B. REMOVAL OF PROTECTIONIST BARRIERS

Not all provisions for the protection of religion are wise or helpful or constitutional. Many are criticized as excessive or preferential solicitude that borders on "establishment" of religion by affording it advantages not available to nonreligious activities and organizations thought otherwise to be similar. A number of "protectionist" barriers have been struck down by the courts over the years, such as those designed to punish "sacrilege," to prevent atheists from serving in positions of public responsibility—or (in an opposite way) to prohibit clergy from serving in public office, to keep the "demon rum" at a safe distance from churches or to keep the Sabbath quiet in a church-owned enclave exercising quasi-governmental powers.

1. *Burstyn v. Wilson* (1952)

In 1950 quite a little stir was generated in New York City by the showing of an Italian motion picture called *The Miracle.* An early work of Roberto Rossellini, it portrayed a simple-minded shepherdess who was seduced by a man she thought of as St. Joseph; when found to be pregnant, she was taunted and abused by other villagers, so she went off to live alone in a cave until the time for her delivery, when she found shelter in a church; there the baby was born and brought a ray of maternal love into the demented girl's face, as the murmured "My son! My love! My flesh!" and the forty-minute film came to an end.[1]

This film was licensed for showing in New York State by the Motion Picture Division of the New York State Education Department, which was directed by statute to license motion pictures "unless [the] film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious,* or is of such a character that its exhibition would tend to corrupt morals or incite to crime"[2] (emphasis added). The film began to be exhibited (with English subtitles) as one of a trilogy of films entitled "Ways of Love" at the Paris Theater on 58th Street in Manhattan on December 12, 1950, just in time for Christmas.

It was promptly attacked as "a sacrilegious and blasphemous mockery of Christian religious truth" by the National Legion of Decency, a private Catholic organization for film censorship. "New York critics on the whole praised `The Miracle'; those who dispraised did not suggest sacrilege. On December 27 the critics selected the `Ways of Love' as the best foreign language film in 1950."[3] On December 23, Edward McCaffrey, Commissioner of Licenses for New York City, ordered the film to be withdrawn if the Paris Theater didn't want its operating license suspended.

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1. *Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York*, 343 U.S. 495 (1952), Frankfurter opinion, quoting Crowther, B., "The Strange Case of 'The Miracle,'" *Atlantic Monthly*, April 1951, pp. 35-37.

2. N.Y. Education Law, § 122.

3. *Burstyn v. Wilson*, Frankfurter opinion, p. 513.

A week later showing was resumed after the New York Supreme Court (the state's lowest court of record) declared that the City License Commissioner did not have authority to act as a movie censor. (All of this Yuletide excitement doubtless redounded to enlarged returns at the box office of the Paris Theater.)

Then on Sunday, January 7, 1951, another voice was heard. A statement by His Eminence, Francis Cardinal Spellman, was read at all masses in St. Patrick's Cathedral condemning the picture and calling on "all right thinking citizens" to unite in tightening up censorship laws. This blast stimulated dissent among Protestant clergy and some distinguished lay Catholics. The chairman of the New York State Board of Regents appointed a committee of three Regents to look into the matter, and after viewing the film, they found it to be "sacrilegious." The full Board issued an order to the licensees to show cause why their licenses should not be cancelled, and on February 16, 1951, the Board of Regents indeed rescinded the licenses with the explanation that "mockery or profaning of these beliefs that are sacred to any portion of our citizenship [*sic*] is abhorrent to the laws of this great State."[4]

In due course the New York Court of Appeals—the state's highest court—upheld the Board of Regents' action. The majority held that "sacrilegious" was an adequately defined term, citing Funk & Wagnalls New Standard Dictionary for its definition; that the state's protection of religion from "contempt, mockery, scorn and ridicule...by those engaged in selling entertainment by way of motion pictures" did not violate the religion clauses of the First Amendment; and that motion pictures were not entitled to the immunities from regulation enjoyed by the press anyway. Two dissenting judges considered the "sacrilegious" standard unconstitutionally vague and believed that the constitutional guarantee of freedom of speech applied to motion pictures and protected them from such censorship.[5]

The U.S. Supreme Court considered the case on appeal and Justice Tom Clark delivered the opinion of the court May 26, 1952. (Briefs *amicus curiae* were submitted by the American Civil Liberties Union and the American Jewish Congress urging reversal and by the New York State Catholic Welfare Committee urging affirmance.) The statute was challenged on three grounds: (1) that it violated the guarantees of freedom of speech and press; (2) that it violated the guarantees of separation of church and state and of the free exercise of religion; and (3) that the term "sacrilegious" was unconstitutionally vague and indefinite. The Supreme Court dealt only with the first, though the fact-situation seemed to cry out for treatment under the Establishment Clause.

The status of motion pictures with respect to the constitutional protections of freedom of expression had been determined in the 1915 case of *Mutual Film Co. v. Industrial Commission*, which held that "the exhibition of motion pictures is a business pure and simple, originated and conducted for profit, like others spectacles, not to be regarded...as part of the press of the country or as organs of public opinion."[6] That was ten years before the freedoms of speech and press of the First

4. Ibid.
5. 303 N.Y. 242, 101 N.E. 2d 665.
6. 236 U.S. 230 (1915).

Amendment were held to be applicable to the states through the Due Process Clause of the Fourteenth Amendment.[7] (It was also prior to the development of *sound* motion pictures, which lent an additional cogency to the claim of freedom of *speech*.[8])

> [T]he present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."
>
> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform....
>
> It is...urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil, it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.
>
> For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in Mutual Film Corp.... is out of harmony with the views here set forth, we no longer adhere to it.
>
> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.... Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular mode of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.
>
> The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This

7. *Gitlow v. N.Y.*, 268 U.S. 652 (1925).
8. *Burstyn v. Wilson, supra*, note 12.

> Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.[9]

Thus far this case represented a run-of-the-mill anticensorship decision, and for that reason is usually not listed as a church-state decision. But the concluding paragraphs of the Court's opinion added an important consideration to the law of church and state as it pertains to the protection of the practice of religious faith.

> New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule...." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor.[10] Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom for worship of all.[11] However from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[12]

(The italicized lines have since provided a basis for rejecting attacks on textbooks teaching about evolution.)

Justice Stanley Reed entered a terse concurrence in the judgment:

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9. Ibid. at 503, citing *Near v. Minnesota*, 283 U.S. 697 (1931).

10. Ibid., citing *Kunz v. New York*, 340 U.S. 290 (1951) (see IIA3a); *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Saia v. N.Y.*, 334 U.S. 558 (1948), *Largent v. Texas*, 318 U.S. 418 (1943), *Lovell v. Griffin*, 303 U.S. 444 (1938), all discussed at IIA2.

11. Ibid., citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed at IIA2c.

12. Ibid., emphasis added. The court at this point quoted in the margin the paragraphs from *Cantwell, supra*, describing the vehement controversies that can be expected in religious and political debate, even "excesses and abuses."

> Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

Justice Felix Frankfurter entered a nonterse concurrence in the judgment, joined by Justices Robert Jackson and Harold Burton, who had also joined the opinion of the Court. Justice Frankfurter's opinion dealt with the meaning of "sacrilege," which he traced through many centuries, cultures and dictionaries to reach the not-surprising conclusion that it was so vague as to make motion pictures subject to a wide array of attacks, some mutually contradictory, so he would void the statute for vagueness.

> Sacrilege, as a restricted ecclesiastical concept, has a long history. Naturally enough, religions have sought to protect their priests and anointed symbols from physical injury. But history demonstrates that the term is hopelessly vague when it goes beyond such ecclesiastical definiteness and is used at large as the basis for punishing deviation from doctrine.
>
> Etymologically "sacrilege" is limited to church-robbing: sacer, sacred, and legere, to steal or pick out.... St. Thomas Aquinas classified the objects of "sacrilege" as persons, places, and things.... Thus, for the Roman Catholic Church, the term came to have a fairly definite meaning...limited to protecting things physical against injurious acts.... To the extent that English law took jurisdiction to punish "sacrilege," the term meant stealing from a church or otherwise doing damage to church property....
>
> A student of English lexicography would despair of finding the meaning attributed to "sacrilege" by the New York Court.... The...dictionaries defined "blasphemy," a peculiarly verbal offense, in much broader terms than [they define] "sacrilege," indeed in terms which the New York court finds encompassed by "sacrilegious."...[13] In light of that history it would seem that the...historical meaning...was not, and could hardly have been, the basis for condemning "The Miracle." [Such broadening of the definition] inevitably left the censor free to judge by whatever dogma he deems "sacred" and to ban whatever motion pictures he may assume would "profane" religious doctrine widely enough held to arouse protest....
>
> History teaches us the indefiniteness of the concept "sacrilegious" in another respect. In the case of most countries and times where the concept of sacrilege has been of importance, there has existed an

13. The same conclusion was reached by Leonard W. Levy in his monumental study *Blasphemy: Verbal Offense Against the Sacred, from Moses to Salman Rushdie* (New York: Knopf, 1993), esp. pp. 526-527.

> established church or a state religion. That which was "sacred," and so was protected against "profaning," was designated in each case by ecclesiastical authority.... But in America, the multiplicity of the ideas of "sacredness" held with equal but conflicting fervor by the great number of religious groups makes the term "sacrilegious" too indefinite to satisfy constitutional demands based on reason and fairness....
>
> History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by "sacrilegious." And if we cannot tell, how are those to be governed by the statute to tell?[14]

No justice was listed in dissent.

2. *Torcaso v. Watkins* (1961)

As is noted below in the discussion of compulsory chapel at the armed services' academies,[15] there has been virtually no occasion to develop case-law interpreting the No-Religious-Test Clause in Article VI of the Constitution—the only reference to "religion" in the main body of the Constitution. In 1961 the Supreme Court for the first time considered a religious test oath required by a state and had to determine whether Article VI applied to the states or only to the federal government. Several of the states had had religious tests for public (state) office, and Maryland had had for its first half century a state requirement that all its officeholders must be Christians. It was only in 1826, after nearly a decade of work by a Christian legislator, Thomas Kennedy, that that limitation was dropped, and Jews were permitted to serve in public office.[16] Maryland retained the requirement in its constitution, however, that officeholders must believe in "the existence of God," and in 1922 the attorney general of that state ruled that every state official was "required in some definite way" to declare his belief in God in order to hold office.[17]

In 1960, one Roy Torcaso was appointed by the governor of Maryland to the office of notary public but was refused a commission to serve because he would not declare a belief in God. He brought action in state court to compel issuance of his commission, contending that the state's theism requirement was contrary to Article VI and Amendments I and XIV of the U.S. Constitution. The case eventually reached the Supreme Court of the United States, where Justice Hugo Black wrote the opinion of the Court.

> There is and can be, no dispute about the purpose or effect of the Maryland...requirement before us—it sets up a religious test which was

14. *Burstyn v. Wilson, supra*, Frankfurter concurrence.

15. At § D1 below.

16. That heroic struggle is recounted in Stokes, A.P., *Church and State in the United States*, I, (New York: Harper Bros., 1950), pp. 867-874.

17. Miller, R.T. and Flowers, R.B., *Toward Benevolent Neutrality*, 4th ed. (Waco, TX: Baylor Univ. Press, 1992), p. 182.

> designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public "office of profit or trust" in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in "the existence of God." It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical "establishment" of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of non-favored believers.
>
> There were, however, wise and far-seeing men in the Colonies—too many to mention—who spoke out against test oaths and all the philosophy of intolerance behind them....
>
> When our Constitution was adopted, the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article VI of that document of a provision that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Article VI supports the accuracy of our observation in Girouard v. United States that "[t]he test oath is abhorrent to our tradition." Not satisfied, however, with Article VI and other guarantees in the original Constitution, the First Congress proposed and the States very shortly thereafter adopted our Bill of Rights including the First Amendment [which] broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly.[18]

Justice Black reiterated the "no-aid" formula he had set forth in *Everson v. Board of Education*,[19] noting that the *Everson* dissenters had not disagreed with his explanation of the Establishment Clause, but in a separate opinion in *McCollum v. Board of Education*[20] had indicated their support for it. Justice Black then set forth again—for the fourth time—that famous formula:

> "The `establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

18. *Torcaso v. Watkins*, 367 U.S. 488 (1961). *Girouard v. U.S.*, 328 U.S. 61 (1946) is discussed at IVA5f.

19. 330 U.S. 1 (1947).

20. 333 U.S. 203 (1948), discussed at IIIC1a.

> 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.'"
>
> * * *
>
> The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in Zorach v. Clauson[21] had in part repudiated the statement in the Everson opinion quoted above and previously reaffirmed in McCollum. But the Court's opinion in Zorach specifically stated: "We follow the McCollum case." Nothing decided or written in Zorach lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.
>
> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[22]

This statement was followed by a historic footnote that has caused more questions than it has provided answers:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

Various commentators have contended over the years that, while the term "secular humanism" may refer to a cluster of beliefs, it does not constitute a "religion" in the sense of having a continuing organization, a cultus, or the intentionality to be a religion.

Justice Black continued:

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21. 343 U.S. 306 (1952), discussed at IIIC1b.

22. *Torcaso, supra*.

> In upholding the State's religious test for public office the highest court of Maryland said:
>
> "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."
>
> The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in Wieman v. Updegraff.[23] We there pointed out that whether or not "an abstract right to public employment exists" Congress could not pass a law providing "`...that no federal employee shall attend Mass or take an active part in missionary work.'"
>
> This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.[24]

Justices Frankfurter and John Harlan concurred in the result. No justice was listed in dissent.

It is not clear whether this holding was reached on the basis of the Establishment Clause or the Free Exercise Clause or both. A footnote made clear that the Court declined to reach the Article VI question because its decision was based on other grounds. The limitation of Article VI to "any Office or public Trust *under the United States*" (emphasis added), if given the meaning it had at the time written, would seem to limit its force to *federal* office.[25]

3. The Saga of Ocean Grove

On the New Jersey seashore there was a remarkable enclave known as Ocean Grove that was the subject of a unique sequence of church-state litigation. It was about three-quarters of a square mile in area and had a year-round population of around 7,500, which swelled in summer to 18,000-20,000. Ocean Grove was one of a number of "camp-meeting" sites that sprang up in the nineteenth century as locales for more-or-less continuous religious programming during the summer, when families came from great distances to spend their vacations "camping out" in tents around a large main tent or auditorium in which religious and cultural events were offered for the inspiration and entertainment of large audiences. It was founded in 1869, and the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church was chartered by act of the New Jersey legislature in 1870 to hold and manage the property and facilities there for the carrying on of religious services. As the attractions of the place became better known, some families came there to live year-

23. 344 U.S. 183 (1952).

24. *Torcaso*, *supra*.

25. See discussion of possible pertinence of Article VI to compulsory chapel at the U.S. armed service academies in *Anderson v. Laird*, at § D1d below.

round and built permanent housing. Additional powers were conferred on the Ocean Grove Camp Meeting Association by the Legislature to match its increasing responsibilities.

One of the chief concerns of the Association was to protect and preserve the "unique character" of the community, which was devoted to creating and maintaining what its sponsors viewed as a wholesome atmosphere for family life, sheltered from the turmoil and temptations of the outside world. To that end, the Association enforced some rather rigorous rules, chief among which was a requirement for the cessation of all commercial and boisterous recreational activity on Sunday. Motor vehicles were not allowed to be driven or parked on the streets of Ocean Grove from midnight Saturday night until midnight Sunday night, and all roads leading into the enclave were chained off during that period.

The land within the enclave was all owned by the Association, which leased parcels to suitable residents for renewable periods of ninety-nine years, conditional upon compliance with the Association's rules. Streets, sidewalks, parks and public buildings were all owned outright by the Association. On Sunday, all commercial activity was banned, including the "vending of any form of merchandise" and the "selling or delivery of newspapers." Also prohibited on that day was bathing in the ocean or the wearing of bathing apparel in the streets.

The population of Ocean Grove was predominantly, but not exclusively, Methodist. The people who chose to live there were apparently attached to the peaceful atmosphere and signed long-term leases in reliance upon the distinctive character of the community. An effort was made in the early 1920s to change the form of government to a borough, and a law was passed to that effect—retaining the Sunday-closing restrictions—but it was held invalid as special municipal legislation,[26] and the earlier legislation continued in force.

a. *Percello v. Ocean Grove* (1929). Another challenge was raised a year or so later to the effect "that camp meeting associations are not a legitimate class of municipalities with respect to which legislation purporting to be general municipal legislation can be enacted."[27] The state's highest court was not persuaded.

> As an abstract proposition we think there is little or no merit in the attack on the constitutional status of the act now under consideration. But even if we were inclined to think it somewhat vulnerable in that regard, the existence of other acts in pari materia, unchanged for a period of fifty years, should clearly turn the scale in favor of its support.[28]

Thus the *Percello* attack was rejected in 1924 without any serious consideration of its merits; the court relied mainly on the general acceptance of the status quo for half a century and did not entertain any serious doubts as to the propriety of the Camp

26. *McCran v. Ocean Grove*, 96 N.J.L. 158 (E.& A. 1921).
27. *Percello v. Ocean Grove Camp Meeting Assn.*, 2 N.J. Misc. at 125-6 (1924).
28. Ibid., pp. 126-127.

Meeting Association's maintaining sheltered enclaves of Methodist virtue for those who liked that sort of thing.

b. *Schaad v. Ocean Grove* (1977). Scarcely had another half-century gone by than someone else was challenging the benign rule of the Camp Meeting Association. One Robert Schaad purchased the Ocean Grove News Service in 1972 and pursued the business of delivering weekday and Sunday newspapers to the residents of Ocean Grove. Incident to that operation was the necessity of delivering five hundred copies of the *Asbury Park Sunday Press* and thirty-five copies of the Sunday *New York Times*. Since the former newspaper was not available for pickup until nearly midnight Saturday, vehicular deliveries of these papers were made in Ocean Grove between midnight and 2:30 Sunday morning. This practice had been followed by Mr. Schaad's predecessor for fifteen years, and he pursued it without incident until August 1974, when two residents of Ocean Grove registered a complaint that the Sunday ordinance was being violated. Apparently no effort had been made to enforce the ordinance against the early-morning delivery prior to that complaint. In fact, the business manager of Ocean Grove had written Schaad a letter in 1973 approving this arrangement. Subsequent to that letter, however, another ordinance was adopted prohibiting, among other things, "the selling or delivering of newspapers."

After the complaint had been filed against him, Schaad brought a counteraction challenging the validity of the ordinances and the enabling statutes as infringements of the freedom of the press, the prohibition against establishment of religion and the Due Process Clause of the Fourteenth Amendment. The trial court agreed with him on all three grounds, but stayed its judgment pending appeal on condition that the newspaper deliveries could continue as before until the appeal was settled. The Supreme Court of New Jersey heard the case in October 1975, remanded it for additional facts and reviewed it in April, 1976. *Amicus* briefs were submitted in support of Ocean Grove by the attorney general of the State of New Jersey, asserting the validity of its empowering legislation, and by the National Council of Churches defending the collective free exercise of religion by the Camp Meeting Association and the residents of Ocean Grove.

The Camp Meeting Association defended its position mainly by asserting that its aims and activities were in laudable contrast to the rest of the world: "Ocean Grove is an oasis of utter quiet on the Jersey shore every Sunday—a day of surcease from the offenses perpetrated on humanity by the noise and commotion of traffic."[29] It relied on the principle that acts of the legislature should not be held to violate due process unless clearly arbitrary or irrational. With respect to alleged violation of freedom of the press, the Association pointed out that newspapers were available on Sundays within a ten minute's walk from any point in Ocean Grove to newsstands in neighboring communities, and therefore any restriction on the distribution of news was negligible. With respect to an establishment of religion, the Association pointed out that the legislature, in allowing it to incorporate and to make rules and regulations for the management of its own internal affairs, was doing no more and no less than it

29. *Schaad v. Ocean Grove Camp Meeting Ass'n*, 370 A.2d 449 (N.J. 1977), brief for Defendants-Appellants, p. 6.

did for many other religious and nonprofit organizations without raising a question of "establishing" religion.

The Supreme Court of New Jersey concluded that the restriction on newspaper delivery was an infringement on freedom of the press, but limited this finding to the hours requested by Schaad, i.e., midnight to 2:30 on Sunday morning, and did not address the question whether prohibition of newspaper deliveries during the remainder of Sunday was unconstitutional. The court considered that the due process objection to the Ocean Grove regulation was "unnecessary and inappropriate" and set it aside. While recognizing that it could dispose of the establishment-of-religion challenge in the same way, it nevertheless chose to deal with it on its merits for two reasons: (1) it was the concern of three justices who dissented on that point from the court's holding, and (2) it was the subject of a decision by a county court since the pendency of the instant appeal in another case involving Ocean Grove, striking down the institution of a municipal court and police force in Ocean Grove as contrary to the Establishment Clause.[30] The court applied the three-pronged *Lemon* test:

> [1] Examined in the light of history of the birth and early development of Ocean Grove, it will be evident that the statutes [in question] had the "secular legislative purpose" of giving the governing body of the camp meeting association the authority to adopt regulations for the good order, proper physical development and general health and welfare of the new community. These purposes are not a whit less secular in nature than if they had been given to a conventional municipal governing body.... [2] The powers given, as will be observed, were the rudimentary police powers which any community had to be vouchsafed, especially a new one in an isolated area sprung up from unimproved lands in the 1870's, to prevent disorder, lay out streets, provide for sewage and other health facilities, regulate and license tradesmen, etc. None of these powers, as enumerated in the enabling legislation, had or have any effect toward advancing or inhibiting religion, much less a "principal or primary effect" in either of those directions.
>
> * * *
>
> There is no indication of any complaint by any resident at any time over the regulatory character of the community.
>
> * * *
>
> How the streets were to be laid out, how the sewers were to be created, how merchants were to be licensed, how order was to be maintained, were all of no consequence in a religious sense. The advancement of the religion of the residents... was a product of their mutual devotion to their beliefs, not a function of the kind of police powers the Legislature saw fit to repose in the board of trustees. What incidental benefit the camp meeting association derived therefrom in its religious aspect, if any was permissibly incidental to the secular purpose of the legislation.[31]

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30. *State v. Celmer*, 143 N.J. Super. 371 (1976), discussed next below.

31 *Schaad*, 370 A.2d at 460.

The court compared such provisions with the legislation under N.J. Title 16, "Corporations and Associations, Religious," as "regulating every aspect of the incorporation, governance and control of properties of religious organizations, and dealing separately with many specific churches by name," and said that it would be equally reasonable to suppose that those statutes constitute "a series of violations of the Establishment Clause because [they have] the purpose of advancing the interests of those churches."

> [3] So far as the discussion of the [Supreme Court's cases] affords any insight as to what is meant by "excessive entanglement," none appears to be present in the case at hand. No surveillance of any nature is required by the State in respect of the powers granted—certainly no administrative surveillance of any phase of its religious activities.... Nor has the grant of limited regulatory powers to camp meeting associations been attended by any degree of political "divisiveness" or "fragmentation" along political lines.... To the contrary, the administration of the community seems to have been attended at all times by general public acceptance, serenity, and even admiration by the people of the County of Monmouth and the State as a whole....
>
> We are, of course, not unaware that there may appear to be something anomalous in the vesting of even limited governmental powers in a private organization, whether religious or otherwise. But there have been analogous instances of it.
>
> * * *
>
> The presumption of validity of the camp meeting association legislation from a constitutional-religious standpoint, arising from long public acceptance and acquiescence therein,...warrants the invocation of the strong presumption of its validity in the respect here debated.[32]

The court quoted the material from *Percello* reproduced above relying upon fifty years' acceptance of the status quo and added that "the passage of yet another 50 years without challenge" doubles the cogency of the presumption of validity. The court added a kind of "grandfather" reservation.

> There is no apparent likelihood that the occasion for further such legislation, or for the application of existing legislation to new camp meeting associations, will arise in the future. This association and community are practically unique in today's society, and the case before us is truly sui generis.... [V]iewed sensibly and realistically, the government of this community presents no threat whatsoever to the constitutional and salutary principle of government abstention from sponsorship or support of religion.[33]

32. Ibid. at 464–65.

33. Ibid. at 466.

Not all of the justices were persuaded by the majority opinion. Justice Mark Sullivan concurred in the result only (allowing Mr. Schaad to deliver papers early on Sunday morning), but contended that the Ocean Grove arrangement was an establishment of religion.

> Camp meeting associations exist for the purpose of providing religious bodies or societies with camp meeting grounds or places for religious services. The statute[s] in question...confer on a Camp Meeting Association the power... to enact ordinances and impose penalties for violations thereof, to establish municipal courts,...to have licensing and regulatory power..., to plan for sewerage and drainage facilities and impose assessments for such improvements, which...become liens on the lands affected.... Its peace officers not only have the power, on camp grounds, to enforce association rules...,but also can arrest for the commission of any crime in all respects....
>
> Camp meeting associations also are constituted fire districts, the duly elected commissioners of which are empowered to issue bonds to finance the acquisition of lands, buildings and equipment for fire fighting purposes. The amount of money needed for fire appropriations or to pay bonds in the district is certified to the appropriate tax assessor for collection as taxes....
>
> That such legislation runs afoul of the establishment clause is clear to me.... Broad governmental powers such as are here involved, can be vested in and exercised only by lawfully constituted governmental bodies, not in or by religious organizations. I would, therefore, invalidate the legislation on this ground....
>
> A striking down of the present statutory scheme would not necessarily mean that Ocean Grove and the way of life it represents must come to an end. Geographically it is a part of Neptune Township[,] which presently exercises limited governmental power over the camp meeting grounds. That Township, in assuming full jurisdiction over the Ocean Grove area, could properly give recognition to Ocean Grove's unique physical characteristics and its historical site status. I would think that much of the secular customs, traditions and practices which endear the Ocean Grove way of life to so many could be preserved.[34]

Somehow, the prospect of Neptune Township evincing much solicitude for the "secular customs, traditions and practices" of Ocean Grove does not inspire great confidence.

Justice Morris Pashman was even less enthusiastic about the majority's carefully tailored preservation of the *status quo*.

> I concur in the Court's judgment to the limited extent that it permits the plaintiff to deliver newspapers for two and one-half hours on Sunday mornings.... By restricting its holding to the plaintiff's right to deliver

34. Ibid. at 468 (Sullivan, J., concurring in result).

newspapers before 2:30 a.m. on Sundays, the Court fails to fully vindicate his free speech and free press rights.... More importantly, the Court strips the establishment clause of all meaning by sanctioning the public role of the Association's trustees and approving Ocean Grove's existing form of government....

[T]he majority's constricted view of the plaintiff's [free-press] claim suggests that these ordinances may be used...to prohibit deliveries...at other times.... I cannot agree with the notion that plaintiff's right to sell or deliver newspapers wanes as the day progresses.

* * *

Because I consider any exercise of public powers by Ocean Grove's governing body to be invalid under the establishment clause..., I would vote to strike down all of its ordinances in their entirety.... In my view, there are few cases that could present a more flagrant and glaring violation of the establishment clause than is posed by this set of facts.... The First Amendment...and [the ban on religious tests for public office]... [a]t the very least...mean that religious affiliation cannot be a prerequisite to holding public office or exercising governmental powers. Furthermore, I fail to see how they do not preclude the enactment and enforcement, by a religious body, of municipal ordinances which promote that group's sectarian beliefs.

* * *

Apparently, the trustees [of Ocean Grove] have performed creditably over the last century in governing the campground. Ocean Grove now has the distinction of being enrolled in the National Register of Historic Places and, we are told, has earned the admiration of other citizens and public officials. However, these considerations are utterly irrelevant to the constitutionality of [the statutes authorizing their powers]. The question is not whether Ocean Grove's "way of life" deserves our approval or support; indeed, no one maintains that there is a necessary connection between Ocean Grove's form of government and its distinctive customs. Rather, the issue before us is the legitimacy of ceding all essential governmental functions to a private, self-perpetuating religious group whose primary purpose is to provide a site for religious services.

* * *

As presently operated, Ocean Grove's government violates the First Amendment by attaching a religious test to public office and by pursuing religiously-inspired policies. However, more important, its structure inevitably places the authority of the State behind the tenets of a particular sect by delegating the prerogatives of government to the trustees.

* * *

I am afraid that the majority's myopic search for the subtle violation of the establishment clause has resulted in its overlooking the obvious flaw. Here the legislative enactment not only tends to encourage religion but also effectively institutes a church or creed as the official faith of Ocean Grove... and hence allows the municipality to use governmental power to order the

> lives of its inhabitants in conformity with the orthodoxy of its religious tenets.[35]

Justice Sidney M. Schreiber joined in Pashman's opinion. But Sullivan, Pashman and Schreiber were not enough to carry the day, and the other four justices prevailed. Ironically, within two years the tables were turned, and Justice Pashman wrote a decision about Ocean Grove that reversed *Schaad*, *Percello* and *McCran*.

c. *State v. Celmer* (1979). The case referred to in the majority opinion in *Schaad* as having arisen since it went on appeal in two years' time eclipsed *Schaad* and its predecessors. The defendant in that case, Louis J. Celmer, Jr., was arrested on March 24, 1976, by officers of the Ocean Grove Police Department and charged with driving while under the influence of alcohol, speeding and disregard of a traffic signal. He was convicted of all three offenses at trial in the Ocean Grove Municipal Court, and he appealed the convictions to the Monmouth County Court, which tried the case *de novo* based upon the record below and found Celmer guilty on all three charges. However, Celmer contended that the statute authorizing the formation of a Municipal Court in Ocean Grove was invalid as an establishment of religion. The County Court agreed, and held that, since the Ocean Grove municipal court was without jurisdiction to determine the defendant's guilt, the defendant's conviction was reversed, and he was acquitted!

The State of New Jersey appealed the case in defense of the invalidated statute, and the Ocean Grove Camp Meeting Association requested and was granted permission to intervene. The Appellate Division reversed the County Court and reinstated the drunk driving conviction. The Supreme Court of New Jersey certified the case and reversed the Appellate Division in an opinion written by Justice Pashman for a unanimous court. After reviewing some of the history encountered in *Schaad*, he added a few further particulars. The charter purpose of the Ocean Grove Camp Meeting Association was to "provide and maintain for the members and friends of The United Methodist Church, a proper, convenient and desirable permanent camp meeting ground and Christian seaside resort."[36]

> The by-laws also establish a governmental apparatus in order to manage the internal affairs of the community. As presently constituted, legislative and executive powers within the Association are reposed in a 26 member Board of Trustees. At least ten of these trustees must be ministers and ten, laymen. All, however, are required to "be and remain members of The United Methodist Church in good and regular standing...." This Board is self-perpetuating in that the trustees themselves select their replacements and successors. Moreover, only the trustees can revise or amend the by-laws, and hence only they can alter the manner in which the present government is structured.
>
> * * *

35 *Id*. at 477–78 (Pashman, J., concurring in result).

36. *State v. Celmer*, 404 A.2d 1 (1979), quoting Association By-Laws, Article III.

> Defendant contends that the statutory scheme...is violative of the First Amendment in that it cedes to a religious organization several governmental powers, including the power to make laws and the power to establish a municipal court in order to enforce compliance with those laws. Consequently, he maintains that The Ocean Grove Municipal Court—being established by a Board ordinance—is an improperly constituted tribunal and hence without jurisdiction to determine his guilt or innocence of the charged offenses.
>
> * * *
>
> [T]here can be no question but that at a minimum [the First Amendment] precludes a state from ceding governmental powers to a religious organization.... As detailed [above], The Ocean Grove Camp Meeting Association of The United Methodist Church is first and foremost a religious organization.... Through the enactment of [its statutes on camp meeting associations], the Legislature has in effect transformed this religious organization into Ocean Grove's civil government. Methodist ministers and laymen have been granted responsibility for the construction and maintenance of public streets, walks, parks, and sewers.... They have been delegated the power to make laws applicable to all who might find themselves situated within the boundaries of the Camp Meeting grounds, to provide penalties for the violation of these laws, and to establish both a police department and a municipal court in order to secure compliance with those laws....
>
> In effect, the Legislature has decreed that in Ocean Grove the Church shall be the State and the State shall be the Church. Individuals chosen by the followers of a particular faith to safeguard their spiritual and cultural way of life have been accorded the authority to determine what shall constitute acceptable modes of conduct for Methodists and non-Methodists alike. Government and religion are so inextricably intertwined as to be inseparable from one another. Such a fusion of secular and ecclesiastical power not only violates both the letter and spirit of the First Amendment, it also runs afoul of the "establishment clause" of our own State constitution....
>
> Other constitutional infirmities are also manifest in the system of "government" presently existing in Ocean Grove. Article I...of the New Jersey constitution prohibits the State from imposing a "religious...test...as a qualification for any office or public trust...." The "free exercise" clause of the First Amendment has been interpreted to likewise forbid a state to condition public office upon an individual's religious beliefs. See Torcaso v. Watkins....37 [Here,] however, the Legislature has ordained that non-Methodists cannot participate in governmental decisions relating to the management of Ocean Grove's secular affairs.
>
> For the foregoing reasons, [the statutes in question are] hereby declared unconstitutional and of no force and effect. The Ocean Grove Camp Meeting Association of The United Methodist Church can be

37. 367 U.S. 488 (1961), discussed in preceding section.

> delegated neither the power to manage public highways or other public property, the power to make laws, nor the power to enforce Board rules through establishment of a police department and municipal court. These functions must henceforth be exercised by the governing body of Neptune Township, of which Ocean Grove forms a part.
>
> To the extent that Schaad v. Ocean Grove..., Percello v. Ocean Grove..., and McCran v. Ocean Grove... are inconsistent with the foregoing, they are hereby overruled.
>
> The "municipal court" which initially tried and convicted defendant was established by an "ordinance" adopted by the Association's Board of Trustees on April 17, 1964. Its magistrate was appointed by this same Board. Consequently, that "court" is an improperly constituted tribunal and hence possessed of no jurisdiction to determine defendant's guilt or innocence....
>
> * * *
>
> Defendant has already been tried once for his alleged offenses—albeit before an improperly constituted tribunal. He has thus been made to suffer...the "embarrassment, expense and anxiety...encountered by those faced with criminal prosecutions." More than three years have elapsed since the conduct which formed the basis of the charges against him was allegedly engaged in. It is therefore not unlikely that his ability to muster a defense has diminished. Finally, it is the State who, through enactment of [the voided statutes] created the situation in which the improper tribunal could be established. Under these circumstances, "a rerun at the trial level would result in unwarranted harassment and should be avoided."[38]

Thus, the court concluded, Mr. Celmer had "suffered enough" (to use the words that President Gerald Ford applied to former President Richard Nixon in granting him a general pardon). As for Ocean Grove, the court threw it a sop of consolation.

> In closing, we wish to emphasize that our holding today should not be read as impugning the integrity of either the Association's Board of Trustees or the way of life it has sought to institutionalize in Ocean Grove. We have no doubt that the Board has worked long and hard to establish rules which it earnestly feels will best secure peace, happiness, and tranquility for the community's inhabitants. The administration of the camp grounds has earned the admiration of many citizens and public officials. Indeed, Ocean Grove is now enrolled in The National Registry of Historic Places. This way of life need not be abandoned on account of today's decision. The Association may continue to adopt rules which it deems necessary to protect Ocean Grove's unique cultural and spiritual characteristics. The inhabitants of Ocean Grove—and indeed all others who so choose—remain free to voluntarily abide by those rules. The Board, however, cannot exercise essential government functions, make law or force compliance with its rules through the establishment of a

38. *State v. Celmer*, *supra.*

> municipal court and police department. These are functions which can be exercised only by the people as a whole....[39]

d. Some Reflections on Ocean Grove. And so fell some well-intended statutory barriers designed to protect the peculiar way of life cherished by a particular gathering of believers who sought to erect a spiritual enclave where life could be lived collectively more as they thought it ought to be. That was a common mode of thinking and acting in the mid-nineteenth century, and not just among religious folk. Beginning in 1825, some fourteen collectivist colonies were formed by the followers of protosocialist Robert Owen; about 1843 some twenty-seven "phalanxes" came into being to put into practice the social teachings of Charles Fourier. Brook Farm, established in 1841 near West Roxbury, Massachusetts, to embody the ideals of cooperation as the basis of community, attracted the likes of Nathaniel Hawthorne, Charles Dana, Ralph Waldo Emerson, Amos Alcott, Theodore Parker and Margaret Fuller. It became a Fourierist Phalanx in 1843, but when the main building burned down in 1846, the colony gradually fell apart. Religious colonies included the Shakers, whose settlements dated from before the American Revolution and continued down almost to the present, the Amana villages in Iowa in 1855, the Oneida Community in upstate New York beginning in 1845 and many others.

Ocean Grove represented a much more conventional kind of "utopia," in that no attempt was made to weld the adherents into a collectivist colony. In that respect it was much more like any other village, where the inhabitants pursued their own economic courses and shared only the community's religious programming—and a strict observance of the Lord's Day. In this respect, it resembled the more famous Chautauqua Institution in Western New York, which was organized in 1874, four years after Ocean Grove, by another group of Methodists, to advance the education of Sunday school teachers, but by the turn of the century had become more cultural than religious in its orientation, with a full-scale symphony orchestra in residence all summer, regular opera performances and a repertory theater company. Ocean Grove, too, aspired to ascendancy in the arts, with performances by the leading celebrities of the day, Enrico Caruso, Walter Damrosch, Mme. Ernestine Schumann-Heink, Fritz Kreisler, Mme. Amelita Galli-Curci, Mischa Elman and many others. Outstanding speakers graced its platform, including Presidents Grant, Garfield, McKinley, T. Roosevelt, Taft and Wilson.

But the main *raison d'etre* of Ocean Grove as a year-round community, unlike Chautauqua, was its religious ethos, epitomized by the "pure joy" of the tranquil Sunday devoid of vehicular traffic and worldly amusements and occupations. Such a Sunday observance is not necessarily a boon to most people—including most Methodists—but for those who find that way of life uplifting there should be room somewhere in the United States for them to have it if they want. And it is not something that can be brought about in the midst of a cosmopolitan community, since the desire for tranquility of hundreds of quiet people can be shattered by one teenager with a boom-box blasting punk-rock music at full volume. It does require a

39. Ibid.

certain measure of geographic homogeneity, which perhaps is not most easily achieved at the New Jersey seashore.

But it is significant that the objections to the secular rule of the Camp Meeting Association did not come from the residents of Ocean Grove but from outside the community, from a businessman who wanted to deliver newspapers there and from a drunken driver who ran a red light while speeding through town. In the case of the newspaper deliverer, there were no complainants from within the precincts of Ocean Grove demanding the First Amendment right to have access to the Sunday *Times*. (In fact, the complainants in Ocean Grove urged the opposite.) Mr. Schaad was allowed to assert their rights for them, though without any evidence that they wanted those rights asserted. "Freedom of the press" was invoked as justification for delivering newspapers on Sunday morning as against the rules of the property owner, the Camp Meeting Association. The judicial minority in *Schaad* would even have granted the right to deliver newspapers at any time on Sunday in the name of "freedom of the press." It would seem as cogent to contend that the collective rights to the *free exercise of religion* on the part of the property owner and the residents should have carried at least as much weight as the abstract freedom-of-the-press claims of an outsider.

Owning all the property on which a community is built does not give the owner the right to prohibit the interchange of communications there that would be normal to a civilian community, as the Supreme Court asserted in the case of a "company" town (*Marsh v. Alabama*[40]). But when the residents as well as the property owner have expressed a desire to be left alone on one day of the week, that would seem to be a reasonable regulation of "time, place and manner" even on the freedom of the press. As the Supreme Court has also observed, every member of a community can "protect himself from...intrusion [by a distributor of pamphlets] by an appropriate sign that he is unwilling to be disturbed,"[41] and can even refuse to receive objectionable mail: "[T]he right of every person `to be let alone' must be placed in the scales with the right of others to communicate.... The court has traditionally respected the right of a householder to bar, by order or notice, solicitors."[42]

The question could be posed whether a community as a whole can collectively post notice that it does not wish to be disturbed by solicitors, vendors or deliverers of *anything* on one day in seven. Apparently not, at least if the notice is posted by a property owner purporting to represent the community and acting as a surrogate municipality. That was the issue that determined the status of Ocean Grove in *State v. Celmer*, and probably rightly—though it was no excuse for letting off the drunken driver. A *religious* society—in which membership is by necessity *selective* (see discussion of the crucial "power of the gate" to determine the terms and conditions of membership[43]) cannot also be a *civic* entity exercising governmental powers over the residents of a given geographical area, who cannot be chosen selectively on the basis

40. 326 U.S. 501 (1949), discussed at IIA2k.

41. *Kovacs v. Cooper*, 336 U.S. 77 (1948).

42. *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970).

43. See discussion at IC1.

of race,[44] religion or other "suspect classifications." This conflict in functions was explored by the U.S. Supreme Court in a more recent case.

4. *Larkin v. Grendel's Den* (1982)

In the same year that *Schaad v. Ocean Grove* was decided, but in another part of the forest, there was a restaurant in the Harvard Square area of Cambridge, Massachusetts, named "Grendel's Den" that applied for a liquor license. But, alas, its rear wall was only ten feet from the rear wall of the Holy Cross Armenian Catholic Church, and there was in Massachusetts a law that said "Premises... located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages *if the governing body of such church or school files written objection thereto*." Holy Cross Church entered an objection to "having so many licenses *so* near" (there being already *twenty-five* liquor licenses in effect in Harvard Square within five hundred feet of the church!). The restaurant owner was denied a liquor license for this reason (only), and he challenged the constitutionality of the law in federal court, being represented throughout this litigation by Laurence H. Tribe of the Harvard Law School, author of *American Constitutional Law*.

The federal district court held that the law violated the Establishment Clause of the First Amendment, and the First Circuit Court of Appeals sitting *en banc*, in a divided opinion, affirmed the district court's ruling on this issue. The U.S. Supreme Court noted probable jurisdiction, and delivered an opinion December 13, 1982, written by Chief Justice Warren Burger.

The Commonwealth of Massachusetts contended that it was entitled to enforce a "zoning" law designed to "shield schools and places of divine worship from the presence of nearby liquor-dispensing establishments," since such a "zone of protection around churches and schools is essential to protect diverse centers of spiritual, educational and cultural enrichment."[45] But the Court did not consider appropriate the means chosen to achieve this end.

> Plainly schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws....
>
> However, [the Massachusetts statute] is not simply a legislative exercise of zoning power. As the Massachusetts Supreme Judicial Court concluded, [it] delegates to private, nongovernmental entities power to veto certain liquor license applications.... This is a power ordinarily vested in agencies of government.... Under [the] circumstances [of this case], the deference normally due a legislative zoning judgment is not merited.

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44. Cf. *Jones v. Mayer*, 392 U.S. 409 (1968).

45. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), Chief Justice Burger's characterization of the Commonwealth's view.

> The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other 18th-century systems. Religion and government, each insulated from the other, could then coexist. Jefferson's idea of a "wall"...was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society..., but the concept of a "wall" of separation is a useful signpost. Here that "wall" is substantially breached by vesting discretionary governmental powers in religious bodies....
>
> * * *
>
> There can be little doubt that [the law] embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means—either through an absolute legislative ban on liquor outlets within reasonable prescribed distances from churches, schools, hospitals, and like institutions, or by ensuring a hearing for the views of affected institutions at licensing proceedings where, without question, such views would be entitled to substantial weight.

The Court noted in the margin at this point that the Massachusetts statute originally imposed an absolute ban on liquor licenses within five hundred feet of a church or school, but was later amended to give those institutions a discretionary veto power, that twenty-seven states have such explicit bans, and that eleven states direct "the licensing authority to consider the proximity of the proposed liquor outlet to schools or other institutions in deciding whether to grant a...license."[46]

> [The statute] gives churches the right to determine whether a particular applicant will be granted a liquor license, or even which one of several competing applicants will receive a license.
>
> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith. We can assume that churches would act in good faith in their exercise of the statutory power..., yet [the statute] does not by its terms require that churches' power be used in a religiously neutral way. "[T]he potential for conflict inheres in the situation...." In addition, the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can

46. Ibid., nn. 7 and 8.

> be seen as having a "primary" and "principal" effect of advancing religion....
>
> * * *
>
> This statute [also] enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." Lemon v. Kurtzman....
>
> * * *
>
> The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.
>
> [The statute] substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines." Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.[47]

The Chief Justice was joined in this opinion by Justices William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, John Paul Stevens and Sandra Day O'Connor. Only Justice William Rehnquist dissented.

> Dissenting opinions in previous cases have commented that "great" cases, like "hard" cases, make bad law.... Today's opinion suggests that a third class of cases—silly cases—also make bad law. The Court wrenches from the decision of the Massachusetts Supreme Judicial Court [in another case] the word "veto," and rests its conclusion on this single term. The aim of this effort is to prove that a quite sensible Massachusetts liquor zoning law is apparently some sort of sinister religious attack on secular government reminiscent of St. Bartholomew's Night. Being unpersuaded, I dissent.
>
> In its original form, [the statute] imposed a flat ban on the grant of an alcoholic beverage license to any establishment located within 500 feet of a church or school.... This statute represented a legislative determination that worship and liquor sales are generally not compatible uses of land....
>
> Over time, the legislature found that it could meet its goal of protecting people engaged in religious activities from liquor-related disruption with a less absolute prohibition. Rather than set out elaborate formulae or require an administrative agency to make findings of fact, the legislature settled on the simple expedient of asking churches to object if a proposed liquor outlet would disturb them.... The flat ban,

47. *Larkin v. Grendel's Den, supra.*

which the majority concedes is valid, is more protective of churches and more restrictive of liquor sales than the present [statute].

The evolving treatment of the grant of liquor licenses...seems to me to be the sort of legislative refinement that we should encourage, not forbid in the name of the First Amendment. If a particular church...located within the 500-foot radius chooses not to object, the State has quite sensibly concluded that there is no reason to prohibit the issuance of the license. Nothing in the Court's opinion persuades me why the more rigid prohibition would be constitutional, but the more flexible not.

* * *

[B]y its frequent reference to the statutory provision as a "veto," the Court indicates a belief that [this statute] effectively constitutes churches as third house of the Massachusetts legislature.... Surely we do not need a three-part test to decide whether the grant of actual legislative power to churches is within the proscription of the Establishment Clause.... The question in this case is not whether such a statute would be unconstitutional, but whether [this Massachusetts law] is such a statute. The Court in effect answers this question in the first sentence of its opinion without any discussion or statement of reasons. I do not think the question is so trivial that it may be answered by simply affixing a label to the statutory provision.

[The statute in question] does not sponsor or subsidize any religious group or activity. It does not encourage, much less compel, anyone to participate in religious activities or to support religious institutions. To say that it "advances" religion is to strain at the meaning of that word.

The Court states that [the statute] "advances" religion because there is no guarantee that objections will be made "in a religiously neutral way." It is difficult to understand what the Court means by this. The concededly legitimate purpose of the statute is to protect citizens engaging in religious and educational activities from the incompatible activities of liquor outlets and their patrons. The only way to decide whether these activities are incompatible with one another in the case of a church is to ask whether the activities of liquor outlets and their patrons may interfere with religious activity; this question cannot, in any meaningful sense, be "religiously neutral...." [I]t is not "religiously neutral" so long as it enables a church to defeat the issuance of a liquor license when a similarly situated bank could not do the same. The State does not, in my opinion, "advance" religion by making provision for those who wish to engage in religious activities... to be unmolested by activities at a neighboring bar or tavern that have historically been thought incompatible.

The Court is apparently concerned for fear that churches might object to the issuance of a license for "explicitly religious reasons," such as "favoring liquor licenses for members of that congregation or adherents of that faith...." If a church were to seek to advance the interests of its members in this way, there would be an occasion to determine whether it had violated any right of an unsuccessful applicant for a liquor license. But our ability to discern a risk of such abuse does not render [the

> statute] violative of the Establishment Clause. The State can constitutionally protect churches from liquor for the same reasons it can protect them from fire..., noise..., and other harm.
>
> The heavy First Amendment artillery that the Court fires at this sensible and unobjectionable Massachusetts statute is both unnecessary and unavailing.[48]

The "artillery" was not "unavailing" as long as it commanded the support of eight justices of the Supreme Court. Not only did Grendel's Den get its liquor license, but Massachusetts had to enact a statute to replace the one struck down in this decision as unconstitutional. *Larkin v. Grendel's Den* thus stands for the proposition that the *exercise of government power may not be delegated to a church*. Even Justice Rehnquist did not disagree with that proposition; he just did not think the statute in question did delegate such powers to churches.

Larkin v. Grendel's Den did not mean that states could not protect churches from the proximity of liquor outlets, only that they could not give churches the discretionary choice whether a given application for a liquor license within the statutory distance should be denied. That does not seem an unreasonable conclusion, Justice Rehnquist to the contrary notwithstanding, though his characterization of the particular statute was not unreasonable either. In a clearer case of delegation of governmental power to a church, or its abuse of such limited powers as the Massachusetts statute provided, he would probably have agreed with the majority's view.

The principle of *Larkin v. Grendel's Den* may have played a crucial role in determining the constitutionality of the taking over of the prairie village of Antelope, Oregon, by the followers of Baghwan Rajneesh and its being renamed Rajneeshpuram and governed by the religious organization led by that guru, had it not collapsed and the inhabitants dispersed in 1985.

An interesting sidelight of this case was the refusal of Massachusetts Attorney General Francis X. Bellotti to pay the attorney's fee billed to the state by Tribe, counsel for the prevailing party. The attorney general said that the amount was outrageous, but counsel for Tribe maintained that it was proportionate to the time spent, the fee schedule usually charged by the professor and the importance of the case.

5. *Thornton v. Caldor* (1986)

A similar consideration moved the Supreme Court in 1985 to strike down a statutory protection for religion in Connecticut. When its Sunday closing law was held unconstitutionally vague by a state court in 1976, the Connecticut Legislature revised the statute to permit some categories of businesses to operate on Sunday. But to protect the religious interests of employees of such stores, the legislature guaranteed employees the right not to work on the Sabbath of their particular religious faith. They had but to declare their preference, and the employer was

48. Ibid., Rehnquist dissent.

required to excuse them on the day they selected irrespective of any other considerations.

The U.S. Supreme Court, in an opinion by Chief Justice Burger, held the statute unconstitutional as a violation of the Establishment Clause:

> In essence, the Connecticut statute imposes on employers and [other] employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or the interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.
>
> * * *
>
> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:
>
> > "The First Amendment...gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities," Otten v. Baltimore & Ohio R. Co. (CA2, 1953).[49]
>
> As such, the statute goes beyond having an incidental or remote effect of advancing religion.... [It] has a primary effect that impermissibly advances a particular religious practice.[50]

In this instance, the fault was not in attempting to protect the free exercise of religious duty by individual employees but in *over*protecting religion at the expense of all other considerations, giving each and every employee a state-enforced "veto power" to compel the employer and other employees to conform to the expressed religious preference. There is no reason to think that a more nuanced statute which permitted an accommodation to be negotiated among the several interests involved, secular and religious, might not have passed the Court's constitutional scrutiny; in fact two concurring justices implied as much.

6. *McDaniel v. Paty* (1978)

One of the more transparent efforts ostensibly to "protect" religion from the rigors of secular life has been the statutory disqualification of clergy from candidacy for public office.[51] A typical provision was that of Tennessee, couched in terms of solicitude for the undistracted practice of religion.

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49. 205 F.2d 58 (1953), discussed at IVA10a.

50. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), discussed at IVA7h.

51. See discussion at IIE4k.

> Whereas Ministers of the Gospel are by their very profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.[52]

This was a classic example of paternalism, of making decisions for someone else that only that person should be in a position to make. If states don't want clergy messing in legislative affairs, that would be a straightforward basis for such disqualification, but to pretend that it is to protect the clergy from the distraction of civic responsibility is to preempt a decision that the clergy should make for themselves (or their congregation or hierarchy should make, as the pope did recently in requiring Father Robert F. Drinan, S.J., to resign from membership in the U.S. Congress). It is possible that some of the clergy might be attracted to public office to the neglect of their "spiritual" or ecclesiastical duties, but the state's solicitude is misplaced; it is none of the state's affair.

Eventually most of the states dropped their prohibitions, the last two being Maryland, whose bar against clergy in public office was struck down by the courts as unconstitutional in 1974,[53] and Tennessee, whose restriction (quoted above) came before the U.S. Supreme Court in a challenge brought by one Selma Cash Paty against McDaniel, an ordained minister of a Baptist church in Chattanooga. Both were candidates for the position of delegate to a state constitutional convention, to which the legislature in 1976 had applied the same criteria as for election to the state legislature. Paty thus claimed that McDaniel was ineligible for the position they were both seeking. The Chancery Court held that the law was invalid under the federal First and Fourteenth Amendments, and McDaniel was elected by almost as many votes as his three rivals combined. But the Supreme Court of Tennessee reversed, holding the restriction to be constitutional as a safeguard against the establishment of religion that might result from clergy participation in the law-making process.

Chief Justice Burger announced the decision of the U.S. Supreme Court and delivered an opinion in which he was joined by Justices Powell, Rehnquist and Stevens.

> The disqualification of ministers from legislative office was a practice carried from England by seven of the original states; later six new states similarly excluded clergymen from some political offices.... In England the practice of excluding clergy from the House of Commons was justified on a variety of grounds [including]...to insure that the priest or deacon devoted himself to his "sacred calling" rather than to "such mundane activities as were appropriate to a member of the House of Commons...." Earlier, John Locke argued for confining the authority of the English clergy "within the bounds of the church, nor can it in any manner be extended to civil affairs; because the church itself is a thing

52. Tenn. Const. of 1796, Art. VIII, § 1.

53. *Kirkley v. Maryland*, 381 F. Supp. 377 (1974).

absolutely separate and distinct from the commonwealth...." Thomas Jefferson initially advocated such a position in his 1783 draft of a constitution for Virginia.[54] James Madison, however, disagreed and vigorously urged the position which in our view accurately reflects the spirit and purpose of the Religion Clauses of the First Amendment....

> "Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate another article of the plan itself which exempts religion from the cognizance of civil power? does it not violate justice by at once taking away a right and prohibiting a compensation for it? does it not in fine violate impartiality by shutting the door against the Ministers of one Religion and leaving it open for those of every other?..."

Madison was not the only articulate opponent of clergy disqualification. When proposals were made earlier to prevent clergymen from holding public office, John Witherspoon, a Presbyterian minister, president of Princeton University, and the only clergyman to sign the Declaration of Independence, made a cogent protest and, with tongue in cheek, offered an amendment to a provision much like that challenged here:

> "No clergyman, of any denomination, shall be capable of being elected a member of the Senate or House of Representatives, because (here insert the grounds of offensive disqualification, which I have not been able to discover). Provided always, and it is the true intent and meaning of this part of the constitution, that if at any time he shall be completely deprived of the clerical character by those by whom he was invested with it, as by deposition for cursing and swearing, drunkenness or uncleanness, he shall then be restored to all the privileges of a free citizen; his offense [of being a clergyman] shall no more be remembered against him; but he may be chosen either to the Senate or House of Representatives, and shall be treated with all the respect due to his brethren, the other members of Assembly."

* * *

The essence of this aspect of our national history is that in all but a few states the selection or rejection of clergymen for public office soon came to be viewed as something safely left to the good sense and desires of the people.

* * *

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54. [footnote to Burger opinion:] Jefferson later concluded that experience demonstrated that there was no need to exclude clergy from elected office. In a letter to Jeremiah Moore in 1800 he stated...

> "The clergy, by getting themselves established by law, and ingrafted into the machine of government, have been a formidable engine against the civil and religious rights of man. They are still so in many countries, and even in some of the U.S. Even in 1783 we doubted the stability of our recent measure for reducing them to the footing of other useful callings. It now appears that our means were effectual. The clergy here seem to have relinquished all pretensions of privilege, and to stand on a footing with lawyers, physicians, etc. They ought, therefore, to possess the same right."

[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other religious functions, or, in other words, to be a minister of the type McDaniel was found to be.... Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention.... Yet under the clergy disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right...." In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion....

If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically forbids government from regulating, prohibiting or rewarding religious beliefs as such.... [But] the Tennessee disqualification operates against McDaniel because of his status as a "minister" or "priest...." And although the question has not been examined extensively in state law sources, such authority as is available indicates that ministerial status is defined in terms of conduct and activity rather than in terms of belief. Because the Tennessee disqualification is directed primarily at status, acts and conduct it is unlike the requirement in Torcaso,[55] which focused on belief. Hence, the Free Exercise Clause's absolute prohibition of infringements on "freedom to believe" is inapposite here.

This does not mean, of course, that the disqualification escapes judicial scrutiny or that McDaniel's activity does not enjoy significant First Amendment protection. The Court recently declared in Wisconsin v. Yoder...

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Tennessee asserts that its interest in preventing the establishment of a state religion is consistent with the Establishment Clause and thus of the highest order.... There is no occasion to inquire whether promoting such an interest is a permissible legislative goal, however,...for Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed. The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another thus pitting one against the others, contrary to the antiestablishment principle with its command of neutrality.... However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that

55. 367 U.S. 488 (1961), discussed in § 2 above.

> clergymen in public office will be less careful of antiestablishment interests or less faithful to their oaths of civil office than their unordained counterparts.
>
> We hold that [the Tennessee restriction] violates McDaniel's First Amendment right to the free exercise of his religion made applicable to the States by the Fourteenth Amendment.[56]

A second opinion was filed by Justice Brennan, joined by Justice Marshall, concurring (only) in the judgment, contending that the Tennessee restriction violated the Establishment Clause as well as the Free Exercise Clause.

> In reaching [its] conclusion, the state court relied on two interrelated propositions which are inconsistent with the decisions of this Court. The first is that a distinction may be made between "religious belief or religious action" on the one hand, and the "career or calling" of the ministry on the other. The [state] court stated that "[i]t is not religious belief, but the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies...." The second is that the disqualification provision does not interfere with the free exercise of religion because the practice of the ministry is left unimpaired; only candidacy for legislative office is proscribed.
>
> The characterization of the exclusion as one burdening appellant's "career or calling" and not religious belief cannot withstand analysis. Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief,[57] even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.
>
> Whether or not the provision discriminates among religions (and I accept for purposes of discussion the State Supreme Court's construction that it does not...), it established a religious classification—involvement in protected religious activity— governing the eligibility for office which I believe is absolutely prohibited. The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualified Catholics, or Jews,

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56. *McDaniel v. Paty*, 435 U.S. 618 (1978).

57. [footnote 2:] That for purposes of defining the protection afforded by the Free Exercise Clause a sharp distinction cannot be made between religious belief and religiously motivated action is demonstrated by Oliver Cromwell's directive regarding religious liberty to the Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted."

or Protestants. Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, Torcaso v. Watkins...compels the conclusion that it violates the Free Exercise Clause. Torcaso struck down Maryland's requirement that an appointee to the office of Notary Public declare his belief in the existence of God, expressly disavowing "the historically and constitutionally discredited policy of probing religious beliefs by test oath or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept...."58 That principle equally condemns the religious qualification for elective office imposed by Tennessee.

The second proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is also squarely rejected by precedent. In Sherbert v. Verner..., a state statute disqualifying from unemployment compensation benefits persons unwilling to work on Saturdays was held to violate the Free Exercise Clause as applied to a Sabbatarian whose religious faith forbade Saturday work. The decision turned upon the fact that "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship...."59 Similarly, in "prohibiting legislative service because of a person's leadership role in a religious faith...," Tennessee's disqualification provision imposed an unconstitutional penalty upon appellant's exercise of his religious faith.... [In] Torcaso...we held that "[t]he fact...that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution...."

The opinion of the Tennessee Supreme Court makes clear that the statute requires appellant's disqualification solely because he is a minister of a religious faith. If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forego an opportunity for political participation he otherwise would enjoy. Sherbert and Torcaso compel the conclusion that because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion.

* * *

The State Supreme Court's justification of the prohibition...as intended to prevent those most intensely involved in religion from injecting sectarian goals and policies into the lawmaking process, and thus to avoid fomenting religious strife or the fusing of church with state affairs,

58. 367 U.S. 488 (1961), discussed at § 2 above.

59. 374 U.S. 398 (1963), discussed at IVA7c.

itself raises the question whether the exclusion violates the Establishment Clause. As construed, the exclusion manifests patent hostility toward, not neutrality in respect of, religion, forces or influences a minister or priest to abandon his ministry as the price of public office, and in sum, has a primary effect which inhibits religion....

* * *

Tennessee...invokes the Establishment Clause to excuse the imposition of a civil disability upon those deemed to be deeply involved in religion. In my view, that Clause will not permit much less excuse or condone the deprivation of religious liberty here involved.

* * *

That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection.... The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association and political participation generally....

The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.... Government may not inquire into the religious beliefs and motivations of officeholders—it may not remove them from office merely for making public statements regarding religion nor question whether their legislative actions stem from religious conviction....

In short, government may not as a goal promote "safe-thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association and political activity generally [emphasis added]. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here.... It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.60

Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes. These prohibitions naturally tend, as they were designed to, to avoid channelling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their

60. At this point Justice Brennan quoted Tribe, *American Constitutional Law*, on the role of religious groups in attempting to influence public policy throughout American history. The footnote is quoted in toto at IIE4k.

> ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.[61]

Justice Stewart wrote a separate, though much shorter, opinion concurring in the judgment.

> Like Mr. Justice Brennan, I believe that Torcaso...controls this case.... Except for the fact that Tennessee bases its disqualification not on a person's statement of belief but on his decision to pursue a religious vocation as directed by his belief, that case is indistinguishable from this one—and that sole distinction is without constitutional significance.[62]

Justice White also concurred in the judgment, but for a still different reason.

> While I share the view of my Brothers that Tennessee's disqualification of ministers...is constitutionally impermissible, I disagree as to the basis for this invalidity.... The plurality states that [the restriction] "has encroached upon McDaniel's right to the free exercise of religion...," but fails to explain in what way McDaniel has been deterred in the observance of his religious beliefs. Certainly he has not felt compelled to abandon the ministry as a result of the challenged statute, nor has he been required to disavow any of his religious beliefs. Because I am not persuaded that the Tennessee statute in any way interferes with McDaniel's ability to exercise his religion as he desires, I would not rest the decision on the Free Exercise Clause but instead would turn to McDaniel's argument that the statute denies him equal protection of the laws.
>
> Our cases have recognized the importance of the right of an individual to seek elective office and accordingly have afforded careful scrutiny to state regulations burdening that right....
>
> * * *
>
> The restriction in this case, unlike the ones challenged in the previous cases, is absolute on its face: there is no way in which a Tennessee minister can qualify as a candidate.... The State's asserted interest in this absolute disqualification is its desire to maintain the required separation between church and State....
>
> Although the State's interest is a legitimate one, close scrutiny reveals that the challenged law is not "reasonably necessary to the accomplishment of..." that objective. All 50 states are required by the First and Fourteenth Amendments to maintain a separation between church and state, and yet all of the States other than Tennessee are able to

61. Ibid., Brennan opinion.
62. Ibid., Stewart opinion.

> achieve this objective without burdening ministers' rights to candidacy. This suggests that the underlying assumption on which the Tennessee statute is based—that a minister's duty to the superiors of his church will interfere with his governmental service—is unfounded. Moreover, the rationale of the Tennessee statute is undermined by the fact that it is both underinclusive and overinclusive. While the State asserts an interest in keeping religious and governmental interests separate, the disqualification of ministers applies only to legislative positions, and not to executive and judicial offices. On the other hand, the statute's sweep is also overly broad, for it applies with equal force to those ministers whose religious beliefs would not prevent them from properly discharging their duties as constitutional convention delegates.
>
> The facts of this case show that the voters of McDaniel's district desired to have him represent them at the...convention. Because I conclude that the State's justification for frustrating the desires of these voters and for depriving McDaniel and all other ministers of the right to seek this position is insufficient, I would hold [the law] unconstitutional as a violation of the Equal Protection Clause.[63]

Justice White had dissented in *Sherbert v. Verner, supra*, apparently considering in that case—as in this one—that civic penalties did not burden the free exercise of religion.

The ninth justice, Blackmun, took no part in the consideration or decision of the case. There was no dissent from the judgment.

7. Reflections on "Protections" for Religion

To recapitulate, many of the statutes and regulations treated in this and other sections of this work have been designed to protect the practice of religious faith by the faithful, though a few profess to "protect" it by cloistering its practitioners off from the rest of civil society (as in the disqualification of clergy from public office, discussed immediately above).[64] Some have been struck down for various reasons:

1. A law against "sacrilegious" movies, on the ground that it was not the responsibility of the state to protect religious groups from portrayals they find distasteful (*Burstyn v. Wilson*);[65]

2. A law against atheists holding public office, on the ground that it infringed the free exercise of religion by disadvantaging those who would not or could not profess belief in God (*Torcaso v. Watkins*);[66]

3. A law permitting camp meeting associations to operate virtually as municipalities in governing the residential communities that had grown up on their

63. *McDaniel v. Paty, supra*, White opinion.

64. See § 6 *supra.*

65. 343 U.S. 495 (1952), discussed at § 1 above.

66. 367 U.S. 488 (1961), discussed in § 2 above.

properties, on the ground that governmental powers may not be delegated to religious organizations (*State v. Celmer*);[67]

4. A law permitting a church, in the exercise of its unfettered discretion, to block the granting of a liquor license to nearby premises, on the ground that this was an impermissible delegation of governmental authority to a religious organization (*Larkin v. Grendel's Den*);[68]

5. A law requiring private employers to give employees their chosen days off for Sabbath observance regardless of effect on the business or on other employees, on the ground that it had the primary effect of advancing a particular religious practice (*Thornton v. Caldor*);[69]

6. A state constitutional provision prohibiting clergy from serving in public office, on the ground that it impaired their free exercise of religion (*McDaniel v. Paty*);[70]

The foregoing catalog suggests that the courts have been averse to laws that seemed to shelter religion from some of the give-and-take of democratic society or that enabled them to exercise quasigovernmental powers. The line of demarcation, however, between permissible protections of Free Exercise and impermissible "establishments" of religion has not always been clear and has shifted with the changing disposition of the courts. For instance, two lower courts found the protection of religion in Section 702 of the Civil Rights Act of 1964 (permitting religious bodies to employ their own members in preference to others despite the general prohibition of religious discrimination in employment) contrary to the Establishment Clause,[71] but the Supreme Court unanimously upheld it as a permissible accommodation of Free Exercise, introducing a newly accommodative note into establishment jurisprudence:

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects"...it must be fair to say that the government itself has advanced religion through its own activities and influence.... Where...government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.[72]

This approach would seem to justify a wide range of accommodations that would represent government's efforts to "get out of the way" of religion, so long as it did not lend religion a "push" in the process. There are advocates of "strict neutrality" who are less than happy with this new accommodationism (not to mention strict

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67. 404 A.2d 1 (1979), discussed at § 3c above.

68. 459 U.S. 116 (1982), discussed at § 4 above.

69. 472 U.S. 703 (1985), discussed at § 5 above.

70. 435 U.S. 618 (1978), discussed at § 6 above.

71. *King's Garden v. FCC*, 498 F.2d 51, n. 7. (D.C.Cir., 1974), dicta only, since Section 702 was not before the court; *Amos v. Corp. of Presiding Bishop*, 594 F.Supp. 791 (1986).

72. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed at ID4b (emphasis in original).

separationists, who tend to view any accommodation of religion with suspicion). "Strict neutrality" is a term sometimes applied to the ingenious suggestion of Philip Kurland in 1962 that the two religion clauses of the First Amendment "should be read as a single precept" that "religion may not be used as a basis for classification for purposes of government action, either to confer a benefit or to impose a burden."[73] In the ensuing years various writers have attempted to promote this idea under the rubric of "strict neutrality," but with little success.[74] The effect of "strict neutrality" would seem to be to make the use of the word "religion" or its synonyms improper in statute, regulation or judicial decision. But the Founders did not appear to consider "religion" a dirty word. They used it twice in the First Amendment (at least they used it once and followed it with a back-reference, "thereof"). And the Supreme Court has devoted over 175 decisions to the specific subject of religion over the past two centuries without once intimating that it was a matter unsuitable for mention in polite company. A fitting verdict was offered by Laurence Tribe in his well-known treatise, *American Constitutional Law*:

> To most observers...strict neutrality has seemed incompatible with the very idea of a free exercise clause. The Framers, whatever specific applications they may have intended, clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free exercise of religion but not say, of philosophy or science. The strict neutrality approach all but erases this distinction. Thus it is not surprising that the Supreme Court has rejected strict neutrality, permitting and sometimes mandating religious classifications.[75]

The remainder of this volume is devoted to an examination of the ways in which government has tried, not only to "get out of the way" of religion, but to keep others from interfering with or inhibiting it.

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73. Kurland, Philip, *Religion and the Law* (Chicago: Aldine Pub. Co., 1962), p. 18.

74. Cf. Weber, Paul, ed., *Equal Separation: Understanding the Religion Clauses of the First Amendment* (Westport, Conn.: Greenwood Press, 1990), see esp. chapters 1 and 7.

75. Tribe, *American Constitutional Law*, 2d. ed., p. 1189.