ABSTRACT

Separation of Church and State: Should we Build a Wall?

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This thesis will analyze a selection of United States Supreme Court cases involving public aid provided to religious and sectarian organizations. It will begin with why I have come to be interested in this topic, before defining the three competing conceptions of Freedom of Religion: Freedom of Religion, Freedom for Religion, and Freedom from Religion. Each conception will have a dedicated chapter that analyzes the arguments presented in United States' Supreme Court opinions. The final chapter will argue for the adoption of the Whisman Wall and the Lime test, which appear to be the new direction the Roberts Court appears to be taking though there are not enough Supreme Court cases to affirm this as the approach of the Roberts Court

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CHAPTER ONE

Introduction

Public funding in the United States has been an issue since the founding, as even the Founding Fathers had conflicting views on the proper relationship between church and state. The First Congress adopted an act in which created a Legislative Chaplain position to open up each legislative session with a prayer and used public funds to pay the salary of the Legislative Chaplain. While some saw no issue with this relationship between church and state, Madison advocated for a strict separation between church and state primarily in the realm of public aid. Madison's *Memorial and Remonstrance Against Religious Assessments*[1] emphasizes the need to separate church from state in order to preserve individuals' unalienable rights to the freedom of conscience. For Madison, any support to religion given by the government, whether that be through salary supplement or through prayer, would result in the harm of citizens' ability to freely accept religious beliefs that may run counter to the belief advanced by the state. The tension between church and state, especially in regard to public aid, is not a new issue and still results in conflict to this day.

Over the last 100 years, the U.S. Supreme Court has become involved in matters of public aid being given to religious and sectarian organizations to try and establish how the Establishment and Free Exercise Clause apply to both the Federal Government. With

[1] James Madison, *Memorial and Remonstrance Against Religious Assessments*, (1785).

the origins of the Court's involvement dating back to *Everson v. Board of Education*[2], this was only the beginning of a long discussion without any consistent interpretation of both the Establishment and Free Exercise Clauses.

Without clarity on how to understand the Establishment and Free Exercise Clause, specifically in relation to public aid given to religious and sectarian organizations, states cannot effectively create laws that will enable their citizens to pursue their own goods. This lack of clarity is a result of three competing conceptions of what constitutes freedom of religion. These competing conceptions are Freedom of Religion, Freedom for Religion, and Freedom from Religion. Throughout this thesis, I will discuss these competing conceptions of freedom of religion to discover which conception can settle the Supreme Court's lack of consistent understanding of the Establishment and Free Exercise Clause.

After defining each conception of freedom of religion, I analyze United States Supreme Court cases to discern the specific arguments underlying these conceptions. The arguments underlying each conception are all considered when trying to solve whether or not the Establishment and Free Exercise Clause of the First Amendment can be understood as allowing for public aid to be provided to religious and sectarian organizations or forbidding all aid.

Finally, I will conclude with a discussion on why the Freedom of Religion Conception that advocates for private choice and maintaining publicly available benefits is best suited for the constitutional question. The Freedom of Religion Conception adopts the best parts of the Freedom for Religion Conception, which argues that the religious

[2] 330 U.S. 1 (1947).

character of individuals and organizations should be protected from discrimination, while also avoiding the instrumentalization of religion from the Freedom for Religion Conception as well as avoiding the degradation of religion from the Freedom from Religion Conception.

CHAPTER TWO

Freedom of Religion

Defining Freedom of Religion

The Freedom of Religion conception requires a "substantive neutrality [from a] government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."
[1] This conception is also known as "incentive neutrality,"[2] because of its requirement to not provide any incentives, specifically monetary, to either religion or non-religion that would influence how a citizen acts outside of their own private choice.

The United States Supreme Court has adopted this conception for cases throughout its history, though never explicitly calls their adoption substantive neutrality or incentive neutrality. The arguments underlying the U.S. Supreme Court's opinions suggests that we should use the term incentive neutrality due to the Court's emphasis on there being no incentive placed on "religious belief or disbelief, practice or nonpractice, observance or nonobservance."[3] The incentive neutrality argument comes to the forefront of the U.S. Supreme Court when the Court interprets state statutes in terms of private choice and discrimination on the basis of religious character. In order for a statute to withstand a Freedom of Religion conception challenge, the state either must avoid

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[1] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).
[2] Laycock, *supra* note 1, at 999-1000.
[3] Laycock, *supra* note 1, at 1001-02.

becoming involved in defining what is religion by maintaining publicly available benefits or create a program in which provides the aid to citizens who direct the aid through a series of private decisions.

Granted, this isn't the only interpretation of the Freedom of Religion conception as it has also been argued that the Freedom of Religion conception requires a state "[that] allow[s] the practice of religion as the citizen [sees fit]."[4] Zuckert believes that the state's focus should be to develop a system in which there is no interference with the private choice of individuals. For Zuckert, so long as the public order does not create a system that inhibits the private choices of individuals, the system will still be conducive to the Freedom of Religion conception. This emphasis on private choice, however, is not the same as creating a system in which there is neutrality between religion and non-religion. Zuckert does not entertain the role of neutrality in the state's actions when creating public benefits.

The lack of discussion about neutrality eliminates an integral aspect of the Freedom of Religion conception. In *Everson,* the U.S. Supreme Court points to the publicly available benefit that makes no mention to religion. There is no mention of private choice in *Everson* as not all cases involving the Freedom of Religion conception hinge around private choice, but rather some hinge around whether the benefit is publicly available to a broad class of citizens. Even in cases that make references to private choice, i.e., *Witters*, the Supreme Court still relies upon the fact that the program is a publicly available benefit. So, while Zuckert nails the private choice aspect of the Freedom of Religion conception, he doesn't fully capture all of the arguments. Thus,

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[4] Michael Zuckert, *Freedom of, Freedom for, and Freedom from Religion: The Contested Character of Religious Freedom in America*, Law and Liberty, (2016).

throughout this chapter I will be using Laycock's conception of Freedom of Religion, when analyzing the United States Supreme Court opinions.

To recognize the United States Supreme Court's understanding of the Freedom of Religion conception, I will look to *Everson v. Board of Education*, *Witters v. Washington Department of Services for the Blind, Zelman v. Simmons-Harris*, and *Espinoza v. Montana Department of Revenue*.[5] These cases were selected because of the Supreme Court's application of substantive and incentive neutrality to the programs created by states. This application is seen in the analysis of the statutes to discover if they favored or disfavored religion by providing some form of monetary benefit to practice or non-practice or if they were a publicly available benefit that was either provided directly to a religious and sectarian organization or directly to citizens that provided the aid to religious and sectarian organizations through a series of private decisions made by citizens. Each of the above cases begins with a discussion of the necessary facts, before analyzing why the arguments offered by the Supreme Court are considered to be Freedom of Religion arguments.

Everson v. Board of Education

Facts of the Case

A New Jersey Statute permitted the reimbursement of parents who used public transportation to send their children to and from public and private schools. Of all the private schools that received aid, 96% of these were parochial Catholic schools. The Catholic schools were under the direction "of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith."[6] Arch R. Everson filed a

[5] 330 U.S. 1 (1947), 474 U.S. 481 (1986), 536 U.S. 639 (2002), and 591 U.S. (2020) respectively.
[6] 330 U.S. 1 (1947).

lawsuit against the statute claiming that the reimbursement to parents sending their children to religious schools was a violation of the New Jersey constitution and Establishment Clause of the First Amendment.

When Everson filed the lawsuit against New Jersey, he argued that the structure of the statute was not what violated the Establishment Clause, but rather the outcome of the statute. Everson noted that since nearly all of the private schools that were receiving the funding were Catholic schools, the state of New Jersey was clearly advancing the Catholic faith over other religious and sectarian beliefs. The perceived neutral face of the statute, according to Everson, is not enough for the statute to be upheld as the perceived neutrality was only done in order to hide New Jersey's true purpose of advancing the Catholic faith, primarily through education.

After the New Jersey state courts rejected Everson's arguments and upheld the New Jersey Statute, the United States Supreme Court granted certiorari. Everson did not question if "the exclusion of private schools operated for profit denied equal protection of the laws; nor did [he claim] that there were any children in the district who attended or would have attended … any [] public or Catholic school but for the cost of transport."[7] Thus, the Supreme Court was only interested in asking if the New Jersey Statute violated the Establishment Clause of the First Amendment under the Due Process Clause of the Fourteenth Amendment.

[7] Supra note 6.

General Application

The United States Supreme Court upheld the New Jersey Statute, as the program created was a publicly available benefit that intended to serve the public "by using tax raised funds to pay the bus fares of *all* school children, including those who attend parochial schools."[8] By intending to help all students and not just those attending specified schools (with the exclusion of for profit private schools), the legislature of New Jersey created a system in which "minimize[s] the extent to which it either encourage[d] or discourage[d] religious belief or disbelief, practice or nonpractice, observance or nonobservance."[9] The creation of a system that is completely neutral in its language allows for the system to be equally applied to all citizens, thus not permitting any form of incentive to either practice or not practice religion. The publicly available benefit that is created by the state of New Jersey falls under the Freedom of Religion conception, by not providing an incentive to individuals to pursue religious or non-religious education thus maintaining incentive and substantive neutrality.

Though the U.S. Supreme Court upheld the New Jersey Statute as a publicly available benefit, it wasn't the only argument offered in terms of the Freedom of Religion conception. The U.S. Supreme Court further argued that New Jersey acted well within their powers, as even the Court was cautious to exercise "[their] far-reaching authority … [on] a state's power to legislate for the public welfare … [as this] power [] is a primary reason for the existence of states."[10] The Court acknowledges the secular purpose of the statute, which was specifically created for the State of New Jersey, and understands that it

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[8] Supra note 6. *Emphasis added.*
[9] Laycock, *supra* note 5, at 1001-02.
[10] Supra note 6.

is not the role of the Supreme Court to set stricter guidelines on states than is required of the Federal Government as they understand the Establishment Clause.

> For the Establishment Clause has been read by the US Supreme Court to mean: "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… 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.[11]"

This reading would seem to establish "a wall of separation between church and State,"[12] but the Court qualifies their interpretation of the Establishment Clauses in two ways: 1.) "[States and the Federal Government] cannot … contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church"[13] and 2.) "[States and the Federal Government] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, [etc.], *because of their faith, or lack of it,* from receiving the benefits of public welfare."[14] These qualifications offered by the Court clearly fit the Freedom of Religion conception, because the first qualification of the Establishment Clause offers the requirement for the state to not create an incentive to practice religion, while the second qualification offers the requirement for the state to create publicly available benefits.

Witters v. Washington Department of Services for the Blind

The criterion of publicly available benefits continued throughout the future of the Freedom of Religion conception in the U.S. Supreme Court's jurisprudence. The next occurrence of publicly available benefits was seen in *Witters v. Washington*, though the

[11] Supra note 6.
[12] 98 U.S. 145 (1879).
[13] Supra note 6.
[14] Supra note 6.

Court added a new consideration to the Freedom of Religion Conception.[15] Private choice of citizens became a new criterion in the Freedom of Religion conception, finding its origin in *Witters*.

Facts of the Case

Larry Witters applied to the Washington Commission for the Blind to receive vocational rehabilitation assistance under a Washington statute. However, since Witters was attending a private Christian college with hopes to become a pastor, missionary, or youth director, the Commission denied Witters any aid. The Commission justified the refusal of aid by stating the provision of aid would be a violation of the State Constitution. Washington's State Constitution "forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."[16] Once Witters was denied aid, he filed suit against the Commission for violating the Free Exercise Clause.

The Commission argued that their decision to deny Witters from receiving government aid was not motivated by a disfavor towards religion, but only to uphold the State Constitution which clearly forbid the use of government funds to assist an individual pursuing a religious career. Had the Commission given aid to Witters, they argued that they would have been improperly advancing religion and possibly even establishing a religion of the state, which is forbidden under the Establishment Clause.

A state hearings examiner and the State Superior Court agreed with the Commissions arguments, where both held the Commissions actions as constitutional

[15] 474 U.S. 481 (1986).
[16] Supra note 15.

since the State Constitution stated that “[all] schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”[17] However, the Washington Supreme Court did not rule with the State Constitution as its basis, but rather that the provision of public funds to an individual seeking a religious career would violate the Establishment Clause of the Federal Constitution. Thus, when the U.S. Supreme Court heard the case, they did not look to the State Constitution, but rather asked whether the First Amendment Establishment Clause forbid Washington from providing funds to Witters to receive vocational assistance in his pursuit for a religious career.

Private Choice for Publicly Available Benefits

The U.S. Supreme Court disagreed with Washington’s Supreme Court, because the program that the Statute created was a publicly available benefit to individuals seeking vocational assistance and would only indirectly aid a religious and sectarian organization through a series of private choices made by citizens. To prove that this program was a publicly available benefit, the U.S. Supreme Court invoked the Lemon Test. There was a clear secular purpose, where “the program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation.”[18] The secular purpose was not enough to prove that the statute was a publicly available benefit, as the statute still must neither advance or inhibit the practice of any religion in order to withstand the substantive and incentive neutrality requirement of the Freedom of Religion conception.

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[17] App. To Pet. For Cert. F-4.
[18] Supra note 15.

The requirement of substantive and incentive neutrality posed a more complicated question than was offered by the State, as "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution."[19] In order to determine whether the statute had the primary effect of advancing or inhibiting religion, the U.S. Supreme Court had to analyze how the aid came to the religious and sectarian organization. When looking to the aid that the Washington program provided, the aid was given "directly to the student,"[20] rather than directly to the institution the student was attending. Thus, the aid only was only given to a religious or sectarian institution as a result "of the genuinely independent and private choices of aid recipients."[21] The private choice of individual citizens removes the state from sponsoring any specific religion because government officials are not giving the aid or withholding the aid to the religious and sectarian organizations on the basis of their religious character.

The U.S. Supreme Court combines the criterion of publicly available benefits with the private choice of individual citizens in *Witters*, by creating a distinction between direct and indirect aid that must be considered separately. While the U.S. Supreme Court could uphold both direct and indirect aid provided to religious and sectarian organizations in the Freedom for Religion conception, the Supreme Court will rely upon the different justifications to uphold the statutes. When considering direct aid, the program that provided the aid must be a program that was publicly available to a broad class of citizens for a clear secular purpose. However, when considering indirect aid, the program can

[19] Supra note 15.
[20] Supra note 15.
[21] Supra note 15.

only be upheld so long as the program is publicly available, and the aid comes to religious and sectarian organizations as a result of a series of private choices. Since the Statute under analysis in *Witters* was specifically designed to provide aid for individuals to pursue a career of their choosing, the State cannot eliminate religious individuals from being able to receive the aid. This would no longer be a substantive and incentive neutral statute that the Freedom of Religion of conception requires of states.

Zelman v. Simmons-Harris

This combination of publicly available benefits with private choices of citizens continues to be the driving force of the Freedom of Religion conception as the U.S. Supreme Court takes on more cases. Post-Witters cases under the Freedom of Religion Conception now just looked to determine whether the aid was direct or indirect, before interpreting the statutes.

Facts of the Case

The Pilot Project Scholarship Program allowed for families in the Cleveland City School District to receive "tuition aid for certain students … to attend participating public or private schools of their parent's choosing and tutorial aid for students who choose to remain enrolled in public school."[22] There were no limitations placed upon the type of schools that were allowed to participate in this program, and no limitations, except on the basis of financial need, to where the parents could spend the tutorial aid. Of the private schools that participated, 82% were religiously affiliated and 96% of the tuition aid that was provided were given to students who enrolled in private religious schools.

[22] 536 U.S. 639 (2002).

A group of Ohio taxpayers argued that any aid that is attributable to the state cannot be given to religious or sectarian organizations, as this would be promoting religious activity or in this case religious education, which is forbidden by the Establishment Clause. The respondents further argued that the Ohio statute most closely resembled the previous U.S. Supreme Court cases of *Committee for Public Education & Religious Liberty v. Nyquist*, *Sloan v. Lemon*, and *Witters v. Washington Department of Services for the* Blind, due to the provision of state funds for religious education.[23] Respondents claimed that the aid cannot be seen as a result of a series of private decisions because although the money is given to the parents to spend as they choose, the statute is skewed heavily towards religion so as to advance religion.

The District Court and the Court of Appeals agreed with the Ohio taxpayers, that the aid provided to the religious and sectarian organizations violated the Establishment Clause, because the Ohio program has the primary effect of advancing religion. While the statute may appear neutral on its face, the primary outcome of the program is funding religious education that individuals would not have been able to attend without the aid from the State. The State of Ohio appealed to the US Supreme Court to ask whether the Ohio Statute that provided tuition and tutorial aid violated the Establishment Clause.

Private Choice from Public Benefits

The US Supreme Court upheld the Ohio Statute, because the statute created a program which allowed for citizens to make private decisions of where to direct aid they received from publicly available benefits. As was seen in *Witters*, the Freedom of Religion criterions of publicly available benefits and private choice must lead the

[23] 413 U.S. 756 (1973), 413 U.S. 825 (1973), and 474 U.S. 481 (1986) respectively.

discussion in looking to whether or not the aid is direct or indirect. To start this discussion, the U.S. Supreme Court argued that the statute did not violate the principles established in *Agostini v. Felton*, which reformatted the use of the Lemon Test to only the first two prongs of the Lemon Test. Specifically, the statute was not only generally applicable but also neither advanced nor inhibited the practice of religion. The benefits were provided to "poor children in a demonstrably failing public school system,"[24] and not strictly to those pursuing religious or sectarian education. These two prongs posed by the US Supreme Court (i.e., generally applicability of the law and neither advances nor inhibits free practice of religion) continue building upon the incentive and substantive neutrality that is required under the Freedom of Religion conception from publicly available benefits and private choices of citizens.

Rehnquist only briefly discusses the neutrality of the Ohio Statute, because the current case is so closely related to *Mueller v. Allen*[25] and *Witters v. Dept. of Servs. for the Blind*[26] where the Court has held that "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing,"[27] are not enough to invalidate a statute on an Establishment Clause claim. Similar to *Witters*, the Ohio program created a publicly available benefit regardless of religious character to apply to a broad class of citizens to pursue a legitimate secular purpose of education. The state is only interested in providing public benefits to its citizens, which in both *Witters* and *Zelman*, is aid for education. Thus, there was no need to extensively discuss the neutrality of the law, because the key

[24] Supra note 22.
[25] 463 U.S. 388 (1983).
[26] Supra note 15.
[27] Supra note 22.

factor of this case, in terms of being a publicly available benefit, is whether the structure of the statute allowed for private choice to direct the state provided aid.

The US Supreme Court has held since *Witters* that when a series of private choices have the result of giving state aid to religious and sectarian organizations, that the state was removed from any attachment to the aid. Since the Ohio program allowed for parents to freely decide where they would send their children, the program is clearly one of private choice. Thus, the U.S. Supreme Court could not invalidate the Ohio Statute on the grounds that the private choices of parents appeared to favor religious schools, because the ruling would effectively be just as harmful as if the State of Ohio had excluded religious schools from the program entirely. The US Supreme Court has long acknowledged that this discrimination on the basis of religion is also unconstitutional due to its clear preference for non-religious entities, furthering its Freedom of Religion stance. Statutes cannot be hostile to religion nor can they be applied with hostility to religion, because this would not only impact the free practice of individuals, but also establish the state as favoring its citizens to be non-religious over any religion. This favoring of non-religion over religion clearly violates the substantive and incentive neutrality where the state is no longer "[minimizing] the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance,"[28] but rather encourages its citizens to hold no religious belief so that they may obtain public aid.

The Supreme Court continued to use its criterion for publicly available benefits and private decisions when analyzing state statutes of future cases. *Espinoza v. Montana*

[28] Laycock, supra note 1.

Department of Revenue emphasized the need to substantive and incentive neutrality amongst both religion and non-religion, as eliminating individuals from receiving publicly available benefits on the basis of their religious character is contrary to the Establishment Clause under the Freedom of Religion conception.

Espinoza v. Montana Department of Revenue

Facts of the Case

The Montana Legislature created a program to provide tax credits to citizens "who donate to organizations that award scholarships for private school tuition."[29] This statute appeared to be in conflict with the Montana Constitution that strictly prohibited any "government aid to [be given to] any school 'controlled in whole or part by any church, sect, or denomination,' Art. X, (section) 6(1)," so to reconcile the conflict the Montana Department of Revenue "promulgated 'Rule 1,' which prohibited families from using the scholarships at religious schools."[30] Three parents challenged the Rule as a violation of the Free Exercise Clause, and brought suit against the Montana Department of Revenue.

Appellants in this case argued that the Rule "conflicted with the statute that created the scholarship program," because the statute allowed for the scholarships to be used at " any private school that meets certain accreditation, test, and safety requirements."[31] The appellants further argued that the Rule placed into effect by the Montana Department of Revenue could not have resolved the conflict between

[29] 591 U.S. __ (2020).
[30] Supra note 29.
[31] Supra note 29.

Montana's no-aid provision and the use of scholarship funds to religious schools without creating conflict between the statute and the Rule as well as without violating the Free Exercise Clause. The claims of the appellants were based upon the removal of their eligibility from a publicly available benefit on the sole basis of the religious character of the private school.

The Trial Court agreed with the parents and enjoined Rule 1 but did not invalidate the statute. However, the Montana Supreme Court held that without Rule 1 the statute was invalid because it was in violation of the no-aid provision of the Montana State Constitution. The group of parents appealed to the Supreme Court which granted certiorari to ask whether a statute that provides funding for private education, while prohibiting funding for religious education, violate the Free Exercise Clause.

Discrimination on the Basis of Religious Character

The U.S. Supreme Court reversed Montana's Supreme Court ruling, because in removing a broad class of individuals from a publicly available benefit, Montana created an incentive towards non-religious education over religion education. The U.S. Supreme Court further argued that *Espinoza* was not similar to *Locke v. Davey,* but rather resembled *Trinity Lutheran Church of Columbia, Inc. v. Comer*. The facts of *Espinoza* did not resemble a restriction of funds based on what an individual "proposed to do," like *Locke v. Davey*[32], but rather a restriction of funds on the basis of religious nature, like *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[33]

This removal of a religious and sectarian organization from eligibility of receiving a publicly available benefit, though may appear to be a Freedom for Religion argument,

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[32] 540 U.S. 712 (2004).
[33] 582 U.S. __ (2017).

clearly fits more appropriately with the Freedom of Religion conception that a statue should not "encourage[] or discourage[] religious belief or disbelief, practice or nonpractice, observance or nonobservance."[34] The Rule put into effect by the Montana Department of Revenue created an incentive against religious practice and could not be upheld under the U.S. Supreme Court's understanding of incentive and substantive neutrality. By removing these religious and sectarian organizations from being able to obtain the publicly available benefit, the statute no longer creates a publicly available benefit but rather creates an exclusive benefit meant to only help those who hold or do not hold certain beliefs. Thus, without a publicly available benefit being created by the state, the aid cannot be considered constitutional under the Freedom of Religion conception as the state is no longer acting neutrally between religion and non-religion.

As a result of the elimination of religious and sectarian organizations from the eligibility of receiving public aid, the U.S. Supreme Court was unable to reconcile the violation of the Free Exercise Clause with the ruling of Montana's Supreme Court. The ruling from Montana's Supreme Court as well as the Rule created by the Montana Department of Revenue created an incentive that favored those who did not practice religion and had no intention to send their children to religious or sectarian schools. This incentive is noticed only through the removal of religious and sectarian schools from being able to receive public aid. The State of Montana clearly favored non-religious schools in the creation of the Rule that blanketly eliminated schools on the sole basis of their religious character, rather than their inability to meet the specified criteria in the statute. The incentive runs counter to the Supreme Court's rulings discussed in this

[34] Laycock, supra note 1.

chapter, that required substantive neutrality and incentive neutrality between religion and non-religion.[35]

Conclusion

Each of the above cases build upon the last to establish the Freedom of Religion conception. The Freedom of Religion conception requires that the state can neither favor nor disfavor religious belief or disbelief in the creation of programs for public aid. To ensure that religious belief or disbelief is not favored by the state, any public aid must be obtained by religious and sectarian organizations either directly through a publicly available benefit or indirectly from a series of private decisions. Thus, our finalized criterion that result from the Freedom of Religion conception look to whether aid is a publicly available benefit and whether the aid is obtained on the merits or needs of the religious and sectarian organizations or through a series of private choices from citizen.

[35] The U.S. Supreme Court did not make any ruling about whether or not the scholarship program was to be reinstated, but that the Montana Supreme Court did not have the authority to invalidate the program on the basis of the no-aid provision in the Montana State Constitution.

CHAPTER THREE

Freedom for Religion

Defining Freedom for Religion

Freedom for Religion requires for the state to give "neutrality between different religions, but not between religion and non-religion."[1] While religion in this concept, unlike Freedom of Religion, is "part of the proper means to the full range of state ends,"[2] it still resembles much of the doctrine held in Freedom of Religion. Freedom for Religion also relies upon the criterion of private choice of citizens and publicly available benefits from Freedom of Religion but differs in its consideration that religion serves a secular purpose that has been present since the American Founding. Religion is seen as way in which the state can produce "strong families, well-knit communities, orderliness and citizens who care for one another as more than merely potential customers or potential competitors,"[3] by advocating for citizens to practice religion.

Zuckert's understanding of the Freedom for Religion conception, is not the only understanding that we could analyze as Laycock offers an adapted version of substantive neutrality from the Freedom of Religion conception. Laycock argues that in order for state sponsored religious aid or speech to be upheld that it must not be a coercive exercise or display.[4] Zuckert's understanding of Freedom for Religion rivals that of Laycock's, in

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[1] Michael Zuckert, *Freedom of, Freedom for, and Freedom from Religion: The Contested Character of Religious Freedom in America*, Law and Liberty, (2016).
[2] Zuckert, supra note 1.
[3] Zuckert, supra note 1.
[4] Thomas Berg and Douglas Laycock, *Espinoza, Government Funding, and Religious Choice*, Public Law and Legal Theory, (2020).

that Zuckert acknowledges the instrumentalization of religion under the Freedom for Religion conception that Laycock simply does not. Rather Laycock relies too heavily on the substantive and incentive neutrality required in the Freedom of Religion conception, that simply does not align with the Freedom for Religion conception that the U.S. Supreme Court has adopted throughout the years. Thus, throughout this chapter I will be using Zuckert's understanding of the Freedom for Religion conception.

There is some difficulty in identifying when the U.S. Supreme Court has used Freedom for Religion in deciding cases, due to how similar the holdings will be when compared to Freedom of Religion cases. However, where Freedom for Religion will differ in U.S. Supreme Court holdings is in the secular and historical purposes of religion.

To understand Freedom for Religion in the U.S. Supreme Court, we will analyze *Zorach v. Clauson, Marsh v. Chambers, Lynch v. Donnelly,* and *Van Orden v. Perry*.[5] These cases were selected due to the Courts' emphasis on the need to continue substantive and incentive neutrality from the Freedom of Religion, but the Court distinguishes these cases due to the important secular and historical role religion plays in the United States. The U.S. Supreme Court applies the Freedom for Religion conception to each of these cases through their historical analysis of the founding, seen in *Marsh* and *Lynch*, as well as their hesitance to favor non-religious individuals, seen in *Zorach*. Each of the above cases begins with a discussion of the necessary facts, before analyzing why the arguments offered by the Supreme Court are considered to be Freedom for Religion arguments.

Zorach v. Clauson

[5] 343 U.S. 306 (1952), 463 U.S. 783 (1983), 465 U.S. 668 (1984), and 545 U.S. 677 (2005). respectively.

Facts of the Case

New York City allowed students to be released during school hours, as long as written requests were obtained by parents, so that students may attend "religious instruction or devotional exercises."[6] New York Education Law and other regulations required that "weekly reports of [student's] attendance at such religious schools must be filed with their principal or teacher… [and limited the amount of school time to be missed at] only one hour a week … for such training."[7] New York also required "no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction," so that the State would not be advocating or coercing students to attend religious teachings. Furthermore, no public funding was used for the program and all responsibility of attendance fell onto the parents and religious schools who "w[ould] explain any failures [of the student] to attend… on the weekly attendance reports."[8] Thus, the State and school system had little to no involvement in the religious teachings besides releasing students from regular school hours and keeping record of attendance.

Appellants argued that "the weight and influence of the school is put behind [the] program for religious instruction [by having] public school teachers police [the program via] keeping tabs on students who are released [, and halting] classroom activities [for release]."[9] Appellants further argue that this case resembles *McCollum v. Board of Education,*[10]in that the program in *McCollum* is also a "released time"[11] program that allowed students to attend religious instruction rather than secular education. The U.S.

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[6] 343 U.S. 306 (1952).
[7] Supra note 6.
[8] Supra note 6.
[9] Supra note 6.
[10] 333 U.S. 203 (1948).
[11] Supra note 6.

Supreme Court struck down the program in *McCollum*, due to the usage of public-school classrooms for the religious education as the U.S. Supreme Court argued this was a violation of the Establishment Clause.

The New York Court of Appeals upheld the released time program arguing that the program did not violate the establishment clause, since no public-school rooms or officials were used for the religion education. Appellants appealed to the U.S. Supreme Court where they considered whether the New York City program violated the Free Exercise Clause or the Establishment Clause of the First Amendment.

Private Choice for all Religions

The U.S. Supreme Court upheld New York City's released time program, because the program allowed for private citizens to decide how they used this release time whether that be for religious instruction or for continued secular instruction. While immediately this would appear to fall into the category of the Freedom of Religion conception, due to the private choice of citizens, the categorization of this case into the Freedom of Religion conception is incompatible because of the U.S. Supreme Court's understanding and reading of the Establishment Clause. The Establishment Clause requires in "so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation [of Church and State] must be complete and unequivocal."[12] However, this reading is qualified by emphasizing that the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State."[13] This understanding reflects arguments used by the U.S. Supreme Court during *Everson,* that there will always be some interaction between

[12] Supra note 6.
[13] Ibid.

Church and State whether it be through the use of Police Officers, Fire Department, or otherwise. We as Americans "are a religious people whose institutions presuppose a Supreme Being."[14] The government should have "an attitude … that shows no partiality to any one [religion] and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[15] If the United States were to establish a complete separation of Church and State, each would be foreign to the other and each would become hostile to the other.

Had the U.S. Supreme Court invalidated the New York program, there would be further issues of "police [and] fire protection to religious groups… [, where] Policemen [could not help] parishioners into their places of worship [without] violat[ing] the Constitution."[16] These issues have been discussed in previous cases (i.e., *Everson,* in theory more than practice), as a way of cautioning the use of Freedom from Religion arguments. Many of the practices and customs that are still present to this day (i.e., In God We Trust on coins, swearing to God before the Court, etc.), would come under attack because people did not agree with the religious undertones. Unlike *Everson*, the U.S. Supreme Court clearly favors religion over non-religion here because of the important customs and traditions that have taken ahold in the United States as a result of the religious undertones of the founding.

However, not all cases involving the Freedom for Religion conception will automatically favor religious people, as the problems facing the U.S. are problems of degree. Just looking to the comparison of *McCollum* to *Zorach,* it is evident that when

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[14] Ibid.
[15] Ibid.
[16] Ibid.

Illinois created a program that allowed public schools to be used for religious teachings as well as allowing the presence of religious teachers in classrooms, that the program violates the Establishment Clause in a way that just simply isn't present in New York's program. New York's program did not allow for religious teachers to be present in public classrooms and did not permit for religious teachings to be conducted in public schools. This problem of degree requires an answer to "how much is too much?" While there seems to be no clear quantitative value presented by the U.S. Supreme Court in either case, it can be inferred that in cases with "released time" programs so long as the public schools are not advocating for students to attend services nor providing any form of funding or aid to the program, then the program will survive free exercise and establishment challenges.

Marsh v. Chambers

The U.S. Supreme Court strayed away from recognizing religion as serving a secular purpose, until *Marsh v. Chambers* where the Court reignited its discussion on the historical significance of religion at the American Founding. Unlike *Zorach,* the opinion in *Marsh* specifically looked to historical examples of church and state interaction beginning at the founding to reason through how the Establishment Clause is to be understood. So although the Freedom for Religion conception still rested upon the secular purpose of religion, the argument now rested upon a historical basis rather than a philosophical basis as is seen in *Zorach*.

Facts of the Case

The Nebraska Legislature has employed a Presbyterian minister as the legislature chaplain since 1965. The chaplain is paid a "salary of $319.75 per month for each month the legislature is in session," so that he may "[begin] each [legislative] session with a prayer."[17] The chaplain is "chosen biennially by the Executive Board of the Legislative Council and [receives their salary] out of public funds."[18] A member of the Nebraska Legislature, Ernest Chambers, brought suit against the Nebraska Legislature's use of a chaplain as a violation of the Establishment Clause of the First Amendment.

Chambers argued that the use of public funds to pay for the salary of the chaplain to pray before the start of every session, constitutes an advancement of religion. Chambers further argued that the continued use of a Presbyterian minister for 16 years, effectively established a preference to the Presbyterian faith and was a means to promote a particular faith to the state of Nebraska.

The District Court held that while the prayers said by the chaplain was not a violation of the Establishment Clause, the payment of the chaplain from public funds was a violation of the Establishment Clause. However, the Court of Appeals argued that Nebraska could not continue to allow the Chaplain to pray before the start of every session as the use of the same chaplain and publication of their prayers for the past 16 years failed all three prongs of the Lemon Test. Thus, the U.S. Supreme Court was faced with deciding whether the payment of a chaplain to pray at the beginning of each legislative session violated the Establishment Clause.

Long History of Legislative Chaplains

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[17] 463 U.S. 783 (1983).
[18] Supra note 17.

The U.S. Supreme Court upheld the employment and payment of the Presbyterian minister, as the United States has had an enduring history of legislative chaplains, since the First Congress of 1789. This history influenced how the Supreme Court has come to understand the Establishment Clause, in that there is not a need for a strict wall of separation between church and state to Jefferson alluded to in his *Letter to the Danbury Baptists*. Or at least not an impenetrable wall. The Establishment Clause is meant to accommodate religion in public life, due to its importance to the Founding Fathers and prevalence throughout the United States history. Though historical patterns have been influential to the Supreme Court, they cannot "justify contemporary violations of constitutional guarantees."[19] Thus, the Supreme Court must look to the practice of the Federal Government in applying the Establishment Clause against the history of legislative chaplains.

The First Congress adopted an act that permitted the use of public funds to pay a legislative chaplain for their services in praying at the beginning of legislative sessions. These legislative chaplains were not seen as counter to the Establishment Clause, because the Establishment Clause was only intended to prevent from requiring the mandatory practice of citizens that was counter to free conscience. Thus, when the First Amendment was applied to the States through the Fourteenth Amendment, a stricter reading of the Establishment Clause cannot be created. Opening prayers were not considered a "proselytizing activity or as symbolically placing the government's"[20] approval upon a religious practice. Afterall, the Supreme Court has long held that "our institutions

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[19] Supra note 17.
[20] Supra note 17.

presuppose a Supreme Being."[21] Engaging in an opening prayer does nothing more than acknowledge the Supreme Being that we owe our institutions to. There is no worry of advancing one religious' tenant over another, and no worry of forcing citizens to ascribe to a religious view they do not hold.

The historical analysis done by the Freedom for Religion conception, creates a method to compare historical instances of the currently challenged practices. This method follows the Freedom for Religion conception advocation for neutrality between religions but not between religion and non-religion, by acknowledging the relationship that the state has always had with the church. Where in the Freedom of Religion and Freedom from Religion conceptions religion cannot be treated as special, the Freedom for Religion conception understands the importance of religion in a state and the special nature of religion. By using the historical analysis method from the Freedom for Religion conception, the U.S. Supreme Court is able to reconcile modern practices with their historical predecessors.

Lynch v. Donnelly

The United States has long had secular uses for religion, and the legislative chaplain is only one version of the secular use for religion. The Supreme Court continues their reasoning of analyzing the history of the United States in relation to the issue at hand, where the Court next uses this reasoning in *Lynch v. Donnelly.*

Facts of the Case

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[21] Supra note 6.

Every year, the city of Pawtucket, Rhode Island presents a Christmas display in association with the downtown retail merchants' association. The Christmas display consists of: "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, …, a large banner that reads 'SEASONS GREETINGS,' and the crèche at issue here."[22] The crèche cost the city $1,365 in 1973 and requires $20 each year to build and tear down the crèche every year. However, the city did not use any money to maintain the crèche over the past 10 years. Pawtucket residents filed a suit against the city for the inclusion of the crèche as a violation of the Establishment Clause.

The residents of Pawtucket argued that by including the crèche in the Christmas display, the city of Pawtucket was advancing one religion over others by providing more than "a remote and incidental benefit on Christianity,"[23] that *Lemon v. Kurtzman* requires. The respondents further argued that the addition of the crèche in the display resulted in an excessive entanglement between church and state "as a result of the political divisiveness."[24] This political divisiveness was argued to be evident in the fact that a court case was filed to challenge the inclusion of the crèche in the Christmas display, where other citizens believed that no Establishment Clause violation occurred.

The District Court held that since the inclusion of the crèche in the Christmas display was done by the city, "the city 'tried to endorse and promulgate religious beliefs,' and that 'erection of the crèche has the real and substantial effect of affiliating the City with the Christian Beliefs."[25] Although the Court of Appeals was divided on the ruling, the Court of Appeals affirmed the ruling of the District Court. Thus, the U.S. Supreme

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[22] 465 U.S. 668 (1984).
[23] Supra note 22.
[24] Supra note 22.
[25] Supra note 22.

Court was faced with deciding whether the inclusion of a crèche in an annual Christmas display would violate the Establishment Clause.

Religious History of the United States

The U.S. Supreme Court allowed the inclusion of the crèche in the Christmas display, due to the religious history of the United States. The Supreme Court argued that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."[26] Any hostility towards religion would bring about a "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."[27] The U.S. Supreme Court argues that this accommodation of religion throughout our history has long allowed for the government to not only recognize holidays with religious significance but also subsidize these holidays. The government has subsidized these holidays by allowing for "federal employees [to be] released from duties on … National Holidays, while being paid from the same public revenues [as] the Chaplains of the Senate and the House."[28] The United States has a religious heritage that we cannot deny and we must be willing to accommodate this heritage, whether that be by allowing for the continued use of Chaplains in the Senate and the House or by allowing the government to subsidize public displays of religious holidays.

Though the Supreme Court already notes the waning utility of the Lemon Test, due to its requirement "to prevent, as far as possible, the intrusion of either into the precincts of

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[26] Supra note 22.
[27] Supra note 10.
[28] Supra note 22.

the other,"[29] they invoke the test due to its use by the District Court and the Court of Appeal in analyzing the practice. First, the crèche has a secular purpose by "[depicting] the historical origins of this traditional event long recognized as a National Holiday."[30] Second, no aid is given to religious or sectarian organizations to a greater extent than as seen in *Everson*, as there is no consistent aid. There is only the initial purchase of the display and the cost to put up and tear down the creche. This purchase of the crèche and display of the crèche is only an incidental benefit of religion. Just because an incidental benefit is given to religious or sectarian organizations, this is not enough to invalidate the law. Finally, there was no excessive entanglement because there was no enduring interaction between church and state with the display of the crèche. The Supreme Court, as the Court of Appeals did, rejected the argument of political divisiveness as any individual may file a lawsuit against church and state interaction to claim a violation of excessive entanglement. Thus, the display passed all three prongs of the Lemon Test and could not be invalidated.

The Court cannot "mechanically invalidat[e] all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith."[31] This is because the Establishment Clause "was to state an objective, not to write a statute."[32] The objective is to just prevent the state from mandating religious practice, and not prevent the state from engaging in religious activity. Though the Supreme Court has noted that this does not mean that states can pass statutes that are purely religious in nature as this would be counter to the Establishment and Free Exercise Clause as understood by the

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[29] 403 U.S. 602 (1971).
[30] Supra note 22.
[31] Supra note 22.
[32] 397 U.S. 664 (1970).

Freedom for Religion conception. The statutes that are created must be done as an acknowledgement of the history of the United States, rather than to indoctrinate individuals into a specific belief.

Van Orden v. Perry

The historical analysis method now being well established in *Marsh v. Chambers* as well as in *Lynch v. Donnelly*, continues its use in *Van Orden v. Perry.* However, the U.S. Supreme Court now looks to the meaning of symbols rather than to the practice itself in *Van Orden*.

Facts of the Case

The Texas State Capitol has numerous monuments and historical markers surrounding it and accepted a new monument from The Fraternal Order of Eagles of Texas. The monument was a six feet high and three feet wide monolith with the "text of the Ten Commandments… two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ."[33] The Eagles "paid the cost of erecting the monument," and no money was given by the State of Texas. Thomas Van Orden frequently passed the monument on his visits to the law library, where he later filed suit against state officials claiming that the monument was a violation of the Establishment Clause. Van Order argued that the use of clear religious texts on the State Capitol grounds sponsored religious belief over non-belief and violated the Establishment Clause.

The District Court held the monument was not a violation of the Establishment Clause, because of its "valid secular purpose in recognizing and commending the Eagles

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[33] 545 U.S. 677 (2005).

for their efforts to reduce juvenile delinquency."[34] The District Court further argued that a reasonable observer would not see the monument as a religious message. The Court of Appeals affirmed the holdings on similar grounds to the District Court. Thus, the U.S. Supreme Court must answer whether the monument with the text of the Ten Commandments on Texas State Capitol grounds violates the Establishment Clause.

Religious Nature and Historical Nature

The U.S. Supreme Court holds that the monument does not violate the Establishment Clause by making a variety of Freedom for Religion arguments, notably the emphasis on the historical significance of religion in the United States history within the three branches of government. As was observed in *School Dist. of Abington Township v. Schempp,*[35] "religion has been closely identified with our history and government … [as it was widely believed] there was a God and that the unalienable rights of man were rooted in Him."[36] The Court cannot create a system in which would be offensive to the view that many of our Founding Fathers held, as their understanding of the Establishment Clause is how it should be understood today. Afterall, "both Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation,"[37] as a day of prayer and thanksgiving to God. Religion must be accommodated by the reading of the Establishment Clause rather than inhibited by it.

There is even a long-standing history of the use of the Ten Commandments on government property. We need not look any further than the U.S. Supreme Court where "since 1935, Moses has stood, holding two tablets that reveal portions of the Ten

[34] Supra note 33.
[35] 374 U.S. 203 (1963).
[36] Supra note 35.
[37] Supra note 35.

Commandments written in Hebrew."[38] Moses stands alongside other lawgivers, emphasizing the influence that these have had on the American tradition. Thus, although the Ten Commandments are obviously religious, they also have "an undeniable historical meaning."[39] This historical meaning allows for the Supreme Court to uphold the display of the Ten Commandments, where it has not been able to in cases like *Stone v. Graham.*[40] Unlike *Stone*, the Texas State Capitol monument does not have any role in education as it is a "far more passive use of the texts than … where the text confronted elementary school students every day"[41] in *Stone*. The Ten Commandments represent a much deeper and rich political and legal history of the United States in the presentation of the monument.

If the Supreme Court were to disallow the presence of the Ten Commandments simply because of the religious character, this would run afoul of the understanding of the Establishment Clause that is truly just a guiding principle more than an absolute law. The Establishment Clause was not intended to prevent the state from becoming involved in religious activity, as there is a history of the state and religions interacting with one another since the founding. As was even stated in *Zorach*, the Establishment Clause cannot ask for a "callous indifference" to religion as this would create an animosity towards religion that the Establishment Clause never intended. Religion serves a secular purpose within the state to educate those about our political and legal history and must be accommodated by the state.

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[38] Supra note 35.
[39] Supra note 35.
[40] 449 U.S. 39 (1980).
[41] Supra note 35.

Conclusion

Each of the cases built upon each other to develop the historical analysis method adopted by the Supreme Court when looking to religious activity allowed by the state or the states actions in engaging in religious activity. To withstand a Freedom for Religion understanding of the Establishment and Free Exercise Clause, the statutes must be a result of the acknowledgment of the historical relationship between the church and the state. Thus, the criteria in which the Freedom of Religion conception creates are: 1.) The degree to which the state action resembles historical state action must be substantially similar and 2.) the symbols adopted by the state must maintain a partial secular meaning or run the risk of creating a purely religiously motivated display.

CHAPTER FOUR

Freedom from Religion

Defining Freedom from Religion

Freedom from religion requires for the state [to have] no religious tasks whatever, which would include legislative chaplains, religious displays, and even any mention to a Supreme Being in or on a government building; "it is to treat its citizens as equal citizens, whose religious convictions or lack thereof are of no relevance to their common citizenship or to the business of the state with them."[1] Religion is not seen as an antiquated practice that should be removed from society as a whole, but rather is viewed as belonging entirely in the private sphere. There is "a strict excision of the state from butting into religion, and of religion from butting into the state."[2] This strict excision resembles the Freedom of Religion requirement to create programs that are neutrally applicable to a wide class of individuals, but goes further than the Freedom of Religion conception by not allowing the church and state interaction that is seen as necessary in the Freedom of Religion conception (e.g. state officials directing traffic for religious services). Freedom from Religion also drastically differs from the previous Freedom for Religion and Freedom of Religion conceptions because no aid can be given to religious or sectarian organizations as this would immediately result in an excessive entanglement of the church and state as well as the inappropriate advancement of religion.

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[1] Michael Zuckert, *Freedom of, Freedom for, and Freedom from Religion: The Contested Character of Religious Freedom in America*, Law and Liberty, (2016).
[2] Zuckert, supra note 1.

The United States Supreme Court has primarily used the Lemon Test when analyzing statutes in Freedom from Religion cases. The Lemon Test was adapted from *Board of Education v. Allen* and *Walz v. Tax Commission,* where the Court considers whether : "the statute [has] a secular legislative purpose; second, [whether] its principal or primary effect [is] one that neither advances nor inhibits religion,"[3] and whether the statute requires "an excessive government entanglement with religion."[4] Each of the three prongs looks to a different aspect of the Establishment Clause: "sponsorship, financial support, and active involvement of the sovereign in religious activity,"[5] respectively. For any statute to withstand an Establishment Clause challenge under the Lemon Test, the statute must pass all three prongs.

To understand Freedom from Religion, this chapter will analyze *Lemon v. Kurtzman*, *Committee for Public Education & Religious Liberty v. Nyquist*, and *Texas Monthly v. Bullock*.[6] These cases were selected due to the strict prohibition of any aid to be provided to any religious and sectarian organization, as the aid results in an immediate excessive entanglement between church and state as well as immediately advance religious belief over disbelief. These cases remove the special character of religion that is recognized in the Freedom for Religion conception and remove the substantive neutrality between religion and non-religion in the Freedom of Religion conception in order to replace it with the strict wall of separation. Each of the above cases begins with a discussion of the necessary facts, before analyzing why the arguments offered by the Supreme Court are Freedom for Religion arguments.

[3] 392 US 236 (1968).
[4] 403 U.S. 602 (1971).
[5] 397 US 664 (1970).
[6] 403 U.S. 602 (1971), 413 US 756 (1973), 489 US 1 (1989) respectively.

Lemon v. Kurtzman

Facts of the Case

In Rhode Island, the 1969 Salary Supplement Act provided schools "a 15% salary supplement to be paid to teachers in nonpublic schools,"[7] so long as the "average per-pupil expenditure on secular education is below the average in public schools."[8] In order for the school to receive the supplement, teachers must meet specific criteria: the teacher "must teach only courses offered in the public schools, using only materials used in public schools, and must agree not to teach courses in religion."[9] Upon investigation, of the "25% of the State's elementary students [that] attended nonpublic schools, about 95% of [the students] attended Roman Catholic affiliated schools."[10] Due to the larger proportion of students who attended Roman Catholic affiliated schools, all of the recipients of the salary supplement were Roman Catholic teachers. In Pennsylvania, the Nonpublic Elementary and Secondary Education Act allowed the "state Superintendent of Public Instruction to 'purchase' certain 'secular educational services' from nonpublic schools."[11] The purchasing of these services go back to reimburse "teachers' salaries, textbooks, and instructional materials,"[12] but the reimbursement must be restricted "to courses in specific secular subjects, the textbooks must be approved by the Superintendent, and no payment [can] be made for any course containing … religious

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[7] Supra note 4.
[8] Supra note 4.
[9] Supra note 4.
[10] Supra note 4.
[11] Supra note 4.
[12] Supra note 4.

teaching."[13] Thus, the statute required for a state official to define what constituted religious teaching in nonpublic schools.

Both acts were challenged as a violation of the Establishment Clause, due to the state providing direct monetary aid to non-public, non-secular schools who had clear religious motives. The appellants in both cases are taxpayers, who argued that any direct aid provided to religious or sectarian organizations violates the requirement of strict separation of church and state in the First Amendment. The appellants claim that no monetary aid can be given to religious or sectarian organizations, as this would require excessive entanglement between the church and state as well as advance religious teaching over secular teaching.

In Rhode Island, the District Court held that the Act violated the Establishment Clause due to the excessive entanglement between church and state. In Pennsylvania, the District Court held that Lemon had standing, but dismissed the case since Lemon did not have a claim for relief. Upon appeal, the U.S. Supreme Court was asked whether the statutes in Rhode Island and Pennsylvania, which provide state funding for non-public, non-secular schools, violated the Establishment Clause.

Excessive Government Entanglement

Excessive entanglement is a key Freedom from Religion understanding, because of the need to create a broad division between what is secular and what is religious or sectarian. The government cannot create definitions or argue for certain understandings of what is religious, because the act of defining what is religious not only favors specific religious practices over others but also requires the state to be familiar with the various

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[13] Supra note 4.

religious activities of the religious beliefs of its citizens. Definitions entangle the government in religious activity by requiring for state officials to be knowledgeable about the broad range of religions to be able to remove them from eligibility of public aid. The United States Supreme Court primarily relies upon the excessive entanglement argument in this case to invalidate both Rhode Island's and Pennsylvania's Statutes.

The U.S. Supreme Court viewed that due to the lack of "precisely stated constitutional prohibitions, [there] must be lines drawn with reference to the three main evils … the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement.'"[14] Thus, the Lemon Test was developed with the use of two previous cases *Board of Education v. Allen*, and *Walz v. Tax Commission*, to question: first, whether there was a secular legislative purpose; second, whether the primary effect advanced or inhibited religion; finally, whether the statute required excessive government entanglement.

Both statutes had clearly stated secular legislative purposes, argued by the states, but required for the state to carefully watch secular education so as to prevent funding of religious instruction. The Court makes no comment on the primary effect of the Acts, because "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[15] In Rhode Island, while there were clear restrictions taken, in which the teacher who received the salary supplement could not teach any religious course, these very restrictions require government surveillance to ensure that no money was going to individuals inoculating students with religious teachings. Even those programs that received aid and exceeded

[14] Supra note 4.
[15] Supra note 4.

the average per-pupil expenditures had to engage in specific book-keeping so that "the government [could] examine the school's records… to determine how much of the total expenditures is attributable to secular education and how much to religious activity."[16] In Pennsylvania, a similar level of surveillance was required from the state to ensure that the money provided was being spent for secular education. This level of surveillance on religious and sectarian organizations required for the states involved to define what qualified as religious and what did not. This distinction between religious teachings and secular teachings developed by the state were a result of the fundamental basis of these religious and sectarian schools to educate not only about secular subjects but also to educate and further the religious practices of their faith. Even though the religious and sectarian schools were teaching secular subjects, the fundamental basis of the schools was still inherently religious, and any government involvement to determine what is a religious practice and what isn't a religious practice clearly violated the Establishment Clause by favoring certain religious practices over others.

The U.S. Supreme Court defines excessive entanglement in this case that requires for the "government …to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[17] This definition of excessive entanglement exemplifies the Freedom from Religion conception, because the state cannot be involved in any manner of advancing religion or acknowledging religion. The state must function as if religion does not exist in the realm of politics, and religion must remain in the private sphere.

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[16] Supra note 4.
[17] Supra note 4.

However, this isn't to say that there is no interaction between government and churches. Rather, the Supreme Court argues that the Constitution "decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."[18] The government cannot become involved in the private choices of their citizens, and thus must create a system in which allows the citizens to decide freely their religious practice or lack thereof. The state is to treat all of its citizens exactly as that, just citizens regardless of a belief or disbelief.

Committee for Public Education & Religious Liberties v. Nyquist

Lemon established the near impenetrable wall of separation between the church and state, specifically with the prohibition of aid being delivered to religious and sectarian organizations as an excessive entanglement. *Nyquist* built upon the wall established in *Lemon* by disqualifying aid provided to religious and sectarian organizations as an advancement of religion that is forbidden by the Establishment Clause.

Facts of the Case

The State of New York established three different financial aid programs for nonpublic schools. The first program provided money directly to "qualifying nonpublic schools to be used 'for maintenance and repair' of facilities and equipment to ensure the students' 'health, welfare, and safety.'"[19] In order to qualify for this direct grant, the school must be "a nonpublic, nonprofit elementary or secondary school serving a high concentration of pupils from low-income families."[20] Once a school qualifies for the

[18] Supra note 4.
[19] 413 US 756 (1973).
[20] Supra note 19.

grant, they are able to receive an annual grant of "$30 per pupil, or $40 if the facilities are more than 25 years old,"[21] but the grant cannot exceed "50% of the average per-pupil cost for equivalent services in the public schools."[22] The second program established a tuition reimbursement for parents who had an annual taxable income below $5,000. The program provided "$50 per grade school child and $100 per high school student,"[23] so long as the parent did not receive more than 50% of the tuition paid to the school. Similar to this second program, the third program established a tax relief for those who were not eligible for the tuition reimbursement from the second program. This third program allowed for the parents "to deduct a stipulated sum from their adjusted gross income for each child attending a nonpublic school."[24] However, the stipulated sum that could be deducted from the parents adjusted gross income would decrease as the parents had more taxable income.

The programs were challenged by taxpayers who believed that these programs advanced religion, thus violating the Establishment Clause as understood by the Lemon Test. However, New York argued that the state "has a primary responsibility to ensure the health, welfare and safety of children attending…nonpublic schools,"[25] as well as support the "right to select among alternative educational systems,"[26] which was a Freedom of Religion argument.

The District Court invalidated the first two programs of the Statute but upheld the third program of tax deductions. The taxpayers appealed to the U.S. Supreme Court,

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[21] Supra note 19.
[22] Supra note 19.
[23] Supra note 19.
[24] Supra note 19.
[25] Supra note 19.
[26] Supra note 19.

where the Court was posed with answering whether the programs established in sections 1-5 of the amendments to New York's Education and Tax Laws violated the Establishment Clause of the First Amendment.

State Cannot Advance Religion

States can have absolutely no role in advancing religion, as the states would begin to favor religious citizens over nonreligious citizens to receive special treatment. Religion does not belong in the public sphere according to the Freedom from Religion, because religion is naturally a private practice that must be freely chosen by the individual. The U.S. Supreme Court in this case relies heavily on the argument that any monetary aid given to religious or sectarian organizations, even if it is a result of private choices or from a publicly available benefit, is an endorsement and advancement of religion that cannot withstand the Establishment Clause as it is understood in *Lemon*.

Thus, since all of the Programs from the amendments to New York's Education and Tax Laws provided aid to religious and sectarian organizations the U.S. Supreme Court invalidated the programs. All of the programs failed the second prong of the Lemon Test, which forbids a law that has a primary effect of advancing religion. The maintenance and repair provisions primarily are delivered to Roman Catholic schools, which although an important fact to consider, is not the primary concern. The maintenance and repair provision makes "no attempt [] to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes,"[27] and without these restrictions the section clearly "has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary

[27] Supra note 19.

schools."[28] Without any form of restricting the use of funds to buildings solely used for secular education, religious and sectarian organizations can repair and maintain buildings used for religious teachings. The Supreme Court even rejects the argument that there are statistical guarantees against the advancement of religion, as it is too loose of an interpretation of the Establishment Clause that could be manipulated by the states to indirectly advance religion. A statistical guarantee assumes that if the state limits the funding that will be provided to religious and sectarian organizations to a comparable amount provided to secular schools, the funds provided by the state will be used for the buildings conducive to secular education rather than for religious instruction.

The tuition reimbursement program could not withstand the primary effect test of the Lemon Test for slightly different reasons than the maintenance and repair program. Whereas the maintenance and repair program were given directly to religious and sectarian schools, the tuition reimbursement was given directly to parents who had the choice of what to do with the money. Where the ruling of *Everson* might suggest that the direct aid to the parents would allow for the program to survive, the Supreme Court argued that "the State seeks to relieve [the parent's] financial burdens sufficiently to assure that they continue to have the option to send their children to religion oriented schools."[29] Had the aid not been delivered in *Everson*, the individuals would still have been able to pursue a religious or sectarian education. Thus, while the direct aid given to the parents and/or students may have been convincing in *Everson*, the Supreme Court doesn't believe that the primary effect of this program was to advance secular education but rather religious education.

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[28] Supra note 19.
[29] Supra note 19.

The last three sections of the amendments, which created income tax benefits to parents that did not qualify for the tuition reimbursement program did not withstand scrutiny under the primary effects prong of the Lemon Test either. The Supreme Court saw no substantive difference between the tuition reimbursement program and the tax benefit program as the "only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum [they] would otherwise be obliged to pay."[30] These tax benefits cannot be related to the tax exemptions offered in *Walz v. Tax Commission*, as the power to tax in *Walz* is one in which could harm the practice of churches and was supported by the long history of exemption from property tax. The New York program rather created "special tax benefits, [which] could not be squared with the principle of neutrality established by the decisions of this Court."[31] These tax benefits were not intended to prevent the government from eliminating the religious and sectarian schools, but as a way in which the state could encourage its citizens to continue to attend these schools. Thus, the Supreme Court could not uphold any of the programs before the Court as they all improperly advanced religion.

The arguments offered by the Supreme Court fall into the Freedom from Religion conception, as the state is not allowed to provide any form of aid that advances religious practice or education. While the Supreme Court acknowledges that some laws may provide aid to all religions, this is not enough to maintain a neutral application amongst all of its citizens as the state is still aiding parents in their ability to send their kids to religious and sectarian schools. Even if a law's "consequence is not to promote a 'state

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[30] Supra note 19.
[31] Supra note 19.

religion,'"[32] it can still be a law that respects an establishment of religion. An establishment of religion is not restricted to the state adopting a singular religion, but rather adopting any stance that favors religious practice over non-practice. The Supreme Court sets a high bar that the state must ignore religion as a class or run the risk of creating special benefits to those who practice religion. By creating any statutes that provide aid to religious and sectarian organizations, the state fosters an atmosphere that advocates for its citizens to actively participate in religion.

Texas Monthly v. Bullock

Texas Monthly finalizes the wall of separation that has been built throughout *Lemon* and *Nyquist*. *Lemon* and *Nyquist* established the roots of prohibiting any public aid to be given to religious and sectarian organization, that *Texas Monthly* continues in the requirement to limit the state to secular purposes.

Facts of the Cases

A Texas statute "exempted … 'periodicals … published or distributed by a religious faith … consist[ing] wholly of writings promulgating the teachings of the faith and books … consist[ing] wholly of writings sacred to a religious faith'"[33] from sales and use taxes that applied to other publications. However, "prior to October 2, 1984, Texas exempted from its sales and use tax magazine subscriptions running half a year or longer [that also] entered as second class mail."[34] The exemption for magazine subscriptions was repealed for a period of three years before it was reinstated. During this period of three years,

[32] Supra note 19.
[33] 489 US 1 (1989).
[34] Supra note 33.

Texas continued to exempt from sales and use tax publications that advanced religious beliefs and teachings, while charging sales and use tax to nonreligious publications. Texas Monthly, a general interest magazine paid sales and use taxes under protest after their exemption from sales and use tax was repealed, before filing a lawsuit to recover taxes paid.

Texas Monthly argued that this exemption from the sales and use tax was advancing religion and violated the Establishment Clause as understood by *Lemon v. Kurtzman*. By providing a special tax break to religious and sectarian publications that is not provided to non-religious publications, the state of Texas is adopting a stance that prefers religious citizens over non-religious citizens.

A Texas State Court invalidated the exemption from the sales and use tax as a violation of the Establishment Clause under *Lemon v. Kurtzman*. However, the State Court of Appeals reversed the ruling, since the exemption "(1) served the secular purpose of preserving separation between church and state; (2) did not have the primary effect of advancing or inhibiting religion; and (3) did not produce impermissible government entanglement with religion."[35] On appeal the United States Supreme Court asked whether the Texas Statute violates the Establishment Clause by exempting religious publications from paying sales and use tax that nonreligious publications must pay.

No Aid to Be Given

As was seen in *Lemon* and *Nyquist,* no aid is to be provided to religious and sectarian organizations as the statutes will have the primary effect of advancing religion. Thus, the Supreme Court invalidated Texas' statute that exempted religious publications from

[35] Supra note 33.

paying sales and use tax, because the statute had the statute clearly benefitted religious publications by removing a barrier that was not removed from all publications, but only those in which published religious teachings/documents. The Court noted that had the benefits flowed to several nonreligious groups as well, it would have resembled *Mueller v. Allen* and *Widmar v. Vincent*. This is because a program that "advance[s] legitimate secular goals," are not invalid "merely because they would thereby relieve religious groups of costs they would otherwise incur."[36] Rather, when statutes single out religious and sectarian organizations as recipients for special benefits Establishment Clause challenges are sure to follow.

Since the Texas statute singled out religion the statute could not properly be read as a neutral benefit that enables religions to practice where they otherwise could not without a removal of barriers. The sales tax exemption "constitute[d] a subsidy that affects non-qualifying taxpayers, forcing them to become 'indirect and vicarious donors."[37] This burden placed on non-qualifying taxpayers violates the Establishment Clause by prioritizing religious believers over those who do not have a religious belief for special aid. It "provide[s] unjustifiable awards of assistance to religious organizations [and conveys] a message of endorsement."[38] As the Supreme Court has established in its *Lemon* and *Nyquist* rulings, states cannot favor religious belief over nonbelief and must be neutral to all of its citizens.

The Supreme Court's arguments in *Lemon*, *Nyquist*, and *Texas Monthly* fall into the Freedom from Religion conception, due to the emphasis on the need to be neutral

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[36] Supra note 33.
[37] Supra note 33.
[38] 483 US 327 (1987).

between all citizens regardless of religious affiliation. For "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another sect of religious beliefs or of religion generally."[39] This prohibition is clearly advocating that the state does not become involved in religion, no matter how neutral it is amongst the varying religions, as this is not conducive to the reading of the Establishment Clause. Rather, the state should concern itself with issues in which would benefit its entire citizenship and not a select group.

The Supreme Court does not make any specific mention to what states should concern themselves with, as "it is not [their] responsibility to specify which permissible secular objectives, if any, the State should pursue,"[40] but rather it is the states' task "to ensure that any scheme … adopted by the legislature does not have the purpose or effect of sponsoring certain religious tenets or religious belief in general."[41] The Supreme Court is only interested in ensuring that the state removes itself from religious tasks that the Establishment Clause requires of it. This interest started back in *Walz* with the acknowledgment of the power a state has to either support or eliminate religion through the evils of "“sponsorship, financial support, and active involvement of the sovereign in religious activity."[42] For it is the Establishment Clause that requires no sponsorship, financial support, or active involvement from the state in religious and sectarian organizations or activities. Both *Nyquist* and *Texas Monthly* emphasize the requirement for the state to remove themselves from all religious activity, as the "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another

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[39] Supra note 33.
[40] Supra note 33.
[41] Supra note 33.
[42] Supra note 5.

sect of religious beliefs or of religion generally."[43] Only arguments of legitimate secular goals can withstand the Freedom from Religion conception, as a requirement for absolute separation is impossible. There will be overlap between church and state that the government cannot eliminate, and the Supreme Court does not expect for the government to eliminate. Rather, the government must ensure that the legislature does not favor religion over non-religion as even this slight favoring qualifies as an establishment of religion.

Conclusion

Each of these cases slowly built an impenetrable wall between church and state, in regard to the provision of aid to religious and sectarian organizations. Though this understanding of the harm that can be done by the state originated in *Walz*, the Freedom from Religion conception became prevalent in the three cases discussed above. *Lemon* created the first criteria that the Freedom from Religion conception would utilize, i.e., secular purpose, neither advances nor inhibits religion, and does not requires excessive entanglement. *Nyquist* and *Texas Monthly* uphold these criteria as a necessary result of the Establishment Clause, so that religion stays in the private sphere to not be harmed by the state.

[43] Supra note 33.

CHAPTER FIVE

What Is the Policy Implication?

What's the Problem and How Should We Solve It?

The Problem

The U.S. Supreme Court's jurisprudence has lacked consistent views on whether or not religious and sectarian organizations can receive public aid from states. These inconsistent views have raised conflicting statements on the states' ability to create statutes that would enable individuals to pursue their preferred careers (i.e., *Witters*), attend private schools (i.e., *Espinoza*), and even provide aid to struggling schools (i.e., *Agostini*). The Supreme Court needs to adopt a clear and firm stance of one of the three conceptions, so that states may begin to better serve their citizens in the pursuit of their own goods. To solve this problem of incongruence, the Court should adopt the Freedom of Religion conception due to its ability to not only prevent the instrumentalization of religion in the Freedom for Religion conception, but also in its protection of religion as a special characteristic that cannot be discriminated against. Once the Freedom of Religion conception is adopted by the Supreme Court, states can begin to create publicly available benefits in which religious and sectarian organizations can receive either directly from the state or indirectly as a result of a series of private decisions.

Why Freedom of Religion?

The adoption of the Freedom of Religion conception can solve the inconsistencies of the Supreme Court, by allowing for individuals to privately choose what they do with the publicly available benefits they receive from the state. When individuals are the recipients of the aid, the state is able to be removed from all responsibility for wherever the aid may end up. Once the aid leaves the hand of the state, it can no longer be treated as an establishment of religion. This is because government officials are not directing where the aid goes and is not required to make decisions upon what constitutes religious use or not. The aid only incidentally ends up in the hands of religious and sectarian organizations as a result of a series of private decisions by the individual.

The Freedom of Religion conception can also solve the inconsistencies of the court by allowing for religious and sectarian organizations to qualify for publicly available benefits, regardless of their religious character. Similar to the Freedom for Religion conception, individuals and organizations cannot be discriminated against on the basis of their religious character. However, in the Freedom of Religion conception the state must still maintain substantive and incentive neutrality between religion and non-religion. So, in order to maintain this substantive and incentive neutrality, the states cannot disqualify individuals or religious and sectarian organizations on the basis of their religious character. They also cannot, however, provide special aid to religious individuals or religious and sectarian organizations on the basis of their religious character. Instead, the individuals and the religious and sectarian organizations must qualify for the aid under the statute or program on their own merits or needs.

Does Freedom of Religion Require Public Aid?

An important discussion must be had on whether or not the Freedom of Religion conception requires for the state to always provide public aid to religious or sectarian organizations. While it has been previously stated that when aid ends up in the hands of religious and sectarian organizations as a result of a series of private decisions it does not constitute as a violation of the Establishment Clause, we have not discussed the issue of violating the Free Exercise of individuals by not providing aid.

Again, so long as the individuals or the religious and sectarian organizations are not removed from consideration from the aid on the basis of their religious character, states are not required to provide the aid. Even if the aid is publicly available, the religious and sectarian organizations cannot receive preferential treatment over those that are not religious. For the purpose of the state in the Freedom of Religion conception is "to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[1] This isn't to say that the state should act as though religion does not exist, but rather that the state should not be concerned with what constitutes religion or non-religion. It is when the state becomes involved with defining what counts as religion and what does not count as religion, that the state overreaches its authority and violates the Establishment Clause.[2] Thus, the state can decide to not provide the aid to religious and sectarian organizations if the organization does not meet specified criteria under the statute or program.

Religious and sectarian organizations should qualify for public aid, due to the United States long history with religious tolerance. The provision or non-provision of

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[1] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).
[2] 403 U.S. 602 (1971).

public aid does not qualify as an establishment of religion or an infringement upon the free exercise of individuals, but rather qualifies as the state providing boundaries for individuals to pursue their own goods.

How Would Statutes be Impacted?

In order for statutes to be in compliance with the Freedom of Religion Conception, the statute can take one of two routes: 1.) create a publicly available benefit for a broad range of citizens, or 2.) create a program that allows for a series of private decisions. The two routes differ from each other in who receive the aid. In order for a statute to travel down the first route, the statute must be available to a broad range of individuals and organizations. Whereas the second route is reserved for statutes that provide public aid strictly to individual citizens.

Both routes require for programs to be a publicly available benefit, so as to not create any form of substantive or incentive neutrality for religion or non-religion. This is because by creating publicly available benefits, the state is able to remove any consideration of religion from programs created and focus on a clear secular purpose. The cases I have used in this thesis focus primarily on education, but this is only one of many legitimate secular purposes. Other legitimate secular purposes could be funding adoption agencies, newspapers or magazines, art galleries, etc.

But only the second route requires public aid to be delivered to religious and sectarian organizations through private decisions. When private choice is involved in state aid programs, only individuals can be the recipients of the aid. This is because religious and sectarian organizations cannot engage in the same private choice as individuals in the context of how to direct the aid that they receive. Whenever religious

and sectarian organizations receive aid, it is under specific guidelines of how the aid is to be used due to the needed secular purpose of the aid. As seen in *Aguilar* the aid was provided via public school teachers helping students with remedial education through Title I and even in *Trinity Lutheran* where the state required the aid to be used for new mulch for the playground. Individuals on the other hand, are able to receive aid from the state and direct the aid how they see fit. This is because individuals are able to direct the public aid towards the many avenues of achieving the secular purpose. *Witters* and *Zelman* are clear examples where Witters was able to use the vocational assistance that Washington offered in pursuit of his career even though it was a religious career, because Washington created the program to aid individuals who were losing their sight in pursuing vocations of their choice, and *Zelman* allowed for the individuals to decide where they attend schooling after receiving aid from the state due to a failing school district.

These two routes offer clear instructions for states to use when creating future statutes, so that they may still pursue legitimate secular ends even if they overlap with religion. It offers the best of the Freedom for Religion conception through the protection of religious and sectarian organizations without instrumentalizing religion as well as avoids the degradation of religion that is seen in the Freedom from Religion conception.

Future of Supreme Court Jurisprudence

In order for the Supreme Court to adopt the Freedom of Religion conception, the Supreme Court actually would not be required to change too much of their jurisprudence. The Lemon Test has already ceased to remain relevant in law and religion jurisprudence, and the Court has long established a pattern of substantive and incentive neutrality in

Everson, Witters, Zelman, and *Espinoza*. The biggest hurdle, per se, for the Supreme Court to overcome will be distinguishing when direct aid to religious and sectarian organizations is permissible. Direct aid can be permissible to religious and sectarian organizations when it is the result of a publicly available benefit where the organization qualifies on its own merits or needs.

While it appears that the Robert's Court has made strides in arguing in favor of private choice as well as protection of religious character, there are not enough cases for me to say this is the belief of the Robert's Court. Due to the limited nature of this topic to public aid given to religious and sectarian organizations, I am not able to call upon other cases the Supreme Court has ruled in regarding, a company's right to refuse service on religious grounds (i.e. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission)*[3] and even a company's right to refuse contraception coverage to its employees (*Burwell v. Hobby Lobby).*[4] However, there is a future regarding public aid and religious and sectarian organizations (i.e. *Fulton v. City of Philadelphia*)[5] currently being decided that may confirm that the Robert's Court is on a path to adopting the Freedom of Religion conception. So, for the time being, I would that the Robert's Court is not clearly adopting the Freedom of Religion conception but rather a blend of the Freedom for Religion conception with the Freedom of Religion conception.

The Supreme Court has held in *Nyquist* and *Texas Monthly* that direct aid provided to religious and sectarian organizations are a clear violation of the Establishment Clause, because the religious and sectarian organizations did not obtain the

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[3] 584 U.S. __ (2018).
[4] 574 U.S. 682 (2014).
[5] Citation pending. Since the Supreme Court has not heard the case, there is no opinion to cite.

benefits because of their merits and needs but rather because of their religious characters. More specifically, the religious and sectarian organizations received the aid in such a way that was advancing religion rather than advancing a legitimate secular purpose. However, in *Aguilar* the direct aid provided to religious and sectarian organizations are actually conducive to the Establishment Clause, because the religious and sectarian organizations were not treated differently on the basis of their religious characters.

Thus, the Supreme Court must approach law and religion jurisprudence with a new understanding. This approach, which shall be known as the Whisman Wall, acknowledges that there is still a separation of church and state while also understanding that there cannot be an absolute separation of church and state. Rather than a solid brick wall, the Whisman Wall is a permeable wall. The holes present in the wall allow for the natural interaction between church and state, via police directing traffic, fire departments putting out fires, and religious and sectarian organizations receiving publicly available benefits for legitimate secular purpose.

The Whisman Wall creates a new test for the Supreme Court to use in future public aid cases, that functions on the two prongs: 1.) Is the recipient of the direct aid a religious and sectarian organization? 2.) If yes, did the organization receive the aid from a publicly available benefit that is the result of a legitimate secular purpose? / If not, did the religious and sectarian organization obtain the aid through a series of private decisions? This test, known as the Lime Test, offers the Supreme Court the method of allowing for secular projects of the state to interact with religious and sectarian organizations if they align with the legitimate secular purpose.

The application of the Whisman Wall and the Lime Test in cases involving public aid given to religious and sectarian organization present an opportunity to create a consistent view for the states to understand the Establishment and Free Exercise Clause. The Supreme Court has long needed this consistent view, as the last 100 years has resulted in the contradictory rulings, e.g., *Agostini* compared to *Aguilar*, *Texas Monthly* compared to *Trinity Lutheran*. As more cases are expected to come, especially with the recent announcement of a case in the U.S. District Court in Oregon filed against the U.S. Education Department for creating Title IX exemptions for religious and sectarian education institutions who receive public aid, the need for a unified approach to the Establishment and Free Exercise Clause is more pressing than ever before.

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