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FREEDOM OF CONSCIENCE AND RELIGIOUS FREEDOM

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I. HISTORICAL CONTEXT

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Generally, this language of the First Amendment relating to religion has been divided into two "clauses" referred to as the establishment clause and the free exercise clause. The original intention of the drafters of the First Amendment was to limit the power of the national government to interfere with the differing treatment of religion by the states ratifying the Constitution. In other words, the amendment was designed to respect the diversity of state law regarding religion from Virginia's disestablishment of the Church of England to Massachusetts's establishment of the Congregationalist Church which continued into the 1830s. Both the free exercise clause and the establishment clause were made applicable to the states as well as the national government by decisions of the Supreme Court in the 1940s.[2]

A popular treatise on American constitutional law summarizes the Supreme Court's approach to the First Amendment by saying that "There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice. This tension between the clauses often leaves the Court with having to choose between competing values in religion cases. The general guide here is the concept of 'neutrality.' The opposing values require that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner."[3] While it is a generally accepted view that there is such "a natural antagonism" inherent in the First Amendment's treatment of

1 Dean, John Paul II Institute for Studies on Marriage and Family.

2 See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) regarding application of the free exercise clause; and *Everson v. Board of Education*, 330 U.S. 1 (1947) for application of the establishment clause.

3 John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 1157 (4th ed. 1991).

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religion, permit me to say here that I would argue and will suggest later that a better reading of the amendment is one which finds that the two clauses are indeed complementary rather than antagonistic. Further, it is the Supreme Court's false reading of the amendment which views the clauses as "antagonistic" that has led to both profound confusion and distortion of the meaning of this constitutional text.

The Supreme Court has afforded the principle of "neutrality" constitutional standing, yet it has failed to provide a general standard of what constitutes a religiously neutral act. Thus, what is constitutionally permissible in this area can only be determined within the context of a legal challenge to a policy, regulation or action.[4] Furthermore, the fact that the Court has adopted differing tests to determine constitutionally permissible action under both the establishment clause and the free exercise clause has worked "to bring the values embodied in those two clauses into conflict."[5]

When a state action is challenged as a violation of the establishment clause the state must show that its action (1) had a secular purpose, (2) had a primary secular effect, and (3) did not involve government in an excessive entanglement with religion. The first two tests relating to a secular purpose and primary effect are relatively straightforward. However, the question of excessive entanglement has itself required a three-part determination involving an evaluation of (1) the character and purpose of the religious organization or institution affected, (2) the nature of the state aid or benefit, and (3) the anticipated relationship between the government and the religious institution or community.

In regard to the free exercise of religion the Supreme Court has ruled that government may regulate the actions of all persons even when those actions are motivated by religious beliefs or convictions without violating constitutional standards if the action of the state is religiously neutral and promotes significant societal interests. In this area, a central question has been how to measure what constitutes a sufficiently significant societal interest to withstand a constitutional challenge. The Supreme Court in the recent past has shifted its view of the matter. It no longer requires that the state show that its action is necessary to advance a "compelling" state interest, that is, a governmental interest of the highest importance. Instead, it ruled that the state need merely show that the governmental action in question was reasonably related to a valid governmental interest.[6] In 1993, the Congress restored the "compelling" state interest standard to these cases through the enactment of the "Religious Freedom Restoration

4 *Ibid.*, p. 1158.
5 *Ibidem.*
6 *Employment Division, Department of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

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Act." Of course, in these cases the individual must show that the state action at issue constitutes a burden on his religious beliefs.

While it is not possible to discuss the entire case law of the Supreme Court regarding religious liberty, a short review of several cases will provide an overview of many of the general principles utilized in the Court's decision-making. Perhaps the most famous decisions of the Court regarding religious liberty and the establishment clause of the First Amendment concerns state action related to religion and state-sponsored or public schools. During the early 1960s, the Supreme Court ruled that the recitation by students in public schools of a "nondenominational prayer" violated the establishment clause of the Constitution.[7] One year later the Court expanded that ruling to strike down, again as a violation of the establishment clause, government-authorized programs in which public school students engaged in reading the Bible or reciting the Lord's Prayer.[8] Then, in 1980, the Supreme Court held that a state law requiring that copies of the Ten Commandments be displayed in the classrooms of public schools was also impermissible under the establishment clause.[9]

In 1972, the Court considered the question of whether a state could compel a small, agrarian Protestant sect known as the Amish to send their children to public school after the eighth grade. The Court applied a two-part balancing test. First, it determined that there was indeed a significant burden on the free exercise of religion by the Amish since compelling attendance at public school could possibly destroy the Amish way of life. Second, the Court balanced this against the state interest involved and the degree to which the state's objective would be undermined by the granting of an exemption for the Amish. The Court held that the religious liberty of the Amish outweighed the interest of the state in promoting the education and general welfare of Amish children.[10] However, a decade later the Court held that there was no violation of the free exercise clause in the action of the federal government in denying tax exempt status from federal income tax to any school or university which discriminated on the basis of race, even when such discrimination resulted from a sincerely held religious belief and when the denial of such a tax exemption would result in significant financial burdens to the school.[11]

Other federal laws have recognized the autonomy of religious institutions in such areas as employment as essential to a religious community's free exercise of religion. For example, the Supreme Court has held in *National Labor*

7 *Engel v. Vitale*, 370 U.S. 421 (1962).
8 *School District v. Schempp*, 374 U.S. 203 (1963).
9 *Stone v. Graham*, 449 U.S. 39 (1980).
10 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
11 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

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Relations Board v. Catholic Bishop of Chicago[12] that the National Labor Relations Board was not authorized by federal law to regulate activities regarding the unionization of lay faculty employees at schools affiliated with the Catholic Church and such actions by the government raised the possibility of government review and assessment of the religious beliefs and practices of the religious community. The Congress has also acted in a similar way in Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the basis of religion by expressly exempting the employment practices of religious institutions in their nonprofit activities thereby allowing churches and their related institutions to make employment decisions on the basis of religious affiliation.

II. The Equal Access Act

In *Widmar v. Vincent*[13] the Supreme Court struck down the policy of a state university which prohibited student religious organizations from using school facilities which were available to other student organizations. The Court held that when the university opened its facilities to student organizations it created a "public forum". Further, it held that the university could only exclude from that "public forum" organizations based on their content, nature or activities when it could show that such exclusion was necessary to serve a compelling state interest and that the policy was narrowly formulated to achieve only that end. The Court held that permitting religiously oriented student groups to use university facilities on the same basis as other student groups would not violate the establishment clause. To the contrary, the Court held that forbidding such equal access would violate students' right to freedom of speech and association.

Following the Supreme Court's decision in *Widmar v. Vincent*, which applied only to university students, the Congress enacted the "Equal Access Act" to apply the rationale of the Court's decision to secondary school students. The Act makes it unlawful for "any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[14] In *Board of Education of Westside Community Schools v. Mergens*,[15] the Supreme

12 440 U.S. 490 (1979).
13 454 U.S. 263 (1981).
14 20 U.S.C. secs. 4071-4074 (Supp. V 1987), Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*
15 110 S.Ct. 2356 (1990).

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Court upheld the "Equal Access Act," ruling that it did not violate the establishment clause of the First Amendment.

In June of this year, the Supreme Court decided *Rosenberger v. University of Virginia*, holding that the University of Virginia infringed vital first amendment principles when it refused to pay the printing costs of a student newspaper entitled *Wide Awake* because it espoused Christianity while the university had a policy of paying the printing costs of other student newspapers. Because the university provided financial assistance to other student papers the Court concluded that the denial to a religious student paper "compromised" the "neutrality" commanded of the state by the First Amendment.

The confusion caused by the decisions in such cases and, more importantly, by the Court's reasoning in its opinions which has failed to find a consistent rationale and method of analysis for religious liberty principles, resulted in President Clinton issuing a statement of the law respecting religious expression in public schools with an instruction that the Attorney General of the United States and the Secretary of Education take steps to inform local school officials of the rights of students and those activities which are appropriate under the terms of current constitutional interpretation by the Supreme Court.[16] Among those constitutional principles listed by the President are the following:

> *Student prayer and religious expression*: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the extent they may engage in comparable non-disruptive activities... Generally, students may pray in a non-disruptive manner when not engaged in school activities or instruction...
>
> *Official neutrality regarding religious activity*: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging anti-religious activity.
>
> *Teaching about religion*: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture...
>
> *Religious literature*: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities...

16 William J. Clinton, *Memorandum for the Secretary of Education and the Attorney General*, July 12, 1995.

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Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

III. The Religious Freedom Restoration Act of 1993

The result of the Supreme Court's decision in the 1990 case of *Employment Division v. Smith* was seen by many religious leaders, churches and organizations as opening the way for government to intervene more pervasively in religious affairs. The opinion of the General Counsel of the United States Catholic Conference was reflective of the concerns of many churches when he wrote that the Supreme Court's decision "effectively eviscerated precedents offering procedural protection for religious freedom and invited governments to undertake more vigorous intervention in religious affairs."[17] The Judiciary Committee of the U. S. House of Representatives found that "The effect of the *Smith* decision has been to subject religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts. Because the 'rational relationship test' only requires that a law must be rationally related to a legitimate state interest, the *Smith* decision has created a climate in which the free exercise of religion is continually in jeopardy; facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion."[18]

In response, the United States Congress enacted the "Religious Freedom Restoration Act" to restore the state of the law to where it was prior to the action of the Supreme Court in *Employment Division v. Smith*. As enacted by the Congress, the "Religious Freedom Restoration Act" provides that "the government cannot burden a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest."[19]

17 Mark E. Chopko and John A. Liekweg, "A Commentary on Legislative Remedies to *Employment Division v. Smith*," Memorandum of the Office of General Counsel, United States Catholic Conference (Washington, D.C., May 24, 1991).

18 *Ibidem*.

19 Committee on the Judiciary, U. S. House of Representatives, 103 Congress, First Session, *Report on H.R. 1308, Religious Freedom Restoration Act of 1993* (May 11, 1993), p. 10.

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IV. The Religious Equality Amendment to the Constitution

Earlier this year a newly proposed amendment to the Constitution of the United States was introduced in the Congress by Representative Charles Canady and currently has 92 co-sponsors. The amendment, entitled "The Religious Equality Amendment", has already been the subject of hearings in various American cities by the Committee on the Judiciary of the House of Representatives. The amendment which is composed of three sections, reads as follows:

Section 1. Neither the United States nor any State shall abridge the freedom of any person or group, including students in public schools, to engage in prayer or other religious expression in circumstances in which expression of a nonreligious character would be permitted; nor deny benefits to or otherwise discriminate against any person or group on account of the religious character of their speech, ideas, motivations, or identity.

Section 2. Nothing in the Constitution shall be construed to forbid the United States or any State to give public or ceremonial acknowledgement to the religious heritage, beliefs, or traditions of its people.

Section 3. The exercise, by the people, of any freedoms under the First Amendment or under this Amendment shall not constitute an establishment of religion.

V. Conclusion

Professor Mary Ann Glendon and others have argued that the insistence of a "wall of separation" between government and religion has continued to "drive" the Supreme Court's approach in interpreting the establishment clause of the First Amendment and giving the principle of neutrality regarding religion itself "priority over other aspects of religious freedom."[20] While this interpretation is indeed a popular one in a wide legal circle in the United States, it apparently is so irrespective of its dubious historical basis. As the Chief Justice of the United States wrote in 1985, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was, of course, in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury

20 Mary Ann Glendon and Raul F. Yanes, "Structural Free Exercise," *Michigan Law Review*, vol. 90, p. 477, 493 (1991).

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Baptist Association [where the expression appeared] was a short note of courtesy, written fourteen years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." [21] Unfortunately, Chief Justice Rehnquist has as yet been unable to convince his colleagues on the matter. In many ways, Justice Arthur Goldberg's prediction regarding the consequences of the insistence upon a neutrality between government and religion *per se* has been fulfilled. In 1963, he wrote,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution but, it seems to me, are prohibited by it.[22]

The current confusion and inadequacy of the Supreme Court's present jurisprudence regarding religious liberty stem in large measure from its insistence that the idea of absolute neutrality or Jefferson's "wall of separation" between church and state be regarded as the fundamental principle guiding determinations of religious liberty. Not only is this approach profoundly ahistorical in that it imposes an interpretation of the First Amendment clearly contrary to its original intention, but it also gives rise to the notion, mentioned earlier, that there exists an internal antagonism within the First Amendment between the free exercise of religion clause and the establishment of religion clause. The better view, and the one maintained by Professor Glendon, is that there is rather a complementarity between the two clauses with a priority given to the protection of the freedom of religion.[23] Moreover, I would even argue that it is just such a reading of the First Amendment which protects the freedom of religion and freedom of conscience that was intended by the drafters of the First Amendment and paramount in the thought of Jefferson himself.

21 *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).
22 *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring).
23 Glendon and Yanes, *op. cit.*, p. 541.

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