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THE RELIGION CLAUSES AND THE 
BURGER COURT*

Philip B. Kurland**

Pope John Paul II, at a Vatican conference marking the twentieth anniversary of Pope John XXIII's encyclical "Pacem in Terris," said: "Among the rights of man one rightly places the right to religious freedom; this is in fact the most fundamental." Surely it is that freedom of the mind, including freedom of conscience, that marks the distinction between those countries where man is free and all the others. No one in our time has symbolized this freedom more than Pope John XXIII. For one who is not a member of the Faith, it is indeed a great honor for me to deliver the lecture that bears his name. Unworthy as they may be, I offer these remarks by way of homage. And to borrow words of Judge Learned Hand from a different context, as I am wont to do: "I thank you in the name of that homage which all of us owe... to the memory of one who was foresighted and temperate and wise and just."1

Freedom of religion was encapsulated in the words of the first amendment to our Constitution, which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."2 The words were composed against a history in which England and most of the states maintained an established church, where a government acknowledged one true form of belief, incorporated that belief, more or less, into its civil laws, provided that church with its sustenance, usually by way of taxation of all inhabitants, and allowed for government participation in the rule of the church and for church participation in the rule of government. All of this is possible where a single religion or sect represents the vast majority of the people or of the ruling class.

Some American states maintained established churches through the first third of the nineteenth century. The amalgam of the thirteen states into one nation meant the absence of any majority denomination in the larger polity.

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2. U.S. Const. amend. I.
Those majorities within each state, for example the Congregationalists in New England or the Church of England in Virginia, were not prepared to subordinate their preferred positions within their states to whatever group might possibly emerge as a majority in the nation. In any event, by the time of the formation of the new nation, there was such a multitude of sects and beliefs, it was unlikely that any one could attain the popularity necessary to support an established church within the nation. Massachusetts was the last state finally to abandon establishment in 1833.

This is not to say that the original states were not frequently blessed with a degree of toleration that far exceeded what was known anywhere in Europe and certainly in England. It cannot be forgotten that a very large number of our original settlers—not to speak of the generations of immigrants who came to these shores after them—were here to escape the religious intolerance of their native lands, whether Calvinists or Catholics, Baptists or Methodists, or the multitudes of smaller religious groups whose religious beliefs subjected them to persecution. Thus, even before the framing of the Constitution, the Continental Congress provided in the very first article of the Ordinance of 1787 for the Government of the Northwest Territory that: “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.”\(^3\) Compare this with Oliver Cromwell’s declaration of what he meant by religious toleration, when he said: “As to freedom of conscience, I meddle with no man’s conscience; but if you mean by that liberty to celebrate the Mass, I would have you understand that in no place where the power of Parliament of England prevails shall that be permitted.”\(^4\)

Most of the American colonies and states made provision in their fundamental laws for religious tolerance that was certainly a good deal more liberal than Cromwell’s. Freedom of conscience and freedom of worship were both usually guaranteed. Some, however, confined these rights to Protestant sects—as would most of the great so-called “liberal” English writings on the subject—others only to Christians. Almost nowhere were all inhabitants, regardless of religious belief, entitled to full and equal participation in governmental affairs or governmental benefits or protections. Indeed, even at the time of the adoption of the Constitution, many were aghast at the provision in article VI that “no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States.”\(^5\)

\(^3\) U.S. CONTINENTAL CONGRESS, ORDINANCE OF 1787, art. I.
\(^5\) U.S. CONST. art. VI, § 3.
Religious toleration, admittedly growing even in England, was not to be equated with religious freedom. Religious tolerance was, in effect, a leave granted by a religious majority to a religious minority to practice some or all of its religious beliefs. Religious freedom must mean that one's obligations to his Creator is a matter between him and his God; it requires no man's leave. Religious freedom must mean that whatever special place one religion may have in the eyes of God, all religions are equal in the eyes of the law.

The forceful argument for religious freedom was not that truth would necessarily emerge from free expression of diversity of beliefs and views. It was rather that the alliance between religion and government had always resulted in bloody divisiveness within a nation and bloody wars between nations. The "first new nation," the United States of America, could afford neither if it was to survive as a free nation, a survival about which we can be more sanguine now than its people could be in 1789.

The equality that is a predicate for religious freedom is more obviously an ingredient in requiring nonestablishment. But the arguments against establishment, most of which derived from the history of the colonies and the new states, tended to be put in one of two alternative ways. Separation was required, according to Roger Williams' teachings, lest the mission of the church be perverted by the goals of the state. Williams never descended to the locution that he who pays the piper calls the tune, a proposition that we have certainly learned the hard way, but it was not irrelevant to his desire to keep the civil government out of the management of his church. The Virginians, with Jefferson and Madison as their most cogent spokesmen, were also of the view that religious freedom required nonestablishment. Their expressed concern was to keep civil government from being perverted to the ends of a Church. (I have often speculated that the Virginians were Francophiles, a view hardly congenial to the hierarchy of the Church of England.) In any event, the preacher Williams was asking government to keep its nose out of his affairs, while the Virginia politicians made a similar appeal to the clerics to mind their own business.

Some today will find it strange that it is to the separation of church and state that deTocqueville attributed the survival of a strong spirit of religion in the United States when he visited this country in the 1830s. In Democracy in America, he wrote:

My desire to discover the causes of this phenomenon [that is, the strong hold of religion on the people] increased from day to day. In order to satisfy it I questioned the members of all the different sects; I sought especially the society of the clergy, who are the de-

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6. A. deTOCQUEVILLE, DEMOCRACY IN AMERICA (Bradley ed. 1945).
positaries of different creeds and are especially interested in their duration. As a member of the Roman Catholic Church, I was more particularly brought into contact with several of its priests, with whom I became intimately acquainted. To each of these men I expressed my astonishment and explained my doubts. I found that they differed upon matters of detail alone, and that they all attributed the peaceful dominion of religion in their country mainly to the separation of church and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.\footnote{7}

This separation of church and state could not be attributed to the first amendment. It will be recalled that, although Madison's earlier draft of the amendment had proposed to make it applicable to the states as well as to the national government, in terms the first amendment, like all provisions of the Bill of Rights, was a restraint on the national government alone. The first amendment became applicable to the states by way of the fourteenth and then not through explication of its legislative history or the intent of its authors. Instead, the amendment's applicability to the states came by way of legerdemain of the Supreme Court, who found license in their commissions to rewrite the Constitution better to their own liking. It is probably much too late to challenge the legitimacy of the application of the religion clauses of the first amendment to the states. But it may be recalled that when, shortly after the promulgation of the fourteenth amendment, another amendment to the Constitution, the so-called Blaine Amendment, was proposed specifically to make the religion clauses applicable to the states, it failed of adoption.

Even so, the religion clauses of the first amendment did not emerge from the cocoon of the fourteenth until well into the twentieth century. When they did, they were treated as separate commands, one relating to freedom and the other to establishment or, as it has become better known, separation. The Establishment Clause was made part of the fourteenth amendment in 1947, in \textit{Everson v. Board of Education}.\footnote{8} The Court held that a state may pay for public transportation of a parochial school student even if it paid for that of no one else. That the argument in the opinion of the Court, did not sustain the result, did not diminish the effective enlargement of the fourteenth amendment. Mr. Justice Black, writing for the Court, all but incorporated Madison’s \textit{Remonstrances}\footnote{9} as an explanation of its meaning. The

\footnote{7}{Id. at 308.}\footnote{8}{330 U.S. 1 (1946).}\footnote{9}{Madison, \textit{Memorial and Remonstrance Against Religious Assessments}, II THE WRIT-}
free exercise clause was applied to the states in 1940, in *Cantwell v. Connecticut*,\(^\text{10}\) although the Court now insists that this did not come about until 1943 in *Murdock v. Pennsylvania*.\(^\text{11}\)

Allow me to digress slightly from the straight path from the origins of the religion clauses through their application by the Burger Court. I must remind you that the function of the Constitution is to establish and to limit the powers of government. The body of the Constitution was meant to establish a government for a free people, a self-government in which "[w]e, the people" were to be sovereign. The government was established to serve the people, not the people the government. Such a government had to be based largely on majority rule. But its creators knew well that majorities, too, could be oppressive and that safeguards for minorities, even minorities of one, were also necessary. The Bill of Rights was largely a series of restraints against majority imposition on minorities, written mostly in terms of assuring procedures that would guarantee the rule of law, that the arbitrary whims of officials would not be invoked. The concern of the Bill of Rights was freedom of individuals. The concern of the religion clauses was also the individual and not the church of which he may be a member. Churches receive protection only in order that their parishioners be free of government restraint, not the other way around.

It must be remembered, too, however, that when the Bill of Rights was written, the role of government in the lives of the people was expected to be a limited one. Its primary functions were to protect the lives, the liberties, and the properties of individuals against invasion by other individuals at home and from depredations by foreign governments from abroad. The greatest problem was to assure a government strong enough to ensure these protections but not so strong as to itself constitute a threat to the life, liberty, and property of its citizenry. This was to be an experiment in a new order of things, a "novus ordo seclorum" as the Great Seal has it.

The experiment has been more or less a successful one, although government has expanded its role to the point where it has invaded our lives to a degree that most of the Founding Fathers could not possibly have foreseen. (Perhaps the greatest fears of our constitution writers that carries over to modern times was their worry about a large military establishment beyond civilian control.) The one area that must remain sacrosanct if freedom is to be preserved is the life of the mind. The life of the mind, including freedom

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\(^{10}\) Rutledge, J., dissenting.

of conscience and freedom of thought, and freedom to communicate ideas, calls for greater and greater protection against pragmatic demands for sacrifice of individual values to societal ends.

I repeat, the Bill of Rights does not purport to limit individual actions, only governmental ones. This explains why the religion clauses may be deemed to have been successful despite the fact that our national history is rife with evidence of religious bigotry and intolerance. American government has itself seldom sought directly to curtail religious freedom. The persecution of the Mormons, both by the national government, with the aid of the Supreme Court, and the State of Illinois, is probably the one big blot on our escutcheon here. But organized anti-religious sentiments outside of government have been only too frequent. Thus, for example, I would remind you that the tenets of the Ku Klux Klan were as anti-Catholic and anti-Semitic as anti-black. In the 1850s a national party, self-labeled the American Party but more generally called the “Know-Nothings,” was largely successful on a platform of anti-Catholic and anti-immigration policies. The number of smaller groups with similar activities at their core is unfortunately legion. Certainly one of the hurdles that Al Smith could not overcome in his 1928 presidential campaign was his religious affiliation and it was no small concern to John Kennedy in his 1960 bid for the presidency. My only point here is that the Bill of Rights does not itself reach this kind of religious prejudice. Article VI and the first amendment were meant to prevent the government from sinking to the depths of religious intolerance that we are not yet prepared to deny to individuals. Perhaps the only cure for societal ills of this kind is that proposed by Mr. Justice Holmes, that we “grow more civilized.”  

I took this digression for two reasons. First, to show the nature of the constitutional limitations with which we are concerned, that is, limitation on government, not private citizens. Second, to recognize that against the world’s history of government persecution of religious minorities, such as may now be seen at work in Iran for example, the issues of government and religion that come before our courts may seem picayune to many of us. Indeed, they may be more important as symbols than for pragmatic reasons. But, as Holmes also told us, “We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it.”  

Besides, that which seems unimportant to some of us may take on great significance to those involved in the controversy. And this is not less the fact where emotion rather than reason is involved. For example, we have the

Burger Court's decision that the State of New Hampshire may not punish a man for defacing his license plate to remove the motto thereon: "Live free or Die," which offended the religious sensibilities of the car owner.14 Remember what Mr. Justice Jackson said when he sustained the right not to have to salute the flag, not only for religious reasons but for any conscientious ones: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."15

Hyperbole tends to mark the commentary on church-state issues, whether that commentary comes from the pulpits, the press, or the halls of academe, all of which are guaranteed freedom of expression by the first amendment and none of which are saddled with any responsibility beyond self-restraint. The typical charge against the school prayer cases was that they removed God from the classrooms. No amount of reason is an acceptable response. The op-ed page of The New York Times featured a piece by Professor Norman Redlich headlined "Nativity Ruling Insults Jews."16 My own view is that the opinion bordered on heresy, but I shall say more of this later.

Let me return to the Supreme Court's path to the Burger Court decisions in the church-state area. Between the time of the incorporation of the religion clauses of the first amendment into the fourteenth amendment by the Court in the 1940s and the accession to the Chief Justiceship of Warren Earl Burger, the Court became heavily involved in church-state cases. On the whole, the Court followed the line of Mr. Justice Black's argument in Everson—the school bus case—rather than his judgment. His oft-quoted language, adopting Jefferson's "wall of separation" rather than Roger Williams' argument for noninterference, was this (for a while it was the talisman for the Court's actions in this area):

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 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 disbelief, 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 reli-

Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *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.'

Most of the pre-Burger Court's more difficult problems in this arena, like those of the Burger Court itself, centered on the issue of religion in the public schools and public aid to private religious schools. After *Everson*, the Court first held an Illinois law invalid that permitted students who opted for religious instruction by nonpublic school teachers on the school premises to attend those classes in lieu of their public school classes. Whether the basis of the decision was the use of the compulsory education laws to supply the students for the religious classes, the coercive influence on the students who did not attend and had to mark the time during the absence of their fellow students, or the stigma of declaring oneself a nonbeliever or heretic, was never clearly delineated by the Court. The public furor against the Court was enormous. The Court retreated as soon as it had the opportunity to do so. In a New York case, where the same facts existed except that the religious instruction was to be offered off the school premises, the Court sustained the validity of the released time concept. It was merely an "accommodation" which the State could graciously make to its religious constituents. The alternative "accommodation," of releasing everyone for an hour at the end of one of the school days, was not acceptable to the churches involved, for fear that if students were given a choice between excuse from school and attendance at catechism classes, there would be no attendance at the classes. That the Court had flip-flopped was evident to all, suggesting that even Supreme Court Justices could be brought to recognize the force of public opinion.

The school prayer cases brought even more opprobrium on the Court when it decided first that the Board of Regents of New York could not compose a nondenominational prayer with which the school day must be opened and later that prayers to be selected by students or faculty from recognized religious texts could not be required, even where those not wishing to participate were excused. Many church groups that had opposed any prayers except those of their own faith had come around to the idea that any prayer was better than none. But the issue had long disturbed the courts.

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even before the Supreme Court entered the fray. Typical of such controversies was that brought by Catholic parents in Illinois where they successfully enjoined the reading of the King James Bible, the singing of hymns, and the recitation of the Lord’s Prayer.\textsuperscript{22} The Illinois Supreme Court may have put the point better than did the United States Supreme Court when in \textit{Ring v. Board of Education} in 1910, it said:

The exclusion of a pupil from this part of school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain pupils must be excused from it because it is hostile to their or their parents religious beliefs, then such instruction or exercise is sectarian and forbidden by the constitution.\textsuperscript{23}

Thus, when President Reagan grew up in Illinois, it was unconstitutional under the state constitution to conduct school prayers in the public schools, at least where any students took exception to it. The fact was, as the President has testified, that school prayers were the order of the day in his classrooms. So, too, after the United States Supreme Court opinions, school prayer remained the rule rather than the exception in most jurisdictions where no one was sufficiently offended to take legal action against it. We tend to forget these days that a judgment is not a statute, that it binds only those who are parties to it, however much it establishes a precedent for later suits. Nonetheless, a movement to cancel the decisions by constitutional amendment quickly came into existence and is still going strong, although it was slowed down when its supporters failed to muster the necessary two-thirds vote in the Senate to initiate such an amendment. The difficulty is in finding a formula that would avoid coercing acquiescence or stigmatizing nonbelievers. It was in the second flag salute case that Mr. Justice Jackson asserted: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{24} It is that “fixed star” that is put in jeopardy by the proposed amendment.

Here is the creed of liberty that was encompassed in the Bill of Rights. The individual is free and supreme, subject to majority rule in those areas where the majority is authorized to rule, but not in regard to matters of

\begin{itemize}
  \item \textsuperscript{22} Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).
  \item \textsuperscript{23} Id. at 351, 92 N.E. at 256.
  \item \textsuperscript{24} Barnette, 319 U.S. at 642.
\end{itemize}
faith, or speech, or ideas, unless the practice of that speech or ideas or faith does specific injury to another. There is a duty of the individual to society, but that did not include an obligation to submit to compulsion of thought. That is what freedom of religion is all about. As Jackson concluded in that same opinion: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

The school prayer issue has not been back to the Supreme Court. Predictions about judicial behavior are always risky at best. But if the trend that the Burger Court has begun were to continue, I should not be surprised if the Court would one day soon obviate the need for a constitutional amendment. The Court has become very much a majoritarian institution. Only recently the Burger Court, in *Widmer v. Vincente*, held that a state university could not deny access to its facilities to a student group seeking to use them for religious discussion and workshops, where other student groups were allowed such access. The ruling would seem impeccable, except for what the Court chose to ignore, over Mr. Justice White's dissent, that the religious group sought the use of the state's facilities not merely for discussion and fellowship but for the conduct of religious worship services. It wanted to use them, and did use them, as a church. The notion of equal clubhouse rights for religious and nonreligious organizations takes on a different visage when it is not a clubroom but a chapel that is in issue. But the precedent is now there.

We must note, however, that the opinion may rest on a different judicial classification, one that could explain several apparent discrepancies in its rulings but is seldom made evident or even stated *sotto voce*. The doctrine of separation has been applied with more vigor where the school population involved has been grammar or high school students, rather than college or university students, or adults in noneducational settings. Whether the *Widmer v. Vincente* ruling will apply to lower level schools, where the students are regarded as more susceptible to impregnation of religious beliefs, is certainly not clear.

Public assistance to private schools is the other large category of church-state cases that have engaged the Court. Here we have a hodge-podge of decisions beginning before the Burger Court but much exaggerated by the Court. If the description I am about to give you sounds like it derived from Alice's Adventures in Wonderland, please believe that I have attempted as

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25. *Id.*

honest a summary as I am capable of giving you. Thus, a government presumably may supply the cost of transportation to religious school students.\textsuperscript{27} It may also make available to parochial school students the same textbooks it supplies for its own school.\textsuperscript{28} It may not afford reimbursement for testing in church schools, if the tests are created and administered by parochial school teachers, but it may do so if the tests are state-created.\textsuperscript{29} So, too, may the state provide funds for “diagnostic speech and hearing services and diagnostic psychological services,” as well as “physician, nursing, dental and optometric services in nonpublic schools.”\textsuperscript{30} Government supply of “therapeutic services” off the school premises does not violate the Establishment Clause, but the provision of such services on school premises does.\textsuperscript{31}

I continue the litany of United States Supreme Court decisions in this area. If government may supply school texts, it may not supply other instructional materials, even when they are “incapable of diversion to religious use.”\textsuperscript{32} Funding for school field trips is invalid, although it provides only transportation costs, because field trips are an integral part of the curriculum.\textsuperscript{33}

When it comes to providing public funds to a religious school, or its students or their parents, the restrictions have been rather stiff. Monies cannot be supplied even for such purely secular purposes as maintenance and repairs of buildings.\textsuperscript{34} “In view of the impossibility of separating the secular educational function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.”\textsuperscript{35} Last year, however, all this restraint on parental reimbursement for parochial school expenses or tax deductions seems to have been quietly and yet firmly removed. Or, at the very least, the demolition of the no-aid structure was begun.

In \textit{Mueller v. Allen},\textsuperscript{36} a Minnesota statute allowed state taxpayers to deduct expenses for tuition, textbooks, and transportation for their children attending an elementary or secondary school. The decision rested on the ground that the benefits conferred by the state did not flow directly to the

\begin{itemize}
\item \textsuperscript{27} See \textit{Everson}, 330 U.S. at 1.
\item \textsuperscript{28} Board of Educ. v. Allen, 392 U.S. 236 (1968).
\item \textsuperscript{29} Wolman v. Walter, 433 U.S. 229 (1977); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
\item \textsuperscript{30} See \textit{Wolman}, 433 U.S. at 242.
\item \textsuperscript{31} See \textit{id.} at 248-51.
\item \textsuperscript{32} Id. at 248; see \textit{Nyquist}, 413 U.S. at 756 (tax credits for educational expenses violates the Establishment Clause).
\item \textsuperscript{33} See \textit{Wolman}, 433 U.S. at 252-55.
\item \textsuperscript{34} See \textit{Nyquist}, 413 U.S. at 774-80.
\item \textsuperscript{35} \textit{Wolman}, 433 U.S. at 250.
\item \textsuperscript{36} 103 S. Ct. 3062 (1983).
\end{itemize}
parochial schools but only indirectly and then at the choice of the parents. The Court divided five-to-four, with Justices Brennan, Marshall, Blackmun, and Stevens in dissent. The majority purported to distinguish rather than overrule Committee for Public Education v. Nyquist,37 decided ten years earlier, where tax credits of a similar nature were held to violate the Establishment Clause. The distinctions, however, were formal rather than real. Both schemes were for the purpose of assisting financing of parochial school education. The Court might have faced the real issue by recognizing that parochial schools, under the regulation of state laws, are required to provide a secular education along with their religious functions. In so doing, they are engaged in a function that all state constitutions impose on state governments. If this is not sufficient justification for state contributions to parochial school education, because of the Establishment Clause, then the various evasions of the limitation should fare no better. If indirect means may be utilized to the forbidden end, which is what the Court said in Mueller, it surely would be more wholesome to acknowledge the validity of the objective than to cover it over by sophistical reasoning of the sort used in Mueller. There are probably only five lawyers in the country—the members of the Supreme Court majority—if that many, who do not see Mueller as a radical departure from the past. Whether it is a desirable change would surely evoke greater controversy.

Meanwhile, the Court has uniformly upheld grants to church-affiliated institutions of higher learning so long as the moneys were not directly used for religious training.38 Whether this is because educational institutions at this level are not regarded as arms of the church or because students of these ages are not regarded as subject to religious indoctrination, the Court has not really bothered to tell us.

The creche case, Lynch v. Donnelly,39 of recent notoriety, was even more disingenuous in reaching a dubious goal for unexpressed reasons. The Court was again divided five-to-four, with the same Justices dissenting as in Mueller. The question was whether the City of Pawtucket, Rhode Island, by erecting a Nativity Scene in a privately owned but publicly accessed park, violated the Establishment Clause of the first amendment. The Court said that this was no more of a breach of the Constitution than the Santa Claus, the Christmas tree, a banner reading “Seasons Greetings,” and the singing of carols which accompanied it.40 It was, said the Court, an accommodation to

40. Id. at 1365.
majority religious sentiment, like chaplains in the state legislatures, on which it had put its imprimatur only the previous term in *Marsh v. Chambers.*\(^4\)

As Mr. Justice Brennan wrote in the legislative chaplain case:

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.\(^4\)

The legislative chaplain case was at least straightforward. Its primary justification was its long undisturbed history. The creche opinion was sleazy. In 1980, the Court, in a per curiam opinion decided, without the necessity for argument because the issue was so clear, that the Establishment Clause prohibited a state from posting copies of the Ten Commandments on schoolroom walls, although the posters were paid for by private funds. The Court's opinion read, in part:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of supposed secular purposes can blind us to that fact. . . . It does not matter that the posted copies of the Ten Commandments are financed by voluntary contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits . . . .

[It] is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.\(^4\)

One might have thought that four-year old precedent sufficient to guide the result in the creche case. But it would seem that the creche was really only a device to attract commercial activity, a passive record of an historical event, to be analogized to religious paintings that occupy the walls of many a municipal museum. To suggest that the creche is unlike the Ten Commandments, and is not a religious symbol clearly demeans the religion of those who erected it. If it is not put forth as illustrative of God's miracle, it is surely not merely the portrayal of the birth of any child in Bethlehem two millennia ago. Such treatment of the creche symbol further detracts from the religious significance of the Christmas holiday, a holiday which every year,

\(^{41}\) 103 S. Ct. 3300 (1983).

\(^{42}\) Id. at 3338.

at least in this country, pays more homage to Mammon than to God. I would think that devout Christians might take umbrage at the government, in the form of the judiciary, for labeling a depiction of the birth of the Christ child as a nonreligious symbol, like a Christmas tree or a banner proclaiming "Seasons Greetings." (I must say that I would have felt surer of my conclusions had I not read in the *The New York Times* that in the recent Polish controversy, Cardinal Glemp said that the crucifixes that the government was removing from the walls of an agricultural college were to be regarded not as religious symbols but rather as symbols of nationalism. Obviously if the crucifix itself can be regarded as a secular symbol, so too can a creche.)

Again, whether the creche case was rightly or wrongly decided, it would seem quite inconsistent with the decision on the Ten Commandments, unless one were again to distinguish a forum for school children from a forum for the general public. This is a distinction frequently made but seldom rationalized.

A review of the Burger Court's Establishment Clause cases always reminds me of the quatrain by that famed nineteenth century English jurisprude, Charles Dodgson, who wrote:

'You are old, Father William,' the young man said,
'And your hair has become very white;
And yet you incessantly stand on your head—
Do you think at your age, it is right?'

I don't think that the point I'm trying to make is that the Burger Court is less concerned about following precedent than it should be, particularly in this area of the law. It is rather that a survey of the Establishment Clause cases since Burger joined the Court reveals a total revolution of the judicial construction of that portion of the first amendment. Remember that the incorporation of the Establishment Clause in *Everson* established its meaning as complete separation of the realms of church and state. Since the Constitution was directed only at government, it forbade government to enter the arena reserved for the religious. Government was not, according to Mr. Justice Black and Jefferson and Madison, to contribute even a farthing to the furtherance of religious affairs. This understanding certainly prevailed at the time that the new Chief Justice donned his mantle. And it was in his very first term that Burger doomed the strict separationist notion of the Establishment Clause, although not many recognized it at the time.

In *Walz v. Tax Commission*, the Court in an opinion by the Chief Justice, upheld a tax exemption granted by New York for churches and other

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44. Carroll, *Alice's Adventures in Wonderland* ch. 5 (1865).
properties of communal benefit. Douglas, adhering to the Madisonian Re-
monstrances which he published by way of Appendix, found a tax exemption
for churches no different from a subsidy. Burger, by statements subtle and
not so subtle, weaned the Court from the strict separationist interpretation.
He found no violation because “[w]e cannot read New York's statute as at-
ttempting to establish religion; it is simply sparing the exercise of religion
from the burden of property taxation levied on private profit institutions.”
"There is no genuine nexus between tax exemption and establishment of reli-
gion.” “A foolish consistency is the hobgoblin of little minds,” Emerson
once told us. So we may forgive the proposition put by Burger only last
term in the Bob Jones University case, where he said: “When the Govern-
ment grants exemptions or allows deductions all taxpayers are affected; the
very fact of the exemption or deduction for the donor means that other tax-
payers can be said to be indirect and vicarious donors.” This was exactly
Justice Douglas' point in his dissent in Walz.

Burger did have two hundred years of history on his side as well as a
recognition of an awful fiscal and social mess if church properties suddenly
became amenable to taxation. What really was not noticed was the shift in
tone from strict separation to cooperation as the hallmark of the Establish-
ment Clause. “The State has an affirmative policy that considers these
groups [including churches] as beneficial and stabilizing influences in com-
community life and finds this classification [for tax exemption] useful, desirable,
and in the public interest.” What becomes clearly visible through hind-
sight is Burger's steady march toward reading the first amendment as a li-
cense for cooperation between church and state. It seems a strange reading
for those who grew up with some familiarity with the origins of the amend-
ments, with Jefferson's sonorous phrases and proud accomplishments of reli-
gious freedom for Virginia in their minds. But it is clear that between 1970
and 1983, when Burger finally had a five-judge cohort to join him, Justice
Black's Everson reading, indeed, was stood on its head. The expectation can
be that where religious groups are able to secure assistance for their endeav-
ors—although presumably still not for liturgical exercises—from legislatures
and executives, the judiciary will put no bar in the way of these beneficences.

When we turn to the Burger Court's Freedom Clause cases, we are met by

46. Id. at 710-11.
47. Id. at 673.
48. Id. at 675.
51. Id. at 2028.
52. Walz, 397 U.S. at 673.
a less revealing set of opinions. From the beginning of the Court's invocation of this constitutional proposition, its judgments have tended to be ad hoc rather than principled. Of course, I would agree with Mr. Justice Jackson's statement in *Barnette*,\(^{53}\) that the "task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century is one to disturb self-confidence."\(^{54}\) To say this, however, is not to negate Justice Frankfurter's proposition that: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."\(^{55}\) And yet, the "majestic generalities" do, somehow, seem to emerge in translation as kadi-like ukases.

Clearly, the central purpose of the Freedom Clause was to preclude government interference with an individual's choice of religious affiliation or his form of worship. When the laws in question are not such direct infringements but rather ordinances that tangentially, if substantially, conflict with religious precepts, the problems become more difficult of resolution. For, surely, the Freedom Clause does not, without more, convey an immunity from all civil laws on those who claim that the breach of them may be attributed to their religious beliefs. So far as I know, no Supreme Court Justice has opted for such an absolutist position as Mr. Justice Black did with reference to the Free Speech and Press Clauses.\(^{56}\)

The Court's behavior in what it labels freedom of religion cases might be compared with the ancient royal prerogative of dispensation, pursuant to which the Crown could exempt individuals from conforming to the laws of Parliament, particularly for reasons of religious activity. Charles I invoked the prerogative on behalf of Catholic allies and lost his head for it; Charles II did the same and lost his throne. The English Bill of Rights deprived the Crown of such authority in 1689. The administration of the freedom clause by the Court often seems no less arbitrary than the exercise of the royal prerogative of dispensation.

The most important of the Burger Court Freedom Clause cases, *Wisconsin v. Yoder*,\(^{57}\) was written by the Chief Justice. He invalidated the Wisconsin compulsory education law requiring the Amish to send their children to high schools after completion of grammar school. The opinion, while long, was narrow. It was composed in the same spirit of church-state cooperation that marked his *Walz* tax exemption opinion. The Amish were held to have

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54. *Id.*
earned their dispensation from compliance with the law by their "goodness," by their long history of abstention from worldly affairs, and by their considered judgment that they and their children would be better off if unschooled. Sophistication was anathema to their way of life. But the Chief Justice made it clear that Johnny-come-lately sects, less than three centuries old, could not expect to have their arguments, however similar to those of the Old Amish, given credence against the state's requirement of high-school education.

On the other hand, not even the Amish could be excused from paying social security taxes because it violated their faith to do so. Furthermore, a state may not disqualify clergymen from legislative office, although such disqualifications had a long history both in English law and in early American law.

Then, too, although Jehovah's Witnesses were once given protection of their rights to distribute religious literature, even when invading private premises, on the ground that such distribution was part of their religious obligations. Krishnas, on the other hand, may be confined to booths at a state fair because other purveyors of nonreligious literature were equally confined. A Jehovah's Witness who voluntarily quit his job in a plant producing war materials could not be denied workmen's compensation, although others who quit for personal reasons may be denied such benefits. But a conscientious objector who did alternative service was not entitled to the governmental benefits available to other military draftees and enlistees. And so it has gone. Which way the fleas will jump is difficult to predict. Certainly it is not according to any discernible pattern.

More important than the Court's cavalier treatment of principles and precedents, however, is the fact that the Court seems to have lost its ear for that fine but important distinction between religious freedom and religious tolerance, between majority rule and minority rights, between the primacy of the individual and that of the collective, between the American version of proper church-state relationships and that which was brought from Europe before the founding of this new nation. The distinction is to be found in the concept that all religions, like all individuals, are equal before the law. The rule of law commands that equality is best achieved by the government's total abstention from religious affairs, from those matters that are the con-

cern only of each individual and his church and his God. No person, no church shall have precedence in law because of religious beliefs or affiliations; no person, no church shall be subordinated because of religious beliefs or affiliations. Any religion that needs government to succor it, to persuade or compel adherence to religious faith, is not likely to survive, except as a mere tool of government. We have come too far down the road of history not to realize that the principal danger to freedom is not the threat to government from the individual but the threat to the individual from government.

The sphere of American constitutional government and American religion are distinct. If a heretic may say so, the survival of American religion depends on the maintenance of the spirit of love—or at least that is one of the things I thought I had learned from Pope John XXIII. The survival of American constitutional government depends on the maintenance of the spirit of liberty. The phrase, “the spirit of liberty,” I take from Learned Hand, and I would conclude these remarks by offering his understanding of its meaning:

The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind the lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.\textsuperscript{64}