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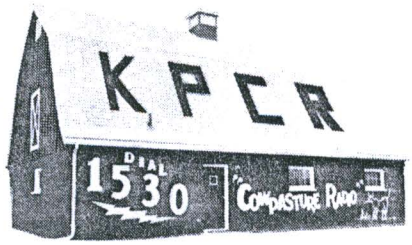

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P. O. BOX 1 – BOWLING GREEN, MISSOURI 63334

Phone: 314-324-2283

The President
Washington D.C.

Dear Mr. Reagan:

May I suggest and recommend for your consideration as appointee to the United States Supreme Court the Dade County, Florida judge Mrs Helen Gable. I only know of Judge Gable by her writing and appearance on radio talk shows, but I think you will be properly impressed by her philosophy, her dedication to justice and her integrity.

Mr. President, may I add that I approve of and support every statement and appointment you have made. Would that more legislators felt as I do. Please don't weaken on any of your stands. Thank you Mr. President.

Sincerely
J. Paul Salois

2

P1

Mr.C.O. Badtke
P.O. Box I68
Santa Monica, Cal 90406
June 20th I98I

President Ronald Reagan
The White House
Washington, D,C, 205II

Dear President Reagan:

Since there will be a opening for a Judge on the bench of the U.S. Supreme Court, and possibly more. I would like to submit the name of the Honorable William Cassius Goodloe for your consideration.

His credentials are enclosed in the pamphlet titled " The Bill of Rights and My Responsibilities".

I am sure this is the caliber of person you had in mind when you said, "I want one to interpret the law and not make It".

With every good wish for your continued success and good health.

I am Very Truly Yours
C. O. Badtke
C.O. Badtke

THE WHITE HOUSE

WASHINGTON

July 30, 1981

Dear Representative Magruder:

Thank you for your letter of June 19, 1981 to the President recommending the Honorable Alfred T. Goodwin to fill the vacancy on the Supreme Court of the United States created by the announcement of the retirement of Associate Justice Potter Stewart.

As you are probably aware, the President has announced his intention to nominate the Honorable Sandra D. O'Connor for the position. The President was presented with a most difficult decision, as there were many extremely well qualified individuals to consider.

We very much appreciate your time and concern in writing to the President regarding this important appointment and bringing the outstanding attributes of Alfred Goodwin to his attention.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Caroline P. Magruder
Sixty-First Legislative Assembly
State of Oregon
State Capitol
Salem, Oregon 97310

24 JUN 1981

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21547112S3 TDMT PHILADELPHIA PA 96 06-19 0806A EST

PMS PRESIDENT RONALD REAGAN

WHITE HOUSE

WASHINGTON DC 20500

I WOULD LIKE TO RECOMMEND FOR UPCOMING VACANCY ON THE U.S. SUPREME COURT THE FOLLOWING NAMES MY FIRST WOULD BE THAT OF SOMEBODY WHO HAS KNOW LEDGE OF CONSTITUTIONAL THEORY AND LAW AND THAT CHOICE WOULD BE HONORABLE BARBARA JORDAN FORMER U.S. CONGRESSWOMAN OF TEXAS AND MY OTHER CHOICES ARE HONORABLE JUDGE J WILLIAM DITTER JR U.S DISTRICT COURT JUDGE PHILADELPHIA. HONORABLE LEVAN GORDON JUDGE COURT OF

COMMON PLEAS PHILADELPHIA, FORMER HUD SECRETARY CARLA M HILLS AND ALSO THAT OF FORMER CONGRESSWOMAN YVONNE BURKE OF CALIFORNIA. THESE ARE MY RECOMMENDATIONS. PLEASE TAKE THESE RECOMMENDATIONS UNDER CONSIDERATION. SINCERELY

GEORGE G BRITT JR
906 SOUTH 60 ST
PHILADELPHIA PA 19143

0810 EST

NNNN

H

THE WHITE HOUSE

WASHINGTON

July 29, 1981

Dear Mr. Adams:

Thank you for your letter of June 22, 1981 to the President recommending Carla Hills to fill the vacancy on the Supreme Court of the United States created by the announcement of the retirement of Associate Justice Potter Stewart.

As you are probably aware, the President has announced his intention to nominate the Honorable Sandra D. O'Connor for the position. The President was presented with a most difficult decision, as there were many extremely well qualified individuals to consider.

We very much appreciate your time and concern in writing to the President regarding this important appointment and bringing the outstanding attributes of Carla Hills to his attention.

Sincerely,

Fred F. Fielding
Counsel to the President

R.F. Adams, Esquire
Johnstone, Adams, May, Howard & Hill
Merchants National Bank Building Annex
8th Floor
Post Office Box 1988
Mobile, Alabama 36633

06 JUL 1981

JOHNSTONE, ADAMS, MAY, HOWARD AND HILL

ATTORNEYS AT LAW

MERCHANTS NATIONAL BANK BUILDING ANNEX, 8TH FLOOR

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C. A. L. JOHNSTONE, JR.
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JAMES L. MAY, JR.
ALEX T. HOWARD, JR.
J. JEPTHA HILL
CHARLES B. BAILEY, JR.
BROCK B. GORDON
BEN H. HARRIS, JR.
WILLIAM H. HARDIE, JR.
E. WATSON SMITH
DAVID C. HANNAN
RICHARD T. DORMAN
WADE B. PERRY, JR.
THOMAS S. RUE
JAMES E. SMITH
CHARLES R. MIXON, JR.
STEVEN T. STINE
ALAN C. CHRISTIAN
JAMES H. FROST
CELIA J. COLLINS

PJ

June 22, 1981

President Ronald Reagan
The White House
Washington, D. C.

Dear Mr. President:

Tremendous pressure will be put on you to appoint a woman to the Supreme Court to succeed Mr. Justice Stewart. If you want an opinion from the "grass roots", you could not make a better selection than Carla Hills. I am confident she would be good for the country, and that your pride in having appointed her would increase with each succeeding year she is on the Bench.

Sincerely yours,

R. F. Adams

RFA:dl

JUL 1981

June 30, 1981

Dear Bob:

Thank you for your letter of recommendation and endorsement.

I have forwarded your message to the appropriate director in the Reagan Administration. Please be assured that your comments will be given every consideration and will be further noted in our personnel files.

I sincerely appreciate your interest in bringing to our attention qualified men and women such as Carla Hills.

Sincerely,

James A. Baker, III
Chief of Staff and
Assistant to the President

The Honorable Robert McClory
House of Representatives
Washington, D.C. 20515

bcc: Fred Fielding and incoming
cc: Kathy Camalier
Central Files

JAB:keb
JAB-1

T McCLORY
DISTRICT, ILLINOIS

ROOM 2469
AYBURN HOUSE OFFICE BUILDING
(202) 225-5221

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Congress of the United States

House of Representatives

Washington, D.C. 20515

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COUNTY BUILDING
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WAUKEGAN, ILLINOIS 60085
(312) 336-4554

MCHENRY COUNTY
56 N. WILLIAMS STREET
CRYSTAL LAKE, ILLINOIS 60014
(815) 459-3399

June 25, 1981

The Honorable
William Franch Smith
The Attorney General
Washington, D. C. 20530

Dear Mr. Attorney General:

A few days ago on the telephone I suggested that President Reagan should consider attorney Carla Hills for nomination to the U. S. Supreme Court to fill the vacancy created by the resignation of Justice Potter Stewart.

From my personal observations of Carla Hills as former Secretary of the Department of Housing and Urban Development, as an attorney at law, and as a citizen involved in public and political affairs, I can attest to her superior qualifications for appointment to this high judicial office.

I am aware of your personal contacts with Carla Hills and your knowledge of her constant support of President Reagan and our Republican positions, including her involvement in the campaigns of Ronald Reagan for Governor of California and, more recently, in the support of his candidacy for President.

Finally, I would submit that Carla Hills, on the basis of her education, experience, and record of public and private service, embodies those qualities of responsible leadership, legal excellence, judicial temperament, personality, and personal integrity, which would bring honor to the Reagan Administration and to the U. S. Supreme Court.

I would be pleased to receive any questions which you may wish to address to me regarding Carla Hills.

Sincerely yours,

Robert McClory
Member of Congress

RMcC/jm

cc: Mr. James A. Baker III

ROBERT McCLORY
13TH DISTRICT, ILLINOIS

ROOM 2469
RAYBURN HOUSE OFFICE BUILDING
(202) 225-5221

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JUDICIARY COMMITTEE

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CRYSTAL LAKE, ILLINOIS 60014
(815) 459-3399

June 25, 1981

JAB-1 Dear Bob
re: Carla Hills
cc: Fred Fielding
incoming

Mr. James A. Baker III
Chief of Staff and Assistant to
the President
The White House
Washington, D. C. 20500

Dear Jim:

For your information, I am enclosing copy of letter which I have today transmitted to Attorney General Smith.

Sincerely yours,

Bob McClory

Robert McClory
Member of Congress

RMcC/jm
Encl.

ED MCGUIRE
3523 SOUTHEAST YAMHILL
PORTLAND OR 97214

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PRESIDENT REAGAN
WHITEHOUSE
WASHINGTON DC 20515

PJ

THE PERSON MOST QUALIFIED FOR THE SUPREME COURT I BELIEVE YOU SHOULD NOMINATE CARLA HILL.

ED AND CARLA MCGUIRE
3523 SOUTHEAST YAMHILL
PORTLAND OR 97214

10:14 EST

MGMCOMP

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24 JUN 1981

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PMS HONORABLE RONALD REAGAN
WHITE HOUSE
WASHINGTON DC 20500
CARLA HILLS AN EXCELLENT CHOICE FOR SUPREME COURT PLEASE GIVE HER EVERY CONSIDERATION
MICHAEL ARTHUR RORER HAMPTON REPUBLICAN PARTY HAMPTON VA

1037 EST

August 17, 1981

Dear Mr. Dillon:

Thanks to the courtesy of Ed Meese, I have received a copy of your June 25, 1981 letter recommending Professor A.E. Dick Howard to fill the vacancy on the Supreme Court created by the announcement of the retirement of Associate Justice Potter Stewart.

As you know, the President has announced his intention to nominate the Honorable Sandra D. O'Connor for the position. The President was presented with a most difficult decision, as there were many extremely well qualified individuals to consider. In the case of Professor Howard, I personally share in your strong words of commendation, since I know him and believe, as you do, that his credentials are indeed impeccable.

Again, thank you for taking the time to write regarding this important appointment and for bringing the attributes of Professor Howard to our attention.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Wilton S. Dillon
Director
Office of Smithsonian Symposia
and Seminars
Smithsonian Institution
Washington, D.C. 20560

06 JUL 1981

30 June 1981

Dear Wilton:

Thank you for your letter of 25 June 1981 regarding your recommendation of A. E. Dick Howard as successor to Supreme Court Justice Stewart Potter. This effort is being coordinated by Fred F. Fielding, Counsel to the President.

Your correspondence has been forwarded to Mr. Fielding who will bring it to the President's attention at the appropriate time.

We also appreciate receiving Professor Howard's paper written for the Roscoe Pound conference at the Harvard Law School.

With best wishes,

Sincerely,

EDWIN MEESE III
Counsellor to the President

Don't make a copy of the paper attached

Mr. Wilton S. Dillon
Director
Office of Smithsonian Symposia
and Seminars
Smithsonian Institution
Washington, D.C. 20560

EM:NH:rs(III-A-7)
cc to Meese
cc w/copy of incoming & orig. encl. to Fred Fielding
Note to autopen: Sign letter - Ed Meese.

OFFICE OF SMITHSONIAN SYMPOSIA AND SEMINARS
Smithsonian Institution, Washington, D.C. 20560

Wilton S. Dillon, Director
202, 357-2328

Personal

The Honorable
Edwin Meese, III
The White House
Washington, D.C. 20500

June 25, 1981

Dear Mr. Meese:

I am taking you at your word--the last of your stimulating remarks at our Berkeley reunion last evening--and offering you: (a) congratulations on your clarity and your respect for the ambiguities of solving public problems; and (b) a suggestion about "human capital development" in the context of the Supreme Court vacancy. (I do the latter without the knowledge of the person I am suggesting.)

Though you and the President are obviously open to suggestions about "the first woman on the Court," I should like to add my name to those would would rally around the nomination of Prof. A. E. Dick Howard, author of the Virginia Constitution, a Rhodes Scholar with a keen sense of the English antecedents of our legal system who presently teaches constitutional law at the University of Virginia. He is a literal conservative in his approach to conserving the Constitution while adapting the ideas of its authors to modern times. The praise George Will gives to Prof. Bork can be repeated for Prof. Howard.

You will find, in any case, some fascinating reading in the enclosed paper Prof. Howard has written for a Roscoe Pound conference I attended with him this past weekend at the Harvard Law School. The paper echoes some of his ideas presented at the 1977 Smithsonian symposium in Newport, Rhode Island, on the theme "From Religious Toleration to Religious Freedom." Naturally, President Reagan would not wish to "pack the court" with Virginians, but Howard as an addition to Justic Powell would not even begin to approach the Virginia monopoly on our governance in the early days of the Republic. (Howard testified in favor of Powell's appointment, as you may recall.)

Apart from the Supreme Court question, you will be interested that Prof. Howard and I both very much appreciate your contribution to the decision for President Reagan to participate in the October 19 celebration of the winning of American independence at Yorktown. Howard serves on the Virginia Independence Bicentennial Commission.

I trust that we shall meet again at forums bringing together that remarkably diverse group of citizens who have drunk deeply at the Berkeley fountains.

Sincerely yours,

Willon (Dillon)

Enclosure

UP AGAINST THE WALL:

THE UNEASY SEPARATION OF CHURCH AND STATE

by

A. E. Dick Howard

White Burkett Miller Professor
of Law and Public Affairs
University of Virginia

Chief Justice Earl Warren Conference on Advocacy
in the United States

Roscoe Pound-American Trial Lawyers Foundation

Cambridge, Massachusetts

June 19-20, 1981

Table of Contents

History is full of famous walls.[1] Commonly they are erected to keep out invaders or barbarians; such was the purpose of Hadrian's Wall on the Scottish border. Sometimes they are put up to keep restless subjects in; our own age knows the Berlin Wall all too well. Walls tend to be lonely places; anyone who has walked Hadrian's Wall, especially to the west from the old Roman fort at Housesteads, has some idea how far from their Mediterranean homeland the legionnaires must have felt.

Walls exist to divide. They stand as symbols that something alien or dangerous lies on the other side. As symbols they often excite resentment. "Something there is that doesn't love a wall," said Robert Frost, "That wants it down."[2]

Thomas Jefferson brought the "wall" into the permanent lexicon of American relations between church and state when, in 1802, he wrote a letter (oft quoted) to the Danbury Baptist Association on his understanding of the meaning of the First Amendment's religion clauses:[3]

> Believing with you that religion lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

Jefferson's "wall of separation" is no exception to the tendency of walls to dominate debate. Much ink has been spilled by lawyers and judges, by historians and theologians, over the wall

of separation -- on whether the concept fairly expresses the purpose of the First Amendment, whether the wall is in fact as absolute and impervious as the language suggests, how the separation of church and state is to evolve in light of new demands vying with old traditions.

A PROLOGUE TO THE FIRST AMENDMENT

From the earliest days of the American Republic, constitutional draftsmen have struggled to chart the contours of religious liberty, to define the bounds between church and state. In 1776, at the Williamsburg convention that adopted Virginia's first Constitution, George Mason's draft for the bill of rights provided that men should enjoy "the fullest Toleration in the Exercise of Religion."[4]

James Madison thought stronger language was needed. An emphasis on toleration -- recalling Locke's views in his Letter Concerning Toleration -- could be taken to mean only a limited form of religious liberty: toleration of dissenters in a state where there was an established church. Madison drafted a substitute declaring that "all men are equally entitled to the full and free exercise of religion" and therefore "that no man or class of men ought, on account of religion to be invested with any peculiar emoluments or privileges. . . ."[5]

In substituting the language of entitlement for toleration, Madison's draft was more firmly grounded in theories of natural rights than was Mason's version. Moreover, the ban on emoluments and privileges would appear to have required the disestablishment of the Anglican Church in Virginia and perhaps have barred state support of religious sects generally. But Patrick Henry, moving

the amendment at Madison's request, disclaimed any implication of disestablishment. Madison drafted a second amendment, retaining the language of equal entitlement but dropping the clause suggesting disestablishment.[6]

A group of citizens in Prince Edward County proclaimed this section of Virginia's Bill of Rights as a "rising sun of Religious liberty," meant to relieve them from "a long night of Ecclesiastical bondage."[7] William Wirt Henry wrote, a bit rhetorically (his namesake, William Wirt, wrote poetry as an avocation), that it was "the high honor of Virginia that she was thus the first state in the history of the world to pronounce the decree of absolute divorce between Church and State, and to lay as the chief cornerstone of her fabric of government this precious stone of religious liberty. . . ."[8]

Nevertheless Virginia continued to have an established church. The next great test came in 1784, when the General Assembly considered two bills, both supported by Patrick Henry, to levy a general assessment for the support of teachers of religion and to incorporate the Episcopal Church. It was against the assessment bill that Madison wrote his famous Memorial and Remonstrance against Religious Assessments.[9] The memorial evoked an avalanche of petitions, and the assessment bill was tabled. In its place emerged Thomas Jefferson's Bill for Establishing Religious Freedom, which declared that no one should be compelled "to frequent or support any religious worship, place, or ministry whatsoever. . . ."[10]

Jefferson knew that one session of the Assembly could not bind future assemblies. Nevertheless he had his bill declare that the rights asserted therein were "the natural rights of mankind"

and that should a later act undertake to repeal his statute or narrow its operation, such act would be "an infringement of natural right." His act remained statute law until 1830, when the convention revising the Virginia Constitution elevated Jefferson's Bill to constitutional stature.[11] In 1969, the commission undertaking the most recent revision of the Constitution of Virginia took the Jeffersonian language (previously in the legislative article) and placed it in the Bill of Rights. Thus two hundred years after Jefferson and Madison first sought to make religious liberty part of the Commonwealth's fundamental law, their classic statements of religious freedom now stand side by side.[12]

Virginia was by no means the only early battleground over religious freedom, though its protagonists were perhaps the most notable. The original constitutions of the other former colonies also reflect efforts to secure rights of conscience.[13]

With the drafting of the Federal Constitution, there was yet another field on which to debate the case for religious liberty. The antifederalists hammered away at the proposed Constitution for its lack of a bill of rights. In Virginia, the contest was especially close; the vote for ratification was 89 to 79. To soothe the antifederalists, the Virginia convention appointed a committee, which drew a proposed list of amendments to the Constitution, and ordered the list distributed to the governors and legislators of every state. Likewise, the New York convention, after rejecting a motion that the Constitution be approved "on condition" that a bill of rights be added to it, simply recommended a bill of rights. When the first Congress convened, in 1789, Madison took the lead in seeing that the implicit pledge that there be a bill of rights

was redeemed. One result, of course, was the adoption of the First Amendment, with its declaration that Congress shall make "no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[14]

THE SUPREME COURT AND FREE EXERCISE

In light of the Founders' concern over religious freedom, the average citizen today might be surprised to learn that virtually all of the significant gloss placed on the First Amendment's religion clauses by the United States Supreme Court has arisen from litigation in the past forty years. The reasons may be readily assigned. In the first place, the Supreme Court ruled in 1833 that the provisions of the Bill of Rights were not enforceable against the states.[15] In 1845 the Court applied this reasoning so as to reject the appeal of a Louisiana priest who had been convicted of conducting funeral services at a chapel unlicensed under state law.[16] Thus, insofar as one's religious liberty might be threatened by state law, it was to state constitutions that the aggrieved party must look. In fact, as state constitutions were revised during the nineteenth century, the trend was toward increasingly stringent separation of church and state.[17]

The First Amendment did apply, of course, to federal legislation. Even here, however, it was 1878 -- nearly a century after the First Amendment's adoption -- before the Supreme Court first had occasion to construe the religion clauses of the First Amendment. In that case, Reynolds v. United States, the Court affirmed the conviction, under federal bigamy laws, of a Mormon practicing polygamy in Utah.[18] Chief Justice Waite looked to Jefferson for guidance.

In his letter to the Danbury Baptists, Jefferson had declared that "the legislative powers of government reach actions only, and not opinions."[19]

Although Jefferson himself had not been at the Philadelphia convention or in the first Congress -- he was at that time minister to Paris -- Waite looked to Jefferson's Virginia Bill for Establishing Religious Liberty as being, in effect, part of the legislative history of the First Amendment. Quoting several passages from the preamble to Jefferson's Bill, Waite said, "Coming as this does from an acknowledged leader of the advocates of the measure [the First Amendment], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured." And Waite seized on Jefferson's distinction between opinion and conduct to conclude that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[20] Polygamy, whatever its religious impetus, was safely within Congress' power to forbid.[21]

Thus, in the Supreme Court's initial look at the First Amendment's religion clauses, was born the notion of looking to ideas and events in postrevolutionary Virginia to give meaning to the First Amendment. In 1878 Justice Waite turned to Jefferson; in 1947 (as elaborated below) Justice Black added Madison.[22]

Other than having to deal with the Mormons -- there was another Mormon case in 1890 (involving an Idaho oath requiring voters to forswear membership in any organization advocating bigamy)[23] -- the Supreme Court had little further occasion to explore

the First Amendment's religion clauses until the 1940s. Then it was the Jehovah's Witnesses whose effort to be different brought them into conflict with the law. (This sect, often maddening to their fellow citizens, was responsible for a considerable amount of judicial interpretation of the First Amendment's protection of freedom of expression as well.)[24]

The cases of the forties saw an erosion of the sharp line Waite had drawn between belief and conduct. In a 1940 case, Justice Roberts viewed the First Amendment as embracing two concepts -- "freedom to believe and freedom to act." The first, he said, "is absolute," the second is not. Roberts went on to say that, while the state might regulate the time, place, and manner of the Witnesses' soliciting and holding meetings in public places, the state's power to regulate conduct must be exercised so that, in attaining a permissible end, the regulation did not operate "unduly to infringe the protected freedom."[25] In other words, while the right to act according to one's religious beliefs is not absolute, neither is the state's power to regulate that conduct.

The protection thus accorded religiously based conduct could be relatively narrow. Two weeks after Roberts' opinion, Justice Frankfurter in another case rejected claims by Jehovah's Witnesses that school regulations requiring Witness' children to salute the American flag infringed their religious scruples. Frankfurter decided that the Constitution's protection of religious liberty "has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects."[26] Three years later, the Court reversed itself on flag salutes, but it did so on freedom of expression grounds, not on the basis of freedom of religion.[27]

The second flag salute case is a reminder of the overlap between free exercise and free speech claims. During the 1940s and 1950s, when the Court was becoming more active in the area of freedom of expression (though its scorecard was rather mixed), Leo Pfeffer has suggested that at times the free exercise clause "came close to being written out of the Constitution."[28]

The nadir of free exercise, in the view of some commentators,[29] came in 1961, when the Court rejected the efforts by Orthodox Jewish merchants (who closed their shops on Saturday) to have Sunday Closing Laws struck down on First Amendment grounds. In an opinion strikingly deferential to the states' legislative power, Chief Justice Warren saw the challenged statutes as simply imposing an "indirect" burden on Jewish businessmen. Warren conceded that the laws made the Jews' practice of their religion "more expensive, but so long as the legislation had a secular purpose (a uniform day of rest) and was not aimed at religious practices he was reluctant to "radically restrict the operating latitude of the legislature."[30]

Free exercise made a sudden, and controversial, comeback two years later. The Warren Court came into full tide in 1962 -- the year that Arthur Goldberg took the place of the stricken Felix Frankfurter -- and one sample of the Court's heightened activism was its 1963 decision in Sherbert v. Verner.[31] The Court ruled that South Carolina was obliged to pay unemployment compensation benefits to a Seventh-Day Adventist who could not get a job because she was unwilling to work on Saturdays. The dissenters objected that the Court was requiring a state to give a preference

to those whose unavailability for work was based on religious grounds, over those unavailable for nonreligious reasons.[32] Justice Brennan, for the majority, laid down a stiff rule: that the burden on the free exercise of religion, even though incidental, must be justified by a "compelling state interest" -- a difficult standard for a state to meet.

Most of the Burger Court's major religion decisions have turned on the establishment clause, notably the decisions about aid to church-related schools and colleges (discussed below). The Court has been less active in construing the free exercise clause (though, as elaborated below, some dissenters in the parochaid cases have seen free exercise implications in the efforts of parochial school parents to get public support for private education).

The Burger Court's most noted free exercise decision is Wisconsin v. Yoder (1972).[33] Members of the Amish religion in Wisconsin had resisted sending their children to public schools after the eighth grade, and Chief Justice Burger ruled that the state's effort to enforce its public school attendance laws against the Amish violated their rights of free exercise of religion. That Wisconsin's statute was neutral on its face and was motivated by legitimate and important state interests did not save it. Nor was the statute immunized from free exercise challenge by the state's characterizing the law as regulating "conduct" rather than "belief."[34] And to the argument that to allow the Amish to opt out of the state's compulsory education requirement would effect an establishment of religion, Burger replied that accommodating the religious beliefs of the Amish "can hardly be characterized as sponsorship or active involvement."

As in Sherbert v. Verner, Burger saw such accommodation as being nothing more than "neutrality in the face of religious differences."[35] Burger's opinion, in short, represents a decision to prefer a free exercise claim in the face of establishment implications -- a choice he has been unsuccessful in pressing on his brethren in some of the later parochaid cases.

Whether many other groups could claim the benefits of the Yoder decision is problematical. Burger was obviously impressed by the success of the Amish way of life. The Amish, he observed, "are productive and very law-abiding members of society; they reject public welfare in any of its modern forms." Burger was careful to stress that Yoder did not involve "a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." The Amish parents were aided by being able to point to three centuries as an identifiable sect, the close tie between religious belief and way of life, and perhaps most persuasively, how their alternative mode of vocational education served the ultimate ends advanced by the state in support of its compulsory high school education. The record made out by the Amish was "one that probably few other religious groups or sects could make."[36]

THE SUPREME COURT AND ESTABLISHMENT

Free exercise is, of course, only one branch of the First Amendment's protection of religious liberty. The other is the establishment clause. As with free exercise, the establishment clause collected gloss only slowly. The Supreme Court's first look at the establishment clause did not come until 1899, when the justices sustained a federal appropriation for a public ward to be administered as part of a hospital run by Catholic nuns.[37]

The seminal case in the modern Court is Everson v. Board of Education (1947).[38] Though much First Amendment law has been written in the subsequent three decades, Justice Black's majority opinion remains the starting point for any consideration of the current Court's approach to religious liberty. A man self-taught in the Greek and Roman classics and in British and American history, Black was fond of advising his law clerks to read Tacitus or Fox's Book of Martyrs. Black took a preeminently Whig view of history, and Everson is an example.[39]

The specific holding in Everson was that New Jersey had not violated the establishment clause by authorizing local boards of education to reimburse parents for the cost of having their children ride the public buses to school, including to a parochial school. The opinion is of wider interest, however, for its effort to provide a roadmap for the reading of the First Amendment.

After reviewing the history of religious persecution, Black went straight to Madison and Jefferson for inspiration. Pointing to Madison's "great Memorial and Remonstrance" and Jefferson's Bill for Establishing Religious Freedom, Black declared that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." Then Black laid down surely the most famous dictum in any Supreme Court opinion on the meaning of the establishment clause:[40]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." Reynolds v. United States, supra at 164.

Notwithstanding his use of the "wall of separation" metaphor, Black was able to sustain the New Jersey law -- which he admitted approached the "verge" of the state's constitutional power -- by viewing it as general public welfare legislation, a statute to help children get safely to school, public or private. The First Amendment, Black thought, "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[41]

Everson has been an important and influential opinion. To begin with, it settled (on this the justices apparently were unanimous) that the establishment clause applies to the states. This was not a foregone conclusion. In the same year of Everson, Justice Black, dissenting in Adamson v. California, had argued that the Fourteenth Amendment applies to the states all the provisions of the Bill of Rights -- a proposition that Justice Frankfurter and other critics on and off the bench derided.[42] Moreover, as to establishment, some wondered how the Court could

apply to the states a provision which, they argued, was put in the Constitution primarily to keep Congress from interfering with state establishments existing at the time the First Amendment was proposed.[43]

Everson's influence went beyond interpretation of the Federal Constitution. State constitutions have often been interpreted by state courts even more restrictively of state aid to private schools than the First Amendment.[44] Everson's "child benefit" theory offered a way to soften some of those state provisions, and the doctrine thus found its way into the decisions of some state courts.[45]

Everson spawned much academic comment, much of it critical. Paul Freund has called the dichotomy between pupil benefit and benefit to the school "a chimerical constitutional criterion."[46] Erwin Griswold has ridiculed Black as an "absolutist,"[47] and as to Black's use of history Paul G. Kauper concluded, "Nothing in the historical research to date lends authority to Justice Black's broad interpretation."[48]

Everson was only the opening shot in the war over the reach of the establishment clause. Subsequent years have seen repeated occasions for the Supreme Court to assess the applications of separationism. The "wall of separation," as Justice Jackson once remarked, has been as serpentine as the walls at Mr. Jefferson's University of Virginia.[49] In 1948 the Court struck down an Illinois "released time" program under which religious instructors were permitted to come into public classrooms, but four years later the justices upheld a New York program which released students during school hours to receive religious instruction off the school grounds.[50]

The Court came down against prayers and Bible reading in the public schools.[51] The Court thought it unnecessary to ask whether unwilling children were coerced into taking part in these exercises; a finding on coercion (relevant to a free exercise claim) is not a prerequisite to showing that the establishment clause has been violated.[52] But the "wall" was found not to have been breached when states enacted Sunday closing laws notwithstanding the laws' religious origins; it was enough that they now served a secular purpose.[53] Nor was there a breach (Board of Education v. Allen) when New York lent textbooks to students in parochial schools, even though textbooks are far more central to the educational process than was schoolbus transportation in Everson.[54]

The Court's cases between Everson and the end of the Warren era (1969) saw, in addition to significant holdings, important evolution in establishment doctrine. Black had painted with a broad brush in Everson. Later cases showed how difficult it was to apply Black's dictum that government could do nothing to "aid" religion. Similarly, "neutrality" has proved a coat of many colors. As for the "wall of separation," Justice Stewart, dissenting in the first of the school prayer cases (1962), complained of the "uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."[55]

Some justices could not conceal the difficulties of construing the establishment clause. Justice Douglas joined in approving the New Jersey bus transportation plan and, in 1952, wrote the majority opinion permitting "released time" programs off school premises. Said Douglas, "We are a religious people whose

institutions presuppose a Supreme Being."[56] Yet Douglas subsequently became one of the Court's strictest separationists. Concurring in the 1962 prayer decision, Douglas confessed that he had changed his mind about Everson--a holding which, he said, "seems in retrospect to be out of line with the First Amendment."[57] And in 1968 Douglas dissented from the New York textbook decision.[58]

As they groped for ways to apply the establishment clause, the justices devised additional tests. The major innovation between Everson and the advent of the Burger Court was the test stated by Justice Clark in the 1963 Bible reading and Lord's Prayer cases, Abington School District v. Schempp and Murray v. Curlett. Clark said that two questions had to be asked about a challenged law: what is the enactment's purpose, and what is its primary effect. In order to be valid, "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[59] The purpose and effect tests quickly became boiler plate in establishment clause options, both during the Warren years and since.

AID TO CHURCH-RELATED EDUCATION

By the time Warren Burger became Chief Justice in 1969, there was already a considerable body of law -- especially the cases discussed above -- on which to build. In the early seventies, the Court was busy with matters of church and state, and while the justices drew upon precedent they also added new dimensions to the jurisprudence of the First Amendment's religion clauses.

In his first term on the Court, the new Chief Justice wrote Walz v. Tax Commission, a near-unanimous decision (only Douglas dissenting) upholding property tax exemptions for religious property. Noting that all fifty states provide for tax exemptions for places of worship, Burger saw the First Amendment as permitting "benevolent neutrality" by government toward religion. Burger found "deeply embedded in the fabric of our national life" the principle that government could fashion policies grounded in benevolent neutrality towards religion "so long as none was favored over others and none suffered interference." Tax exemptions, he reasoned, did not constitute sponsorship as the government does not transfer revenue to churches "but simply abstains from demanding that the church support the state."[60]

The Court's 1968 Allen opinion, permitting New York to lend textbooks to parochial schoolchildren, had fired the hopes of proponents of more general aid to church-related schools. Burger's Walz opinion, two years later, stirred those hopes even further. Concerned about the flagging finances of parochial schools, Catholic educators and parents saw in the language of "benevolent neutrality" the opportunity to carry Everson's general welfare legislation notion quite beyond such narrow aids as bus transportation or textbooks. Indeed, even before Walz, in the late sixties state legislatures had begun to enact significant programs of aid to private education--among them supplements to teachers' salaries, money to pay for textbooks and instructional materials, appropriations for maintenance and repair of schools, tuition grants to parents, and income tax credits. Opponents of such aid promptly went to court, and the stage was set in the early seventies for a

major round of Supreme Court decisions on aid to church-related schools.

In 1971, in Lemon v. Kurtzman, the Court passed on aid programs from Rhode Island and Pennsylvania.[61] Rhode Island's statute provided for a 15% salary supplement to be paid to teachers in non-public schools. Pennsylvania's act authorized the "purchase" of "secular" educational services from private schools, reimbursing those schools for teachers' salaries, textbooks, and instructional materials. Both states, conscious of the sensitive First Amendment questions raised by such aid, had laced the programs about with safeguards and restrictions. For example, Pennsylvania required that reimbursement be limited to courses in specified secular subjects, that textbooks and materials must be approved by the state, and that payment was not to be made for any course having religious content.

The safeguards proved the programs' undoing. To the purpose and effect test of establishment used in the 1963 prayer cases, Burger in Walz had added a third test--that a program not result in an "excessive governmental entanglement with religion."[62] The property tax exemptions in Walz had passed that test, but the Pennsylvania and Rhode Island school aid programs in Lemon failed it. The very fact that the state had "carefully conditioned its aid with pervasive restrictions" meant that "comprehensive, discriminating, and continuing state surveillance" would be necessary to ensure that the schools honored the restrictions; the result would be "excessive enduring entanglement between state and church."[63]

The Chief Justice had yet another ground for striking down

the Pennsylvania and Rhode Island programs--their "divisive political potential." Burger saw political division along religious lines one of the principal evils against which the First Amendment was directed. State programs channeling money to a relatively few religious groups--Roman Catholics were the overwhelming beneficiaries of the challenged programs--would, Burger thought, intensify political demands along religious lines.[64]

Undaunted, the proponents of parochaid kept trying. The result was another round of major Supreme Court decisions, in June 1973. In the principal case, Committee for Public Education & Religious Liberty v. Nyquist, a divided Court struck down three New York programs--direct grants to private schools for "maintenance and repair" of facilities and equipment, a tuition reimbursement plan for low-income parents of children in private schools, and tax deductions for parents who did not qualify for tuition reimbursement.[65] In the 1971 decisions, it had been "entanglement" that proved fatal for the Pennsylvania and Rhode Island programs. In 1973 it was the "effect" test that was fatal; the three programs were found to have the effect of advancing religion.[66] Justice Powell, who wrote the majority opinion in Nyquist, found it unnecessary to consider whether the New York program would result in entanglement of state and religion. He did, however, bolster his opinion by invoking the political entanglement argument--that the programs carried a "potentially divisive political effect."[67]

Nyquist brought a new lineup on the Court. The justices had been nearly unanimous in Lemon; only Justice White would have permitted the kinds of aid there struck down. In Nyquist the Court was more divided, three justices dissenting in whole or part. The

case split the four Nixon appointees; Blackmun joined Powell's majority opinion, while Burger--hitherto the spokesman for the Court in every religion case--and Rehnquist dissented in part (they would have upheld the tuition grant and tax credit statutes).[68] Burger thought "simple equity" supported aid to parents who sent their children to private schools; moreover, to give such aid would promote a "wholesome diversity" in education.[69]

Since 1973, the Court has decided yet other parochaid cases, but the course has been largely charted by Lemon and Nyquist. In Meek v. Pittenger (1975), the Court reviewed three Pennsylvania programs--the loan of textbooks to students in private schools, the loan to the school themselves of instructional equipment and materials, and provision of "auxiliary" services, such as counseling, testing, speech and hearing therapy, and similar services. Only the textbook program passed muster--and even that dispensation largely on the strength of the precedent set by Allen. Effect, entanglement, political divisiveness--all figured in the Court's opinion. The loan of instructional material was found to have the effect of advancing religion, while provision of auxiliary services raised the spectre of excessive entanglement in order to police the program, as well as the opportunity for divisive conflict along religious lines.[70] As in 1973, Burger, White, and Rehnquist would have allowed more aid to church-related schools than permitted by the majority.[71]

The Court relaxed the barriers somewhat, but only slightly, in Wolman v. Walter (1977). Reviewing several Ohio programs, the Court refused to permit the state to lend instructional materials and equipment for use in sectarian schools or to pay for field

trips. The Court did, however, permit the state to provide specialized diagnostic, guidance, and other services to students in nonpublic schools, as the services were not performed on school premises.[72]

The majority's continuing suspicion of any form of aid to sectarian schools at the primary and secondary level stands in sharp contrast to the Church's more deferential posture on aid to church-related colleges. The same day that the Court ruled against parochaid in Lemon v. Kurtzman, the justices upheld federal construction grants to four church-related colleges in Connecticut. The federal statute placed limits on the purposes for which grants could be used, among them the exclusion of facilities to be used for sectarian instruction or religious worship. Writing for a five-man majority, Chief Justice Burger in Tilton v. Richardson concluded that the grant program satisfied all the Court's establishment tests--purpose, effect, entanglement, and political divisiveness. Key to the decision were the differences Burger noted between higher education and primary and secondary schools. College students, he thought, are less impressionable and less susceptible to religious indoctrination than younger students. Moreover, other forces, such as traditions of academic freedom, operate to create a more open climate at the college level.[73]

All four of the Connecticut colleges were controlled by religious orders, and the faculty and student body at each was predominantly Catholic. Nevertheless, Burger noted that non-Catholics were admitted as students and were given faculty appointments. None of the colleges required students to attend religious

services. Although all four schools required students to take theology courses, it was stipulated that the courses covered a range of religious experience and were not limited to Catholicism. In fact, some of the required courses at two of the colleges were taught by rabbis. In short, Burger was able to conclude that, although the colleges had "admittedly religious functions," their predominant educational mission was to provide their students with a secular education.[74]

The Court has continued to maintain a sharp distinction between aid to sectarian primary and secondary schools and aid at the level of higher education. The justices' consistent rebuffs to parochaid in all its forms have been matched on the other side by a relaxed posture on aid to church-related colleges and their students. In 1973, in Hunt v. McNair, the Court rejected First Amendment challenges to the issuance by a South Carolina state authority of revenue bonds to help a Baptist college borrow money for capital improvements.[75] No state money was involved, but having the authority's backing enabled the college to borrow money at more favorable interest rates. Justice Powell, who wrote the majority opinion, noted that the college's board of trustees were elected by the South Carolina Baptist Convention, that its charter could be amended only by the Convention, and that the Convention's approval was required for certain financial transactions. But Powell concluded that the college was not "pervasively sectarian" and that South Carolina had laid down sufficient safeguards to ensure that aid did not flow to religious activities.[76]

Yet another case, decided in 1976, reflects the majority's ability to be more permissive toward aid to church-related colleges

than to primary and secondary education. In that decision, Roemer v. Board of Public Works, the Court upheld Maryland's appropriation, on an annual basis, of noncategorical grants to private colleges, some of them with religious affiliations.[77] For each fulltime student (not including seminary and theology students), a college received an amount equal to 15% of the state's appropriation for full-time students in the state college system. At issue were appropriations to four Roman Catholic colleges. The district court had concluded that the four colleges were not "pervasively sectarian," and Justice Blackmun, reviewing findings as to curriculum, faculty, and other factors, held that the lower court's conclusion was not "clearly erroneous." Moreover, Maryland's system operated to ensure that aid would go only to "the secular side" of the colleges' activities. Nor, finally, was there "excessive entanglement" between government and religion.[78]

LINE-DRAWING IN THE AID-TO-EDUCATION CASES

Even the most cursory reading of the Court's decisions brings into sharp relief the distinction the Court makes between programs aiding nonpublic elementary and secondary schools and those aiding private colleges, including colleges that are church-related.[79] The legislative imagination seeking ways to aid parochial schools has had little success in surmounting the Court's "wall of separation." Textbooks and transportation remain the only important exceptions. Yet the Court has continued to uphold direct aid to colleges whose church ties were unmistakable.

Supreme Court decisions often turn on assumptions about the record, on who is required to prove what. In First Amendment

cases generally, it is not unusual for the Court to rest the constitutionality of a statute by looking not merely at how the statute has been applied on the facts of the case at bar but also at how it might be applied in other situations. Thus, in speech cases, a litigant may be able to argue a statute's "chilling" effect--that, apart from its impact on his speech, it may operate to discourage others from expressing themselves.

One might expect the Court to take a similarly prophylactic approach in the religion cases, policing the "wall of separation" by measuring the potential, as well as actual, hazards of a state program. In this respect the contrast between how the Burger Court decides parochaid cases and how it handles college cases is striking.

Chief Justice Burger's opinion in Lemon v. Kurtzman illustrates the prophylactic approach. Several Rhode Island teachers had testified that they did not inject religion into their secular classes. But Burger thought it enough that the state's program carried "potential" hazards. He had no need to assume that teachers would be unsuccessful in attempting to keep their religious beliefs out of their secular teaching. Yet because of the "potential" for impermissible fostering of religion, the state had to condition its aid with pervasive restrictions--surveillance giving rise to entanglement of government and religion. Similarly, although the district court in Lemon had found only one instance in which the state had had to examine a school's records to determine which expenditures were religious and which secular, Burger relied on the state's power to conduct adults as creating "an intimate and continuing relationship between church and state."[80] Justice White,

in dissent, complained of the Court's striking down the Rhode Island statute on its face. Nothing in the record, he said, indicated that any participating teacher "had inserted religion into his secular teaching or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary."[81] White, in short, wanted the case to turn on the facts as found. The majority was more willing to speculate on what might happen under the statute's operation--and to strike it down on the basis of the potential hazards.

This willingness to speculate is missing from the majority opinions when the Court has reviewed aid to church-related colleges and universities. In Hunt Justice Powell noted the "sweeping powers" conferred upon the South Carolina authority by its enabling statute, such as powers to fix and collect fees and charges for the use of or services furnished by an aided project and to establish rules and regulations for the use of a project. Were there a "realistic likelihood" that these powers would be exercised fully, Powell conceded that there might be entanglement problems. Under the actual lease agreement with the Baptist College at Charleston, however, the authority could not take action unless the college defaulted in its obligation. Possibly some of those actions, such as setting rates and charges, would offend the establishment clause, but, Powell said, "we do not now have that situation before us."[82]

The Court could, of course, have taken a tougher line toward the dangers of entanglement in Hunt. It could, as in Lemon, have emphasized the dangers of what might happen, rather than looking only at the facts as developed in the case before the Court. Justice

Brennan, dissenting in Hunt, thought the Court should be more influenced by what the authority had the power to do: "Indeed, under this scheme the policing by the State can become so extensive that the State may well wind up in complete control of the operation of the College, at least for the life of the bonds."[83]

In narrowing issues in higher education cases, the Court takes a college-by-college approach--again, a sharp contrast to the parochial school cases. The parties challenging the federal construction grants to the Catholic colleges in Tilton asked the Court to accept a "composite profile" of the "typical sectarian" institution of higher education. Chief Justice Burger, however, refused to "strike down an Act of Congress on the basis of a hypothetical profile." Assuming that some church-related colleges did fit such a profile, it would be enough to deal with those situations "if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics."[84] Similarly, in Hunt Justice Powell said that, in considering the "primary effect" of the South Carolina program, "we narrow our focus from the statute as a whole to the only transaction presently before us"--the arrangement with the Baptist College of Charleston.[85]

In the parochial school cases, by contrast, the Court paints with a broader brush. In Lemon v. Kurtzman, Justice White, dissenting in part, complained that the Court "accepts the model for the Catholic elementary and secondary schools that was rejected for the Catholic universities or colleges in the Tilton case." It was wrong, thought White, for the Court to strike down the Rhode Island statute on the Court's "own suppositions and unsupported views of what is likely