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### No Law Respecting the Practice of Religion

Leslie C. Griffin

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

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# McELROY LECTURE

## No Law Respecting the Practice of Religion

LESLIE C. GRIFFIN\*

Thank you for giving me the honor of presenting the Phillip McElroy Lecture at the University of Detroit Mercy. I deeply admire the two founding traditions of your University: the Society of Jesus and the Sisters of Mercy. Long before I became a lawyer I admired the writings of the late Jesuit John Courtney Murray, who taught Roman Catholics to value the First Amendment and to read their own tradition historically, not literally. My late colleague in moral theology, Richard A. McCormick, S.J., was a proud member of the Detroit Province of the Society. At Yale my doctoral advisor was Sister of Mercy Margaret Farley, a University of Detroit alumna, former professor and current member of the Board of Trustees. I appreciate the opportunity you have provided for me to honor them as well as Phillip McElroy, who received four degrees from UDM—B.S. '25, LL.B.'29, LL.M. '30 and LL.D. '32—and, upon his death in 1993, generously remembered the University by funding this excellent lecture series.

From the Jesuits and the Sisters of Mercy I learned the important lesson that religions are living traditions, not ideas set in stone for all times and places, but vital traditions that must respond to human experience as they seek the best way to promote the dignity of the human person. The same is true of legal and constitutional traditions. The challenge in writing about religion *and* law, combined, is the difficulty of considering not one, but two, living traditions, and how they are appropriately joined.

We could spend this entire evening debating just that point, namely, what a living tradition is, which legal and religious scholars or Supreme Court Justices favor the concept, and who would be opposed. Certainly, for example, we could expect Justice Antonin Scalia to insist it is NOT a living Constitution, indeed, to deride the very concept, and he would be joined by many other constitutional interpreters who favor theories of original meaning or original intent. Instead of debating that point, however, tonight I will explain instead how First Amendment religion case law might have developed if the Court had followed the idea of living traditions in its First Amendment jurisprudence.

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\* Larry & Joanne Doherty Chair in Legal Ethics, University of Houston Law Center, [lgriffin@uh.edu](mailto:lgriffin@uh.edu).

As background to that lecture, however, and so that you may understand my starting point, I provide a brief summary of why I advocate living traditions and what I learned from theology and law about what a living tradition protects. Taking a static or non-living view of traditions can perpetuate old wrongs (like slavery or inequality); exclude new members of the community from participation; create new harms that were unanticipated in the past; and lead to senseless extremes instead of moderate middle positions. All of these problems arose at one point or another in the Supreme Court's non-living interpretations of the First Amendment.

The First Amendment states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>1</sup> These two religion clauses, Establishment and Free Exercise, appear to stand in some tension with one another, and pose a difficult challenge to any constitutional interpreter. Nonetheless, it is no exaggeration to write that, in contrast to many other areas of the law, the modern First Amendment jurisprudence of the last sixty years is a special mess, full of inconsistencies and odd outcomes that have led many writers figuratively to throw up their hands in despair over the possibility of offering a coherent account of religious freedom. Consider the titles of two recent books about constitutional law and religion: Frank Ravitch's *Masters of Illusion* and Winnifred Fallers Sullivan's *The Impossibility of Religious Freedom*.<sup>2</sup> The former challenges the Justices' capacity to offer a fair interpretation of the Constitution, while the latter argues that the reality and complexity of lived religion render it impossible for courts to define and protect religion in an acceptable manner. Challenges such as Ravitch's and Sullivan's are recurrently met with defenses of a non-living tradition that focuses on the needs of the Founders' era while paying insufficient attention to our own. The status of religion law is thus reminiscent of theologian H. Richard Niebuhr's warning that Christians who fear pluralism and change "can become nihilists and consistent skeptics who affirm that nothing can be relied upon; or they can flee to the authority of some relative position, affirming that a church, or a philosophy, or a value, like that of life for the self, is absolute."<sup>3</sup> The quest of living traditions is to avoid both such extremes.

The world's living religions are examples of what the philosopher John Rawls calls *comprehensive doctrines*.<sup>4</sup> Philosophies (like Utilitarianism, Kantianism, or Atheism), as well as religions (like

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1. U.S. CONST. amend. I.

2. FRANK RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* (2007); WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).

3. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 238 (1st Harper Torchbook ed., Harper & Row 1956) (1951).

4. JOHN RAWLS, *POLITICAL LIBERALISM* 58 (1993).

Christianity, Islam, or Buddhism), are comprehensive doctrines. I envision comprehensive doctrines as big circles that include many ideas governing all aspects of life. Religions and philosophies, after all, provide their adherents with ultimate ideas about the purpose of life and death; fundamental teachings about marriage, family, reproduction, and morality; myths and doctrines that explain life's origins; and blueprints for how to live, including what to eat and how to worship. One small part of that big circle is what comparative religion scholar Ninian Smart labeled the "practical and ritual dimension" of religion: "Every tradition has some practices to which it adheres—for instance regular worship, preaching, prayers, and so on. They are often known as rituals (though they may well be more informal than this word implies)."<sup>5</sup> Such rituals, from Catholic mass to Bible reading or yoga and meditation, are one of the essential characteristics of religion.<sup>6</sup> Although *essential*, however, they need not be *exclusive*: there are many aspects of religions other than the practical and ritual dimension.<sup>7</sup>

My question tonight is to ask what would First Amendment jurisprudence look like if the Court held that the Religion Clauses apply to that little circle of practical and ritual dimension, but not to the whole comprehensive doctrine. The lecture begins in Part I with the Establishment Clause, focusing on four perennial issues that have consumed the Court's attention: prayer (in Part I.A), public religious displays (in Part I.B), and aid to religious schools and organizations (in Part I.C). Part I.D examines the religion-becomes-speech cases where the Court ignored the Establishment Clause because it analyzed religious practice as free speech rather than as free exercise. Then in Part II, I examine Free Exercise. On each topic I provide a brief summary of how the law actually developed, and then explain how it would look under my test.

An essential part of a living tradition is that it is not handed down from on high and provided in absolute form, but instead arises from the lived experience of the community. This point is consistent with the recent emphasis in American constitutional law that constitutional interpretation is a matter for the people and not just the courts.<sup>8</sup> Accordingly, I provide you with your own set of circles, so that you may decide what qualifies as the practice of religion for First Amendment purposes. I also provide my own filled-in circles so that you may participate in my thought experiment to see if mine is a First Amendment you could accept.<sup>9</sup> As with any theory,

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5. NINIAN SMART, *THE WORLD'S RELIGIONS* 13 (2d ed. 1998).

6. *See id.* at 13-14.

7. *Id.* at 14-21. The other dimensions are experiential and emotional; narrative or mythic; doctrinal and philosophical; ethical and legal; social and institutional; material. *Id.*

8. *See, e.g.,* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

9. *See* Figure 1.

although some points in the circles are crystal clear, a few topics straddle the line between the little circle and the big.

## I. THE ESTABLISHMENT CLAUSE

*"Congress shall make no law respecting an establishment of the practice of religion . . . ."*<sup>10</sup>

### A. Prayer

I begin with the easiest subject, prayer, which is a quintessential religious practice. Most of the case law reflects my intuition that the government should not be involved in the religious practice of prayer. Going back to 1962, when the Court ruled in the *Engel* case from New York that the Regents prayer should not be recited in public school classrooms;<sup>11</sup> and forward to the Pennsylvania *Schempp* case, striking down a law requiring Bible reading in public schools;<sup>12</sup> to the Alabama case invalidating moment of silence legislation because it was clear the legislature was sponsoring prayer, not silence;<sup>13</sup> to the Rhode Island case disallowing a "nonsectarian" invocation by a rabbi at a public high school graduation;<sup>14</sup> and finally in 2000 to the rejection of prayer before high school football games in Texas,<sup>15</sup> the Court has well understood the basic point that the government should not participate in the practice of religion. As later sections of this talk confirm, however, although the Court reached the right results in these cases, the prayer rulings nonetheless participate in the jumble of Establishment Clause jurisprudence. Instead of my singular practice of religion test, the Justices have applied different tests to limit prayer, intermittently relying on the secular purpose, endorsement and coercion tests, or asking if a government or student speaker participated, seeing those issues as much more determinative than whether the practice of religion was involved.

Within this string of prayer cases, one stands out as conspicuously wrong under my practice of religion test, namely the 1983 decision in *Marsh v. Chambers*, which held that the Nebraska Legislature could constitutionally begin each session with prayers offered by a chaplain paid by the State.<sup>16</sup> The Court upheld the practice even though only one Presbyterian minister had been chaplain since 1965, and his prayers were exclusively Judeo-Christian, offering the odd conclusion that one cannot

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10. U.S. CONST. amend. I.

11. *Engel v. Vitale*, 370 U.S. 421 (1962).

12. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

13. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

14. *Lee v. Weisman*, 505 U.S. 577 (1992).

15. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

16. *Marsh v. Chambers*, 463 U.S. 783 (1983).

“perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.”<sup>17</sup>

The Court’s reasoning in *Marsh* relied on a historical practice; because the first Congress had chaplains, concluded Chief Justice Warren Burger, it could not be unconstitutional, two hundred years later, for a state legislature to do the same. The facts of *Marsh*, with the legislature’s preference for one type of minister and a limited range of prayers, demonstrate the limits of a Constitution of non-living original practice. One of the most significant changes in the United States since its origins is the incredible diversity of its religious population; it is now the most religiously pluralistic nation in the world. Ironically, the years at issue in *Marsh*, from 1965 to 1983, witnessed extensive immigration of new citizens of non-Christian and non-European backgrounds.<sup>18</sup> Basing the rules about religion on the practice of the Founders excludes a wide swath of religions and philosophies from constitutional protection.

A living constitutional tradition does not permit the Court to stick with exclusionary practices of the past or to offer a historical exception to the Establishment Clause. Although *Marsh* is often viewed as a limited precedent, it continues to cause trouble. In 2007 a Hindu priest, Rajan Zed, was invited to offer prayers in the U.S. Senate, and protesters interrupted him by loudly asking for God’s forgiveness for allowing the “abomination” of Hindu prayer in the Senate chamber.<sup>19</sup> Contrary to *Marsh*’s avoidance of the favoritism to Christianity present in legislative prayer, in reality religions are distinctive living traditions, which each have their own prayers and rituals. The government may not participate in some without excluding others. There should be no historical exception to the rule that government should not become involved in religious practice.

One other ritual forms an important part of American life. Since the 1940s challenges to the constitutionality of the recitation of the Pledge of Allegiance in public schools have been issued as freedom of speech rulings, as the Court recognized that the government may not force students to pledge allegiance to the flag because of free speech.<sup>20</sup> Considering religious rituals and the practice of religion, however, suggests that pledging allegiance “under God” turns the pledge into a religious ritual akin to a prayer. From that perspective, it should be a Free Exercise

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17. *Id.* at 793.

18. Rhys H. Williams, *The Languages of the Public Sphere: Religious Pluralism, Institutional Logics, and Civil Society*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 44-46 (2007).

19. Michelle Boorstein, *Hindu Groups Ask '08 Hopefuls to Criticize Protest*, WASH. POST, July 27, 2007, at A4.

20. See generally *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (the pledges in these two cases did not include the words “under God”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (father had no standing to raise “under God” Establishment challenge).

violation for the government to ask students to recite the version of the pledge that includes “under God,” and an Establishment violation for school teachers to lead its recitation. Congress shall make *no* law respecting an establishment of the practice of religion or prohibiting the free exercise thereof.

### *B. Public Religious Displays*

In a 1980 case, *Stone v. Graham*, the Court held that Kentucky could not require posting of the Ten Commandments on the classroom wall.<sup>21</sup> The ruling was direct and the reasoning straightforward: the state lacked a *secular purpose* for its actions and therefore violated the Establishment Clause.<sup>22</sup>

The 5-4 vote in *Stone v. Graham* portended trouble ahead. Later in the 1980s, the secular purpose test was stretched to include religious symbols when the Court heard two cases about Christmas—well, holiday—displays. In Pawtucket, Rhode Island, the city park’s display included a nativity scene surrounded by a Santa Claus house, reindeer, a Christmas tree, candy-striped poles, a clown, an elephant, a teddy bear and other items.<sup>23</sup> In ruling that the display was constitutional, Chief Justice Burger followed the historical precedent of *Marsh*, arguing that the government had always accommodated religion and could do so in Pawtucket. Overruling the district court, moreover, the Chief Justice concluded that Pawtucket had “legitimate secular purposes” for its display, namely “to celebrate the Holiday . . . and to depict the origins of that Holiday.”<sup>24</sup> In concurrence, Justice Sandra Day O’Connor introduced her influential endorsement test, according to which the display is judged by whether a reasonable observer would believe that the government had endorsed religion. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community,” wrote Justice O’Connor, and therefore such endorsement violates the Establishment Clause.<sup>25</sup>

Following Justice O’Connor’s lead, in a subsequent display case the Court ruled that a freestanding crèche in a county courthouse was unconstitutional, while a display of a menorah next to a Christmas tree and a sign of liberty was constitutional. Deriding O’Connor’s endorsement test, Justice Anthony Kennedy found both displays constitutional, proposing in place of endorsement the coercion test, according to which the “government may not coerce anyone to support or participate in any

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21. *Stone v. Graham*, 449 U.S. 39 (1980).

22. *Id.* at 41.

23. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

24. *Id.* at 669.

25. *Id.* at 688.

religion or its exercise.”<sup>26</sup> Although Kennedy later used that coercion test to invalidate the high school graduation prayers in Rhode Island, he found the public displays of religion uncoercive and therefore constitutional.

Since then, state and local governments have followed the clown or reindeer or Christmas tree rule, sprinkling their religious displays with enough secular symbols to pass constitutional muster. This result has been deeply unsatisfactory to many religious people who believe that the mix of secular and religious symbols trivializes the practice of religion.<sup>27</sup> As the dissenting Justices had pointed out in the Pawtucket case, *Lynch v. Donnelly*, the crèche represents not a commercial public holiday, but the central religious event of Christianity: the birth of its Founder, the Son of God, Jesus Christ. The crèche is a symbol of that event as well as part of the ritual of honoring the Founder’s birthday at Christmas. In similar fashion, the menorah was used in the ancient Temple as part of the Hanukkah ritual. Both the crèche and menorah are a significant part of the ritual of religion and therefore should not be sponsored by the government.

The sprinkling-of-secular-with-religious-symbols approach to public religion has also been applied to cure Ten Commandments displays, which, as noted above, were held unconstitutional in 1980 because they lack a secular purpose. After the American Civil Liberties Union challenged gold-framed copies of the Ten Commandments hung in the McCreary and Pulaski County Kentucky courthouses, the Counties passed a resolution asserting that the Commandments are the basis of state law and surrounding the displays with eight other documents, namely:

the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.<sup>28</sup>

A third display included “nine framed documents of equal size,” the Ten Commandments, along with the “Magna Carta, the Declaration of

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26. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989).

27. STEVEN GOLDBERG, *BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE* 44 (2008).

28. *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 854 (2005) (alteration in original) (citations omitted).

Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.”<sup>29</sup>

In Austin, Texas, on the state capitol grounds, a Ten Commandments monument was part of a state park that also included monuments of the Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts’ Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.<sup>30</sup>

In mixed decisions, by 5-4 votes, and relying on an assortment of Establishment Clause tests, the Court invalidated the Kentucky display and upheld the Texas monument. According to Justice David Souter, the displays lacked a secular purpose; to Justice O’Connor, both endorsed religion; Chief Justice Rehnquist emphasized their passive nature; Justice Scalia used a historical argument to conclude that the government may favor religion generally; Justice Thomas found the displays consistent with the Constitution’s original meaning; and Justice John Paul Stevens wrote that the displays sent an “unmistakably Judeo-Christian message of piety.”<sup>31</sup> The swing voter, Justice Stephen Breyer, voted against the Kentucky displays but upheld the Texas monument because it would be more divisive to tear it down than to leave it standing.

The practice of religion test is much more straightforward. The Ten Commandments are a quintessentially religious text, given by God to Moses as part of a covenant, and recorded in the Hebrew Bible’s Book of Exodus.<sup>32</sup> “The first four Commandments . . . deal with Israel’s obligations to YHWH.”<sup>33</sup> Over the centuries, those commandments have been interpreted and reinterpreted by numerous Jewish and Christian groups, who number, order, and translate the commandments differently.<sup>34</sup> All the Ten Commandments cases that have come to the Supreme Court involve variants of the King James Version of the Commandments, which suggests that one religion—Protestant Christianity—is generally favored over others, as it was in *Marsh*. Therefore, the government should not establish the practice of religion and should not sponsor Ten Commandments displays.

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29. *Id.* at 855-56.

30. *Van Orden v. Perry*, 545 U.S. 677, 681 n.1 (2005).

31. *Id.* at 720.

32. There are several versions within Exodus, and there is another version in Deuteronomy. See GOLDBERG, *supra* note 27, at 9-10.

33. JOHN J. COLLINS, INTRODUCTION TO THE HEBREW BIBLE 127 (2004).

34. See generally WILLIAM P. BROWN, THE TEN COMMANDMENTS: THE RECIPROCITY OF FAITHFULNESS (2004).

How shall we address Justice Breyer's serious concern that the destruction of historical monuments such as the Ten Commandments arouses division and animosity among citizens and supports the perception that the Court is anti-religious? The practice of religion test requires honesty that the Ten Commandments are religious documents, not secular sources of law. If they stand, they must be surrounded by comparable religious texts such as the Qur-an or the Bhagavad Gita, not the Constitution and the Declaration of Independence.<sup>35</sup> A living tradition may not exclude new members from participation by ignoring their sacred symbols while sponsoring others. It would be interesting to see if public displays of the Ten Commandments remained as popular if surrounding the Ten Commandments with non-Christian religious texts were the constitutional requirement.

### *C. Public Aid to Religion*

By far the most confusing legacy of the Court's Establishment Clause jurisprudence occurred in the area of government aid to religious institutions, where the case law proves that an unyielding formula is as harmful to constitutional interpretation as the unchanging history of *Marsh*. The modern aid cases began in 1947 with the famous *Everson* case, when the Court upheld a New Jersey program to reimburse parents for bus transportation of their children to and from school, including religious schools.<sup>36</sup> Although the parents won that case, the decision's wording included two features that posed recurring difficulties for the next sixty years: first was the majority's proclamation of the wall of separation between church and state, a standard that quickly became an unliving constitutional test that was used to exclude some religions, especially Catholicism, from equal treatment;<sup>37</sup> second was Justice Hugo Black's characterization of the involved schools, primarily Roman Catholic parochial schools, as "church schools."<sup>38</sup> With that expression, the Court ignored the actual practice of the schools, preferring their dead characterization to appropriate analysis of life in the schools. Over the next sixty years, the static formulations led the Court to senseless extremes instead of moderate middle positions as well as perpetuated old rivalries between religious traditions, especially Protestants and Catholics.

Consider first the terminology of "church schools." In terms of my circles,<sup>39</sup> according to Justice Black's opinion, a Catholic school was the

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35. This was done on a street corner in Mission Viejo, California. See Wade Clark Roof, *Pluralism as a Culture: Religion and Civility in Southern California*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 82 (2007).

36. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

37. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) (tracing anti-Catholic sources of separationism).

38. *Everson*, 330 U.S. at 3.

39. See Figure 1.

same as a church or a religion, the big circle, and therefore everything that went on inside the school was perceived as the practice of religion. Adding the religious formula, "church schools," to the legal standard, "separation of church and state," suggested that every attempt to assist those schools was the same as establishing a church.<sup>40</sup> From that perspective, it is easy to understand why *busing* survived constitutional scrutiny; busing takes place beyond the reach of church-school authorities. After *Everson*, however, the formula failed dramatically when state and federal legislatures repeatedly attempted to place aid inside the schoolhouse door.

It could take us a full semester to work through the details of all those cases, so consider instead Justice William Rehnquist's summary of the crazy patchwork of post-*Everson* aid cases:

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.<sup>41</sup>

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40. *Id.* at 24 (aid to school is "indistinguishable" from aid to Church).

41. *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (citations omitted).

Moreover, at the same time, the Court prohibited the funding of secular subjects in religious schools while upholding the constitutionality of religious worship on public school grounds.<sup>42</sup>

Within this line of cases, several are especially noteworthy. Most famous, or notorious, is *Lemon v. Kurtzman*,<sup>43</sup> which provided the three-part *Lemon* test that the Court has used so frequently to decide Establishment Clause cases.<sup>44</sup> In the facts of *Lemon*, Rhode Island provided a 15% salary supplement to teachers in religious schools who would teach only courses offered in public schools, using only public school materials. Pennsylvania reimbursed religious schoolteachers for their salaries for secular courses, as well as for secular textbooks and materials approved by the state. Although the programs met the first two prongs of the *Lemon* test—they were passed with a secular purpose and did not advance or inhibit religion—the Court ruled that the excessive entanglement of church and state in the state’s oversight of the materials violated the Establishment Clause.

The Court invoked *Lemon* in *Aguilar v. Felton*<sup>45</sup> when it invalidated a federal program that sent New York public schoolteachers into religious schools to provide remedial education to disadvantaged children after an original plan to bus parochial schoolchildren to public schools was rejected for reasons of safety. The safer plan of moving the teachers instead of the children was rejected because of *Lemon*’s entanglement prong. The Court nullified the program even though the public school teachers were trained by the state, and were merely teaching what they usually taught in public school in a classroom stripped of religious symbols. Even though the public school teachers were within the boundaries of the religious school, no practice of religion was involved.

Because of *Lemon* and *Aguilar*, the Satmar Hasidic Jewish children of New York could no longer receive their remedial education in their religious schools. In response, their parents, with the aid of the New York legislature, then created the Village of Kiryas Joel Public School District, which was ruled unconstitutional because of the religious gerrymander of forming a school district based on religious identity.<sup>46</sup> Also due to *Aguilar*, New York, at great expense, placed vans and “mobile instructional units” outside the religious schools to hold the public remedial educators. Justice Black’s combination of “church schools” and “separation of church and state” had reached its apex: any instruction within a religious school, even

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42. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971), with *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

43. 403 U.S. 602.

44. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. *Id.* at 612-13.

45. 473 U.S. 402 (1985).

46. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

remedial education by trained public schoolteachers, violated the Establishment Clause.

The Supreme Court eventually overruled *Aguilar* in *Agostini v. Felton*, with some Justices complaining that *Aguilar* was hostile to religion.<sup>47</sup> Instead of reclaiming the middle ground, however, the Court soon swung back to the other extreme end of the Establishment Clause spectrum. Three years after *Aguilar* was overruled, Justice Clarence Thomas wrote a plurality opinion in *Mitchell v. Helms* upholding a federal law providing library books, computers, computer software, slide and movie projectors, overhead projectors, television sets, tape recorders, VCRs, projection screens, laboratory equipment, maps, globes, filmstrips, slides and cassette recordings to public and religious schools.<sup>48</sup> Although the result seemed reasonable, Thomas' reasoning was risky; he concluded that the aid was neutral, and therefore constitutional, solely because it was provided to both religious and public schools. In sharp contrast to Justice Black, who believed that everything occurring in the church schools was religious, Justice Thomas' opinion ignored the possibility that some government aid might be used to support the practice of religion and seemed to recognize no limits on government aid to religion. Justice O'Connor's concurrence warned the plurality that its reasoning permitted "actual diversion of government aid to religious indoctrination."<sup>49</sup> Post-*Mitchell*, the Court upheld, on similar reasoning, a vouchers program that gave tuition aid to parents of religious schoolchildren rather than directly to the schools.<sup>50</sup>

There is some reason to believe that the Court will not allow funding of the practice of religion; in 2004 it upheld against constitutional challenge a Washington State program that financed general student scholarships while refusing to spend state money to assist the study of devotional theology or ministry.<sup>51</sup> This decision was correct; as the group specifically ordained to practice religion, the ministry's training should not be sponsored by the government.

With Justice O'Connor's retirement from the Court, and the expansion of aid to religious institutions during the administrations of Presidents Bill Clinton and George W. Bush,<sup>52</sup> it is possible that the Court, following Justice Thomas's lead and ignoring Justice O'Connor's warnings, will

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47. *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

48. *Mitchell v. Helms*, 530 U.S. 793 (2000).

49. *Id.* at 837.

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

51. *Locke v. Davey*, 540 U.S. 712 (2004).

52. See 42 U.S.C. § 604a; Exec. Order No. 13,199, 3 C.F.R. 752-54 (2001), reprinted in 5 U.S.C. 601 app. at 597 (2006); Exec. Order No. 13,198, 3 C.F.R. 750-52 (2001), reprinted in 5 U.S.C. 601 app. at 752-53 (2006); Exec. Order No. 13,280, 3 C.F.R. 262-64 (2002), reprinted in 5 U.S.C. 601 app. at 756 (2006); Exec. Order No. 13,342, 3 C.F.R. 180-81 (2004), reprinted in 5 U.S.C. 601 app. at 756 (2006); Exec. Order No. 13,397, 3 C.F.R. 214-15 (2006), reprinted in 5 U.S.C. 601 app. at 758-59 (2006).

approve public financing of the practice of religion.<sup>53</sup> Some drug and alcohol counselors promote belief in Jesus Christ as the most effective solution to addiction, while prison programs like InnerChange teach that prayer and Bible reading will reform prisoners' hearts and minds and lessen recidivism. Their sponsors often demand equal aid for these religious practices. Such programs should not receive government funding; the government should not aid the practice of religion. We face the possibility, however, that, with the vouchers precedent and the popularity of government aid to faith-based organizations, the Court will create a new harm unimaginable in the past: government provision of millions of pence to the churches.<sup>54</sup>

The path of public aid to religion law could have been much straighter. My interpretation of the Establishment Clause allows busing, secular books, remedial courses by public school teachers in religious schools, strictly secular courses by religious schoolteachers, computer and other technical aid that is not diverted to religion, and welcomes government monitoring to police the boundaries. My line of cases contains no *Lemon* or *Aguilar*, and therefore no *Kiryas Joel* or *Zelman*. There would be no vouchers movement and no wave of aid to faith-based organizations. Both extremes of the no-aid and no-limits-to-aid spectrum would have been avoided.

Taking a static or non-living view of traditions can perpetuate old wrongs, exclude new members of the community from participation, lead to senseless extremes instead of moderate middle positions, and create new harms that were unanticipated in the past. The Court's aid to religion cases contributed to all these ills by heightening tensions between public and religious schools; excluding the new Catholic immigrants from equal participation in neutral government programs; swinging from a no-aid to no-limits-to-aid jurisprudence; and raising the specter of massive aid to religion unimagined at our country's origins. The unevenness of the treatment of religious practice is confirmed by the next set of cases, where public schools received financial support for the practice of religion.

#### *D. Religious Practice Becomes Speech*

At the same time that the Court strictly prevented secular items from being funded in religious schools, it decided the so-called "equal access"

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53. Right now, the leading precedent on aid to FBO is *Bowen v. Kendrick*, 487 U.S. 589 (1988), in which the Court upheld the Adolescent Family Life Act's provision of grants to religious counseling services, but remanded for a determination by the district court whether the recipients were pervasively sectarian and involved in religious activities. The pervasively sectarian standard was abolished in *Mitchell*, however, and a new Court may provide a new FBO test.

54. The million pence is a play on "three pence" from JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in BROOKE ALLEN, MORAL MINORITY: OUR SKEPTICAL FOUNDING FATHERS 191, 193 (2006).

cases in the public schools. The first case arose at the University of Missouri, which made its facilities available to a number of student groups but did not allow the rooms to be used for “religious worship or religious teaching.”<sup>55</sup> When Cornerstone, a religious group whose meetings included the practice of religion—namely, prayer, hymns, and Bible reading—sued to use the school’s rooms, the district court wisely ruled that the Establishment Clause permitted the university’s policy. That holding was consistent with my reasoning that public facilities should not be used for the practice of religion. The Supreme Court, however, ruled that the policy violated the *free speech* rights of the students because it was not content-neutral; if philosophers used the classrooms to debate ideas, according to Justice John Paul Stevens’ concurrence, then churches must be permitted entry as a matter of equality.

The Supreme Court’s analysis ignored the distinctive status of the practice of religion within the First Amendment. Dissenting Justice Byron White understood that point when he wrote that the majority’s analysis “emptied [the Religion Clauses] of any independent meaning.”<sup>56</sup> Justice White shrewdly explained that the majority’s decision left no way to distinguish a university class practicing Sunday Mass from one about the History of the Catholic Church. He observed, moreover, that the Court’s reasoning undermined the Ten Commandments case, *Stone v. Graham*, as well as the prayer and Bible cases, *Engel* and *Schempp*.<sup>57</sup>

The Court has recurrently ignored Justice White’s advice and repeated its mistake several times in *Widmar*’s misbegotten progeny, which permitted Christian prayer clubs and Bible study groups to meet in elementary and secondary public schools,<sup>58</sup> and then required the University of Virginia to fund a student publication titled *Wide Awake*, whose purpose was to preach the Gospel of Jesus Christ and to convert students to the Christian faith.<sup>59</sup> Taken in conjunction with the aid cases, the odd result was that religious proselytizing was permitted in the public schools while secular remedial education was denied in the religious schools.

Justice White wrote the unanimous decision for the one equal access case that was appropriately decided on free speech rather than Free Exercise grounds. The Center Moriches School District denied permission to Lamb’s Chapel, an evangelical church, to show a six-part film series about family values from a Christian perspective after public school hours.<sup>60</sup> Other groups’ presentations about the family were allowed. The

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55. *Widmar v. Vincent*, 454 U.S. 263, 263 (1981).

56. *Id.* at 284 (White, J., dissenting).

57. *Id.* at 286.

58. *See Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

59. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

60. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Court, finding that “all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint” were allowed, correctly ruled for Lamb’s Chapel.<sup>61</sup> Showing movies about the family is not the practice of religion, but instead offers a presentation of ideas protected by the other First Amendment.

The next Free Exercise case confirms that family values are not the practice of religion.

## II. FREE EXERCISE

*“or prohibiting the free exercise” of the practice of religion*<sup>62</sup>

In 1879, the Supreme Court ruled that laws against polygamy did not violate the free exercise rights of a Mormon man who contested his prosecution for a second marriage on the grounds that he was acting out of religious obligation.<sup>63</sup> The Court’s ruling that religious citizens must usually obey the law (or, in other words, are not usually exempt from the law because of their religion) is consistent with my theory. Although religions set standards and norms for marriage and the family, marriage is not the practice of religion. More than a century later, adult sexual privacy (including, perhaps, polygamous relationships) enjoys some constitutional protection under the Due Process Clause of the Fourteenth Amendment,<sup>64</sup> but polygamy and marriage do not fall within the protection of the First Amendment. This argument, however, should cut both ways: the government should not set marriage laws based on the idea that marriage is sacred or religious.

In a controversial 1990 decision, *Employment Division v. Smith*, Justice Antonin Scalia cited *Reynolds* (the polygamy case) when he wrote for a 5-4 majority that Native American drug counselors who used peyote in a religious ritual were not entitled to unemployment benefits because they had broken a “neutral law of general applicability,” namely the criminal law against drug use.<sup>65</sup> Although I agree with Justice Scalia’s strong restatement of *Reynolds*’ rule that granting religious citizens exemptions from the law would inappropriately “permit every citizen to become a law unto himself,”<sup>66</sup> peyote use differs from polygamy in my understanding of free exercise. Peyote is part of the ritual practice of the Native American religion and therefore should enjoy constitutional protection, namely exemption from neutral laws of general applicability.

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61. *Id.* at 393.

62. U.S. CONST. amend. I.

63. *Reynolds v. United States*, 98 U.S. 145 (1879).

64. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

65. *Employment Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

66. *Id.*

Such exemptions should be a matter of constitutional requirement rather than legislative grace.<sup>67</sup>

Under my reasoning, the Court's recent decision to protect access to a hallucinogenic *hoasca* tea for members of a small Brazilian church was correct,<sup>68</sup> as was the assumption that Roman Catholic churches were entitled to an exemption from Prohibition laws for their sacramental wine. Because the rituals of death are also an essential part of the practice of religion, the Court was wrong to allow the government to build roads over the sacred burial sites of Native Americans.<sup>69</sup> When the City of Hialeah, Florida, banned Santeria animal sacrifice, it also violated the practice of religious ritual while permitting non-ritual slaughtering of animals.<sup>70</sup>

The Santeria case suggests that there should be some limits on the free practice of religion; I would not like my standard to justify the Church of Human Sacrifice's ritual. Therefore, religious practices that cause harm to human persons fall outside Free Exercise protection. Accordingly, religious parents' refusal of medical treatment for their children fails on two counts: medicine is not the practice of religion and refusal causes physical harm to the children.<sup>71</sup> Many readers will be disappointed to learn that my standard undoes the most famous surviving religious exemption case, *Wisconsin v. Yoder*, in which the Court exempted Amish parents from obeying the compulsory school attendance laws for their children.<sup>72</sup> Not only is compulsory education not the practice of religion (as we learned above in the Court's aid cases), there is also, as Justice William Douglas' dissent in *Yoder* argued, a harm to children who are kept from school because of their parents' but not their own desires:

If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.<sup>73</sup>

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67. See *id.* at 890 (explaining Justice Scalia's conclusion that legislatures, not courts, should be the ones to grant religious exemptions from the law).

68. See generally *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

69. See generally *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

70. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

71. For a compelling account of these cases, see SHAWN FRANCIS PETERS, *WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW* (2008).

72. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

73. *Id.* at 242 (Douglas, J., dissenting).

Because *Smith* apparently changed the Court's test in the Free Exercise area from strict scrutiny to a more relaxed standard of review,<sup>74</sup> the technical legal debate since *Smith* has involved questions about the proper test for Free Exercise violations. My practice of religion test can ignore the level of review. The pre-*Smith*, strict scrutiny line of cases developed in the unemployment compensation benefits area in 1963 when Adele Sherbert was denied unemployment benefits after she refused to accept a job requiring work on Saturday, her Sabbath.<sup>75</sup> The case is now famous for its heightened level of scrutiny, namely that any law that imposes a substantial burden on religion must meet the compelling state interest test. I need not focus on the standard of review, however, for in my test Sabbath observance is a core religious ritual that enjoys constitutional protection, no matter what day of the week it occurs.

Under my test, therefore, Sherbert is entitled to her unemployment compensation benefits, not because of strict scrutiny, but because the state's burden is on the practice of her religion. However, of the three unemployment cases that followed *Sherbert*, only two (*Hobbie* and *Frazee*) are correct, as those two plaintiffs were also Sabbatharians who belonged to less recognized religions than Sherbert. They demonstrate that Free Exercise applies broadly, to a range of religions, popular and solitary.<sup>76</sup> Thomas, however, a Jehovah's Witness who refused for moral reasons to accept a transfer to the armament factory section of his employer, is not entitled to unemployment compensation;<sup>77</sup> although morality is a central component of all religious traditions, and part of the big circle, it is not the practice of religion.<sup>78</sup>

The Sabbatarian argument also cuts both ways. Sunday closing laws should have been invalidated under the Establishment Clause because by picking one Sabbath the state established the practice of religion. Similarly, Jewish plaintiffs who challenged the Sunday closing laws because their Sabbath was not Sunday should have won their Free Exercise claims.<sup>79</sup> Some employers may be unhappy with this standard; contrary to Supreme Court precedent, they would be required to respect their

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74. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) for a debate surrounding *Smith* and its standard of review.

75. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

76. See generally *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Frazee v. Ill. Dep't. of Employment Sec.*, 489 U.S. 829 (1989).

77. See generally *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

78. See SMART, *supra* note 5, at 18-19.

79. See generally *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws under Establishment Clause). See also *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (law also upheld on Establishment grounds). For free exercise cases see generally *Braunfeld v. Brown*, 366 U.S. 599 (1961) and *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 599 (1961).

employees' Sabbath of choice.<sup>80</sup> Employers would gain something from my standard as well: their legal responsibility would be to accommodate only the practice of religion.

One of the most difficult areas of employment law and religion has been to determine when or if churches can be sued for discrimination on the basis of race, gender or religion. Consider the identities of five original plaintiffs against the Church of Jesus Christ of Latter-Day Saints in the leading Title VII case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.<sup>81</sup> Three were seamstresses who manufactured temple garments; the named plaintiff, Christine Amos, typed and processed insurance forms in the personnel department; and Arthur Frank Mayson was a building engineer at a church gymnasium. All five were fired because they did not have a temple recommend. My theory permits the Church to be exempt from the anti-discrimination laws for firing the seamstresses who prepared ritual garments (a core part of the practice of religion), but, contrary to Supreme Court precedent, subjects the church to suit by the secretary and the janitor.<sup>82</sup> In similar fashion, I can allow a ministerial exception that dismisses lawsuits for individuals involved in the practice of religion, but allows even clergy to be sued for non-religious conduct.

By now you know my standard and can apply it on your own to other issues. Creation science? Studying the Bible with its creation stories is the practice of religion, so the Supreme Court correctly decided the evolution cases.<sup>83</sup> Tax exemptions? Churches receive them on the condition that they not endorse candidates.<sup>84</sup> Should the clergy instead be permitted to endorse candidates from the pulpit (where, of course, they practice the rituals of their religion) but nowhere else?<sup>85</sup> Don't expect to hear any prayers at the inauguration of our next president. And so forth. If I continue to speak, my living test will start to die and you along with it. I appreciate your generous attention and invoke the memory of Phillip McElroy, who in death started this wonderful new and living tradition of the McElroy lectures.

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80. See generally *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

81. 483 U.S. 327 (1987).

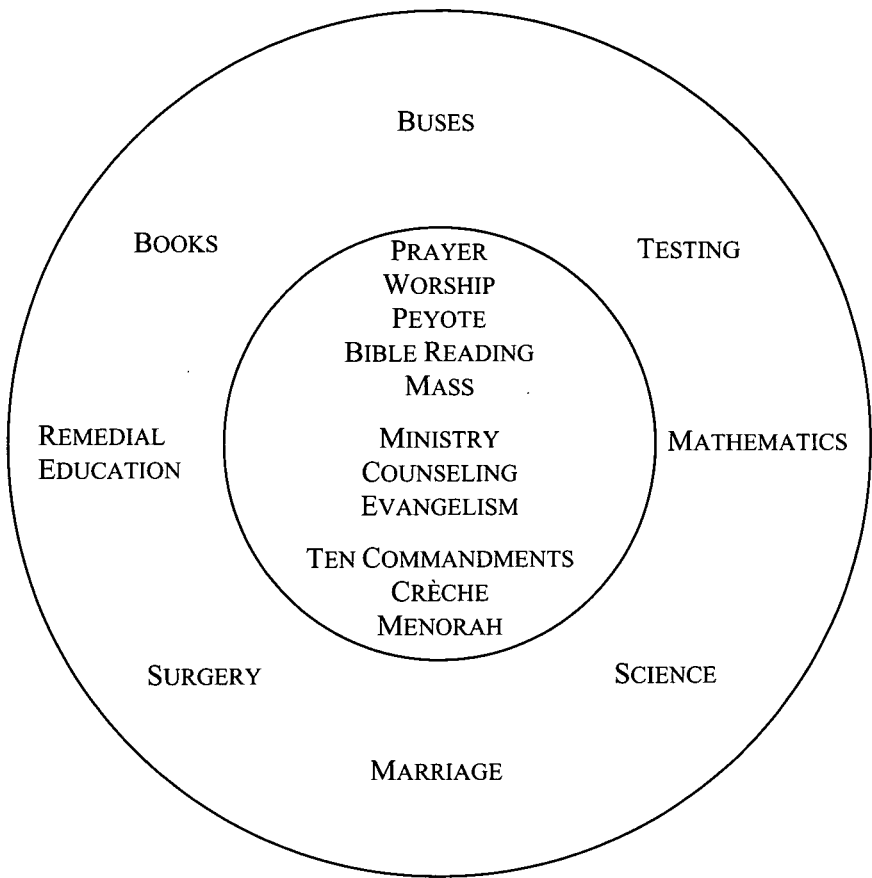
82. My analysis is closer to the standard employed by the district court in *Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791 (D. Utah 1984), rather than the Supreme Court's decision in *Amos*, 483 U.S. 327 where the Supreme Court allowed Mayson to be fired even though he was a building engineer at a gymnasium.

83. See generally *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987).

84. 26 U.S.C. § 501(a), (c)(3) (2000).

85. Representative Walter Jones suggested pulpit protection in the Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. § 2 (2003).

FIGURE 1. THE PRACTICE OF RELIGION, REPRESENTED BY THE INNER CIRCLE, IS ONLY PART OF RELIGIONS' COMPREHENSIVE BELIEFS, WHICH ARE REPRESENTED BY THE LARGER CIRCLE.



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