CHAPTER NINE

RECENT CONSTITUTIONAL ISSUES

The Barnette and Schempp decisions of 1943 and 1963 respectively brought free exercise and establishment clause values to their fullest expression. But the twenty year period between the two cases was one of profound social change. The Cold War, the arms race, internal subversion, the civil rights movement, foreign trade, and foreign aid were among the dominant political issues in the two decades that followed the Second World War. America had by then become the premier world political, economic, and military power. Amidst a booming economy, a generation of victorious soldiers became the core of a new middle class.

But peace and prosperity ever prove to be fugitive visions. In a period of less than nine months in 1963 and 1964, the assassination of the President and the Gulf of Tonkin Resolution seem in retrospect to have triggered a series of shocks that sent the country careering through a decade of internal strife and external defeat unlike any period since the Civil War and reconstruction. This decade full of passionate intensity finally spent itself in the Watergate escapade and the collapse of the war effort in Indochina. It has been followed by a decade of irresolution which calls to mind William Butler Yeat's comment that "the best lack all conviction." In some respects, the Court itself has reflected the changing times in a changing of the guard.

Doctrinal Entanglements

The doctrinal tensions noted by Chief Justice Burger, Justice Rehnquist, and others has occasionally surfaced in cases that cover issues ranging from unemployment compensation and employment practices to religious displays on public property and tax exemptions for churches. The conflicts have been most clearly evident in regard to church property disputes and aid to private schools. But the greatest innovations have come in cases involving conscientious objection.

Church Property

In the decades before and after its Watson decision, the Court ruled upon a variety of church property disputes. Some involved bequests, as in Stanley v. Colt, 5 Wall. 119 (1866), Christian Union v. Yount, 101 U.S. 352 (1880), and Gilmer v. Stone, 120 U.S. 586 (1887). Others involved disputes concerning communal property, such as the German Separatist colony at Zoar, Ohio in Goesele v. Bimeler, 14 How. 589 (1852), and the Harmony Society of Beaver County, Pennsylvania--a sect known as the Rappites--in Baker v. Nachtrieb, 19 How. 126 (1856), and Speidel v. Henrici, 120 U.S. 377 (1887). In Smith v. Swormstedt, 16 How. 288 (1853), the Court was asked to assist in the division of common property when the Methodist Episcopal Church split over the issue of slavery. But not all the property cases during this period dealt with internal church disputes. In Gibbons v. District of Columbia, 116 U.S. 404 (1886), the Court ruled that church land which is left unnecessarily vacant is not exempt from local taxes.

The Court did not base any of its church property rulings on the

First Amendment until 1952 when it reversed the judgment of the New York courts in Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), a case involving the right to use and occupy a church that was complicated by international politics and Cold War attitudes. Justice Reed reviewed the history of the Russian Orthodox Church in America, the ecclesiastical disruptions that accompanied the Bolshevik Revolution, and the circumstances that led to the temporary administrative separation of the American diocese in 1924 until such time as a general convention or sobor should be legally convened in Moscow. When an admittedly canonical sobor was held in 1945, the delegates from North America were prevented from attending because of delays. A year later, the American congregations met at a sobor held in Cleveland, discussed the question of reunion, and decided to refuse the Moscow Patriarchy's stipulation that the American church abstain from political activities against the Soviet Union.

As Justice Frankfurter emphasized in his concurring opinion: "What is at stake here is the power to exercise religious authority" (344 U.S. 94, 121). "A cathedral is the seat and center of ecclesiastical authority." Because of the turmoil that accompanied Soviet interference with the church, the Legislature of New York passed a special act in 1925 that incorporated the cathedral, which was occupied by the head of the American churches. In 1945 and 1948, the legislature added provisions to the Religious Corporations Law that recognized the Russian Church in America as "an administratively autonomous metropolitan district." The archbishop appointed by the Moscow hierarchy challenged the validity of this action and called it an interference with the free

exercise of religion. The Court agreed with this argument and additionally held that New York's legislative application of the cy-pres doctrine was invalid, since the case did not involve either the dissolution of a charitable corporation for unlawful practives or the failure of a charitable purpose.

Justice Jackson, however, contended that the controversy was a matter for settlement by state law and concluded that the religious freedom issue was insubstantial. Even if the legislature had resorted to a transfer--rather than a confirmation--of property rights that resulted in a denial of due process, such an action would only "raise a question of deprivation of property, not of liberty:"

> The fact that property is dedicated to a religious use cannot, in my opinion, justify the Court in sublimating an issue over property rights into one of deprivation of religious liberty which alone would bring in the religious guaranties of the First Amendment. I assume no one would pretend that the State cannot decide a claim of trespass, larceny, conversion, bailment or contract, where the property involved is that of a religious corporation or is put to religious use, without invading the principle of religious liberty (344 U.S. 94, 130).

He characterized the Russian ecclesiastical establishment as a captive church and, after describing the case as one involving "an ostensible schism with decided political overtones," denied that "New York law must yield to the authority of a foreign and unfriendly state masquerading as a spiritual institution" (344 U.S. 94, 127, 131).

This did not settle the matter, however, and the dispute came once again before the Court on a common law question in Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960). Again, the Court reversed.

Cold War politics also played a major role in First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958), a case in which

issues about church property, test oaths, and conscientious objection converged. Under a provision of the California constitution, the tax exemption of church property was conditioned on the taking of a loyalty oath. As a matter of conscience, the members, officers, and ministers of First Unitarian Church refused to comply and denied "'power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs'" (357 U.S. 545, 547). But Justice Clark, who dissented in this and a companion case, Speiser v. Randall, 357 U.S. 513 (1958), approved the view of the California court which had upheld the requirement: "'An exemption from taxation is the exception and the unusual. . . . It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn'" (357 U.S. 513, 541). He added: "Refusal of the taxing sovereign's grace in order to avoid subsidizing or encouraging activity contrary to the sovereign's policy is an acccepted practice" (357 U.S. 513, 543). This choice of words is unfortunate but revealing, since it is in the familiar language of divine right which the crowned heads of Europe arrogated to themselves. The law is a veritable reliquary of such unamended, and perhaps unexamined, holdovers of the tradition of established religion.

The next church property case, Presbyterian Church v. Hull Memorial Church, 393 U.S. 440 (1969), added a new wrinkle to the Watson doctrine when the Court ruled that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded" (393 U.S. 440, 449). The issue in this case was whether alleged departures from

doctrine by the hierarchy of the Presbyterian Church in the United States had violated its constitution and terminated an implied trust, thus freeing local churches to secede and retain their property. The concept of an implied trust was used in the nineteenth century to help resolve internal church disputes but often required courts of equity to scrutinize doctrinal standards in determining whether the trustees had departed from them. The doctrinal departures in question in the Hull Church case included the ordination of women, making political pronouncements, supporting the removal of Bible reading and prayers from public schools, "teaching neo-orthodoxy alien to the Confession of Faith and Catechisms," and requiring all member churches to remain in the National Council of Churches.

Justice Brennan declared that it was appropriate for courts to make marginal reviews of ecclesiastical determinations and reaffirmed the definition of this role that Justice Brandeis gave in the Gonzalez case: "'In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive. . .'" (280 U.S. 1, 16; 393 U.S. 440, 447). But he concluded that "the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of religion--the interpretation of particular church doctrines and the importance of those doctrines to the religion" (393 U.S. 440, 450), a role that is forbidden by the First Amendment. The Court remanded the case to the Georgia Supreme Court, which ultimately resolved the issue in favor of the local church on a different basis.

A few months later, Justice Brennan developed his views further when he concurred with the Court's per curiam dismissal--for want of a substantial federal question--of an appeal in Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970). Turning to the Watson, Kedroff, and Hull Church decisions as models, he outlined three approaches that he believed were permissible for states to adopt in settling property disputes. Regarding the "neutral-principles" approach suggested in the last case, he wrote: "Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws" (396 U.S. 367, 371).

In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court split over a complicated case involving the defrocking of a priest and the resolution of a property dispute. The majority found the neutral-principles approach inapplicable in this case and held that the courts must defer to the decision of the church's ruling hierarchy. But Justices Rehnquist and John Paul Stevens believed that the Illinois courts had correctly applied neutral principles of law. In addition, they disagreed with the Court's acceptance of the petitioners' deference argument:

> Such blind deference . . . is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause" (426 U.S. 696, 735).

The Brennan and Rehnquist viewpoints converged in Jones v. Wolf, 443 U.S. 595 (1979), when the Court upheld Georgia's use of the

neutral-principles approach and held that the First Amendment does not require the states to "adopt a rule of compulsory deference to religious authority in resolving church disputes, even where no issue of doctrinal controversy is involved" (443 U.S. 595, 605). Justice Blackmun agreed that this approach was not free of difficulties but maintained that hierarchical churches could take steps to "ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property" (443 U.S. 595, 606). But three justices joined Justice Lewis Powell's dissent in the belief that the approach invited intrusion into the church polity.

One result of the Jones decision is the rejection of the implied trust concept. According to Dallin Oaks, the justices associated with Justice Brennan's viewpoint are even unwilling to examine express trusts if they require a determination of religious law or doctrine. Oaks believes that a century of precedents will need to be reexamined and views the state of church property law as a specimen of the larger conflict over the relationship between church and state today:

> The last two decades of the twentieth century are likely to involve more frequent legal conflicts between church and state. These conflicts are a result of the general growth in government regulation of private activities, the expanding role of government as a provider of social welfare services traditionally provided by churches, the insatiable revenue requirements of government and churches, and the increasing secularization of society.[1]

Another critic, Robert Recio, agreed with Justice Powell that an examination of a church's structure is constitutionally permissible if it is limited to determining where authority lies. "Certainly, determining the form of church governance as a fact is less dangerous to free exercise than presuming church governance to be vested in the

congregational majority without regard to the provisions by which the parties had agreed to be governed prior to the conflict."[2] Whether this decision does indeed provide an opportunity for intrusion still remains to be seen. But this area of the law has become very fluid and the status of the Watson rule is somewhat in doubt.

Religious Tests

Doubts have similarly intruded into other areas of legal doctrine. One area of doubt is what is included in the word "religion" with respect to the free exercise and establishment clauses. Changes are most evident in cases involving conscientious opposition to oaths and obligations that violate personal beliefs. The religion clauses have had to do double duty, first as a means of protecting religious liberty and second as a defense for any conscientious scruple deemed sincere, including avowedly nonreligious or antireligious beliefs.

The initial departure from a theistic understanding of religion came in United States v. Kauten, 133 F.2d 703 (2nd Cir. 1943), a case involving conscientious objection. Although Judge Augustus Hand affirmed the lower court ruling against the defendant, he broadly interpreted the religious grounds for draft exemption: "Religious belief arises from the sense of inadequacy of reason as a means of relating the individual to his fellow men and to his universe--a sense common to men in the most primitive and the most civilized societies" (133 F.2d 703, 708). Furthermore, Judge Hand held that a conscientious opposition to war under any circumstances "may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for

many persons at the present time the equivalent of what has always been thought a religious impulse" (133 F.2d 703, 708). Although this shift of attention from theology to anthropology--from the commands of God to the beliefs of man--was not immediately endorsed by other courts, the new approach gradually gained ground.[3] Justice Frankfurter recalled the Kauten opinion in his Barnette and Saia dissents.

Subsequent cases have played down the traditional conception of religion, even to the point of defining away problems with respect to official use of religious language. Thus in the Gallagher case the Supreme Court reversed a lower court ruling that a Sunday closing law was unconstitutional and held that "the objectionable language" --referring to the law's retention of the term "Lord's day"--was "merely a relic" (366 U.S. 617, 627).

But it was in Torcaso v. Watkins, 367 U.S. 488 (1961), that the Supreme Court departed for the first time from a theistic definition of religion. In a unanimous ruling, the Court held that the prohibition of religious tests for office in Article VI applies equally to the states, which made this the last of the religion clauses to be specifically incorporated into the Fourteenth Amendment. Justice Black, who delivered the opinion of the Court, reviewed the history of test oaths and cited the Court's opinion in the Girouard case to the effect that the "test oath is abhorrent to our tradition." Quoting Justice Jackson's opinion in the Barnette case, Justice Black underscored his own view that church and state must be kept entirely separate and gave the definition of religion a new twist:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief

> or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs (367 U.S. 488, 495).

In a footnote to the last clause, Justice Black noted several nontheistic religions: Buddhism, Taoism, Ethical Culture, and Secular Humanism. In effect, the earlier distinction between religion and "mere belief and opinion" had become nearly erased.

Justice Brennan applied the Torcaso rule two years later in Sherbert v. Verner, 374 U.S. 398 (1963), when he stated that government may not "compel affirmation of a repugnant belief." This case, which was decided on free exercise grounds, involved the ineligibility of a Seventh-Day Adventist for unemployment compensation benefits because of her refusal to work on Saturday. Under a South Carolina law, a claimant was ineligible for benefits if he "'failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer. . .'" (374 U.S. 398, 401).

Justice Brennan believed that, as applied, this rule imposed a direct burden on the free exercise of the appellant's religion and could not be justified on the basis of a compelling state interest. "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. 398, 404). Neither rights or public benefits may be so conditioned: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege" (374 U.S. 398, 404). But he

denied that the Court was fostering an establishment of religion and maintained that the ruling "reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . ." (374 U.S. 398, 409).

Justices Potter Stewart and John Harlan, however, took their cue from the recent Sunday law cases and sought to clarify the case's establishment clause implications. In his concurring opinion, Justice Stewart treated this case as a situation where legitimate free exercise claims ran "into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause" (374 U.S. 398, 414). He wanted to see the Court reverse its Sunday law decisions. Justice Harlan, who was joined by Justice White in dissenting, argued that an exception on religious grounds would be a permissible accommodation of religion. But he disagreed with the Court's "conclusion that the State is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case" (374 U.S. 398, 423).

In a case that similarly involved conscientious scruples, In re Jenison, 375 U.S. 14 (1963), the Court vacated the contempt conviction of a Minnesota woman who refused to serve as a juror because of her religious conviction against judging others.

A religious test of sorts was again the issue in McDaniel v. Paty, 435 U.S. 618 (1978). This time the Court reversed a provision of the Tennessee constitution that disqualified ministers from serving in the state legislature, an English rule that had at one time or another been observed by thirteen states. The appellant was an ordained Baptist minister who had been elected as a delegate to the state constitutional

convention.

There was considerable disagreement, however, as to the constitutional grounds for reversing the disqualification and the opinions revealed the divisions that had begun to characterize the Court's interpretation of the religion clauses. Chief Justice Warren Burger, who was joined by three others, took note that the disqualification was originally intended to prevent the establishment of a state religion. He held that the Torcaso rule, which focused on belief, did not apply because the disqualification was directed at the status and conduct of the clergy but agreed that it unconstitutionally conditioned the minister's free exercise right on the surrender of his right to seek office. Justice William Brennan, who was joined by Justice Thurgood Marshall, noted that the minister had been disqualified because of his leadership role in religion and his dedication "'to the full time promotion of the religious objectives of a particular religious sect.'" He viewed the disqualification as a violation of the minister's freedom of belief, then added that it violated the establishment clause, as well. Justice Stewart believed that the Torcaso decision controlled because this case was virtually indistinguishable. Justice Byron White, however, contended that the disqualification did not violate the appellant's free exercise right but that it did deny him equal protection, noting that the disqualification did not extend to judicial or executive offices.

At various times, Justices Stewart, Harlan, and Rehnquist attributed the Court's difficulties to an inability to reconcile its treatment of the establishment clause under the incorporation theory

with its generous interpretation of the scope of free exercise protections. The clashing values are particularly evident in the conscription cases, which gave practical effect to the new meaning of religion.

Conscription

The peacetime draft and the outbreak of the Korean War set the stage for the Court's intervention on behalf of the conscientious objector claims of two members of Jehovah's Witnesses in Sicurella v. United States, 348 U.S. 385 (1955), and Gonzalez v. United States, 348 U.S. 407 (1955). In the first case, the Justice Clark contended that the petitioner's willingness to fight in a spiritual war between the powers of good and evil did not contradict his opposition to participating in a shooting war. In the second case, the Court ruled that a registrant who was granted a hearing by the Department of Justice had a right to have its recommendation furnished him at the time it was sent to the selective service appeal board. Justice Sherman Minton objected that the Court ignored the congressional test for objectors, which held that the opposition must be to participation in war in any form.

After the Torcaso decision, the first test of its expanded interpretation of religion came in United States v. Seeger, 380 U.S. 163 (1965), a case involving conscientious objection on ethical rather than avowedly religious grounds. Taking his lead from the use of "Supreme Being" rather than "God" in the law, Justice Clark gave a broad construction to the Universal Military Training and Service Act of 1948

and maintained that it provided considerable latitude for exempting conscientious objectors:

> We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption (380 U.S. 163, 165-66).

After discussing the implications of various lower court opinions on the scope of the religious exemption, he declared that "we believe this construction embraces the ever-broadening understanding of the modern religious community" and cited the examples of Paul Tillich, John Robinson, and David Muzzey, a leader in the Ethical Culture movement who advocated an anthropocentric rather than a theocentric view of religion. Later, he quoted Paul Tillich's definition of God as a person's "ultimate concern:" "what you take seriously without any reservation" (380 U.S. 163, 187). Sincerity was thus made the test of belief. The shift of focus from theology to anthropology in the Torcaso decision shifted once again, this time to psychology.

The Seeger decision turned the draft law's requirement of belief in a "Supreme Being" into an anachronism and in due course it was dropped. But first the Military Service Act of 1967 eased the strictures used to determine eligibility for conscientious objector status in order to bring the law into compliance with the Seeger doctrine. Yet even these changes failed to satisfy the Court. In Welsh v. United States, 398 U.S. 333 (1970), Justice Black equated religion with any sincerely held beliefs, including those which are purely ethical or moral in their origin and content, such as a personal moral code. The Court's construction of the statute, however, flatly contradicted its express

language. Justice John Harlan concurred in the result because he believed that the theistic standard was unconstitutional, but protested what he called this "emasculated construction of a statute to avoid facing a latent constitutional question. . . ." After acknowledging that he had been mistaken in supporting the Seeger ruling, he reviewed the steps that had led to an obliteration of the theistic standard and then commented: "It is a remarkable feat of judicial surgery to remove, as did Seeger, the theistic requirement. The prevailing opinion today, however, in the name of interpreting the will of Congress, has performed a lobotomy. . ." (398 U.S. 333, 351).

Justice Byron White, who spoke for the three dissenters, agreed with Justice Harlan's objection to the Court's construction of the statue, but disagreed that religious classifications are unconstitutional:

> We have said that neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment. "Neutrality," however, is not self-defining. If it is "favoritism" and not "neutrality" to exempt religious believers from the draft, is it "neutrality' and not "inhibition" of religion to compel religious believers to fight when they have special reasons for not doing so, reasons to which the Constitution gives particular recognition? It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech. . . . We should thus not labor to find a violation of the Establishment Clause when free exercise values prompt Congress to relieve religious believers from the burdens of the law at least in those instances where the law is not merely prohibitory but commands the performance of military duties that are forbidden by a man's religion (398 U.S. 333, 372, 373).

In view of the Court's determination that any religious classification must include all forms of belief, it was probably no

surprise that the Court next decided to limit the grounds on which a religious objection could be made. In two companion cases, Gillette v. United States and Negre v. Larsen, 401 U.S. 437 (1971), the Court upheld the Selective Service's denial of an exemption to two objectors, one a Humanist and the other a Roman Catholic, who were selectively opposed to unjust or immoral wars. Justice Thurgood Marshall asserted that the petitioners in this case asked for "greater 'entanglement' by judicial expansion of the exemption to cover objectors to particular wars" and concluded that "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization" (401 U.S. 437, 451). He believed that fairness was at stake:

> Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled. There is even the danger of unintended religious discrimination--a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear. . . . While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory (401 U.S. 437, 458).

Justice Douglas wrote separate dissents in the two cases. In the first, he pointed out that the Court has never squarely faced up to the question whether a conscientious objector can be required to kill and ended by remarking: "I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment" (401

U.S. 437, 470). In the second, he noted that under Roman Catholic doctrine a person has a moral duty to take part in just wars, and to refuse to participate in unjust wars, declared by his government. Justice Douglas believed that the decision whether a war is just or unjust "is a personal decision that an individual must make on the basis of his own conscience after studying the facts" (401 U.S. 437, 472).

Almost as a footnote to the Gillette ruling, the Court held three years later in Johnson v. Robison, 415 U.S. 361 (1974), that a denial of veterans' educational benefits to conscientious objectors who had performed alternative service did not create an arbitrary classification or a violation of due process. Justice Douglas was again the sole dissenter in this case.

The Court's extension of religious grounds for conscientious objection to include objection based on political, sociological, and philosophical grounds in the Welsh case began raising questions about the fairness of religious classifications. Indeed, it is not altogether clear why conscientious objection was ever restricted to a purely theistic basis except possibly to silence a potentially major source of opposition. But the redefinition of religion by dilution is likely to have many unforeseen consequences for the religious liberty guarantees of the First Amendment. Shortly after the Seeger decision, Donald Giannella wrote that the Court's broadened definition of religion will finally compel it to set some clear standards to decide what religious practices fall within the protection of the First Amendment:

> This much seems certain: regardless of whether the Court elects to proceed under the free exercise clause or the due process and equal protection clauses, it must formulate some kind of rudimentary natural theology in order to evaluate nontheistic religious claims.

> One may quarrel with the two main propositions I suggest--first, that nontheistic practices seeking to advance individual psychological and spiritual development are to be denied equal status with sacramental acts of worship; and second, that only those nontheistic conscientious objections that are based on intensely felt, selfless, and thoroughgoing personal commitment to the brotherhood of man should receive treatment equal to theistically based scruples. But if the Court does not adopt broad guidelines similar to these, it will have to evolve some other neotheological criteria to separate the dross from the gold.[4]

This has not happened yet. Indeed, the Court's treatment of the rationale for upholding or denying particular religious claims for preference or exemption has been too sporadic to confidently predict how it might decide a variety of issues. In recent cases on legislative chaplains, tuition tax deductions, federal aid stipulations, and religious displays, the Court's decisions cut across the grain of many of its previous rulings. It cites the separationist rhetoric of the Everson and McCollum decisions but the reality is still a very unpredictable, potentially entangling, accommodationism.

The problem may be even more deep seated than has yet been suggested by constitutional scholars. Giannella described the nature of the relationship between church and state as it presents itself today:

> In a political society characterized by significant governmental disability and wide personal autonomy, religious interests need not make special claims to achieve a wide zone of immunity. But in a society where governmental regulation is pervasive and individual freedom generally limited, religious interests must make special claims vis-a-vis the state if they are to enjoy an equally wide ambit of action.[5]

It is difficult to argue with the last statement purely as a practical matter. But if religion becomes only one more special interest to be appeased or special claim to be adjusted, what is then left to be said about the intrinsic value of religious liberty? When conflicts between church and state occur, it may indicate that

fundamental principles of justice have been violated by one or both sides. It is often assumed that conscientious opposition to laws on principled grounds demands nothing more than an exemption in the absence of a compelling state interest. But this approach reduces the conscientious principle to the status of a "personal truth" whose validity may not be questioned but which is not in any way regarded as binding society in its observance. It begs the question whether liberty of conscience is protected in the interest of protecting truths that make a claim on all of society. If the primary value of the First Amendment is to safeguard whatever truths may be gleaned from any vantage, then vagueness about the scope of the liberties it protects may only compound a common political tendency to ignore critics and reduce every argument to a matter of competing interests or points of view. It is worth asking, then, whether a polity founded upon certain common religious and political principles can successfully operate apart from its founding traditions.

Civil Rights

The Court has given a fairly broad construction to the religious rights of prisoners under the Civil Rights Act. In Cooper v. Pate, 378 U.S. 546 (1964), it held that a member of the Black Muslim sect may not be denied permission to purchase religious publications.

In another case involving the rights of prisoners, Cruz v. Beto, 405 U.S. 319 (1972), the Court held that even though a special place of worship need not be provided for every faith represented at a prison, reasonable opportunities must be afforded all prisoners for the free

exercise of their religion, including the holding of religious services. But Justice Rehnquist believed that this particular case should have been dismissed as frivolous and suggested that it may have been the brainchild of an "unscrupulous writ-writer." He called attention to what the trial judge had called the "voluminous, repetitious, duplicitous and in many instances deceitful" actions previously brought by the prisoner.

In Trans World Airlines v. Hardison and International Association of Machinists and Aerospace Workers v. Hardison, 432 U.S. 63 (1977), the Court reversed a religious discrimination judgment in favor of a former stores clerk. The respondent, who had joined the sabbatarian Worldwide Church of God in 1968, was originally able to avoid a scheduling conflict by transferring to the night shift. Later, when he transferred to a different building, he lost his seniority and was required to substitute for a vacationing employee on Saturday. The union was unwilling to violate the seniority provisions of the collective bargaining contract in order to arrive at an accommodation and the company fired the respondent after he refused to report for work on Saturdays.

An appellate court ruled that the airline and labor union had failed to comply with Title VII of the Civil Rights Act of 1964, which created the Equal Employment Opportunity Commission (EEOC) and, among other things, prohibited religious discrimination in employment. But Justice White, writing for the Court, resorted to a balancing test and held that the company was under no obligation to take steps inconsistent with a valid agreement: "Collective bargaining, aimed at effecting

workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts" (97 S.Ct. 2264, 2274). It maintained that if the airline had ordered a senior employee to replace him, "it would have denied [him] his shift preference so that Hardison could be given his" (97 S.Ct. 2264, 2275).

Justice Marshall, who was joined by Justice Brennan, was troubled by a result that compelled "adherents of minority religions to make the cruel choice of surrendering their religion or their job." He concluded that the Court had ignored the clear meaning of the act. He suggested that various alternatives were available to TWA to make a reasonable accommodation.

Church Tax Exemptions

One area of considerable controversy in recent years concerns the nature of the income and property tax exemptions enjoyed by churches. Now that churches have been required to make social security payments for all of their non-ministerial employees, this issue promises to become very acute in 1984. Different philosophies of tax exemption are currently in wide circulation. Some argue that they are immunities that protect churches from political interference. Other argue that they are privileges that may be accorded or denied charitable organizations in general. Still others claim that they are subsidies that may not be lawfully awarded to churches on establishment clause grounds.

The Court first weighed the constitutionality of church tax exemptions in Walz v. Tax Commission of City of New York, 397 U.S. 664

(1970), a case in which the the New York City Tax Commission was sued for granting property tax exemptions to religious organizations for property solely used for religious worship. Chief Justice Burger, who wrote for the majority, briefly touched on the establishment isue: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity" (397 U.S. 664, 668). He emphasized the difficulties of steering a "neutral course" between the apparently competing demands of the religion clauses and proposed a flexible approach:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly governmental acts, there is room for play at the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference (397 U.S. 664, 669).

But he urged that government involvement with religion is unavoidable, adding that "the very existence of the Religion Clauses is an involvement of sorts--one that seeks to mark boundaries to avoid excessive entanglement" (397 U.S. 664. 670).

Upon a review of the legislative history of the New York exemption, the Chief Justice concluded there was no evidence of an intent to establish religion, only a desire to spare "the exercise of religion from the burden of property taxation levied on private profit institutions" (397 U.S. 664, 673). He added:

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others--family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the

> scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions (397 U.S. 664, 674).

He drew a distinction between tax exemptions and subsidies and indicated that no transfer of funds was taking place, but also sought to balance a number of competing factors in order to ensure that the end result of the exemption "is not an excessive government entanglement with religion."

> The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. The test is inescapably one of degree. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement (397 U.S. 664, 674-75).

Justice Brennan concurred for the reasons he expressed in his Schempp opinion: ". . . the line we must draw between the permissible and impermissible is one which which accords with history and faithfully reflects the understanding of the Founding Fathers" (397 U.S. 664, 680). He contended that the tax exemption of churches is clearly supported by the historical evidence:

> The absence of concern about the exemptions could not have resulted from any failure to foresee the possibility of their existence, for they were widespread during colonial days. Rather, it seems clear that the exemptions were not among the evils that the Framers and Ratifiers of the Establishment Clause sought to avoid (397 U.S. 664, 682).

Justice Brennan maintained that such exemptions serve two secular purposes: they bear community welfare burdens that would otherwise have to be met by taxation or not met at all, and they "uniquely contribute to the pluralism of American society by their religious activities." Like the Chief Justice, he also refused to equate tax exemptions with subsidies, reserving the latter term for instances involving "the direct transfer of public monies."

In another concurring opinion, Justice Harlan indicated he was concerned about "the radiations of the issues involved," especially the potential for political divisiveness if a high degree of government involvement is required.[6] But he concluded that churches may properly receive an exemption in the context of a broad statute exempting a variety of groups, "even though they do not sponsor the secular-type activities mentioned in the statute but exist merely for the convenience of their interested members" (397 U.S. 664, 697). Moreover, he suggested that states "should be freer to experiment with involvement--on a neutral basis--than the Federal Government," including direct aid. But in a footnote which probably referred to Justice Brennan's opinion, he added: "The dimension of the problem would also require consideration of what kind of pluralistic society is compatible with the political concepts and traditions embodied in our Constitution" (397 U.S. 664, 699 n2). Wilber Katz, who was an early proponent of the policy of neutrality, later commented:

> Turning the question around, what kinds of pluralistic societies may be incompatible with our traditions? This would presumably be true of a pluralism in which equal benefits would be given to groups from which persons are excluded on grounds of race. Might it conceivably be true of a pluralism in which equal favor would be shown to groups which reject the principle of religious liberty?[7]

For that matter, might it even be true of a pluralism in which equal favor would be be shown to groups from which persons are excluded on grounds of religion or some other distinctive?

Justice Douglas, the only dissenter, insisted that a tax exemption is a subsidy and remarked that the tax exemption of churches is "highly suspect, as it arose in the early days when the church was an agency of the state." He contended that the church as a church or as a welfare agency must be treated differently than other organizations, "lest we in time allow the church qua church to be on the public payroll, which, I fear, is imminent." He reiterated a comment by Justice Brennan in the Schempp case: "'It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil policy, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government'" (374 U.S. 203, 259; 397 U.S. 664, 711). He concluded with a discussion of this "old, old problem" of government aid, which he illustrated by citing various objections that had been raised by Presidents Madison and Grant, then reviewing a study of real estate holdings by churches and statistics on federal grants to private religious schools.

It is difficult to assess whether the Walz ruling, despite its support by eight justices, lends much support to an argument for tax immunity or mandatory tax exemption. This implication may be drawn from

the Chief Justice's remarks on excessive entanglement. But a clear statement like the Court's earlier refusal to accept the licensing and taxing of colporteurs is missing here. Indeed, Justice Douglas had earlier indicated in his Murdock opinion that "a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities" is permissible, although this does not appear to square with the implications of the Follett ruling. In Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972), the Court vacated a lower court decision upholding the validity of a recently repealed Florida statute that exempted church property used as a commercial parking lot. Justice Douglas dissented.

By then, the divisions had sharpened in a pair of school aid cases that signaled the doctrinal fluctuations that have characterized the Burger Court. By the end of the decade, the Court handed down more than a dozen separate decisions on this subject. Arguments over fairness, neutrality, entanglement, political divisiveness, and secularization all came into play. The entire controversy became highly abstruse and involuted, much like the pornography and subversive activities cases. The debate is likely to continue in this vein until the Court breaks out of this self-imposed dilemma and begins grappling with an even more basic issues, such as finding solutions that neither burden nor subsidize religious schools and their patrons.

Private School Aid

The Court's consideration of aid to private schools began in earnest with two decisions in 1968. In Flast v. Cohen, 302 U.S. 83

(1968), it set the stage by holding that federal taxpayers have standing to sue to prevent federal expenditures for the purchase of textbooks and other instructional materials. Five separate opinions, including one dissent, were written, foreshadowing the fragmentation of the Court on this entire issue of school aid. In fact, three justices dissented in the first of this series, Board of Education v. Allen, 392 U.S. 236 (1968), which was decided the same day. The Court upheld a New York statute requiring school districts to purchase and loan textbooks to students enrolled in public and parochial schools. Justice White, who wrote for the majority, based his opinion on the child benefit concept of the Everson case. He cited the Pierce decision in support of his view that "religious schools pursue two goals, religious instruction and secular education:"

> A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in asuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes" (392 U.S. 236, 246-47).

Justices Black, Douglas, and Fortas dissented separately. Justice Douglas concentrated his attack on the ideological nature of textbooks by cannily pulling passages from various science and history textbooks that supported various religious viewpoints and then asking whether these books would be eligible for the program. He believed this practice presaged a politicization of the textbook selection process:

> It will be difficult, as Mr. Justice Jackson said, to say "where the secular ends and the sectarian begins in education." People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S., at 237-238, 68 S.Ct., at 478. But certain it is that once the so-called "secular" textbook is the prize to be won by that religious faith which selects the book, the battle will be on for those positions of control. Judge Van Voorhis expressed the fear that in the end the state might dominate the church. Others fear that one sectarian group, gaining control the state agencies which approve the "secular" textbooks, will use their control to disseminate ideas most congenial to their faith (392 U.S. 236, 262).

What Justice Douglas foresaw regarding the textbook selection process has, indeed, come to pass. The reasons for this, however, are not exclusively connected with the loans of textbooks. Indeed, the problem is inherent in the process due to the ideological nature of textbooks, the competing interests that have a stake in their selection, and the difficulty of knowing where the sectarian ends and the secular begins in education. Recent efforts by state education departments to pools their collective purchasing power in order to demand improvements have accompanied publicity over the poor intellectual quality of many textbooks.[8] Part of the difficulty comes from having to please too many interests and satisfying none in the process.

But Justice Douglas's point is well taken. The tender of federal or state aid may be characterized as an attractive nuisance. Financially pressed colleges and grade schools are often all too willing to accept the strings attached to government money. But while it is true that many schools erect a secular facade in order to obtain a financial edge, the other side of the coin is that over a period of time these church-affiliated schools that receive grant money tend to lose their identity and their original mission. It is an edge that cuts both ways. In France, the price of aid to parochial schools may be ultimate

absorption into the public school system.[9]

Three years later, the Court ruled in Tilton v. Richardson, 403 U.S. 672 (1971), that federal grant money may be used by church-related colleges and universities for the construction of academic facilities under the Higher Education Facilities Act of 1963, but overturned a twenty year limitation on a provision that the facilities must be used for secular educational purposes. Chief Justice Burger claimed that the entanglement problems were minimized because "college students are less impressionable and less susceptible to religious indoctrination" (403 U.S. 672, 686). He also believed that surveillance problems were reduced because the "the Government aid here is a one-time, single-purpose construction grant" (403 U.S. 672, 688). Three justices dissented.

Lemon v. Kurtzman and its companion cases, Earley v. DiCenso and Robinson v. DiCenso, 403 U.S. 602 (1971), were decided on the same day as the Tilton case. These cases involved a Pennsylvania statute authorizing salary supplements for teachers of secular subjects in religious schools and a Rhode Island statute that provided a similar "purchase of services" from nonpublic schools whereby the state reimbursed the schools for teachers' salaries, textbooks, and instructional materials. The Court ruled both statutes unconstitutional but split on doctrinal issues. The Chief Justice wrote the Court's opinion but was joined by only three other justices. Justice White dissented in one of the two cases. Justice Brennan concurred but sought a stronger rejection of school aid by the Court. Justices Black and Marshall joined a separate concurring opinion by Justice Douglas.

The Chief Justice injected the Court's opinion with an accommodationist coloring when he cited the Everson case and remarked that the line between permissible and impermissible aid is difficult to perceive. He set forth the famous three-part test used--with the notable exception of Marsh v. Chambers, 103 S.Ct. 3330 (1983)--in subsequent establishment cases: "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion'" (403 U.S. 602, 612-613). But he emphasized that a total separation between church and state is impossible:

> Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in Walz, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship (403 U.S. 602, 614).

The most revealing part of this opinion, however, was the Chief Justice's application of the concept of "divisive political potential," which he considered a variety of entanglement:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government (403 U.S. 602, 622-23).

This last statement was astonishing in the sweep of its implications and the use of political divisiveness as a test has found considerable disfavor. But there is evidence that the Court has qualified its construction of it. Justices Brennan and Sandra Day O'Connor both indicated in Lynch v. Donnelly, 104 S.Ct. 1355, 1367, 1375 n9 (1984), that the focus of any inquiry into political divisiveness must be "on the character of the government activity that might cause such divisiveness."

The Lemon case represented the first time the Court itself had struck a law permitting aid to private religious schools. It then remanded the case to a trial court for an appropriate decree. But the trial court did not prohibit payment for services provided before that date. Subsequently, in Lemon v. Kurtzman, 411 U.S. 192 (1973), known as Lemon II, the Court enjoined further payments under an elaborate procedure set by Pennsylvania to insure that state payments only went for services to services kept free of religious influences, but it did not deal with the reimbursement issue. Later, it held in New York v. Cathedral School, 434 U.S. 125 (1977), that the schools affected by its earlier decisions could not be reimbursed for services they had already performed.

The Lemon ruling inaugurated a series of separationist decisions, but the Court's record after 1975 became increasingly uneven. In Norwood v. Harrison, 413 U.S. 455 (1973), the Court held that a Mississippi textbook program crossed the line of permissibility because it aided private schools that might practice racial discrimination. In Levitt v. Committee for Public Education and Religious Liberty, 413 U.S.

472 (1973), ruled as impermissible the reimbursement of private schools for expenses incurred in the administration and grading of examinations, including traditional teacher-prepared tests. But the Court was more clearly divided in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), when it rejected maintenance and repair grants, along with tuition reimbursement grants in this case and in Sloan v. Lemon, 413 U.S. 825 (1973). Justice Powell wrote for the majority in the Nyquist case that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid" (413 U.S. 756, 771). In Grit v. Wolman, 413 U.S. 901 (1973), and Byrne v. Public Funds for Public Schools, 442 U.S. 907 (1979), the Court summarily affirmed decisions rejecting tuition relief schemes. But in Hunt v. McNair, 413 U.S. 724 (1973), the Court upheld state bond issues for the construction of facilities to be leased back to colleges for exclusively secular uses.

The following year, the Court sidestepped a question in Wheeler v. Barrera, 417 U.S. 402 (1974), whether federal funds could be used in teaching educationally deprived children on the premises of private religious schools, which was adopted as a means of administering Title I of the Elementary and Secondary Education Act of 1965. Title I had been amended to provide federal funding for special programs for educationally deprived children in both public and private schools. Justice Douglas, who was again the lone dissenter, chided his brethren:

> The plain truth is that under the First Amendment, as construed to this day, the Act is unconstitutional to the extent it supports sectarian schools, whether directly or through its students.

> We should say so now, and save endless hours and efforts which hopeful people will expend in an effort to constitutionalize what is impossible without a constitutional amendment (417 U.S. 402, 432).

But hope springs eternal in the human breast. In Meek v. Pittenger, 421 U.S. 349 (1975), the Court split over the specific forms of permissible aid when it ruled invalid the provision of auxiliary service programs and the direct loan of instructional materials and equipment, but upheld textbook loans. A year later the still divided Court upheld noncategorical grants to public and private colleges in Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976). The divisions finally reached a climax in Wolman v. Walter, 433 U.S. 229 (1977), when the Court upheld state expenditures for textbook loans, standardized test and scoring services, and diagnostic and therapeutic services for private school students, but rejected expenditures for transportation on field trips and for instructional materials or equipment. Six separate opinions--concurring in part and dissenting in part--were written. Justice Harry Blackmun, who wrote the first part of the Court's opinion, attributed a definite secular purpose to these practices: "The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction, . . . and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled" (43 U.S. 229, 240).

But three years later Justice Blackmun was among the dissenters in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), when the Court held that the Wolman case was controlling and upheld direct cash reimbursements to schools that administered

state-prescribed examinations and graded them. Justice Blackmun underscored the perplexities by citing defections among the judges from one side to the other in the course of the decade since the first Lemon case. Justice Stevens, who also dissented in this case, aptly summarized the entire series of school aid rulings as follows:

> The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools. In groping for a rationale to support today's decision, the Court has taken a position that could equally be used to support a subsidy to pay for staff time attributable to conducting fire drills or even for constructing and maintaining fireproof premises in which to conduct classes. Though such subsidies might represent expedient fiscal policy, I firmly believe they would violate the Establishment Clause of the First Amendment (444 U.S. 646, 671).

Thus disagreements over the application of the establishment clause in schol aid cases had brought the Court to a stalemate by 1980. Ever since they were devised, the secular purpose and neutral primary effect tests have been used to justify policies as variable as the enforcement of Sunday closing laws against Orthodox Jews, aid to religious schools because they are agents of the state, and the withholding of such aid to religious schools because they are not completely secular. shifts among the justices and the ad hoc nature of the Court's rulings should not be too surprising considering the depth of the underlying problem. A total prohibition of school aid, like a denial of religion-based exemptions, might then compel the court to examine the establishment implications of basic public policies, whether they are the utilization of religious schools to carry out secular state purposes or the use of religious symbols or values to bolster a sense of community spirit or national and local allegiance. The fact that religious schools--and even

churches--are incorporated by the state suggests that they may be treated as agents of the state. If the Court were ever to adopt this view, its implications from a separationist standpoint can only be imagined.

Perhaps the issue is whether a true disestablishment of religion is even possible and what a policy of strict separation might therefore entail if it were ever practically implemented. The accommodationists have persisted in minimizing or ignoring the entanglements involved in direct and even indirect aid. The separationists have similarly overlooked the already considerable burden the state places on religious organizations by setting various requirements and then subsidizing their expenses for all schools but sectarian schools. Neither side has been able to find a satisfactory common ground and may never do so as long as they seek their equally unreachable goals of religious neutrality and secular homogeneity.

Compulsory School Attendance

By 1972, the Court had already ruled in several cases that clearly involved compulsion of religious belief or practice. It had struck down various laws and regulations in the Pierce, Barnette, Torcaso, and Sherbert cases. On the establishment side of the ledger, the Engels and Schempp cases are particularly illustrative.

After the Sherbert case, the Court handed down another groundbreaking ruling in this regard when it restricted the parens patriae power of the state in Wisconsin v. Yoder, 406 U.S. 205 (1972), and permitted Amish children to withdraw from school after completing

the eighth grade. Chief Justice Burger reviewed at length the Amish way of life and their educational views, noting that "they view secondary school as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs" (406 U.S. 205, 211), and that they usually establish their own elementary schools. Expert witnesses testified that high school age children were taught to be productive citizens through a system of learning by doing and contended that high school attendance would result in great psychological harm for the Amish children and in the destruction of the Old Order Amish community.

The Chief Justice drew on the Pierce and Sherbert rulings in writing his opinion:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. . . . Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. . . . As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. . . . Thus, a State's interest in universal education, however highly we rank it, is not totally free from the balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare [them] for additional obligations" (406 U.S. 205, 213-14).

Drawing on the Sherbert test, he declared: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion" (406 U.S. 205, 220).

The Chief Justice also reviewed the origins of compulsory school attendance laws, associating them with the movement to prohibit child

labor, and rejected "a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State" (406 U.S. 205, 234).[11] But the decision was a narrow one that not greatly influenced subsequent state actions. Justices Stewart and Brennan concurred with the observation that Wisconsin had sought to brand the parents as criminals for following their religious beliefs. Justice White placed a narrow construction on the Court's decision and commented that the administration of an exemption for Old Order Amish "will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices . . . which the Court has heretofore been anxious to avoid" (406 U.S. 205, 240).

Justice Douglas, however, dissented on the grounds that the children had not been examined by the Court to determine their own wishes in the matter. He also did not believe that the "law and order" record of the Amish was relevant and remarked that a religion is a religion regardless of the criminal records of its members. But he conceded that "if a group or society was organized to perpetuate crime and that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis" (406 U.S. 205, 246). Referring to the polygamy decisions, he predicted:

> Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds will be overruled (406 U.S. 205, 247).

Richard E. Morgan has represented the ruling as a major doctrinal

innovation:

> . . . Yoder . . . suggests that Burger may be in the process of persuading himself that "no-entanglement" is an altogether independent value; that there is no establishment clause violation absent of entanglement. Government may create favored classifications for the religious so long as it does not administratively intermeddle. . . . The free-exercise clause has now grown far beyond the confines of Reynolds, and it is problematical whether the Burger Court, even if a majority wished to, could reduce free-exercise to its pre-Sherbert dimensions.[12]

But in fact the Yoder case was narrowly decided and, to date, remains a singular exception. Those who expected a higher profile for the free exercise clause have had a long wait. The other shoe has yet to drop. As in the Sherbert case, the Court simply balanced the free exercise and establishment considerations, tipping them in favor of the free exercise values. But there is no indication that the Court is willing to extend such exceptions. Years earlier it had let stand without comment a lower court ruling in Donner v. New York, 342 U.S. 884 (1951), that upheld compulsory attendance at state-approved elementary schools despite its effect of inhibiting religious liberty.

In the absence of a clear standard of religious practice, the Court has had to continually wrestle with the problem of where and how to draw the line between free exercise rights and the interest of society in being "left free to reach actions which [are] in violation of social duties or subversive of good order" (98 U.S. 145, 167). Given the breadth of the social behavior compassed by the word religion, the difficulties raised by Justice Douglas are not to be lightly dismissed. The ingenuity of state legislatures and local officials in discovering new ways of either favoring or restricting religious behavior should not be discounted. Very often the prevailing attitude is that where there

is a will there is a way. These ways are many and varied. If one does not suffice, there are many others to call upon. Thus in legal battles over government subsidies or regulations, the final outcome is most likely to be determined by the larger purse.

Synthesis

Several recurring motifs knit the Supreme Court's pronouncements on religious issues throughout its history. The later free exercise and establishment clause tests draw upon political and religious perspectives that span several centuries.

The major theme is a variation of the state religion motif. This is the idea that the state, as the sovereign, is the parens patriae over the people of the land, including the church. The Holy Roman Emperor claimed to be the vicar of Christ. The later French and English monarchs were awarded such titles as Most Christian King and Defender of the Faith and the church was one of the great estates of the realm. The first Queen Elizabeth became Head of the Church of England. Political power was always expected to be vested with spiritual authority. Napoleon's act of crowning himself thus had great significance, as did his dissolution of the Holy Roman Empire. Together they symbolized the end of the idea of a united Christian Europe.

The institutions of the state, some of which predate ancient Rome, are religious in origin. Their current identification with secular regimes does not in the least detract from their religious significance but it has nevertheless changed the character of the relationship between church and state. From the viewpoint of the church, the state

is still obliged to be "a minister for good." E. R. Norman maintains that a total separation of religious belief and public life was never contemplated by the religious dissenters who sought to disestablish and remove "the privileged and exclusive state churches" and insists that "an overwhelming majority of men still believed in the confessional office of the state."[13] But the church of today no longer serves as the conscience of the state. This role is claimed by academia, the press, presidential advisers, the courts, and congressional committees. Of course, the question of who will guard the guardians remains the perennial problem under any regime.

The nature of the current disestablishment of religion is such that the political participation of the church must be fairly circumspect. The spiritual authority of the church still receives considerable deference. But as an organization that holds property and makes pronouncements on politically sensitive issues, the church is generally treated as one among many competing interest groups. Many of the accoutrements of state religion have survived their original functions, but they are not placed in the service of avowedly secular purposes with the stipulation that they use the least restrictive means consistent with state interests and be religiously neutral in effect.

The minor theme of the Court's rulings on religion is the perennial quest to maintain a constitutional balance between compelling state interests and religious liberties. Assuming that the state is not simply a neutral arbiter of competing interests with none of its own, it will tend to favor some religions over others despite all intentions to the contrary. Whatever may be said about the justice of the rulings

themselves, the admitted religious bias of the Reynolds and Davis rulings was a more predictable and more realistic judicial standard than the professed religious neutrality of the Everson and Lemon cases. If religion can include practically any idea or activity, then the constitutional importance of religion is likely to suffer in the interests of maintaining order.

By disestablishing religion, the judiciary has not thereby avoided the pitfalls of state religion. It has simply disguised the nature of the conflict. Religious activities that do not show their colors enjoy an advantage over those that do. It is difficult to imagine that a teacher might be prevented from teaching classical, Marxist, or Keynesian economics on the grounds that this would be an establishment of religion. But Justice Black articulated a fundamental problem in his Epperson dissent when he suggested that the evolutionary theory has a religious bias. Evangelical Christians, for example, will be found on almost all sides of any of these issues. But the significant fact here is that the issues themselves are politically and religiously divisive because they raise basic questions of a religious nature. While interpretations and applications of biblical teachings respecting creation, tithing, just weights and measures, employment practices, and property may differ, the issues are no less religious in the context of a political discussion than in a church setting. The secularization of the Sunday closing laws does not make them any less of a religious establishment than the secularization of the Christmas holiday in the recent Lynch case. To maintain otherwise, as Justice Brennan suggested in the latter case, is to trivialize the institution.

The free exercise tests used in the Reynolds and Davis cases appear to have begun losing ground with the Murdoch, Ballard, or Torcaso decisions. The Seeger and Welsh cases took the redefinition of religion to such an extreme that its usefulness as a definition of conduct--as opposed to mere belief--has been terminated. It was with the Sherbert ruling, however, that the free exercise clause acquired for the first time an independent status from other First Amendment considerations. Along with the Yoder decision, it represents a unique attempt to ensure free exercise values and, as such, may remain highly exceptional. Not only a clear and present danger but a compelling state interest may be generally cited as restrictions upon free exercise values. But it appears that the Reynolds and Davis tests, which defined religion more narrowly, might not have necessitated the kind of balancing between religious and state interests that has resulted. Had these rulings served more completely as a model for later doctrinal refinements the Court might have avoided creating a tension between the free exercise and establishment clauses by taking a narrower view of each. Perhaps this would have vindicated Justice Harlan's assertion in the Sherbert case that the "situations in which the constitution may require special treatment on account of religion . . . are few and far between" (374 U.S. 398, 423).

Assuming that the modern state is less guided by its religious traditions than ever, the conflicts between state interest and religious conscience may be expected to increase. In this context, it is not special treatment for dissenters but a careful review of priorities that is required. Different perceptions of power, morality, and the common

good are often at work whenever fundamental religious values--including those of the state--come into conflict. The issues themselves are often short-lived and are rarely brought to general public attention, but they are dominated by recurring themes that may be indicative of more general problems of public policy. As a record of the shifting battle lines, the agenda at the Conference on Government Intervention in Religious Affairs, which was held in the Spring of 1982 in Washington, D.C., is especially illuminating:

1. Efforts by state and local governments to regulate fund-raising by religious bodies
2. Efforts to require religious bodies to register with and report to government officials if they engage in efforts to influence legislation (so-called "lobbying disclosure" laws)
3. Efforts by the National Labor Relations Board to supervise elections for labor representation by lay teachers in Roman Catholic parochial schools (which have been halted by the U. S. Supreme Court)
4. Internal Revenue Service's definition of "integrated auxiliaries" of churches that tends to separate church-related colleges and hospitals from the churches that sponsor them and to link them instead to their "secular counterparts"
5. Attempts by state departments of education to regulate the curriculum content and teachers' qualifications in Christian schools (which have been halted by state courts in Ohio, Vermont, and Kentucky, but upheld in Nebraska, Wisconsin, and Maine)
6. Attempts by federal and state departments of labor to collect unemployment compensation taxes from church-related agencies that hitherto were exempt, as churches are
7. Imposing by the (then) Department of Health, Education and Welfare of requirements of coeducational sports, hygiene instruction, dormitory and off-campus residence policies on church-related college (such as Brigham Young University) which have religious objections to mingling of the sexes in such ways
8. Efforts by several federal agencies (Civil Rights Commission, Equal Employment Opportunities Commission, Department of Health and Human Services, Department of Education) to require church-related agencies and institutions, including theological seminaries, to report their employment and admissions statistics by race, sex, and religion, even though they receive no government funds, with threats to cut off grants or loans to students unless they hire faculty, for instance, from other religious adherences
9. Sampling surveys by the Bureau of the Census of churches and

church agencies, requiring them to submit voluminous reports under penalty of law, even though the Bureau admitted to a church attorney that it had no authority to do so, but refused to advise churches that they were not required to comply

10. Grand jury interrogation of church workers about internal affairs of churches
11. Use by intelligence agencies of clergy and missionaries as informants
12. Subpoenas of ecclesiastical records by plaintiffs and defendants in civil and criminal suits
13. Placing a church in receivership because of allegations of mismanagement of church funds made by dissident members
14. Granting by courts conservatorship orders allowing parents to obtain physical custody of (adult) offspring out of unpopular religious movements for purposes of forcing them to abandon their adherence thereto
15. Withdrawal by IRS of tax exemption from various religious groups for failure to comply with "public policy"
16. Determination by IRS of what is "religious ministry" by clergy to qualify for exclusion of cash housing allowance from taxable income (often in contradiction to the religious body's own definition of "ministry")
17. Redefinition by the civil courts of ecclesiastical polity, so that hierarchical bodies are often in effect rendered congregational with respect to their ability to control local church property, and dispersed "connectional" bodies are deemed to be hierarchical with respect to their ostensible liability for torts committed by local entities, contrary to their own self-definition in both cases[14]

So far, the Supreme Court has directly addressed only the third, fifteenth, and seventeenth of these items. The lower courts have ruled on several others, many of which are treated in the remaining chapters. But this listing and the examples that follow only scratch the surface of a problem whose depths have yet to be fully explored. They are simply the tangible expressions of a basic dilemma: how to protect religious liberty when the political and legal institutions themselves are fundamentally religious in their origins and effects.

The potential points of conflict are practically limitless, but for the remainder of this dissertation the issues are divided into three categories: fiscal, educational, and social regulation. Each category

raises different but related questions. For example, where is the line to be drawn regarding fees, taxes, and subsidies, such as educational vouchers and tuition tax credits? The Supreme Court has recently decided unfavorably in regard to the religious tax exemptions claimed in United States v. Lee, 102 S.Ct. 1051 (1982), and Bob Jones University v. United States, 103 S.Ct. 2017 (1983). In the area of education, does the free exercise clause have any bearing on mandatory curriculum standards and teacher certification requirements? And in regard to social regulation, should churches and church schools have a free hand in helping to shape the face of their communities? In Larkin v. Grendel's Den, 103 S.Ct. 505 (1982), the Court held that churches may not be empowered to effectively veto the location of a liquor store in their immediate neighborhood.

Changing practical circumstances have considerably altered the character of the basic separationist and accommodationist positions. Neither position is necessarily hostile to religious liberty, but either one may be used to suppress religious liberty. Judicial doctrine has reached such an impasse that it may be time to change the terms of debate. It is hoped that the discussion which follows will provide some assistance toward restructuring the political alternatives and reconstituting the conscience of the state.

Notes

[1]Dallin H. Oaks, "Trust Doctrines in Church Controversies," Brigham Young University Law Review (1981): 806.

[2]Robert A. Recio, "Jones v. Wolf: Church Property Disputes and Judicial Intrusion in to Church Governance," Rutgers Law Review, 33 (1981): 561-62.

[3]See Berman v. United States, 156 F.2d 377 (9th Cir. 1946), cert. denied, 329 U.S. 795 (1946), for an express rejection of this innovation. In his dissent, Judge William Denman wrote: "It is wrong to say that 'a sincere devotion to a moralistic philosophy' is inconsistent with 'a belief in his responsibility to an authority higher and beyond any earthly one,' if that supernatural authority is confined to a belief in a particular god. This would exclude all Taoist China and in the Western world all believers in Comte's religion of humanism in which humanity is exalted into the throne occupied by a supreme being in monotheistic religions" (156 F.2d 377, 384). Compare Fellowship of Humanity v. County of Alameda, 315 P.2d 395 (1st Dist. 1957): "Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing a belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of the belief. The content of the belief is of no moment." See also United States v. Downer, 335 F.2d 521, 524 (2nd Cir. 1943), and the decision by Judge Warren Burger in Washington Ethical Society v. District of Columbia, 249 F.2d (D.C.Cir. 1957).

[4]Donald A. Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development," Harvard Law Review, 80 (May 1967): 1430-31.

[5]Ibid., 1383.

[6]The concept of "political divisiveness" was earlier suggested by Paul Freund: "While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall." Paul A. Freund, "Public Aid to Parochial Schools," Harvard Law Review, 82 (1969): 1692.

[7]Wilber G. Katz, "Radiations from Church Tax Exemption," The Supreme Court Review (1970): 107. On the concept of neutrality, see Wilber G. Katz, "Freedom of Religion and State Neutrality," The University of Chicago Law Review, 20 (1953): 426-40.

[8]Lee Mitgang, "Education Critics Decry 'Dumbed-Down' Textbooks,"

The Oregonian, 10 April 1984, p. A-12.

[9]E. J. Dionne, Jr., "French Cabinet OKs Private School Bill," The Oregonian, 19 April 1984, p. A-10. A year earlier, there were reports indicating that those church-related schools which received state subsidies would be absorbed into the public school system.

[10]See, for example, Edward McGlynn Gaffney, Jr., "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," Saint Louis University Law Journal, 24 (1980): 205-36.

[11]The parens patriae doctrine, which lies at the foundation of the juvenile justice system, had already been greatly reduced in scope by In re Gault, 387 U.S. 1 (1967). For background on the juvenile court system and the concept of delinquency see Julian W. Mack, "The Juvenile Court," Harvard Law Review, 23 (December 1909): 116-17; Anthony M. Platt, The Child Savers: The Invention of Delinquency (Chicago: The University of Chicago Press, 1969), pp. 135-36.

[12]Richard E. Morgan, The Supreme Court and Religion (New York: Free Press, 1972), pp. 160-61.

[13]E. R. Norman, The Conscience of the State in North America (Cambridge: University Press, 1968), p. 15.

[14]Dean M. Kelley, "Religious Freedom: The Developing Pattern of Restriction," in Freedom and Faith: The Impact of Law on Religious Liberty, ed. Lynn R. Buzzard (Westchester, Ill.: Crossway Books, 1982), pp. 82-83.