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THE RELIGION CLAUSES OF THE FIRST AMENDMENT: WHERE IS THE SUPREME COURT HEADING?†

MICHAEL W. McCONNELL*

For almost a decade observers have predicted that the Supreme Court would reconsider its approach to interpreting the religion clauses of the first amendment. For some, this was an outcome to be feared; for others, it was to be welcomed. Optimist and pessimist alike, the Court has repeatedly proven them wrong. Once again, the Court appears on the verge of change. Maybe this time it will come to pass.

If doctrinal confusion and incoherence are predictors of doctrinal change, then change is surely on the way. Consider two recent decisions. According to the Supreme Court, the Constitution permits the State of Nebraska to hire a Presbyterian minister to deliver official prayers at the beginning of each meeting of the legislature.¹ The same Constitution forbids the State of New York from sending public school teachers onto the premises of an inner city parochial school to teach remedial English and math to children needing special help.² It is tempting to imagine that the Clerk of the Court got the files in these two cases mixed up—that the Court really meant to say that the state cannot hire legislative chaplains, but that remedial teachers are unobjectionable. It is equally tempting, and more realistic, to hope that results such as these will cause the Court to rethink its position.

It is conceded by most observers, whatever their substantive perspec-

† This Article is adapted from a speech given at the twenty-fourth Annual Meeting of the Diocesan Attorneys Association of the United States Catholic Conference in Washington, D.C., April 25, 1988.

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¹ See *Marsh v. Chambers*, 463 U.S. 783 (1983).

² See *Aguilar v. Felton*, 473 U.S. 402 (1985).

tive, that the present state of Supreme Court doctrine is a muddle. My intention in this Article is to explore the causes and potential remedies for this doctrinal confusion. This requires me first to recount the recent history of twists and turns in religion clause doctrine. This section will unavoidably contain reflections on cases in which I have participated as an advocate.³ While I strive to be objective, readers should be alert lest I fall short of that ideal at times. In the second section I will put forward a more theoretical explanation for the current doctrinal confusion. The third section will outline the logical alternatives for resolving that confusion. Finally, in the fourth section I will explore in greater depth the alternative that, to me, holds the greatest promise for religious freedom.

I. RECENT HISTORY

Ever since the establishment clause was first applied to the activities of state governments in 1947,⁴ the courts have wavered between two conflicting ideals: separation of church and state, and neutrality toward religion. From the beginning the Court has correctly rejected a third logical alternative: the claims of the majority for special preferences for their chosen faith.

The animating metaphor of separationism is the famed "wall of separation between church and state." This metaphor portrays a world divided into two spheres: the private, in which religion is permitted to operate freely, and the governmental, which is to be strictly secular. When the government is involved in an activity (principally by providing financial support), any suggestion of religious teaching or endorsement must be scrupulously avoided. As government assumes a larger share of the responsibility for education and social welfare in the modern world, the result is that those fields—once pluralistic, with significant religious involvement—become, of necessity, secularized.

The ideal of neutrality, by contrast, is that religious institutions and religiously motivated individuals should be free to participate in government-assisted matters on equal terms with others. Even where government financial assistance is available, private preferences—not a constitutional rule of secularism—should determine the degree of religious

³ Of the cases discussed in this Article, those for which I prepared briefs are *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Witters v. Department of Services for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); and *Tony & Susan Alamo Foundation v. Donovan*, 471 U.S. 290 (1985). I prepared briefs and delivered the oral argument in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988); and *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). I wrote the brief in opposition to the petition for certiorari in *Goldman v. Weinberger*, 475 U.S. 503 (1986).

⁴ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

involvement. The government must be neutral between religion and secularism, as well as between religions. The way to accomplish this is to treat all institutions neutrally.

The result of separationism is a secular public sphere; the result of neutrality is a pluralistic public sphere. The conflict between separation and neutrality can be seen in the cases involving aid to students attending religiously affiliated private schools. Under the separationist view, such aid is impermissible, since it involves ("entangles") the government with religious institutions, and it is difficult to be sure that government money, when given to religious institutions, does not support religious teaching. Under the neutrality view, however, such aid is legitimate so long as all students receive equivalent assistance without regard to which school they may choose. Oddly enough, the separationist view has come to prevail in cases involving primary and secondary schools, while the neutrality view has prevailed in cases involving higher education and other social welfare activities.

The prevailing Supreme Court "test" for an establishment of religion—the "*Lemon*" test—attempts a marriage of the two approaches. On the one hand, the government action is legitimate if its purpose is secular and its primary effect is neither to "advance[] nor [to] inhibit[] religion."⁵ This seems to embody the neutrality view. On the other hand, government action is impermissible if it entails an excessive "entanglement" between government and religious institutions.⁶ This seems to be the separationist view. Since all parts of the test have to be satisfied if government action is to be sustained, the separationist view has the upper hand. Indeed, so powerful is the "entanglement" test that the Court has recently described it as a "Catch-22."⁷

The mid-1970's were the heyday of separationism, at least as far as religiously affiliated primary and secondary schools were concerned. In 1973, in *Committee for Public Education & Religious Liberty v. Nyquist*,⁸ the Court held unconstitutional a small tax credit for private school tuition, and in a long series of cases the Court struck down various forms of secular in-kind assistance to private school students, including bus rides on field trips, maps, films, laboratory equipment and other instructional materials, teacher-prepared tests, on-premises therapeutic and remedial services, and maintenance and repair of school buildings.⁹ While formal legal doctrine remained as muddled as ever, the results became

⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁶ *Id.* at 612.

⁷ See *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988).

⁸ 413 U.S. 756 (1973).

⁹ See Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 67 (chart of court's decisions in this area).

predictable: aid to parochial school students, other than transportation and textbooks, was almost always impermissible.

In the early 1980's, however, the Court began to soften its stance. In *Mueller v. Allen*,¹⁰ the Court approved a Minnesota program of tax deductions for educational expenses, including parochial school tuition, on the ground that the aid is equally available to all families. The Court downplayed the "entanglement" argument. This came close to a repudiation of the earlier *Nyquist* decision. Then came *Marsh v. Chambers*,¹¹ the decision upholding the legislative chaplaincy. Whether this case was rightly or wrongly decided,¹² it was important in two respects. First, it did not use the standard *Lemon* test to determine whether there was an establishment. Second, it relied heavily on historical evidence strongly suggesting that the *Lemon* test, indeed the entire separationist framework, was based on an historical mistake. *Marsh* thus signalled that the Court was no longer bound to its earlier doctrinal framework.

After *Marsh* came *Lynch v. Donnelly*,¹³ a difficult case involving the display of a city-owned nativity scene. Once again, in *Lynch* the Court rejected the separationist position, upholding the right of the city to display the creche. In doing so, the majority expressly stated that the *Lemon* test was not a binding doctrine¹⁴ and it applied *Lemon* in a transparently half-hearted manner. The Court's treatment of Thomas Jefferson's famous "wall of separation" metaphor was symbolic, but indicative. In prior cases, the Court had used the "wall" to summarize the commands of the first amendment.¹⁵ In *Lynch*, the Court crisply pointed out that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."¹⁶

Thus, by the summer of 1983, the Supreme Court had apparently retreated from its separationist posture of the 1970's, and had indicated a willingness to entertain doctrinal formulations other than the *Lemon* test. *Mueller*, *Marsh*, and *Lynch* all pointed in the same direction, but they contained no hint of a theory or of a doctrine to replace the *Lemon* test. During the 1984 Term, the Court agreed to hear an unprecedented number of establishment clause cases, ranging from private employment to moments of silence to parochial schools. Lawyers in these cases had the

¹⁰ 463 U.S. 388 (1983).

¹¹ 463 U.S. 783 (1983).

¹² See McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362-63 (1988) (criticism of decision in *Marsh*).

¹³ 465 U.S. 668 (1984).

¹⁴ *Id.* at 679. The court acknowledged that although it has "often found [the *Lemon* test] useful . . . [it has] repeatedly emphasized . . . unwillingness to be confined to any single test or criterion in this sensitive area." *Id.*

¹⁵ See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

¹⁶ 465 U.S. at 673.

opportunity to participate in the development of alternative approaches to the establishment clause; the briefs, therefore, were forced to go beyond mere precedent to the fundamental history and purposes of the religion clauses.

The decisions that term came as a rude surprise. In *Wallace v. Jaffree*,¹⁷ the Court reaffirmed the *Lemon* test with a vengeance—though without addressing any of the historical arguments (such as were presented in Justice Rehnquist's dissent) or theoretical problems (such as were discussed in Justice O'Connor's concurrence). The Court simply reaffirmed *Lemon* and returned to the "wall of separation" without explanation.¹⁸ And the Court went out of its way to strike down the moment of silence law in *Jaffree* on the basis of a strained reading of its peculiar legislative history, even while conceding, in the abstract, the legitimacy of moment of silence laws and the lack of any unconstitutional effect.¹⁹

The decision in *Jaffree* was driven home several weeks later by two of the most extreme and indefensible interpretations of the establishment clause the Court has ever rendered. These were *Aguilar v. Felton*²⁰ and *School District of the City of Grand Rapids v. Ball*.²¹ These are cases, mentioned earlier, refusing to allow public school teachers to provide remedial English and math courses to needy parochial school children on the premises of their own school. Under Title I of the Elementary and Secondary Education Act of 1965, a cornerstone Great Society program, federal funds were used to send specially trained public school teachers on an itinerant basis to schools in low income areas, where they would work with children with demonstrated educational deficiencies. The statute required all eligible students, public and private, to receive "comparable services." The record demonstrated that the most cost-effective, educationally-effective way to deliver the services was for the students to receive them within their own school. (To transport the students to "neutral" sites would cost the students valuable instructional time and would increase program costs by about one third.)

The Supreme Court held this program to be an establishment of religion, largely on the theory that the atmosphere of parochial schools might induce the teachers to introduce some elements of religious doctrine into their courses.²² To state the Court's theory is to refute it. The record re-

¹⁷ 472 U.S. 38 (1985).

¹⁸ *Id.* at 55-56.

¹⁹ *Id.* at 57-61; see also *id.* at 62-66 (Powell, J., concurring); *id.* at 73-79 (O'Connor, J., concurring); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 42-50 (criticizing *Jaffree* decision).

²⁰ 473 U.S. 402 (1985).

²¹ 473 U.S. 373 (1985).

²² See *id.* at 388. The Court explained that "[t]eachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while

futed it as well: nineteen years of operation in New York City—reputed to be a diverse and contentious community—produced not *one* instance, or even complaint, of any teacher or student mixing religion with the Title I program. *Aguilar* and *Grand Rapids* are decisions with no winners, only losers. Their effect is that needy children will receive remedial help in a far less effective way, at much greater cost. The parochial school children suffer; the taxpayer suffers; even the public school children suffer, since the increased cost of the less effective program will be shared among all participants.²³

In another decision the same term, the Court voted overwhelmingly to strike down a Connecticut statute that protected the right of workers who observe a sabbath to designate that as their day off.²⁴ The law replaced a prior Sunday Closing law, which had been upheld by the courts, but which protected only the rights of the mainstream of the Christian majority. It is difficult to see how broadening the protection to those who observe a sabbath other than Sunday, while freeing up those who observe no sabbath at all to choose days other than Sunday, could be thought more of an establishment than the prior law. More fundamentally, the decision created doubts about the constitutionality of a variety of state efforts to protect free exercise in the context of the workplace.

The 1984 Term thus ended on a discouraging note. Since then, however, the Court has rendered three decisions that strike a quite different tone. In 1986, the Court unanimously held—in *Witters v. Department of Services for the Blind*²⁵—that it did not violate the establishment clause for a state to pay the tuition of a student for the ministry at an institution called the Inland Empire School of the Bible. After *Aguilar* and *Grand Rapids*, this result may seem impossible. How can the state pay the tuition for a ministerial candidate at a Bible college, when it cannot pay the salary of a public school specialist to teach remedial English and math to disadvantaged parochial school children?

If *Aguilar* and *Grand Rapids* represented separationism taken to the extreme, *Witters* represented a turn back toward neutrality. In *Witters*, the State offered to pay tuition to certain categories of disabled individu-

students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." *Id.*; accord *Aguilar*, 473 U.S. at 409 (intrusive monitoring required to "prevent[] the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school").

²³ See McConnell, *Remedial Education Programs for Private School Children: Judicial Developments and Future Prospects*, in *THE CHURCH, THE STATE AND THE SCHOOLS* 19 (C. Vergon ed. 1986).

²⁴ See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); McConnell, *supra* note 19, at 50-58 (criticizing *Thornton* decision).

²⁵ 474 U.S. 481 (1986).

als for any course of study leading to a job. Witters was blind and wanted to study for the ministry. The program was so obviously *neutral* that the Court subordinated its usual separationist posture. The "program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' and is in no way skewed toward religion," explained Justice Thurgood Marshall for the Court majority.²⁶ Why that principle did not apply equally in *Aguilar* and *Grand Rapids* went unexplained. *Witters* is a hopeful decision because it placed the focus squarely where it ought to be: on how a program affects the religious choice of the individuals involved, rather than on whether there is an "entanglement" between church and governmental bureaucracies.

Witters was followed by yet another unanimous decision—and unanimous decisions in this area are exceedingly rare. In this case, *Corporation of Presiding Bishop v. Amos*,²⁷ the Court upheld a federal statute exempting religious organizations from laws forbidding discrimination on the basis of religion. Under the exemption, churches are able to staff their noncommercial operations with members of their own faith. Two points about *Amos* deserve attention. First, it is the first Supreme Court decision to uphold a statute singling out religious organizations for protection from government regulation. It thus goes beyond mere facial neutrality, to an affirmative accommodation of religious autonomy.²⁸

Second, the decision showed unusual sensitivity to the way in which apparently nonreligious aspects of church operations can have a religious dimension. The case involved a building superintendent in a gym owned by the Mormon Church, who was no longer a member in good standing of the Church. The superintendent was fired; he sued. The district court refused to allow the statutory exemption, on the ground that the job was wholly secular, no different from the job of a janitor in a for-profit health facility. The Supreme Court, in contrast, recognized that a church's social welfare mission may be linked to its religious mission in ways that are not apparent to an outsider. To the Court, the real threat to religious freedom was not the exemption, but the notion that the government has the right to decide which aspects of a church's operations are related to its religious mission and which are not. *Amos* was therefore a major victory for religious autonomy.

Still more recent is *Bowen v. Kendrick*,²⁹ a decision of potentially far-reaching importance. The question in *Bowen* was whether religiously-

²⁶ *Id.* at 487-88 (citation omitted).

²⁷ 483 U.S. 327 (1987).

²⁸ See McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. Rev. 146 (1986); McConnell, *supra* note 19, at 27-28.

²⁹ 108 S. Ct. 2562 (1988).

affiliated organizations may participate in a federally-funded program to encourage innovative services to deal with the problem of adolescent pregnancy. The program, authorized by the Adolescent Family Life Act, funds projects started by public and private groups to provide housing, nutritional care, health services, adoption counseling, and related services to pregnant adolescents, and—more controversially—to encourage sexual self-discipline. Opponents of the program claimed that these matters are so close to religious issues that allowing religiously-affiliated organizations to participate amounts to funding the teaching of religious doctrine. The lower court agreed, and issued an injunction barring any religiously-affiliated organization from involvement in the program.

The implications of *Bowen* went far beyond the relatively minor Adolescent Family Life Act. The wider question was whether the Court would apply the secularist model of church-state separation, heretofore confined almost exclusively to cases involving elementary and secondary education, to other social welfare activities. Under the lower court's theory, religiously-affiliated organizations would be barred from participating in publicly-funded, privately-administered programs, involving tens of billions of dollars, at least insofar as those programs were related to the religious mission of the organizations. But it is difficult to conceive of a social welfare activity in which religious organizations are involved (feeding the hungry, housing the homeless, healing the sick, assisting the alien, caring for the widow and the orphan) that is not based on their fundamental theological commitment and that could not, at least in theory, be the vehicle for spreading religious teachings and values. Thus, the theory, if it had been accepted by the Supreme Court, would have marked a dramatic shift toward the secular, and away from the pluralistic, model of social welfare services in this country.

The Supreme Court's decision emphatically rejected the lower court's approach, insisting that any exclusion of an otherwise qualified religious grantee from a government grant program must be based on actual proof that funds were used for a "specifically religious" activity.³⁰ The Court provided little guidance on what this restriction may entail. Is it confined to overt religious teaching—something that is likely to prove exceedingly rare? Or is it equivalent to a requirement of total secularization? However this question may be resolved, the decision represents a major shift away from the rigid separationism of *Aguilar* and *Grand Rapids* towards a more neutral posture toward religion.

³⁰ *Id.* at 2580-81. The Court also held that "pervasively sectarian" grantees must be barred from the program. *Id.* at 2580 n.16. These are organizations whose sectarian purpose is so "inextricably intertwined" with its secular activities that the two cannot be distinguished. *Id.* Two members of the Court criticized this aspect of the holding. *See id.* at 2582 (Kennedy, J., concurring).

In particular, the *Bowen* decision solidifies the distinction between elementary and secondary schools, on the one hand, and other government-assisted social welfare activity, on the other. Even the four dissenters were forced to distinguish government assistance to religious providers of social welfare services, such as "running a soup kitchen or a hospital."³¹ *Bowen* thus calls a halt to the previously growing tendency to extend the separationist logic of the parochial school cases to the wider universe, in which church-state interaction has been the norm, and indicates we have seen the high-water mark of separationism.

It does not, however, resolve the doctrinal confusion. The Court has offered no satisfactory explanation why it applies a rigorous separationist test to government programs involving elementary and secondary education, a relaxed test to other social welfare activities, and a standard of simple neutrality to cases like *Witters*. It has left in place *Lemon's* incoherent mixture of neutrality and separation. Some observers will applaud *Aguilar* and excoriate *Bowen*; others will applaud *Bowen* and excoriate *Aguilar*; others might disagree with both decisions. But I doubt that any reasonable observer could conclude that both decisions were correct—or could even offer a plausible justification that could explain both results.

II. THE REASON FOR DOCTRINAL CONFUSION

No one would suggest that the Justices have created the religion clauses muddle because they are unintelligent, or because they have devoted insufficient attention to the problem. Rather, there has been a fundamental mistake at the most basic level about the relationship between the free exercise and establishment clauses. The mistake arose, historically, from looking at the two clauses in isolation and giving them a different cast. Since then, the Court has worked out the logical implications of the divergent interpretations, to the point that today the clauses are read as if they meant opposite things—not simply that there is a "tension" between free exercise and establishment, which the Court has frequently stated, but that the two clauses of the first amendment are essentially at war with one another.

What does the free exercise clause mean today? According to the Court, it means that the government may not impose a burden on religious practice unless it has a compelling justification, and no less restrictive means, for doing so.³² In the leading case, *Sherbert v. Verner*,³³ a

³¹ *Id.* at 2591 (Blackmun, J., dissenting).

³² *See, e.g.,* *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) (government must show unusually important interest at stake and that requested exemption will result in substantial harm to such interest); *United States v. Lee*, 455 U.S. 252, 257-58 (1982) (state may limit religious liberty if essential to accomplish overriding governmental interest); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (state can justifiably invade reli-

Seventh Day Adventist working in the textile mills lost her job when the industry went on a six-day work week (remaining closed on Sundays). Under the free exercise clause, she was constitutionally entitled to unemployment compensation. In a similar case, the Court held that the State must pay unemployment benefits to a Jehovah's Witness who quit his job in an armaments factory because of his religious pacifist principles.³⁴ The Court reasoned that denial of the benefit would be a burden on free exercise, since it would force the worker to choose between violating a tenet of his or her faith, and being eligible for unemployment compensation.³⁵

It is important to stress that state law in these cases would not have provided benefits to workers who quit because of nonreligious reasons however strong or conscientious those reasons might be. If Mrs. Sherbert had quit because she had to take care of an elderly parent on Saturdays, she would have lost her benefits; if the worker in the armaments factory had quit because of political conviction, he would have had no redress. Under the free exercise clause, religiously motivated conduct is protected and nonreligious conduct is not.

To show how the two religion clauses are now read as opposite to one another, imagine that *Sherbert v. Verner* was an establishment clause case instead of a free exercise case. Imagine that Mrs. Sherbert's state had enacted an unemployment compensation program that provides benefits to persons who are unemployed because of religious scruples, but not because of nonreligious scruples. Is it not perfectly clear that this statute has both the purpose and the effect of advancing religion, and is thus unconstitutional under the *Lemon* test? If the worker has a religious objection to working he gets the benefit; if he has a nonreligious objection he is denied the benefit. That is almost like rewarding religious faith and penalizing nonreligion. If the result in *Sherbert* were a statute challenged under the *Lemon* test, it would clearly be struck down.

Imagine, also, that *Aguilar* and *Grand Rapids* were free exercise cases instead of establishment cases. Imagine that some benighted state passes a statute providing that remedial help will be given to poor, educationally deprived children on the premises of their school, with the following proviso: "provided, however, that no such help may be provided to children who have chosen to attend religiously-affiliated schools." If a

gious liberty only by showing it is "least restrictive means of achieving some compelling state interest").

³³ 374 U.S. 398 (1963).

³⁴ See *Thomas*, 450 U.S. at 720; see also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (unemployment compensation for discharge on account of religious belief adopted after beginning employment).

³⁵ See *Thomas*, 450 U.S. at 719. The merits of this claim are considered in detail in McConnell & Posner, *An Economic Analysis of Issues Arising Under the Religion Clauses*, 56 U. CHI. L. REV. — (1988) (forthcoming).

child's family chooses a secular school, public or private, the child receives the benefit of on-premises remedial education; if the family chooses a religious school, the benefit is denied. Is it not perfectly clear that this hypothetical statute violates the free exercise clause, as interpreted in *Sherbert v. Verner*? It in effect amounts to a tax on the exercise of the constitutional right to attend a religious school. It puts families to the cruel choice between needed remedial services and following the dictates of their faith.

This is more than evidence of "tension" between the clauses. What the free exercise clause requires the establishment clause forbids, and vice versa. This helps to explain the Court's doctrinal confusion: it is using legal constructs that are internally inconsistent.

III. RESOLVING THE CONFLICT BETWEEN THE CLAUSES

There are three logical alternative ways to reduce or eliminate the conflict the Supreme Court has created between the free exercise and establishment clauses. Each has its advocates on the Supreme Court.

First, the Court might leave its establishment doctrine intact and retreat on the free exercise front. This might be called the "secularist" position, since it would guarantee exclusion of religious elements from public benefits, without protecting religious activity from the consequences of public burdens. The result would be to raise the cost of religious activity and reduce its scope. Justice John Paul Stevens is the leading exponent of this view. He is one of the most candid advocates of the "no aid" approach to the establishment clause, and has stated that his view of the free exercise clause leaves "virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application."³⁶

For example, in *Goldman v. Weinberger*,³⁷ an Orthodox Jew was expelled from the military because of his inability to comply with a facially neutral rule forbidding military personnel from wearing non-uniform headgear. He filed suit, claiming that he was entitled under the free exercise clause to an exception that would permit him to wear the yarmulke required by his faith. Justice Stevens agreed that the requested exemption would "create[] almost no danger of impairment of the Air Force's military mission,"³⁸ but nonetheless voted to deny the free exercise claim. In his view, as explained in an earlier opinion, the government has an "overriding interest" in keeping "out of the business of evaluating the

³⁶ *Lee*, 455 U.S. at 263 (Stevens, J., concurring).

³⁷ 475 U.S. 503 (1986).

³⁸ *Id.* at 511 (Stevens, J., concurring).

relative merits of differing religious claims."³⁹

There is no danger of a clash between free exercise and establishment under the secularist view, since the establishment clause is all-powerful and the free exercise clause has little application.

Second, the Court might adopt a posture of "judicial restraint" toward both clauses. This view, which is followed by Chief Justice Rehnquist and Justice Byron White, tends to defer to invocations of governmental interests and to reject challenges to governmental action, whether based on free exercise or on establishment. Rehnquist, for example, dissented in both the unemployment compensation cases and in *Aguilar v. Felton*. Adoption of this view would eliminate conflict between the religion clauses by granting far more latitude to representative institutions, both to extend assistance to religious organizations and to impose incidental burdens on religion. This would help religion in some ways, and hurt it in others.

Third, the Court might adopt a posture of "accommodation" to religion. Justice Sandra Day O'Connor is the closest to this view on the present Court—though Justices Antonin Scalia and Anthony Kennedy could prove sympathetic as well. This view would require the Court to modify its separationist posture toward the establishment clause, while retaining its free exercise jurisprudence in full vigor. The result would be a more diverse and pluralistic society, since religion would receive neutral treatment under the establishment clause and minority religious preferences would receive special protection under the free exercise clause.

There is, of course, a fourth logical possibility: to retain the status quo. The establishment clause could continue to be read as meaning the opposite of the free exercise clause. This view has powerful adherents: Justices William J. Brennan, Jr., Thurgood Marshall, and Harry Blackmun, as well as the ACLU, the American Jewish Congress, and other private organizations. If this position prevails, the Court's decisions can be expected to remain confused, inconsistent, and unpredictable.

IV. A UNIFIED THEORY OF RELIGIOUS CHOICE

The accommodationist option, limned above, offers the possibility of a unified theory of religious choice. The two religion clauses can be understood as complementary provisions guaranteeing that government action be conducted, as much as possible, so as to reduce effects on religious choice. The free exercise clause prevents the government from influencing religious choice by creating disincentives to religious alternatives, and the establishment clause prevents the government from influencing religious choice by creating positive incentives to religious alternatives. While

³⁹ See *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982).

government action inevitably will affect religious choice to some degree—even a decision to increase welfare payments, or to go to war, will do that—the first amendment requires that those effects be minimized. Effects on religious choice can be permitted only if demonstrably needed to achieve public purposes unrelated to the encouragement or suppression of religion; religious institutions and religiously motivated conduct may be treated differently only if it is necessary to reduce effects of government policy on religious choice or to achieve public purposes unrelated to religion.

There is both an individual and an institutional dimension to this unified theory of religious choice. At the individual level, it would guarantee that decisions about questions of faith and religious practice will be left to the individual conscience, in contrast to the present latitude for government inhibition of religion. This would require modifications in both free exercise and establishment jurisprudence.

Free exercise decisions in the modern era are almost uniformly disappointing to religious claimants. Indeed, since 1970, the Supreme Court has rejected *every* free exercise claim that has been presented, with the single exception of claims for unemployment compensation, which are governed by clear precedent dating back to 1963. A major reason for the Court's reluctance to uphold free exercise claims is the unarticulated assumption that free exercise exceptions constitute "special benefits" for religion, which violate the spirit of the establishment clause. The accommodationist position, however, teaches that free exercise claims are consistent with a wider theory of neutrality: the religion clauses are a systematic prohibition of government action that distorts religious choice, whether for it or against it. When an Orthodox Jew is excused from the military's no-headgear rule or a Seventh Day Adventist is excused from the requirement of availability for work on Saturday, they are not being given special favors. Rather, they are exempted from government-generated pressure to abandon the dictates of their religious faith. This is neutrality of the most fundamental sort, since it prevents the power of the state from being used, even unintentionally, to inhibit the free exercise of religion.

The protection of individual exercise of religious conscience also requires a reinterpretation of the establishment clause. For individuals to exercise religious choice requires a pluralistic society. If government taxing and spending is systematically skewed in favor of secular institutions, that pluralism is in danger. Families who wish to take advantage of Adolescent Family Life Act programs for their teenage children are able, thanks to the *Bowen* decision, to choose from among service providers, some of which are secular and some of which are religious. If separationist opponents of the Act had their way, the religious alternatives would have been eliminated. By contrast, due to the *Grand Rapids* and *Aguilar* deci-

sions, poor families who wish to educate their children in a religious environment can do so only at the cost of forfeiting their right to on-premises remedial education. This is a heavy price to pay. The establishment clause, no less than the free exercise clause, can serve as a guarantor of religious choice, but only if separationism gives way to neutrality. Government should leave the choice to the individual by extending its benefits equally to the religious and nonreligious segments of the educational and social welfare field. It should not be required to exclude religious alternatives.

The institutional dimension of religious liberty is also important. The ideal of religious autonomy does not exist in our constitutional scheme solely for the protection of individual conscience, important though it is. It is a happy coincidence that the protection of individual choice in religious matters will also preserve one of the essential preconditions to the maintenance of a democratic republic such as ours. One of the key features of our system is that it recognizes the importance and the autonomy of voluntary associations larger than the individual, but independent of the state. Neighborhoods, colleges and universities, families, labor unions, and clubs offer opportunities for individuals to gather together in a communitarian way to order their lives. These associations can be a source of thinking different from, and at times in opposition to, majoritarian ideals that dominate the government. They can call the government's principles and decisions into question; they can keep alive alternative ways of thought; they can generate and transmit principles and beliefs that challenge the orthodoxies of society.⁴⁰

At a constitutional level, perhaps the best recognized of such associations is the press. Newspapers are sometimes called "the Fourth Estate," for the reason that their power to question governmental acts, to stimulate public attention to an agenda different from that of the officials in power, and to organize public opinion by persuasion makes them powerful political actors. Freedom of the press is granted not just (or even primarily) out of respect for the rights of the publisher, but because of the public function that is performed by an independent press. Press freedom contributes to the diffusion of power, and thus to the preservation of republican liberty.

First amendment protections for religious freedom have a similar institutional dimension. Religious autonomy is not unlike freedom of the press. Churches, like the press, are able to command the attention of portions of the public; they can take positions at odds with social orthodoxy; they can organize public opinion. For much the same reasons that under-

⁴⁰ See generally P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 26-33 (1977).

lie the newspapers' status as "the Fourth Estate," Tocqueville described religion as "the first of [America's] political institutions."⁴¹ The political importance of churches is even more evident on the world scene. In many countries (Poland, South Africa, and Nicaragua come immediately to mind) the church is virtually the only institution strong enough to stand up to the state. Traditions of church autonomy thus constitute one of the last protections against the all-powerful state.

The interpretation of the religion clauses as a guarantee of religious choice furthers this institutional autonomy. The free exercise clause, properly interpreted, prohibits the government from forcing churches to conform to prevailing political norms, whether it is the Jim Crow laws that were forced on Christian colleges like Berea in Kentucky in the last century,⁴² or acceptance of homosexuality as an alternative lifestyle, as is forced on Georgetown University in our day.⁴³ Churches should be allowed to follow their own lights in matters of doctrine and organization, lest their vital role as counters to governmental power be sacrificed. This means that church teachings must on occasion be tolerated even when they are abhorrent, like the racial doctrines of a Bob Jones University.⁴⁴ Liberty is not limited to things that matter little.

The establishment clause, too, has a part to play in the protection of the institutional autonomy of religious organizations. If religious autonomy is important, we must not allow the demands of the welfare state to result in a forced secularization of the social welfare field. We must strengthen and preserve elements in our system that promote diversity and the independent—and distinctive—character of religious associations. To force religious organizations to secularize their missions, at the risk of exclusion from public programs, would be a major step toward neutralizing the church as an independent voice.

Prevailing misconceptions of the religion clauses—misconceptions that would force religious voices to the margins of public life—are thus inimical to the constitutional vision of independent churches (along with other independent voluntary associations) in a pluralistic society. To return to this constitutional vision requires a reorientation of first amendment doctrine, away from secularism and separation, and toward religious choice as a unified interpretation of both free exercise and establishment.

⁴¹ See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292 (Anchor Books ed. 1969).

⁴² See *Berea College v. Kentucky*, 211 U.S. 45 (1908).

⁴³ See *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc). An attempt to overrule this case by an act of Congress has been ruled unconstitutional. For an interesting discussion of the deep intrusion on religious liberty presented by the *Georgetown* case, see Comment, *Gay Rights Coalition v. Georgetown University, Failure to Recognize a Catholic University's Religious Liberty*, 32 *CATH. LAW.* 170 (1988).

⁴⁴ See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

If one has any faith in the persuasive power of the constitutional vision, this must be the direction the Supreme Court is heading—if not now, then some day.