

# The ‘Wall of Separation’ Vision and Religion Clause Jurisprudence\*

Mackenzie Woods  
The University of New Mexico

## Abstract

What is religions place in the United States government? Such is the inquiry at hand. Examined through the early American philosophy of Thomas Jefferson, James Madison, John Adams, and George Washington, this study analyzes religion clause jurisprudence from *Cantwell v Connecticut* (1940) through *Pleasant Grove City v Sumnum* (2009). Culminating in an analysis of the current Justices on the Supreme Court, this study argues that the founders never intended for religion to be incorporated with the United States Government and that today this vision has been generally realized vis-à-vis religion clause jurisprudence.

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\* Special thanks to Peter Kierst J.D., Professor Rocca and Professor Butler for your invaluable comments, guidance, and patience.

## **Introduction To the Journey of Epistemology**

Contained within the opening sentence of the First Amendment to the United States Constitution exists a phrase of unimaginable consequence. Philosophers and scholars alike have not only debated the meaning of government and religion as separate entities for centuries, but the interaction between these two profoundly powerful institutions have been cause for endless debate and scholarship (*see* Brenner 2004, Camp 2006, Davis 2000, Kramnick 2005, Martin 2004, Munoz 2003, Sorauf 1976, Woods 1998). From these examinations, countless representations have been presented to understand the dynamic between religious institutions and the United States government in terms of the First Amendment; this study takes those examinations a bit farther by applying early American philosophy to contemporary religion clause jurisprudence.

The United States was founded by separationist thinkers and has today, albeit a weaker version of, realized Thomas Jefferson's 'wall of separation'. Ernest Holmes said, "The starting point of our thought must always begin with our experiences" (Holmes 1997); thus, this study begins with the early American experience. Extracting the central tenets of *separationism* and *accommodationism*, section I argues that it is a mistake to consider Washington and Adams as accommodationists; it will be shown that even these men were separationists. Thus, section I establishes the concepts guiding the examinations of section's II and III.

As time passes, so does the progression of this analysis. Section II is an examination of religion clause jurisprudence in the U.S. beginning with the Supreme Court decision in *Cantwell v Connecticut* (1940). Here Justice Roberts applied the founder's philosophy by arguing that Americans have an absolute right to believe what

they wish; however, interference by the state necessarily begins at action. Section II concludes with the argument that although there are punctuated moments in which the jurisprudence takes a turn for accommodationism, the linear path of such, is a weak version of the intended separationist philosophy.

The study does not end here, however. By coming to the understanding that to comprehend the aggregated Court is to understand its parts, an examination of each Justice is performed in section III. Through an analysis of their opinions, from dissents to concurrences in part, each Justice on the Supreme Court is placed on a linear spectrum of separationist to accommodationist, left to right, respectively. It is at this point where the final claim can be made that the U.S., although experiencing moments of departure from, separates religion from government as seen from early American thought, a long history of Supreme Court precedent, and the belief structures of those currently interpreting the Constitution.

Let us no longer summarize and begin by exploring the environment surrounding the drafting of the phrase at question: the religion clause of the First Amendment.

### **Early American Thought and the Place of Religion**

To responsibly study the interaction between Church and State in the U.S., one must start at the beginning. For this study to begin on solid ground, we must first understand both how this argument came to be and why each side of the debate believes that they are correct. The perspective of this study is explicit; the signers of the Constitution had no desire for religion to be incorporated into government, or vice-versa. This section, withholding the summation, is intentionally impartial so as to walk the reader through the logic each side appeals to when they argue why the government

should either accommodate religion or be completely separate from it.

Thus, this section first articulates what the environment was like, both intellectually and politically, when the First Amendment was crafted and ratified. Then, the terms *separationist* and *accommodationist* acquire explicit and coherent definitions culminating in a working definition of what it means to say that the actions of either a United States government entity or official was, or is, either *separationist* or *accommodationist*. And finally, the position of this study is articulated and defended in light of the knowledge established immediately prior.

### *The Environment During the Ratification of the First Amendment*<sup>1</sup>

The drafters of the Constitution had a deep adherence to the tenets of the Enlightenment that fundamentally shaped their perspective of how America should be governed. Elihu, a commentator writing at the time the Constitution was being drafted, wrote the following in both the Connecticut and Massachusetts newspapers in February of 1788:

*... the light of philosophy has arisen... miracles have ceased, oracles are silenced, monkish darkness is dissipated... Mankind are no longer to be deluded with fable.* (Kramnick and Moore 2005)<sup>2</sup>

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<sup>1</sup> I believe it is helpful to note when discussing this topic that in the same way that John Locke and Edmond Burke are associated with liberal and conservative thought, respectively, the traditional approach to this topic is that Thomas Jefferson and James Madison are *separationists* and George Washington and John Adams are *accommodationists*. This paper will later show why the latter can actually be understood in the same terms as the former, but for now this analogy is helpful to keep in mind.

<sup>2</sup> Here, Elihu is referring to the way the framers of the Constitution distinctly set religion and government apart from one another with the “no religious test for office” clause in Article VI.

Committing themselves to an unprecedented reliance upon rationality, virtue and equality, the framers made very clear in Article VI that there shall be no religious test for any office in the United States government. In a letter Thomas Jefferson wrote to Roger C. Weightman, the last letter he ever wrote, he said:

*May it be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booting and spurred, ready to ride them legitimately, by the grace of God. (Brenner 2004)*

For Jefferson, his confidence in man's ability for reason and virtue was why not only self-governance would work, but why the American government necessarily had to encourage open and free debate when it came to religion. Neither rationality nor virtue was sufficient; Jefferson and the others knew this. They all agreed that religion was necessary in a government for its moral lessons. They were not hostile to the teachings of religion specifically; rather, it was the perversion of religious institutions they feared. As John Adams wrote to Thomas Jefferson on June 25, 1813:

*I wish You could live a Year in Boston, hear their Divines, read their publications, especially the Repository. You would see how spiritual Tyranny and ecclesiastical Domination are beginning in our Country: at least struggling for*

*birth.* (Jefferson 2005)

Although religion as a teacher of morality and virtue was something they embraced at a personal level, the founding fathers feared that the institutions of religion would pervert such lessons. Jefferson writes in his notes on Locke and Shaftesbury that “Nothing but free argument, raillery even ridicule will preserve the purity of religion.” That is, if the government were to try and regulate or establish religion in America they would be, in fact, harming the true nature of the very religion they are establishing. Jefferson and Madison both profoundly believed that the incorporation of church with state would necessarily lead to the destruction of both (Kramnick and Moore 2005). If America was going to harness the profundity of religion and human rationality it had to separate religion from the tainting effects of government, and vice-versa. However, it was not only their philosophy concerning human nature shaping their opinions, they were equal scholars of history; their fears that government/religion incorporation would destroy each other were validated through the historical lens through which they were looking.

The Bancroft and Pulitzer prize-winning author Gordon Wood clearly explicates the dependence the founding fathers placed on learning from England’s past, a lesson that would perpetuate the making of unprecedented decisions by the United States. Wood argues that the American Revolution not only embodied the Enlightenment but also was unlike any other revolution in the history of man because these people suffered no egregious harm (Wood 1969). American colonists were never the object of tyrannical rule or profound oppression. Rather, the Americans were unlike any other revolutionary people because they sought to anticipate oppression by attaining a comprehensive understanding of human history. Josiah Quincy wrote “Happy are the men, and happy the

people, who grow wise by the misfortunes of others.” (Wood 1969) Americans would not become oppressed; rather they would offensively secure their own liberties (Wood 1969). The philosophy of the American revolutionary can be understood to be one of great emphasis on rationality, virtue, education, and human liberty. The religious debates of both the Constitutional Convention and the first Congress would reflect these very philosophical tenets.

James Madison, like many others of the ratification party, opposed any form of a “superfluous” bill of rights (Davis 2000). Their thoughts were that the Constitution did not grant any power for the things a bill of rights would be denying from the government; thus, a power not granted is not worth denying. However, the American revolutionaries approached this in the same way they approached their decision to revolt, by a close examination of history and exploration of rationality. And before the first Congress had even met, the States who had become fearful of the federal government demanded explicit limitations of federal powers that were not explicitly granted as such. On June 8, 1789, the first day of the first Congress, James Madison would present the following Constitutional Amendment:

*The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner or in any respect be infringed.”* (Davis 2000)

Here, Madison initiated what would be an endless debate on the establishment of religion and government infringement upon the free exercise of “conscience” in American Constitutional Law (Davis 2000).

In June of 1790 nine states gave the sufficient votes to approve the Bill of Rights;

establishing the foundation from which *separationists* and *accommodationists* would battle about the meaning behind the phrase “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

### *Accommodationist Philosophy and Reasoning*

Those with the perception of the Church and State dynamic similar to that of Chief Justice William Rehnquist argue that the First Amendment of the Constitution was established to ensure that the government treats all religions equally and protects their right to practice the tenets of their religion (Sorauf 1976). In essence, the government’s attitude toward religion should be on a non-preferential basis. The First Amendment would be, in the accommodationist point of view, in favor of the funding of a parochial school as long as parochial schools of all religious denominations can be funded equally. When Madison and the members of the first Congress drafted the establishment clause they intended it to make certain that the United States government would not advance any single religion; the commitment to the idea that religion is necessary in order for any society to be moral is continually appealed to (Brenner 2004).

Accommodationists rely heavily on two tenets, the first of which is a necessary premise for the second: 1) religion is necessary because of the moral force it has on society and 2) when the Constitution and Bill of Rights were being drafted, the founding fathers were religious men - to the extent that the First Congress opened with prayer and later appointed their own Chaplain – therefore, they intended for their government to aid and promote their religion (Davis 2000). Extrapolating on the first tenet, accommodationists argue that because religion is, and was even at the founding of the



country, such a powerful force in citizens lives, the government necessarily must support, "...if not initiate..." religion (Davis 2000). The establishment clause created a positive right, invoking the support of religion by government, not a harsh separation from it.

George Washington and John Adams are referred to as the founding father's who most adamantly believed in this school of thought. Being a traditional thinker, Washington argued many times that religion was necessary for the American society to be moral:

*Of all the disposition and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Man and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity... Tis substantially true, that virtue or morality is a necessary spring of popular government. (Washington 1796)*

Thus, if morality was necessary for the Republican government of the United States to be successful, in the accommodationist's eyes, Washington necessarily called for government support of the moral institutions- i.e religious institutions.

The second tenet defends the perception that because the founding fathers were religious men they drafted the First Amendment to support religion. It is believed that because the First Congress opened with a prayer and would later appoint a congressional Chaplain, there is no basis to believe that these religious men would have a problem with their government supporting and promoting religion.

Frank Sorauf has shown that in contemporary jurisprudence accommodationists take a defensive position at an incredibly high rate; rarely, if ever, do they take a plaintiff position in any Church/State litigation (Sorauf 1976). Thus, he argues that *stare decisis* has essentially created Constitutional Law filled with anti-accommodationist precedent as the result of separationists having the strategic advantage in judicial disputes of church and State. This point is addressed in sections II and III of this study.

### *Separationist Philosophy and Reasoning*

*Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and State' (Brenner 2004).*

These are the words of Thomas Jefferson when he wrote to the Danbury Baptists; the understanding of rational freedom and the dynamic of Church and State interaction that is articulated in these few sentences would serve to be the revolutionary catalyst dividing accommodationists and separationists for centuries. Acting as the antithesis of the accommodationist perspective, Jefferson, Madison and the separationists would wince at the idea of government injecting itself into American religious dealings. Rationality and, therefore, freedom of choice serve as the crux of the separationist's argument. In a time when Enlightenment philosophy and scripture could be cited on the same page and both

were being widely read by American intellectuals, lessons were being learned from the English homeland and Jefferson and Madison were formulating a belief structure unlike anything seen before (Wood 1969). As Madison drafted the Bill of Rights, he gave great thought to the aspect of religious freedom; thought that centered on freedom of rationality not appeals to the divine (Brenner 2004).

In response to the Virginia's general assembly bill of 1784, Madison argued in his "Memorial and Remonstrance" that "...religion or the duty to which we owe our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." (Brenner 2004). The intent of this bill Madison so vehemently opposed would have established that "...the Christian religion..." would be established as the official religion of Virginia. From his words, we can see that a proponent of separationism deemed that religious beliefs were the result of a rational decision making process; a process that all men (and women as it were) had the "...inalienable right..." to engage in. The government of civil society thus had no more of a right to establish one set of religious beliefs as effecting the citizenry than one man has the right to make any other believe that which he believes to be True. The strict adherence to individual sovereignty guides the separationist in his pursuit of understanding religious freedom. If every citizen is responsible for creating his and her own belief structure through rational introspection, then no government, or other person for that matter, has the ability, nor right, to affect a set of beliefs onto them. Not only would government then not have the ability to tell a citizen what religion to believe, governments are barred from any state sponsorship of religion in any form. Therefore, separationists vehemently contend with accommodationists on the issue of funding parochial schools- separationists argue that

government is acting unconstitutionally when *any* public funding is granted to these schools.

*Why Washington and Adams were Indeed Separationists*

It is a mistake to classify George Washington and John Adams, the two men appealed to as the quintessential accommodationist thinkers, as accommodationists. Indeed, both of these men were more Christian, in the traditional sense, than Jefferson and Madison<sup>3</sup>, however to extrapolate from the fact that because these men adhered to Christian doctrine that they would support public favoritism of religion, is where the pivotal mistake is made. Both men were prolific when it came to articulating their perspective that without the affirmative protection of freedom of religion, the majority religions would reject the rights of the minorities, effectively ridding any freedom for religion. In 1813, John Adams wrote to Thomas Jefferson articulating this exact point:

*Checks and Ballances, Jefferson, however you and your Party may have derided them, are our only Security, for the progress of Mind, as well as the Security of Body. Every Species of these Christians would persecute Deists, as soon as either Sect would persecute another, if it had unchecked and unballanced Power. Nay, the Deists would persecute Christians, and Atheists would persecute Deists, with as unrelenting Cruelty, as any Christians would persecute them or one another. Know thyself, human Nature!*

This fear of the ‘worm turning’, as it were, and seeing the various sects of the religions

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<sup>3</sup> Jefferson and Madison qualified themselves as Deists. Jefferson wrote to Ezra Styles Ely: “You say you are a Calvinist. I am not. I am of a sect by myself, as far as I know.” (Brenner 2004).

present in America subjugate the others, is why John Adams defended and supported the First Amendment. Adams did not in any way endorse the idea that government would benefit by involving itself with religion, the morality taught by religions should be what is sought after – such lessons, he argued, did not necessitate government sponsorship (Jefferson 2005). Washington spoke of this precisely in his “farewell address” of 1796:

*All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection, should demean themselves as good citizens.*

He and Jefferson agreed these powerful institutions must be separated from each other in order to protect the important services they provide- lessons like morality.

Washington would have agreed wholeheartedly with Jefferson and Madison on three crucial points exemplifying his truly separationist opinion: first, that the purpose of religion was to teach morality and virtue and that no specific religion would do that better than any other. Second, that the citizen who does not live a virtuous, productive, moral life cannot consider himself as a “...true...” member of his or her religion; thus, serving to pervert the beneficence of that religion. And third, all citizens of the United States have the *right* to worship any Deity that agrees with the “...dictates of their conscienc[e]...” For he wrote in his letter to the General Assembly of the Presbyterian Church in May of 1789 that:

*While all men within our territories are protected in worshipping the Deity*

*according to the dictates of their consciences; it is rationality to be expected from them in return, that they will be emulous of evincing the sanctity of their professions by the innocence of their lives and the beneficence of their actions; for no man, who is profligate in his morals, or a bad member of the civil community, can possibly be a true Christian, or a credit to his own religious society.* (Munoz 2003)

Jefferson argued a similar point when he said "...it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg."

(Notes on Virginia 1782). The two men paralleled each others reasoning by arguing that there is no 'Right' religion; rather man's faculty of reason is what needs to be exercised, not the power of government to control beliefs or perpetuate Christianity or the like. It is the deterioration of the religious institutions that is to be feared most and stopping such a thing from happening is vital to the perpetuation of a moral society.

John Adams and George Washington both used rhetoric essentially identical to that of Thomas Jefferson and James Madison – all of these men had profound respect for religion, government, human rationality, and virtue; thus, they sought to protect all of these things. The only way that could be done, they argued, was to separate government from religion with the Jeffersonian "wall of separation". For if they did not do so with the First Amendment, the morality of the citizenry would suffer and the majoritarian fervor would bring forth certain ruin for the "great experiment" that was the United States of America. Thus, these men, who fundamentally crafted the Constitution and direction of the United States, did not seek to create a religious government in any way; rather, they sought to establish an enlightened nation where religion and government would benefit

from their distinct separation.

Let us now see if this vision has been realized by exploring how the Supreme Court has interpreted this protection.

## **Section II: Church and State – The Supreme Court’s Interpretation**

With an understanding of how the American founding fathers viewed the unendingly complicated dynamic between Church and State, we can move to somewhat more contemporary times and begin answering the question of whether or not that vision has been realized today. To most clearly answer this question we embark on a chronological analysis of Supreme Court precedent – establishing the story of how our contemporary society has dealt with the Constitutionality of religion/state interaction. Beginning with the Hughes Court (1930-1941), we will discuss the lineage of religion clause cases in terms of the Court in which it was decided; thus, staying true to this chronological intent.

From the following analysis, this section will extrapolate two premises leading to a central conclusion. First, that when it comes to the vision our founding fathers had of the Church/State dynamic, as developed in the previous section, the Supreme Court has taken a clear position on only one sub-section of religion clause cases- when it comes to school children, the Court has a very low threshold of allowable interaction between them and the Church<sup>4</sup>. And two, that in the years this body of case law has evolved, a consistent and defined threshold of interaction between Church and State has eluded the grasp of the Justices; specifically, no consistent test, such as the *Lemon* test, has been

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<sup>4</sup>See *Everson v. Board of Education*, *Engle v. Vitale*, *School Dist. Of Abington Township v. Schempp*, *Lemon v Kurtzman*, *Wisconsin v. Yoder*, *Lee v Weisman*, *Lamb’s Chapel v Center Moriches Union Free School District*, *Santa Fe Independent School District v Doe*, *Zelman v. Harris*.

maintained. Therefore, to really understand the jurisprudence of what Chief Justice Burger called an “...extraordinarily sensitive area of Constitutional law...” (Epstein, Walker 2003) we must come to a close and coherent understanding of each Justice on the current Court – the final section of this study will do just that.

*Laying the Groundwork – Pre Lemon v Kurtzman*

In 1940, *Cantwell v Connecticut* 310 U.S. 296 (1940) was decided by the Supreme Court; it was a case that would establish fundamental concepts and become the first attempt to create a tool to test whether or not there had been a violation of the First Amendment’s religion clause. To start, Justice Roberts had to show why the Supreme Court was able to hear a case where State actions were at question, not Federal. Necessarily, he stood on the argument that the First Amendment was necessarily applicable to the States vis-à-vis the Fourteenth Amendment. Jurisdiction was thus established; the religion clauses became applicable to the States.

In his letter to the Danbury Baptists, Thomas Jefferson said, “...*the legislative powers of government reach actions only, and not opinions...*” (Brenner 2004), later criticized for doing so<sup>5</sup>, Justice Roberts made this thought Supreme Court precedent as he said:

*The constitutional inhibition of legislation on the subject of religion has a double aspect... freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for*

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<sup>5</sup> In his dissent of *Wallace v Jaffree* (1985), Chief Justice Rehnquist would criticize the Court’s entire framework of addressing religion based on, what he calls a mis-application of this analogy by Justice Roberts – more to be said on this later in the section.



*the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection... Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. (Cantwell v Connecticut 310 U.S. 296 (1940))*

Thus, the *belief/action* dynamic was created and necessarily defined. Americans are free to believe whatever they wish, but they are not free to behave in that same manner. In the same way that Adams, Madison, Washington and Jefferson argued for freedom of the mind but restraint in action<sup>6</sup>, Justice Roberts delivered a unanimous opinion expressing these same tenets of freedom.

Now that the Court established the dichotomy of how religious expression would be viewed, the first test seeking to define the extent to which the government could Constitutionally regulate these "...actions..." was attempted. Justice Roberts essentially laid out two ways in which the government could regulate five different religious actions. The State can regulate "...the times, the places... the manner [in which religious organizations solicit] upon [the] streets... [hold] meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community...". However, it can only do so in a "...general and non-discriminatory..." fashion. Thus, the first attempt at creating a test of what exactly the government could regulate was outlined – they could only regulate the actions of religious expression as long as it was "...general and non-discriminatory..." Little did Justice Roberts know, this would be the first among many attempts to answer this question.

The Courts rendering of how the religion clause of the First Amendment was to

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<sup>6</sup> See section one for several examples when this idea was at the center of various communications between the men.

be read, led to the dichotomy of belief and action; action was primarily referred to at the individual level, not government action. The Establishment of religion went nearly unaddressed in *Cantwell*, barring the deciding factor of the case that no public official shall have the ability to determine what a religion is:

*...the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution... (Cantwell v Connecticut 310 U.S. 296 (1940))*

The role of the public official was slightly defined; the general government's role was not. Decades earlier, however, the Court first explored the issue of public assistance to religious organizations in *Bradfield v Roberts* 175 U.S. 291 (1899). Here, \$30,000 was appropriated to aid a hospital run by Roman Catholic nuns. Suit was brought claiming this appropriation was unconstitutional based on the Establishment clause – the Court unanimously disagreed, arguing that the aid was “...intended to advance a clearly secular purpose...” thus, establishing the first, fundamentally accommodationist link in a long lineage of Establishment clause jurisprudence.

Not until forty-eight years later would the Establishment clause question be raised again in; however, this time school children would be the center of debate. In *Everson v Board of Education* 330 U.S. 1(1947), suit was brought questioning the New Jersey law that authorized the state to assist in the transportation of children to and from school in the various townships. Ewing Township provided money to the parents of both public high school and non-profit private school attendee's – essentially the contention was that state tax money was assisting the transportation of students to and from four Roman Catholic private schools. It is in this case where Justice Black explicitly defines what the

Establishment Clause *at least* means:

*Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. (Everson v Board of Education 330 U.S. 1(1947))*

Immediately following this detailed account of what the government of the United States can and cannot do in terms of its relations with religion, Justice Black sets forth, injecting great controversy into the decision “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’” Thus, a very clear, separationist perspective is outlined by Justice Black –the government walks a very fine line when it interacts with religious institutions. The case, however, is decided in favor of allowing New Jersey to subsidize the travel costs of its school children to and from both public and Catholic schools because:

*[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 so as to handicap religions,*

*than it is to favor them. (Everson v Board of Education 330 U.S. 1(1947))*

Thus, Justice Black and four of his colleagues believe that by not allowing New Jersey to equally fund non-profit private school students as they do public school students, they would essentially be punishing them for their profession of faith; thus, hindering religion, not protecting the freedom of its expression. *Everson* concludes by establishing the *neutrality* threshold that would later be used in more decisions.

Building on the Court's desire for a neutral alliance between Church and State, Chief Justice Earl Warren adds the *least restrictive means* test to the logic of *Cantwell* in the decision of *Braunfield v Brown* 366 U.S. 599 (1961). In *Cantwell*, Justice Roberts established the belief/action dichotomy of religious expression – specifically that freedom of religious belief is absolute, whereas, religious action can be regulated by the State for the protection of society. Building on that logic came *Everson* in which Justice Black argued for a neutral relationship with religion, one where government, among other things, was not the adversary of religion. When a Jewish man by the name of Abraham Braunfield came to the Court because the state of Pennsylvania did not allow his clothing store to conduct business on Sunday, due to its “Blue Law”<sup>7</sup>. Braunfield argued that the Pennsylvania law was unconstitutional, as he necessarily needed to work on Sunday because of, among other things<sup>8</sup>, his Jewish faith. Thus, he could not work on Saturday, his Sabbath. Chief Justice Earl Warren wrote the opinion of the Court and made another attempt to clarify the Court's approach to religion clause jurisprudence by adding the

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<sup>7</sup> A “Blue-Law” is essentially the public recognition of a day of rest as established through State law.

<sup>8</sup> For economic reasons, Braunfield needed to work 6/7 days. If he could not work on Saturday or Sunday, he argued that he was being unfairly discriminated against due to his Jewish faith.

logic of the *least restrictive means* test:

*... if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. (Braunfield v Brown 366 U.S. 599 (1961))*

The logic of the excerpt above is aligned with *Cantwell's* paradigm of secular purpose; however, the last phrase significantly changes the Court's approach by qualifying secular purpose with the necessary condition that the State cannot accomplish its goals by a less restrictive policy than the one at question.

*Braunfield* signals an important departure from the Court's previous approach to religion in two ways. First, the previous, generally accommodationist decisions of *Cantwell* and *Everson* are contrasted with a decision that created a distinct separation between government regulation and religious action – the government had to show that its interaction with religion was as least restrictive as possible. And second, Chief Justice Warren had established a qualification/test that would necessarily affect the way in which the government attempted to regulate the actions of religious expression – only *Sherbert v Verner* would add anything to this line of logic until *Lemon v Kurtzman* would redefine it all.

Separationists began seeing hope for the realization of Jefferson's "wall of separation" and began litigating the ever-prevalent occurrence of prayer in public schools. *Engel v Vitale* 370 U.S. 421 (1962) was their first case questioning such a thing; specifically the case was questioning the Constitutionality of the New York Board of

Regents requiring teachers to lead public school children in prayer. New York argued that the prayer readings were completely voluntary, those who did not wish to participate could either remain silent or leave the room. Justice Black delivered the opinion of the Court arguing that the government has no authority to draft a prayer that any American would recite as part of a government sponsored event:

*... it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried out by the government. (Engel v. Vitale 370 U.S. 421 (1962))*

Immediately after the decision of *Engel*, the Court granted a writ of certiorari to *School District of Abington Township v Schempp* 374 U.S. 203 (1963). Whereas *Engel* only questioned state-written prayers, *Abington* would raise a broader question of Bible readings. Early in the decision, Justice Clark recounts the precedent yet established by the court regarding the Establishment clause:

*The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (School District of Abington Township v Schempp 374 U.S. 203 (1963))*

Neutrality and secularity being the primary conditions for a Constitutional interaction between Church and State lead the Court to quote Madison as saying "...it is proper to take alarm at the first experiment on our liberties..." and rule that Bible prayer by

teachers at a public school where attendance is legally mandated is an unconstitutional Establishment of religion. The separation between Church and State was ever increasing and perpetuated with decisions like *Lee v Weisman* 505 U.S. 507 (1992) and *Santa Fe Independent School District v Doe* 530 U.S. 290 (2000) which both resulted in decisions arguing that school sponsored prayer at graduation (*Lee*) and athletic events (*Santa Fe*) were unconstitutional; thus, the issue of public schools and prayer invariably became topics where any government sponsorship of religion was intolerable on Constitutional grounds.

With school prayer essentially settled, the broader cases of Establishment inquiry necessitated a coherent tool of analysis; thus, *Sherbert v Verner* 374 U.S. 398 (1963) would add the “...compelling state interest...” test to the least restrictive means test. Adell Sherbert was refused unemployment benefits by South Carolina because she was not willing to work on Saturday. Sherbert claimed that she could not work on Saturday because it was her Church’s Sabbath – she was a Seventh Day Adventist. Justice Brennan lays out a dichotomous path of logic: if South Carolina was correct, either Sherbert’s right to free exercise was not infringed upon by South Carolina’s refusal to pay her unemployment benefits **or** her rights were violated but the violation was “...justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate...” However, Justice Brennan was not about to leave this term in its obviously vague state, so he qualified it by saying: “It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interests, give occasion for permissible limitation...”

In this case, the least restrictive means test was used in conjunction with the compelling state interest test in order to establish the new paradigm of free exercise jurisprudence: the balancing test calling for those “...governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest...” (*Employment Division v Smith* 494 U.S. 872 (1990) Justice Brennan addresses the argument of the appellees (South Carolina) that “...spurious claims...threaten to dilute the fund and disrupt the scheduling of work...” by applying the least restrictive means test:

*For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights...*

Thus, South Carolina was compelled to show that they had no less intrusive ways to provide the same protection of its citizens from fraudulent claims for unemployment. *Sherbert* and the combination of the “compelling state interest” and least restrictive means tests served to create a more difficult test for the government to pass; thus protecting free exercise of religion more<sup>9</sup>. However, this would be the end of the Warren Court and the soon to be new Chief Justice, Warren Earl Burger, would take the oath and seek to usher in a new, more accommodationist Court.

Beginning with *Walz v Tax Commission of the City of New York* 397 US 664

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<sup>9</sup> A clear counter-argument arises here – is the increased protection of religion accommodationist? Not according to the previously established definition of separationist because of the perspective that protecting religion was only done through the separation of government from religion. All of the founding fathers discussed in section one were analyzed on this very topic. Protection of human rationality was fundamentally done through the protection of religion.



(1970) Chief Justice Burger began his legacy of accommodationist jurisprudence, contrasting the previous streak of separationist decisions. *Abington* laid out the two standards by which the Court looked at Establishment clause cases: first, the *purpose* of the legislation and second the *effect* that the legislation has on religion. If the purpose was secular and the effect was neutral, then the legislation was Constitutional. However, Chief Justice Burger added a third prong in *Walz*; the “...excessive government entanglement...” standard.

The logic of *Walz* began with the exploration of the previously established standards, effect and purpose, “The legislative purpose of property tax exemptions is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.” Burger would institute, what on face value would seem to be a test specifically analyzing Jefferson’s “wall of separation”, but in effect Burger would apply the “excessive government entanglement” test in an accommodationist way. In *Walz* Burger argued that:

*Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result – the effect – is not an excessive government entanglement with religion. (Walz v Tax Commission of the City of New York 397 US 664 (1970))*

Thus, the third prong of an Establishment test was established; the degree to which the government would interact with religion, as a function of the legislation at question, would be an additional standard by which the Court would address this line of jurisprudence. Burger and all but one dissenting Justice, found that property tax

exemptions for Churches was Constitutional based on the “...excessive government entanglement...” test: the tax exemption “...restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.” Essentially, not exempting Church’s from property taxes would necessitate that government officials would have to question religious institutions on various minute matters such as clarity of tax returns, etc; thus, creating an excessive entanglement – exempting them would lessen the intensity of this interaction. This seemingly separationist criteria was thus used to accommodate a property tax-exemption for all religious institutions; a stark contrast to Justice Black’s articulation in *Everson* that the Establishment clause meant that government can neither aid *any* nor *all* religions.

The tests established in *Bradfield*, *Everson*, and *Walz* would culminate in *Lemon v Kurtzman* 403 U.S. 602 (1971). The purpose, effect, and entanglement tests, respectively, would first be thoroughly and explicitly applied by Chief Justice Burger to the question of whether or not a tax levied by Pennsylvania and Rhode Island, through the purchases of cigarettes in the states respectively, could be used to subsidize non-public schools in terms of teaching materials and teacher salaries. The law stipulated that only secular books could be purchased and only the teachers who taught secular courses could have their salaries subsidized. Burger wrote:

*In order to determine whether the government entanglement with religion is excessive we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority... here we find that both statutes foster an impermissible degree of entanglement. (Lemon v*

*Kurtzman* 403 U.S. 602 (1971))

Here, Burger established that the purpose and effect tests as necessary steps to the final, and most deciding test, the degree to which the government was entangled with religion. Burger, on behalf of the unanimous Court, explained that the funding by Rhode Island and Pennsylvania, although heavily restricted and closely scrutinized by audits and inspections, created a far too "...intimate..." relationship between the States and the Church's. Having the States inspect the books is a punctuated regulation; however, the continuous regulation of the lessons being taught by teachers is, in the Court's opinion, an "...excessive government entanglement..." with private schools that Burger established as unquestionably Catholic institutions. The logic established here in *Lemon* would become the essential groundwork from which contemporary religion clause jurisprudence would proceed.

#### *Contemporary Jurisprudence – Post Lemon*

Immediately after the *Lemon* decision was made in 1971, the right to free exercise was again questioned in *Wisconsin v Yoder* 406 U.S. 205 (1972); this decision necessitating that a State provide a greater degree of proof that it had a 'compelling state interest' when a piece of its legislation was at odds with religious ideals. Chief Justice Burger articulated the nearly unanimous decision (6 to 1, Justice Douglas dissenting) that the State of Wisconsin did not sufficiently argue that it had a "...compelling state interest..." to mandate school attendance up until the age of sixteen; a requirement at odds with the Amish belief that education should conclude at the eighth grade. Standing on the shoulders of *Sherbert*, Burger applies the compelling state interest test:

*It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause...*

Interestingly, the least restrictive means test is absent from *Yoder*; thus, it becomes a secondary test to presumably be applied only if a compelling interest has been shown to exist for the State to regulate the religious expression at question. The crux of the Court's decision lies with the question of to what extent the State of Wisconsin is violating the central tenets of the Amish faith by requiring compulsory education to the age of sixteen. *Yoder* defines religion with both sides of the complaint agreeing that the Amish faith is such; thus, the State's interest to protect Amish children from "ignorance" and society from the detrimental effects incurred by these students not progressing past the eighth grade is quickly dispensed with when Burger argues "[Amish] members are productive and very law-abiding members of society." Thus, free expression jurisprudence stays consistent through *Yoder*; a clear separation is maintained between government regulations and the actions of religious expression – with clear preference being with the protection of religious expression, not government regulation thereof.

However, the separationist decision of *Yoder* would soon be challenged in two cases where government prayer was at question – *Marsh v Chambers* 463 U.S. 783 (1983) and *Wallace v Jaffree* 472 U.S. 38 (1985). It would be in his dissent of *Wallace* where future Chief Justice, William Rehnquist, would articulate his disagreement with

*Everson*'s containment of Thomas Jefferson's "wall of separation" metaphor. And *Marsh* would validate the Constitutionality of a Presbyterian minister performing a daily prayer for the Nebraska State Legislature. Chief Justice Burger was joined by five of his colleagues collectively signaling a distinct change in the tides by *not* applying the *Lemon* test; thus, coming to the decision that such prayer was indeed constitutional.

Soon after *Marsh*, in 1985 the Burger Court would deliver its last opinion regarding religion – *Wallace v Jaffree* (1985). Jaffree brought suit when his child was required to observe a moment of silence "for meditation or voluntary prayer" at an Alabama public school. This time, however, a majority of the Court, without the concurrence of Chief Justice Burger, applied the *Lemon* test and found that the Alabama law authorizing the moment of silence had *no* secular purpose. The return to the *Lemon* test in this case, however, was not the only thing that made heads turn – rather it would be the dissent of the next Chief Justice, William Rehnquist.

One year before taking the role of Chief Justice, then Justice Rehnquist, dissented in *Wallace* taking opposition with the fundamental way in which the Court had been addressing the Establishment Clause in *Everson* and *Reynolds*:

*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.... 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.* (Rehnquist's Dissent in *Wallace v Jaffree* (1985))

Therefore, Justice Black's explication of what the Establishment Clause meant in *Everson* was mistaken according to Justice Rehnquist. To him, it only:

*...forbade the establishment of a national religion and forbade preference among religious sects or denominations... it did not prohibit the federal government from providing nondiscriminatory aid to religion...*

From this explication of Rehnquist's perception of Establishment, certainly we would predict his Court to view *Lemon* as out of touch and inapplicable. *Lee v Weisman* 505 U.S. 577 (1992). could only tell; however, *Employment Division, Department of Human Resources of Oregon v Smith* (1990) would come first and would question the free exercise jurisprudence established in *Sherbert*.

1990 would be the year in which *Employment Division v Smith* would come before the Court and challenge the application of *Sherbert*'s balancing test between the burden placed on religious expression and the compelling interest expressed by the State for doing so. Alfred Smith and Galen Black were fired from their jobs as private drug and alcohol abuse counselors in the State of Oregon because they were caught using peyote, a drug illegal in Oregon<sup>10</sup>. Because they were fired, therefore terminated under the classification of "misconduct", the State of Oregon refused to pay them unemployment. In *Smith*, Justice Scalia would reject the application of *Sherbert* on the grounds that the

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<sup>10</sup> In 1987 the Supreme Court first heard the facts of this case, however refused to decide the case because there was no decision by the Oregon State Supreme Court regarding whether or not smoking peyote for religious reasons was criminal in the State of Oregon. The decision was remanded for such a decision to be made. This case, in 1990, is when the Court again granted *cert* and is hearing the case with the understanding that smoking peyote was indeed a crime in the State of Oregon.

law at question was “...a generally applicable criminal law...” under Oregon statute. The question is then raised: is such a prohibition of religious sacrament Constitutional? According to the 6-3 decision in *Smith*, because a “...democratic government must be preferred to a system in which each conscience is a law unto itself of in which judges weigh the social importance of all laws against the centrality of all religious beliefs...” Oregon must have the ability to outlaw such things as it deems necessary for the safety of its citizens. If a state cannot do so, Scalia argues, the state approaches anarchy at a rate proportionate to the number of different religions present in that state. *Smith*, thus, rejects the application of compelling state interest and orders that any “...generally applicable prohibitio[n] of socially harmful conduct...” is Constitutionally valid due to the reasoning of the Court that when an individual’s religious expression can only be regulated when there is a compelling state interest, it makes all men “...a law unto himself...” Thus, *Smith* marks the progression of free exercise jurisprudence to a position effectuating a clear understanding that actions can be regulated, regardless of the religious significance that action possesses.

In 1992, school prayer came before the Rehnquist Court for the first time in the case of *Lee v Weisman* 505 U.S. 577 (1992). At question was the traditional invocation and benediction a Rabbi gave at a Rhode Island public school’s graduation ceremony. The principal, who was the defendant because he invited the Rabbi thus giving State authority to give the prayer, responded to the complaint asking the Supreme Court to reconsider the *Lemon* test. Justice Kennedy, the author of the majority opinion, an opinion Rehnquist did not join, wrote that the pervasive interaction of Church and State in this case did not support the Court to even consider the reconsideration of *Lemon*.

Rather, the Court took a stark separationist approach, perpetuating its consistent stance that prayer at a public school event or on such grounds is “...no part of the business of government...”.

Despite the separationist outcome of *Lee*, the Rehnquist Court would have its distinct affect on the *Lemon* test vis-à-vis its decisions in *Agostini v Felton* 521 U.S. 203 (1997) and *Zelman v Harris* 536 U.S. 639 (2002). Beginning with *Agostini*, Justice O’Connor would effectually collapse the *entanglement* test into the *effect* inquiry as the Court rationalized that both are dependent upon the same evidence; however, the *effect* inquiry was found to be a function of the *entanglement* inquiry, therefore, *entanglement* became a part of the logic used to answer the question of *effect*. Thus, the *Lemon* test was consolidated back into a two-prong test of secular purpose and neutral effect.

The decision of *Zelman v Harris* (2002) would demonstrate the application of the Rehnquist Courts version of the *Lemon* test. At question in *Zelman* was the fact that the city of Cleveland was providing checks for up to the amount of \$2,250 to parents of students in under-performing schools in the city. The question of Constitutionality arose when private religious schools were receiving these funds. Chief Justice Rehnquist wrote the 5-4 opinion applying the *Agostini* version of the *Lemon* test; specifically, he argued that the funding had the secular purpose of promoting higher levels of educational achievement in Cleveland and because the money was going to the parents, not directly to the religious schools, Rehnquist argued that it had a wholly neutral effect on religion as a function of the indirect entanglement of government with religious institutions. Thus, *Zelman* seems to add a qualification to the effect test, essentially the *indirect* support of religion is what distinguishes a Constitutional program from an unconstitutional one.



Being the functional end of the Rehnquist Court, *Zelman* exemplifies the evolutionary nature of religion clause jurisprudence that requires constant attention in order to understand its current position. The explicitly accommodationist Chief Justice Rehnquist promised to bring about a great restructuring of the Church/State dynamic, yet he only managed to effectuate the minimal reformation of the separationist decision of *Lemon* into the slightly more accommodating paradigm of *Zelman*. The incredible evolution from *Everson* to *Zelman*, however, exemplifies the constantly evolving nature of precedent in this field of Constitutional law and shows that over the years, the Supreme Court has maintained a common-theme throughout religion clause jurisprudence. Specifically, truly accommodationist positions are forgone in favor of separationist decisions<sup>11</sup>; thus, the vision of early American thinkers has been, to significant degree, realized up to the time of *Zelman*.

However, concluding with *Zelman*, a decision given in 2002, to explain the complete progression and current state of religion clause jurisprudence in 2009 would be a mistake. Taking note that accommodationist Justices coming to the Court could only slightly effect the state of religion clause jurisprudence, as seen by both Burger and Rehnquist, the following section will explore each Justice on current Court, as of 2009, in terms of their individual opinions on religion. Finally, this study will come to the conclusion that a version of the separationist philosophy of Adams, Jefferson, Madison and Washington has been realized by a majority of the current Supreme Court.

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<sup>11</sup> See *Santa Fe Independent School District*, where the Court was coming off of decisions like *Capital Square* and *City of Boerne* which were accommodationist decisions. However, in *Santa Fe* the Court stuck to their strict commitment to the separation of public schools and religious organizations.

## **Religion and the Justices Today**

Now, we come to the concluding section analyzing the dynamic between the United States government and the formidable force of religion- an examination of the current Supreme Court Justices. Because the Court is essentially an institution defined by the sum of its parts, if we seek to sufficiently understand religion clause jurisprudence, we must understand how each Justice perceives that interaction.<sup>12</sup> Only by reading the opinions was it realized that the concurring and dissenting opinions say much more about the Justices true perception of the dynamic at question than any other writings by the Justices<sup>13</sup>. The proceeding discussion shall mainly be comprised of concurring and dissenting opinions; thus, the opinions that follow should not necessarily be taken as legal precedent. In two cases, Chief Justice Roberts and Justice Alito, there is an insufficient presence of their opinions to responsibly establish what position they will take on this issue; however, their few opinions are analyzed.

This section will conclude by claiming that a placement of the Justices on a linear spectrum defined by the left and right extremes is possible and appropriate. To the far left lay the separationists, to the far right lay the accommodationists. As will be shown, the Justices can be aligned, from left to right respectively, in the following order: Stevens,

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<sup>12</sup> For further reading on this subject see the writings of Mazmanian, Parsons 1995, Sabatier and Jenkins-Smith 1993, Sabatier 1988 on the cognitive deconstruction of government structures. Their work focus' on public policy, but the same rationale is pertinent to this claim because they argue that to understand the whole (in their case the process of public policy), the student must break the cognitively overwhelming process into its functional parts. Thus, this examination applies that theory to the Supreme Court that is, in essence, only the product of the decisions of nine men and women.

<sup>13</sup> It was quickly realized that when the Justice in question was designated to write the majority opinion, very little personal opinion was explicitly stated. Perhaps this is due to the bargaining that takes place necessary to reach a majority opinion, this author does not wish to be distracted by such an intriguing and necessary question in this body of work.

Ginsburg/Souter, Breyer, Alito/Roberts, Kennedy, Thomas, Scalia. Justices Ginsburg and Stevens will be shown to be almost equally separationist, with the exception that Stevens, is at times, more apt to accommodating religious institutions. Chief Justice Roberts and Justice Alito are equally moderate, from what can be extrapolated from their limited promulgation of opinions, and yet are more accommodating than even Breyer. Let us now embark on the examination of each Justice on an individual basis, beginning with the longest-standing Justice currently on the Court- Justice John Paul Stevens.

### *Justice Stevens*

Nominated by Ford and taking authority in the Court on December 19, 1975, Justice Stevens is the longest-sitting Justice currently on the Court; thus, our conversation necessarily begins with him. In his long history of deciding landmark cases, Stevens has established himself, as will be seen in the proceeding articulation of his opinions, as a *separationist* Justice who arguably has the narrowest definition of how close the church and state can Constitutionally interact.

Beginning with Justice Stevens's concurring opinion in *Goldman v. Weinberger* 475 U.S. 503 (1986), Stevens reluctantly joins the majority in a case involving an Air Force officer who comes to the Court with a question placing Church and State very close to one another. Here, Stevens must decide whether or not an Air Force rule requiring its service members to wear nothing other than the pre-described uniform can Constitutionally not allow the wearing of religious garb. The majority decides the rule is Constitutional as it has the neutral intention of creating uniformity; Stevens reluctantly concurs but adds "The interest in uniformity, however, has a dimension that is of still

greater importance for me. It is the interest in uniform treatment for the members of all religious faiths.” Here, Justice Stevens articulates his belief that having uniform acceptance of religious expression, in a broad sense, is of greater importance than uniformity of dress among the Air Force personnel. However, he concludes by saying that the rule is:

*...based on a neutral, completely objective standard -- visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.*

This concurrence sums up the crux of Justice Stevens perception of how religion and government should interact- the government must treat them all the same, but must be essentially neutral and without any special treatment for any religion.

Throughout Stevens’ career he has continued to write opinionated concurrences and dissents critiquing the way in which other Justices<sup>14</sup> approach church/state interactions. In *Marsh v. Chambers* 463 U.S. 783 (1983) Stevens adamantly dissents in a majority opinion arguing it is Constitutional for the Nebraska legislature to hire a Chaplain using public funds to provide a sermon for the legislators. In his dissent he argues very clearly that he stands against this very apparent acceptance of religious establishment:

*Regardless of the motivation of the majority that exercises the power to appoint the chaplain, [n1] it seems plain to me that the designation of a member of one*

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<sup>14</sup> Other Justices mainly included Scalia, Thomas and Kennedy as they are in a large way, the epitome of the accommodationist thinkers of today.

*religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.*

Thus, Justice Stevens clearly articulates a position so closely paralleling early American thinkers like Thomas Jefferson and John Adams, thinkers who stood uprightly against the idea of the United States government favoring or condemning *any* religious institutions, that by contrasting him to the other Justices it will be shown that Justice Stevens is the most separationist Justice currently on the Court.

#### *Justice Scalia*

Nominated by President Reagan and taking authority in the Court on September 26, 1986, Justice Antonin Scalia is best understood as the contemporary inculcation of accommodationist thought. Voting with Chief Justice William Rehnquist, 21 out of 23 times when the crux of the case was religious in nature<sup>15</sup>, Justice Scalia repeatedly stands in favor of a Church/State dynamic where government includes religion wherever tradition and history show a long-time incorporation of the two. In the landmark case of *Lee v Weismann* (1992) where the majority essentially ruled that public schools could not hire Chaplains to give prayer at high school commencement ceremonies, Scalia writes the following in his dissent:

*In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court -- with nary a mention that it is doing [p632] so -- lays waste a tradition that is as old as public school*

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<sup>15</sup> See Appendix A.1 for a summary of these cases.

*graduation ceremonies themselves...*

This dissent in a 5-4 decision where Stevens was in the majority, Scalia lays the foundation for his approach to Establishment Clause cases; essentially, that wherever tradition dominates the argument, any interaction between religious institutions and the State is acceptable.

In *Pleasant Grove v Summum* 555 U. S. \_\_\_\_ (2009), a case where the religious organization *Summum* brought suit against the city of Pleasant Grove, Utah alleging that the city violated their right to free speech when the city declined to accept the religious organization's donation of a monument inscribed with the Seven Aphorisms of Summum. The organization sought to erect the monument in the city park next to the pre-existing monument inscribed with the Ten Commandments. Concurring with the majority who made a ruling primarily based on a question of freedom of government speech, Scalia interjects with a concurrence reassuring the city that “[They] ought not fear that today’s victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire.” Explicitly showing relief that the respondents did not present an Establishment Clause argument for this case that was fundamentally dealing with the right to free speech, Scalia presents a concurrence solely concerned with the rhetorical destruction of Establishment Clause jurisprudence.

And finally, by showing selective reliance on established precedent, Scalia tends to make the argument of the *accommodationists* sounder by presenting opinions that possess either *no* or very little appeal to precedent<sup>16</sup>. To the former point, Scalia makes claims

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<sup>16</sup> For examples see *Lamb’s Chapel v Center Moriches School District* 508 U.S. 384 (1993), *City of Boerne v Flores* 521 U.S. 507 (1997), *Watchtower Bible & Tract Society*

that either appeal directly to history or tradition; not law.<sup>17</sup> To the latter point, whether concurring or dissenting, Scalia presents arguments that embody the *accommodationist* body of thought:

*...the Constitution affirmatively mandates accommodation, not merely tolerance, of all religions. . . . Anything less would require the 'callous indifference' we have said was never intended." (Lamb's Chapel v Center Moriches School District 508 U.S. 384 (1993))*

Viewing the interaction of church and state in a positive, enabling, perspective, it can be argued that Scalia is as much an accommodationist as Stevens is a separationist.

#### *Justice Kennedy*

Taking authority in the Court on February 18, 1988 on behest of President Reagan, Justice Anthony Kennedy, as will be shown, can be best understood as an accommodationist who has a slightly lower threshold for church/state interactions than Justice's Scalia and Thomas. Having voted with Scalia in 18 out of 19 cases pivoting on a question of the religion clause<sup>18</sup>, Kennedy regularly votes to accommodate religious expression when it is questionably related with government.

Beginning with his concurrence in *Allegheny v ACLU* 492 U.S. 573 (1989), Kennedy lays the groundwork for the central tenets of his perspective on this topic of Constitutional law. At question in this case was the erection of a menorah outside the

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*of New York, inc et al v Village of Stratton* 536 U.S. 150 (2002), *Lee v Weisman* 505 U.S. 577 (1992), *Capitol Square Review and Advisory Bd. v Pinette* 515 U.S. 753 (1995)

<sup>17</sup> See *Lee v Weisman* 505 U.S. 577 (1992) and *Pleasant Grove v Summum* 555 U. S. (2009)

<sup>18</sup> See Appendix A.2

Allegheny County Courthouse and a nativity scene inside the Courthouse. The majority ruled that the nativity scene was a violation of the Establishment clause, however, they also ruled that the menorah was not. Kennedy had this to say about the decision regarding the nativity scene "...this view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding." Accommodating the religious expression on public grounds, i.e. the county Courthouse, was in Kennedy's eyes a more than acceptable act.

However, in *Lee v Weisman* (1992) Kennedy shows his reluctant side on this topic. *But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.*

There is a very definite limitation for Kennedy when it comes to religious expression, a limit Scalia does not possess and Stevens possesses to a larger degree. Thus, if the set of facts pertain to a situation where a singular religion is being forced upon captive audiences, Kennedy, if he holds to his previous opinions, would be in opposition.

### *Justice Souter*

Justice David Hackett Souter was nominated by President Bush Sr. and took authority in the Court on December 9, 1990. With a deep respect for the linearity of precedent, the opinions of Justice Souter show him to be a separationist thinker with a



fundamental loyalty to established precedent.

In several concurring and dissenting opinions, the majority of his time is spent on the reconciliation of logic throughout the chain of precedent. In *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah* 508 U.S. 520 (1993), Souter's concurrence begins with "I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should re examine the rule *Smith* declared." Souter goes on to articulate why the flaws of the established precedent contained in *Smith* (1990), which the majority stands on when deciding this case, needs to be reconciled with the flaws it has created.

Similarly to Justice Stevens, Souter has a history of promulgating opinions with quite narrowly define allowances for any interaction between Church and State. In *Rosenberger v. University of Virginia* 515 U.S. 819 (1995) the Court's majority rules that although the University of Virginia withheld funding from a student organization that was explicitly religious in nature on Establishment grounds, by doing so they violated their right to free speech. Souter dissents by saying the following:

*The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses.*

He is invariably opposed to the idea of public monies being appropriated to religiously based institutions and groups; thus, constructing his place in religious Constitutional law as a separationist with a close commitment to the reconciliation of conflicting precedent.

*Justice Thomas*

Another Bush Sr. nominee, Justice Clarence Thomas took the bench on October 23, 1991. Justice Thomas is interestingly enamored with American history as can be seen from most of his opinions that pertain, generally, to his account of historical accuracy. Such a commitment to history bleeds through as support for many of his accommodationist opinions.

In Justice Thomas' concurrence in *Rosenberger v. University of Virginia* (1995), he summarily articulates his adamantly accommodationist position on the subject of church/state relations:

*The historical evidence of government support for religious entities through property tax exemptions is also overwhelming...property tax exemptions for religious bodies "have been in place for over 200 years without disruption to the interests represented by the Establishment Clause." Walz v. Tax Comm'n of New York City, 397 U.S. 664, 676-680 (1970) In my view, the dissent's acceptance of this tradition puts to rest the notion that the Establishment Clause bars monetary aid to religious groups even when the aid is equally available to other groups.*

As Scalia appeals to the action in place as justification for its Constitutionality, Thomas appeals to the current action of tax exemptions as justification for the Constitutionality of the government subsidization of religious institutions. From this one example, it can be seen that Justice Thomas' perspective on this topic is one of facilitation not neutrality.

Therefore, understanding Justice Thomas to be an accommodationist poses a new question: is he more or less accommodating than Justice Kennedy? Arguably, Kennedy

has a very distinct threshold that, if the government violates, he will find such action as unconstitutional. Thomas does not appear to have such a distinct threshold; in fact he votes with Scalia 13/13 times religion is at question<sup>19</sup>. Being very similar to Justice Scalia in terms of appealing to the status quo, the opinions of Justice Thomas appear to be clearly more accommodationist than even Justice Kennedy.

### *Justice Ginsburg*

A President Clinton nominee who took the bench on August 10, 1993; Justice Ruth Bader Ginsburg is a separationist who generally concurs with the opinions of Justices Souter and Stevens<sup>20</sup>. Standing on framers intent in her opinion in *Capitol Square Review and Advisory Bd. v Pinette* 515 U.S. 753 (1995), Ginsburg proclaims:

*If the aim of the Establishment Clause is genuinely to uncouple government from church, see Everson v. Board of Ed. of Ewing, 330 U.S. 1, 16 (1947), a State may not permit, and a court may not order, a display of this character.*

“...this character...” referring to the Latin cross erected by the Ku Klux Klan outside of the Ohio Statehouse; Justice Ginsburg disagrees with the majority that not allowing the Klan to erect such a display would be a violation of their free speech rights. Rather, she argues that regardless of the fact that it was the Ku Klux Klan who petitioned to erect the

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<sup>19</sup> See Appendix A.3

<sup>20</sup> For opinions on the topic of Establishment Clause or right to free exercise in which Justice Ginsburg concurs with either or both Justice Stevens and Justice Souter see *Rosenberger v. University of Virginia* 515 U.S. 819 (1995), *City of Boerne v Flores* 521 U.S. 507 (1997), *Watchtower Bible & Tract Society of New York, inc et al v Village of Stratton* 536 U.S. 150 (2002), *Capitol Square Review and Advisory Bd. v Pinette* 515 U.S. 753 (1995), *Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000), *Good News Club et al v. Milford Central School* 533 U.S. 98 (2001), *Cutter v. Wilkinson* 544 U.S. 709 (2005), *McCreary County v. ACLU* 545 U.S. 844 (2005), and *Van Orden v. Perry* 545 U.S. 677 (2005).

display, because there was no clear statement that the cross was *in no way* a display sponsored by the Ohio State government the fact that a giant cross sat, un-attended, outside the Statehouse, the “reasonable man” would perceive the cross as a statement made by the government.

Furthermore, Ginsburg joins Justice Stevens concurrence in *Pleasant Grove v Sumnum* (2009) which lays great confidence in the limitability of the government to exercise its right to free speech; limits fundamentally established and enforced by the Establishment Clause:

*Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.*

Clearly reading the Establishment Clause as seeking a separation between Church and State, Justice Ginsburg is as separationist as Souter; both adhere to the logic of Justice Black in *Everson*, and are completely at odds with Justice Rehnquist in *Wallace*.

#### *Justice Breyer*

Justice Stephen G. Breyer is the other Clinton nominee. Taking the bench on August 3, 1994, he has fostered an approach to the church/state dynamic similar to the separationist approach. Here, we have come to the moderate justices in terms of religion. Arguably more moderate than Justice Stevens, Justice Breyer can be likened to slightly more accommodating degree of separationist than Justices Souter and Ginsburg. Breyer has clear lines where the interaction between religious institutions and the government are acceptable and narrow, yet distinct, parameters separating the two.

Beginning with his concurring opinion in *Watchtower Good News Club et al v. Milford Central School* (2001), Justice Breyer defends a position where separating church and state, in terms of allowing religious organizations to utilize public school facilities for after-school meetings, can only be defined in regards to two criteria:

*First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion. (Watchtower Good News Club et al v. Milford Central School 533 U.S. 98 (2001))*

Thus, identifying the degree to which the action by the state is neutral to religion is critically necessary, yet is not sufficient to answer the question of Constitutionality. The government must show that the individuals whom are directly involved in the situation at question would reasonably perceive the actions of the State to be official sponsorship of the religious organizations. If such a perception were found, Justice Breyer would be in opposition.

With this strict understanding and pronouncement of distinction between what is and is not acceptable interaction between church and state, Justice Breyer leans toward the ideals first spoken by Thomas Jefferson and the separationists by hinging his perspective on the neutrality of the state towards religion; however, he has often voted with Scalia on key cases such as *Watchtower Bible and Good News Club*, Justice Breyer is more separationist than Scalia or Thomas, yet more accommodationist than Souter or

Ginsburg.

*Chief Justice Roberts and Justice Alito*

Because these Justices have only been on the Court since September 29, 2005 and January 31, 2006, respectively, the accumulation of their opinions from the Supreme Court regarding this field of Constitutional law is extremely limited. Justice Alito, having served on the United States Court of Appeals for the Third Circuit, has promulgated a few opinions regarding religion clause cases; such opinions will be referenced. However, Chief Justice Roberts, whom served on the United States Court of Appeals for the D.C. Circuit, did not promulgate such opinions. Either way, only a general understanding of their perspective can be obtained at this time.

Although *Pleasant Grove v Summum* (2009) is a case turning on the right to freedom of speech, primarily the question of what is government speech and what are its parameters, this case has a distinct flavor of Establishment Clause controversy which Justice Alito mention's in the majority opinion he wrote and Chief Justice Roberts joined. While articulating a complex definition of government speech, Alito references a critical limitation upon it- the Establishment Clause. Specifically, he argues that the Establishment Clause is a limitation upon the government's speech and not a clause enabling the expression of any opinion the government or its officials may seek to express at any time. Although this case provides a glimpse into these Justice's understanding, more is desired.

In 2004, then Judge Alito, decided a case centering on a similar question while serving on the Third Circuit: *Child Evangelism Fellowship of New Jersey Et Al vs.*

*Stafford Township School District Et Al* 386 F.3d 51. At question before Judge Alito and his colleagues was whether or not Stafford School District could prohibit a religious based organization, Child Evangelism Fellowship, from advertising to the students via fliers, posters, and setting up tables at the “Back-to-School Night”. Alito stood on the shoulders of the Supreme Court decisions in *Good News Club* and *Lambs Chapel*, which argued by not making the same resources available to a religious organization that the school makes available to non-religious organizations that district is violating the religious organizations right to free speech. Alito dismisses the districts argument that it would be in violation of the Establishment Clause if it had allowed such access to school facilities on the grounds that when there is such a diverse presence of opinion (various other community organizations had been allowed to attend on-campus events and advertise to the students), and no school policies are being violated by allowing the religious organization to participate, then the opinions are no longer public opinion (government speech), instead they become essentially private (non-government speech). In this opinion Justice Alito shows that “...viewpoint discrimination...” transcends the threshold necessary to violate the Establishment Clause.

Interestingly, in the case of *Lambs Chapel* the separationist Justices, Stevens, Souter, and Ginsburg joined a unanimous opinion; yet, in *Good News Club* only Breyer disagreed with his more separationist colleagues. Thus, when Judge Alito stands on the argument that “...no Establishment Clause concern justifies...” (*Good New Club v Milford*) discrimination based on viewpoint, he is standing on an opinion expressed by both separationists and accommodationists.

In response to *Smith* (1990), Congress passed the Religious Freedom Restoration

Act of 1993 (RFRA), essentially reinstating the compelling state interest and least restrictive means test established in *Sherbert* to federal agencies. The first religion clause case Chief Justice Roberts heard was *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* 546 U.S. \_\_\_\_ (2006) the crux of which would center on the reconciliation of *Smith* and RFRA in terms of how the Court would address free exercise cases. *Gonzales* was a case where a religious organization, comprised of roughly 130 Americans, receive communion by ingesting hoasca, a substance containing DMT, which is a hallucinogen regulated under Schedule I of the Controlled Substances Act. Chief Justice Roberts authored the opinion of the Court, as such established that compelling state interest and least restrictive means would guide free exercise decisions as stipulated by the RFRA. A central argument of Roberts was that if the mescaline found in peyote, which has the same problems and ramifications as DMT, has been exempted from regulation by both the Executive and Legislative branch, an exemption affecting hundreds of thousands of Native Americans, then how can a similar exemption effecting only 130 Americans not also be exempted? Furthermore, Roberts argues that the state completely failed to show that it had any interest in regulating DMT at the detriment of this organizations religious freedom. Thus, Roberts authors an opinion that effectually protected the religious use of hoasca based on the strict scrutiny mandated by the RFRA.

Alas, the general attitudes of these two Justice's can be seen from their opinions in *Hein v. Freedom From Religion Foundation, Inc.* 551 U. S. \_\_\_\_ (2007) where the executive order signed by President George W. Bush that ensured faith-based community groups would become eligible for federal funding was disputed on Establishment Clause grounds. In the dissenting 5-4 minority were the previously defined separationists,



including Justice's Stevens, Souter, Ginsburg, and Breyer, sided with the petitioners whom argued that they did indeed have the standing necessary to bring suit. In contrast, the majority contained the opinions of Chief Justice Roberts and Justice's Scalia, Kennedy, Thomas, and Alito who argued that because the suit centered on a question of Executive authority, not Congressional appropriation, that under the precedent set forth in *Flast v. Cohen*, 392 U.S. 83 (1968), which appealed to Congress' power to tax and spend under Article I, section 8 of the Constitution, the petitioners could not bring suit merely because they were federal tax payers. Because much of this decision was based on procedural grounds, not religion clause logic, the positions of Chief Justice Roberts and Justice Alito continue to be inadequately defined. However, three reasons justify the interpretation that these Justices are moderately accommodationist: they repeatedly join the arguments of accommodationists, Justice Alito agrees with the accommodationist decisions of *Good News Club* and *Lambs Chapel* as seen by his Third Circuit decision of *Child Evangelism Fellowship*, and because Roberts and Alito were of the same opinion in *Pleasant Grove*; these two Justices can be generally understood as slightly accommodationist Justices – though not without doubt.<sup>21</sup>

*Conclusion: Who Accommodates? Who Separates?*

If we assimilate accommodationists with the right end of a spectrum and separationists with the left, then from what we have seen in terms of the Justice's opinions we can place them as follows from left to right: Stevens, Ginsburg/Souter,

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<sup>21</sup> As seen in the decisions of *Lambs Chapel* and *Good News Club*; also, because repetition in decision making is not apparent with these two Justices – only general attitudes by less-than opinionated decisions guide our classification of them.

Breyer, Alito/Roberts, Kennedy, Thomas, Scalia. Justices Souter and Ginsburg are very proximate to one another when it comes to their approach to religion clause jurisprudence, as are Chief Justice Roberts and Justice Alito. Based on the opinions and voting patterns of the Justices, this study claims that Breyer, Alito and Roberts are the median voters, while Stevens and Scalia represent the extremes of separationism and accommodationism. Therefore, the current Court can be understood as leaning only slightly in favor of accommodationism; however, the lineage of separationist precedent and litigation was only made more separationist since *Zelman* with cases like *Gonzales* (2001) and *McCreary County v ACLU* (2005)<sup>22</sup>.

## **Conclusion**

We began with a simple question: what is the place of religion in the United States? Methodologically we found that we had to start at the very beginning, we had to start with the intentions of those who signed the Constitution. Two points of view were addressed in terms of which relationship between Church and State was desired by these men, specifically the separationist and accommodationist perspectives. By focusing on Thomas Jefferson, James Madison, John Adams and George Washington, the men most appealed to by both opinions, and extracting the central tenets of each line of thought, we were in a position to claim that although John Adams and George Washington are appealed to as the quintessential accommodationist thinkers (Sorauf 1976, Davis 2000), they were in fact not accommodationists, per our established understanding and based on the letters and primary writings of these men. Thus, Section I concluded with the

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<sup>22</sup> *McCreary* was handed down on the same day that *Van Orden* was; however, the Court ruled that the Ten Commandments display at this Kentucky courthouse was unconstitutional based, among other things, that a secular purpose was not established.

argument that the United States was established with the intention of cultivating a distinctly separate relationship between religious institutions and government; a relationship that necessitated the presence of each, but demanded that they did not interact. With the foundation of intent established, we were able to begin the crux of our study, a close examination of religion clause jurisprudence, beginning with *Cantwell v Connecticut* (1940).

*Cantwell* would serve as the starting point for a long line of religion clause jurisprudence; a line of case law representing a general realization of the intent sought by the founders examined in the preceding section. Although punctuated with moments departing from the separation desired by men like Jefferson and Adams, the Supreme Court was shown to have generally established distinct lines in the sand where the interaction of Church and State cannot pass<sup>23</sup>; thus, Jefferson’s “wall of separation” was accepted to exist – albeit with leaks here and there<sup>24</sup>.

Finally, the study concluded with the most contemporary analysis conducted – an examination of the current Supreme Court Justices and their positions on religion and state. In this section, it was found that Justices Stevens and Scalia were the most extreme separationist and accommodationist, respectively. Justices Ginsburg and Souter were roughly equal when it came to being separationist thinkers, while Justice Thomas was shown to be slightly more extreme than his most proximate accommodationist colleague, Justice Kennedy. And finally, Chief Justice Roberts and Justices Breyer and Alito were

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<sup>23</sup> Such a line being school prayer. See *Lamb’s Chapel v. Center Moriches Union Free School District* 508 U.S. 384, *Good News Club et al v. Milford Central School* 533 U.S. 98 (2001), *Van Orden v. Perry* 545 U.S. 677 (2005)

<sup>24</sup> See *City of Boerne v Flores* 521 U.S. 507 (1997), *Capitol Square Review and Advisory Bd. v Pinette* 515 U.S. 753 (1995)

decidedly median votes, albeit Alito and Roberts more accommodationist than Breyer creating a slight accommodationist skew, when the religion clauses are at question. Thus, the final claim of this paper can be made: the current state of religion clause jurisprudence resides in the decisions of a slightly accommodationist Court – although, the lineage of precedent being founded in separationism.

Where the Court will go next is impossible to say, but what can be said is what further study could be conducted from the knowledge acquired here. The most current question of Establishment Clause jurisprudence is the question of what is government speech<sup>25</sup>. The Court's definition as argued in *Pleasant Grove City* (2009) will inevitably be applied to the Establishment clause, a better understanding of how the Court has addressed government speech in the past would lead to a better understanding of what actions would constitute the state establishing a religion; rather than purely understanding the logic tests used now. Furthermore, taking this study as a foundation establishing the central philosophical tenets of church/state interaction, doing the same type of study in a different common-law country, then comparing the two would not only be fascinating, but such a study could lead to a far better understanding of what conditions are necessary for these two institutions, religion and government, to harmoniously coexist. Jefferson, Madison, Adams and Washington arguably thought they could only do so if distinctly separated, but this claim, and others like it, could possibly be disproved by such a comparative analysis.

Until then, however, we can further contemplate what religions place is in America. As we have seen, this country was in no way founded as a Christian nation; yet,

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<sup>25</sup> See *Pleasant Grove City v Summum* 555 U.S. \_\_\_\_ (2009)

the religious right claim the founders of this nation, being Christians, sought to incorporate its ideals into their government (Gingrich 2006). Such a claim is not only a misrepresentation of history, it is factually and philosophically completely wrong. Hopefully this study has responsibly shown that to be true; but more importantly, hopefully it accomplished its ultimate goal: inspiring further study of this fascinating topic in American politics.

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