and its peaceful and orderly manifestation in worship and precept, may not be treated as a menace to the peace and welfare of the community, or as a possible cause of disorder; and second, that whatever restraint is placed upon religious activity, through the rules of property or otherwise, must be applied to all denominations alike, in order to avoid the preference and discrimination which the constitutions forbid. Ibid., 493.

[20] As quoted in ibid., 489.

government. "Thus acts of cruelty or debauchery," Freund concluded, "would be properly repressed under the police power, though demanded by some religion as a form of worship."[21] Henry Black, in a paragraph preceding his discussion of religious liberty, summarized a guiding principle of American law as follows:

> In an organized civic society, living under the dominion of law, liberty is something very different from mere license. The state has the right to take measures essential to its own health and preservation, and to enact regulations for the dealings of citizen with citizen. And rights must be exercised in accordance with these laws. By them liberty is not so much restricted as defined. Liberty is marked out, on the one side, by the reciprocal duties of government and subject, and on the other side, by the co-existence in all of equal rights.[22]

In short, constitutional provisions for religious liberty did not preclude legislatures from regulating human relationships. Religious liberty extended to socially beneficial or benign beliefs and actions that did not infringe upon the equal rights of others, and no further. The rights and welfare of all were to be protected by fairly administered standards of justice.

Establishment of Religion:

Disestablishment norms in state and federal constitutions also prohibited laws that coerced, persecuted, or bestowed unequal privileges upon individuals or groups on the basis of their religion. This point is worth re-emphasizing: *leading analysts at the turn of the century viewed religious coercion, preferences, and persecutions as characteristics of unconstitutional religious establishments – not just as infringements of individuals' free exercise rights.*

The Illinois constitution did not use the phrase "establishment of religion," but Ernst Freund argued that it and virtually every other state constitution prohibited several

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[21] Ibid., 497.

[22] Black, *Handbook of American Constitutional Law*, 493.

manifestations of established religion. A prohibition on the use of tax funds to support religious institutions was the most obvious of these norms, insofar as government-funded maintenance of clergy and church property was a basic characteristic of state-sponsored religious establishments. While state legislatures undoubtedly possessed the power to levy taxes, Freund argued that legislatures could not use this power to fund religious institutions: "There is now no American state in which the power of taxation is exercised for the support of one religion, or a number of religions, and all legislation to that effect would be contrary to a provision, that 'no person shall be required to attend or support any ministry or place of worship against his consent.'"[23] Thomas Cooley similarly described the use of tax funds for "religious instruction" as unlawful under every American constitution. In his reading of state and federal laws, financing religion was outside the prerogative of American government: "Not only is no one denomination to be favored at the expense of the rest," he wrote, "but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it."[24] Although states could lawfully exempt religious institutions from tax obligations, legislatures could not lawfully use their powers of taxation to procure or disperse funds to religious institutions.

Ernst Freund optimistically reasoned that overt religious persecution had run its course in the United States, claiming that state and federal constitutions all reflected "the principle of toleration." Religious toleration was characterized by the absence of "sectarian" laws that were intended to "punish or restrain expressions of sentiment

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[23] Freund, *Police Power: Public Policy and Constitutional Rights*, 490. Emphasis added.

[24] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 663-64.

having reference to religion, which are contrary to some particular [established] religion, faith or doctrine."[25] In contrast to the laws of fifteenth-century England and several of the early American colonies, American laws by the turn of the century "amply secured" such toleration for minority sects.[26]

Religious *equality* was less ensconced in American law. Despite recent progress in several states, Freund noted that several others still imposed religious tests for public office and other legal functions. Such tests did not "impair personal liberty or affect rights of property" to the same extent as did "sectarian legislation." However, religious tests "discriminate[d] on account of religion," and were inconsistent with the overarching principle that "no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions."[27] This principle, implicit in virtually every states' constitutions, was, in some states, neutered by the fact that religious tests were, themselves, constitutional provisions and thus beyond the scope of judicial review. Freund explained:

> The disqualification of non-Christians has disappeared everywhere: and it is inconsistent with a provision that "no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions." In the absence of such a provision, it was held in Massachusetts and Illinois that that an atheist may be disqualified from acting as a witness, but the insertion of the provision in the Illinois constitution of 1870 was held to abrogate the former rule. In Maryland, North Carolina, Tennessee, Mississippi, and Arkansas, atheists are excluded from office by constitutional provisions; and this is conclusive, since the federal constitution does not protect the right to hold office under the states. If the provision were not constitutional [i.e. written into these states' constitutions], but statutory, there can be no doubt that a discrimination against atheists with reference to the right to hold office, would be, under probably every state constitution, an invalid discrimination on account of religious opinion.[28]

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[25] Freund, *Police Power: Public Policy and Constitutional Rights*, 489.

[26] Ibid., 490.

[27] Ibid., 491.

[28] Ibid.

Thomas Cooley addressed similar concerns in his writings. Whereas Freund had tepidly affirmed the religious "toleration" present in every American state, Cooley more forcefully denounced unequal privileges granted to some sects as unlawful forms of religious "persecution" that flaunted non-establishment norms:

> The legislatures have not been left at liberty to effect [sic] a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over the other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.[29]

Several states fell short of the religious equality that Cooley advocated; nonetheless, emergent state and federal disestablishment norms generally prohibited legislatures from enacting laws that *funded, coerced, persecuted, or bestowed unequal privileges* on religious individuals or institutions, as such.

Cooley emphasized that "[c]ompulsory attendance upon religious worship" was prohibited under every American constitution. These prohibitions were rooted in legal, political, and theological norms. In much the same way that funding religious institutions exceeded the limits of the state legislatures' powers of *taxation*, enforcing religious duties exceeded the limits of states' *police* powers. Cooley attributed this norm to a particular conception of "true" worship:

> It is the province of the State to enforce, so far as it may be found practicable, the obligations and duties which the citizen may be under or may owe to his fellow-citizens or to society; but those [obligations and duties] which spring from the relations between himself and his Maker are to be enforced by the admonitions

[29] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 663-64.

> of the conscience, and not by the penalties of human laws. Indeed, as all real worship must essentially and necessarily consist in the free-will offering of adoration and gratitude by the creature to the Creator, human laws are obviously inadequate to incite or compel those internal and voluntary emotions which shall induce it, and human penalties at most could only enforce the observance of idle ceremonies, which, when unwillingly performed, are alike valueless to the participants and devoid of all the elements of true worship.[30]

American legislatures were, in other words, deprived of power to enforce religious duties precisely because an individual's conscience – and only that – could compel true worship. Religious compulsion not only encroached on citizens' free exercise rights; it exceeded the structurally limited powers of government.

Play in the Joints: Recognizing and Regulating Religion

Legal analysts at the turn of the century generally agreed that state and federal constitutions did not require legislative indifference to religion. There existed in American law grey areas in which governments could legitimately "recognize" religion without thereby "establishing" it. "The state avails itself of the existence of religious sentiment among the people," Freund explained, "or acknowledges those sentiments in official utterances, in the following matters: the reference to the divine power in the constitutions; the proclamation of thanksgiving days; the use of the religious sanction for the oath, leaving a right of affirmation where the oath is objected to; and the recognition of the religious celebration of marriages."[31] Thomas Cooley used similar language, concluding: "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public

[30] Ibid., 664.

[31] Freund, *Police Power: Public Policy and Constitutional Rights*, 491.

transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings."[32] Henry Black argued that "many of our best civil and social institutions, and the most important to be preserved in a free and civilized state, are founded upon the Christian religion, or upheld and strengthened by its observance…and while toleration is the principle in religious matters, the laws are to recognize the existence of that system of faith, and our institutions are to be based on that assumption."[33]

Two main factors validated such "recognitions" of religion in light of constitutional objections. First, governments could not recognize religion in "sectarian" ways. Second, governments could not coerce citizens to participate. Freund suggested in passing that the employment of chaplains in various branches of government was legally questionable: Though "sanctioned by long acquiescence…the abandonment of the practice in most of the state legislatures indicates some doubt as to its propriety."[34] Other recognitions of religion apparently rested on stronger legal footings. According to Freund's analysis, thanksgiving proclamations, religious oaths, and governmental recognition of religious weddings were not actually *religious* in character – they were merely *moral*. "In these cases the government neither compels nor restrains, and its relation to religion may be described as purely moral; hence these practices are not regarded as objectionable on constitutional grounds."[35] Thomas Cooley echoed this logic, concluding that governmental recognitions of religion that expressed the "general

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[32] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 669.

[33] Black, *Handbook of American Constitutional Law*, 528.

[34] Freund, *Police Power: Public Policy and Constitutional Rights*, 492.

[35] Ibid., 491.

religious sentiment of mankind" had been deemed valid in light of their ecumenical character and valuable social functions. Certain theological truths were acknowledged by everyone. Indeed, governmental recognitions of the "Supreme Being" fulfilled social duties rather than religious ones. Cooley explained:

> Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. This public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of public morals, and valuable, if not indispensable assistants in the preservation of the public order.[36]

This passage defined a narrow range of acceptable religious practices in legislative and other governmental spheres. Government officials were not forbidden to invoke religious themes in public addresses, or to employ military chaplains, or to exempt religious institutions from taxation. Neither, however, were governments' powers unlimited in such matters: the "spirit" of the constitution implied that legislative acts must avoid "discrimination in favor of or against any one religious denomination or sect." Second, governmental recognitions of religion were justifiable as expressions of

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[36] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 669.

legislature's powers only insofar as they served social and moral purposes – not because they fulfilled religious duties. In other words, non-sectarian recognitions of religion fell loosely within the ambit of legislature's police powers because religion and religious institutions complemented governments' acknowledged power to preserve the public order. In sum, legislatures could thus "recognize" religion without "establishing" it only by remaining fastidiously non-sectarian and non-coercive.

Several other types of religion-related legislation skirted the boundaries of constitutionality, according to legal scholars at the turn of the century. State laws that incorporated religious societies, punished blasphemy, prohibited certain activities on Sundays, and allowed (or prohibited) Bible reading in public schools were on the books of many, if not all states. Such statutes posed difficult legal questions, and illustrated that the differences between establishing and recognizing religion, and between regulating and prohibiting the free exercise of religion, were not uniformly settled. Were like-minded groups of religious citizens entitled to receive corporate status? If so, could legislatures limit the rights and powers of the resulting corporations? Could legislatures ban blasphemous speech, or require businesses to close on Sundays? And on what grounds? Could public schools require children to read the Christian Bible, or exclude the Bible from the curriculum? The legal principles governing such questions were nuanced and sometimes ambiguous, according to thinkers like Cooley and Freund.

Despite some differences in the categorization and regulation of religious corporations in different states, American courts had established basic principles for governing religious trusts and corporations. Freund observed that American citizens enjoyed unfettered rights of *association* for religious purposes. Whether the principles of

religious liberty required that groups of like-minded believers were entitled to formal corporate status, or to hold property in trust was less clear. Freund explained, "The exercise of religion practically requires the use of property, but it does not follow that its free exercise involves uncontrolled property relations."[37] Every state had "made provision for the formation of religious societies as property holding bodies." Not every state technically recognized religious societies as corporations, however, and Virginia and West Virginia law even forbade the legislature from granting corporate status to churches. These differences aside, the formation of religious entities as property holding bodies necessarily involved substantial regulation of those bodies. But these regulations were not unjust restrictions of religious liberties: "Such regulation operates practically as a restraint," Freund noted, "but is hardly felt as such; for the statutes are generally framed for the convenience and accommodation of the societies, and not for their control."[38] Freund further noted that all states fixed the maximum amount of property that religious corporations could hold; and that many states enforced statutes of "mortmain" limiting religious corporations' power to receive property by devise or bequest. Mississippi, for example, prohibited "all devises of real property to religious corporations and associations."[39] Constitutional principles required that such restrictions be applied evenhandedly to all religious sects and denominations. These restrictions were justified, however, on the grounds that they expressed one or more of the legislatures' enumerated powers:

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[37] Freund, *Police Power: Public Policy and Constitutional Rights*, 495.

[38] Ibid.

[39] Ibid., 496.

> Whether they [regulations] are regarded as manifestations of the police power or as rules of property, or, in so far as they affect corporations, as conditions annexed to the grant of corporate capacity, their constitutionality has never been questioned; and it may therefore be safely stated that religious liberty does not preclude the regulation or restraint of the right to hold property for religious purposes, and does not impair the well understood and historically established power of the state over the corporate holding of the property or the holding of property upon charitable and eleemosynary trusts.[40]

Christopher Tiedeman more forcefully argued that these legislative powers were not absolute. In addition to the principle that "whatever privileges are granted to one [religious] society or sect, must be granted to all,"[41] American courts had restricted their own power, and the power of legislatures to intervene in the internal affairs of religious bodies. American courts could apply only civil and criminal laws, even when adjudicating property disputes or other conflicts arising from doctrinal differences among a corporation's members. Such cases implicated both free exercise and establishment concerns, insofar as the outcome of civil disputes depended partly upon citizens' membership in a religious society. [42]

Sunday laws around the nation also raised questions about whether governments could enforce religious duties, or favor the religious practices of a particular sect. Ernst

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[40] Ibid.

[41] Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 163.

[42] Ibid., 165-66. "The law cannot undertake to regulate the religious affairs of the society, or overrule the decisions and actions of the properly constituted authorities of the church in respect to such religious affairs. The creed, articles of faith, church discipline, and ecclesiastical relations generally, are beyond State regulation or supervision…But whenever the civil and property rights of the individual are invaded, the State is justified and expected to exercise the same control and supervision as it would in the case of any other incorporation…Membership in the corporation assumes ordinarily a more or less religious aspect, and depends upon the performance of certain religious conditions. The civil rights of such a member may, therefore, be materially affected by the decisions of the ecclesiastical authorities, and to that extent and for the protection of such civil rights are these decisions on religious matters subject to review. The religious status cannot be determined in any event by a civil court, except as it bears upon and interferes with the temporal or civil rights of the individual. And even then the courts are not permitted to review and determine the essential accuracy of the decision. The court must confine its investigation to ascertaining, whether the proper religious authorities had had cognizance of the case, and had complied with their organic law in the procedure and how far the decision affects the civil rights under the by-laws and character of the corporation."

Freund concluded that most states' Sunday laws were more or less modeled after fifteenth-century British Sabbath regulations in England, but varied by state:

> The majority of states forbid all common or ordinary labor (works of necessity and charity, and sometimes other stated kinds of business, excepted), and all game, sport or play. Employment of others is specially forbidden in a number of states. Some states forbid only the keeping open of shops, stores and places of business, or only public amusements. Colorado and Illinois forbid the disturbing of the peace and good order of society by labor or amusement, and New Hampshire likewise forbids only work to the disturbance of others. California, Idaho and Arizona have no Sunday legislation.[43]

Freund claimed it was "obvious that the institution of the Sabbath rests historically upon religious injunction," and further noted that "the connection of the secular law with the law of Christianity [in relation the observance of rest on Sundays] has been judicially recognized."[44] This connection functioned in some states as an indirect justification of Sunday laws in that the ability of Christians, who made up large majorities in many communities, to freely exercise their religion required a community-wide day of public tranquility: "In Minnesota and Dakota," Freund explained, "the acts forbidden are described in the statute as serious interruptions of the repose and religious liberty of the community: it seems thereby implied that religious liberty involves a claim to have others respect one's religious feelings and practices."[45]

Rulings defending Christians' right to a day of tranquility were less pervasive, however, than rulings emphasizing the "secular" character and functions of Sunday laws. Echoing the Georgia Supreme Court's logic in *Hennington,* Freund concluded that American courts had generally affirmed the constitutionality of Sunday laws on the

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[43] Freund, *Police Power: Public Policy and Constitutional Rights*, 168-69.

[44] Ibid., 501.

[45] Ibid.

grounds that they were "secular" expressions of legislatures' police powers, and were appropriately accommodated to the rights of religious minorities:

> It is well established that the character of Sunday legislation is secular and not religious, and under the principle of separation of church and state it could not be otherwise. The enforced abstention from work has been held to be justified by the experience, that periods of rest from ordinary pursuits are requisite to the moral and physical wellbeing of the people.[46]

Such laws were "secular" because they imposed rest as a civil duty rather than as a religious one. Even here, however, the religious practices of the community could be taken into account in choosing the day of corporate rest. "If one day is to be selected," Freund admitted, "it is a recommendation rather than an objection, that the day chosen conforms to the voluntary practice of the vast majority of the people, since the choice should cause as little inconvenience as possible."[47] Freund also suggested an alternative interpretation of Sunday laws as "an established social institution." Social conventions implied different standards for public order at different times of the day; so, why not acknowledge the same for different times of the week? "As under natural conditions public order has a different meaning in the night time and in the day time, so it has under social conventions a different meaning on Sundays and weekdays."[48] Once again, the validity of such regulations was rooted in the specific powers of each legislature: "As such requirements where they exist proceed as a rule from municipal authorities, and not

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[46] Ibid., 169. Thomas Cooley similarly explained that Sunday laws were generally defended on one of two grounds: first, that "desecration of the Christian Sabbath" was morally offensive to large segments of a community; and/or second, as "sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind." See Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 675.

[47] Freund, *Police Power: Public Policy and Constitutional Rights*, 502.

[48] Ibid., 169.

from the [state] legislature, their validity depends in part also upon the extent of the delegation of power to the municipality."[49]

Although American courts had affirmed many Sunday regulations as valid exercises of governments' police powers, many courts and legislatures expressed concerns about the unequal burdens that such laws placed on those who observed a different day of rest. Exemptions from Sunday laws varied significantly by state. Jews and Saturday Sabbatarians were granted limited exemptions from Sunday laws in at least fourteen states, according to Freund, on the condition that their Sunday activities did not "disturb others."[50] On the other hand, similar exemptions had been overturned in Louisiana on the grounds that they granted "special privileges to a class of the community."[51] Freund opined that such rulings were incongruous with American principles and practical experience:

> But when we consider that the prohibition of work carried on in private is justifiable only on the ground of protection against an unfair advantage over those who rest, it is clear that there is no valid reason for the prohibition where another day is observed, and that on the contrary, such prohibition creates a special burden. All laws should scrupulously respect the principle of religious equality, and as experience shows that the exemption with the bounds indicated is quite feasible, it should be recognized as a constitutional right.[52]

Religion in public schools

Religious exercises and Bible-reading in public schools were controversial around the turn of the century. Tensions flared in many communities between Protestants and

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[49] Ibid., 169, note 16.

[50] Ibid., 502.

[51] Ibid. The Louisiana case was *Shreveport v. Levy,* 26 La. Ann. 671. The states with exemptions, according to Freund, included: Arkansas, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New York, Ohio, Rhode Island, Virginia, and West Virginia.

[52] Ibid.

Catholics over which translation of the Bible schools should use. Other controversies and suits focused more on the issue of compulsion. Litigants argued that requiring students to participate in such activities was a coercive form of established religion, and that using public funds to pay for such activities forced taxpayers to support religious practices and tenets with which they did not necessarily agree. State-level courts and legislatures had not resolved these controversies uniformly by the turn of the century. Freund noted that Washington State's laws prohibited using the Bible in public schools, whereas Mississippi law provided that "the Bible shall not be excluded from the public schools."[53] The Supreme Court in Maine, where attendance at the public schools was not compulsory, had upheld the expulsion of a Catholic child from public school "for refusing to read the Protestant version of the Bible." The Supreme Courts of Wisconsin and Ohio, on the other hand, had ruled that Bible-reading in public schools inappropriately compelled taxpayers to support "religious worship."[54] Meanwhile, the Nebraska Supreme Court had ruled that school authorities could decide for themselves whether or not to include the Bible in their curricula, but that the judiciary could intervene if schools' practices were too sectarian:

> …whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities to determine, but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence.[55]

Notwithstanding these scattered interpretations of religious exercises and Bible-reading in public schools, the legal principles governing such practices were relatively stable.

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[53] Ibid., 493.

[54] Ibid., 492.

[55] Ibid. Quoting *State v. Scheve*, 93 N.W. 169.

Freund described a wide consensus among state laws affirming that students should not be forced to participate in religious exercises against their (or their parents') will; that any religious exercises in public schools must not require special funding; and that such exercises must carefully avoid sectarian form and content. Here, again, Freund referred to the federal constitution as consistent with, if not quite constitutive of, the meanings of state-level religious liberty provisions:

> Religious liberty would seem to require that pupils at the request of their parents, or otherwise for good cause, must be excused from attendance, and this is recognized by many states…It is hardly possible to contend that reading from the Bible unless carefully restricted to purely historical passages, is not a religious exercise, whether sectarian or not. A liberal interpretation of the constitution might allow such non-sectarian religious instruction in the public schools as is implied in reading from the Bible without comment, provided no special funds are expended for that purpose; but would not allow the forcing of such instruction upon children against the wishes of their parents; and this is the view taken in most of the states.[56]

Christopher Tiedeman, writing a decade-and-a-half before Freund, reached similar conclusions. Tiedeman acknowledged that some states' laws allowed limited religious instruction in public schools partly because attendance was voluntary. Tiedeman rebutted the notion that such practices were allowable, however, simply because students could theoretically forego a free public education in order to attend a privately-funded school of their choice:

> It is true that the Hebrew or infidel need not attend the public schools, if he objects to the religious exercises conducted there. But such a regulation would amount to the bestowal of unequal privileges, which is as much prohibited by our constitutional law as direct religious proscription. In accordance with the permissible recognition of Christianity as the prevailing religion of this country, it may be permitted of the school authorities to provide for devotional exercises

[56] Ibid., 492-93.

> according to the Christian faith, but neither teacher nor pupil can lawfully be compelled to attend.[57]

Tiedeman also rebutted the argument that religious instruction was a necessary aspect or means of the moral training students received in public schools. Tiedeman affirmed the importance of moral education, and defended the governments' duty to provide it in public schools. But, he distinguished "morality" from "religion," and reasoned that public schools should seek to educate diversely religious and non-religious students without treading on anyone's conscience:

> The development of the mind without the elevation of the soul, only sharpens the individual's wits and makes him more dangerous to the commonwealth. The teaching of morality is therefore not in any sense objectionable; on the contrary, it should be the chief aim of the public school system. But religion should be carefully distinguished from morality. The Jew, the Christian, the Chinese, the Mohammedans, the infidels and atheists, all may alike be taught the common principles of morality, and the State can as well provide for moral instruction in its public schools. It is its duty to do so. But moral instruction does not necessitate the use of the Bible, or any other recognition of Christianity, and such recognition is unconstitutional, when forced upon an unwilling pupil.[58]

Blasphemy

Legal commentators' interpretations of the nation's withering "blasphemy" laws at the turn of the century highlighted tensions between traditional legal norms and the emerging inter-state consensus about religious liberty. In his *Commentaries on the Laws of England*, William Blackstone had classed blasphemy as one of eleven "offences against law and religion" punishable under British common law.[59] In British law, blasphemy

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[57] Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 163.

[58] Ibid.

[59] The offences included: 1) apostasy; 2) heresy; 3) reviling the ordinances of the church or non-conformity to the worship of the Church of England; 4) blasphemy; 5) profane and common swearing and cursing; 6) witchcraft, conjuration, inchantment [sic], or sorcery; 7) religious imposters; 8) simony; 9) Sabbath-breaking; 10) Drunkenness; and 11) lewdness. Blackstone also makes note of having "bastard children" in this category

consisted of denying "the being or providence" of God; "contumelious reproaches of our Savior Christ"; or "profane scoffing at the holy scripture, or exposing it to contempt and ridicule."[60] Such offences were "punishable at common law by fine and imprisonment, or other infamous corporal punishment: for christianity [sic] is part of the laws of England."[61] American jurists in the nineteenth century frequently cited Blackstone in their interpretations of state and local laws against blasphemy. They increasingly tempered Blackstone's assessment of blasphemy laws, however, with indigenous notions of religious liberty.

Whereas Blackstone had assumed that Christianity and the Church of England were fundamentally embedded in, and protected by English law, American courts came to view Christianity's legal status in more qualified terms. Legal commentators emphasized the influential precedents set forth in a series of blasphemy cases argued between 1811 and 1838 in New York, Pennsylvania, Delaware, and Massachusetts.[62] Ernst Freund explained, "In these cases the [judicial] opinion was expressed, that a willful and malicious denial of God, or a similar attack upon Christianity, was sufficient to constitute the offense, one of the arguments relied upon being that Christianity is part of the law of the land."[63] In all but one of these cases, the courts had ruled that the mere denial of God or Christianity was not "blasphemous." When uttered without willful malice, calumny, or "abusive language," such statements were protected forms of speech

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of crimes and misdemeanors. See Blackstone's *Commentaries,* Book 4, Chapter 4, pp. 42ff; e.g. in Blackstone, *Chitty's Blackstone*, 2.

[60] Ibid., quoting Book IV, Ch. 4, p. 59 (at p. 42 in this edition)

[61] Ibid.

[62] See: *People v. Ruggles,* 8 Johns. (NY) 290 (1811); *Updegraph v. Commonwealth*, 11 Serg. and Rawle (PA) 394 (1824); *The State v. Thomas Jefferson Chandler*, 2 Harr. (DE) 553 (1837); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206 (1838).

[63] Freund, *Police Power: Public Policy and Constitutional Rights*, 494.

and religious expression. As for a Massachusetts court's ruling that found such a denial as blasphemous, irrespective of motive, Freund insisted:

> The Massachusetts decision is not consistent with present ideas of freedom of conscience and its expression, nor is it conceivable that the Kneeland case would be decided in Massachusetts to-day as it was decided sixty years ago. Public sentiment and long continued practice of toleration must be regarded as conclusive upon the true interpretation of the constitutional freedom of religion, which cannot be irrevocably fixed by one decision rendered by a divided court, and never since acted upon.[64]

Freund further argued that blasphemy laws should be rooted in legislative police powers, and tempered by principles of religious liberty – not in the notion that Christianity was a part of American law:

> The decisions in other cases can be sustained without subscribing to all that was said by the courts in support of them [about Christianity's legal status]. The freedom of religion demands the freedom of attack; but the right of attack and public propaganda does not justify the violation of public order and common decency. The offence of blasphemy, to be consistent with the constitution, should not be held to be complete without calumny, detraction or abusive language; it should in other words be treated like profaneness, upon principles applicable to all nuisances.[65]

Thomas Cooley similarly described the legal status of Christianity in relation to American blasphemy laws. In his 1891 treatise, *The General Principles of Constitutional Law,* Cooley noted that state and federal courts,

> …find it necessary to take notice that the prevailing religion of the country is Christian, and that because of that fact certain conduct may constitute a breach of public decorum, and therefore be illegal, though it might not be where a different religion prevailed. The law of blasphemy depends largely for its definition and application upon the generally accepted religious belief of the people; and in the law of contracts many provisions might be found to be illegal in a Christian country which would be enforced where the Mohammedan or some other form of religion prevailed.[66]

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[64] Ibid.

[65] Ibid., 494-95.

[66] Cooley, *The General Principles of Constitutional Law in the United States of America*, 215.

Cooley elaborated on the overlap between police regulations and the moral precepts of Christianity in American law in a subsequent treatise on constitutional law published in 1903. There, he emphasized the inevitable impression of a community's moral norms on its laws, even as he emphasized the distinct spheres and powers that American courts had begun to carve out for church and state:

> The criminal laws of every country are shaped in greater or less degree by the prevailing public sentiment as to what is right, proper, and decorous, or the reverse; and they punish those acts as crimes which disturb the peace and order, or tend to shock the moral sense or sense of propriety and decency, of the community. The moral sense is largely regulated and controlled by the religious belief; and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws, and to corrupt the community.[67]

While punishing profane and blasphemous acts thus fell within the scope of American legislatures' presumed powers, Cooley reasoned that such laws were legally rooted in positive – not divine – law.

> It is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true. The best features of the common law, and especially those which regard the family and social relations; which compel the parent to support the child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy, -- if not derived from, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book. But the law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of

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[67] *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 670. On this point also see: Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 167. "Anything, therefore, that is calculated to diminish the people's religious inclinations is detrimental to the public welfare, and may therefore be prohibited. Public contumely and ridicule of a prevalent religion not only offend against the sensibilities of the believers, but likewise threaten the public peace and order by diminishing the power of moral precepts. Inasmuch, therefore, as Christianity is essentially the religion of this country, any defamation of its founder or of its institutions, as well as all malicious irreverence towards Deity, must and can be prohibited. These acts or offenses are generally comprehended under the name of *blasphemy.*"

> those precepts, though we may admit their continual and universal obligation, we must nevertheless recognize as being incapable of enforcement by human laws…The precepts of Christianity, moreover, affect the heart, and address themselves to the conscience: while the laws of the State can regard the outward conduct only; and for these several reasons Christianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precepts and principles have been incorporated in and made a component part of the positive law of the State.[68]

Laws prohibiting blasphemy were constitutionally justifiable, under this view, not because governments admitted the divine origin and truth of Christianity, but because "malicious" attacks on pervasive religious beliefs threatened to undermine morality and in predominantly Christian communities. The crime of blasphemy, therefore, properly included only *malicious* ridicule of the deity and Christianity, but not earnest theological disputations about God's character and attributes:

> It is a willful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent Creator, Governor, and Judge of men, and to prevent their having confidence in him as such. Contumelious reproaches and profane ridicule of Christ or of the Holy Scriptures have the same evil effect in sapping the foundations of society and of public order, and are classed under the same head.[69]

Cooley reasoned that laws prohibiting such attacks were limited by, and consistent with American constitutional principles of religious liberty. On one hand, no sane person could possibly feel compelled to commit blasphemy: "The language which the Christian regards as blasphemous, no man in sound mind can feel under a sense of duty to make use of under any circumstances, and no person is therefore deprived of a right when he

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[68] Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union, 7th Ed.*, 670.

[69] Ibid., 671.

is prohibited, under penalties, from uttering it."[70] On the other hand, constitutional norms exempted a broad range of speech from prohibition:

> But outside of such wilful [sic] and malicious attempt [to lessen men's reverence for the Deity], there is a broad field for candid investigation and discussion, which is as much open to the Jew and the Mahometan as to the professors of the Christian faith…The courts have always been careful, in administering the law, to say that they did not intend to include in blasphemy disputes between learned men upon particular controverted points. The constitutional provisions for the protection of religious liberty not only include within their protecting power all sentiments and professions concerning or upon the subject of religion, but they guarantee to every one a perfect right to form and to promulgate such opinions and doctrines upon religious matters, and in relation to the existence, power, attributes, and providence of a Supreme Being as to himself shall seem reasonable and correct. In doing this he acts under an awful responsibility, but it is not to any human tribunal.[71]

Christopher Tiedeman similarly argued that maliciously motivated ridicule of the "prevalent religion" was punishable insofar as it amounted to a public "nuisance."[72] Even more forcefully than the authors described above, Tiedeman challenged Joseph Story's claim in *Girard* that American law admitted the "divine origin and truth" of the Christian religion. "The only thing that the law can admit, in respect to Christianity," Tiedeman concluded, "is its potent influence in carrying on the development of civilization, and more especially in compelling the recognition and observance of moral obligations."[73] American constitutions thus took "religion proper…out of the field of legislation," but allowed legislature's to consider its "moral power" within society.[74] Blasphemy against religion was, therefore, punishable because it threatened the moral foundations of society, not because it offended God or God's law. That Christianity was

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[70] Ibid., 672.

[71] Ibid., 672-73.

[72] Tiedeman, *A Treatise on the Limitations of Police Power in the United States, Considered from Both a Civil and Criminal Standpoint*, 167.

[73] Ibid., 167-68.

[74] Ibid., 167.

the only religion protected under American blasphemy laws was merely a matter of historical circumstance, not a legal assertion of Christianity's theological veracity. In fact, American principles of religious equality allowed and even commended laws that would punish blasphemy "against whatever religion it may be directed."[75] But the pervasiveness of Christianity in American society, and the extent to which it was "ingrafted" with the nation's culture and institutions, meant that blasphemy against the Christian religion posed a distinctive threat to morality and public order.[76]

§ 4 Conclusion

Leading thinkers at the turn of the twentieth century described religious liberty in the United States as a matter of broad consensus in state and federal law. Ernst Freund, Thomas Cooley, Christopher Tiedeman and others believed that the American constitutions reflected an increasingly shared set of principles and norms by which courts defined the substance and scope of state and federal legislatures' powers in matters related to religious belief, practice, speech, and association. This consensus was not uniform. States' constitutional provisions for religious liberty sometimes varied in significant ways. Nor did shared first principles always lead to uniform results. Moreover, established jurisdictional boundaries meant that state and local laws still were not subject to the federal constitution's religion clauses, even if state constitutions substantively expressed the same principles. Despite these variations, however, the methods and

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[75] Ibid., 169.

[76] Quoting James Kent in *People v. Ruggles,* 8 Johns 289 (5 Am. Dec. 225). Kent's quote reads: "Nor are we bound, by any expressions in the constitution, as some have strongly supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted in Christianity."

norms applied in state and federal courts overlapped to such a degree that leading scholars described them in terms of a coherent legal tradition. Courts applied common methods of statutory review, and imposed similar limits on specific legislative powers.

Some of these limits were categorical; others required legislatures to act according to basic virtues like fairness and equality. Some were strictly enforced; others were judicially commended. The lines between laws that "established" religion and those that prohibited its free exercise were usually ambiguous. Establishments of religion often implicated infringements upon the free exercise of religion, and *vice versa.* Religious liberty jurisprudence, therefore, was not reducible to a single standard of constitutional review. None of the treatises discussed in this chapter, for example, described a widespread application of something analogous to the modern *Lemon* test. Instead, courts weighed specific legislative acts against the enumerated or presumed powers of specific legislative bodies, and against the enumerated or presumed rights of persons within specific jurisdictions. Some of these legislative powers – especially police powers – were defined by a limited set of end-purposes. But American courts, according to these sources, did not explicitly require that all legislation challenged under non-establishment provisions must advance a "secular" legislative purpose, *per se.*

Still, state and federal courts had ruled that their respective constitutions conveyed no legislative powers to establishment of religion or prohibit its free exercise. "Religion proper," as Christopher Tiedeman phrased it, was simply beyond the prerogative of American government. This meant that legislative bodies could not directly fund religious organizations, or perform "sectarian" acts. It meant that legislatures could not coerce citizens to profess religious beliefs or to perform religious

actions against their will. It meant that laws could not discriminate in favor of, or against persons on the basis of their religious "opinions" or preferred modes of worship, or lack thereof. The nation's laws were self-consciously moving away from previous modes of religious *toleration* toward a fuller embodiment of religious *equality*.

Religious equality, however, did not require absolute legislative indifference to religion, or to the particular role Christianity supposedly played in American law and culture. American legislatures possessed various powers by which they could recognize, regulate, and restrict religious practices. Only a person's conscience could dictate his or her manner of relating to God. But legislators were duty-bound, and constitutionally empowered to regulate persons' manner of interacting with other members of society, and with society as a whole. Not every governmental invocation of theological themes or religious beliefs expressed subjective sectarian "opinions." Thus, public officials were not prohibited from speaking religiously in public. Not all religiously-motived act performed by citizens, on the other hand, were socially beneficial or benign. Legislatures could, therefore, prohibit and punish licentious acts, even if such acts were avowedly motivated by religious faith, and even if the moral norms being enforced were rooted in the traditional teachings of religion. Moreover, legislatures could "recognize" the important moral functions of religion in the United States by hiring chaplains to serve in the military and other government agencies, or by legally acknowledging marriages performed by religious functionaries. Legislatures could also use their powers to incorporate religious societies on a non-discriminatory basis, and could circumscribe the legal status and rights of the resulting corporations. All of these exercises of legislative power were necessarily rooted in the specific powers of each legislature, and were

necessarily tempered by constitutional norms of religious liberty. Constitutional law mediated religious and legislative spheres more than it separated them; if it established a wall between church and state, it was a one that had as many bridges and gates as it had guards.

The court's constructed religion as the sphere of human relations with God – a domain in which the individual conscience could freely dictate (or decline) private acts of worshipping a Deity whose existence, and whose basic moral commands were mostly given; such relations functionally molded sinners into citizens. The sphere of legislation, on the other hand, governed human-to-human relationships –legislation governed a public domain in which citizens regulated their interactions with one another, and punished infractions against the social order on the basis of powers conferred by foundational legal documents, or constitutions.

Socio-economic developments, demographic shifts, and geo-political events in the coming decades would pose new and unforeseen challenges to the emerging national consensus on religious liberty. Waves of new immigrants, and an otherwise dynamic "marketplace" of religious ideas would strain the Protestant hegemony that made possible previous assertions that America was a "Christian nation." Franklin Roosevelt's New Deal would dramatically reshape the scope and functions of the federal government in American society. Assertive new religious groups, like the Jehovah's Witnesses, would challenge the relatively narrow definitions of religious practices protected under the nation's various free exercise provisions. Military drafts for both World Wars would precipitate a host of civilians who objected to military service on religious grounds. And

a growing number of litigants would object to official governmental "recognitions" of religion.

Constitutional law evolved in ways that both shaped and reflected these changes. Two shifts in the ways that American courts conceived of, and enforced boundaries between religious and legislative spheres are especially relevant to this study. First, the U.S. Supreme Court's incorporation of the federal religion clauses through the Fourteenth Amendment's Due Process Clause shifted the locus of religious liberty jurisprudence from a bottom up process of interstate consensus, to a more centralized model of defining the meanings of religious liberty. Second, Establishment Clause jurisprudence shifted away from a method of measuring legislative purposes in terms of enumerated legislative powers, and toward measuring such purposes in terms of their secularity. These shifts are the main topics of the next chapter.

Chapter 8
The Centralization of Religious Liberty

A curious fact is that in the early official utterances of the government the term "United States" is always used in the plural number, but of late we are coming to use it as a collective and singular noun. It used to be said 'the United States are' but now it is 'the United States is.'[1]
– Justice David J. Brewer

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.[2]
– Justice James C. McReynolds

§ 1 Introduction

The U.S. Supreme Court ruled in nearly three-dozen cases implicating religious liberty norms between 1900 and 1947. Many of these cases, as I show below, belied social tensions rooted in growing levels of racial, ethnic, and religious diversity. Many also reflected the changing scope and forms of state and federal governments' interventions in the spheres of education and the economy. The nation's involvement in both of the World Wars accentuated these tensions, raising questions about how far legislatures could go to promote political and cultural homogeneity among the citizenry. The Supreme Court's limited jurisdiction meant that religious liberty norms played a peripheral role in some of these cases, at least after appeals processes had moved out of state courts and into federal courts on review. Until the 1940s, federal courts did not

[1] David Josiah Brewer, "Two Periods in the History of the Supreme Court." Delivered at the 18th annual meeting of the Virginia Bar Association, August 7th, 8th, 9th, 1906, p. 6.

[2] *Meyer V. Nebraska*, 262 U.S. 390 401 (1923).

expressly apply the federal constitution's religious liberty clauses to state or local laws. Even in pre-1940s cases involving challenges to state and local laws on different grounds, however, religious liberty norms informed the Supreme Court's rulings. And, an important area of federal jurisprudence – the Court's interpretation of the Due Process clause – developed alongside the Court's religion jurisprudence during this period, and ultimately merged with the Supreme Court's interpretation of the Establishment Clause, giving rise to the secular purpose test.

This chapter analyzes the Supreme Court's methods for evaluating the legislative purposes of statutes under constitutional review in the years leading up to the incorporation of the federal religion clauses. I address these cases in three groups based on the religious liberty norms at stake in each case; the cases are not listed in strictly chronological order. In the first group of cases, the Court evaluated the extent of legislatures' power to regulate religious practices. In the second group of cases, the Court evaluated the extent of legislatures' power to impose political duties that conflicted with individuals' religious scruples. In the third group of cases, the Court evaluated the extent of legislatures' power to fund and/or cooperate with religious institutions.

Many of these cases will be familiar to readers who have studied Constitutional law. Unlike the chapters in Sections 1 and 2, I do not uncover new source materials, or analyze these cases in their full depth. Rather, I use them to illustrate several important themes related to the subsequent introduction of the secular purpose test. I argue that, in the years leading up to the incorporation of the federal religion clauses in *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), the Court applied a common method of review in both establishment-type and free exercise-type cases. Like the cases

addressed in Chapters 1 through 6, the Court evaluated the constitutionality of statutes and government actions not in terms of their "secular" purposes, but in relation to 1) public purposes that were consistent with the enumerated (or assumed) powers of specific legislatures, 2) religious liberty norms that functioned to limit scope of those powers, and 3) other principles of law implicated in specific cases. In addition, the Court applied different levels of "scrutiny" for evaluating the practical relationships between legislative ends and legislative means.[3]

The term "incorporation," mentioned above, refers to the application of the First Amendment's religion clauses to state and local statutes via the Fourteenth Amendment's Due Process Clause. The Fourteenth Amendment to the Constitution was adopted in 1868 – in the wake of the Civil War. It provides that, "No State […] shall deprive any person of life, liberty, or property without due process of law."[4] The Due Process Clause has myriad implications. Most importantly for our purposes, the Supreme Court in *Cantwell* and *Everson* ruled that the clause prohibits state (and local) legislatures from depriving any person of *religious* liberty without due process of law. This logic expanded the Supreme Court's, and lower federal courts of appeals' jurisdiction to include the review of state and local laws under the federal Constitution's religion clauses. Thus, after their incorporation, the Free Exercise and Establishment Clauses

[3] I hope to explore the significance and sources of this shift in more depth in subsequent publications. My working thesis, however, is that the Court's religion jurisprudence shifted from a deferential posture toward the political judgment of state legislatures toward more confrontational and critical standards of review for evaluating the purported means-ends relationships of legislation because of a growing fragmentation of society's members – or, better, the growing power of the nation's underrepresented and traditionally disempowered minority groups. The shift moved the Court's jurisprudence away from an ideal of local self-government and toward a science of individual rights.

[4] "Constitution of the United States of America," Amendment 14, Sec. 1.

functioned as limits on the powers of state and local governments – not just as limits on the powers of the federal Congress.[5]

§ 2 Public Purposes and the Power to Regulate Religion

This section analyzes the Supreme Court's rulings in four cases involving state laws that evaluated state legislatures' power to regulate avowedly religious practices: *Berea College v. Kentucky* (1908), *Meyer v. Nebraska* (1923), *Pierce v. Society of Sisters* (1925), and *Cantwell v. Connecticut* (1940).[6] Although *Cantwell* was the first case in which the Supreme Court expressly incorporated the First Amendment's Free Exercise Clause – i.e. interpreted it as a limit on state and local legislatures' powers – the Court in each of these cases interpreted the substance and limits of religious spheres.

Berea College v. Commonwealth of Kentucky, (1908)

Berea College was the only interracial college in Kentucky in 1904 when the state legislature passed a law entitled, "An act to prohibit white and colored persons from attending the same school,"[7] also known as the Day Law.[8] According to court records,

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[5] See John Jr Witte, *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, 2nd ed. (USA: Westview Press, 2005), 135-40.

[6] *Berea College V. Commonwealth of Kentucky*, 211 U.S. 45 (1908); *Meyer V. Nebraska*; *Pierce V. Society of Sisters*, 268 U.S. 510 (1925); *Cantwell V. Connecticut*.

[7] *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623 (1906)

[8] The statute read: "Section 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction.

"Sec. 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction, shall be guilty of operating and maintaining same, and fined as provided in the first section hereof.

"Sec. 3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be

Berea was a "private nonsectarian school" that had been incorporated for the purposes of "promoting the cause of Christ" and giving "general and nonsectarian religious instruction to all youth of good moral character."[9] On October 8, 1904, the school was indicted under the Day Law after receiving "both the white and negro races as pupils for instruction."[10] The college corporation was subsequently fined $1,000 in accordance with the statute.

Attorneys for the college appealed the penalty, arguing in the Kentucky Court of Appeals that the law exceeded the limits of the legislature's police powers, violated individual and corporate property rights under the Fourteenth Amendment's Due Process clause, and contravened virtually every aspect of the state constitution's bill of rights – including teachers' and pupils' "right to worship God according to the dictates of their own consciences by attending and participating in nonsectarian religious exercises in a school or institution of their own choice."[11]

The college was unsuccessful. The Court of Appeals acknowledged that it had a duty to enforce appropriate limits on legislature's exercise of the police powers – namely "to declare void an attempted exercise of such power, which is not fairly and reasonably

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fined $50 for each day he attends such institution or school: provided, that the provisions of this law shall not apply to any penal institution or house of reform.

"Sec. 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty–five miles distant, for the education exclusively of one race or color.

"Sec. 5. This act shall not take effect, or be in operation, before the 15th day of July, 1904."

Acts 1904, p. 181, c. 85." See *Berea Coll. v. Commonwealth*, 123 Ky. 209, 94 S.W. 623, 624 (1906)

Also see *Berea College V. Commonwealth of Kentucky*, 211. "After the constitution of 1891 was adopted by the State of Kentucky, and on June 10, 1899, the college was reincorporated under the provisions of chap. 32, art. 8, Ky. Stat. (Carroll's Ky. Stat. 1903, p. 459), the charter defining its business in these words: 'Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, 'to promote the cause of Christ.'"

[10] Transcript of the Record*, Berea College v. The Commonwealth of Kentucky,* 211 U.S. 45 (1908).

[11] *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623, 624 (1906)

related to a proper end."[12] The court concluded, however, that the Day Law advanced legitimate police purposes: the preservation of racial purity was, in its view, reasonably related to the ends of public health and safety, and was thus a valid exercise of legislature's police powers. Remarkably, the court portrayed the law as a relatively humane solution to the social problems coinciding with "cross-breeding" between members of different races:

> No higher welfare of society can be thought of than the preservation of the best qualities of manhood of all its races. If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross–breeding, it would seem to be equally within the same power to regulate that character of association [i.e. the co-education of racially diverse students] which tends to a breach of the main desideratum—the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity.[13]

Under this view, society's interest in preserving racial purity outweighed the school's religious liberty claims, along with their other arguments pertaining to Kentucky's bill of rights and the federal due process clause. The state's police powers were fundamental in the Kentucky's scheme of government, the court concluded, and enabled "it to conserve the well-being of society, and prohibit all things hurtful to its comfort or inimical to its existence." Even religion was subject to these broad powers. The court here classed the College's inter-racial program of education alongside polygamy and child-sacrifice, as an ostensibly religious practice that was not to be tolerated in a civilized society:

> The right of worshipping Almighty God according to the dictates of our own consciences—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well–being of society, though deemed a

[12] *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623, 625 (1906)

[13] *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623, 626 (1906)

> religious rite, must yield to the police power of the state. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the state, however conscientious the votary of the right."[14]

In short, the Court of Appeals ruled that religious practices "inimical to the wellbeing of society…must yield to the police power of the state."[15]

The U.S. Supreme Court narrowly upheld the appeals court's ruling in *Berea*, despite a strongly dissenting opinion written by Justice John M. Harlan. The college's argument in the Supreme Court jettisoned its earlier religious liberty claims, and focused entirely on the due process and equal protection rights of individuals and corporations under the Fourteenth Amendment. Responding to these claims, the Court's majority focused on "the power of the State over its own corporate creatures."[16] The Kentucky legislature possessed relatively clear powers to issue and amend corporate charters. Justice David Brewer reasoned that the law amounted to an amendment to the college's corporate charter – one that revoked "any authority given by previous charters to instruct the two races at the same time and in the same place."[17] This "amendment" was valid under the Fourteenth Amendment insofar as it did "not destroy the power of the

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[14] *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623, 625 (1906)

[15] "The right of worshipping Almighty God according to the dictates of our own consciences—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well–being of society, though deemed a religious rite, must yield to the police power of the state. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the state, however conscientious the votary of the right." See *Berea Coll. v. Commonwealth,* 123 Ky. 209, 94 S.W. 623, 625 (1906).

[16] *Berea College V. Commonwealth of Kentucky*, 58.

[17] Ibid.

college to furnish education to all persons," in accordance with the stated mission of its original charter, "but simply separates them by time or place of instruction."[18]

Justice Harlan vitiated this construction of the statute in a dissenting opinion,[19] and noted the ruling's grave implications for religious liberty. If the legislature could so invade the spheres of free speech and private education under the auspices of protecting racial purity, he asked, what was to keep it from invading the sphere of religion. Harlan acknowledged that the state could segregate its own public schools. But no government, federal or state, could legitimately forbid the voluntary association of "white and colored children" to receive "instruction which is not in its nature harmful to or dangerous to the public." Harlan continued:

> If the Commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the

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[18] Ibid., 57.

[19] Ibid., 58-67.

> Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races? Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.[20]

Justice Harlan lost the argument in *Berea*. In two subsequent cases, however the Supreme Court sought to establish protective boundaries around the spheres of religion and private education.

Meyer v. Nebraska (1923)

In *Meyer v. Nebraska* (1923), the Court overturned a state law commonly known as the Siman Act. The Siman Act prohibited public and private school teachers from teaching any course in a foreign language, and from teaching any foreign language courses to students below the eighth grade.[21] Nebraska was one of several states to pass such laws in the wake of World War I, amidst a wave of anti-German sentiment.

Robert T. Meyer was convicted violating the Siman Act after he was observed teaching students in a private Lutheran school how to read German Bible stories. Meyer appealed his conviction, in part, on religious liberty grounds. In the Nebraska Supreme Court, Meyer argued that he was merely preparing students to participate in the liturgy practiced by their German-immigrant parents. The Nebraska court, however, interpreted

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[20] Ibid., 68-69.

[21] See "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919; as quoted in *Meyer V. Nebraska*, 397.

the law as a valid exercise of the legislature's police powers. On one hand, the legislature had reason to believe that children reared in foreign languages and ideals posed a threat to public safety,[22] and that teaching young children foreign languages would be detrimental to their health and wellbeing.[23] On the other hand, because Meyer's teaching was not strictly a religious exercise,[24] and because the German language was not an essential aspect of the children's religious beliefs,[25] Meyer's actions were not protected forms of religious exercise under the state constitution.[26] The state court concluded: "Whenever the actions of individuals, even though in pursuance of religious beliefs…are

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[22] See *Meyer v. State,* 107 Neb. 657, 187 N.W. 100, 102 (1922). "The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."

[23] See *Meyer v. State,* 107 Neb. 657, 187 N.W. 100, 102 (1922). "The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law."

[24] *Meyer v. State*, 107 Neb. 657, 187 N.W. 100, 101 (1922). "From this testimony it is clear that the reading from the text–book was not, at least solely, a devotional exercise. It was not religious worship, nor was it, primarily, religious instruction in itself. The text–book contained biblical stories, but the subject–matter of the text, used for the purpose of studying a language, does not alone control nor indicate the object of the study. The object was, as stated, 'to have the children learn so much German that they could be able to worship with their parents.'"

[25] *Meyer v. State,* 107 Neb. 657, 187 N.W. 100, 101-02 (1922). "It does not appear that the German language is a part of the religion of this church, nor that the services must, according to that particular faith, be rendered in German. It is true that in familiarizing the children with the German language they would become better able to fully understand the services of the church when conducted in ***102** German, but, so far as teaching the particular religious beliefs of the church to the children in the school was concerned, such religious teaching could, manifestly, be as fully and adequately done in the English as in the German language."

[26] See *Meyer v. State,* 107 Neb. 657, 187 N.W. 100, 102 (1922). "Though the statute prohibits the study of the German language and may, to an extent, limit the younger children from as freely engaging in religious services, conducted in the German language, as otherwise might be the case, we cannot say that such restriction is unwarranted. The law in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship."

considered [by the legislature] as not in harmony with the public welfare, then it is proper that those acts be curbed."[27] Like so many other illicit activities pursued under the auspices of religion, the learning of foreign languages was subject to the legislature's police powers.

In his subsequent appeal to the U.S. Supreme Court, Meyer argued that the statute violated his due process rights. Records do not indicate that Meyer challenged his conviction on free exercise grounds in the Supreme Court. Rather, he argued that the Siman Act deprived him of the right to pursue an ordinary occupation that was "not inherently immoral or inimical to the public welfare."[28] The high Court agreed, and for the first time in its history, explicitly stated that the Fourteenth Amendment's due process clause included religious liberties. Justice McReynolds explained:

> Without doubt, it [the Due Process clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[29]

Thus, even though Meyer had not pressed his religious liberty arguments on appeal to the Supreme Court, the Court's ruling identified the right to "worship God according to the dictates of [one's] own conscience" as a fundamental liberty guaranteed by the federal constitution. This jurisprudential shift toward incorporating the religion clauses into the Due Process Clause was accentuated by Justice McReynolds' relatively confrontational posture toward the state legislature and its exercise of police powers. In

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[27] *Meyer v. State,* 107 Neb. 657, 187 N.W. 100, 102-103 (1922).

[28] *Meyer V. Nebraska*, 391.

[29] Ibid., 399.

contrast to the lower court's ruling, McReynolds' opinion emphasized that the courts, not the legislatures, were the final judge of "what constitutes proper exercise of police power." Indeed, the police powers were "subject to supervision by the courts" in order to ensure that citizens' rights were not abridged "under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[30] No longer would the high Court simply defer to state legislatures' claims that statutes advanced police purposes: a legislature's means tangibly had to advance end-purposes within the ambit of police powers.

McReynolds applied this standard in *Meyer,* and concluded that Nebraska's language requirements had no real relation to public safety or to the wellbeing of school children. He affirmed that state legislatures could use their police powers to regulate public and private schools, and to compel students to attend some school.[31] In light of the still-fresh wounds of World War I, he further conceded that "the desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate."[32] In this case, however, the legislature's desired ends did not justify its chosen means. Teaching children to read the German language posed no threat to public safety. Moreover, prohibiting Meyer from practicing his occupation interfered with his due process rights, and with the due process rights of parents who wished to hire him to teach their

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[30] Ibid., 400.

[31] Ibid., 402.

[32] Ibid. "The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration."

children. "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear;" he wrote, "but the individual has certain fundamental rights which must be respected…a desirable end cannot be promoted by a prohibited means."[33]

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary (1925)

Two years after *Meyer*, the Supreme Court again used a similar method to evaluate the constitutionality of the Oregon Compulsory Education Act (OCEA) – a law aimed at "Americanizing [the state's] new immigrants and developing them into patriotic and law-abiding citizens."[34] Whereas the Nebraska legislature had mandated English-only education in private and public schools, the OCEA compelled all parents and guardians of children between eight and sixteen years old to send their kids to public schools in their local districts.

Two private corporations – the Society of Sisters, a Catholic organization that operated numerous schools, junior colleges, and orphanages; and the Hill Military Academy – filed suit to enjoin enforcement of the statute on due process grounds, arguing that the law conflicted "with the rights of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right schools and teachers therein to engage in a useful business or profession."[35]

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[33] Ibid., 401.

[34] *Pierce V. Society of Sisters*, 526.

[35] Ibid., 532. This quote summarizes the Society of Sisters' position, which overlapped partially with the argument of the Hill Military Academy. See *ibid.* at 513-529, 533.

Lawyers for the state of Oregon argued that the law served multiple legislative purposes consistent with the state's police powers. Specifically, they claimed that mandatory public education would decrease juvenile crime and safeguard against "future internal dissentions" within the community by "mingling together…the children of all races and sects."[36]

Much as it had in *Meyer*, however, the Supreme Court in *Pierce* scrutinized the practical relationship between the law's purported ends and means. The OCEA was written in such a way that it required students to attend public schools without technically banning attendance at private schools. Justice McReynolds noted that "the inevitable practical result" would, nevertheless, be the destruction of the state's private schools.[37] This outcome would have been acceptable if private schools actually posed a threat to public order and welfare. But, such schools were performing an important and valuable public service – not a dangerous one. In addition to maintaining multiple orphanages, the Society of Sisters had "long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians."[38] By destroying such schools the legislature would effectively forestall parents' ability to choose an appropriate form of education for their own children. "These parties are engaged in a kind of undertaking not inherently harmful," McReynolds insisted, "but long regarded as useful and meritorious."[39]

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[36] Ibid., 524-25.

[37] Ibid., 534.

[38] Ibid., 532.

[39] Ibid., 534.

McReynolds then outlined a "fundamental" theory of constitutional liberty that limited the powers of state and federal legislatures alike:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[40]

The Court's *Pierce* ruling thus enforced legal boundaries protecting the spheres of family and education from legislative intrusions: Oregon's education law was unconstitutional because it abridged the rights of parents and schools while having "no reasonable relation" to a legislative end-purpose "within the competency of the state." In other words, the state's police powers were limited by the rights of parents to choose an appropriate form of education for their children, and by the property rights of school corporations. Religious liberty was simmering just below the surface of the Court's *Pierce* ruling, however, and would come to the forefront in subsequent cases.

Cantwell v. Connecticut (1940)

In *Cantwell v. Connecticut* (1940), the Supreme Court directly applied the federal Free Exercise Clause to a state law for the first time. At issue in *Cantwell* was a state permit law regulating public solicitations for funds, including solicitations for religious and charitable causes. Three Jehovah's Witnesses – a father and his two teenaged sons – challenged the law after being convicted of soliciting donations, without a proper permit, in exchange for books and pamphlets promoting their religious beliefs.

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[40] Ibid., 535.

Attorneys for the state of Connecticut argued that the law served a legitimate purpose consistent with the legislature's police powers, without infringing on the Cantwell's "liberty of worship."

> The purpose of the statute is to protect the public from fraud in the solicitation of money or other valuables under the guise of religion…The 'liberty' of worship undoubtedly includes the right to entertain the beliefs, to adhere to the principles, and to teach the doctrines which appellants advocate…But it is difficult to see how this statute can interfere with their freedom to worship as they see fit. It does not limit or define their mode of worship or restrict their teachings or doctrine.[41]

None of the Supreme Court's nine justices, however, were swayed by this argument. In an opinion written by Justice Owen J. Roberts, the Court acknowledged that the state legislature had a legitimate interest in preventing fraud. And, the state possessed power to prohibit and punish fraud when it was committed – even when it was committed under the guise of religion.[42] The legislature's chosen means for preventing such fraud, however, exceeded its power with respect to the Free Exercise Clause. Justice Roberts asserted that the First and Fourteenth Amendments together delimited the powers of state legislatures: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," he explained. "The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[43]

Unlike the Court's earlier decision in *Permoli v. New Orleans* (1844), then, the *Cantwell* ruling held that the federal Constitution established a sphere of religious liberty

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[41] *Cantwell V. Connecticut*, 302.

[42] See ibid., 306. "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury."

[43] Ibid., 303.

that neither federal nor state legislatures could invade. Governments could not, as the Court put it, compel "acceptance of any creed or the practice of any form of worship," or restrict individuals' adoption of, or adherence to the "religious organization or form of worship" of their choosing. But, state and federal governments could still regulate some religious practices under the right conditions, and when they exercise appropriate powers. The First Amendment embraced the freedom to "believe" and the freedom to "act" according to one's chosen form of religion. Individuals' freedom to believe was "absolute," in the court's view – the mind was a sphere unto itself. On the other hand, the freedom to *act* according to one's religious beliefs was to be measured against the equal rights of others. Roberts explained:

> Conduct remains subject to regulation for the protection of society… a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[44]

Applying this logic, the *Cantwell* court concluded that Connecticut's permitting law exceeded the legislature's police powers because it functioned as a "prior restraint" on religious practice, and not merely as a limit on the time, place, and manner in which the Cantwells could propagate their religion. "If a certificate [authorizing persons to seek solicitations] is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited."[45] The Court thus measured the

[44] Ibid., 304.

[45] Ibid.

constitutionality of the Connecticut statute in terms of the limits imposed by the First Amendment's religion clauses on the state legislature's police powers.[46]

The Court's rulings in *Berea, Meyer, Pierce* and *Cantwell* highlight four attempts to mark out the legal boundaries between religious and legislative spheres in cases where state laws effectively limited religious activities. In each of these cases the Court evaluated the legislative purposes of the statutes in question, without imposing a requirement that such purposes be "secular." Instead, the Court considered whether the statutes advanced "public" purposes, needs, and interests using legislative means that did not unduly restrict citizens' exercise of religion. In the next group of cases, the Court evaluated the extent of state and federal legislatures' power to impose political duties – i.e. to require the performance of certain actions – that conflicted with persons' religious scruples.

§ 3 Public Purposes, Political Duties and Conscientious Scruples

In this section I analyze four cases: *Selective Draft Law Cases* (1918), *United States v. MacIntosh* (1931), *United States v. Bland* (1931), and *Minersville v. Gobitis* (1940).[47] The first three cases involved federal laws that were challenged as direct violations of the federal religion clauses. The fourth case, *Minersville v. Gobitis,* involved a state law that was challenged as a violation of the same.

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[46] See ibid., 307. The court summarized their approach in an epic feat of multi-clause sentence construction: "The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact."

[47] *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States V. Macintosh*, 283 U.S. 605 (1931); *United States V. Bland*, 283 U.S. 636 (1931); *Minersville V. Gobitis*, 310 U.S. 586 (1940).

Selective Draft Law Cases (1918)

The Court very concisely evaluated the limits the federal legislature's war powers in relation to religion during World War I, in a group of cases known collectively as *Selective Draft Law Cases* (1918). Plaintiffs in these cases argued that statutory exemptions from the military draft – for clergymen and members of recognized pacifist sects – violated both the Establishment and Free Exercise clauses. On the one hand, such exemptions allegedly created a privileged class of persons based on their religious affiliations. On the other hand, limited religious exemptions pressured conscientious objectors to join one of those sects in order to escape the draft.

The Court summarily dismissed both of these arguments. In an opinion written by Chief Justice Edward D. White, the Court ruled that Congress possessed plenary war powers that included the power to raise an army. Although the Constitution did not expressly enumerate Congress' power to raise an army *by draft*, such power was implied insofar as "the mind cannot conceive an army without the men to compose it."[48] As to the plaintiffs' claim that the legislature had exceeded its powers under the federal religion clauses, White simply noted, then curtly dismissed the notion that such exemptions were inappropriate: "[W]e think its unsoundness is too apparent to require us to do more."[49]

United States v. Macintosh (1931) and *United States v. Bland* (1931)

Whereas the Court affirmed Congress' constitutional power to grant religious exemptions from military service in the *Selective Draft Law Cases,* it subsequently ruled in two 5-4 decisions that citizens were not constitutionally *entitled* to such exemptions. In

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[48] *Selective Draft Law Cases*, 377.

[49] Ibid., 390.

United States v. Macintosh (1931) and *United States v. Bland* (1931) the Court found that the government had properly denied U.S. citizenship to two applicants whose religious scruples affected their willingness to take an oath promising to serve the nation in armed conflicts. Douglas C. Macintosh was a theology professor at Yale who had served as a Chaplain for Canadian forces in World War I. On his application for citizenship he noted that he was willing to take the standard oath of to defend the nation, but would only serve in wars that he believed were "morally justified" and consistent with "the will of God."[50] In *Bland,* another Canadian applicant, Marie Averil Bland, was denied citizenship for comparable reasons: she refused to take the oath to defend the nation unless she could append the phrase, "as far as my conscience as a Christian will allow."[51]

Over the strong dissent of Chief Justice Charles E. Hughes, the Court's majority ruled that powers of Congress to wage war and regulate immigration were not subject to the religious scruples of current or potential citizens. "No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated," Justice Sutherland wrote, "which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general."[52] In time of war, the sphere of religion simply offered no refuge from the legislative sphere.

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[50] *United States V. Macintosh*, 618.

[51] *United States V. Bland*, 636.

[52] *United States V. Macintosh*, 624.

Minersville v. Gobitis (1940)[53]

In the same year as its *Cantwell* decision, the Supreme Court ruled in another free exercise case involving religious litigants who sought exemptions from a different type of duty: saluting the flag. State law in Pennsylvania mandated that school districts teach students "civics, including loyalty to the state and national government."[54] The Minersville School District consequently enacted a resolution requiring students in public schools to salute the American flag while reciting the Pledge of Allegiance. Two siblings – both Jehovah's Witnesses – had been expelled after refusing to comply. The Gobitis children and their parents objected to the flag salute on religious and constitutional grounds: they claimed that it amounted to a coercive, state-sponsored form of religious idolatry.

The District Court and the Third Circuit Court of Appeals initially ruled in the Gobitis family's favor, concluding that the school board could not condition students' access to public education on the performance of acts that conflicted with their religious beliefs. The District Judge explained that forcing conscientiously opposed students to salute the flag was "not a reasonable method of teaching civics." Furthermore, "the refusal of these two earnest Christian children to salute the flag cannot even remotely prejudice or imperil the safety, health, morals, property or personal rights of their fellows."[55] Even if teaching civics and promoting police purposes were valid legislative ends, the district's chosen means were inappropriate.

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[53] *Minersville V. Gobitis*. The Court reversed this decision three years later in *West Virginia v. Barnette,* 319 U.S. 624 (1943), a decision that I plan to analyze in greater detail in subsequent drafts.

[54] See 24 Purdon's Pa.Stat.Ann., § 1551, as quoted in *Minersville Sch. Dist. v. Gobitis,* 108 F.2d 683 (3d Cir. 1939).

[55] *Gobitis v. Minersville Sch. Dist.,* 24 F. Supp. 271, 274 (E.D. Pa. 1938)

The U.S. Supreme Court, however, reversed the lower courts' rulings on the grounds that legislative efforts to promote "national cohesion" merited the judiciary's utmost deference to legislators' discretion.[56] Justice Felix Frankfurter, a consistent proponent of judicial restraint, authored the majority's opinion.[57] Frankfurter suggested that, because the interests at stake in *Gobitis* were "so subtle and so dear, every possible leeway should be given to the claims of religious faith."[58] Nonetheless, he insisted that the "mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[59] The power to promote national cohesion, Frankfurter continued, was even more basic to American government than the states' police powers. The Supreme Court had a long history of upholding general laws manifesting "specific powers of government" against demands for religious exemptions. The *Minersville* case was unique insofar as it was "not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government." But the purpose of the flag salute was to foster a form of social solidarity that was basic to American civilization itself:

> But all these specific activities of government [the promotion of the needs and interests of "secular society" listed above] presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a

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[56] *Minersville V. Gobitis*, 595

[57] "Judicial restraint" refers to the general view that the judiciary should, in matters of constitutional review, defer to judgment of legislative bodies with regard to the needfulness of a particular statute or governmental program.

[58] *Minersville V. Gobitis*, 595.

[59] Ibid., 594-95.

> people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization…The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.[60]

Frankfurter admitted that the school board's chosen method for "training children in patriotic impulses" may have been ineffective, unwise, or even harsh.[61] In its pursuit of goals so foundational to the political order, however, the legislature deserved the Court's deference in choosing the appropriate means of advancing those ends.[62]

In these cases involving the military draft, immigration and patriotic exercises, litigants' religious liberty claims offered little refuge from a legislature that was exercising core enumerated powers. The U.S. Supreme Court, at least, treated national defense and national cohesion as legislative ends that outweighed these particular demands for religious exemptions and accommodations. Although Justice Frankfurter's Minersville decision alluded to the interests of "secular society," none of the Court's rulings in these cases imposed a "secular purpose" requirement. The next section analyzes a group of cases in which litigants argued that federal and state laws inappropriately funded religious institutions.

§ 4 Public Purposes and Differentiating Religious and Legislative Institutions

Quick Bear v. Leupp (1908)

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[60] Ibid., 597.

[61] Ibid., 598.

[62] The Court reversed this decision three years later in *West Virginia v. Barnette,* 319 U.S. 624 (1943), a decision that I plan to analyze in greater detail in subsequent drafts.

In *Quick Bear v. Leupp* (1908) the Court considered whether the Secretary of the Interior and Commissioner of Indian Affairs could contract with a private religious organization to operate a school on the Rosebud agency – a Native American reservation in South Dakota. The federal government had contracted with numerous private and religious organizations to operate schools in Indian country since at least 1819, under an official policy of encouraging "the education and civilization of the Indians."[63] Support for such contracts dropped off in the late-1800s, and Congress articulated a new policy the Indian Appropriations Acts of 1896 and 1897, stating: "And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."[64] With federal funding cut off, a group of Rosebud Sioux had successfully petitioned the Commissioner of Indian Affairs to use

[63] See defendant's response, as quoted in *Reuben Quick Bear V. Leupp, Commissioner of Indian Affairs*, 210 U.S. 50 58, n.1 (1908). "The Catholic Missions schools were erected many years ago at the cost of charitable Catholics, and with the approval of the authorities of the Government of the United States, whose policy it was then to encourage the education and civilization of the Indians through the work of religious organizations. Under the provisions of the act of 1819, ten thousand dollars ($10,000) were appropriated for the purpose of extending financial help 'to such associations or individuals who are already engaged in educating the Indians,' as may be approved by the War Department. In 1820, twenty-one schools conducted by different religious societies were given eleven thousand, eight hundred and thirty-eight dollars ($11,838), and from that date until 1870, the principal educational work in relation to the Indians was under the auspices of these bodies, aided more or less by the Government. For a long time the different denominational schools referred to were aided by the Government without any formal contract. In 1870, an act of Congress was passed appropriating one hundred thousand dollars ($100,000) for the support of Indian schools among Indian tribes not otherwise provided for, i.e., among tribes not having treaty stipulations providing funds for educational purposes, and these appropriations continued until 1876. Contracts were made annually with the mission schools of the different denominations payable out of this appropriation for the education of Indian pupils. As to the tribes having funds for educational purposes under treaty stipulations, contracts were also made with the mission schools of the different denominations payable out of the treaty funds. In 1876, Congress began the general appropriation 'for the support of industrial schools and other educational purposes for the Indian tribes,' and these annual appropriations from the public moneys of the United States have been—from that time until the present. These appropriations always were put in the appropriation acts under the heading 'Support of Schools'—and from these public funds, and, in the discretion of the commissioner of Indian Affairs, from the tribal funds hereinafter explained, were paid the amounts due under the contracts made by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, with the various denominational schools for the education of Indian pupils."

[64] See Transcript of Record, Appendix 2, at 13ff, Reuben Quick Bear, Ralph Eagle Feather, and Charles Tackett, on behalf of Themselves and All Other Members of the Sioux Tribe of Indians of the Rosebud Agency, S.D. vs. Francis E. Leupp, Commissioner of Indian Affairs; James Rudolph Garfield, Secretary of the Interior, George Bruce Cortelyou, Secretary of the Treasury, et al. October term, 1907 (No. 569), filed January 15, 1908.

tribal funds held in trust on their behalf to pay for a Catholic school on the reservation. Another group of tribal members filed suit to enjoin payment of the contract – which would diminish a pool of funds they held in common with the rest of the tribe. This second group, led by Reuben Quick Bear, argued that the appropriation would violated Congress' new policy against funding sectarian schools, and that it went against the spirit of the federal Establishment Clause.

The Supreme Court ultimately upheld the contract over these objections, arguing that Congress had conferred power on the Secretary and Commissioner to oversee tribal funds that had been appropriated to the tribe as part of the government's treaty obligations. Congress could limit "gratuitous" appropriations for tribal education to "nonsectarian" public schools. And legislators had good reasons not to fund sectarian organizations with taxpayer funds. However, tribal members' right to choose (and pay for) a religious education for their own children outweighed the legislature's duty to remain "undenominational." Citing the Appeals Court decision below, Chief Justice Melville Fuller explained:

> The 'Treaty' and 'Trust' moneys are the only moneys that the Indians can lay claim to as a matter of right; the only sums on which they are entitled to rely as theirs for education…it seems inconceivable that Congress should have intended to prohibit them from receiving education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction [of federal policy] for which the complainants contend.[65]

"The *cestui que trust,"* Fuller concluded, "cannot be deprived of their rights by the trustee in the exercise of the power implied."[66] Thus, the Commissioner of Indian Affairs could

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[65] *Reuben Quick Bear V. Leupp, Commissioner of Indian Affairs*, 82.

[66] Ibid.

enter into a contract with a religious school, in part, because he was spending the tribe's money – not the federal government's – and, because the free exercise rights of Sioux children and their parents depended on it.

Cochran v. Louisiana Board of Education (1930)

The case of *Cochran v. Louisiana Board of Education* (1930) the Court evaluated for purposes, to what extent, and under which conditions *state* governments could support and/or cooperate with religious schools. The plaintiff in *Cochran* was a Louisiana taxpayer who challenged a law under which state officials issued textbooks to students throughout the state, including to those who attended private religious schools. Cochran argued that the law violated the state constitution's religious liberty provisions, and that it violated the federal Constitution's Due Process clause insofar as "taxation for the purchase of school books constituted a taking of private property for *private purposes*."[67]

The Supreme Court had not yet incorporated the federal religion clauses when *Cochran* was argued, and thus ruled only on the federal Due Process question. In evaluating whether the statute inappropriately used tax funds for "private purposes,"

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[67] Emphasis added. Unlike the draft of the Louisiana Constitution under which the *Permoli* case (*Bernard Permoli V. Municipality No. 1 of the City of New Orleans.*) was argued, the 1921 Louisiana Constitution included several provisions directly related to religious liberty: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship. No appropriation from the State treasury shall be made for private, charitable or benevolent purposes to any person or community; provided, this shall not apply to the State Asylums for the Insane, and the State Schools for the Deaf and Dumb, and the Blind, and the Charity Hospitals, and public charitable institutions conducted under State authority." (Article, 4, Section 8); "Every Person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship," (Article 1, Section 4); "No public funds shall be used for the support of any private or sectarian school," (Article 12, Section 13); "The funds, credit, property or things of value of the State or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private…" (Article 4, Section 12). This constitution also included tax exemptions for "Places of religious worship; rectories and parsonages belonging to religious denominations, and used as places of residence for ministers…" (Article 10, Section 4).

however, the Supreme Court relied heavily on the lower court's interpretation of the state constitution's religious liberty norms. The Louisiana Supreme Court had upheld the statute against Cochran's religious liberty arguments, in large part, because the program provided books to *all* schoolchildren in the state, and not directly to religious schools. Some of the books distributed under the law were ultimately used in "sectarian" schools that "instruct their pupils in religion." The Louisiana Court emphasized, however, that the books were not "adapted to religious instruction," and that the direct beneficiaries of the program were the state and the students themselves. Moreover, the program served legislative ends consistent with the state's police powers.[68]

The U.S. Supreme Court adapted the lower court's ruling to its own interpretation of the federal Due Process clause. Chief Justice Charles E. Hughes quoted the lower court at length, explaining that the statute advanced a "public" purpose in a religiously neutral manner:

> One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made…The schools, however…obtain nothing from [the books], nor are they relieved of a single obligation because of them…one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children…What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.[69]

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[68] "The furnishing of school books to the children of the state, for their use, in attending school, tends directly to promote the education of the children of the state and to obliterate illiteracy, thereby improving the morals of the children and promoting the general welfare and safety of the people, and hence comes within the police power." *Borden v. Louisiana State Bd. of Educ.,* 168 La. 1005, 1021-22, 123 So. 655, 661 (1928)

[69] *Cochran Et Al. V. Louisiana State Board of Education Et Al.*, 281 U.S. 370 374-75 (1930).

Affirming the lower court's construction of the statute's purpose and effect, the U.S. Supreme Court concluded the statute was a legitimate expression of the state's power to tax citizens for "public" purposes. Justice Hughes explained:

> …we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.[70]

Everson v. Board of Education (1947)

The Supreme Court would rely on *Cochran's* "public purpose" logic seventeen years later in *Everson v. Board of Education* (1947) – the first case in which it formally applied the federal Establishment Clause as a limit on the powers of state and local governments. The appellant in *Everson* challenged a New Jersey statute (and a local township's coinciding resolution) on Due Process and Establishment Clause grounds. The statute in question authorized local school districts to make "rules and contracts for the transportation of children to and from" public and private schools, excluding schools that operated for profit.[71] The board of education in Ewing Township subsequently passed a resolution to reimburse parents for the cost of bus fares to two public high schools and unspecified Catholic schools.[72] Arch R. Everson, an area resident, filed suit on the grounds that the program inappropriately used taxpayer funds for the "private purposes" of families whose children attended non-public schools. Furthermore, the

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[70] Ibid., 375. [Look at state level cases citing Cochran pre-1947; the logic was significantly curtailed in the lower courts.]

[71] *Everson V. Board of Education of Ewing Township*, 3 (n.1).

[72] The resolution specifically designated two public high schools and, les specifically, Catholic schools: "The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years." As quoted in ibid., 62 (n. 59).

program amounted to unconstitutional establishment of religion because it thereby helped fund religious schools.

The Court ruled in favor of the school district, refuting Everson's Due Process Clause and Establishment Clause arguments in separate stages of its opinion. First, the Court refuted Everson's due process argument by citing *Cochran* and other decisions that affirmed states' legitimate interest in "secular education." "It is much too late," Justice Hugo L. Black wrote, "to argue that legislation intended to facilitate the opportunity of children to get a *secular education* serves no *public purpose*."[73] This argument downplayed Everson's claim that the reimbursement program facilitated the opportunity for children to get a religious education in satisfaction of their parents "private desires."[74] Here, Black deferred to the state legislature's judgment of the public need, insisting that the overlap of public and private interests did not render the law invalid. "[T]he New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools...The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."[75] The "power to legislate for the public welfare…is a primary reason for the existence of states," Black reasoned. "The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution."[76]

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[73] Ibid., 7. Emphasis added.

[74] Ibid., 6.

[75] Ibid.

[76] Ibid., 7.

Black evaluated Everson's Establishment Clause argument separately, and in light of three main sources: the history of religious liberty in the colonies and early republic; religious liberty norms articulated in state courts; and the Supreme Court's own First Amendment jurisprudence. Black described the Establishment Clause as the Founding Fathers' solution to the injustices perpetrated under religious establishments before the Revolutionary War. Bristling under the yoke of religious persecutions and unjust taxation for established churches, Black urged, the movement for religious liberty in America was most clearly expressed in Virginia, under the influence of James Madison and Thomas Jefferson. "The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[77]

Next, Black cited a series of state and federal cases in which jurists had interpreted the meaning of constitutional provisions for religious liberty. Black noted that state courts had struggled to define clear boundaries on legislatures' power to finance religious education: "Their decisions…show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."[78] Black also cited several cases in which the U.S. Supreme Court had articulated the meaning of the federal constitution's religion clauses, quoting with approval the Court's conclusion in *Watson v. Jones* (1871) that, "The structure of our government has, for the preservation of civil

[77] Ibid., 11.

[78] Ibid., 14.

liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[79] With these broad principles in mind, Black enumerated a list of basic Establishment Clause norms governing the legislative sphere:

> 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.'[80]

These principles thus emphasized the norms of non-coercion, and the administrative and financial differentiation of religious and legislative spheres. Black's interpretation of the Establishment Clause, however, nonetheless maintained that state legislatures possessed powers that could approach the "wall of separation" without necessarily breaching it. The norm of institutional differentiation functioned as a structural limit on the state's tax powers, even as the norm of neutrality among religious sects qualified those limits:

> But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,*

[79] Ibid., 15. Quoting *Watson V. Jones*, 80 U.S. 679 730 (1871).

[80] Everson at 16

> from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.[81]

Tacking back and forth between the religious liberty norms of institutional differentiation and non-compulsion, on the one hand, and religious neutrality and equality, on the other, the Court upheld the school district's bus reimbursement program. Much as the lower courts in *Cochran* had upheld Louisiana's textbook program on the grounds that the state furnished textbooks directly to all students, not to schools themselves, the *Everson* Court concluded the state was neither required, nor prohibited from reimbursing parents for the cost of their children's bus fares to religious schools:

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.[82]

Building on the precedent of the cases discussed earlier in this chapter, Everson Court defined "secular education" as a point of convergence between religious and legislative spheres. The Court's method of review in *Everson* had two parts. First, as part of its Due Process review, the Court emphasized the "public purposes" (not the secular purposes) that the legislature's efforts to facilitate secular education served. Second, as part of its Establishment Clause review, the Court emphasized the differentiation of religious and legislative institutions, the norm of non-coercion in matters of religious belief and practice, and legislatures' general incompetence, or lack of enumerated powers, to promote or inhibit religion, as such. Although the Establishment Clause imposed a

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[81] *Everson V. Board of Education of Ewing Township*, 16.

[82] Ibid., 18.

strict differentiation of religious and legislative spheres and institutions, the majority ruled that the bus reimbursements did not, in fact, breach the "wall of separation" between church and state.

In a sharply dissenting opinion, Justice Robert H. Jackson accused the majority of violating its own separationist principles. Why, he asked, after its compelling portrayal of the battle for church-state separation in Virginia, would the majority then uphold a program that helped fund religious education? Quoting Lord Byron's poem, *Don Juan*, Jackson prodded:

> In fact, the undertones of the [majority's] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent' – consented.'[83]

§ 5 Conclusion

The cases described above offer glimpses of a budding jurisprudence that would take on new life, and new forms in the decades after incorporation. Cases like *Berea*, *Meyer*, *Pierce* and *Cantwell* show how the contested sphere of religion intersected with social conflicts and tensions resulting from growing racial, ethnic and religious diversity. The cases involving the military draft law and immigration laws show the Court wrestling with the implications of individuals' membership in multiple, discordant societies – religious and political. Finally, *Quick Bear, Cochran* and *Everson* illustrate the shifting, and constantly contested institutional relationships between religious and legislative institutions.

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[83] Ibid., 19.. Citing Lord George Gordon Byron, *Don Juan,* Canto I, st. 17 (1819).

The Supreme Court in each of these cases explicitly or implicitly defined and enforced specific boundaries between, and conceptions of religious and legislative spheres. In none of these cases did the Court describe the promotion or support of religion, *per se*, as an appropriate object of legislation. But, neither did the Court define the legislative sphere in terms of "secular" legislative purposes; instead, the Court continued to apply its earlier method of evaluating the specific powers of specific legislatures – many of which were defined in terms of legislative ends. The religious liberty norms that limited these powers were increasingly uniform. Particularly after the Court incorporated the federal religion clauses in *Cantwell* and *Everson*, the locus of religious liberty norms shifted away from state constitutional provisions for religious liberty and toward the federal Constitution.

In the next chapter, I trace the Supreme Court's emerging Establishment Clause jurisprudence from *Everson* to the case of *Lemon v. Kurtzman* (1971) – the influential case in which the Supreme Court formally stated that, in order for a law or government action to clear Establishment Clause review, it must have 1) a secular legislative purpose, and 2) a primary effect that neither advances nor inhibits religion; and 3) it must not foster an excessive government entanglement with religion.[84] The Court portrayed this test as the summary and meaning of its Establishment Clause jurisprudence to-date. *Lemon* clearly drew from the Court's earlier precedents and religious liberty norms. However, its three-pronged test – especially the secular purpose test – had novel implications for the differentiation of religious and legislative spheres.

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[84] *Lemon V. Kurtzman*, 612.

Chapter 9
Birth of the Secular Purpose Test: 1947-1971

> *[T]he Establishment Clause has been directly considered by this Court eight times in the past score of years and…it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*[1]
>
> – Justice Tom C. Clark

§1 Introduction

How, exactly, did the secular purpose test come about? Jurists, legislators and ordinary citizens struggled to make sense of the boundaries between religious and legislative spheres in the wake of the Supreme Court's incorporation of the federal religion clauses in *Cantwell* and *Everson*. Between 1940 and 1971, the U.S. Supreme Court heard more than sixty cases involving various free exercise of religion, free religious speech, and establishment of religion claims. Free exercise litigants continued to test the limits of legislatures' power to regulate religiously motivated conduct and grant exemptions from generally applicable laws. Legislatures sought new ways to protect, incorporate, or exclude religious exercises in public schools without violating constitutional norms. And the Court interpreted new cases with evolving standards of review.

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[1] *Abington School District V. Schempp*, 374 U.S. 203 222 (1963).

By 1971, the Supreme Court's Establishment Clause jurisprudence had coalesced into a seemingly concise, three-part test that subsequently became known as the *Lemon* test. The Court announced this method in its *Lemon v. Kurtzman* (1971) decision, explaining:

> Every analysis in this area [i.e. Establishment Clause cases] must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, *the statute must have a secular legislative purpose;* second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'[2]

In formulating this test, the *Lemon* Court intentionally drew from earlier Establishment Clause cases, especially from the post-*Everson* period. As previous chapters have shown, state and federal courts had long evaluated the purposes and effects of legislation with respect to religious practices, beliefs, and institutions. And in that sense, the *Lemon* test had continuity with longstanding norms in constitutional law. On the other hand, the *Lemon* test represented a significant innovation in the Supreme Court's methods for reviewing laws challenged under the Establishment Clause. Previous courts had evaluated the purposes of statutes in terms of specific legislative powers and "public" purposes. In contrast, the *Lemon* test measured the constitutionality of legislative purposes in terms of their secularity, as such.

The secular purpose test, as formulated in *Lemon,* was conceptually rooted in three lines of cases argued between 1947 and 1971. In the first line of cases, discussed in §2 below, the Court evaluated a new round of state Sabbath laws that were challenged as violations of the federal religion clauses. In the second line of cases, discussed in §3, the Court evaluated limits on religious practices and accommodations in public schools.

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[2] *Lemon V. Kurtzman*, 612-13. Internal citations omitted. Emphasis added.

Finally, in the third line of cases, discussed in §4, the Court evaluated statutes that financially benefitted religious institutions. I focus in each of these sections primarily on cases that served as direct precedents for the Court's decision in *Lemon v. Kurtzman* (1971).

§2 Sabbath Laws and Secular Purposes

The first line of cases leading to the secular purpose test involved Sabbath (or Sunday) laws, and evaluated the scope of state legislatures' power to enforce ostensibly religious norms as political and civic duties. Litigants in four separate cases that were decided in 1961 challenged Sunday laws, in their respective states, as violations of the Establishment Clause, the Free Exercise Clause, the Due Process Clause, and/or the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The statutes in question prohibited residents from engaging in commercial activities and other forms of labor on Sundays; they also included numerous exceptions that varied by locale. Litigants insisted that these laws inappropriately enforced Christian piety on the general public, and disadvantaged adherents of religious traditions who observed a different day of rest. The Court, echoing the logic of earlier Sabbath cases, including *Hennington v. Georgia,* upheld the statutes in all four cases.

The Court's ruling in *McGowan v. Maryland* (1961) addressed the Establishment Clause issues at stake in these cases most directly, and helped shape the Court's emerging "secular purpose" doctrine. The appellants in *McGowan* had been convicted of unlawfully selling a three-ring binder, a can of floor wax, a stapler and staples, and a toy submarine from their department store one Sunday in Maryland. Citing the long history of Sunday

laws in the state, they argued that the statutes served essentially religious purposes, and, therefore, amounted to an unconstitutional establishment of religion.[3]

The Court disagreed. Chief Justice Earl Warren authored the Court's opinion. Over the vociferous dissent of Justice William Douglas, he concluded that Maryland's Sunday laws were consistent with the legislature's police powers. Warren's logic, which emphasized the statute's benefits for public health and welfare, mirrored the Georgia and U.S. Supreme Courts' earlier rulings in *Hennington*. What was new in the Supreme Court's *McGowan* ruling, however, was its explicit and frequent reference to the "secular" purposes and character of such laws.

Warren acknowledged that Sunday laws had religious origins, and affirmed that any laws with the purpose or effect of using "the State's coercive power to aid religion" would violate the Establishment Clause.[4] He concluded, however, that the enforcement and observance of Sabbath rest in Maryland had taken on a primarily secular meaning in American law and culture. "There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces," he explained.[5] Such laws functioned to hallow the "Lord's Day," to punish its profanation, and to encourage church attendance. "But, despite the strongly religious origin of these laws, beginning before the eighteenth century nonreligious arguments for Sunday closing began to be heard more distinctly and

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[3] *Mcgowan Et Al V. Maryland*, 431. The Court summarized this argument as follows: "The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day."

[4] Ibid., 453.

[5] Ibid., 431.

the statutes began to lose some of their totally religious flavor."[6] Modern Sunday laws protected workers' health and wellbeing, and fostered leisurely afternoons in the countryside with family and friends.[7] These "secular justifications" now outweighed the original, religious purposes of most Sunday laws.[8]

Warren also pointed out that several non-religious organizations publicly supported such laws,[9] and cited the Court's previous rulings in *Soon Hing v. Crowley* (1885) and *Hennington v. Georgia* (1896) as evidence that contemporary Sunday laws enforced merely "civil" duties that advanced "secular goals."[10] The coincidence of such duties with religious norms was irrelevant to their constitutional validity.[11]

> In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis on secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to the establishment of religion as those words are used in the Constitution of the United States. Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our

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[6] Ibid., 433-34.

[7] See ibid., 450. The Court responds here to the appellants' suggestion that a law allowing individuals to choose their own day of rest would inadequately serve the legislature's end-purposes. "However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days." Justice Frankfurter noted, in a concurring opinion, that "…one of the prime objectives of the legislation is the preservation of an atmosphere—a subtle desideratum, itself the product of a peculiar and changing set of local circumstances and local traditions."

[8] Ibid., 434.

[9] Ibid., 434-35.

[10] Ibid., 436-37. Also see: *Soon Hing V. Crowley, Chief of Police, Etc.*, 113 U.S. 703 (1885); *Hennington V. Georgia.*

[11] The Court here followed the logic of its earlier polygamy cases, arguing: "However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue." *Mcgowan Et Al V. Maryland*, 442. (Internal citations omitted.)

> citizens […] Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact this this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.[12]

In a concurring opinion, Justice Felix Frankfurter identified a similar relationship between the statutes' purposes and effects. Frankfurter conceived of the Establishment Clause as a set of structural limits on governmental powers that were based on a very specific conception of religion. The Establishment Clause, he explained, "withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief…With regulations which have other objectives the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned."[13] This logic meant that laws promoting non-religious objectives or interests – namely, laws that did not promote transcendental ideas or practical adherence thereto – did not violate the Establishment Clause. "To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine…the regulation is beyond the power of the state."[14] Frankfurter then re-emphasized that legislators' religious motives were beyond the scope

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[12] Ibid., 444-45.

[13] Ibid., 465-66.

[14] Ibid., 466-67.

of judicial review before concluding that the statutes' secular purposes and effects cleared the relatively low bar set by the Establishment Clause.

Justice William Douglas, however, strongly dissented. Douglas challenged the Court's portrayal of the Sunday laws' as merely "civil" regulations. In his view, Sunday regulations were inherently and irrevocably religious. "No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment [of the Decalogue]; and they serve and satisfy the religious predispositions of our Christian communities."[15] Douglas admitted that the state could require citizens to observe one day of rest per week for the sake of public health. He insisted, however, that the supposed benefits of imposing a *uniform* day of rest upon all citizens, regardless of their religious affiliations, could not justify the prohibition of socially benign activities every Sunday, especially given the burdens that such regulations placed on those who observed a different day of rest. In Douglas's view, the Constitution fundamentally prohibited religious groups from imposing their distinctive religious "regimes" – i.e. their routines and observances – on those who did not adhere to the same faith:

> The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs another. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause…Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?[16]

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[15] Ibid., 572-73.

[16] Ibid., 575-76.

Thus, where the majority of the Court saw a harmless and coincidental alignment of religious and secular interests, Douglas perceived a malicious invasion of the religious sphere into the legislative sphere, and, from there, into the private lives of everyone – including those who did not observe the Christian Sabbath.

Douglas ultimately lost this argument. His interpretation of the Establishment Clause, however, and the limits he thought it placed on legislature's powers to enforce religious norms would reemerge in subsequent cases. Most important for our purposes, however, is that the majority and concurring opinions in *McGowan* helped usher a new legal rhetoric into the Court's jurisprudence. Whereas the *Everson* Court had emphasized the legitimate "public" purposes of secular education, the *McGowan* Court emphasized the legitimate "secular" purposes of Sunday regulations. The secular purposes the Court attributed to these laws were consistent with longstanding definitions of state legislatures' police powers, insofar as they were supposed to advance public health and welfare. Nonetheless, the Court's method for evaluating such purposes was decreasingly moored to the enumerated powers of specific legislative bodies, and increasingly defined in terms of secularity.

§ 3 Public Education and Secular Purposes

A second line of cases that shaped the development of the secular purpose test focused on religious practices and accommodations in public schools. The five cases I describe below address three main questions relevant to the development of the secular purpose test. In the first two cases – *McCollum v. Board of Education* (1948) and *Zorach v. Clauson* (1952) – the Court evaluated "release time" programs in which public school

students were dismissed from their "secular" studies during the school day in order to attend classes in which they received religious instruction. The central issue in these two cases was the scope of state and local governments' power to facilitate voluntary religious instruction as part of public schools' otherwise non-religious curricula. A decade later, in *Engel v. Vitale* (1962) and *Abington Township v. Schempp* (1963), the Court considered whether state and local governments could incorporate voluntary group prayers and Bible readings as part of public schools' morning exercises. Finally, in *Epperson v. Arkansas* (1968), the Court evaluated a state law that prohibited the teaching of Darwinian theories of evolution in public schools and universities. The Court's decisions in each of these cases included distinctive, antecedent forms of the secular purpose test that were eventually adapted in *Lemon v. Kurtzman* (1971).[17]

McCollum v. Board of Education (1948)

Not long after ruling in *Everson* that the "wall of separation" between church and state allowed for bus reimbursements, but prohibited direct aid to religious schools, the Court was asked to decide if, and to what extent public officials could facilitate voluntary religious instruction for students in public schools. The appellant in *McCollum v. Board of Education* challenged a program in her child's school district under which students, with the written permission of their parents, were released once each week from their normal studies for a 30-45 minute period of instruction from unpaid "religious teachers."[18] Classes were held in students' regular classrooms, with those who did not wish to

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[17] *Mccollum V. Board of Education*, 333 U.S. 203 (1948); *Zorach V. Clauson*, 343 U.S. 306 (1952); *Engel V. Vitale*, 370 U.S. 421 (1962); *Abington School District V. Schempp*; *Epperson V. Arkansas*, 393 U.S. 97 (1968); *Lemon V. Kurtzman*.

[18] *Mccollum V. Board of Education*, 208.

participate being dismissed to another part of the school to continue their standard coursework. The instructors of these classes represented three religious traditions – Protestant, Catholic and Jewish[19] – and were subject to the approval and supervision of the district superintendent.

The Court overturned the district's program in *McCollum,* concluding that state and local governments possessed no power to promote religion or provide aid to religious groups as part of a public education program.[20] Justice Hugo Black authored the Court's opinion, and reasoned that the Establishment Clause required more than government neutrality between religious sects; it required a strict differentiation of public institutions from religion, as such.[21] Neither the absence of overt coercion, nor the program's official neutrality between Protestant, Catholic and Jewish traditions could justify the program's active engagement with religion. Justice Black insisted that legislatures could not provide material aid to any religious groups, or to all religious groups: "The foregoing facts…show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects […] This is not the separation of Church and

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[19] The appellant, Vashti McCollum, argued that certain Protestant teachers had gained an "overshadowing advantage" in the program, and that, in practice, students were pressured to conform with the majority of their peers in participating in the religious classes, despite the programs formally "voluntary" policies.

[20] The *McCollum* Court treated the establishment Clause as a structural limitation on states' power: "This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First an Fourteenth Amendments to the Federal Constitution." See *Mccollum V. Board of Education*, 204-05.

[21] Ibid., 211.

State."[22] Justice Jackson, in a concurring opinion, urged caution on those who would mark out the metes and bounds of secular and religious education: "The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy."[23] Justice Frankfurter, however, put an exclamation point on the Court's strict "separationist" reading of the Establishment Clause. "Separation means separation," he asserted, "not something less. Jefferson's metaphor…speaks of a 'wall of separation,' not a fine line easily overstepped."[24] Like Justice Black, Frankfurter insisted that government neutrality toward religion required public schools to be non-religious – not benignly, vaguely or diversely religious. American public schools represented a "symbol of our secular unity," he declared – a place where citizens of all creeds could send their children to be educated. The Establishment Clause, under this view, prohibited the "commingling of sectarian and secular instruction in the public school," and thereby protecting the integrity of the "the family altar, the church, and the private school."[25]

Zorach v. Clauson (1952)

The Court adopted a more nuanced interpretation of the Establishment Clause four years later in *Zorach v. Clauson* (1952).[26] The "release time" program in *Zorach* was different from the *McCollum* program in one key respect: rather than releasing students to attend religious courses that were held in public school classrooms, it released students

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[22] Ibid., 210-12.

[23] Ibid., 237.

[24] Ibid., 231.

[25] Ibid., 217, 20.

[26] *Zorach V. Clauson*, 312. Douglas wrote: "There cannot be the slightest doubt," Justice Douglas wrote for the Court, "that the First Amendment reflects the philosophy that Church and State should be separated…The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."

to attend religious classes at nearby churches and other religious institutions. Students still needed written permission from their parents to participate in the program; the state still paid no money to the religious teachers; and religious teachers still reported students' attendance (or lack thereof) to the schools. But, now, religious classes were held at off-campus locations.

Appellants had argued that the New York program aided religion in much the same way that the program in *McCollum* had – by putting the weight and influence of compulsory attendance laws "behind a program for religious instruction."[27] The Court, however, ruled that the program simply accommodated students' religious needs without commingling religious and secular instruction in the public schools themselves. In sharp contrast to Justice Frankfurter's declaration in *McCollum* that the public schools represented a symbol of the nations "secular unity," Justice William O. Douglas portrayed the nation as deeply, if diversely, religious: "We are a religious people whose institutions presuppose a Supreme Being," he wrote,

> 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 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 [do so] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile

[27] Ibid., 309.

> to religion and to throw its weight against efforts to widen the effective scope of religious influence.[28]

This logic implied that, much in the same way that teachers could excuse individual students to attend to the religious observances of their own or their family's choosing, teachers could also excuse groups of students "pursuant to a systematized program designed to further the religious needs of all the students."[29]

The majority's opinion in *Zorach* elicited strongly dissenting opinions from Justices Black, Frankfurter and Jackson. Jackson insisted that the program was coercive because it 1) enforced attendance at the off-campus religious classes: "if they are made free many students will not go to the Church," and 2) required those who didn't attend religious classes to remain at the public school – "a temporary jail for a pupil who will not go to Church."[30] Justice Black's dissent similarly emphasized the program's implicit religious compulsion:

> Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools.[31]

Thus, whereas Justice Douglas had portrayed the legislative sphere under a norm of "benevolent neutrality" toward the religious practices and needs of a deeply and diversely religious populace, the dissenting justices emphasized that the admixture of religion and education in *Zorach* was inherently tainted by the coercive elements of government power.

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[28] Ibid., 313-14.

[29] Ibid., 313.

[30] Ibid., 324.

[31] Ibid., 318.

Two more cases involving religion in public schools brought the Supreme Court closer to adopting the secular purpose test as an official part of its Establishment Clause jurisprudence. In *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), the Court considered whether policies for teacher-led prayers and Bible readings in public schools violated Free Exercise and Establishment Clause norms. If public schools could dismiss students to receive religious instruction off campus without violating the Establishment Clause, as in *Zorach,* could a public school teacher lead a voluntary prayer as part of the morning exercises? In both cases, the Court reaffirmed the principle that state legislatures' power over public education did not include the power to establish religion. This did not mean that the disinterested study of religions was an invalid subject within a secular curriculum, or that every vestige of religion was to be banned from public schools. Schools could teach students about the historical forms and functions of the world's religions, for example. But, they should do so from a religiously neutral perspective. In other words, public schools could teach students *about* religion, but they could not lead students in the performance of religious acts; public officials could not *do* religion in their capacity as government officials. This logic ultimately gave birth to the original secular purpose test in *Abington v. Schempp* (1963) – a case in which the Court emphasized that government actions, especially in the context of public schools, must not take on a devotional or religious quality.

Engel v. Vitale (1962)

In *Engel v. Vitale* (1962), the Supreme Court overturned a state policy under which students in public schools recited a short prayer each morning after the Pledge of Allegiance. The New York Board of Regents had composed the prayer, and teachers led

students in praying: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents our teachers and our Country."[32] Attorneys for the state emphasized that the prayer used "non-denominational" language consistent with the nation's "spiritual heritage," and noted that students were not required to participate.[33] Lower courts had followed a similar logic, upholding "the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer of his or his parents' objection."[34] The Supreme Court, however, interpreted the Establishment Clause as a stronger limit on governments' power to perform religious actions. The prayer's phrasing was not narrowly sectarian, the Court admitted. But, the beliefs it expressed were undoubtedly religious. "There can be no doubt," Justice Black wrote for the Court, "that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer."[35] Moreover, although the prayer was not overtly compulsory, its recitation in classrooms was a religious form of action – one that was subtly coercive. Again, the Establishment Clause functioned as a structural limit on the types of action in which governments could engage: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[36]

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[32] *Engel V. Vitale*, 422.

[33] Ibid., 430.

[34] Ibid., 423.

[35] Ibid., 430.

[36] Ibid.

In a concurring opinion, Justice Douglas, who had written the Court's decision upholding the release time program in *Zorach,* emphasized the financial aspects of the state's prayer program. "The point for decision is whether the Government can constitutionally finance a religious exercise."[37] Even though teachers spent a relatively tiny portion of the day reciting the prayer, Douglas concluded, "the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution."[38] Unlike the release-time program in *Zorach,* therefore, in which schools' accommodation of students' religious needs neither funded nor performed religious activities, the New York program financed a "religious exercise" and thus inserted "a divisive influence into our communities."[39] In short, the prayer was a "religious" act. As such, it stood outside of the state legislature's powers over public education.

Abington School District v. Schempp (1963)

The Supreme Court's decision in *Abington School District v. Schempp* (1963) officially introduced the secular purpose test as a central component of the Supreme Court's Establishment Clause jurisprudence. *Abington* addressed two cases in a single ruling: one involved a Pennsylvania law that required short Bible-readings and recitation of the Lord's Prayer along with the Pledge of Allegiance during the morning exercises in public school classrooms; the other case involved a Maryland statute that required a full chapter of the Bible to be read at the beginning of each school day. In both cases, the Bible was read without comments or interpretation, and students were not required to participate

[37] Ibid., 437.

[38] Ibid., 441.

[39] Ibid., 442.

in the exercises. Student-volunteers typically chose which Bible verses to read, and led morning exercises.

The Court found both of the statutes in *Abington* unconstitutional. Justice Tom C. Clark, writing for the majority, echoed the *Engel* Court in asserting that "neutrality" toward religion required more than neutrality between religious sects. "The wholesome 'neutrality' of which this Court's cases speak," he wrote, prohibits the "fusion of governmental and religious functions or a concert or dependency of one upon the other."[40] Neither state nor federal governments could lend their "official support" to "the tenets of one or of all orthodoxies."[41] Once again, the absence of overt coercion in the morning exercises was less relevant than their "religious" character.

Justice Clark introduced the secular purpose test in the majority's opinion, identifying it as an element of the Court's recent Establishment Clause jurisprudence. Citing *Everson* and *McGowan* as precedents, Clark asserted that the Establishment Clause categorically prohibited state and federal legislatures from promoting or otherwise expressing religious beliefs:

> As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years, and with only one justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.[42]

This much of Clark's opinion was closely aligned with the Court's recent rulings in cases like *Engel* and *McCollum*. There, the Court reasoned that the Establishment Clause limited

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[40] *Abington School District V. Schempp*, 222.

[41] Ibid.

[42] Ibid.

legislatures' power to promote religious doctrines and aid religious institutions, at least directly. In the very next sentence of the Court's ruling, however, Justice Clark rephrased this negative purpose test as a positive requirement.

> That is to say that to withstand the strictures of the Establishment Clause there must be a *secular legislative purpose* and a primary effect that neither advances nor inhibits religion.[43]

This new phrase neatly – too neatly, perhaps – conflated a diverse set of legal norms and principles that the Court had applied in previous cases. Recall that the Court in *Everson* affirmed, as part of its Fourteenth Amendment due process analysis, that "secular education" served a legitimate "public purpose" that was consistent the state's police powers, and with citizens' due process rights: Maryland's bus reimbursement program was valid because it facilitated the opportunity of all students to receive such an education (in keeping with the Due Process Clause) without directly aiding religious institutions (in keeping with the Establishment Clause). The *Everson* Court did not, however, rule that the reimbursement program served a *secular*-and-therefore-legitimate purpose. Similarly, the *McGowan* Court had evaluated the purposes and effects of contemporary Sunday laws with regard to religion, but did not conclude that "secular" legislative purposes were legitimate, as such. Rather, the *McGowan* Court ruled that contemporary Sunday laws served end-purposes consistent with the state legislatures' police powers, even though earlier forms of Sunday laws in the United States had enforced Sabbath rest as a religious duty for "keeping holy the Lord's day."[44] Unlike the

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[43] Ibid. Emphasis added.

[44] *Mcgowan Et Al V. Maryland*, 432.

original Sunday laws, the *McGowan* statutes' "present purpose and effect [was] not to aid religion but to set aside a day of rest and recreation."[45]

The *Abington* ruling, in contrast, implied that legitimate legislative purposes were, by definition, "secular." The *Abington* Court did not clearly state what the "purposes" at issue referred to – i.e. legislative end-purposes or motives. In subsequent cases, however, the secular purpose requirement would replace earlier standards of review in which the courts used legislative purpose inquiries to establish the link (or lack thereof) between the ends that a specific statute advanced, and the enumerated powers of the legislature that had enacted it. Before *Abington*, that is, American courts generally evaluated the legislative purposes of statutes under constitutional review in an effort to determine whether the statute was consistent with the explicit or implicit powers of specific legislatures. Such powers rarely, if ever, included the power to "establish" religion. Legislatures could not – in light of their limited powers and state or federal constitutional religious liberty provisions – directly fund overtly religious institutions; directly promote "sectarian" beliefs, or perform sectarian acts; or discriminate in favor of one sect (or sects) at the expense of others. Such acts were not within the "competency" of most legislative bodies because the constitutions and charters by which those bodies were established did not convey such powers, and often expressly limited them. Legislatures could enact laws that affected, to varying degrees, citizens' exercise of religion. Why? Because legislatures possessed powers to do things like protect public health and safety, to enjoin civil duties, and to enforce criminal laws – things that inevitably came into contact with citizens in their exercise of religion. These legislative powers and functions

[45] Ibid., 449.

could certainly be described as "secular." But legislative powers were not definitively secular, or legitimate *because* they were secular. And, because these powers were defined in terms of specific end-purposes, rather than in terms of the non-religious or "secular" purposes, legislatures could wield these powers, for better or worse, in a relatively wide variety of ways, and for a relatively wide range of legislative reasons or motives – including religious reasons and motives. As the *Hennington* Court had emphasized, "Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within the legislative competency."[46] This form of functional differentiation of religious and legislative spheres (without religious privatization) was disrupted by the introduction of the secular purpose test.

Almost immediately after setting forth its new "secular purpose" standard, the *Abington* Court encountered its conceptual ambiguity. Attorneys for both school districts in the case had argued that reciting the Lord's Prayer and/or reading the Bible in public schools, in fact, served multiple secular purposes. These purposes included "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions…the teaching of literature" and the improvement of classroom order and discipline.[47] In addition, attorneys for one of the districts argued

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[46] *Hennington V. The State*, 397.

[47] *Abington School District V. Schempp*, 223. Also see ibid., 278. Also see School Dist. of Abington Tp. v. Schempp, 1963 WL 106326 (U.S.), 18 (U.S., 2006): "The practice of Bible reading developed as an aid to moral training, and not for the purpose of introducing religion or sectarian instruction into public education." Also see William J. MURRAY, III, infant, by Madalyn E. Murray, his mother and next friend and Madalyn E. Murray, individually, Petitioners, v. John N. CURLETT, president, Samuel Epstein, Mrs. M. Richmond Farring, Eli Frank, Jr., Dr. Roger Howell, Henry P. Irr, Dr. William D. McElroy, Mrs. Elizabeth Murphy Phillips, John R. Sherwood, individually, and constituting the Board of School Commissioners of Baltimore City: "It is thus our contention that the dominant purpose and effect of these exercises is not religious instruction, as in *McCollum,* nor the conduct of religious services, as in a place of worship. To the contrary, the pervading

that the Bible and the Lord's Prayer, like the Sunday Laws in *McGowan*, had gradually accrued a non-religious meaning in American culture:

> The Bible is not merely a great religious work of a particular sect or religion, it is also a treasury of fundamental moral and ethical values. The Lord's Prayer is not merely a prayer to be recited in church as part of a religious service. In our society, the Lord's Prayer has, over the centuries, attained a far greater height and meaning. It has transcended its sectarian origin, and indeed its purely religious roots, and stands with the Bible as a great moral and inspirational work of high value.[48]

Justice Clark acknowledged that the purpose of the exercises was "not strictly religious." He further admitted that teachers could, without violating the Establishment Clause, teach students "objectively" about religious topics and texts. In fact, "it might be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities."[49] Despite these concessions, however, Clark concluded that the exercises were pervasively religious in character: "[T]he place of the Bible as an instrument of religion cannot be gainsaid," he explained. And, there was no evidence to suggest that schools were actually using the Bible as "an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects."[50] In short, "They are religious exercises, required by the States in violation of the command of the First Amendment that the Government

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purpose and objective in such use of the Lord's Prayer and the Bible is the utilization of a source material for inculcation of moral and ethical precepts."

[48] William J. MURRAY, III, infant, by Madalyn E. Murray, his mother and next friend and Madalyn E. Murray, individually, Petitioners, v. John N. CURLETT, president, Samuel Epstein, Mrs. M. Richmond Farring, Eli Frank, Jr., Dr. Roger Howell, Henry P. Irr, Dr. William D. McElroy, Mrs. Elizabeth Murphy Phillips, John R. Sherwood, individually, and constituting the Board of School Commissioners of Baltimore City, Respondents., 1963 WL 66464 (U.S.), 14, Respondents., 1963 WL 66464 (U.S.), 13.

[49] *Abington School District V. Schempp*, 225.

[50] Ibid., 224.

maintain strict neutrality, neither aiding nor opposing religion."[51] The Court thus evaluated the purpose and primary effects of the statutes in *Abington* in terms of the form of activity they mandated, not the long-term ends that the exercises presumably served. The exercises amounted to a government sanctioned "religious ceremony" that was not neutral toward religion. As such, they exceeded the scope of the state legislatures' powers.

Epperson v. Arkansas (1968)

The case of *Epperson v. Arkansas* (1968) presented a different sort of Establishment Clause question, and elicited a different sort of secular purpose test than the Supreme Court had applied in *Schempp*. In 1928, one year after Tennessee's sensational *Scopes* monkey trial,[52] the state of Arkansas had enacted a law prohibiting teachers in public schools and universities from teaching "the theory or doctrine that mankind ascended or descended form a lower order of animals."[53] Similar "anti-evolution" statutes were introduced in approximately twenty other states during the 1920s. When *Epperson* arrived in the U.S. Supreme Court, however, Mississippi was the only other state with such a law on the books. Enforcing the law was apparently a low priority for Arkansas authorities.[54] Nonetheless, a high-school biology teacher named Susan Epperson feared that she would lose her job if she taught a chapter about

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[51] Ibid., 225.

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

[53] See Ark. Stat. Ann. § 80-1627, 80-1628 (1960 Repl. Vol.) as quoted in *Epperson V. Arkansas*, 99.

[54] Justice Hugo Black described the law as "lifeless" and noted the following in his concurring opinion in *Epperson*: "We are informed that there has never been even a single attempt by the State to enforce it. And the pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law should it remain on the books for the next century." Ibid., 109-10.

evolution from her school's new biology textbook, and filed a lawsuit challenging the statute as an unconstitutional establishment of religion.[55]

Epperson's Establishment Clause argument presented a novel question for the Supreme Court. The Tennessee law that had been challenged in the *Scopes* case had prohibited the teaching of "any theory that denies the story of the Divine Creation of man as taught in the Bible."[56] Arkansas' anti-evolution law, however, mentioned neither the Bible nor any other overtly religious themes. It simply prohibited the teaching of evolution, as such. Moreover, the broader curriculum in Arkansas' public schools did not prescribe the teaching of Biblical doctrines about human origins.[57] Widely accepted legal norms limited legislatures' power to fund or support religious ideas, practices and institutions – at least directly. Free exercise norms similarly limited legislatures' powers to regulate and prohibit individuals' religious beliefs and practices. But, did the First Amendment prohibit Arkansas from narrowing the scope of biology education to exclude one topic in publicly financed schools?

The Supreme Court concluded that Arkansas' anti-evolution law did, in fact, violate the Establishment Clause. Justice Abraham Fortas authored the Court's opinion, and portrayed the law as a sort of anti-heresy law that was not "neutral" with respect to "religious theory, doctrine and practice."[58] Fortas acknowledged that state legislatures possessed power, and considerable discretion, to define public schools' curricula as they

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[55] Epperson's attorneys also argued that the law was unconstitutionally "vague" (see Ibid. at 102) and that it violated her free speech rights under the Fourteenth Amendment.

[56] As quoted in *Epperson V. Arkansas*, 108.

[57] Ibid., 113.

[58] Ibid., 103-04. The Court further interpreted the principle of neutrality to mean that government "May not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." (Ibid. at 104)

saw fit. However, only certain "reasons" could justify states' exercise of those powers. Citing *Schempp,* the *Epperson* Court concluded that the law served religious purposes because it was intended to suppress theories contrary to "fundamentalist" interpretations of the Bible.

> The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon *reasons* that violate the First Amendment…In the present case, there can be no doubt that 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. 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. It is clear that fundamentalist sectarian conviction was and is the law's *reason for existence*.[59]

The Court thus equated the "purpose" of the statute with the "reasons" behind its enactment. Although the Arkansas law did not directly prescribe religious teachings, its proscription of teaching evolution represented an "attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read."[60] In fact, the Court cited a puzzling hodgepodge of extrinsic evidence to illustrate voters' reasons for enacting the statute, including: several articles in legal journals analyzing similar laws in other states, the text of Tennessee's anti-evolution statute, a political advertisement urging passage of the law in an Arkansas newspaper, and letters to the editor speaking in its favor.[61] Justice Black cautioned in a concurring opinion that the Court should not overturn such laws based on the supposed "motives" of those who enacted them; such motives were simply "too difficult to determine."[62] Nonetheless, even though the

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[59] Ibid., 107-08. Emphasis added.

[60] Ibid., 109.

[61] Ibid., 108 (n. 16).

[62] Ibid., 113.

Arkansas statute was phrased differently than Tennessee's law, the Court concluded that "there is no doubt that the motivation for the law is the same [as the Tennessee law]: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."[63] Such motives were fatal under the Court's new secular purpose doctrine.

The Court was probably right about the motives of Arkansas voters who supported the anti-evolution law – some of them, at least. Justice Fortas' emphasis on these motives, however, diverged from the Court's previous methods for evaluating statutes under Establishment Clause norms. In previous cases, the Court's purpose inquiries focused on 1) determining whether statutes related to end-purposes within the competency of state and federal legislatures, and 2) constructing the meanings of statutes in order to determine whether the actions they inappropriately prescribed or proscribed religious activity. In the *Sunday Law* cases, for example, the Court determined that various Sabbath regulations served end-purposes consistent with states' police powers. In *Schempp,* the Court concluded that the morning exercises used religious means for religious purposes – that is, the schools' prayers and Bible readings prescribed religious ceremonies. Although the Court's jurisprudence disparaged arbitrary laws that favored or disfavored certain religious beliefs or groups, the Court had always emphasized that legislators' religious motives, as such, were not constitutionally suspect. The mere coincidence of civil or criminal legislation with the norms or interests of a particular religious tradition or community was not grounds for an Establishment Clause challenge. The substance of a law – its meaning, or application – was constitutionally relevant; the motives behind its enactment were not. *Epperson* was unique in that Arkansas' law did

[63] Ibid., 109.

not proscribe or prescribe religious activity, but rather banned from public schools and universities the teaching of a scientific theory that was incongruent with a religious cosmology. This law established religion, the Court reasoned, by expressing citizens' "fundamentalist sectarian conviction" and displacing an unorthodox (relative to Christian fundamentalism) theory of human origins.

These five public education cases – *McCullom, Zorach, Engel, Abington* and *Epperson* – thus led to the first explicit applications of the Court's new secular purpose requirement. The Court's efforts to distinguish the limits on religious exercises and accommodations for religious adherents in public schools proved confounding, and several times divided the Court. Traditional religious liberty norms like non-coercion and the differentiation of religious and governmental institutions made frequent appearances in the Court's rulings. Most importantly, the Court's vocabulary and methods began to shift in these cases toward normalizing the expressly "secular" character of legislative and other governmental spheres. Where once "sectarian" legislative actions were deemed constitutionally suspect, the Court increasingly viewed "religious" acts in the same light. The next two cases, discussed below, carried the secular purpose test through to the case of *Lemon v. Kurtzman* (1971), where the Court would finally forge it into the first prong of the *Lemon* test.

§4 Secular Purposes and Public Funding for Religious Institutions

A third line of cases that helped establish the secular purpose test as part of the Court's three-pronged *Lemon* test involved public funding for religious organizations. In the Sabbath law cases discussed above, the Court considered if and how the religion

clauses limited legislatures' power to enforce religious duties as civil obligations. In the public education courses discussed above, the Court analyzed the limits of state-sponsored religious practices and accommodations in government-run schools. In the final line of cases, discussed below, the Court evaluated claims that the Establishment Clause prohibited state legislatures from enacting laws that financially benefitted religious institutions, including parochial schools and places of worship. The Court's rulings in *Board of Education v. Allen* (1968) and *Walz v. Tax Commission* (1970) applied nascent forms of the secular purpose test that established precedents for *Lemon*, another a case in which litigants challenged state programs that helped finance education in private religious schools.[64] The *Allen* and *Walz* rulings are particularly significant as midpoints in transition from *Everson* to *Lemon*.[65] They illustrate the Court's continuing shift away from defining legitimate legislative purposes in terms of specific legislative powers and "public" purposes, and toward defining such purposes in terms of secular character, *per se*. Both cases reflected the Court's evolving vocabulary and legal norms. They also demonstrated an emerging sense that diverse religious sects held secular, rather than religious values and interests in common. "General Christianity" was no longer the default or overarching religion of all Americans, and several justices portrayed the involvement of religious groups – especially Catholics – in political processes with deep suspicion. These suspicions, however, did not sway a majority of the Court in either case to overturn the challenged statutes. Whereas other rulings in this period enforced a

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[64] *Board of Education of Central School District No. 1, Etc., Et Al. V. James E. Allen, Jr., as Commissioner of Education of New York, Et Al*, 392 U.S. 236 (1968); *Frederick Walz V. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

[65] Also see: *Florence Flast Et Al. V. Wilbur J. Cohen, Secretary of Health, Education, and Welfare, Et Al.*, 392 U.S. 83 (1968).

relatively strict form of functional differentiation within the nation's public schools, *Walz* and *Allen* followed earlier cases – including *Cochran v. Louisiana, Pierce v. Society of Sisters, and Everson v. Board of Education* – in upholding laws that created limited forms of administrative, financial, and functional cooperation between legislative and religious spheres and institutions. Such laws were deemed valid because they advanced secular ends without directly aiding religious institutions, and because their benefits were distributed in a religiously neutral manner.

Board of Education v. Allen (1968):

The New York state education law at issue in *Board of Education v. Allen* (1968) required local school boards to purchase textbooks, and lend them (free of charge) to all students within their respective districts who were enrolled in grades seven through twelve, including students who were enrolled at private religious (or "parochial") schools.[66] State law had previously allowed voters within each district to authorize special taxes in order to purchase textbooks that could be loaned out in a similar manner. The state legislature amended the law to *require* such purchases in 1965, however, on the grounds that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the

[66] Section 701, subdivision 3 of the New York Education Law, as amended L. 1965, C. 320, §2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, §701.3. See Brief for Appellants, *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 1-3 (1968). The statute provides: ""In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities." *Board of Education of Central School District No. 1, Etc., Et Al. V. James E. Allen, Jr., as Commissioner of Education of New York, Et Al*, 2-3.

general welfare of the state."[67] Members of a local school board challenged the law in court, arguing that it forced them to choose between 1) honoring their oaths of office by refusing to administer a program that violated the Constitution (and state law), but, thereby, endangering their jobs, and 2) administering the program in violation of their oaths of office.[68]

New York's law had clear parallels to the statutes at issue in the earlier cases of *Cochran* and *Everson*. Unlike both of those cases, however, the arguments in *Allen* focused on the meanings of the federal Constitution's religion clauses as they had been incorporated through the Fourteenth Amendment Due Process Clause, without the corollary Due Process arguments featured in both *Cochran* and *Everson*. Recall that *Everson* and *Cochran* both involved arguments about whether state laws constituted the unlawful "taking" of "private property" (i.e. taxes) for "private purposes." Litigants in *Everson* and *Cochran* claimed that their legislatures had used public tax funds to help pay for parents' personal preference to give their kids a religious education, even though free public education was readily available. The Court in both cases ruled that religious schools provided viable forms of secular education that served legitimate "public" purposes. Litigants in *Everson* and *Cochran* had *also* argued that the programs violated constitutional religious liberty norms implicit in the Establishment Clause. Although *Cochran* was ultimately decided solely on due process grounds, the final rulings in both cases left the programs intact, in part, because the perceived benefits to religious institutions were

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[67] As quoted in ibid., 239.

[68] Members of the board had taken an oath of office promising, in part, to "support the Constitutions of the United States and the State of New York." They alleged that compliance with the education law would violate their oath office, but that failure to comply would result in their dismissal by the state's Commissioner of Education, James E. Allen, Jr. See Brief for Appellants, *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 5-6 (1968).

indirect, relatively minimal, and administered in ways that were indifferent to students' religious affiliations.

The Court's *Schempp* ruling then modified and reframed its earlier Fourteenth Amendment "public purpose" test into a First Amendment doctrine. In *Schempp*, the Court's previous affirmations of the "public purpose" of "secular education" became a requirement that laws must possess a "secular legislative purpose" in order to clear Establishment Clause review. Litigants in *Allen* treated *Everson* and *Schempp* as alternative precedents: the *Everson* test imposed limits on close and/or direct relationships between religious and governmental institutions; the *Schempp* test, in contrast, evaluated statutes in terms of their secular purposes and effects. The meanings of the terms "secular" and "purpose" remained unclear, however, when *Allen* was being argued. As a matter of statutory construction and public policy, New York's law was clearly intended to broaden the distribution of tax-funded textbooks to include students who were attending religious (and other private) schools. But did this goal represent the "purpose" of the statute? And, if so, did the presumably secular subjects and viewpoints presented in such textbooks affect the religious or secular character of that legislative purpose? Or, on the other hand, did the broader policy goal of better educating the states' residents, in order to improve national defense and public safety, represent the statute's legislative purpose? And, if so, did these weighty goals justify indirect governmental aid to religious institutions and groups who, through their schools, advanced those interests?

Attorneys for the school board members argued that the law violated both of the federal Constitution's religion clauses. On one hand, the textbook program conflicted with the principles of religious voluntarism implicit in the Free Exercise Clause.

"Compulsory attendance and forced observance of religious forms and ceremonies went out early in the process of separating church and state…By the same token, our [constitutional] tradition is based on the premise that a state may not coerce a man to contribute his funds to a religious institution, or to do so through the medium of the state's taxing power."[69] Because the program used taxpayer funds to purchase the books, and because the books were to be used in and by religious schools in the process of teaching children religious beliefs, the state had effectively taxed citizens in order to pay for the "propagation of [religious] opinions" in which many of them did not believe.[70]

The school board's attorneys similarly argued that the program inappropriately established religion. Attorneys for the state of New York had portrayed the textbook program as something akin to the establishment of a public library: In practice, they said, it functioned like a public repository of books that was accessible to all students, irrespective of their religious beliefs. The school board's attorneys, however, described the program as a more nefarious form of state-sponsored religion. Whereas their free exercise argument had posited that the statute unlawfully compelled taxpayers to support religious institutions, the board's Establishment Clause argument posited that the program exceeded the state legislature's limited powers in the sphere of religion. Unlike the bus in *Everson*, they reasoned, textbooks were essential tools for religious education. Even seemingly secular subjects, like science or history, were inevitably tinged with religious dogmas when studied in a sectarian context. "There is no such thing as secular education in a sectarian school," they insisted, "because the whole curriculum is

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[69] Brief for Appellants, *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 34 (1968).

[70] Ibid, 32

permeated by religion."[71] Moreover, the textbooks were chosen and assigned by religious schools' administrators. The school board retained its authority, under the law, to approve or disapprove textbooks that were purchased; and, only those textbooks that were appropriate for public schools were to be used. In addition, the books were to be requested by, and delivered to individual students – not to their schools. Despite these formal barriers between governmental and religious institutions, the board's attorneys pointed out that students did not choose or assign their own textbooks – school administrators and teachers did. Religious administrators would inevitably assign textbooks that were favorable or flattering to their own religious views and traditions. Such texts would surely reflect "private" religious opinions, rather that the shared views and values of the general public. "If a textbook is an integral part of the educational process," the board's attorneys asserted, "and if the operation of a sectarian school is intended by its sponsor to fulfill a basic religious function, then the furnishing of such book[s] by the state constitutes a use of public funds for the support of a religious institution."[72]

The Supreme Court upheld New York's textbook law in a decision authored by Justice Byron White. White treated the Court's rulings in *Everson* and *Schempp* as complementary methods for locating "the line between state neutrality to religion and state support of religion."[73] The *Everson* Court, he reasoned, had established a principle of religious neutrality that prohibited state legislatures from showing preference toward any religions or all religions, and from levying taxes in any amount to support "any

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[71] Ibid, 7

[72] Ibid, 9

[73] *Board of Education of Central School District No. 1, Etc., Et Al. V. James E. Allen, Jr., as Commissioner of Education of New York, Et Al*, 242.

religious activities or institutions."[74] At the same time, *Everson* did not prohibit legislatures from extending the benefits of public welfare programs to all citizens within their states, irrespective of their religious affiliations. Just as the state could provide police and fire protection to religious persons and buildings, along with sewage facilities, streets and sidewalks that were otherwise accessible to all, *Everson* allowed state officials to provide bus fares for all school children, including children who rode the bus to religious schools. In White's view, the *Schempp* Court's "secular legislative purpose" and "primary effect" tests helped clarify the precise limits that the Establishment Clause placed on such laws. "The test is not easy to apply," he explained, "but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson*." Thus, even though the *Everson* Court had not actually applied *Schempp*'s purpose or primary effect tests, Justice White concluded: "The statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades."[75]

Justice White's application of the secular purpose test was concise: after reciting the test as it had been set forth in *Schempp*, he simply summarized the legislature's stated reasons for enacting the law, and noted that there was no evidence indicating that the law's practical effects belied any purposes to the contrary.[76] "The express purpose of [the statute] was stated by the New York Legislature to be furtherance of the educational

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[74] Ibid.

[75] Ibid., 243. Quoting *Schempp*, 374 U.S., at 222 (1963).

[76] See Freund on why Allen was a "guarded" decision, e.g. repeatedly noting "meager evidence," etc. Also see footnote #6 on p. 244

opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose."[77] In fact, Justice White's re-phrasing of the legislature's "express purpose" emphasized the legislative *means* and the direct *beneficiaries* of the program over the long-term policy goals (public safety and national defense) that the textbook program was supposed to advance. In grammatical terms, textbooks were the direct objects of the legislature's actions; children were the indirect objects of those actions. The "primary purpose" of the act, therefore, was fulfilled via the distribution of books to all children. "The law merely makes available to all children the benefits of a general program to lend school books free of charge,"[78] White explained. "Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[79] The purpose of New York's education law was "secular," under this view, because it provided benefits to *all* children, regardless of their religious affiliations, and because it did not *directly* promote religion or aid religious institutions. "Perhaps free books make it more likely that some children choose to attend a sectarian school," White admitted, "but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution."[80]

White's *Allen* opinion was guarded, and conditioned upon the assumption that school boards could distinguish between secular and religious textbooks. White cited the

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[77] *Board of Education of Central School District No. 1, Etc., Et Al. V. James E. Allen, Jr., as Commissioner of Education of New York, Et Al*, 243.

[78] Ibid.

[79] Ibid., 243-44.

[80] Ibid., 244.

"meager record" available to the Court several times, giving ample leeway to lower courts that might reach different conclusions about similar programs if and when their local circumstances differed from the fact pattern in *Allen*.[81] At the same time, however, White reaffirmed the dual functions of parochial schools in providing both religious and secular forms of education. Textbooks were, indeed, more central to the learning process than bus-rides. But not all teaching in "sectarian" schools was inherently "religious." Nor were the "processes of secular and religious training…[necessarily] so intertwined that secular textbooks furnished to students by the public" inevitably became "instrumental in the teaching of religion."[82] There was simply not enough evidence to suggest that the statute "result[ed] in unconstitutional involvement in religious instruction."[83] Despite strong objections expressed in three separate dissenting opinions, the Court's majority thus upheld the textbook law as consistent with the Establishment Clause.

The *Allen* Court was certainly aware of many previous rulings affirming state legislatures' police powers to mandate and fund a wide range of secular education programs. Justice White cited the Court's "public purpose" test in *Cochran,* explaining, "Louisiana's interest in the secular education being provided by private schools made

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[81] See, e.g., ibid., 248., "Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that s 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment."

[82] Ibid.

[83] Ibid.

provision of textbooks to students in those schools a properly public concern."[84] Justice John M. Harlan qualified White's formulation of the *Schempp* test in a concurring opinion in *Allen*, in which he stated: "I would hold that where the contested governmental activity *is calculated to achieve nonreligious purposes otherwise within the competence of the State,* and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to…divisive influences and inhibitions of freedom,' it is not forbidden by the religious clauses of the First Amendment."[85]

These distinctions went largely overlooked in subsequent cases, and Justice White's *Allen* decision helped displace the Court's earlier methods for applying Establishment Clause norms. Again, earlier purpose inquiries typically established which legislative powers were at stake – powers that were often defined in terms of legislative end-purposes, and limited by Establishment Clause norms like non-coercion and non-sectarianism. *Allen* carried forward the language and logic of *Schempp* by measuring the legitimacy of laws in terms of their "secular" rather than "public" purposes. The difficulty of measuring the "secular" purposes of the textbook program was further confounded by the fact that White measured the statute's "purpose" in terms of its proximate means (books) and beneficiaries (children and their parents), rather than in terms of the broader policy goals the law was intended to serve.

Walz v. Tax Commission (1970)

Walz v. Tax Commission (1970) was the U.S. Supreme Court's last Establishment Clause case involving public funding for religious institutions prior to *Lemon v. Kurtzman*

[84] Ibid., 247.

[85] Ibid., 249.

(1971). The Court's ruling in *Walz*, in fact, avoided using the term "secular," and seemed uneasy about applying the secular purpose test in the same manner as *Schempp*. In Justice Burger's view, the Establishment Clause prohibited state and federal legislatures from sponsoring, financially supporting, or involving themselves in religious institutions and activities. In order to clear the Establishment Clause, he reasoned that laws must not be "intended" to accomplish any of these prohibited incursions into the religious sphere.

Frederick Walz was a New York resident and property owner who challenged a state law exempting religious organizations from property taxes. New York's constitution authorized the legislature to implement certain tax exemptions for "religious, educational or charitable purposes," and the state's tax laws accordingly exempted from taxation, "Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes…and used exclusively for carrying out thereupon one or more of such purposes."[86]

Walz was a self-identified Christian who rejected institutionalized churches as "hostile," and thus did not formally belong to a religious community.[87] His lawsuit alleged that New York's property laws inappropriately aided religion by exempting property used exclusively for religious purposes from taxation. Such exemptions, in essence, extracted "involuntary payment" from Walz and other taxpayers in order to aid

[86] *Frederick Walz V. Tax Commission of the City of New York*, 666-67.

[87] Ibid., 700.

religious organizations to which they did not belong.[88] In an acerbic brief submitted to the Supreme Court, Walz's attorney argued that property ownership was neither necessary for religious worship, nor a constitutionally protected form of religious exercise: "Ownership of property is not a religious exercise except to devotees of a golden calf cult, which is not within the purview of the Constitution," he wrote. "Those who listened to the Sermon on the Mount had no roof over them; there was no altar in the garden of Gethsemane; if the Israelites wandered forty years in the wilderness they did not enter a temple. John Wesley preached the Gospel in the fields. If 'there are no atheists in foxholes' neither are there any religious edifices [in foxholes]."[89] Walz further contended that religious organizations did not need tax exemptions in order to remain financially viable. The accumulated wealth of religious corporations in America amounted to one-hundred-eighty billion dollars, he claimed, and the annual "tax avoidance" of such institutions added up to more than five billion dollars: "Religious organizations pay for the land they acquire and the construction thereon; they pay for the maintenance thereof in all respects as private property--except taxes, taxes which make government possible, which makes all their material things possible."[90]

In addition to draining public funds, Walz alleged that religious organizations' record of contributing to public morality in the United States was mixed, at best: Puritans had executed Quakers and supposed witches; religious involvement with the "negro question" had precipitated the Civil War; Protestants had visited "violence and

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[88] Reply Brief of Appellant at 5, Walz v. Tax Commission, 397 U.S. 664 (1970). See: Walz v. Tax Com'n of the City of New York, 1969 WL 119918 (U.S.), 5 (U.S., 2004)

[89] Reply Brief of Appellant at 4-5, Walz v. Tax Commission, 397 U.S. 664 (1970). See: Walz v. Tax Com'n of the City of New York, 1969 WL 119918 (U.S.), 4-5 (U.S., 2004)

[90] Reply Brief of Appellant at 7, Walz v. Tax Commission, 397 U.S. 664 (1970). See: Walz v. Tax Com'n of the City of New York, 1969 WL 119918 (U.S.), 7 (U.S., 2004)

vituperation" upon Catholics throughout the nation, though "not without grave provocation by Irish Catholic bishops who predicted publicly that they would gain dominion over the land." In addition, the Episcopal Church had owned "slums" in New York, and consequently opposed efforts to provide public housing for the poor; Catholic clergy had opposed child labor laws; Baptists and Methodists helped impose Prohibition, thus "ushering in an [era] of unparalleled corruption." Next came religious "hatemongering" during the nation's involvement in World War I, with a "repeat performance" during World War II. Finally, at the time *Walz* was being argued in the Supreme Court, religious groups had thrust "many irons in the legislative fires to gain public money for their private purposes." Namely,

> Catholics and orthodox rabbis oppose humane abortion and birth control…; they oppose humane slaughtering of meat animals…; they oppose 'mixed marriages' and some forbid burial in non-sectarian cemeteries. Mormons preach the Old Testament blessing of polygamy and God-accursedness of the Negro race. Ministers curry favor with minority interests by referring to Christians as 'gentiles'; clergy teach the faulty translation 'lead us not into temptation' – creating a cruel god in their own image.[91]

This unflattering description of religious involvement in American society and politics, Walz admitted, did not apply uniformly to every religious person or organization. But, it called into question the notion that religious organizations' contributions to Americans' moral and cultural lives justified their tax-exempt status. Despite the long history of religious tax exemptions in American law, Walz quipped, "A constitutional question is not settled until it is settled right."[92]

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[91] Reply Brief of Appellant at 7-9, Walz v. Tax Commission, 397 U.S. 664 (1970). See: Walz v. Tax Com'n of the City of New York, 1969 WL 119918 (U.S.), 7-9 (U.S., 2004)

[92] Quoting Justice Louis Brandeis. Reply Brief of Appellant at 6, Walz v. Tax Commission, 397 U.S. 664 (1970). See: Walz v. Tax Com'n of the City of New York, 1969 WL 119918 (U.S.), 6 (U.S., 2004)

The Supreme Court ultimately upheld New York's property tax exemptions for religious organizations. In an opinion authored by Justice Warren Burger, the Court's majority concluded that the tax code reflected a viable form of "neutrality" toward religion that neither established religion, nor prohibited its free exercise. The essential meaning of religious "establishment," in Burger's view, was the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[93] Burger posited that there was "room for play in the joints" between governmental establishments of religion, on the one hand, and governmental interferences with religious exercises, on the other. That is, the First Amendment allowed legislatures to adopt a posture of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[94]

Burger applied these generalized religious liberty norms to the specific facts of the case in *Walz* by evaluating the apparent purposes and effects of the tax exemptions. In evaluating the "legislative purpose" of the tax exemptions, Justice Burger studiously avoided using the term "secular" – using it only once to describe non-religious public advocacy groups. Moreover, Burger did not cite *Schempp* or the secular purpose test directly. Instead, he assessed whether the states' tax laws were intentionally calculated to do a prohibited thing: namely, to sponsor or financially support religious institutions; to actively involve government in religious activity; or, to interfere with the exercise of religion. "Each value judgment under the Religion Clauses," he wrote, "must therefore turn on whether particular acts in question are *intended* to establish or interfere with

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[93] *Frederick Walz V. Tax Commission of the City of New York*, 668.

[94] Ibid., 669.

religious beliefs and practices or have the effect of doing so."[95] Burger's re-framing of *Schempp's* secular purpose and effects test in non-secular terms seems intended to affirm the public role of religious groups in legislative and other public forms of political discourse. The "purpose" of legislation was to be measured in terms of its practical implementation, not primarily in terms of legislators' motives, or even in terms of the social goods the legislation presumably advanced. Noting the large number of *amicus* briefs submitted in the *Walz* case by religious organizations, Burger wrote:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.[96]

Neither legislators' reasons for enacting legislation, nor the end-results they sought to achieve were totally irrelevant to the Court's inquiry; Burger was deferential, however, to the political judgments of the state legislature. Burger saw no evidence suggesting that the state's tax laws were "intended" to establish or interfere with religion. On the contrary, tax exemptions effectively diminished "administrative relationships" between religious institutions and the government, and helped to prevent governmental interferences with religious exercise. New York's legislature had simply decided that a broad class of organizations – including, but not limited to religious organizations – should remain uninhibited by property taxes because they existed "in a harmonious

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[95] Ibid. Emphasis added.

[96] Ibid., 670.

relationship to the community at large, and…foster its 'moral or mental improvement.'"[97] Burger continued:

> The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest…We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.[98]

While noting that religious organizations presumably advanced the common interests of New York's residents, Burger also emphasized that the constitutionality of the religious tax exemptions was not conditional upon the "social welfare services" or the "good works" that "some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children."[99] Wide variations in the degree to which different congregations and communities performed such services made such measures a less-than-useful legal benchmark for doling out tax exemptions. Evaluating the degree to which different congregations performed such services, moreover, would likely result in "day-to-day" entanglements of religious organizations and governmental agencies.[100]

Beyond the conclusion that New York's religious tax exemptions were not "intended" to establish or interfere with religion, Burger also evaluated the type of aid that tax exemptions provided to religious organizations, and considered the history of such exemptions in American law. In his view, religious tax exemptions did not amount to direct sponsorship of religious institutions. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but

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[97] Ibid., 672.

[98] Ibid., 673.

[99] Ibid., 674.

[100] Ibid.

simply abstains from demanding that the church support the state…There is no genuine nexus between tax exemption and establishment of religion."[101] To support this claim, Burger noted the long history of tax exemptions in the federal Congress and in all fifty states. Such exemptions were clearly not a slippery slope toward established religion, he concluded: "Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief."[102]

Justice William Brennan drafted a concurring opinion in *Walz* that is noteworthy for its distinctive formulation of the secular purpose test. Building on an argument that he first articulated in his concurring *Schempp* opinion, Brennan asserted that "the history, purpose, and operation of real property tax exemptions for religious organizations must be examined to determine whether the Establishment Clause is breached by such exemptions."[103] In contrast to Justice Burger, Brennan evaluated the "legislative purpose" of New York's tax exemptions in terms of the broader social goods they advanced – not in terms of whether the exemptions were "intended" to establish or interfere with religion. Also in contrast to Justice Burger, Brennan heavily relied on the term "secular" as an adjective describing legitimate government actions and legislative purposes. On the other hand, like Burger, Brennan strongly affirmed the "public" functions of diverse religious institutions and ideas in American society.

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[101] Ibid., 675.

[102] Ibid., 678.

[103] Ibid., 681. Brennan concurring.

Justice Brennan claimed that tax exemptions for religious organizations' real property served two basic secular purposes. The first was related to the social services religious organizations provided using that property:

> First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.[104]

Recall that Frederick Walz's original lawsuit focused solely on tax exemptions for real property that was used solely for religious purposes – properties like cathedrals or synagogues, for example, as opposed to religiously-owned orphanages and hospitals. This narrowly defined claim was intended, in Brennan's view, to weaken the state's argument that religious tax exemptions served "secular" purposes. Brennan countered by arguing that religious and secular activities often took place in the same physical spaces:

> Thus, the same people who gather in church facilities for religious worship and study may return to these facilities to participate in Boy Scout activities, to promote antipoverty causes, to discuss public issues, or to listen to chamber music. Accordingly, the funds used to maintain the facilities as a place for religious worship and study also maintain them as a place for secular activities beneficial to the community as a whole.[105]

Brennan reasoned that tax exemptions served another valid purpose beyond encouraging the "secular" activities of various religious organizations: "Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activity."[106] Brennan's argument on this point resonated with Justice Burger's claim that religious property tax exemptions were not constitutionally valid solely on the basis of the "secular" social

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[104] Ibid., 687. Brennan concurring.

[105] Ibid., 688.

[106] Ibid., 689.

services that churches and other religious organizations provided. Much as Joseph Story had concluded, more than a century before *Walz*, that fostering a legal environment conducive to the spread and practice of Christianity was an appropriate goal, Brennan concluded that fostering religious and cultural pluralism was a valid "secular legislative purpose." Legislative powers were not unlimited in this respect: governments could not, for example, single out religion (or specific religions) for special benefits or burdens. But, maintaining legal conditions in which diverse religious and moral traditions could thrive was a legitimate public interest. Brennan wrote:

> Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society…To this end, New York extends its exemptions not only to religious and social service organizations but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions 'organized exclusively for the moral or mental improvement of men and women.' The very breadth of this scheme of exemptions negates any suggestion that the State intends to single out religious organizations for special preference…[the exemptions] merely facilitate the existence of a broad range of private, non-profit organizations, among them religious groups, by leaving each free to come into existence, then to flourish or wither, without being burdened by real property taxes.[107]

Justice Brennan's formulation of the "secular purpose" test thus varied in form and scope from Justice Burger's "legislative purpose" test. Whereas Burger focused on whether the exemptions were intended to establish or interfere with religion, Brennan focused on the "secular" social goods and goals that the tax exemptions presumably advanced.

§5 Conclusion

[107] Ibid.

The Supreme Court's rulings in *Allen* and *Walz*, along with the Sabbath and public education cases discussed earlier in this chapter, moved the Court's jurisprudence from an affirmation of the "public purpose" of "secular education" to a requirement that all laws must have a "secular legislative purpose" in order to clear the Establishment Clause. In *McGowan* and other Sabbath law cases, the Court considered the extent to which state legislatures could enforce religious norms as civil duties. In *McCullom, Zorach, Engel, Abington* and *Epperson* the Court evaluated the extent to which state and local governments could accommodate and/or require religious practices and instruction within public school curricula. Finally, in *Allen* and *Walz*, the Court evaluated laws that financially benefitted religious institutions. The Court applied multiple longstanding religious liberty norms in these cases ranging from religious voluntarism, to the financial and functional differentiation of religious and governmental institutions, to religious "neutrality," and more. Between 1947 and 1971, however, the Court's conceived of these norms increasingly in terms of secularity. Despite Justice Burger's attempt to jettison the term "secular" from the Court's rapidly evolving jurisprudence in *Walz*, Burger went on, in the majority's opinion in *Lemon,* to identify the secular purpose test as one of the three legal principles summarizing the Court's religion jurisprudence.[108]

In the Conclusion I show how the secular purpose test took on multiple meanings in subsequent cases, and consider its practical ramifications for the quantities and qualities of religious argumentation in legislative discourse. Several important factors in the emergence of the test, however, are worth recalling here.

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[108] *Lemon v. Kurtzman,* at 612.

First, the secular purpose test displaced earlier methods of constitutional review that evaluated legislative purposes in terms of specific legislatures' enumerated and presumed powers, and the public purposes by which those powers were defined. Previous courts began their review of challenged statutes by considering whether those statutes advanced purposes consistent with the "police" or "public policy" powers of state and local legislatures, or with the enumerated powers of the federal Congress. State and federal courts in the post-*Abington* (and especially post-*Lemon*) era, in contrast, would begin their evaluation of statutes challenged under the Establishment Clause by asking whether such statutes possessed or advanced "secular" legislative purposes. This shift had significant implications for how subsequent courts would interpret the boundaries between religious and legislative spheres. The function of religious argumentation in legislative discourse would be viewed with increasing suspicion in subsequent years.

Second, the Court during this period did not seem to know precisely what the secular purpose test required. The secular purpose test was rarely the sole consideration in the Court's Establishment Clause rulings, before or after *Lemon*. It's role was not trivial, however, and its meaning was unclear. Did the "purpose" of a statute refer to the ultimate ends that it purportedly advanced? Or, did the test evaluate the religious character of legislators' motives or reasons for enacting a statute? Or, did it measure the religious or devotional qualities of the activities that a statute enjoined? The Court answered 'yes' to each of these questions at different points in time between 1947 and 1971. And, the Court applied widely variant standards for what counted as evidence of a statute's legislative purpose during this time. The Court's failure to provide clear guidance on these matters would lead to more confusion later on.

In the concluding chapter, I examine the multiple forms that the secular purpose test took in subsequent cases, and consider its implications for the exercise of religion in legislative spheres.

Conclusion

Here Comes the Post-Secular Purpose Test

> *What we need are better theories of the intermeshing of public and private spheres. In particular, we need to rethink the issue of the changing boundaries between differentiated spheres and the possible structural roles religion may have within those differentiated spheres as well as the role it may have in challenging the boundaries themselves.*[1]
>
> – Jose Casanova

§ 1 Introduction

The previous chapters explored individual cases and broad developments in American courts' religious liberty jurisprudence between 1844 and 1971. Section One and Section Two showed how litigants contested the boundaries between religious and legislative spheres in oral and written arguments before local, state and federal courts. Not all of these cases involved direct interpretations or applications of the First Amendment's Free Exercise or Establishment Clauses. Nonetheless, the courts and litigants in each of these cases interpreted and enforced boundaries between religious and legislative spheres on the basis of legal norms and narratives that expressed specific conceptions of legislatures' powers, and the rights of individuals and corporations to exercise "religion." I have argued that the rulings in these cases shared a common method for evaluating the limits of legislative powers with respect to religion. Namely, courts focused on whether legislation expressed the enumerated or presumed powers of specific legislative bodies – powers that were often defined in terms of legislative end-purposes, such as the promotion of public health, safety, and morality. Legislatures were,

[1] Casanova, *Public Religions in the Modern World*, 7.

under this view, limited in the extent to which they could use these powers to support or regulate religious beliefs, practices and institutions. But, legislation was not required to have or advance "secular" purposes, as such. Next, Section Three traced the emergence of a new method for defining and enforcing boundaries between religious and legislative spheres via First Amendment's Establishment Clause review – i.e. the secular purpose test. In contrast to earlier methods for evaluating legislative purposes, the secular purpose test measured the purposes of statutes primarily in terms of secularity, not in terms of specific legislative powers.

In this concluding chapter, I describe the Supreme Court's methods for interpreting and applying the secular purpose test, and consider the implications of the test for the differentiation of religious and legislative spheres. A comprehensive analysis of patterns in American courts' interpretations of the secular purpose test is beyond the scope of this study. The secular purpose test has been applied (or cited), in one form or another, in at least 45 U.S. Supreme Court decisions, 245 federal appellate court decisions, and 96 state-level decisions.[2] Instead of analyzing each of these cases in detail, I identify below key variables in the U.S. Supreme Court's interpretations of the secular purpose test, and consider the implications of secular purpose test the privatization of religious idioms and norms. The secular purpose test is not, I contend, a single standard of constitutional review. Instead, it is a set of legal standards by which the Court has measured diverse types of legislative purposes, using multiple evidentiary standards, and ambiguous notions of what makes a legislative purpose secular or religious. Different forms of the secular purpose test inevitably yield different legal results, and presumably

[2] Data is based on keyword searches in the WestlawNext database, most recently accessed on September 8, 2014.

affect legislative discourse in distinctive ways. Together with other factors in American society and culture, the secular purpose test – particularly when it is perceived by legislators and the general public as a requirement that laws must have a "secular" rather than a "religious" purpose, and when courts routinely use extrinsic evidence to determine the purpose of contested legislation – may lead participants in democratic processes to translate, strategically obfuscate, self-censor, or indignantly assert their religious idioms and norms. I contend that candid debates about legal norms and public policies, however, and open dialogue about the interests, moral rationales and worldviews that guide legislative decision-making play important roles in democratic processes. Thus, the negative effects of imposing the secular purpose test as a constitutional norm seem to outweigh its potential benefits. As an alternative, I argue that American courts should retrieve earlier methods of evaluating legislative purposes in Establishment Clause cases, focusing on the "public" or "legal" purposes of contested laws instead of on "secular" purposes. This method would be more consistent with American legal tradition, and would better foster valuable forms of critical and reflective discourse about public policies and the moral norms and worldviews that, as a matter of fact, guide citizens' participation in democratic processes.

§ 2 Secular Purpose Test(s): Variables and Implications

One important variable in the Supreme Court's interpretation of the secular purpose test is how it conceives of "legislative purposes." The *Lemon* Court formulated the secular purpose test as follows: "First, the statute must have a secular legislative

purpose…"[3] Many of the Court's Establishment Clause rulings cite this language as the basis for their application of the secular purpose test. However, the Court has been inconsistent in identifying whether the term "legislative purpose" refers to 1) the end-purposes or functions of a law, 2) to legislators' apparent motives or rationales for enacting a law, 3) legislators' stated reasons for enacting a law, or 4) the meaning, or "message" that legislative acts seem to convey.[4]

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[3] *Lemon V. Kurtzman*, 612-13. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (Internal citations omitted). Also see, e.g. *Mueller V. Allen*, 463 U.S. 388, 773 (1983).

[4] On this point see: DeForrest, "The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light of the Lemon Test's Secular Purpose Requirement; Josh Blackman, "The Lemon Comes as a Lemon: The Lemon Test and the Pursuite of a Statute's Secular Purpose," *George Mason University Civil Rights Law Journal* 20(2009-2010). For competing interpretations within the Supreme Court itself, see: *Edwards v. Aguillard,* 482 U.S. 578 (at 636-638 (Scalia, J. dissenting). "But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (*i.e.,* the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist. Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. Quite obviously, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien,* 391 U.S. 367, 384, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968). Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read—even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications—for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs? Having achieved,

In *Mueller v. Allen* (1983), for example, the Court defined the purpose of a tax law in terms of its proximate and ultimate ends. Justice William Rehnquist authored the Court's opinion, and described the secular purpose test as a relatively lax standard[5] – one that reflected Court's "reluctance to attribute unconstitutional *motives* to the states, particularly when a plausible secular *purpose* for the state's program may be discerned from the face of the statute."[6] The Minnesota law under review in *Mueller* allowed

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through these simple means, an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?" Compare to *McCreary County v. ACLU*, 545 U.S. 844 (2005), at 861-863 (Souter, J.): "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, … and governmental purpose is a key element of a good deal of constitutional doctrine. With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago. But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an "'objective observer,'" one who takes account of the traditional external signs that show up in the "'text, legislative history, and implementation of the statute,'" or comparable official act.; see also *Edwards v. Aguillard,* 482 U.S. 578, 594–595 (1987) (enquiry looks to "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, ... and the specific sequence of events leading to [its] passage"). There is, then, nothing hinting at an unpredictable or disingenuous exercise when a court enquires into purpose after a claim is raised under the Establishment Clause. The cases with findings of a predominantly religious purpose point to the straightforward nature of the test. In *Wallace,* for example, we inferred purpose from a change of wording from an earlier statute to a later one, each dealing with prayer in schools. 472 U.S., at 58–60, 105 S.Ct. 2479. And in *Edwards,* we relied on a statute's text and the detailed public comments of its sponsor, when we sought the purpose of a state law requiring creationism to be taught alongside evolution. 482 U.S., at 586–588, 107 S.Ct. 2573. In other cases, the government action itself bespoke the purpose, as in *Abington,* where the object of required Bible study in public schools was patently religious, 374 U.S., at 223–224, 83 S.Ct. 1560; in *Stone,* the Court held that the "[p]osting of religious texts on the wall serve[d] no ... educational function," and found that if "the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S., at 42, 101 S.Ct. 192. In each case, the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action." (Some internal citations omitted.)

[5] *Mueller V. Allen*, 394. "Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework."

[6] Ibid., 394-95. Emphasis added.

parents to deduct tuition and other private school expenses from their state income taxes. In Rehnquist's view, this law served "secular and understandable" purposes:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – *evidences a purpose that is both secular and understandable.* An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses *plainly serves this secular purpose* of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a *strong public interest* in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers.[7]

Thus, after initially referencing the state's "motives," the *Mueller* Court evaluated as part of its secular purpose review: the apparent purpose of the state's decision to provide a tax deduction for private school expenses, and the concomitant public interest that the tax deduction served. The statute's legislative purposes thus consisted of 1) ensuring that the Minnesota citizens were well educated, and thereby ensuring the "political and economic health" of the community; and 2) relieving taxpayers of part of the financial burden of funding public schools. The value of these social goods was readily apparent, in the Court's view, and their character or quality was unimpeachably "secular."

The Court applied a slightly different version of the secular purpose test in *Bowen v. Kendrick* (1988). Litigants in *Bowen* had challenged the constitutionality of the Adolescent Family Life Act (AFLA) – a federal program that funded services and research related to premarital sex and pregnancy among teenagers. The AFLA provided grants to organizations that provided such services, and required recipients of the grants to collaborate with other organizations in their communities, including religious

[7] Ibid., 395. Emphasis added.

organizations.[8] Appellees in the case argued that the law had an "impermissible purpose" because Congress had intended to "increase the role of religious organizations in the programs sponsored by the Act," beyond what was previously allowed.[9]

The Court's application of the secular purpose test in *Bowen* is notable for the sheer number of synonyms it used to describe the "purpose" of the AFLA. Within a single paragraph, Chief Justice William H. Rehnquist referred to the statute's purpose in terms of legislative concerns, goals, aims, and motives. "As we see it," he explained for the Court, "it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose – the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood."[10] Much as it had in *Mueller*, the Court in *Bowen* conceived of the legislative purpose of the statute under review in terms of the ends – or social goods – that it advanced. Teenage sex, pregnancy and parenthood, under this view, were social problems with which Congress was properly concerned. Addressing such problems – namely, by eliminating or reducing the "social and economic problems caused by teenage sexuality, pregnancy, and parenthood" – was a "legitimate secular purpose."[11]

The *Bowen* Court also considered the legislature's motives for enacting the AFLA, along with the AFLA's proximate ends (i.e. broadening the scope of religious and other community groups in order to stem the problems surrounding teen pregnancy). Chief Justice Rehnquist acknowledged that religious concerns likely played a role in the law's

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[8] These community resources included religious organizations, family members, charitable organizations, voluntary associations, and other groups in the private sector. See *Bowen V. Kendrick*, 487 U.S. 589, 603 (1988).

[9] Ibid.

[10] Ibid., 602.

[11] Ibid.

passage. As long as such motives were not the legislature's *only* concern, however, they did not invalidate the law: "Appellees cannot, and do not, dispute that, on the whole, religious concerns were not the sole motivation behind the Act," Rehnquist explained.[12] Once again, Rehnquist used a variety of synonyms to describe the supposed purposes of the law:

> …[E]ven if it is assumed that the AFLA was *motivated* in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate *secular concerns* […] Congress' decision to amend the statute in this way [enlisting the help of religious and other community organizations] reflects the entirely appropriate *aim* of increasing broad-based community involvement 'in helping adolescent boys and girls understand the implications of premarital sexual relations, pregnancy, and parenthood.' […] In adopting the AFLA, Congress expressly *intended to* expand the services already authorized by Title VI, to insure the increased participation of parents in education and support services, to increase the flexibility of the programs, and to spark the development of new, innovative services. These are all legitimate secular *goals* that are furthered by the AFLA's additions to Title VI, including the challenged provisions that refer to religious organizations. There simply is no evidence that Congress' *'actual purpose'* in passing the AFLA was one of 'endorsing religion.'[13]

Thus, Rehnquist described the AFLA's legislative purposes in at least three layers: first, in terms of the statute's ultimate ends (addressing the social problems surrounding teen pregnancy); second, in terms of its proximate ends (expanding community involvement in order to more effectively address such problems); and third, in terms of the purpose of endorsing religion. Nowhere did Rehnquist explicitly examine *why* legislators might value or prioritize such ends. Nonetheless, his repeated references to Congress' intent and motivation for enacting the AFLA strongly implied that the legislature's motives – their subjective reasons or justifications for enacting the law – constituted part of the AFLA's legislative purpose.

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[12] Ibid., 602-03.

[13] Ibid., 603-04. Internal citations omitted. Emphases added.

Mueller and *Bowen* illustrate how the Court's interpretation of the secular purpose test has used a variety of terms – ranging from legislative intentions, ends, motives, goals, aims, objects, concerns, and interests – to describe the purposes of challenged legislation. These cases also show how the Court has used such terms, often interchangeably, to evaluate at least two different types of "legislative purpose." In some interpretations of the secular purpose test, the Court has focused on legislative *ends*; in other cases, the Court has focused on legislators' *reasons* or *motives* for enacting a law. Legislative ends refer to a statute's intended, anticipated, or otherwise conceivable functions – namely, the practical results of a statute's enforcement, or the state of affairs it will presumably bring about. Describing legislative *ends* answers the question: What will this statute accomplish?[14]

In contrast, legislative motives refer to the normative reasons for which a legislature has pursued those ends. Describing legislative motives answers the question: Why are certain legislative ends good, justifiable, or worthwhile in the first place? Why, for example, would the legislature in *Bowen* want to reduce teenage pregnancy rates, or enlist religious organizations to help accomplish that goal? What is wrong with teenage pregnancy? And what is good about engaging religious organizations to help reduce teenage pregnancy rates? In cases like *Bowen*, the Court hinted that such reasons were relevant, if only tangentially, for evaluating the legislative purposes of statutes under review.

In other cases, however, some of the Court's justices used another iteration of the secular purpose test to evaluate the religious sources of legislators' reasons for

[14] In *Bowen v. Kendrick*, for example, the legislative ends included things like reducing the rates of teenage pregnancy, and/or building broad-based community involvement in such issues.

enacting various laws. Most of these cases involved laws regulating abortion, sex, and end-of-life issues. In *Harris v. McRae* (1980), for example, the Court reaffirmed the principle that laws could "harmonize with the tenets of some or all religions" without thereby establishing religion.[15] Appellees in *Harris* had argued that a controversial law known as the Hyde Amendment, which barred federal funding for most abortion procedures, essentially gave legal force to "the doctrines of the Roman Catholic Church," and thereby violated the Establishment Clause.[16] The Court refuted this claim, however, concluding that the Hyde Amendment reflected "traditionalist" values as much as it embodied "the views of any particular religion." The fact that certain provisions of the law coincided with "the religious tenets of the Roman Catholic Church" did not, in the Court's view, "contravene the Establishment Clause."[17]

In contrast to the *Harris* Court, Justice John Paul Stevens and a handful of other justices used the secular purpose test to evaluate the moral rationales behind abortion regulations in at least two other cases – *Webster v. Reproductive Health Services* (1989), and *Planned Parenthood v. Casey* (1992).[18] Justice Stevens first hinted at this approach in his concurring opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986).[19] There, he distinguished between theological notions of personhood, and the

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[15] *Harris V. Mcrae*, 448 U.S. 297 319 (1980).

[16] Appellees also argued that the Hyde Amendment unduly restricted the Free Exercise rights of Protestant and Jewish women who might feel religiously compelled to have an abortion under circumstances that were prohibited by the law. The Court did not address this argument in its written opinion. Briefs submitted to the Court, however, outline the substance of this claim in (fascinating) detail, and with reference to the writings of numerous religious ethicists, including Philip Wogaman, Paul Ramsey, and others. See WL 339642 (U.S.), at 68ff.

[17] *Harris V. Mcrae*, 319-20.

[18] See *William L. Webster, Attorney General of Missouri, Et Al. V. Reproductive Health Services, Et Al.*, 492 U.S. 490 (1989); *Planned Parenthood of Southeastern Pennsylvania V. Robert P. Casey, Et Al.*, 505 U.S. 833 (1992).

[19] *Richard Thornburgh, Et Al., V. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

state's secular interest in protecting "fetal life." Although a "powerful theological argument" could be made for defining fetuses as persons, Stevens explained, the Supreme Court's "jurisdiction is limited to the evaluation of secular state interests."[20]

Stevens' indirect reference to the secular purpose test in *Thornburgh* became more explicit and thorough in a concurring opinion he authored in *Webster*, three years later. The preamble to the statute at issue in *Webster* stated the Missouri legislature's finding that: "(1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being."[21] Although the Court's majority opinion in *Webster* declined to rule on the constitutionality this language under the Establishment Clause, Justice Stevens argued in a concurring opinion that the preamble conflicted with the Establishment Clause's secular purpose requirement. Stevens was careful to qualify this claim, insisting that it did not "rest on the fact that the [preamble's] statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations."[22] Instead, Stevens explained, his logic was based "on the fact that the preamble, an unequivocal endorsement of a religious tenet of some by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the

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[20] Ibid., 778-79. The state's secular interest in protecting an embryo increased with its progressive capacity "to feel pain, to experience pleasure, to survive, and to react to its surroundings […] day by day." Legal distinctions between "the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth," Stevens noted, were "supported not only by logic, but also by history and by our shared experiences."

[21] See Mo. Ann. Stat. § 1.205 (West). The statute further provided, among other things, that: "Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state."

[22] *William L. Webster, Attorney General of Missouri, Et Al. V. Reproductive Health Services, Et Al.*, 566.

statute violates the Establishment Clause."[23] In other words, the legislature's assertions that life begins at conception, and that unborn children had legally protectable rights and interests violated the secular purpose test, in Stevens' view, because of what they lacked (i.e. a legitimate secular purpose), and not because of what it possessed (i.e. a theological purpose).

Stevens' subsequent analysis made clear, however, that religious moral premises or "tenets" were not merely insufficient or irrelevant as grounds for the State's definition of personhood; they were constitutionally suspect. Personhood, as far as the state was concerned, could only be based on "secular" considerations, Stevens argued, like an organism's level of sentience or capacity for suffering. Legal personhood was not a function of an organism's supposed possession of a soul. After briefly describing the thirteenth-century Catholic theologian Thomas Aquinas' interpretation of human ensoulment, or the time at which the human soul is supposed to enter a growing embryo or fetus, Stevens explained:

> As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescinds the theological concept of ensoulment—or one accepts St. Thomas Aquinas' view that ensoulment does not occur for at least 40 days—a state has no greater secular interest in protecting the potential life of an embryo that is still "seed" than in protecting the potential life of a sperm or an unfertilized ovum.[24]

Stevens thus posited that protecting the "potential life" of embryos was, at most, secondary to the state's secular interest in protecting women's freedom to use

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[23] Ibid., 566-67.

[24] Ibid., 569.

contraceptive procedures of their choice. In theory, a state or federal legislature might have a legitimate secular interest in protecting potential life. It might wish, for example, to bolster the population for military or economic reasons.[25] But, no one had seriously suggested that increasing the state's population was the legislature's actual "secular reason for [seeking to foster] potential life."[26] Stevens offered a sardonic final riposte to the statute's proponents, writing: "Contrary to the theological 'finding' of the Missouri Legislature [that life begins at conception, and that unborn children have protectable interests], a woman's constitutionally protected liberty encompasses the right to act on her own belief that—to paraphrase St. Thomas Aquinas—until a seed has acquired the powers of sensation and movement, the life of a human being has not yet begun."[27] Stevens did not elaborate on why the powers of sensation and movement were legally or morally constitutive of human life. Rather, he interpreted the protection of persons from pain and suffering to be definitively secular, and therefore within the scope of the legislative sphere. This logic did not have the full weight of a majority opinion. Nonetheless, Justice Stevens' opinion in *Webster* interpreted the secular purpose test as a

[25] Stevens relied on a similar logic in his opinion (concurring in part, and dissenting in part) in *Planned Parenthood of Southeastern Pennsylvania V. Robert P. Casey, Et Al.*, 914-15. "Identifying the State's interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life. In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person…"

[26] *William L. Webster, Attorney General of Missouri, Et Al. V. Reproductive Health Services, Et Al.*, 569.

[27] Ibid., 572.

constitutional limit on the basic moral premises upon which legislatures could enact laws, at least in instances where they restricted women's reproductive rights.[28]

The Supreme Court applied yet another version of the secular purpose test in a series of cases involving symbolic religious displays on government property. The *Mueller* and *Bowen* Courts' application of the secular purpose test focused primarily on legislative ends; Justice Stevens, in *Webster*, focused more on the character of the moral rationale that apparently guided the legislature's decision to enact its "personhood" law. In contrast to these cases, the Court in *Lynch v. Donnelly* (1984), and in numerous other cases, evaluated legislative purposes in terms of the meanings and messages conveyed by religiously symbolic displays. These displays ranged from depictions of the Ten Commandments in public schools, courthouses and Capitol buildings, to menorahs and Christmas nativity scenes erected in public parks and buildings. Hearkening back to the case of *Abington v. Schempp* (1963), the Court in these cases frequently sought to distinguish between government-sponsored acts and symbols with a devotional religious character, on the one hand, and religiously "neutral" or "secular" acts and symbols, on the other hand.

The case of *Lynch v. Donnelly* (1984) offers a prime example of this version of the secular purpose test. Litigants in *Lynch* filed a lawsuit challenging the inclusion of a crèche, or nativity scene, as part of a Christmas display erected each year by the City of

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[28] Stevens applied much the same logic, and cited *Webster*, in another case, this time involving a patient who was in a coma, and whose family wished to remove her feeding and hydration tubes. There, Stevens wrote: "In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261, 350, 110 S. Ct. 2841, 2888, 111 L. Ed. 2d 224 (1990).

Pawtucket, Rhode Island.[29] The crèche was positioned in the midst of other figures, including Santa Clause, reindeer, talking wishing wells, candy-striped poles, a clown, an elephant, a teddy bear, colored lights, and a large banner that read, "Seasons Greetings." The Court narrowly affirmed the constitutionality of the city's display, interpreting the secular purpose test as a requirement that government entities must not intentionally advance or otherwise promote religion. The Court's concurring and dissenting justices disagreed, however, about whether the secular purpose test should be applied to the crèche itself, or to the entire display – reindeer and all. Justice Warren Burger drafted the majority opinion in *Lynch*, and took the latter approach. Burger concluded that the display did not reflect "a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message."[30] Taken as a whole, the display seemed intended to acknowledge a significant holiday, without endorsing or promoting the religious meaning of that holiday. Pawtucket's Christmas display, under this view, did not celebrate Christmas so much as it celebrated the celebration of Christmas. "In a pluralistic society a variety of motives and purposes are implicated," Burger explained:

> The City, like the Congresses and Presidents [of the United States], has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday […] These are legitimate secular purposes.[31]

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[29] For a particularly insightful and fascinating analysis of the *Lynch* opinion, see: Winnifred F. Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, Mass: Harvard University Press, 1994).

[30] *Lynch V. Donnelly*, 465 U.S. 668, 680 (1984).

[31] Ibid.

Justice Sandra Day O'Connor defended a similar argument in her concurring opinion. O'Connor, however, conceived of the display as a sort of governmental communiqué, the meaning of which depended, in part, on the intentions of city officials in erecting the display, and, in part, on its objective meaning. "The purpose prong of the *Lemon* test," she wrote,

> …asks whether [the] government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.[32]

This formulation of the secular purpose test did not merely require that laws have or advance a secular purpose; more importantly, it prohibited laws that were intended by legislators to "convey a message of endorsement or disapproval of religion."[33] Alongside Justice O'Connor's interpretation of *Lemon*'s "effect prong," this meant that legislators' subjective motives for enacting legislation were subject to the secular purpose test. Applying this logic to the facts in *Lynch*, Justice O'Connor concluded that Pawtucket's Christmas display did not violate the Establishment Clause. City officials, in her view, had not intended "to convey any message of endorsement of Christianity or disapproval of non-Christian religions." Rather, their purpose was the "celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[34]

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[32] Ibid., 690.

[33] Ibid., 691.

[34] Ibid.

Justice William Brennan – joined by Thurgood Marshall, Harry Blackmun and John Paul Stevens – applied his own version of the secular purpose test in a dissenting opinion. The city had argued that its Christmas display was intended to attract people to the downtown area, to promote retail sales, and to "help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season."[35] Despite these avowedly secular purposes, Brennan and his fellow justices insisted that the crèche injected an unnecessary, and overtly religious symbol into the display. "To be found constitutional," Brennan wrote, "Pawtucket's seasonal celebration must at least be non-denominational and not serve to promote religion. The inclusion of a distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene." Brennan noted that, in addition to the inherently religious nature of the crèche, the city's mayor was on record stating that removing the crèche would represent "a step towards establishing another religion, non-religion that it may be." Based on this testimony, Brennan concluded that the crèche served the "wholly religious" purpose of keeping "Christ in Christmas."[36]

> Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere 'traditional' symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's [majority] suggestion, the crèche is far from a mere representation of a 'particular historic religious event.' It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith.[37]

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[35] Brief for Petitioners, as quoted in ibid., 699.

[36] Ibid., 700-01.

[37] Ibid., 711.

Brennan's was a rather dramatic interpretation of the display's significance to observers. His logic, however, built on an argument that Brennan had been pushing since *Abington v. Schempp* (1963) – namely, that governments could not use religious "means" to advance otherwise legitimate legislative ends, where secular means would suffice. In *Lynch*, however, Brennan viewed the "mystical" significance of the manger scene as an indication of the display's inherently religious purpose. City officials could certainly "acknowledge" religion without promoting it, he admitted. But, city officials had not included the crèche in the otherwise secular display for legitimate reasons. Brennan wrote: "The fact that Pawtucket has gone to the trouble of making such an elaborate public celebration and of including a crèche in that otherwise secular setting inevitably serves to reinforce the sense that the City means to express solidarity with the Christian message of the crèche and to dismiss other faiths as unworthy of similar attention and support."[38] In sum, symbolic, government-sponsored expressions of solidarity with a particular religious group did not evince a legitimate secular purpose.

Further cases abound in which the Court applied some version of the secular purpose test. In *Wallace v. Jaffree* (1985) the Court overturned a state law that provided a short period of silence in public schools for "meditation or voluntary prayer." The law violated the secular purpose test, the Court concluded, because legislators had simply intended to "return voluntary prayer" to the public schools.[39] More recently, in *Van Orden v. Perry* (2005), the Supreme Court, without explicitly citing the secular purpose test, concluded that a large stone monument depicting the Ten Commandments on the

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[38] Ibid., 713.

[39] *Wallace, Governor of Alabama, Et Al. V. Jaffree Et. Al*, 472 U.S. 38 57, 59 (1985).

grounds of the Texas State Capitol was valid, in part, because it conveyed "a predominantly secular message."[40] The secular purpose test has also informed court rulings that were not directly related to Establishment Clause claims. Dissenting justices in *Bowers v. Hardwick* (1986), for example, condemned a state law prohibiting "sodomy"[41] on the grounds that it reflected parochial religious norms, and invaded individuals' right to privacy: "The legitimacy of secular legislation depends," Justice Blackmun wrote, "on whether the State can advance some justification for its law beyond its conformity to religious doctrine […] A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."[42]

The Court's applications of the secular purpose test in these and other cases, though inconsistent, fall into three main categories. The first form of the secular purpose test evaluates the legislative *ends* of challenged statutes – i.e. their presumed social functions or intended outcomes. The second form of the test evaluates legislative reasons, or justifications for enacting the statute(s) in question. The third form of the test evaluates the intended meaning, and/or the message of endorsement that a legislative act or symbol conveys.

Additional variables add still more layers of complexity to the Court's interpretations of the secular purpose test. The Court has applied inconsistent standards, for example, of how "secular" a legislative purpose must be in order to pass the test. In some cases, it has required that statutes have a "clearly" secular purpose. In other cases, a merely "plausible" secular purpose was necessary. "Legitimate" secular purposes were

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[40] *Van Orden V. Perry*, 545 U.S. 677 702 (2005).

[41] The statute in *Bowers* formally prohibited oral and anal intercourse between homosexual and heterosexual partners alike; it was apparently enforced primarily against homosexual partners.

[42] *Bowers V. Hardwick*, 478 U.S. 186, 211-12 (1986).

required in other cases, and "primarily, if not entirely"[43] secular purposes were sufficient in others. Inconsistent standards of evidence function as another variable in the Court's applications of the secular purpose test. In some cases, the Court has merely evaluated the express language of statutes in order to determine the purpose of challenged legislation. In other cases, the Court has trawled through legislative records and histories in its search for evidence of a statute's purpose. In still other cases, the Court simply infers the purposes of legislation from the justices' own sense of what the end-purposes of legislation seem to be. Finally, the Court has weighted the secular purpose test differently relative to other Establishment Clause norms. In some cases, the test has given credence to laws that are suspect under other standards of review – such as the "effects" and "entanglement" prongs of the *Lemon* test. Sometimes the Court ignores the secular purpose test altogether, emphasizing other religious liberty principles, such as religious voluntarism or administrative differentiation of religious and legislative institutions. And, in some of the Court's opinions, the test functions as the Court's sole, dispositive standard of Establishment Clause review.

These variables suggest that the secular purpose test is not a single standard of review, but a family of legal norms that the Court has applied under a single heading. Different forms of the secular purpose test have different implications for the differentiation of religious and legislative spheres. Before discussing these implications, let us consider some of the secular purpose test's points of continuity and divergence with earlier methods of evaluating the purposes of statutes under constitutional review.

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[43] *Bowen V. Kendrick*, 589.

Versions of the secular purpose test that focus on legislative *ends* share much in common with earlier courts' methods for evaluating the "police" or public policy purposes of statutes under constitutional review. First, both of these approaches have typically attributed to legislatures the power to pursue a wide range of legislative goals. State legislatures' police powers, for example, were often construed in terms of broadly defined legislative ends including, for example, public health, safety, and morality. Such ends are arguably (though not definitively) secular in nature. Moreover, many of the statutes that have passed muster under the secular purpose test would likely have passed unscathed through earlier courts' legislative purpose inquiries. Despite these points of overlap, however, the underlying logic of earlier purpose inquiries and the secular purpose test differ from the secular purpose test in important ways. Earlier methods defined legitimate legislative ends in terms of the enumerated or presumed powers of specific legislative bodies. In contrast, the secular purpose test defines legislative ends in terms of their secular, or non-religious character. Legislative ends are valid under the secular purpose test not by virtue of the legislative powers they express, but by virtue of their secular (or non-religious) character.

Versions of the secular purpose test that evaluate the symbolic meanings, or message of "endorsement" that legislative acts convey have continuity with the long-standing, but dynamic constitutional norm of religious "neutrality" – especially in matters relating to expressions of "civil religion."[44] Recall, for example, how several of the legal thinkers discussed in Chapter Seven argued that legislative bodies and government officials should remain fastidiously non-sectarian in their public recognitions of religion.

[44] See: Bellah, "Civil Religion in America."

The term "non-sectarian," for these authors, did not mean non-religious; instead, it described those aspects of religious belief and practice that were presumed to be shared by all or most members of society – or, at least, by all mainstream Christian denominations. Expressions of "general Christianity" were matters of common sense, and were, in that sense, religiously neutral. What changes with interpretations of the secular purpose test that focus on messages of "endorsement" is the meaning of religious neutrality. Whereas earlier courts and legal thinkers presumed that the shared beliefs and practices of leading Christian denominations were religiously neutral, the "endorsement" version of the secular purpose test conceives of religious neutrality in terms of secularity, as such. The use by governmental bodies of religious acts and artifacts, under this view, is constitutionally suspect. Thus, we see the Court, in turns, stretching common sense to describe plainly religious objects and activities – like the Pawtucket crèche – in terms of the secular qualities and purposes. Or, we see the Court – as in *Abington v. Schempp* (1963), *Wallace v. Jaffree* (1985), and *McCreary County v. ACLU* (2005) – altogether jettisoning religious symbols and acts from government-controlled spaces.

Third, like the Court's earlier methods for evaluating legislative purposes, the secular purpose test is rarely the only factor in the Court's final rulings. In the cases discussed in Sections One and Two, court rulings typically began by establishing the legislative powers (and corresponding purposes) at stake in a case, but then applied an evolving set of religious liberty norms in order to determine whether a legislature had exceeded its powers with respect to religion. Thus, the lower courts in *Permoli v. First Municipality of New Orleans* (1844) considered not only whether regulating the display of corpses expressed the City Council's police powers, but also whether the City Council

had invaded Reverend Permoli's Free Exercise rights. Likewise, in *Bradfield v. Roberts* (1899), the courts considered not only whether the federal Congress had power to provide indigent healthcare in the District of Columbia, but also whether Congress' power to provide such care extended to partnerships with religious institutions. In all but a handful of recent cases,[45] the Supreme Court has employed the secular purpose test alongside multiple constitutional religious liberty norms and narratives – including, but not limited to, the "effects" and "entanglement" prongs of the *Lemon* test. That the Supreme Court has rarely overturned statutes on secular purpose grounds alone, however, does not imply that the test has had negligible effects with regard to the differentiation of religious and legislative spheres. Along with other constitutional norms, the test imposes basic limitations on the exercise of legislative powers. Just as traffic laws shape driving patterns and habits despite the fact that relatively few drivers are ticketed on any given day, the secular purpose test may also affect patterns of legislative and legal discourse via the threat of its enforcement in courts of constitutional review.

Finally, the secular purpose test has points of continuity and divergence with distinctions that early courts made between legislative ends and legislative motives. The Supreme Court has, since introducing the secular purpose test, reaffirmed the principle that religious citizens (of whatever persuasion) are no less free than their non-religious counterparts to participate in legislative processes. The Court has also reaffirmed the long-standing principle that laws that are consistent with religious beliefs and norms are not, as such, violations of the Establishment Clause. However, the Court in several cases

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[45] See: *Epperson V. Arkansas*; *Stone V. Graham*, 449 U.S. 39(1980); *Wallace, Governor of Alabama, Et Al. V. Jaffree Et. Al*; *Edwards V. Aguillard*, 482 U.S. 578(1987); *Mccreary County, Kentucky, Et Al. V. American Civil Liberties Union of Kentucky Et Al.* , 545 U.S. 844 (2005).

has aggressively evaluated legislatures' reasons and motives for enacting contested laws. Whereas earlier courts might have examined legislative histories and records of debates in an effort to reconstruct the practical meaning and application of a statute – as the Supreme Court did in Church of the *Holy Trinity v. United States* (1892) – more recent courts have sometimes trawled through such records in search of illicit legislative motives.[46] In addition, rather than simply deferring to legislatures' discretion in their exercise of enumerated powers, the Court (or at least some of its dissenting justices) has sometimes evaluated the character of legislators' moral rationales or justifications for enacting a given statute. Such an approach is understandable given the range of possible meanings for a legal standard that requires laws to evince a "secular legislative purpose." Nonetheless, it represents a substantial break with earlier methods of evaluating legislative purposes.

§ 3 Reflecting on Constitutional Law as a Carrier of Secularization

What, then, are the implications of the secular purpose test for legislative discourse and the differentiation of religious and legislative spheres? In the introductory chapter of this dissertation, I described constitutional law as a social sphere, and as a "carrier" of secularization. Having now examined a series of individual cases and broader trends in constitutional law, we are better situated to consider how these premises relate to the secular purpose test. I argue below that the methodological and conceptual shift implicit in the secular purpose test represents a novel form of differentiation between religious and legislative spheres. I contend that the secular purpose test – or, at least

[46] E.g. *Wallace, Governor of Alabama, Et Al. V. Jaffree Et. Al*; *Mccreary County, Kentucky, Et Al. V. American Civil Liberties Union of Kentucky Et Al.* .

legislators' perception that a given statute or government action may be subjected to the test – may lead legislators and citizens to translate, strategically obfuscate, self-censor, or indignantly assert their religious idioms and norms in legislative debates. In many cases, such effects thereby forestall valuable forms of critical and reflective discourse between religiously and non-religiously diverse constituencies.

Recall that social spheres are distinguishable categories of social activity; they consist in the physical spaces, materials, acts, actors and norms and processes that constitute a given area of social life.[47] Social spheres are defined relative to 1) the material or ideal sources from which they issue; 2) the socially meaningful forms they take; 3) the practical ends or outcomes they yield; and/or 4) the social roles, identities, norms and narratives of which they are a part. Constitutional law is a social sphere in this sense. In contrast to the popular reprints of the United States Constitution, constitutional law cannot fit in your pocket. Nor can constitutional law fit on the shelves upon shelves of Supreme Court opinions that are housed in university libraries. Constitutional law is no less bound to those texts than it is to the patterns and processes of debating the meanings and implications of those texts for social life. If we take the first case treated in this dissertation, *Vidal v. Girard's Executors* (1844), as an example, we can say that constitutional law includes Horace Binney's submission of a 307-page legal brief on the laws of charities in Western civilization; it includes Daniel Webster passionately declaiming Stephen Girard's "infidel" college; it includes Joseph Story, robed in black, tiring of Webster's melodrama, and weighing, with the Court's other eight justices, the

[47] This conception of spheres overlaps with other authors' conceptions of "institutions" and "culture systems." See, e.g. Bellah, *The Good Society*, 287ff. Also see Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*; *Thick and Thin: Moral Argument at Home and Abroad*; Geertz, "Thick Description: Toward an Interpretive Theory of Culture; "Religion as a Cultural System." Also see MacIntyre, *After Virtue: A Study in Moral Theory*, 205-06.

relevant facts and legal norms from state and federal law; it includes the written laws, and the text of Girard's will, that the Court was interpreting; and, it includes the final, written opinion in which the Court declared, among other things, that Stephen Girard must have meant to include lessons in the New Testament when he instructed that orphans at his "college" should be trained in the principles of pure morality. One might even say that constitutional law includes the courtroom full of "beautiful women, 'dressed to the highest'" who came to watch and listen to the oral arguments in *Girard*; the newsman who took note of them as he transcribed the proceedings for public consumption; and the citizens and lawmakers who subsequently read his account of the case in their copy of the newspaper.[48] In this sense, constitutional law is a semi-choreographed, semi-scripted performance of the nation's basic legal norms and narratives. It constitutes and communicates a higher law by which American citizens and their laws are governed. It is one of the ways – one of the most important ways, perhaps – that Americans come to understand what is "really real" in law and politics.[49] Constitutional law not only helps to define the boundaries between, and the substance of differentiated social spheres in American society – namely, the spheres of legislation and religion – it also helps to reintegrate them.

This view of constitutional law raises important questions about common assumptions about the structure of modernizing societies. Scholars commonly portray highly developed societies in terms of a multiplicity of semi-autonomous social spheres, the practical and moral logics of which are irreconcilable, if not outright contradictory.

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[48] See: "Mr. Webster's Argument on the Girard Will Case: United States Supreme Court."

[49] Geertz, "Religion as a Cultural System," 112.

"Many old gods ascend from their graves," Max Weber observed of the modern era, "they are disenchanted and hence take the form of impersonal forces."[50] Weber is suggesting, here, that modern social spheres have internal rationalities and organizational structures all their own. Science, economics, politics, religion, and other spheres are no longer integrated under a single sphere, or oriented toward a unified *telos*. Rather, seemingly impersonal forces structure these aspects of society, stretching and tearing at the fabric of individuals' and groups' moral identities. "Our civilization destines us to realize more clearly these struggles again," Weber asserted, "after our eyes have been blinded for a thousand years—blinded by the allegedly or presumably exclusive orientation towards the grandiose moral fervor of Christian ethics."[51] The sacred canopy that was Christendom has been rent asunder. Moral paradox and the division and rationalization of social spheres have taken its place.

We should not get too carried away with such arguments. Even if religious belief has become just one option among others, as Charles Taylor contends, modern societies are surely structured around other 'givens' unique to our era. There are surely centripetal social forces at work today that, in their own limited ways, mediate between the many spheres of modern life. Does constitutional law function in American society as "Christian ethics" supposedly did in pre-modern Europe – as a transcendent "value sphere" that orients all other social spheres toward a unified *telos*? Probably not. But constitutional law *does* function as an important mediating and contributing factor in the differentiation and moral (re)integration of social spheres.

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[50] Weber, "Science as a Vocation," 147-48.

[51] Ibid., 149.

Constitutional law differentiates, mediates, and reintegrates social spheres by conferring various powers and rights to certain persons and entities, and, by settling disputes in patterned ways between entities whose activities and interests come into conflict. Every individual or corporate power, right and duty is premised on, and communicates the existence of a corresponding social sphere – a bounded, more-or-less formalized category of social activity that sits in relation to other such categories of social activity. The legal category of "religion" is not value-neutral. At least, the ways in which courts interpret the substance and scope of what persons and institutions may do under the auspices of religion are not value-neutral. Likewise for the sphere of legislation, and other spheres ranging from family, to commerce, to privacy, and more. If this is the case, then courts' methods for defining and limiting what persons may do in religious and legislative roles – i.e. what they may do within the spheres, or under the auspices of religion, legislation, or whatever else – inevitably affect the legal and other social boundaries between religious and legislative spheres. How, then, does the secular purpose test affect legislative discourse?

Quantifying the effects of the secular purpose test is difficult. After all, constitutional law is only one part of a complex set of dynamic societal processes. Numerous factors influence the quantities and qualities of public discourse in the United States.[52] Nonetheless, at least four types of responses to the secular purpose test seem plausible, and more-or-less evident.

One potential response is *translation*. On the one hand, translation might involve reconstructing the symbolic meanings of religious acts or artifacts. Thus, parties in cases

[52] See, e.g., Steve Tipton, *Public Pulpits: Methodists and Mainline Churches in the Moral Argument of Public Life* (Chicago and London: University of Chicago Press, 2007), 414.

like *Abington v. Schempp* (1963) and *Lynch v. Donnelly* (1984) might emphasize the nonreligious functions and cultural meanings of things like holiday displays, or prayers and patriotic exercises in morning schools. On the other hand, citizens, legislators and/or litigators might attempt to translate religious norms and into political and moral arguments that do not overtly rely on religious sources, such as sacred texts or traditions, or invoke explicitly religious terminology. Instead of defending certain sexual or familial norms in terms of their relation to divine law, for example, a religious practitioner might emphasize the financial or other social benefits of laws that enforce such norms. Indeed, political and legal norms may take on a life of their own within a religious organization, becoming organizing principles in their own right, with nonreligious idioms and practices replacing earlier forms of discourse, narrative and ritual.[53]

Another potential response to the secular purpose test is *strategic obfuscation* of religious purposes or motives. Here, legislators may intentionally hide their religious motives or rationales from judicial review for fear of jeopardizing the legal status of a legislative act. Rather than translating their arguments into nonreligious idioms and norms, for example, legislators might simply remain silent during legislative debates, or otherwise manipulate the legislative record such that it appears to convey permissible legislative purposes where impermissible ones may have, in fact, carried the day. As Professor Josh Blackman has argued, "Knowing that courts are forced to rely on extrinsic evidence like legislative history to analyze the purpose prong of the Lemon test, politicians have a strong incentive to manipulate the legislative history so a future case

[53] Ibid.

can be resolved in accordance with their personal views."[54] Similarly, legislators might strategically obscure inappropriate religious purposes with statutory language that is designed to conceal a legislature's or legislator's religious purposes behind a patina of formal religious neutrality.

Two other possible responses include *self-censorship*, or the *indignant/militant public assertion* of religious idioms and norms. In the case of self-censorship, legislators and other participants in political or legislative discourse might feel duty-bound, or socially pressured to neither voice religious arguments, nor apply religious norms when casting their votes. Alternately, religious persons or groups might interpret the secular purpose test as a form of implicit disenfranchisement. Indeed, such persons or groups may feel deeply wronged by the secular purpose test – indignant that their moral values and motives are viewed as constitutionally suspect under the secular purpose test, whereas the values and motives of their nonreligious counterparts are given a sort of constitutional imprimatur. Groups that feel disenfranchised may, as a result, voluntarily disengage from political spheres; or, they might adopt a militant posture aimed at re-taking the spheres of politics and law for religion.[55] It seems no coincidence, for example, that the rise of Religious Right coincided with the introduction of the secular purpose test, and a host of other developments that were relatively hostile to public religion.[56] Richard John Neuhaus tellingly argues in *The Naked Public Square* (1984) that,

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[54] Blackman, "The Lemon Comes as a Lemon: The Lemon Test and the Pursuite of a Statute's Secular Purpose," 409-10.

[55] This view is not uncommon. As Justice Potter Stewart noted in his *Schempp* dissent: "And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private." *Abington School District V. Schempp*, 313.

[56] For example, the sexual revolution(s), and the publication of John Rawls' *A Theory of Justice* in 1971. John Rawls, *A Theory of Justice* (Cambridge, MA; London: The Belknap Press of Harvard University Press, 1971).

for anti-abortion advocates, the most offensive aspect of the Supreme Court's decisions in *Roe v. Wade* (1973) and other abortion cases was not the Court's assertive posture in striking down state-level abortion regulations, but rather, its relegation of religious moral norms to the private lives of religious practitioners. Neuhaus writes:

> It is said that the court may have been too far ahead of popular opinion and prejudice [in its abortion rulings]. It seems more likely, however, that this is not an instance of aheadness or behindness but of fundamental disagreement with the court's decision. One suspects that the most fundamental disagreement is with the court's stated assumption that religious belief can have no bearing upon the determination of which human life has a claim and which human life does not have a claim upon societal protection.[57]

If this is the case, then secular purpose test, paradoxically, might actually widen rifts between religious and nonreligious constituencies by communicating to the broader public that religious moral norms and worldviews are irrelevant and/or inappropriate grounds for legislative decision-making. As a legal norm, then, the secular purpose test would seem likely to make nonreligious constituencies disinclined to engage in substantive dialogue with those who might introduce religious arguments and norms in legislative debates. Religious constituencies, for their part, feeling as though they have been silenced, may simply resort to belligerence. Discourse about the common good, in this case, is replaced by discursive indifference. The so-called "public sphere" has become a "secular sphere," and both sides seem to know it.[58]

§ 4 Here Comes the Post-Secular Purpose Test

[57] Neuhaus, *The Naked Public Square: Religion and Democracy in America*, 27.

[58] Of course, there is not just one "public sphere," and there are far more than two "sides" to such discourse. See, e.g., Tipton, *Public Pulpits: Methodists and Mainline Churches in the Moral Argument of Public Life*, 412-23.

Should judges worry about the relatively diffuse effects of the secular purpose test when they issue rulings in specific cases? The proximity of the Establishment Clause to the First Amendment's provisions for the freedom of speech, press, assembly, and the right to petition the government "for a redress of grievances" would seem to suggest that any interpretation of the Establishment Clause tending to diminish the quality or quantity of public, and especially legislative discourse is misguided. Yet, any judge worth her salt is most immediately concerned with issuing a correct ruling in the case at hand. In that sense, if the secular purpose test has proven itself to be a consistent and effective method for enforcing core Establishment Clause norms, then American courts should not hastily discard it. Learned jurists and legal scholars have argued that the secular purpose test does play such a role in American law, or at least could do so if it was properly interpreted and applied. Professor Andrew Koppelman, for example, argues that the secular purpose test is a legal bulwark that prevents American democracy from reverting to a primitive theocracy. He concludes: "A world without the secular purpose requirement would be so strange as to be nearly unrecognizable."[59] This conclusion seems rather out of place, or perhaps just too melodramatic under the circumstances, given that the secular purpose test did not exist, as such, until 1963. Even Koppelman admits, "Very few laws will fail the secular purpose requirement."[60]

Numerous scholars have argued that moral idioms, norms and narratives that are rooted in "religious" communities and cultures can, and often do contribute to well-functioning democratic processes. José Casanova, for example, convincingly argues that,

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[59] Koppelman, "Secular Purpose," 166.

[60] Ibid., 93.

> …the public interventions of religion in the public sphere of modern civil societies can no longer be viewed simply as antimodern religious critiques of modernity. They represent, rather, new types of immanent normative critiques of specific forms of institutionalization of modernity which presuppose precisely the acceptance of the validity of fundamental values and principles of modernity, that is, individual freedoms and differentiated structures. In other words, they are immanent critiques of particular forms of modernity from a modern religious point of view.[61]

Other scholars – including Jeffrey Stout, Lenn Goodman, Robert Bellah, Steven Smith, John Rawls (in his later works) and others – have argued that religious norms and narratives play influential, and sometimes valuable or praiseworthy roles in legislative and public discourse.[62] Steve Tipton, for example, notes that,

> Every movement to make America more fully realize its professed values has grown out of some form of public theology, from the abolitionists to the Social Gospel and the early Socialist Party to the civil rights movement under Martin Luther King, Jr., and the farmworkers' movement under César Chávez. But so has every expansionist war and every form of oppression of racial minorities and immigrant groups.[63]

The ubiquity of religion as a motivating force in American politics, if nothing else, implies that religious motives and norms ought to be subject to public scrutiny, rather than hidden in the shadows of deliberative democracy. Insofar as the secular purpose test prevents open and candid legislative debates about Americans' actual motives and

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[61] Casanova, *Public Religions in the Modern World*, 221-22. Also see Casanova at 228-230. Also see: Lenn E. Goodman, *Religious Pluralism and Values in the Public Sphere* (New York: Cambridge University Press, 2014), 86-87. Goodman observes: "But religious voices may see harms that contractual models of human relations fail to register…The humanism that invigorates many a religious tradition is protective of human bodies and spirits. It vigorously contests the notion that we human beings are social isolates with no obligations to self or other beyond what we contractually assume…Religion, at its fairest reach, welcomes daylight unafraid of fair debate, even thoughtful probing of its deepest mysteries."

[62] Bellah, "Civil Religion in America; Goodman, *Religious Pluralism and Values in the Public Sphere*; Bellah, *The Good Society*; Smith, *The Disenchantment of Secular Discourse*; Stout, *Democracy and Tradition*; John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64, no. 3 (1997).

[63] Tipton, *Public Pulpits: Methodists and Mainline Churches in the Moral Argument of Public Life*, 40. To these lists we must also add the oppression of women and sexual minorities. Here, and elsewhere, religious groups have often played more-or-less central roles in promoting and/or opposing the expansion of rights and opportunities for oppressed classes and groups.

political rationales, then, American courts would do well to reevaluate its meaning and/or its prominent role in Establishment Clause jurisprudence.

In fact, the Supreme Court currently seems to be casting about for alternatives to the secular purpose test. A pair of cases decided on the same day in 2005 suggests two very different possibilities. *Van Orden v. Perry*[64] and *McCreary County v. ACLU*[65] both involved legal challenges to the public display of the Ten Commandments on government property. In *Van Orden,* a plurality of the Court did not explicitly apply[66] the secular purpose test, and upheld the constitutionality of a large stone monument engraved with the Ten Commandments that had been erected on the grounds of the Texas state capitol forty years prior. The *Van Orden* Court described the *Lemon* test as an optional set of guideposts that was not particularly useful for the case at hand. The most important factor in determining whether the monument violated the Establishment Clause was not whether it was religious or secular, but whether it was a coercive or passive display of religious content. "Of course, the Ten Commandments are religious," the Court explained, "[but] Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[67]

In *McCreary County v. ACLU,* however, a narrow majority of the Court applied a strict and far-reaching interpretation of the secular purpose test, ruling that a "Foundations of American Law" display erected in two county courthouses was unconstitutional. The counties' displays consisted of a framed copy of the Ten

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[64] *Abington School District V. Schempp, 313.*

[65] *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al.* 545 U.S. 844 (2005).

[66] The Court tacitly affirmed the lower court's conclusion that the monument, noting that it conveyed a "predominantly secular message."

[67] *Van Orden V. Perry.*

Commandments mounted alongside several other historical documents of the same size. The courthouses had modified the display twice in a somewhat provocative attempt to comply with previous court orders. But Justice Souter insisted in the Court's written opinion that the most recent version of the display reflected the unconstitutional, religious purpose of the original.

In light of *Van Orden* and *McCreary*, it seems that the Court will move in one of at least two directions. The first path, preferred by conservative commentators and justices, treats the secular purpose test as optional at best, and as incoherent, ahistorical and undemocratic at worst.[68] Proponents of this view favor abandoning the secular purpose test, while instead emphasizing "coercion" as a more appropriate touchstone for Establishment Clause cases. In *Van Orden*, for example, Justice Clarence Thomas explained, "[O]ur task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses. The Framers understood an establishment 'necessarily [to] involve coercion.'"[69] In practice, this coercion standard would mean that a government could employ the trappings of a particular religious tradition as long as it did not force dissenters to participate.

Liberal commentators and jurists usually advocate a different approach. Advocates of this view acknowledge some of the test's potential pitfalls. But they insist that the secular purpose test serves a vital function in First Amendment law. Justice Souter's opinion in *McCreary*, for example, forcefully rebutted critics of the secular purpose test: "When the government acts with the ostensible and predominant purpose

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[68] For a useful summary of the main criticisms that have been leveled against the secular purpose test, see: Koppelman, "Secular Purpose."

[69] *Van Orden V. Perry*, 693. (Justice Thomas concurring).

of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." Souter continued, "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country," Souter continued, "With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago."[70]

In other words, courts evaluate legislative purposes all the time, and it is easy enough to determine whether a law's purpose is secular.

Neither of these approaches addresses the main shortcomings of the secular purpose test, or responds fruitfully to current scholarship on secularization and secularism. A more coherent approach would be to retrieve earlier methods for evaluating legislation in terms of its "public" or "legal" purposes. Simply requiring that laws reflect a "secular" purpose is an incredibly ham-handed method for evaluating the substance of legislative powers. It implies that all levels of government possess the same forms of power – namely, the power to pursue secular purposes. But state and federal constitutions, and municipal charters convey specific powers to their respective legislative bodies. Even when these powers are plenary – as in states' power to enact general police regulations – they are often defined in terms of a limited set of end-purposes, such as public health and safety. Since 1947, U.S. law has prohibited all levels of government from enacting laws respecting an establishment of religion. But should this mean that every power granted to every legislative body ought to be defined solely in

[70] *Mccreary County, Kentucky, Et Al. V. American Civil Liberties Union of Kentucky Et Al.* , 861-62.

terms of "secular" purposes? In Establishment Clause cases implicating issues as diverse as school curricula, courtroom decorations, legislative prayers, charitable tax exemptions, and even marriage laws, are we to presume that every legislative body possesses the power to pursue any legislative purpose, so long as that purpose is secular?

This does not mean that courts should never evaluate statutory purposes, or that the law should not limit the religious means with which governments exercise their enumerated powers. Instead, I'm suggesting that a more appropriate *first step* in reviewing Establishment Clause cases would be to determine whether the law in question reflects an enumerated or presumed power of the legislative body that enacted it. In other words, before considering the negative limits of a government's powers with respect to religion, courts should consider the positive substance of those powers. They should first ask whether a law reflects an enumerated legislative power, or advances a legitimate "public" purpose or interest instead of merely asking whether it has a secular legislative purpose.

This would mean, for example, that courts would first examine whether a legislative act reflects a state's police powers, or the federal legislature's power to regulate interstate commerce, or a municipality's power to pass zoning laws, and so on. The next step would be to evaluate whether the legislative act exceeds this specific power with respect to religion. And here, in the second phase of the courts' review, jurists could apply appropriate Establishment Clause norms limiting the religious means legislatures can use in the exercise of their enumerated powers – things like non-coercion, non-preferential treatment, and so on. This approach would allow the Supreme Court to establish more nuanced and predictable limits on specific forms of legislative power as they relate to religion. It would diminish the not-so-subtle implication that the

Establishment Clause prohibits legislation that reflects religious moral norms. And it could be done without dramatically breaking precedent.

Given the increasing diversity of religious identities and practices in the United States, future cases will undoubtedly present difficult questions about the scope and meaning of the Establishment and Free Exercise clauses. Whether, and how U.S. courts apply the secular purpose test to resolve these cases will affect American law and policy in significant ways. The first step in judicial reviews of laws challenged under the Establishment Clause should establish a law's public or legal purposes instead of its secular purposes.

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