

CHAPTER SEVEN

THE SUPREME COURT AS A GUARDIAN

The Supreme Court addressed the great issues of religious faith and practice only rarely during its first century of operation. It usually let state law and local custom prevail except where some larger constitutional value was at stake. Even in the first decades of this century, the Court was circumspect in its treatment of religious controversies. Most of the cases that directly implicated the religion clauses in these early years involved members of religious minorities, particularly Mormons and Catholics. The Court weighed the religious issues--which often played only a minor part in the Court's final determination--on the scales of a generalized Christian standard of personal morality and public expression without explicitly defining religion. Specific cultic practices that threatened to disturb public peace and order simply fell outside the pale of free exercise protections. This early period is covered in Chapter Seven.

The justices began to negotiate more precise constitutional metes and bounds in earnest during the 1940s after the Court decided that the Fourteenth Amendment made the free exercise and establishment provisions of the First Amendment applicable to the states and localities. A rough sketch of acceptable practices and legitimate regulations began to emerge. With a few exceptions, such as the polygamy cases, the Court had until then carefully avoided taking an activist role in the area of

religion. But in its efforts to correct some definite abuses and constitutional problems in the local regulation of religious proselytism, the Court perhaps needlessly broadened its jurisdiction, leaving it open to a myriad of competing claims and counterclaims. Moving from the protection of what one commentator called "a sect distinguished by great religious zeal and astonishing powers of annoyance,"¹ the Court then began taking up the complex financial, pedagogical, and social issues that, since 1947, have become the primary focus of its deliberations on the place of religion in the proper study of mankind. These later years are covered in Chapter Eight.

Accommodation

Although the religion clauses of the Constitution were not subjected to close scrutiny by the Supreme Court until late in the nineteenth century, religious issues figured in a few cases that reveal much about the Americanization of common law principles and the evolution of the constitutional tradition. While most of these cases concerned church property, wills, and unincorporated religious societies, some of them anticipated the issues of religious liberty that began to fill the Court's docket at the start of World War Two.

The first cases to reach the Court early in the nineteenth century are indicative of the difficult legal transition from a tradition of church establishments to the new system of free churches. During the colonial period, only the established churches and a privileged minority of the dissenting churches were able to protect their property by means of incorporation. Ever since the Tudor period, established churches

operated as municipal corporations vested with the ability to acquire property and govern their affairs, raise revenues, and compel attendance at their services.

All this changed when, following the War for Independence, one church establishment after another was dissolved. Suffrage was extended to dissenters in places where Catholics, Jews, Baptists, Unitarians, and Quakers had once been excluded. Mortmain statutes that limited the rights of churches disappeared. But despite these changes, much remained the same. A few states barred clergymen from holding public offices. Religious corporations were treated as creatures of the state. Title to church property had to be vested either in lay trustees or in the clergy as corporations sole, rather than in the ruling ecclesiastical body, thus reinforcing a pronounced bias in favor of congregational forms of church government. Hierarchical churches, such as the Roman Catholic Church, were consequently disadvantaged.

According to Patrick J. Dignan:

The American legal theory of corporations is fundamentally the same as that of English law. There can be no corporation which is not the creation of the civil law, and all tenure of property likewise required civil authority. The Church enjoys a large measure of freedom, but the law does not, within the United States, deal with it as such.²

The early Supreme Court cases involving trusts, bequests, and police powers helped establish a pattern of accommodation, secular control, and dependency that has characterized the interaction of church and state ever since. Despite the growth of practical religious liberty, some of the habits of state intervention have continued to persist and have lately grown in various and subtle ways. In the absence of an official religious establishment, the unifying value of an

ideological common ground has had to be pursued by other means. Historically, these means have included political and religious pluralism, national symbols and ceremonies, nonsectarian education, a national language, and the secularization of religious traditions into a common moral code.

Trusts and Bequests

In Terrett v. Taylor, 9 Cranch 43 (1815), the Court upheld the vested property rights of an Episcopal church and ruled unconstitutional a Virginia statute confiscating its lands, denying that a state "can repeal statutes creating private corporations" or "by such repeal can vest the property of such corporations exclusively in the state . . . without the consent or default of the corporators." By upholding the right of the former established church of Virginia to retain its corporate identity and endowments, the Court claimed to stand "upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of the most respectable judicial tribunals. . ." (9 Cranch 43, 52).

Justice Story, in a unanimous opinion, discoursed on the limited powers of the state under a constitutional form of government:

Had the property thus acquired been originally granted by the state or the king, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it; nor of the parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. It

was not forfeited; for the churches had committed no offence. The dissolution of the regal government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state were held. The state itself succeeded only to the rights of the crown; and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property (9 Cranch 43, 49-50).

But while affirming the right of the legislature to abolish the exclusive rights and prerogatives once enjoyed by the Episcopal Church, the Court also upheld the permissibility--if not the duty--of aiding religion generally:

But the free exercise of religion cannot 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, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations (9 Cranch 43, 49).

In Town of Pawlet v. Clark, 9 Cranch 292 (1815), a town in Vermont pressed its claim to a tract of land originally set aside under a colonial grant as a glebe to support a parish church. Justice Story, who again wrote the Court's opinion, held that it was "a clear principle that the common law in force at the emigration of our ancestors is deemed the birth right of the colonies unless so far as it is inapplicable to their situation, or repugnant to their other rights and privileges" (9 Cranch 292, 333). Under English common law, the parsons of Episcopal churches that were duly erected and consecrated had a right

to the glebe in perpetual succession. An unappropriated glebe could be used by the crown for other purposes, but only with the consent of the town, which was still legally obliged to provide for a church.

In this case, the church had never been built. The Episcopal society that later took possession of the glebe was founded only in 1802, long after independence. The Court upheld the claim of the town and declared that "a mere voluntary Society of Episcopalians within a town, unauthorized by the crown, could no more entitle themselves, on account of their religious tenets, to the glebe, than any other society worshipping therein" (9 Cranch 292, 334). The Church of England had never existed as a corporation but only as an ecclesiastical institution under the patronage of the state. It had no legal counterpart in the independent state of Vermont, where the Church of England had never been exclusively established. Since the state had meanwhile succeeded to the rights of the crown, the town could not apply the land to a purpose other than public worship without its permission. But a recent law that enabled the selectmen of Vermont towns to recover title to unappropriated glebe lands, then lease them to the town schools, provided a new option.

Two other cases involved bequests to religious societies. In Baptist Association v. Hart's Executors, 4 Wheat. 1 (1819), the Court ruled that the beneficiary of a will, although clearly described as the Baptist Association, was incapable to taking the trust as a society since it had not been incorporated at the time. Chief Justice John Marshall ruled that the claim of the Baptist Association depended on the English law of charitable trusts, which had been rejected by Virginia.

He found nothing to justify the opinion that a "vaguely expressed" donation could be established in courts of equity prior to the English statute of charitable uses under Elizabeth. Justice Story wrote a very detailed concurring opinion that was published as a lengthy note preceding the Court's opinion and was later incorporated into a treatise.³ Many years later, Justice Horace Gray criticized the Baptist decision in Russell v. Allen, 107 U.S. 163, 167 (1883), remarking that it "was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would sustain the bequest, had its origin in the Statute of Elizabeth, which had been repealed in Virginia." In a companion case, Jones v. Habersham, 107 U.S. 174, 182 (1883), Justice Gray denied that a similar gift to an incorporated religious society was too indefinite and uncertain to be valid:

It is objected that this corporation is not empowered under its charter to accept and administer this charity. But it is a novel proposition, as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religious society cannot receive and distribute money to poor churches of its own denomination so as to promote the cause of religion in the State in which it is established.

Ten years after the Baptist decision, the Court upheld a bequest to an unincorporated Lutheran society. Justice Story wrote in Beatty v. Kurtz, 2 Pet. 566, 584 (1829), that Maryland's Bill of Rights recognized the doctrines of the Statute of Elizabeth for charitable purposes, even though it rejected the statute itself: "We think then it might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patriae*, by its attorney general or other law officer." But by introducing the doctrine of

parens patriae, which was included among the attributes of sovereignty, the Court opened the door to the concept of the church as a charitable public trust.

The Court demonstrated in these cases a desire to be faithful to both the letter of disestablishment and the spirit of religious liberty, but it was unable to make a clean break with the establishment tradition of English common law. In its early years, the Court often rose to the defense of vested property rights, including those of churches and legators, when they required protection from the unforeseen consequences of a changing political, economic, and social order. At the same time, it sought to bring these interests into harmony with the changing political and economic facts of life. The result was a selective incorporation of common law precedents into a growing body of distinctly republican law.⁴ As long as the Court kept the founding principles ever in view, this process of judicial review helped consolidate a fairly consistent body of American law. But there was always a danger that, if the basic political consensus should ever be lost, such a mixture of diverse traditions might grow unstable and its different elements be brought into conflict.

The Girard College Case

The Supreme Court handed down the most important and controversial decision of this early period in Vidal v. Girard's Executors, 2 How. 127 (1844), when it upheld a bequest to the city of Philadelphia to establish a college "for poor male white orphan children" which, although it contained anticlerical stipulations, was not expressly

hostile to Christianity. The case turned on the technical question of whether the bequest was too indefinite to be established in a court of equity. By upholding the Girard will, the Court practically overturned its earlier decision against the Baptist Association, citing more recent scholarship--including research by Justice Story--on the subject.

But what attracted public attention was the substantive question in the case: whether the will was contrary to public policy as being opposed to Christianity. The Court used the occasion to recall an earlier blasphemy case and paraphrase its statement to the effect that "the Christian religion is a part of the common law of Pennsylvania" (2 How. 127, 198).⁵ For Justice Story, who wrote the unanimous decision, this meant 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" (2 How. 127, 198). But he rejected the appellants' contention, which was argued eloquently by Walter Jones and Daniel Webster, that the exclusion of members of the clergy from campus gave evidence that Christianity could not be taught there.

Why may not laymen instruct in the general principles of Christianity. There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be, men, not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings, which such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. 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 evidence explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the great evidences of Christianity, from being read and taught in the college by lay-teachers? Certainly there is nothing in the will, that proscribes such studies (2 How. 127, 200).

One biographer has detected in the opinion a vindication effort by Justice Story of the Unitarian faith he claimed as his own against orthodox critics.⁶ Indeed, the issues raised on both sides of the case bore a strong resemblance to a controversy over the campaign led by Horace Mann to purge sectarian religious materials from the public school classroom, which was part of a larger struggle between competing religious and political factions in the Northeast. Yet there is little evidence to support the contention that this decision represented a defeat for the orthodox position. This clearly does not jibe with the Court's view:

Hitherto it has been supposed, that a charity for the instruction of the poor might be good and valid in England even if it did not go beyond the establishment of a grammar-school. And in America, it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require any thing to be taught inconsistent with Christianity (2 How. 127, 201).

Many of these issues were addressed again at greater length in the series of polygamy decisions late in the century. These and some later decisions continued to be informed by the principle that Christianity was a part of the law of the land, although always "with its appropriate qualifications." As William George Torpey observed:

Under this theory, the states adopted a common law recognition of Christianity, rejecting those portions of the English law on the subject which were not suited to their institutions. Hence, freedom for the exercise of Christian beliefs has antedated freedom for the exercise of any belief and freedom for lack of belief.

Police Powers

If "the leading doctrine of constitutional law during the first

generation of our National history was the doctrine of vested rights," in which "'the whole duty of government is to prevent crime and preserve contracts,'" a leading characteristic of the second generation under Chief Justice Roger Taney was "the rapid development of the doctrine of the police power . . . 'in the furtherance of the security, morality and general welfare of the community, save only as it was prevented from exercising its discretion by very specific restrictions in the written Constitution.'"⁸ In an early test of the police powers of local governments, the Court upheld a public health ordinance in New Orleans which made it unlawful to convey and expose any dead person, except in an obituary chapel. An epidemic of yellow fever was given as the reason for the regulation but the ordinance was challenged as discriminatory because it prevented the celebration of the Catholic funeral obsequies in a consecrated church. In this case, Permoli v. First Municipality, 3 How. 589 (1845), the Court commented only briefly on the religious liberty issue when it reiterated the stance it had earlier taken in Barron v. Baltimore, 7 Pet. 243 (1833), that the provisions of the Bill of Rights did not apply to the states.

The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states (3 How. 589, 609).

The Court claimed to lack jurisdiction in the case because the Northwest Ordinance of 1787, which had served as the territorial charter of Louisiana and provided a generous guarantee of religious liberty, had been superseded by the state constitution. But the fact that the Louisiana constitution originally had to pass muster with Congress makes

it doubtful that such a law was ever constitutional or that a legal remedy was unavailable.

Years later, in Jacobson v. Massachusetts, 197 U.S. 11 (1905), the Court upheld the validity of a compulsory vaccination requirement. Although this case did not specifically address the issue of religious liberty, it was later cited by the Supreme Court in Sherbert v. Verner, 374 U.S. 398, 403 (1963), in support of its assertion that religious practices may be restricted if they pose a threat to public safety, peace, or order.

Another regulation that falls within the traditional police power is the setting aside of compulsory periods of rest, such as curfews and Sunday observances. The first case of this kind to reach the Supreme Court was Richardson v. Goddard, 23 How. 28 (1859), a libel case that concerned the right of a ship's master to discharge his cargo on a day proclaimed as a fast by the governor of Massachusetts. The Court dismissed the libel, asserting that the ship had made good delivery of the cargo and that a fast day did not have the same force of law as a Sunday observance. Thus a carrier was not bound to postpone the discharge of his cargo because its recipient was observing a voluntary holiday.

The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as insurer of his property, to suit his convenience or his conscience (23 How. 28, 40).

Additionally, the Court surveyed the history of Sunday labor laws, which showed that the original purpose of these laws was to relieve the

hardships of slaves and poor laborers. Even so, the multiplication of holidays during the late Middle Ages eventually created problems: "But afterwards, when these vassals were enfranchised and tilled the earth for themselves, they complained that 'they were ruined' by the number of church festivals or compulsory holidays" (23 How. 28, 41). Yet even at that time, "the lading and unlading of ships engaged in maritime commerce" were among the exceptions recognized under canon law. The Court thought it "would certainly present a strange anomaly" that observances might be reestablished with increased rigor in the nineteenth century "which both priest and sovereign in the seventeenth have been compelled to abolish as nuisances." Although the later Puritans who settled Massachusetts "enforced the most rigid observance of the Lord's day as a Sabbath," they repudiated all other holidays because they "'did not desire to again be brought in bondage, to observe days and months, and times and years'" (23 How. 28, 43).

Laws that restricted working hours and which included Sunday provisions were subsequently challenged in several cases, such as Barbier v. Connolly, 113 U.S. 27 (1885), and Soon Hing v. Crowley, 113 U.S. 703 (1885), but the Court did not deliberate on the constitutionality of Sunday legislation until 1961. But two rulings near the turn of the century clearly indicated the Court's answer to that question. In Hennington v. Georgia, 163 U.S. 299 (1896), a divided Court upheld a law forbidding the operation of freight trains on Sunday. The earlier decision of the Supreme Court of Georgia was cited to the effect that, although "'religious views and feelings may have had a controlling influence'" in the selection of the particular day of the

week set aside as the day of rest, this consideration was not

"destructive of the police nature and character of the statute," even if some of the duties specified in the Ten Commandments were adopted:

"Those of them which are purely and exclusively religious in their nature cannot 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 is not, it is certain that the legislature of Georgia has prescribed it as a civil duty" (163 U.S. 299, 307).

Citing an earlier precedent that was set in Wilson v. Black Bird Creek Marsh Company, 2 Pet. 245 (1829), the Court ruled that a state police regulation was valid as long as it did not conflict with any existing law of Congress. Justice John Harlan wrote for the majority:

In our opinion, there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the state. It is nonetheless a civil regulation because the day in which the running of freight trains is prohibited is kept by many under a sense of religious duty (163 U.S. 299, 304).

But Chief Justice Melville Fuller saw the matter differently, urging in his dissent that only Congress has the power to limit the freedom of interstate commerce in any way.

Four years later, the Court upheld a Minnesota law in Petit v. Minnesota, 177 U.S. 164 (1900), that prohibited all labor on Sunday except works of necessity or charity, and specifically included the operation of barber shops in the prohibition. Chief Justice Fuller showed that his objection in the Georgia case had been a narrow one when he spoke for the unanimous Court: "We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate

exercise of the police power of the state" (177 U.S. 164, 165).

Despite the care taken by the state and federal courts to uphold Sunday laws as civil regulations, it is difficult to deny that they had the effect of establishing the Christian sabbath. Yet unless one assumes that a secularization of Christianity or a civil religion had already taken place, it is unlikely that the Court recognized any real conflict with the establishment clause. This conclusion deserves an explanation in light of the later official position of the Court that the founders intended to erect a high and impregnable wall of separation between religion and the state. Perhaps the explanation is simply--as Robert Cord and others have contended--that a religious establishment, respecting which Congress shall make no law, has been historically understood in the narrow sense of an official, exclusive, state-controlled, tax-financed, sectarian church. Freedom from religion was not among the advantages contemplated by the authors of the First Amendment.

Sunday observances were then part of the normal fabric of social life. Indeed, probably no other civil exercise of a religious character ever enjoyed more ecumenical support, defended by Catholics, Presbyterians, and Baptists alike. While the specific cases that came to the Court's attention involved state laws, even the federal government did not ordinarily conduct business on Sunday. Despite a gradual erosion of support, which was marked by the general acceptance of Sunday baseball in the 1920s, Sunday laws were still the rule rather than the exception as late as the 1960s.¹⁰

The persistence of this institution cannot be simply explained away

as a thoughtless concession to a tradition that had outlived its usefulness. While there may be considerable merit in the claim that, by time and custom, the traditions of the church are being domesticated into an unofficial civil religion, even a variant form of Christianity, it is a doubtful step that leads from there to the conclusion that the Court might be blind to the difference. Even recently, in an opinion upholding a traditional religious display on public property, Chief Justice Warren Burger resisted any such equation of religion with its cultural accretions by refusing to grant that the Court's decision placed the creche on the same level as the cruder secular customs of the Christmas holiday. The ruling in this case, Lynch v. Donnelly, 104 S.Ct. 1355 (1984), represents such a clear departure from its own establishment clause tests that it may signal the beginning of their reexamination as suggested by Justice William Rehnquist earlier in his dissenting opinion in Thomas v. Review Board, 450 U.S. 707, 720-727 (1981).

Consensus-Building

Following the Civil War, the Supreme Court took the lead on a wider range of issues involving civil and religious liberty, both personal and corporate. The emergence of the central government from the conflict as the dominant partner in the federal union at first met with resistance from the justices as they began taking a more active role in reviewing federal and state legislation. The Court moderated or overruled many of the more radical features of the Reconstruction, as it later did with the New Deal, during the first surge of this new judicial activism. But

this middle period of the Court's history eventually ended, as it began, with the Court being forced to concede much--if not most--of the contested constitutional ground to Congress, the President, and the bureaucracy.

The defeats the Court suffered on issues of constitutional law, economics, and social policy are nowhere in evidence in its decisions on various religious issues. Here the Court enjoyed virtually a free hand to shape the relationship between church, school, and state.

Test Oaths

In its contest with the Radical Republicans, the Court threw down the gauntlet in April of 1866 when, in Ex parte Milligan, 4 Wall. 2 (1866), a treason case, it struck down the wartime use of military tribunals in localities where civil courts were still in operation, thus vindicating the position taken by the Supreme Court of Indiana in Griffin v. Wilcox, 21 Ind. 370 (1863). Congress responded to this decision with a law reducing the membership of the Court. The release of the Court's opinion in December aroused severe public censure.¹¹

The Court soon stirred the waters again with two more findings in the same vein. In Cummings v. Missouri, 4 Wall. 277 (1867), it overruled provisions of the new Missouri state constitution that required certain classes of individuals--in this case a Roman Catholic priest--to take a loyalty oath. As evidence of his unfitness to perform his pastoral and teaching duties, the priest was accused of having emigrated to Missouri to avoid the draft. On the same day in Ex parte Garland, 4 Wall. 333 (1867), it struck down a federal law requiring

attorneys admitted to the bar of the Supreme Court to take a similar oath. In both cases, the Court based its decision on the unconstitutionality of ex post facto laws and bills of attainder. The four dissenting justices, however, could see no resemblance between an affirmation of loyalty and the dispossession of the heirs of a condemned criminal. While the attorneys raised the issues of religious liberty and the power of a state to establish a religion, anticipating some of the later conscientious objection cases, these concerns were incidental to the Court's determination.

Church Property

The war that pitted brother against brother and father against son also split churches. In Watson v. Jones, 13 Wall. 679 (1871), a schism within the Presbyterian Church brought Walnut Street Presbyterian Church of Louisville, Kentucky to the center of attention over the question of legal ownership of church property. The case had been held under advisement since the previous term when the arguments were heard. John M. Harlan was one of the attorneys for the appellees.

Justice Samuel Miller expressed regret at the beginning and the end of his opinion that such a controversy should be brought before a secular court. But since an appeal had been made, he noted that religious organizations "come before us in the same attitude as other voluntary associations for benevolent or charitable purposes. . . ." The case hinged on the question of which of two factions represented the lawful session of the church. The appellants, who were numerically in the minority, claimed to represent the original principles of the

religious society.

The Court distinguished three classes of cases concerning the property rights of ecclesiastical bodies. The first class includes trusts dedicated to the support of a specific doctrine or teaching.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority . . . , by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine (13 Wall. 679, 723).

A second class covers independent congregations. The courts must determine the principle of government by which the church operates, whether majority rule, elder rule, or some other basis. In these cases, no inquiry can be made into the religious opinions of those comprising the legal organization, "for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church" (13 Wall. 679, 725).

The third and most common class of cases involves the property of congregations that are subordinate members of a general church organization governed by superior tribunals. In this class and in the case at hand, the Court held that whatever is decided upon a question "by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them" (13 Wall. 679, 727).

Here Justice Miller drew a sharp contrast with the doctrine of English courts, which were empowered inquire into the true standard of faith in the church organization, a practice which tended to

disadvantage dissenting churches:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it (13 Wall. 679, 729).

This doctrine was more suited to a constitution of limited powers and left little doubt that the Court meant to break with the traditional role of the Lord Chancellor as the conscience of the sovereign. Absent the broad power of inquiry once vested in that office, the Court could not do otherwise than rule that the appellees held legal title to the property. Two justices dissented over another issue, believing that because a suit in state court was pending at the time it heard the complaint the decision of the Circuit Court should be reversed and dismissed for want of jurisdiction.

Although the Court has recently begun making significant departures from the Watson doctrine, the decision stands as the major precedent in this field. It was reaffirmed in Shepard v. Barkley, 247 U.S. 1 (1918), and later cited in Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929). In the latter case, in which the petitioner claimed a right by inheritance to the surplus net income earned from a perpetual chaplaincy, Justice Louis Brandeis rejected the claim, maintaining that the canon law in force at the time governs, not that which may have applied in 1820 when the chaplaincy was created. Several years earlier,

in Ponce v. Roman Catholic Apostolic Church, 210 U.S. 296 (1908), and Santos v. Holy Roman Catholic Church, 212 U.S. 463 (1909), the Court recognized the legal personality of the Catholic Church. In the Ponce case, it noted that its capacity of the Church to enjoy property was established by the edict of Constantine in 321 A.D. and held that the use of state funds to repair a church building does not entail any claim over the property by a municipality. The Court also held that the municipal law of an acquired territory remains in force unless it violates the Constitution.

Polygamy

Although the Watson case did not directly raise a First Amendment question, Justice Miller's brief exposition of a constitutional doctrine of religious liberty laid a foundation for the Court's interpretation of the establishment and free exercise clauses during the second period. A series of cases involving Mormon polygamy in the western territories of Utah and Idaho provided the Court with an opportunity to explore the implications of this doctrine in greater depth.

The decisions in two of these cases are particularly important because they set forth the initial standard by which the Court interpreted the nature and scope of the free exercise guarantees of the First Amendment. The first of these, Reynolds v. United States, 98 U.S. 145 (1878), was brought on a petition by a man who had been tried and convicted in a federal court on charges of polygamy.

Chief Justice Morrison Waite wrote the opinion in this unanimous decision. Regarding the law banning polygamy, he first observed that

Congress cannot pass a law prohibiting the free exercise of religion:

"Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition" (98 U.S. 145, 162). He also noted that the word "religion" is not defined in the Constitution and turned to the history of the times in order to determine what was meant by religious freedom:

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect 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. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia (98 U.S. 145, 162-63).

Chief Justice Waite observed that the long fight to assure religious freedom culminated in the passage of the First Amendment. Thomas Jefferson's letter to the Danbury Baptist Association was cited as an expression of the purpose behind the amendment. It contains the following key passage:

"Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, 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" (98 U.S. 145, 164).

From this review, Chief Justice Waite suggested 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 and subversive of good order. . ." (98 U.S. 145, 164). He reiterated this idea in the now famous passage which is now used as the basic free exercise test:

"Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (98 U.S. 145, 166). Turning briefly to a history of laws prohibiting polygamy, he concluded:

In the face of the evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. 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 built, 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 on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy (98 U.S. 145, 165-66).

A religious exception for polygamy, like one for human sacrifice or for suttee, would introduce a new element into the criminal law: "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" (98 U.S. 145, 167).

The Reynolds case proved to be only the opening round in a controversy that continues to this day. Anson Phelps Stokes summarized the events that followed:

In 1882 Congress passed the Edmunds Act, which punished actual polygamy by disfranchisement, imprisonment, and other penalties. Five years later the corporation of the Church of Jesus Christ of Latter Day Saints was dissolved by the Federal government. Effective resistance was no longer possible. Hundreds of polygamists suffered fines and imprisonment, over one thousand were disfranchised, and much of the property of the Church was confiscated.¹²

It was in this volatile political situation that Davis v. Beason,

133 U.S. 333 (1890), was brought on appeal from a territorial court in Idaho by a member of the Mormon Church who was convicted for conspiring to unlawfully register to vote. The appellant challenged the constitutionality of an 1882 law disfranchising Mormons. But the Court would only consider whether the territorial court had jurisdiction to try the defendant. Justice Stephen Field wrote the opinion in this unanimous decision:

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . 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 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 (133 U.S. 333, 341-42).

Perhaps the most significant feature of the opinion is its definition of religion:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect (133 U.S. 333, 342).

This differentiation between religion and a particular sectarian form of worship was not a novel one, having been used by Justice Story in the Girard College case. But it was also not free of ambiguity. Justice Field appears to have reserved the term religion to denote, in a positive sense, the common faith of the people that undergirded the

political and legal system. In this sense, the First Amendment protected the exercise of religion--practices as well as beliefs--against any interference. On the other hand, he appears to have used the word "sect" exclusively in contexts that suggest criminality or religious intolerance: "Crime is not less odious because sanctioned by what any particular sect may designate as religion." Whether he based this dichotomy on historic Christian values, natural law, or a changeable community standard is only intimated rather than openly stated. It is clear, however, that Justice Field wanted to rule out of court any attempt to claim the sanction of religion as a criminal defense.

It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. . . . Probably never before in the history of this country has it been seriously contended that the whole punitive power of government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance (133 U.S. 333, 342-43).

The Reynolds and Davis rulings represent the first and possibly most important step the Supreme Court took toward defining the nature and limits of the free exercise protections. But these decisions, in turn, were only part of a long series of cases that identified the front lines in the clash between public policy and Mormon Church practice. In Miles v. United States, 103 U.S. 304 (1881), and Clawson v. United States, 114 U.S. 477 (1885), the Court upheld the exclusion of potential jurors--from a trial jury and grand jury respectively--for bias. Both

cases involved Mormons.

Suffrage was the issue in Murphy v. Ramsey, 114 U.S. 15 (1885).

Justice Stanley Matthews wrote for the Court:

The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of the government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States (114 U.S. 15, 44-45).

The Court also denounced bigamy and concluded that the "holy state of matrimony" is the "sure foundation of all that is stable and noble in our civilization" (114 U.S. 15, 45).

In Cannon v. United States, 116 U.S. 55 (1885), the Court ruled that the mere cohabitation of a married man with another woman he represented as his wife was sufficient to convict him, even in the absence of a sexual connection. But Justices Miller and Field regarded this interpretation as a "strained construction of a highly penal statute" and dissented.

Two other cases involved the same party, one Lorenzo Snow, who had seven wives. In the first, Snow v. United States, 118 U.S. 346 (1886), the Court held that it had no jurisdiction in this instance due to the small size of the fines imposed on Snow, who was convicted on three separate charges of cohabitation. It also vacated its judgment in the Cannon case for want of jurisdiction. But the following year, In re Snow, 120 U.S. 274 (1887), was brought up on an appeal for a writ of habeas corpus, which had been refused by a lower court. This time the Court adopted the argument of George Ticknor Curtis, which had originated with George Sutherland,¹³ that cohabiting with more than one

spouse is a continuous offense rather than an isolated act. This ruling prevented multiple indictments.

An altogether different question was raised when the Court heard an appeal by the Mormon Church itself in Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890)--decree entered May 25, 1891, 140 U.S. 665 (1891)--after Congress had revoked the church's charter and seized some of its property.

The Mormon Church had originally been chartered by the government of Mexico. In a brief for the United States, the Attorney General claimed that the church was empowered by its corporate charter to enforce "every religious duty promulgated by the church." One provision virtually established it as a theocracy, extending "the law-making power of the corporation so as to embrace generally all the duties of Man to his Maker. Among others, it extends it specially to tithes, or collecting tithes."¹⁴ This clause read as follows:

Provided, however, That each and every act or practice so established or adopted, for law or custom, shall relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithings, marriages, fellowship, or the religious duties of man to his Maker, inasmuch as the doctrines, principles, practices, and performances, support virtue and increase morality, and are not inconsistent with or repugnant to the Constitution of the United States, or of this State, and are founded on the revelations of the Lord.¹⁵

In a sharply divided decision, the majority upheld the act of 1887 as falling within the prerogative of parens patriae and approved the distribution of some of the seized property to the common schools of Utah, citing the common law doctrine of cy-pres to the effect that if a charitable purpose should fail the sovereign may rededicate property to a related charitable object. But the Court refused to consider any

further use of the property by the church or for the purpose of preaching, upholding, promoting, and defending polygamy. Justice Joseph Bradley wrote:

The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society (136 U.S. 1, 49).

The Court refused to be moved by "the pretence of religious conviction" or what Justice Field had earlier called "mere religious belief" as a plea:

One pretence 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 sophisticated plea (136 U.S. 1, 49).

The use of the church property for illegal purposes justified its seizure and diversion. The Court here relied on the concept of the church as a charitable public trust, a doctrine that grew out of an established church context, in which the sovereign reigned as the supreme head of the church. The class of cases involving the administration and application of charitable estates fell within the ordinary jurisdiction of the English chancery courts. But in cases that were beyond the jurisdiction of the English courts of chancery, "the king as parens patriae, under his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise" (136 U.S. 1, 51-52).

Having noted that the "principles of the law of charities . . . prevail in all countries pervaded by the spirit of Christianity," the Court simply adopted them under the inherent parens patriae prerogative of the state, insisting that this "most beneficent function" had "no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties" (136 U.S. 1, 57). It did acknowledge, however, that charities were not similarly favored in many states, where the property reverted to the donors, their heirs, or their representatives.

Chief Justice Fuller, joined by Justices Field and Lucius Q. C. Lamar, vigorously dissented and maintained that Congress had far exceeded its limited constitutional authority:

I regard it of vital consequence, that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals, or corporations, without office found, because they may have been guilty of criminal practices (136 U.S. 1, 67).

The Chief Justice also found fault with the Court's peculiar application of the doctrine of cy-pres:

The doctrine of cy-pres is one of construction, and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in Congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was

accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation (136 U.S. 1, 67-68).

But the Court reaffirmed its position in United States v. Late Corporation of the Church of Jesus Christ of Latter-Day Saints, 150 U.S. 145 (1893), when it returned the church property--which had been placed in receivership--for charitable uses.

These stern measures ultimately had their desired effect. In 1890, the head of the Mormon Church issued a pronouncement repudiating polygamous marriages. Six years later, Utah was admitted as a state on the condition that plural marriages be forever prohibited. Anson Stokes, who chronicled the active role played by churches in this controversy, commented:

Thus came to an end a memorable controversy which had aroused the Christian people of the nation, who felt that polygamy was contrary to the Jewish-Christian moral code of the Bible, on which its ideals and law were largely based. They took the ground that the government could not tolerate any practice that was contrary to fundamental Christian ethics, and pointed to the many decisions of American courts taking this point of view.

But it has proven more difficult to root out the practice of polygamy than its doctrinal supports. Cases still surface periodically. The resulting hardship is suggested by In re State in the Interest of Black, 283 P.2d 887 (1955), in which polygamous parents lost custody of their children on grounds of "child neglect." The charge exemplified the state's willingness to go to considerable lengths and to resort to novel devices in the exercise of its police power.

The cases that reached the Court following the Second World War illustrate the continuing dilemma as well as the political and moral strains of the period. In Chatwin v. United States, 326 U.S. 455

(1946), it reversed the conviction of a polygamist on federal kidnapping charges. But in Cleveland v. United States, 329 U.S. 14 (1946), a divided Court upheld the conviction of Mormon fundamentalists under the Mann Act, which forbade the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." Justice Frank Murphy criticized the Court's depiction of polygamy as promiscuity and its continued willingness to widen the scope of the act beyond its express purpose of ending the white slave traffic. In Musser v. Utah, 333 U.S. 95 (1948), an equally divided Court ruled unconstitutional a statute that outlawed the advocacy of polygamy as a conspiracy to commit acts injurious to public morals.

These cases have left some troubling questions in their wake. On the one hand, it is evident that the test stated in the Davis case was simply a logical development of the Watson doctrine. Justice William O. Douglas was probably recalling this test and his own opinion in the Cleveland case when he later wrote that "a 'religious' rite which violates standards of Christian ethics and morality is not in the true sense, in the constitutional sense, included within 'religion,' the 'free exercise' of which is guaranteed by the Bill of Rights."¹⁷ Similarly, R. J. Rushdoony has noted the preferred status historically enjoyed by Christianity in particular and theism in general:

The structure of state represents, implicitly or explicitly, a particular religion. Implicit in the Court's decision was the equation of Christian moral standards with civilization. The legal structure they defended was implicitly Christian. It is other religions which are restricted to "mere opinion" when they are in conflict with the religious establishment of American law.¹⁸

On the other hand, the law has lacked clear standards for determining appropriate restrictions on deviant practices like polygamy.

The dissenters in three of these cases expressed doubts about the fairness of the often severe measures that were taken.

This series of cases involving members of a single religious sect was paralleled once again in the 1940s by a number of cases involving Jehovah's Witnesses. The two series had features in common. Both involved unpopular native religious minorities whose behavior offended the common beliefs and customs of the people. Both sects were thought to seriously endanger the safety of their own members as well as others in the community. Both threatened to upset the existing political and religious consensus. If the importance of the first series lies in the moral bounds it set to the free exercise of religion, the second was important for broadening ordinary civil bounds governing social commerce for the sake of enhancing existing constitutional liberties.

The Trinity Case

The definitive judicial statement regarding the Christian character of the American constitutional system is probably the lengthy obiter dictum by Justice David Brewer in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). At issue was the validity of the church's contract with an English citizen who was called to New York to serve as the church's rector and pastor. Justice Brewer, writing for the unanimous Court, conceded that immigration officials had correctly applied a provision of the Alien Contract Labor Law that prohibited the prepayment by any citizen of passage for immigrants under contract to perform labor or service of any kind. But he cited testimony indicating that Congress intended only to stop certain companies from importing

unskilled workers at low wages in order to break down the labor market.

Justice Brewer reviewed the laws and charters of the American colonies, the national and state constitutions, and various court opinions to show that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." After this lengthy survey, he passed to American customs, called attention to the massive support given to Christian missions, and then observed:

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. 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 (143 U.S. 457, 471)?¹⁹

Judging that the language of the statute was "broad enough to reach cases and acts which the whole history and life of the country affirm could not intentionally have been legislated against," he concluded:

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 cannot be within the statute (140 U.S. 457, 472).

Federal Aid

Two early cases involving agencies of the Roman Catholic Church raised the issue of financial aid for religious organizations. The first, Bradfield v. Roberts, 175 U.S. 291 (1899), was an appeal from an unsuccessful suit by a taxpayer of the District of Columbia to prevent payments by the federal treasury to a hospital operated by a Catholic sisterhood as compensation for the treatment of poor patients under a

contract. Justice Rufus Peckham upheld the earlier ruling, emphasizing that the hospital was a nonsectarian, secular corporation and not--as the complainant alleged--a sectarian institution because nothing to that effect appeared in the articles of incorporation. He added that the religious affiliation of the individuals who compose the corporation

. . . is not of 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. Nor is it material that the corporation may be conducted under the auspices of the Roman Catholic Church (175 U.S. 291, 298).

This decision may have been a mixed blessing for churches, however, because for all practical purposes incorporation transformed religious institutions into creatures of the state. To be sure, the Terrett case, like the later Dartmouth College v. Woodward, 4 Wheat. 518 (1819), clearly specified that the authority of the state over corporations is limited. But the establishment implications remain. Vested property rights were already being curtailed for the sake of a variety of new economic and social values.²⁰ Moreover, the power to create involves the power to regulate. In Hale v. Henkel, 201 U.S. 43, 74-75 (1905), for example, a divided Court held that since a corporation--in this case a business corporation--is a creature of the state it lacks a constitutional right to refuse to submit its books and papers to inspection at the suit of the state. In principle, this rule applies to churches, as well.

In the other case involving the aid question, Quick Bear v. Leupp, 210 U.S. 50 (1908), the Court ruled that an 1897 law prohibiting federal support of sectarian schools applied only to "gratuitous payments of public moneys" and not to treaty funds or trust funds. It held that

payments made by the Commissioner of Indian Affairs toward the support of Catholic mission schools came from treaty funds which belonged to the Sioux. Chief Justice Fuller wrote that "we cannot concede the proposition that Indians cannot be allowed to use their own money in schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof" (210 U.S. 50, 81-82). The question of aid to private schools still remained to be addressed. But in the meantime, the Court had to decide issues affecting the very existence of independent education in this country.

Private Schools

National sentiments reached a high pitch of intensity during and following the First World War. Various ethnic groups and labor unions were suspected of harboring revolutionary ideas. Nativist organization like the Ku Klux Klan capitalized on sundry fears about blacks, Catholics, and immigrants. War and massive migration brought about a clash of cultures that sent tremors throughout the western world. Overseas, the term "Americanization" became a term of reproach for all that was cheap and tawdry about the burgeoning popular culture that quickly spread beyond our shores. At home, "Americanization" signified the democratic ideal to which public and even private education were being consecrated.

As part of a general Americanization program, several states that had sizable immigrant communities passed laws under their police power prohibiting the teaching of any school subjects in a foreign language.

In Nebraska, where half the population was not more than two generations removed from Continental Europe, Robert Meyer, a teacher at a Lutheran parochial school, was arrested and convicted on criminal charges for teaching Bible stories to his pupils in the German language after regular school hours.

The ruling by the Supreme Court of Nebraska in Meyer v. State, 107 Nebr. 657, 661-62 (1922), shows the court's clear perception of the connection between language and ideology:

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 interest of this country.

The case eventually reached the United States Supreme Court as Meyer v. Nebraska, 262 U.S. 390 (1923), along with four other cases from Nebraska, Iowa, and Ohio that were decided together as Bartels v. Iowa, 262 U.S. 404 (1923). One of the attorneys for Meyer, Arthur Francis Mullen, conceded the power of the state to require the teaching of English but denied it had the right to prohibit the teaching of foreign languages as an optional subject. Under questioning by the justices, he reviewed the very revealing legislative history of the law. An attempt in 1919 to abolish all private primary education passed the House--Nebraska still had a bicameral legislature at the time--but failed in the Senate by a single vote. A law regulating private schools was then substituted and passed. Afterwards, the language prohibition

law was added to the package. By the Nebraska Supreme Court's own admission, the purpose of the law, he said, was "to stop religious instruction in any school in the State until the child can understand the English language." He continued:

The compulsory system, requiring children to attend some school, public or private, was first enacted in 1852. And now it is seriously argued that a legislative majority can change the entire history of the human race, and by its mere fiat take my children and require me to send them to a public school, and have the course of study absolutely regulated by the State. I deny that any such legislative power exists in a constitutional government.²¹

Justice James McReynolds, writing for the majority, likened the Nebraska legislation to the Ideal Commonwealth of Plato and the garrison state of Sparta, which submerged the individual for the sake of developing ideal citizens, then added:

Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

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. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown (262 U.S. 390, 402).

Although the Court did not question the state's right to compel attendance at some school or to regulate such schools, it did hold that "a desirable end cannot be promoted by prohibited means" (262 U.S. 390, 401).

But in the next case in the series, Pierce v. Society of Sisters,

268 U.S. 510 (1925), the power of the state to abolish private schools altogether was finally raised. A campaign against private elementary schools in Oregon that was spearheaded by the Ku Klux Klan with the cooperation of a radical faction of the Scottish Rite Masons led to passage of the Compulsory Education Act of 1922 by popular initiative.²² The Society of Sisters, which still operates St. Mary's Academy in Portland, and Hill Military Academy--now the site of Portland Bible College--obtained restraining orders to prevent enforcement of the statute. Although both were incorporated by the state, the Court unanimously ruled that this fact did not prevent them from seeking relief from enforcement of a law that would destroy their business and property. Justice McReynolds reiterated the Meyer doctrine:

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 (268 U.S. 510, 535).

A week later, in Gitlow v. New York, 268 U.S. 652 (1925), the Court issued the first of a long series of rulings that incorporated specific provisions of the Bill of Rights--freedom of speech in this case--into the liberty guarantee that the Fourteenth Amendment made applicable to the states.²³ The broadened definition of liberty that the Court adopted in the Meyer and Pierce cases had earlier been suggested by Justice Harlan in his dissenting opinion in Berea College v. Kentucky, 211 U.S. 45 (1908), in which the Court upheld a racial segregation law. But Justice Harlan recognized the wider implications of the decision:

The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden

or interfered with by government,--certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,--especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States (211 U.S. 45, 67).

The last case in this series upholding the rights of private schools, Farrington v. Tokushige, 273 U.S. 284 (1927), did not raise a religious issue because of the exemption enjoyed by sabbath schools but the Court's ruling has a particular relevance to some of the school controversies of today. The law in question required the exclusive teaching of English and Hawaiian in the public schools of Hawaii. Its admitted object was to promote Americanism. According to Justice McReynolds,

. . . the school Act and the measures adopted thereunder go far beyond mere regulation of privately-supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books. Enforcement of the Act probably would destroy most, if not all of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful (273 U.S. 284, 298).

Not all the cases involving private schools at this time grew out of attempts to abolish them or severely curtail their individuality. One in particular raised a question about the constitutionality of state aid to private religious schools. In Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930), the first of many cases on this subject, the Court upheld a Louisiana law that provided "appropriations for the specific purpose of purchasing school books for the use of the

children of the state, free of cost to them." The Court accepted the child benefit theory set forth by the Louisiana Supreme Court and agreed with its finding that no money was appropriated "'for the use of any church, private, sectarian or even public school'" (281 U.S. 370, 374).

The common thread that links each of these cases is the standardization of education--through regulation and subsidization--around a common core of national, cultural, and pedagogical values. Here the Court construed these values broadly and gave wide berth to the exercise of dissenting views. But elsewhere it tipped the balances in favor of a narrower conception of the public good.

Conscientious Objection

National security is the theme that ties together a similar series of cases that raised the issue of liberty of conscience. These cases resembled and occasionally intersected another series relating to freedom of expression which, besides the Gitlow case, included Abrams v. United States, 250 U.S. 616 (1919), and Near v. Minnesota, 283 U.S. 697 (1931). They marked the beginning of the Court's transition from its role as the guardian of traditional religion to its more recent role the vanguard of an experimental pluralism.

The prevailing religious accommodation was, in many respects, a Procrustean bed of doctrinal indifference that fully satisfied none of the major confessional churches. But some were left further out in the cold than others. Several religious groups are particularly identified with a historic tradition of conscientious objection to military service. Their objections often extend to jury service and the taking

of oaths. Ever since the War for Independence, state and national laws have usually made provision for objectors in the form of exemptions and alternative forms of service. A national draft exemption was passed in 1864 to cover members of religious denominations who declared their conscientious opposition to bearing arms. When the United States entered the First World War, however, conscription for service in a foreign war was instituted for the first time. The constitutionality of the Draft Act of 1917 was soon tested in Arver v. United States, also known as Selective Draft Law Cases, 245 U.S. 366 (1917).

A detailed brief for the plaintiffs examined the origins of the militia, its history of local control, and its traditional protection against service abroad. It pointed out that the Saxon kings organized the militia by counties. Attempts by William the Conqueror to raise a standing army in England were met with popular resistance. As for conscription, it applied at first only to paupers and vagabonds.

In his study of the English Constitution, A. V. Dicey noted that while a militia may be converted into a standing army it cannot be required to serve abroad.²⁴ This appears to have also been the understanding of the American fathers at the time our Constitution was written. During the War for Independence, a provision authorizing Congress to summon the militia to enforce treaties was dropped at the insistence of Gouverneur Morris.²⁵

The Court, however, upheld the statute, made only a passing reference to the English tradition, and dismissed as unsound the proposition that religious exemptions violated the First Amendment. Another generation passed before the Court dealt directly with

conscientious objection to conscription. By appearing to skirt what might otherwise seem to be the most important issue, the Court indicated that the real issue transcended any species of conscientious objection.

In the meantime, several cases raised questions about the interpretation of the Naturalization Act of 1906. In the first of these, Schwimmer v. United States, 283 U.S. 644 (1929), the Court upheld a refusal of citizenship to a Hungarian woman described as "an uncompromising pacifist with no sense of nationalism but only a cosmic sense of belonging to the human family. . ." (283 U.S. 644, 648). The dissent of Justice Oliver Wendell Holmes, Jr., resembled his earlier dissent in the Abrams case:

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount (283 U.S. 644, 655).

United States v. Macintosh, 283 U.S. 605 (1931), and its companion case, United States v. Bland, 283 U.S. 636 (1931), were scarcely distinguishable from the Schwimmer case. The respondent in the first case was Douglas Clyde Macintosh, a Canadian citizen who was an ordained Baptist minister and a theology professor at Yale Divinity School. Although he had served as a chaplain in the Canadian Army during the First World War and was not a professed pacifist, he declined to "promise in advance to bear arms in defense of the United States unless

he believed the war to be morally justified. . ." (283 U.S. 605, 613). Both sides of the divided Court admitted the religious basis of his refusal to take the prescribed oath but still reversed the ruling of the Circuit Court of Appeals, which had been in his favor.

The majority and the four dissenters diverged most noticeably in the frankly theological assumptions they brought to their interpretation of the scope of protected religious liberty. Justice George Sutherland used the Trinity case as a point of departure:

When he speaks of putting his allegiance to the will of God above his allegiance to the government it is evident, in the light of his entire statement, that he means to make his own interpretation of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people . . . , according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God (283 U.S. 605, 625).

He also cited the Jacobson case of 1905, which had dealt with compulsory vaccination, as an example of the limits on the liberties guaranteed to the individual by the Fourteenth Amendment:

". . . And yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense" (197 U.S. 11, 29; 283 U.S. 605, 624).

In his dissent, Chief Justice Charles Evans Hughes drew a parallel between this oath and the constitutional oath of office, denying that it was ever the intent of Congress to impose any religious test or that any promise to support an unjust war could be extorted. Addressing himself

to the former, he contended: "I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience." Citing the Davis decision, he wrote:

Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation (283 U.S. 605, 633-34).

But the Court proved no more receptive to such appeals to conscience in two other cases that involved citizens. In Hamilton v. Regents of the University of California, 293 U.S. 245 (1934), the unanimous Court affirmed the suspension of three university students who were members of a Methodist student organization for refusing to take a required military training course, saying that "California has not drafted or called them to attend the University" (293 U.S. 245, 262). It did indicate, however, that the university--a land grant college--was only required to offer such a course and noted that two states had recently made it elective.²⁶

In re Summers, 325 U.S. 561 (1945), was a case involving a challenge to the test oath required for admission to the bar in Illinois. The petitioner, Clyde Wilson Summers,²⁷ who was a law professor, had been denied permission to practice law because of his inability to take the required oath in good faith. The state found his objection to the use of force "inconsistent with the obligations of an

attorney at law'" (325 U.S. 561, 564 n4). The Court upheld this action by the state, noting that Illinois had a constitutional provision requiring service in the militia in time of war. But four justices dissented. After citing the dissents in the naturalization cases with approval, Justice Black noted that there had been no draft into the Illinois militia since 1864 and indicated that anyone holding the petitioner's views would be covered by an existing exemption:

I cannot agree that a state can lawfully bar from a semi-public position, a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet and may never be enacted. Under our Constitution men are punished for what they do or fail to do and not for what they think and believe (325 U.S. 561, 578).

The dissenting opinion in the Summers case indicated the direction in which the Court was beginning to head. Shortly after the end of the Second World War, the three naturalization decisions were overruled in Girouard v. United States, 328 U.S. 61 (1946), a case that involved a Seventh-Day Adventist. Justice Douglas repeated the earlier dissenting arguments and declared that the "test oath is abhorrent to our tradition." He also cited more recent opinions which given a broadened effect to the Fourteenth Amendment protections. Chief Justice Harlan Fiske Stone, who had joined the dissents in two of the earlier cases while serving as an associate justice, dissented this time because Congress had subsequently adopted the Court's earlier construction of the naturalization laws.²⁸ This decision represented one of the first hints that the Court was beginning to reconsider its views on the nature of religion and the scope of the religious liberty guarantees. But the full impact of the change was not felt until the 1960s and early 1970s.

Recapitulation

The drive for consensus is one of the great motivating factors in American law. It is the search for unity in the midst of plurality. This purpose is manifested in different ways through almost all the cases that have thus far been examined. Along with the Terrett, Permolli, Cummings, Reynolds, Davis, and Mormon Church cases, the private school and conscientious objection cases are only the most obvious examples of a fact that pervades our constitutional history. It is equally a religious and a political fact.

One of the ironies of the relationship of church and state in America that "the least dangerous branch"--itself an offspring of the old clerical class--has most often been left with the responsibility to provide a countervailing influence in behalf of the dissenting tradition from which American politics, culture, and religion originally sprang. It is particularly ironic that the judiciary has generally done so with tools once designed to consolidate feudal states into a religiously unified national state under the aegis of a hereditary monarch. These ironies are reflected in the ideological push and pull that lend such vitality to the Court's otherwise erratic course in the last half century. Perhaps it is the ferment of new wine in old bottles.

Notes

¹Leonard F. Manning, The Law of Church-State Relations in a Nutshell (St. Paul, Minn.: West Publishing Co., 1981), p. 257, quoting Zechariah Chafee, Jr., Free Speech in the United States (Cambridge: Harvard University Press, 1941), p. 399.

²Patrick J. Dignan, A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932) (Washington, D.C.: The Catholic University of America, 1933), p. 50.

³Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court (New York: Simon and Schuster, 1970), p. 418 n39. In a letter to the Justice, the Court's reporter, Henry Wheaton, regretted that Story's opinion had not been delivered as that of the Court.

⁴See, for example, William Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge: Harvard University Press, 1975), pp. 8-10. Early in the nineteenth century, the Supreme Court of Pennsylvania cataloged the English statutes that were still operative in the Commonwealth. Report of the Judges of the Supreme Court, 3 Binney 593 (1808).

⁵Justice Story was careful to distinguish between Christianity and sectarianism in his interpretation of the will: "All that can be gathered 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, the love of truth, sobriety and industry, by all appropriate means, and of course including the best, the surest and most impressive" (2 How. 127, 200). R. H. Martin later concluded: "This decision, coming from the highest judicial authority in the land, established three things: (1) that there is a decided difference between sectarianism and Christianity; (2) that Christianity can be taught in a school from which sectarianism is excluded; (3) and that the Bible is not a sectarian book." Renwick Harper Martin, Our Public Schools--Christian or Secular (Pittsburgh: The National Reform Association, 1952), p. 102.

⁶Dunne, Justice Joseph Story, pp. 419-20. Dunne noted that the case "assumed a semitheological aspect . . . with Webster rivaling any preacher in America." For the text of Webster's argument, see Daniel Webster, The Writings and Speeches of Daniel Webster, vol. 11 (Boston: Little, Brown, & Company, 1903), pp. 135-77.

⁷William George Torpey, Judicial Doctrines of Religious Rights in America (Chapel Hill: The University of North Carolina Press, 1948), p. 31. Perry Miller interpreted the Girard College decision as a defeat

for the Christian view of law, but his evidence does not support this conclusion. See Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War (New York: Harcourt, Brace & World, 1965), pp. 198-206. Francis Lieber, who drew up a plan of education for Girard College in 1834, certainly did not share this conclusion. He later noted that he "insisted upon the introduction of the Bible; although the founder had prohibited the very entrance of a divine into the precincts of the institution by stringent provisions in his testament." See Lieber, Miscellaneous, vol. 2, p. 526. Lieber protested that it was literally impossible to dispense with instruction in Christianity and affirmed that no historian would deny that Christianity was at the foundation of modern history.

⁸Charles Warren, The Supreme Court in United States History, vol. 2, rev. ed. (Boston: Little, Brown, and Company, 1937), p. 34.

⁹This passage was later quoted in Justice Samuel Miller's dissenting opinion in Ex parte Garland, 4 Wall. 333, 398 (1867).

¹⁰Leo Pfeffer, Church, State, and Freedom, revised ed. (Boston: Beacon Press, 1967), 270-87.

¹¹Warren, Supreme Court, pp. 424-34.

¹²Anson Phelps Stokes, Church and State in the United States, vol. 2 (New York: Harper & Brothers, 1950), p. 280. See Paul G. Kauper and Stephen C. Ellis, "Religious Corporations and the Law," Michigan Law Review, 71 (August 1973): 1516-20; Harrop A. Freeman, "Remonstrance for Conscience," University of Pennsylvania Law Review, 106 (1958): 822-26.

¹³Joel Francis Paschal, Mr. Justice Sutherland: A Man Against the State (Princeton: Princeton University Press, 1951; reprint ed., New York: Greenwood Press, 1969), p. 23.

¹⁴Philip B. Kurland and Gerhard Casper, ed., Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, vol. 10 (n.p.: University Publications of America, 1975), pp. 266-67.

¹⁵*Ibid.*, p. 266.

¹⁶Stokes, Church and State, p. 280.

¹⁷Although Justice Douglas did not cite any authorities for this statement, he was simply repeating a sentiment commonly held at one time. William O. Douglas, An Almanac of Liberty (Garden City, N.Y.: Doubleday and Company, 1954), p. 304. A decade after the Girard College case, Stephen Colwell similarly denied that religious liberty rendered the American system defenseless against "Ecclesiastical usurpation" and wrote that the standard of good morals is Christianity. "The Christians of this country really tolerate only what is not inconsistent with their morality. They could not inhabit a country in which any obscene, profane, murderous or idolatrous rites might be practiced under their

eyes in the name of any religion. As it is of the very spirit of our people to resist such an aggression as this upon their religious position, so it is of the very essence of our legislation to forbid it. We are a Christian people: our code of morals is Christian, our social system is Christian, and our civilization is Christian. . . . We are not a nation of Christians; but this is a Christian nation. Christianity has all the authority and control over our legislation, our institutions and their administrations, which, according to its true spirit, it can or ever will claim,--that which is exercised through the wisdom, energy, and influence of individual Christians." Stephen Colwell, The Position of Christianity in the United States, in Its Relations with Our Political Institutions, and Especially with Reference to Religious Instruction in the Public Schools. (Philadelphia: Lippincott, Grambo & Co., 1854), pp. 16-17.

¹⁸Rousas John Rushdoony, "The State as an Establishment of Religion," in Freedom and Education: "Pierce v. Society of Sisters" Reconsidered, ed. Donald P. Kommers and Michael J. Wahoske (Notre Dame, Ind.: University of Notre Dame Law School, 1978), p. 39.

¹⁹For a critique, see William Addison Blakely, American State Papers: Bearing on Sunday Legislation, revised ed. by William Allen Colcord (Washington: D.C.: The Religious Liberty Association, 1911), pp. 487-513. See also David McAllister, Christian Civil Government in America: The National Reform Movement: Its History and Principles, 6th ed. revised by T. H. Acheson and Wm. Parsons (Pittsburgh: National Reform Association, 1927), pp. 333-35. On the secular interpretation of the Constitution, see Franklin Steiner, Religious Treason in the American Republic (Chicago: The American Rationalist Association, n.d.), pp. 37-38, which echoes Blakely's comparison of the Trinity case with the Dred Scott case.

²⁰James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: The University of Wisconsin Press, 1956), pp. 23-29.

²¹Kurland and Casper, Landmark Briefs, vol. 21, p. 771. Two dissenters on the Nebraska bench voiced a similar view: "Legislatures have not always respected personal rights. . . . Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachments by the legislature upon the liberty of the citizens protected by the Constitution." Meyer v. State, 107 Nebr. 657, 669 (1922).

²²See David B. Tyack, "The Perils of Pluralism: The Background of the Pierce Case," American Historical Review, 74 (October 1968): 74-98.

²³For a discussion of the steps leading to incorporation, see Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," Harvard Law Review, 39 (February 1926): 431-65.

²⁴A. V. Dicey, Introduction to the Study of the Constitution, 8th

ed. (London: The Macmillan Company, 1915; Indianapolis: Liberty Classics, 1982), pp. 287-88. John W. Burgess challenged the constitutionality of Congress's action--later upheld by the Supreme Court--in sending a conscript army overseas during the First World War. Foreign wars had previously been fought by volunteer armies, not by the state militias. Sections 8 and 10 of Article I of the Constitution were considered bars against such a practice before 1917. At the time the Constitution was adopted, "there was not a state in the world which fought its foreign wars with a conscript army. . . . Now the power in a government to conscript its citizens or subjects into its military service upon an occasion which it may, of its own motion, at any times, invent and perpetuate amounts to a power to hold the people of the country under permanent military law, that is, to hold them under a law which is not limited by any constitutional immunities protective of the individual against governmental power, namely, the law governing the army, into which they may all be conscripted, which law Congress is authorized by the Constitution itself to construct and ordain without any limitations whatsoever." John W. Burgess, Recent Changes in American Constitutional Theory (New York: Columbia University Press, 1923), pp. 60, 62.

²⁵See the discussion in the brief for the plaintiffs in *Kurland and Casper*, Landmark Briefs, vol. 18, pp. 581-604. During the War of 1812, Rep. Zebulon R. Shipherd spoke out against a bill authorizing President James Madison to enlist additional troops for what Rep. Shipherd regarded as a war of conquest. In a speech on the floor of the House on January 17, 1814, Rep. Shipherd contended that "there is not a word, by reasonable exposition, that imposes upon the citizen the least obligation to aid the Government in the prosecution of a war beyond our territorial jurisdiction, nor had the Government any power over its citizens in this respect, except the levying of taxes." Charles S. Hyneman and George W. Cary, ed., A Second Federalist: Congress Creates a Government (New York: Appleton-Century-Crofts, 1967), p. 302. See also the speech on the Conscription Bill by Daniel Webster. Webster, Writings, vol. 14, pp. 55-69. Similarly, E. C. Wines believed that the provisions of biblical law were arrayed against foreign adventures. Standing armies were forbidden under the Old Testament economy and there were laws against raising horses. Had these laws been obeyed, a class of cavaliers or gentry would have been preempted. Other barriers to wars of conquest included the agrarian character of the country, the requirement that enemy horses be hamstrung rather than captured, laws regarding attendance at religious festivals, and the prohibition of martial regulations. E. C. Wines, The Hebrew Republic (Uxbridge, Mass.: American Presbyterian Church, n.d.), pp. 17-22.

²⁶Beginning with the Morrill Act of 1862, which created a system of land grant colleges, federal grants-in-aid have provided a conduit for fiscal, educational, and social regulation through the attachment of various stipulations. According to Daniel Elazar, land grants were first established as "a major means of implementing national policy." Daniel J. Elazar, "Federal-State Collaboration in the Nineteenth-Century United States," Political Science Quarterly, 79 (June 1964): 248-81.

²⁷See Clyde W. Summers, "The Sources and Limits of Religious Freedom," Illinois Law Review, 41 (1946): 53-80.