Separation of Church and State, Neutrality, and Religious Freedom in American Constitutional Law

Robert A. Sedler, Distinguished Professor of Law, Wayne State University

Abstract

Religious freedom is a favored value under the United States Constitution. The Constitution provides two-fold protection to religious freedom by means of the Establishment Clause and the Free Exercise Clause. The Establishment Clause protects against the "establishment" of an official church by the government and against governmental action "establishing religion," while the Free Exercise clause is a textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs, free from governmental interference. The Establishment Clause would appear to an outside observer as strongly endorsing the concept of separation of church and state, and the Supreme Court has sometimes referred to the Establishment Clause as creating a "wall of separation" between church and state. However, the concept of separation of church and state has not in theory or practice guided the Court's Establishment Clause jurisprudence. To the contrary, the Court has interpreted the Establishment Clause not as requiring separation of church and state in the sense that the government may not constitutionally become involved with religion, but as only requiring that the government must maintain a course of complete official neutrality toward religion. This means that the government may not favor one religion over another religion and may not favor religious belief over non-religious belief. But as a constitutional matter, the government may become involved with religion in a number of ways so long as it maintains a course of complete official neutrality toward religion. It is the thesis of this paper that the guiding force governing the Supreme Court's Establishment Clause jurisprudence has been a concern with protecting religious freedom, and that the Court will only find an Establishment Clause violation when the law or governmental action in question has the potential for interfering with the religious freedom of individuals or groups who are not the beneficiaries of that law or governmental action. While the cases demonstrate that the Court has found many Establishment Clause violations over the years, the Court has also upheld laws or governmental actions that have the effect of treating religion equally with non-religion. This trend has been particularly evident in recent years with respect to the government's including the religious with the secular in the receipt of governmental benefits. The Court has also upheld against Establishment Clause challenge governmental actions that are precisely tailored to protect the religious freedom of individuals and religious institutions. In the final analysis, as this paper will demonstrate, the function of the Establishment Clause in the American constitutional system is to protect religious freedom by requiring that the government maintain a course of complete official neutrality toward religion. The government is not required by the Establishment Clause to be hostile toward religion, but to the contrary may treat the religious and the secular equally and may act affirmatively to protect the religious freedom of individuals and religious institutions.

I. **Introduction**

Religious freedom is a favored value in the American constitutional system.

It is the first guarantee of the First Amendment, which provides that there shall be "[n]o law respecting the establishment of religion or prohibiting the free exercise thereof."[1] The First Amendment was enacted against the background of an established church in Great Britain during the colonial period and the official persecution of religious dissenters in Great Britain and colonial America.[2] It provides a two-fold protection to religious freedom by what we refer to as the "religion clauses." The Establishment Clause protects against the "establishment" of an official church by the government and against governmental action "establishing religion," while the Free Exercise clause is a textual guarantee of peoples' right to practice their religion and to hold and act on religious beliefs, free from governmental interference. [3]

---

[1] U.S.CONST.amend. I. While the guarantees of the Bill of Rights by their terms apply only to the federal government, the major guarantees of the Bill of Rights, such as the religion clauses, have been incorporated into the "liberty" protected by the Fourteenth Amendment's due process clause, and so apply equally to the states. See the discussion in the concurring opinion of Justice William Brennan in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 230-234 (1963) (Brennan J., concurring).

[2] See the discussion of the historical background of the religion clauses of the First Amendment in Everson v. New Jersey, 330 U.S. 1, 8-14 (1947).

[3] As the Supreme Court has stated: "The structure of our government has, for the preservation of religious liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority." *Everson*, 330 U.S. at 15.

Religious freedom means freedom with respect to religious belief - the belief in the existence or non-existence of a Supreme Being, and the nature and manifestation of such existence. In this sense, all people, secularists, atheists and agnostics, as well as religious adherents, have religious beliefs, and the religion clauses protect peoples' freedom with respect to those beliefs.

The two-fold protection of religious freedom under the American Constitution is a distinctly American phenomenon. It is possible in a democratic society for governmental establishment of religion to coexist fully with religious freedom. This is clearly the situation in Great Britain. In Great Britain, there is not only the officially-established Church of England and Church of Scotland, supported by public funds, but the government aids other religions by providing substantial public funds to sectarian schools. *See* the discussion of governmental funding of sectarian schools in Governing Body of JFS and the Admission Panel of JFS and others [2009] UKSC 15, 63-65 (Judgment of Lord Hope), [2010] IRLR 136. At the same time, Great Britain affirmatively protects religious freedom by its enactment human rights laws and its adherence to the European Convention on Human Rights, much in the same way and to the same extent as religious freedom is protected under the Free Exercise Clause in the United States. *See e.g.*, R (on the application of SB) v. Governors of Denbigh High School, 2 All ER 396 [2005], 2005 EXCA Civ 1999 (school could not require student to wear school uniform instead of jilbab, which she claimed was required by her Moslem religion); R (on the application of Suryanada [2007] EWHC 1736 (Q.B.Admin) (proposed slaughter of bullock solely on basis of bullock's testing positively for bovine tuberculosis violated religious freedom of Hindu community). Similarly, in Canada, the Charter of Rights and Freedoms contains a freedom of conscience and religion clause, but no establishment clause. The reason for this is that in Canada the government continues to support Protestant and Catholic sectarian schools as part of the pact between the Founding Nations at the time of Confederation.*See* Adler v. Ontario [1996] 3 S.C.R. 609, where the Supreme Court of Canada held that the refusal of the province to fund the sectarian schools operated by other religious groups did not violate the freedom of conscience and religion or the equality provisions of the Charter. *Compare* Re Zylberberg and Director of Education of Sudbury Board of Education, 65 O.R.2d 641 (Ontario Court of Appeal 1988), holding that a requirement that public school students participate in school-sponsored prayer violated the freedom of conscience and religion clause of the Charter. But our approach is different, and as a matter of constitutional structure, in the United States we protect religious freedom both by prohibiting the government from "advancing or inhibiting religion" - the Establishment Clause requires that the government pursue a policy of complete official neutrality toward religion -

The Supreme Court has interpreted the Establishment Clause very broadly to protect religious freedom, and as a consequence, the Establishment Clause has supplanted the Free Exercise Clause as the primary means of protecting religious freedom under the American Constitution.[4]

The Establishment Clause would appear to an outside observer as strongly endorsing the concept of separation of church and state, and the Supreme Court has sometimes referred to the Establishment Clause as creating a "wall of separation" between church and state.[5] However, the concept of separation of church and state has not in theory or practice guided the Court's Establishment Clause jurisprudence. To the contrary, the Court has interpreted the Establishment Clause not as requiring separation of church and state in the literal sense that the government may not constitutionally become involved with religion, but only as requiring that the government must maintain a course of complete official neutrality toward religion. The requirement of complete official neutrality toward religion is the overriding principle of the Establishment Clause. Under this overriding principle, the government cannot favor one religion over another religion and cannot favor religious belief over non-religious belief.[6] The overriding principle of complete official neutrality toward religion has replaced the earlier "wall of separation concept.[7] Or to put it another way, under the Establishment Clause, the objectives to be achieved by the concept of separation of church and state are achieved by the requirement of complete official neutrality toward religion. This means that as a constitutional matter, the government may become involved with religion in a number of ways so long as it maintains a course of complete official neutrality toward religion.

The neutrality principle furthers the "objective of separation, by precluding the government from favoring religion, but at the same time, it does not require the government to be hostile to religion.[8] Because the Establishment Clause does not require the government to be hostile to religion, obviously, the government can include religious institutions in the services it

---

and by specifically guaranteeing religious freedom. In the United States, as we will see, any school-sponsored prayer in the public schools violates the Establishment Clause, so its is not necessary for the courts to decide whether the imposition of the requirement that students participate in school sponsored prayer violates the Free Exercise Clause.

[4] *See* the discussion of this point in Robert A. Sedler, "The Constitutional Protection of Religious Liberty in the United States," 2010 FORUM ON PUBLIC POLICY ON LINE, Vol.5, pp.9-10.

[5] Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 146, 164 (1879). In *Everson*, the first modern Establishment Clause case, Justice Black, writing for the Court stated: "in the words of Jefferson, the clause against the establishment of religion by law was intended to erect a 'wall of separation' between church and State." *Id*. at 16 (quoting *Reynolds*, 98 U.S. at 164).

[6] *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1981).

[7] The problems with the "wall of separation" concept were pointed out by Justice Douglas in Zorach v. Clauson, 343 U.S. 306,312 (1952). Justice Douglas noted that while the First Amendment "reflects the philosophy that Church and State should be separated," "[it] does not say that in every and all respects there shall be a separation of Church and State." Rather, "it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."

[8] As the Court noted in *Everson*: "The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18.

provides to the public generally, such as police and fire protection,[9] and likewise, the government can include religious institutions among recipients of governmental funding to provide secular services.[10] In addition, the principle of complete official neutrality is not breached when the government provides religious organizations with equal access to governmental facilities, such as access to a public forum. This being so, such equal access is required by the First Amendment freedom of speech principle of content neutrality.[11] And as we will see, at least in certain circumstances, the Court has held that the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits.

It is the thesis of this paper that the guiding force governing the Supreme Court's Establishment Clause jurisprudence has been a concern with protecting religious freedom. This being so, I maintain that the Court has found an Establishment Clause violation only when the law or governmental action in question has the potential for interfering with the religious freedom of individuals or groups who are not the beneficiaries of that law or governmental action. While the cases demonstrate that the Court has found many Establishment Clause violations over the years, the Court has also upheld laws or governmental actions that have the effect of treating religion equally with non-religion. This trend has been particularly evident in recent years with respect to the government's including the religious with the secular in the receipt of governmental benefits. The Court has also upheld against Establishment Clause challenge governmental actions that are precisely tailored to protect the religious freedom of individuals and religious institutions.

I will now discuss the four situations where the Court's Establishment Clause jurisprudence can be demonstrated to have been guided by a concern for protecting religious freedom. One, the Court has held unconstitutional under the Establishment Clause all governmental actions that have had the effect of favoring one religious belief over another religious belief or of favoring religious belief over non-religious belief. In so doing, the Court has protected the religious freedom of those persons who do not share the favored religious beliefs. Two, the Court has protected the religious freedom of religious institutions and their adherents by holding that under the Establishment Clause[0] the government cannot become involved in matters of religious doctrine or policy and must respect the religiously-based decisions of religious institutions. Three, the Court has held that at least in some circumstances,

[9] As Professor Laycock has noted, police and fire protection are such a universal part of our lives that they have become part of the baseline, and to deny them to churches would put religion outside the protection of the law." Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L.REV. 993, 1005 (1990).

[10] *See* the discussion in Sedler, Understanding the Establishment Clause, *infra*, note 12 at 1374-1376.

[11] *See* the discussion, *Id*. at 1331-1338, 1392-1393. *See also* Good News Club v. Milford Central School, 533 U.S. 98 (2001) for a discussion of the equal access of religious speech to a designated public forum, here the use of after-school facilities in a public school.

[0]

the Establishment Clause permits the government to include the religious with the secular in the receipt of governmental benefits, and to that extent the Establishment Clause protects the religious freedom of religious institutions and religious adherents. Fourth, the Court has held that the Establishment Clause permits the government to take actions that are precisely tailored to protect the religious freedom of individuals and religious institutions.

II. **The Establishment Clause and Protecting Religious Freedom**

A. Governmental Action Advancing Religion

The most important operative principle of the Establishment Clause is that the government may not take any action that has the purpose or effect of advancing or inhibiting religion.[12] Most of the cases decided under this operative principle involve the situation where the government has taken action that favors religion over non-religion and sometimes that favors a particular religion over another. First off, the government may not provide public funds to support the religious activities of churches and other religious institutions. In *Everson*, Justice Black stated a core meaning of the Establishment Clause: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." [13] Professor Jesse Choper has observed, "There is broad consensus that a central threat to the religious freedom of individuals and groups-indeed, in the judgment of many, 'the most serious infringement upon religious liberty'-is posed by 'forcing them to pay taxes in support of a religious establishment or religious activities.'"[14] In addition to precluding the government from providing public funds to churches to be used for religious activities, the government may not provide public funds directly to sectarian schools, such as funds for the maintenance and repair of parochial school buildings,[15] or an unrestricted lump-sum grant, purportedly designed to reimburse the parochial schools for the expenses

[12] Some years ago, I published a lengthy law review article in which I attempted to explicate the structure of the Establishment Clause from the perspective of constitutional litigation. Robert A. Sedler, Understanding the Establishment Clause: The Perspective of Constitutional Litigation, 43 WAYNE LAW REVIEW 1317 (1997). I have recently completed a revisit and updating of that article, Robert A. Sedler, Understanding the Establishment Clause: A Revisit which will be published in the Wayne Law Review in 2014. In the article, I explain the Establishment Clause as consisting of four components. An overriding principle: complete official neutrality toward religion; three operative principles; subsidiary doctrines, and precedents in the main areas of Establishment Clause Litigation. The three operative principles are based on what is called the *Lemon* test, first propounded by the Court in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), but reflecting "the cumulative criteria developed by the Court over many years." The first operative principle is that the law or governmental action must have a secular legislative purpose. The second operative principle is that the principal or primary effect of the law or governmental action must be neither to advance nor inhibit religion. The third operative principle is that the challenged law or governmental action may not foster "excessive governmental entanglement with religion." If either operative principle is violated, the law or governmental action violates the Establishment Clause. In actual litigation, the operative principles serve as the point of departure for Establishment Clause analysis. The *Lemon* operative principles are discussed in Understanding the Establishment Clause, 43 WAYNE LAW REVIEW at 1343-1351.

[13] Everson v. Board of Education, *supra*, note 2 at 15-16.

[14] Jesse H. Choper SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 16 (1995).

[15] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

mandated by state law,[16] or funds to supplement the salaries of parochial school teachers in secular subjects.[17] By prohibiting the government from providing funds to churches and religious institutions to support religious activities, the government is thereby protecting the religious freedom of those persons who are not members of the church or religious institution. An essential component of religious freedom in the United States then is the right to be free from taxation for the benefit of churches and religious institutions.

Next, under this operative principle the Court has held unconstitutional all state-sponsored religious practices in the public schools, such as school-sponsored prayers and bible-reading,[18] the posting of a copy of the Ten Commandments in public school classrooms,[19] a "moment of silence" designed to encourage school prayer,[20] and school-sponsored prayers at school commencements and athletic events.[21] Moreover, the government may not try to advance a biblical view of creation by prohibiting the teaching of evolution in the public schools,[22]," or by requiring the teaching of "creation science" in addition to evolution, based on the Court's factual finding that "creation science" was not science, but religion masquerading as science.[23]

---

[16] Levitt v. Committee for Public Education, 413 U.S. 472 (1977).

[17] Lemon v. Kurtzman, *supra,* note 12. However, as will be discussed subsequently, *infra,* note 52 the Establishment Clause does not prohibit the government from providing funds for secular purposes to most religiously-affiliated colleges and universities, since they are sufficiently similar to secular colleges and universities in their operation and function. The Establishment Clause generally permits the government to provide aid to religious institutions in order to enable them to perform a secular function.

[18] Engel v. Vitale, 370 U.S. 421 (1962), School District of Abington Township v. Schempp, 374 U.S. 203 (1963),

[19] Stone v. Graham, 449 U.S. 39 (1980).

[20] Wallace v. Jaffree, 472 U.S. 38 (1985).

[21] Lee v. Weissman, 505 U.S. 577 (1992); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000);

[22] Epperson v. Arkansas, 393 U.S. 97 (1968).

[23] Edwards v. Aguillard, 482 U.S. 578 (1987).The most recent attempt to undermine the teaching of evolution in some school districts has been to counter evolution with "intelligent design," purportedly an alternative "scientific" explanation of the origin of human life. Applying these precedents to the teaching of "intelligent design, a federal court held an extensive evidentiary hearing, and made comprehensive findings to the effect that like "creation science, " "intelligent design was not science, but religion masquerading as science, so that the teaching of "intelligent design" in the public schools violated the Establishment Clause. *See* Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D.Pa.2005). The effect of the District Court decision was to ban the teaching of "intelligent design" as effectively as if the decision had been rendered by the Supreme Court. The findings were not only comprehensive, but so strongly supported by expert scientific testimony as to be unassailable. Any school district motivated to try to put "intelligent design" into the curriculum would be advised by the school board attorney that the district would be sued in federal court and the federal judge, relying on the findings in the *Dover* case, would hold the practice to be violative of the Establishment Clause.

In Tangipahoa Parish Board of Education v. Freiler, 185 F.3d 337 (5th Cir. 1999), *cert.denied*, 530 U.S. 1251 (2000), a school board adopted a resolution that required the teaching of evolution in the schools to be accompanied by a disclaimer to the effect that "the lesson to be presented, regarding the origin of life and manner, is known as the Scientific Theory of Evolution and should be presented to inform students of the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or an other concept." It went on to state that, "Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." The Fifth Circuit found that the disclaimer violated the second *Lemon* prong, because its primary effect was to "maintain a particular religious viewpoint, namely belief in the Biblical version of creation." 185 F.3d at 346-348. The Supreme Court denied certiorari, over the dissent of Justice Scalia, joined by Chief Justice Rehnquist and Justice

This operative principle also precludes the government from sponsoring a display of an unadorned religious symbol, such as a Nativity Scene, on public property.[24] The display of the Nativity Scene, standing alone, would perceived by an objective observer as sending a message of endorsement of Christianity and a message to non-Christians that they are "outsiders and not full members of the political community."[25] Similarly, the government may not sponsor displays on public property of the Ten Commandments, because the Ten Commandments is a sacred religious text for the Jewish and Christian faiths, and so endorses the religious beliefs of those faiths over other religious beliefs.[26] By prohibiting the government from using its power to endorse the religious beliefs of some faiths over others, the Establishment Clause protects the religious freedom of those who do not share the "favored" religious beliefs. Again, the overriding principle of the Establishment Clause is that the government must maintain a course of complete official neutrality toward religion, and so cannot favor one set of religious beliefs over another set of religious beliefs and cannot treat those who do not share the "favored" beliefs as "outsiders and not full members of the political community.[27]

Thomas, who maintained that the disclaimer was sufficiently neutral and had the secular effect of advancing freedom of thought.530 U.S. at 1251 (Scalia, J., dissenting from denial of certiorari).

[24] Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989). The same result was reached in an earlier lower court case litigated by the author. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir.1986) . However, in the United States, Christmas, despite its historically religious origin is observed primarily as a secular holiday. It is the "national holiday of gift-giving," so to speak. For this reason, the Court has held that the government may celebrate Christmas as a secular holiday, so that the inclusion of a Nativity Scene in a governmentally-sponsored Christmas holiday display, containing a Santa Claus, Christmas trees, and other secular and commercial symbols of the Christmas season, does not have the religious effect of endorsing Christianity and so does not violate the Establishment Clause. Lynch v. Donnelly, 465 U.S. 668 (1984). Similarly, in *Allegheny County* the Court held that the display of Chanukah Menorah, a Jewish religious symbol, which could not be displayed by the government, standing alone, could be included in a governmentally-sponsored "Salute to Liberty" display next to a large Christmas tree and a "Salute to Liberty" sign.

[25] See the discussion of this point by former Supreme Court Justice Sandra Day O'Connor in Lynch v. Donnelly, *supra*, note 24 at 687-689. .

[26] McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005). While the display of the Ten Commandments, standing alone, would be unconstitutional as an endorsement of the religious teachings of the Christian faiths, the inclusion of the Ten Commandments in a broader display of historical documents, showing the foundations of American law," would have a secular purpose and effect, and so would be unconstitutional. *C.f.* Van Orden v. Perry, 545 U.S. 677 (2005), decided the same day as *McCreary*, where the Court held that the display of a monument donated by a private organization that was inscribed with the Ten Commandments on the grounds of the Texas state capitol, along with 17 other monuments and 21 historical markers commemorating the "people, ideals and events that compose Texas identity," had a primarily secular effect and so did not violate the Establishment Clause. However, in *McCreary*, the governmental bodies began by posting copies of the Ten Commandments standing alone in governmental buildings. It was only after the federal courts had held that the posting of those copies of the Ten Commandments violated the Establishment Clause that the governmental bodies came up with a new display, consisting of a framed copy of the Ten Commandments, and nine other documents, such as the Magna Carta, the Declaration of Independence, the Mayflower Compact, and the like. The Court found that the new display was undertaken for the religious purpose of displaying the Ten Commandments. This being so, the display violated the first s24 *Lemon* operative principle prohibiting governmental actions undertaken for a religious purpose, and so violated the Establishment Clause.

[27] Since the Establishment Clause prohibits the government from giving a preference for one religion over another religion, the Court has held that it violates the Establishment Clause for a state to require the registration as a charitable organization and so subject to more extensive regulation of those religious groups that receive more than half their funds from non-members. Larsen v. Valente, 456 U.S. 228 (1982). Similarly, both the Establishment Clause and the Free Exercise Clause invalidate laws that expressly discriminate against religion or against people

B. Non-involvement with religious doctrine and religious institutions

The third *Lemon* principle of excessive entanglement protects the religious freedom of religious institutions and their adherents in two ways. This principle means first that the civil courts may not become involved with matters of religious doctrine or policy, and must defer to the resolution of these issues by the highest tribunal of a hierarchial church authority. Thus, the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials.[28] Nor may they become involved in disputes between church factions over control of church property, with each group claiming to have the "true faith." Again, the courts must defer to the determination of this matter by the highest tribunal of a hierarchial church organization.[29] However, where the form of church organization is congregational rather than hierarchial, the courts may, consistent with the Establishment Clause, apply general principles of contract and property law to determine which of the contending factions is entitled to the church property.[30]

Second, the excessive entanglement principle may prevent application of general laws to the activities of religious institutions. In this context, the excessive entanglement principle of the Establishment Clause may overlap with the Free Exercise Clause, but there is an important difference. The application of general laws to the activities of religious institutions would only raise a Free Exercise concern if that application significantly interfered with the ability of the religious institution to carry out its religious function. But under the excessive entanglement principle, the government may not apply a general law to the activities of a religious institutions if the application of the law to those activities would result in governmental interference with religious-based decisions of the religious institution. The interplay between the Establishment Clause and the Free Exercise clause in this situation is illustrated by the recently-decided case of *Hosana-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity*

---

because of their religious beliefs, such as a law that disqualifies members of the clergy from serving as legislators, *see* McDaniel v. Paty, 435 U.S. 618 (1978), or a law requiring the declaration of a belief in the existence of God as a test for holding public office. Torasco v. Watkins, 367 U.S. 488 (1961). Art.VI, cl.3 of the Constitution specifically prohibits a religious test as a qualification for holding federal office. The *Torasco* decision requires the same result under the Establishment Clause, so that this prohibition binds the states as well.

It also must be remembered that the Establishment Clause prohibits the government from favoring religious belief over non-religious belief. So a non-denominational religious display or non-denominational school-sponsored prayer would also violate the Establishment Clause.

[28] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S.696 (1976); Gonzalez v. Roman Catholic Archdiocese, 280 U.S. 1 (1929).

[29] *See* Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871). These cases and the cases cited in the preceding footnote were recently discussed by the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S.Ct. 694, 704-705 (2012), during the course of which the Court observed that, "Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."

[30] *See* Jones v. Wolf, 443 U.S. 595 (1979).

Commission.[31] In that case, the Court held that there was a "ministerial exception" to anti-discrimination laws, and that only the religious institution could decide who had the status of a "minister" under the applicable religious law.[32]

The employee in this case was a member of the Lutheran Church-Missouri Synod and was employed as a teacher at Hosana-Tabor Evangelical Lutheran Church and School, a small Lutheran parochial school, operated by a Lutheran congregation, and offering a "Christ-entered education" to students in kindergarten through eighth grade. But under church law she was considered a "called" teacher rather than a lay teacher. While lay teachers were appointed by the school board, "called" teachers were regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher had to satisfy certain academic requirements. One way of doing so was by completing a "colloquy" program at a Lutheran college or university. The program required candidates to take eight courses of theological study, obtain the endorsement of their local Synod district and pass an oral examination by a faculty committee. A teacher who met these requirements could be "called" by a local congregation. Once "called," a teacher would receive the formal title of "Minister of Religion, Commissioned." A commissioned minister served for an open-ended term, and at Hosana-Tabor, a call could only be rescinded for cause and by a supermajority vote of the congregation.[33]

The employee here was a "called" teacher. She taught secular courses and also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service, which she led herself about twice a year.[34] When she became ill with narcolepsy, the congregation put her on disability leave and later concluded that she would be unlikely to be physically capable of returning to work in the future. The congregation offered her a "peaceful release" from her call, and tried to negotiate her resignation from the school. She refused and threatened legal action against the congregation. The congregation then voted to rescind her call and sent her a letter of termination.[35]

The United States Equal Employment Opportunity Commission brought suit against Hosana-Tabor, alleging that the employee had been fired in retaliation for threatening to file a suit under the Americans with Disabilities Act, (ADA),[36] and the employee joined the suit,

[31] 132 S.Ct. 694 (2012).
[32] As Chief Justice Roberts observed in his opinion for the Court: "The Establishment Clause prevents the government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such decisions." 132 Sup. Ct. at 702-703.
[33] *Id*. at 699.
[34] *Id*. at 700.
[35] *Id*.
[36] 42 U.S.C. sec. 12101 *et seq*.

asserting a claim for unlawful retaliation both under the ADA and the state disabilities rights law. The suit sought her reinstatement to her former position and monetary relief.[37] The United States Court of Appeals for the Sixth Circuit recognized the existence of a "ministerial exception," barring certain employment discrimination claims against religious institutions, but held that the employee did not qualify as a "minister" under the exception, because the duties of "called" teachers at the school were the same as the duties of lay teachers.[38]

The Supreme Court, citing the above cases holding that the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials,[39] The Court found that it was highly relevant that Hosana-Tabor held the employee out to be a "minister" after she had a completed a course of religious training, and that it was less relevant both that lay teachers performed the same religious duties as the "called" teacher and that the "called" teacher also performed secular duties.[40] What appeared to be dispositive for the Court was that the church was entitled to decide who would be its ministers, and the ministerial exception" "ensures that the authority to select and control who will be minister to the faithful - - a matter 'strictly ecclesiastical - - is the church's alone."[41]

As *Hosana-Tabor* indicates, an entanglement problem arises when a court or administrative agency in a suit against a religious institution either applies the law to invalidate a religiously-based action taken by the institution, or is required to interpret religious doctrine to order to resolve the particular dispute. Such a situation occurred in a case where a Catholic nun who had been denied tenure in the Canon Law department of the Catholic University of America, the national university of the American Catholic Church, brought a Title VII sex discrimination claim against the university. The United States Court of Appeals for the District

[37] *Id*. at 701.
[38] *Id*. at 701-702.
[39] *Supra*, notes 27-28, and accompanying text.
[40] 132 Sup.Ct. at 708-709.
[41] *Id*. at 709 (citations omitted). The Court concluded as follows: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way." *Id*. at 710. The Court noted that it was not deciding in this case whether or not the "ministerial exception" would bar other types of suits by an employee against a church employer, including actions alleging breach of contract or tortious conduct by the church employer. *Id*.

In a concurring opinion, Justice Thomas stated that the fact that the church considered the employee a minister should be dispositive. 132 Sup.Ct. at 710-711 (Thomas, J., concurring). In another concurring opinion, Justices Alito and Kagan emphasized that the formal ordination and designation of a church employee as a "minister" should not be controlling in deciding whether the church is entitled to invoke the "ministerial exception." They pointed out that the use of the term "minister" or concept of ordination was not followed by some religious groups, and that what mattered here was that the employee performed important religious functions, so that the church alone had the right to decide for itself whether she was religiously qualified to remain in her office. 132 Sup.Ct. at 711-716 (Alito,J., and Kagan, J., concurring).

of Columbia Circuit concluded that the Establishment Clause precluded the civil courts from determining the validity of the claim, both because in so doing they would be required to evaluate the teacher's scholarship and her teaching of religious doctrine, and because the inquiry itself would intrude into the church's ability to make religious judgments about its officials.[42] By the same token, both the Establishment Clause and the Free Exercise clause interact to protect the decision of a religious organization to terminate an employee who has engaged in conduct that violates the essential tenets of the religion and so renders the employee unfit to advance the organization's religious mission, such as where a teacher at a Catholic parochial school, who had been divorced and had not obtained an annulment of her prior marriage in the Catholic Church, remarried a man who had been baptized as a Catholic,[43] or a teacher at a Catholic parochial school who engaged in sexual relations outside of marriage.[44]

We see then that the Establishment Clause protects the religious freedom of religious institutions and their adherents in two ways. First, the excessive entanglement principle precludes the civil courts from becoming involved with matters of religious doctrine or policy, and requires that they must defer to the resolution of these issues by the highest tribunal of a hierarchial church authority. Second, the Establishment Clause, here sometimes interacting with the Free Exercise Clause, prevents the application of general laws to the activities of religious institutions where this would result in an interference with the religiously-based decisions of the religious officials administering those institutions.[45]

---

[42] Equal Employment Opportunity Commission v. Catholic University of America, 83 F.3d 455 (D.C.Cir.1996).

[43] *See* Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991). The teacher was a Protestant and brought a religious discrimination claim under Title VII. Title VII contains a "religious entity" exception," under which religious organizations and religious schools may limit employment to persons of their religion. But if the religious organization or religious entity does not limit employment to persons of its own religion, it may not avoid the application of Title VII. In this case, the Third Circuit, in order to avoid a serious constitutional question, construed the "religious entity" exception very broadly to cover an employee's conformity with the religious entity's religious beliefs.

[44] Boyd v. Harding Academy of Memphis, 88 F.3d 410 (6th Cir. 1996). However, if the teacher was a woman and became pregnant as a result of having sexual relations outside of marriage, she is entitled to show that she was discharged because of her pregnancy and not because she had sex outside of marriage, so that her discharge would violate the federal Pregnancy Discrimination Act, 42 U.S.C. sec. 2000e(k). She can make such a showing by proving that the policy against having sex outside of marriage was enforced only against pregnant women and not against men or against women who were not pregnant. Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000). In a very recent and post-*Hosana-Tabor* case, an unmarried non-Catholic technology coordinator at a Catholic parochial school was terminated because she became pregnant by means of artificial insemination. The school contended that becoming pregnant by means of artificial insemination was a violation of Catholic religious doctrine. The court held that the "ministerial exception" did not apply to bar her claims and that for purposes of the school's motion to dismiss, she had made out a plausible claim of pregnancy discrimination. Dias v. Archdiocese of Cincinnati, 2012 U.S.Dist.LEXIS 43240, U.S.D.C.S.D. Ohio, March 29, 2012. The court subsequently held, following discovery by the parties, that there was a sufficient factual dispute over the reasons for her termination that had to be resolved by a trial of the case.Dias v. Archdiocese of Cincinnati, 2013 U.S.Dist.LEXIS 12417, U.S.D.C.S.D. Ohio, January 30, 2012.

[45] A different question is presented where the application of general laws to the activities of a religious institution would interfere with the decisions of the religious officials administering those institutions, although those decisions might not have involved the application of religious doctrine. But a concern that labor relations decisions might have involved the application of religious doctrine influenced the Supreme Court to hold Congress did not intend that the federal National Labor Relations Act, 29 U.S.C. secs. 151-169, apply to the regulate the unionization of lay faculty members at parochial schools. National Labor Relations Board v. Catholic Bishop of the City of Chicago, 440 U.S.

490 (1979) The Court said that the National Labor Relations Board's resolution of unfair labor practices at the schools would in many instances involve an inquiry into the good faith of the position asserted by clergy-administrators and its relationship to the school's"religious mission." 440 U.S. at 501. Because of these "entanglement" concerns, the Court, invoking the statutory interpretation principle that where possible a statute will be interpreted so as to avoid a serious question as to its constitutionality, concluded that Congress did not intend that the Act apply to the unionization of lay faculty members at parochial schools. The Court has also held that Congress did not intend that non-profit church-affiliated schools be subject to federal unemployment compensation laws. St. Martin Lutheran Evangelical Church v. South Dakota, 451 U.S. 772 (1981). This decision was based primarily on general principles of statutory interpretation rather than on a concern with avoiding a serious constitutional question. However, the Court saw no constitutional problem in applying the federal wages and hours law to a commercial business operated by a religious organization and staffed by former drug addicts, derelicts, or criminals before their conversion and rehabilitation by the foundation. The foundation was a nonprofit religious organization that operated a number of commercial businesses, including service stations, retail clothing and grocery outlets, roofing and electrical construction companies, a candy company, and a motel. The converted and rehabilitated workers received no cash salaries but were provided with "food, clothing, shelter, and other benefits." *Id*. at 292. The district court found that these workers were "employees" within the meaning of the federal wages and hours law under the "economic reality" test of employment. *Id*. at 291-292. The Court held that the application of the law to the foundation's commercial businesses did not implicate the Free Exercise Clause because the required payments in cash to the workers, which they could voluntarily return to the foundation, did not in any way interfere with their religious beliefs. *Id*. at 303. The foundation's "entanglement" objection to the record keeping requirements of the law was rejected on the ground that the routine and factual inquires required by the law "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." *Id*. at 305. Nor did the Court see any constitutional problem in the application of a state sales and use tax to a religious organization's sale of religious materials. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990). *See also* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989), where the Court held that the Internal Revenue Code's deduction for contributions to charitable and religious institutions did not include fixed fees paid for spiritual auditing and training services, because the payments were made in exchange for something of value. The Court noted that disallowing such a deduction avoided Establishment Clause problems because it did not require the Internal Revenue Service to decide what services and benefits were religious in nature. 490 U.S. at 694-698.

Because *Catholic Bishop* was decided on statutory interpretation grounds, it does not serve as a binding precedent with respect to the application of the Act to non-faculty employees of parochial schools or the application of other federal laws to the activities of religious organizations. The United State Court of Appeals for the Ninth Circuit held that *Catholic Bishop* was limited to the unionization of teachers at a parochial school, and that the National Labor Relations Act did apply to the unionization of non-faculty personnel, such as child-care workers, cooks, recreation assistants, and maintenance workers at a Catholic school for boys. The court also found that the exercise of jurisdiction over the unionization of these employees did not violate the Establishment Clause. Because the duties of these employees were overwhelmingly secular, the Board's exercise of jurisdiction over them would not involve the Board in the school's religious mission, nor would there be any governmental monitoring of the school's religious activities. NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991), *cert.denied*, 504 U.S. 1295 (1992).

In a similar vein, the United States Court of Appeals for the Second Circuit has held that the federal Age Discrimination in Employment Act, 29 U.S.C. secs. 621-634, was applicable to age discrimination claims brought by a lay teacher against his parochial school employer. In holding that the application of the law to such claims did not violate the Establishment Clause, the court emphasized that the sole question in an age discrimination case was whether an employee had been unjustly discriminated against because of age. No Establishment Clause problem would be presented when the parochial school employer asserted that the employee was discharged not because of his age, but for religiously-based reasons. In such a case the court could not inquire into the plausibility of the religiously-based reasons. The inquiry is limited to the question of whether, in fact, the employee was discharged for the asserted religiously-based reasons or was discharged because of his age. DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir.1993). The United States Court of Appeals for the Eighth Circuit reached the same conclusion in an age discrimination claim brought by the administrator of a Jewish synagogue. Weissman v. Congregation Sharre Emeth, 38 F.3d 1038 (8th Cir.1994).

These cases have not been qualified by subsequent cases and are not affected by the Supreme Court's decision in *Hosana Tabor*, since they involved only lay employees of a religious institution. As these cases indicate, the mere fact that a court or governmental agency exercises jurisdiction over employment relations at a religious institution

Thus far, we have seen how the Court has interpreted the Establishment Clause to hold unconstitutional governmental actions that have had the effect of favoring one religious belief over another religious belief or of favoring religious belief over non-religious belief and governmental actions that would have involved the government in matters of religious doctrine and policy. We have said that these declarations of unconstitutionality have protected the religious freedom of those persons who do not share the favored religious beliefs and have protected the religious freedom of religious institutions and their adherents. We now turn to the Court's interpretation of the Establishment Clause where the Court has found that the challenged law or governmental action does not violate the Establishment Clause and will demonstrate how these decisions also have had the effect of protecting the religious freedom of religious institutions and religious adherents.

C. **The Inclusion of the Religious with the Secular in the Receipt of Governmental Benefits**

First, applying the doctrine of the non-discriminatory inclusion of religion, the Court has held that at least in some circumstances, the Establishment Clause permits the government to include the religious with the secular in the receipt of governmental benefits. To the extent that the government is permitted under the Establishment Clause to include the religious with the secular in the receipt of governmental benefits, the Establishment Clause thus protects the religious freedom of those religious individuals and religious institutions that are permitted to receive the benefit.

The most important benefit for religious institutions resulting from this interpretation of the Establishment Clause is that the Court has held that a property tax exemption for non-profit institutions that includes churches and religious institutions, did not violate the Establishment Clause.[46] The inclusion of church property in the exemption was said to promote "benevolent neutrality" toward religion,[47] and avoided the "entanglement" problems that could result from governmental valuation of church property for tax purposes and enforcement of the tax against church property.[48]

Nonetheless, the property tax exemption for church property conferred a very valuable financial benefit on churches, and like any other tax exemption, effectively subsidized the churches' activity. The effect of *Walz* is to allow the state to provide a financial benefit to religion through a tax exemption when it could not provide such a benefit through a direct

---

does not necessarily create an entanglement problem. An entanglement problem only arises when the court or agency either applies the law to invalidate an action that was religiously-based or is required to interpret religious doctrine to resolve the particular dispute.

[46] Walz v. Tax Commission, 397 U.S. 664 (1970).

[47] *Walz*, 397 U.S. at 669, 671-673.

[48] *Id*. at 674-676.

grant.[49] Crucial to the Court's holding in *Walz* is the matter of inclusion. The tax exemption was for all non-profit institutions. Therefore, churches qualified for the grant, not because they were churches, but because they were included within the class of non-profit institutions. As one commentator put it, "those institutions shared a relevant nonreligious attribute with secular institutions."[50] There is no doubt that a property tax exemption for churches alone would violate the Establishment Clause as a preference for religion, notwithstanding that such an exemption would avoid the "entanglement" problems that the Court identified in *Walz*. This point is demonstrated by the fact that the Court has held unconstitutional an exemption from the state sales tax law for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."[51] In other words, it is the matter of the inclusion of the religious with the secular that marks the distinction between the constitutionally permissible equal treatment of religion and the constitutionally impermissible preference for religion.[52]

---

[49] See William P. Marshall, "We Know It When We See It": The Supreme Court and Establishment. 59 S.CAL. L. REV. 495, 500-501 (1986). Professor Marshall notes that the tax exemption in *Walz* provided a more significant benefit to religion than any other, so that the result is inconsistent with the Establishment Clause objective of prohibiting financial aid to religion. Professor Choper also attacks the result in Walz as endangering religious liberty because the effect of the exemption is to allow tax funds to be expended for religious purposes. See Jesse H. Choper, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 37 (1995)..

[50] Abner S. Greene, "The Political Balance of the Religion Clauses," 102 YALE L.J. 1611, 1627 (1993).

[51] Texas Monthly,Inc. v. Bullock, 489 U.S. 1 (1989).

[52] See Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 184 (1992). As Professor McConnell has observed: "When the government provides no financial support to the nonprofit sector except for churches, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does not aid religion. It aids higher education, health care, or child care; it is neutral to religion."

By the same token, the government does not violate the Establishment Clause when it provides financial aid to a religious institution, such as a religiously-affiliated hospital, to enable that institution to perform a secular function. The funding has a secular purpose (the first *Lemon* principle), and does not have the primary effect of advancing religion (the second *Lemon* principle), and so the funding does not violate the Establishment Clause. *See* Bradfield v. Roberts, 175 U.S. 291 (1899), where in what appears to be the first Establishment Clause case to come before the Supreme Court, the Court saw no possible Establishment Clause objection to Congress' providing funding to a Washington, D.C. charitable hospital operated by a religious order pursuant to a contractual arrangement by which the hospital agreed to devote two-thirds of its patient capacity for indigent District of Columbia residents. The Court will also assume that the religious institution will carry out the secular function "in a lawful, secular manner," and will not use the funding to achieve religious objectives. *See* Bowen v. Kendrick, 487 U.S. 589 (1988), where the Court held that the government could include a religiously-affiliated organization in a program of grants to private organizations to provide counseling for the prevention of adolescent sexual relations and care for pregnant adolescents and adolescent parents. The Court also held that it would not presume that the organization would use the grant to advance its religious views on adolescent sexual relations, and that only if such a showing could be made by opponents of the grant would the grant be revoked.

The proposition that the government can provide funding to religiously-affiliated institutions in order to enable them to perform a secular function has been relied on by the Supreme Court to uphold federal assistance to church-affiliated colleges and universities. Crucial to this holding was the Court's "constitutional finding of fact" that most church-affiliated colleges and universities are sufficiently similar to secular colleges and universities in their educational operation, so that providing them with governmental funding will not have the effect of "advancing religion." Nonetheless, the particular funding program involved in these cases did not take the form of a general grant to the institution, but was targeted for specific secular purposes and was upheld on that basis. Where a church-affiliated college or university operates a distinctly sectarian program, such as a divinity school, an unrestricted

Because the inclusion of the religious with the secular in the receipt of a governmental benefit does not necessarily violate the Establishment Clause, an Establishment Clause violation would only occur when the inclusion of the religious in the particular benefit is inconsistent with a specific Establishment Clause principle or doctrine. We have earlier discussed governmental financial assistance to the educational function of parochial schools.[53] The Court has held that governmental financial assistance that takes the form of "aid to the school", such as paying the salaries of parochial school teachers of secular subjects, violates the Establishment Clause, notwithstanding that the government also pays the salaries of teachers of secular subjects in the public schools.[54] The government would also violate the Establishment Clause by sending public school teachers of basic subjects into the parochial schools, since this form of financial assistance would "relieve sectarian schools of costs they otherwise would have borne in educating their students" and would "have the effect of advancing religion by creating a financial incentive to undertake sectarian education."[55] The same would be true of a program providing grants to both parochial and public schools for the repair of school buildings.[56]

However, while the Court has held that governmental assistance to the educational function of parochial schools is unconstitutional when the assistance takes the form of "aid to the school," in the leading case of *Everson v. New Jersey*,[57] the Court drew a sharp distinction between "aid to the school" and "aid to the child" who is attending a parochial school. Because of the necessary admixture of the religious and secular in parochial school education, in *Everson* the Court proceeded on the assumption that any form of direct governmental assistance to parochial schools would violate the Establishment Clause, since it would advance the religious function of the schools.[58] But at the same time the Court held that the Establishment Clause is not violated when the governmental funding takes the form of "aid to the child" who is attending

---

grant would presumably violate the Establishment Clause because it would have the effect of supporting, to some degree, the institution's sectarian program .See Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (involving grants to defray part of expense of educating students in private colleges and universities, including grants to religiously-affiliated institutions that had given "adequate assurance that funds would be used for a secular purpose"); Hunt v. McNair, 413 U.S. 734 (1973) (involving state-issued revenue bonds that could be used by church-affiliated colleges and universities to borrow funds to finance construction of facilities used for secular purposes); Tilton v. Richardson, 403 U.S, 672 (1971)(involving federal construction grants to church-affiliated colleges and universities for buildings and facilities used exclusively for secular purposes). Because these church-affiliated colleges and universities are considered to be essentially secular institutions, there is also no Establishment Clause problem when the government provides financial assistance to students attending such colleges. *See e.g.*, Americans United for Separation of Church and State v. Blanton, 433 F.Supp. 97 (M.D.Tenn.), *aff'd. mem.*, 434 U.S. 803 (1977). But if a particular church-affiliated college or university is found by a court to be a primarily sectarian institution, any governmental aid to that institution, of course, violates the Establishment Clause. See, e.g., Habel v. Industrial Dev. Auth., 400 S.E.2d 516 (Va. 1991) (holding that Jerry Falwell's Liberty University was a sectarian institution so that the city's issuance of construction bonds for educational facilities at the university violated the Establishment Clause).

[53] *See* the discussion, *supra*, notes 13-16, and accompanying text.

[54] *See* the discussion of Lemon v. Kurtzman, 403 U.S. 602 (1971), *supra*, note 16, and accompanying text.

[55] *See* Agostini v. Felton, 521 U.S. 203 (1997).

[56] *See* Committee for Public Education v. Nyquist, *supra* note 14.

[57] *Supra*, note 2.

[58] *Everson*, 330 U.S. at 14-16.

the parochial school. Once the Court drew this distinction in *Everson*,[59] it was clear that the state's providing bus transportation to parochial school students in that case fell on the side of "aid to the child" and so was constitutionally permissible. Applying the *Everson* precedent, the Court has held that a state could constitutionally provide parochial school students with the same kinds of individual-based benefits that it provides to public school students, such as loaning the parochial school students the same textbooks in secular subjects that it loaned to public school students,[60] including parochial school students in programs that loaned the students educational materials and equipment such as library books and computer hardware and software,[61] providing diagnostic services in which state employees would go into the parochial schools to test individual children for particular health and educational problems,[62] providing a sign-language interpreter for a hearing-impaired student at a parochial school when it provided a sign-language interpreter for hearing-impaired students in the public schools,[63] and sending public school teachers into the parochial school buildings to teach certain "enrichment" secular subjects and to provide remedial instructional services for low-income students.[64] The permissibility of aid to children attending parochial schools was relied on by the Court to hold that where the state established a program to enable students with disabilities to receive an education so that they could acquire a marketable skill, the state did not violate the Establishment Clause by paying the tuition of a blind student to attend a sectarian college in order to receive an education that would enable him to pursue a religious vocation.[65] However, while the state is permitted by the

[59] While this distinction has been criticized by some academic commentators as focusing on the form of aid rather than on its substance and effect, *see e.g.*, William P. Marshall, "Toward a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses, 26 SAN DIEGO L.REV. 243, 246-47 (1989), it has been consistently applied and never questioned by the Court.

[60] Board of Education v. Allen, 392 U.S. 236 (1968).

[61] Mitchell v.Helms, 530 U.S. 793 (2000). Here the program took the form of the federal government distributing funds to state and local governmental agencies that in turn loaned the educational materials and equipment to elementary schools, including private and parochial schools. The materials provided to the private and parochial schools had to be "secular, neutral and nonideological." Five Justices took the position that the program had to contain "divertibility" safeguards to ensure that the materials and equipment would not be used for religious purposes. Two of these Justices found that the program had adequate "divertibility" standards, and combined with the four Justices who took the position that "divertibility" standards were not required, since the funds were allocated on the basis of neutral, secular criteria, resulted in a 6-3 majority to uphold the constitutionality of the program.

[62] Wolman v. Walter, 433 U.S. 229 (1977). *See also Lemon*, 330 U.S. at 616, discussing the providing of school lunches to parochial school students. Providing individualized services or school lunches or immunizations to parochial school students in the parochial schools means only that the school is the conduit for the distribution of a governmental benefit to the children.

[63] Zoberst v. Catalina Foothills School District, 509 U.S. 1 (1993).

[64] Agostini v. Felton, *supra*, note 55. 521 U.S. 203 (1997). The significance of *Agostini* in this regard was that the Court had previously held that the remedial instructional services could not be provided in the parochial school itself because of concerns that doing so would create an impermissible "symbolic union" between the state and the parochial school. As a result, these remedial instructional services were provided off-premises, usually in mobile facilities parked on the parochial school grounds. These prior holdings were overruled in *Agostini*. So long as public school employees provide the remedial instruction, they can do so in the parochial school building.

[65] Witters v. Washington Department of Social Services for the Blind, 474 U.S. 481 (1986) The purpose of the program was to enable students with disabilities to receive an education so that they could acquire a marketable skill, and the most logical place for him to do so would be at a sectarian college.

Establishment Clause to include religious study in a program of financial assistance to college students, it is not required by the Free Exercise Clause to do so. For this reason, a state does not violate the Free Exercise Clause when it denies financial assistance to a student pursuing a degree in "devotional theology." Locke v. Davey, 540 U.S. 712 (2004). The state's refusal to provide financial assistance to a student pursuing a degree in "devotional theology" was based on a "no aid provision" in the state constitution, Wash.Const., Art. I, sec. 11, which states that, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." The Court held that the ban on funding for study in "devotional theology" advanced a valid state "anti-establishment" interest and noted that the state did provide scholarships for study at pervasively sectarian institutions so long as the student was not pursuing a degree in "devotional theology." 540 U.S. at 724-725. *Compare* Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir.2008), where the court found unconstitutional as distinguishing between religions, a state scholarship program that provided funding for students attending sectarian institutions, but denied funding for students attending institutions that were "pervasively sectarian."

Closely related to the distinction between constitutionally impermissible "aid to the school" and constitutionally permissible "aid to the child" is the distinction between "aid to the school" and "aid to the parents of children attending a parochial school." The state assists the educational function of parochial schools when it gives tax benefits to parents who send their children to parochial schools. Presumably, this form of aid reduces the costs of parochial school education and therefore, provides a financial incentive for parents to send their children to parochial schools. In *Committee for Public Education and Religious Liberty v. Nyquist*[66] the Court held unconstitutional the state's grant of a tax credit for school tuition paid by parents whose children were attending private or parochial schools. The Court reasoned that by lowering the costs of parochial school education for these parents, the state was subsidizing parochial school education, and held that this subsidization violated the Establishment Clause.[67] However, in the later case of *Mueller v. Allen*,[68] the Court held that there was no Establishment Clause violation when the state allowed all parents across the board to take a tax deduction, as opposed to a tax credit, for educational expenses, notwithstanding that 96% of the deductions were taken for parochial school tuition.

Some academic commentators were troubled by the implications of the *Mueller* decision, especially insofar as it indicted that the Establishment Clause was not violated, simply because the tax deduction made it easier for parents to exercise a private choice to send their children to parochial schools.[69] There is no doubt that the Court could have held that the tax deduction in

---

[66] 413 U.S. 756 (1973).
[67] 413 U.S. at 794.
[68] 463 U.S.388 (1983).
[69] *See* Gary J. Simson, "The Establishment Clause in the Supreme Court: Rethinking the Court's Approach, 72 CORNELL L. REV. 905, 926 (1987). Professor Simson says that the tax deduction has a substantial effect of supporting religion with public funds…." Although a tax deduction is not an expenditure of public funds in form, it

Mueller, like the tax credit in *Nyquist*, violated the Establishment Clause, because the practical effect of the deduction was to subsidize parochial school education. But the Court did not do so. Again, as we saw with respect to the property tax exemption for non-profit institutions that includes churches and religious institutions, it is precisely the inclusion of the religious with the secular in a receipt of a governmental benefit that marks the distinction between the constitutionally permissible equal treatment of religion and the constitutionally impermissible preference for religion. Here the tax deduction was one of many provided by the state to taxpayers, it was available to all parents who incurred educational expenses, and the decision to use the tax deduction to defray the cost of parochial school education was the result of the private choice by parents to send their children to parochial schools. *Mueller* thus holds that he state may provide tax benefits for parents of all schoolchildren, notwithstanding that most of the tax benefits are claimed by parents of children attending parochial schools.

The matter of "aid to the parents of children attending parochial schools" and "individual choice" proved dispositive in the Court's 2002 decision of *Zelman v. Simmons-Harris*,[70] where the Court first addressed the question of whether the Establishment Clause prohibited state-sponsored voucher programs that included vouchers to defray the cost of attendance at parochial schools. The facts of that case are very important in regard to the inclusion of the religious with the secular in the receipt of a governmental benefit. In that case, Ohio had set up a pilot program designed to increase the choices of lower-income parents with children in the Cleveland public schools, which, according to the Court, "have been among the worst performing public schools in the Nation."[71] The program contained both a tuition aid component and a tutorial aid component. Under the tuition aid component, private schools, both non-religious and parochial, could participate in the program and accept eligible students, so long as the school was located within the boundaries of the Cleveland school district. Public schools located in a district adjacent to the Cleveland school district could also participate in the program. All the participating schools were required to accept Cleveland school students in accordance with rules promulgated by the state superintendent. Tuition aid was distributed to parents according to financial need. If the parents chose a private or parochial school, checks were made payable to the parents, who then endorsed the checks over to the chosen school[72] Virtually all of the students participating in the tuition grant program enrolled in parochial schools. In addition to

---

plainly is so in fact. Moreover, by relieving parents of a tangible part of the cost of educating their children in public schools, this deduction materially increases the likelihood that parents contemplating sending their children to parochial school will decide to do so."; Jesse H. Choper,"The Establishment Clause and Aid to Parochial Schools - An Update, 75 CAL.L.REV. 5, 9-10 (1987).. Professor Choper says that *Mueller* is indistinguishable from *Nyquist*. In both instances, the state was trying to provide some financial relief to parents who sent their children to private schools, including parochial schools.*Id*. at 8. He contends that it should not matter that the law in *Mueller* was facially neutral, while the law in *Nyquist* expressly favored religion, as the record showed that 96% of the tax deductions under the law were taken for parochial school payments. *Id*. at 9. He concludes that the decision in *Mueller* "opened a large window for aid to parochial schools." *Id.* at 11.

[70] 536 U.S. 639 (2002).

[71] *Simmons-Harris*, 536 U.S. at 644.

[72] *Id*. at 645-646.

the tuition aid and tutorial assistance programs, the Cleveland school district set up programs for community or charter schools, which were funded by the state, but were operated by their own school boards instead of by the Cleveland school district. For each child enrolled in a community school, the school received state funding that was twice the funding received by a school participating in the tuition aid program. The school district also operated magnet schools that emphasized a particular subject area, teaching method or service to students. For each student enrolled in a magnet school, the school district received the same amount of funding as it received for students enrolled at a traditional public school.[73]

In a 5-4 decision, the Court held that the inclusion of vouchers for parochial schools in the Cleveland tuition assistance program did not violate the Establishment Clause. The opinion of the Court by Chief Justice Rehnquist, joined in by Justices O'Connor, Scalia, Kennedy and Thomas, invoked the "aid to the parent" and "private choice" rationale of *Mueller* and other cases.[74] According to Chief Justice Rehnquist, these cases "make clear that where a government aid program is neutral with respect to religion, and that provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to a challenge under the Establishment Clause."[75] This was because, "A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choice of numerous individual recipients," so that, "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of the benefits."[76] The Chief Justice went on to point out that there were no "financial incentives" that would "skew" the program toward parochial schools, since the aid was "allocated on the basis of neutral, secular criteria that neither favor or disfavor religion," and that in fact the program created "financial disincentives" for religious schools, with private and parochial schools receiving only half the assistance given to charter schools and only one-third the assistance given to magnet schools.[77] He also rejected the contention that the state was creating a public perception that it was "endorsing religious practices and beliefs," since the program was a neutral one of private choice, "where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals," and that there was no evidence that the

[73] *Id*. at 648. Approximately 75,000 students were enrolled in the Cleveland school district when these programs went into operation. About 3,700 students were enrolled in the tuition aid program, about 1,400 received tutorial assistance, about 1,900 were enrolled in charter schools, and about 13,000 were enrolled in magnet schools. *Id*. at 646-648.
[74] Including Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), and Zoberst v. Catalina Foothills School District, 509 U.S. 1 (1993)
[75] *Zelman*, 536 U.S. at 652.
[76] *Id*.
[77] *Id*. at 653.

program failed to provide genuine opportunities for Cleveland parents to select secular educational opportunities for their school-age children."[78]

The *Zelman* decision provides a roadmap for states and school districts wishing to adopt voucher programs that include vouchers for attendance at parochial schools. The voucher program must be filtered through the parents of children attending parochial schools and must include a number of other alternatives to the use of vouchers for attendance at parochial schools. However, the use of voucher programs since *Zelman* has been relatively limited, and while a number of voucher programs of one sort or another have been adopted, voucher programs, particularly those that include vouchers for attendance at parochial schools, have not become a major part of the American educational system.[79] Be that as it may, *Zelman* is another example of the permissible inclusion of the religious with the secular in the receipt of governmental benefits.

By drawing a sharp distinction between the constitutionally impermissible "aid to the school" and the constitutionally permissible "aid to the child," including aid to the parents of children attending parochial schools, the Court has enabled the government to provide significant

[78] *Id*. at 655. Justices O'Connor and Thomas, in a concurring opinion, insisted that the decision was not a "dramatic break from the past," and emphasized that a "true private choice" inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents." 536 U.S. at 663 (O'Connor,J., concurring). Justices Souter, Stevens, Ginsburg, and Breyer dissented, insisting that public funds would be supporting the teaching of religion and that this result was not obviated by the fact that the governmental support for the teaching of religion comes about through "private choice." 536 U.S. at 669-700 (Souter, J., dissenting.

[79] For discussions of voucher programs since 2002, *see* Jim Carl, "Freedom of Choice [electronic resource]; vouchers in American education (Praeger 2011) ("[t]he growth of school vouchers has been anemic since 2002"); Lenford C. Sutton & Richard A. King, "School Vouchers in a Climate of Political Change, " 36 JOURNAL OF EDUCATION FINANCE 244-267, Winter, 2011); "Keeping Informed About School Vouchers," CENTER ON EDUCATION POLICY, July, 2011).

There are three reasons why voucher programs have not become a major part of the American educational system.. In the first place, the Court in *Zelman* made it clear that vouchers for attendance at private and parochial schools must be only one component of a larger program involving a number of other alternatives for parents of children enrolled in the public schools. This being so, a state or school district cannot do vouchers "on the cheap," so to speak, but must devote considerable resources to providing other alternatives. Second and more importantly, 39 states have state constitutional "no aid" provisions that preclude the use of state funds for the support of "sectarian or denominational schools," *see* Sutton and King, "School Vouchers" at 248-251, Table 2, for a summary of "no aid" clauses in state constitutions, and these and related provisions, such as "uniformity" and "local control," have been interpreted by some state courts as prohibiting voucher programs that include vouchers for attendance at parochial schools. *See* Cain v. Horn, 220 Ariz. 77, 202 P.2d 1178 (2009); Chittenden Town School District v. Department of Education, 169 Vt. 310, 738 A.2d 539 (1999); Owens v. Colorado Congress of Parents, Teachers and Students, 92 P.2d 933 (Colo.2004); Holmes v. Bush, 919 So.2d 392 (Fla.2006). Third, and probably most importantly, has been the rise in charter schools, which are publicly-funded non-sectarian schools operated under contract between the state or public school systems and private companies. Charter schools give parents of children attending public schools an alternative to avoid the public schools, often with a greater degree of parental control. The availability of charter schools, has clearly reduced public pressure for voucher programs. According to Mr. Carl, "Freedom of Choice," at 199, as of 2010, charter schools operated in 40 states and the District of Columbia, enrolling nearly 2 million students. He suggests that, "In the first decade of the new century, state legislatures and voters were more attracted to charter schools than they were to voucher programs, perhaps because charter schools avoided church state entanglements." So, while the Supreme Court has upheld the constitutionality of voucher programs that include vouchers for attendance at parochial schools, such programs are not widespread in the United States today.

financial assistance to the educational function of parochial schools. [80] And to this extent, the Court's interpretation of the Establishment Clause has served to protect the religious freedom of parents who want their children to attend parochial schools.

Second, again applying the principle of the non-discriminatory inclusion of religion, the Court has held that providing religious groups along with secular groups with the equal access to public facilities for purposes of expression does not violate the Establishment Clause. The Court has held that providing equal access to public facilities for religious groups does not have the effect of advancing religion, it does not create a symbolic union between government and religion, and it does not constitute governmental endorsement of the religious group's message. Once the Court has held that providing equal access to religious groups does not violate the Establishment Clause, the freedom of expression component of the First Amendment comes into play. Under the First Amendment principle of content neutrality and the public forum doctrine, whenever the government designates public property or facilities as a public forum, it must provide all groups equal access to the property for the purpose of expression. Since providing equal access to religious groups for purposes of expression does not violate the Establishment Clause, the government is constitutionally required to provide such access under the First Amendment's public forum doctrine.[81] This is another example of how the Court's interpretation of the Establishment Clause has resulted in protecting the religious freedom of individuals and religious institutions.

D. **Governmental Actions Protecting the Religious Freedom of Individuals and Religious Institutions**

We have previously pointed out that the Establishment Clause renders unconstitutional certain actions that directly interfere with the religious freedom of individuals and religious institutions.[82] Moreover, as we have discussed previously, under the third *Lemon* principle of

[80] In an interesting article, Professor Richard C. Schragger, says that the effect of the Zelman v. Harris" aid to the parent rational is to insulate the public subsidization of private religious activity from Establishment Clause concern and to eliminate inquiry into matters such as "divertibility" or the "pervasively sectarian" character of the institution to which the aid flows. The only constitutional requirement, he says, is one of neutrality and even-handedness. Richard C. Schragger, "The Role of the Local in the Doctrine and Discourse of Religious Liberty," 117 HARV.L.REV. 1810, 1857-58 (2004).

[81] *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (statehouse plaza dedicated as a public forum); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (after-school use of school facilities by private groups); Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990) (facilities of public schools available for use by student groups); Widmar v. Vincent, 454 U.S. 263 (1981) (facilities of state university available for use by student groups); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (university's policy of paying printing costs of student publications as applied to require payment of printing costs for publication of student religious organization). *See also*, John H. Garvey, "All Things Being Equal . . ., 1996 B.U.LREV. 587, 588-92 discussing the interaction between the Establishment Clause, the First Amendment public forum doctrine, and the content neutrality principle in this situation..

[82] See the discussion, *supra*, note 27. Since the Establishment Clause prohibits the government from giving a preference for one religion over another religion, the Court has held that it violates the Establishment Clause for a state to require the registration as a charitable organization and so subject to more extensive regulation of those religious groups that receive more than half their funds from non-members. Larsen v. Valente, 456 U.S. 228 (1982).

excessive entanglement, the civil courts may not become involved with matters of religious doctrine or policy, but must defer to the resolution of these issues by the highest tribunal of a hierarchial church authority.[83] Finally, as we have discussed previously, the excessive entanglement principle may prevent application of general laws to the activities of religious institutions.[84]

Now we will discuss how the Court has interpreted the Establishment Clause to uphold as constitutional affirmative efforts on the part of the government to protect the religious freedom of individuals and religious institutions. Here we see the interaction of the Establishment Clause with the Free Exercise Clause to advance the constitutional value of religious freedom. The operative principle in this area may be stated as follows. Governmental action that has the effect of providing a preference for religion over non-religion violates the Establishment Clause. But governmental action that is precisely tailored to protect the religious freedom of individuals and religious institutions does not violate the Establishment Clause. The crucial question in these cases, therefore, is whether the governmental action is an unconstitutional preference for religion, or a precisely tailored and so constitutionally permissible means of protecting the religious liberty of individuals and religious institutions.[85]

Let me explain why this is so. When the government gives a preference for religion over non-religion, it is violating the overriding principle of the Establishment Clause, which is that the government must pursue a course of complete official neutrality toward religion. This overriding principle is not obviated by the claim that the government is trying to make an "accommodation" for religion. It is precisely because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion that the government may not make an

---

Similarly, both the Establishment Clause and the Free Exercise Clause invalidate laws that expressly discriminate against religion or against people because of their religious beliefs, such as a law that disqualifies members of the clergy from serving as legislators, *see* McDaniel v. Paty, 435 U.S. 618 (1978), or a law requiring the declaration of a belief in the existence of God as a test for holding public office. Torasco v. Watkins, 367 U.S. 488 (1961). Art.VI, cl.3 of the Constitution specifically prohibits a religious test as a qualification for holding federal office. The *Torasco* decision requires the same result under the Establishment Clause, so that this prohibition binds the states as well.

[83] *See* the discussion, *supra*, notes 28-30, and accompanying text. As the Supreme Court stated in *Everson*, *supra* note 2 at 16: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa."Thus, the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials. Nor may they become involved in disputes between church factions over control over church property, with each group claiming to have the "true faith," but must defer to the determination of which group has the "true faith" that has been made by the highest tribunal of a hierarchial church organization.

[84] *See* the discussion, *supra*, notes 31-45, and accompanying text. This application of the excessive entanglement principle was involved in the Supreme Court's most recent Establishment Clause decision, Hosana Tabor Evangelical Lutheran Church, 132 Sup.Ct. 694 (2012), where the Court held that there was a ministerial exception to anti-discrimination laws, and that only the religious institution could decide who had the status of a "minister" under religious law.

[85] I have discussed this interaction more fully under the heading of "Preference for Religion" and the subsidiary doctrine of "Accommodation for Religious Freedom, But Not for Religion," in Robert A. Sedler, Understanding the Establishment Clause: The Perspective of Constitutional Litigation, *supra*, note 12 at 1419-1437.

"accommodation" for religion by giving a preference for religion over non-religion. Thus, the Court has found a preference for religion in violation of the Establishment Clause in the following cases: a state law providing an exemption from the state sales tax for religious periodicals alone; [86]a state law that gave churches the power to prevent the issuance of a liquor license to a business that would be located within 500 feet of the church;[87] a state law setting up a special school district embracing the boundaries of a religious community;[88] and a state law entitling an employee to take off work on the day that the employee stated that he or she observed as the Sabbath, without any requirement that the employee's religion precluded the employee from working on the Sabbath or even that the employee used that day for religious purposes.[89]

Conversely, when the government takes action that is precisely tailored to protect the religious freedom of individuals and religious institutions, the government is acting to protect the religious freedom that is the primary concern of both the Establishment Clause and the Free Exercise Clause. Since religious freedom is a favored constitutional value under the American Constitution, it would be inconsistent with the overriding purpose of the religion clauses, taken together, to hold that the Establishment Clause precludes the government from taking such action. It is irrelevant in this regard that the failure of the government to take such action and that the application of facially neutral laws to individuals and religious institutions would not violate the Free Exercise Clause.[90] The measure of what the government cannot constitutionally do is not the measure of what the government is constitutionally permitted to do. So long as the government's action is precisely tailored to protect the religious freedom of individuals and religious institutions, that action advances the overriding purpose of the religion clauses and so does not violate the Establishment Clause.

In order to satisfy the standard of "precisely tailored to protect the religious freedom of an individual or religious institution," the action must be directed toward obviating an interference with religious freedom. An interference with an individual's religious freedom occurs when the individual is prevented from doing something that his or her religion requires, such as when a member of the Native-American Church is being prevented from using peyote in a religious ceremony, or when someone is compelled to do something that the person's religion prohibits, such as being compelled to work on the Sabbath, which the religion dictates be a day of complete

[86] Texas Monthly,Inc. v. Bullock, 489 U.S. 1 (1989).
[87] Larkin v. Grendel's Den, 459 U.S. 116 (1982).
[88] Board of Education v. Kiryas Joel Village School District, 512 U.S. 687 (1994).
[89] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
[90] As a general proposition, the Free Exercise Clause does not require that the government exempt the religiously-motivated conduct of individuals from neutral and generally applicable laws. *See e.g.*, Employment Division v. Smith, 494 U.S. 872 (1990), where the Court held that the government could constitutionally prohibit the use of peyote in the religious services of the Native American Church. *See generally* the discussion of "The Role of the Free Exercise Clause" in Robert A. Sedler, "The Constitutional Protection of Religious Liberty in the United States," 2010 FORUM ON PUBLIC POLICY ONLINE, No. 5, pp. 9-11.

rest. An interference with the freedom of a religious institution occurs when the law prevents the institution from carrying out its religious function, such as a law prohibiting a religious institution from employing only its adherents in the religious activities of the institution or a zoning law prohibiting the construction of a religious facility in a residential area.

Applying the standard of "precisely tailored to protect the religious freedom of an individual or religious institution," the courts have upheld a number of governmental actions directed toward protecting religious freedom against Establishment Clause challenge. The Supreme Court has upheld Title VII's "religious entities" exemption,[91] which exempts religious institutions from Title VII's religious discrimination prohibition and permits them to employ individuals of the same religion to carry out the work of the institution, including the institution's non-profit secular activities[92] The Court has also held that Title VII's prohibition against religious discrimination[93] requires an employer to make a "reasonable accommodation" for an employee's religious beliefs, so long as this can be done without undue hardship on the conduct of the employer's business.[94] It may be noted that the "reasonable accommodation" provision has been interpreted very narrowly so as to meet the "precisely tailored" standard and so be constitutionally permissible. For example, an employer was not required to accommodate a Sabbatarian's effort to avoid Saturday work when this would require the employer to disregard the seniority system that had been provided for in the collective bargaining agreement.[95] An example of a required "reasonable accommodation" is where two Jewish employees of a skin care salon had made a request two weeks in advance that they be permitted to take off work on Yom Kippur, the holiest Jewish holiday, and where the employer could have reassigned or rescheduled their previously-booked appointments.[96] Another example of a "reasonable accommodation" is the "substituted charity" provision of federal labor relations law, which enables persons who have religious objections to joining unions to avoid paying union dues or representation fees and instead make a charitable contribution in an equivalent amount.[97]

Other permissible actions designed to protect the religious freedom of individuals and religious institutions include: an exemption from the former Sunday closing laws for Sabbatarians who closed their businesses on Saturday;[98] during Prohibition the exemption for sacramental wine used in religious services, and a modern equivalent, the exemption from the

[91] 42 U.S.C. sec. 2000e-1.
[92] Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
[93] 42 U.S.C. sec. 2000e-2(a)(1).
[94] Trans World Airlines v. Hardison, 432 U.S. 63 (1977).
[95] *Id*.
[96] See EEOC v. Ilona of Hungary,Inc., 108 F.3d 1569 (7th Cir. 1997).
[97] See *e.g*., Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981).
[98] See *e.g*., Commonwealth of Kentucky v. Arlan's Dep't. Store, 357 S.W.2d 808 (Ky.1962), *appeal dismissed*, 371 U.S. 218 (1962). In Braunfeld v. Brown, 366 U.S. 599 (1961), where the Court held that the state's failure to provide such an exemption did not violate the Free Exercise Clause, the Court noted that a number of states did provide such an exemption, and noted that, "this may well be the wiser solution to the problem." 366 U.S. at 608.

federal substance abuse laws for the use of peyote in the religious ceremonies of Native-American tribes;[99]an exemption from the federal Eagle Protection Act to permit members of Native-American tribes to use eagle feathers in their religious services;[100] the exemption in the federal Humane Slaughter Law for Jewish religious slaughter and now for Halal religious slaughter and for the religious slaughter of all religious faiths that use the severance of the carotid artery method of slaughter;[101] an exemption from social security self-employment taxes for members of religious sects that have tenets opposed to participation in the social security system and that provide reasonable support for their dependent members; [102]; and an exemption for Amish buggies from the requirement that slow-moving vehicles display a special emblem.[103] And, of course, the government may take actions to protect the religious freedom of persons subject to governmental control, such as the Dearborn, Michigan, public schools making arrangements for their Moslem students to pray at required times during school hours, and the military and prison systems trying to accommodate the religious needs of persons under their control by providing them with chaplains, releasing them for religious services, excusing them from uniform requirements, and enabling them to observe religious dietary restrictions.[104]

This brings us to the Religious Freedom Restoration Act of 1993 (RFRA)[105] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[106] In an effort to overcome the Supreme Court's unwillingness to recognize a Free Exercise-based exemption for

[99] See *e.g*., Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C.Cir. 1989).

[100] See Rupert v. Director, United States Fish and Wildlife Service, 957 F.2d 32 (1st Cir.1992). In this case, the exemption for the use of eagle feathers for religious purposes by members of Native-American tribes was challenged by a member of an "all-race" church that followed Native-American religious customs, including the ceremonial use of eagle feathers. They asserted that the exemption constituted a preference for one religion over another, but the court was able to avoid the religious preference claim by finding that the exemption was based on the sovereignty of the Native-American tribes and their special relationship to the federal government. 957 F.2d at 33-35. *C.f.* Morton v. Mancari, 417 U.S. 535 (1974) (the federal government may give employment preference to members of Native American tribes in the Bureau of Indian affairs). The courts have also relied on the sovereignty and special relationship justification to avoid the religious preference claim in the peyote use cases, *supra* note 99. If the peyote exemption had been for use by all religious groups, as opposed to ordinary drug users, there would be no question but that it would be a constitutionally permissible means of protecting the religious liberty of individuals and religious institutions. In Gonzales v. O Centro Esp.Benef. Uniao Do Vege., *infra*, note 108 , the Court referred to the "well-established peyote exception"and noted that this exception "fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." 126 S.Ct. at 1222.

[101] See Jones v. Butz, 374 F.Supp.1284 (S.D.N.Y. 1974).

[102] See Droz v. Commissioner of IRS, 48 F.3d 1120 (9th Cir. 1995).

[103] See State v. Hershberger, 462 N.W.2d 393 (Minn.1990), holding that such an exemption was required by the state constitution and did not violate the Establishment Clause.

[104] See *e.g*., Katcoff v. Marsh, 755 F.2d 223 (2d Cir.1985), rejecting an Establishment Clause challenge to the military chaplaincy. Congress has by statute overturned the "uniform headgear" regulation upheld against Free Exercise challenge by an observant Jewish service member seeking to wear a skullcap in Goldman v. Weinberger, 475 U.S. 503 (1986) , so as to permit the wearing of religiously-required headgear by military personnel. See 10 U.S.C. sec. 774 (1994).

[105] 42 U.S.C. sec. 2000bb *et seq*.

[106] 42 U.S.C. sec. 2000cc *et seq*.

religiously-motivated conduct from laws of general application Clause and to protect the religious liberty of individuals and religious institutions,[107] Congress enacted the Religious Freedom Restoration Act of 1993. The Act applied to all federal and state laws and provided that whenever any law "substantially burdened" a person's exercise of religion, the government had to demonstrate that the law was in the furtherance of a compelling governmental interest and that it was the least restrictive means of advancing that interest. This would be so even if the "substantial burden" on a person's exercise of religion resulted from a rule of general applicability. In 1997, the Supreme Court held that the Act was unconstitutional in its application to the states as being beyond Congress' enforcement power under section 5 of the Fourteenth Amendment.[108] In 2000,Congress came back with RLUIPA, [109]a much narrower law enacted under the spending power, and applicable only to programs or activities receiving federal assistance. RLUIPA imposes the compelling governmental interest test to determine the validity of land use regulations that impose a substantial burden on the religious exercise of a person or religious institution and the validity of institutional regulations that impose a substantial burden on the religious practices of institutionalized persons.

In *Cutter v. Wilkinson*,[110] the Supreme Court reviewed a lower court decision holding that in its application to prison inmates, RLIPUA violated the Establishment Clause, because it favored religious rights over other fundamental rights without any showing that religious rights were at any greater risk of deprivation in the prison context.[111] The Supreme Court unanimously reversed that decision held that the application of RLUIPA to protect the religious practices of the prison inmates that were at issue in that case did not violate the Establishment Clause. The Court first noted that, it "has long recognized that the government may…accommodate religious practices…without violating the Establishment Clause," and that "'there is room for play in the joints between ' the Free Exercise Clause and the Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the

[107] *See* Employment Division v. Smith, *supra* note 90. In *Smith* the Court held that the Free Exercise Clause does not prohibit the government from burdening religious practices through generally applicable laws, and that laws imposing such a burden did not have to be justified under the exacting compelling governmental interest standard of review.

[108] Boerne v. Flores, 521 U.S. 507 (1997). RFRA still applies to the application of federal laws.In Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418(2006), the Court applied RFRA to invalidate the application of Schedule I of the Controlled Substances Act, 21 U.S.C. sec. 812(c), Schedule I (c), to the use of hoasca, a tea containing a hallucinogen, in the religious ceremonies of a very small sect in the United States. The Court held that RFRA requires case-by-case consideration of religious exemptions to generally applicable laws and that the government bears the burden of demonstrating that serious harm would result from the granting of specific exemptions to particular religious claimants. The government could not sustain its burden in this case, The Court also referred to the "well-established peyote exception," discussed earlier, *supra*, note 99, and accompanying text, and noted that this exception "fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." 546 U.S. at 433-43

[109] *Supra*, note 106.

[110] 544 U.S. 709 (2005).

[111] Cutter v. Wilkinson, 423 F.3d 579 (6th Cir. 2005), *rev'd*, 544 U.S. 709 (2005).

Establishment Clause."[112] It then noted that Congress had documented in hearings spanning three years that "'frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise."[113]The Court then found that on its face, RLUIPA "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."[114] This was because it "alleviates exceptional government-created burdens on private religious exercise" and "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the governments permission and accommodation for exercise of their religion."[115] Moreover, RLUIPA would be applied in an "appropriately balanced way with particular sensitivity to security concerns."[116] Finally, the Court concluded that the lower court had misunderstood the Court's precedents when it held that the government could not give greater protection to religious rights than to other constitutionally protected rights. If this were the law, said the Court, "all manner of religious accommodations would fail," and the Court had held in other cases, [117]that religious accommodations need not "come packaged with benefits to secular entities."[118] The Court thus upheld against Establishment Clause challenge the provisions of RLUIPA requiring the state to make a reasonable accommodation for the religious needs of institutionalized persons. The Court's decision in Cutter v. Wilkinson strongly affirms the principle that the government can, consistent with the Establishment Clause, take action that is precisely tailored to protect the religious freedom of individuals and religious institutions.[119]

---

[112] 544 U.S. at 713, citing Hobbie v. Unemployment Appeals Commission of Florida, *480* U.S. 136, 144-145, and Locke v. Davey, 540 U.S. 712,718 (2004). In *Locke* the Court held that although the state would not be violating the Establishment Clause if it permitted state scholarship funds to be used for theology courses, the state did not violate the Free Exercise Clause by prohibiting the use of state scholarship funds for this purpose. *See* note 64, *supra*.
[113] 544 U.S. at 716.
[114] *Id*. at 720.
[115] *Id*.
[116] *Id*. at 722.
[117] Most notably Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, *supra*, note 92.
[118] 544 U.S. at 724, citing *Amos*, 483 U.S. at 338.
[119] The Supreme Court's decision in *Cutter* upholding the constitutionality of the institutionalized persons provisions of RLUIPA necessarily upholds the parallel land use provisions of RLUIPA. *See e.g.*,Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 353-356 (2d Cir. 2007). There are four such provisions. One provision provides that if a land use regulation substantially burdens the free exercise of religion, the government must show that the burden serves a compelling governmental interest by the least restrictive means. Two provisions prohibit discrimination against religious institutions. And one provision deals with exclusion by providing that a land use regulation may not totally exclude religious assemblies or unreasonably limit religious assemblies, institutions or structures within a jurisdiction. The substantial burden and equal terms provisions have been the most important and the most frequently litigated. *See* the summary of the provisions and the discussion in Douglas Laycock and Luke W. Goodrich, "RLUIPA: Necessary, Modest, and Under-Enforced," 32 FORDHAM URB.L.J. 1021, 1023 (2012). No cases involving the land use provisions of RLUIPA have yet reached the Supreme Court. In commenting on the lower court RLUIPA cases, Laycock and Goodrich observed as follows: "Over the twelve years since its enactment, RLUIPA has proven its worth. Churches have brought numerous successful lawsuits protecting their core First Amendment rights and many cases have settled. Local officials are now on notice that they cannot treat churches as a disfavored land use, despite the issues with NIMBY neighbors, tax collection, or commercial districts, or fear of Muslims or other prejudices among their constituents." Laycock & Goodrich, *supra* at 2071. For recent illustrative cases involving RLUIPA challenges to land use regulation, *see* Bethel World Outreach Ministries v. Montgomery County Council, 2013 U.S.App.LEXIS 2211, Jan. 31, 2013; Fortress Bible Church v. Feiner, 694 F.3d 208 (2d Cir. 2012); Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011).

Conclusion

In this paper I have discussed the role of the Establishment Clause in protecting religious freedom in the United States. I have explained that while the Establishment Clause has sometimes been referred to as creating a "wall of separation" between church and state, the concept of separation of church and state has not in theory or practice guided the Supreme Court's Establishment Clause jurisprudence. Rather the overriding principle of the Establishment Clause has been that the government must maintain a course of complete official neutrality toward religion. Under this overriding principle, the government cannot favor one religion over another religion and cannot favor religious belief over non-religious belief. To put it another way, under the Establishment Clause, the objectives to be achieved by the concept of separation of church and state are achieved by the requirement of complete official neutrality toward religion. This means that the government may become involved with religion in a number of ways so long as it maintains a course of complete official neutrality toward religion.[120]

It is the thesis of this paper that the guiding force governing the Supreme Court's Establishment Clause jurisprudence has been a concern with protecting religious freedom. This being so, I maintain that the Court has found an Establishment Clause violation only when the law or governmental action in question has the potential for interfering with the religious freedom of individuals or groups who are not the beneficiaries of that law or governmental action. While the cases demonstrate that the Court has found many Establishment Clause violations over the years, the Court has also upheld laws or governmental actions that have the effect of treating religion equally with non-religion. This trend has been particularly evident in recent years with respect to the government's including the religious with the secular in the receipt of governmental benefits. The Court has also upheld against Establishment Clause challenge governmental actions that are precisely tailored to protect the religious freedom of individuals and religious institutions.

I have discussed the four situations where the Court's Establishment Clause jurisprudence can be demonstrated to have been guided by a concern for protecting religious freedom. Two of these situations are reflected in the cases where the Court has found an Establishment Clause violation, and two of these situations are reflected in the situations where the Court has not found an Establishment Clause violation. The Court has held unconstitutional under the Establishment Clause all governmental actions that have had the effect of favoring one religious belief over another religious belief or of favoring religious belief over non-religious belief. In so doing, the Court has protected the religious freedom of those persons who do not share the favored religious beliefs.[121] The Court has also protected the religious freedom of religious institutions and their adherents by holding that under the Establishment Clause the government cannot

[120] *See* the discussion, *supra*, notes 5-11, and accompanying text.
[121] *See* the discussion, *supra*, notes 12-27, and accompanying text.

become involved in matters of religious doctrine or policy and must respect the religiously-based decisions of religious institutions.[122] At the same time, the Court has held that at least in some circumstances, the Establishment Clause permits the government to include the religious with the secular in the receipt of governmental benefits, and to that extent the Establishment Clause protects the religious freedom of religious institutions and religious adherents.[123] Finally, the Court has held that the Establishment Clause permits the government to take actions that are precisely tailored to protect the religious freedom of individuals and religious institutions.[124]

The Supreme Court's constitutional decisions under the Establishment Clause, holding what it is that the Establishment Clause prohibits and what it is that the Establishment Clause permits, have strongly reinforced and advanced the constitutional guarantee of religious freedom in the United States.

References

Robert A. Sedler, "Understanding the Establishment Clause: A Revisit," to be published in the WAYNE LAW REVIEW 2014

Robert A. Sedler, "Understanding the Establishment Clause: The Perspective of Constitutional Litigation," 43 WAYNE LAW REVIEW 1317 (1997)

William Marshall, "The Limits of an Establishment Clause 'Restatement': A Response to Professor Sedler," 43 WAYNE LAW REVIEW 1465 (1997)

Robert A. Sedler, "The Constitutional Protection of Religious Liberty in the United States," 2010 FORUM ON PUBLIC POLICY ONLINE, Vol. 5

Jesse H. Choper, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995)

Richard C. Schragger, "The Role of the Local in the Doctrine and Discourse of Religious Liberty," 117 HARVARD LAW REVIEW 1810 (2004)

Hosana-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 132 S.Ct. 694 (2012)

Cutter v. Wilkinson, 544 U.S. 709 (2005)

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

Published by the Forum on Public Policy

[122] *See* the discussion, *supra*, notes 28-45, and accompanying text.
[123] *See* the discussion, *supra*, notes 46-80, and accompanying text.
[124] *See* the discussion, *supra*, notes 82-119, and accompanying text.