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# Justice Brennan and the Religion Clauses

Nadine Strossen†

Thank you so much for that gracious introduction. I really am sorry that I have to talk and run because I enjoy the participatory aspect of these forums much more than the lecture mode, as my students can tell you. When I was asked to speak here, though, I knew that immediately following my talk I would have to leave in order to get to my constitutional law class on time. I consider my teaching responsibilities sacrosanct. When I was a practicing lawyer, I would never dream of being late for court, and to me the idea of being late for class is pretty much in the same category. I'm sure all of you students in the audience feel the same way about going to your classes, right?! So I apologize in advance.

Right before I got here, I received a telephone call from the ACLU national office telling me that the Supreme Court had just decided to review a case in which the future of the religion clauses will be at issue. It is a case involving a religious invocation at a public school,<sup>1</sup> and will require the Court to evaluate the scope of the establishment clause, which mandates separation of church and state.<sup>2</sup> During recent terms, this issue has very badly divided the Court, with splintered votes among multiple concurring and dissenting opinions.<sup>3</sup> Four members of the Court probably would vote to endorse a very narrow view of the establishment clause: that it only prohibits the establishment of a national religion and discrimination among religions. In their view, the establishment clause would not prohibit government

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† Professor of Law, New York Law School. B.A. Harvard Radcliffe College; J.D. Harvard Law School. Professor Strossen is President of the American Civil Liberties Union. The following article is adapted from Professor Strossen's lecture. She gratefully acknowledges the research assistance of Marie Costello and Catherine Siemann.

1. *Lee v. Weisman*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

2. That clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

3. See, e.g., *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989).

preference of religion per se, as long as no particular religion is disadvantaged or favored vis-a-vis any other religion.<sup>4</sup> This is one of many areas where we cannot predict how Justice Souter would rule.<sup>5</sup> Therefore, in a few months, I might well be standing up here presenting a different description of the establishment clause from the one that was advocated by Justice Brennan, which I am going to be describing today.

### I. Justice Brennan's General Role

Before focusing on Justice Brennan's religion clause jurisprudence, I would like to say a few words about his role on the Court more generally. From the introduction by Professor Gershman, you have already gained some appreciation of what a unique contribution Justice Brennan has made to individual rights.

At the outset of all constitutional law courses, students read opinion after opinion by Chief Justice John Marshall, and many of my students come to admire him as the chief architect of the Constitution in the sense of establishing both the judicial review power of the federal courts and the significant power of the federal legislative branch.

Just as Chief Justice Marshall can be viewed as the prime architect of the Constitution, we can look upon Justice Brennan as the prime architect of the Bill of Rights.<sup>6</sup> He was the Justice who most consistently and most effectively was able to help translate those "parchment barriers," as James Madison called them,<sup>7</sup> into actual enforceable individual freedoms.

Unfortunately, there is a big gap between when our Bill of Rights was ratified, exactly two hundred years ago as of December 15th of this year, and when it first started to become enforceable and actually to give individuals and minority groups redressable causes of action in the courts. That did not start

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4. See *id.* at 655-58 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Scalia, J.J.).

5. After this lecture was presented, Justice Thurgood Marshall resigned from the Supreme Court, making it even more difficult to predict whether the Court's extant religion clause jurisprudence will be carried forward in future rulings.

6. This metaphor previously was used by Professor Laurence Tribe. See Tribe, *Architect of the Bill of Rights*, 77 A.B.A. J. 47 (1991).

7. 5 THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1906).

happening until the present century. Indeed, although *Marbury v. Madison*<sup>8</sup> — thanks to Justice Marshall back in 1803 — gave the Court the power to overturn an act of Congress as violating the Constitution, I am fond of asking audiences if they realize when the Court first actually exercised that power to hold that a congressional statute violated the first amendment's free speech clause. Even many law students and lawyers are surprised to learn that this did not happen until 1965.<sup>9</sup> And similarly long delays occurred before the Court enforced other provisions in the Bill of Rights.<sup>10</sup>

I think it is especially important for us to recognize this gap between the existence of the Bill of Rights and its enforcement, at this moment in history, for two reasons. First, we are entering an era during which we can expect the Supreme Court and federal courts to be less active in interpreting and enforcing the Bill of Rights. Second, the United States is increasingly serving as a role model for other countries that are newly democratized and for the first time writing their own constitutions and bills of rights. It is important to impress on these other countries that while having individual rights guaranteed on paper is certainly a significant first step, many other steps need to be taken to transform those paper guarantees into actual liberties. I think Justice Brennan will go down in history as playing a particularly crucial role in that process. That has been agreed upon both by people who share his vision and by those who do not.

Justice Brennan's unique role sets him apart from another Justice whom I admire and who shared many of Justice Brennan's ideological positions: Justice William O. Douglas. Several years ago, I had the honor of participating in a commemorative conference in Justice Douglas' honor at the University of Washington in Seattle. Justice Douglas was from Washington, and had maintained close ties to that state. So, in 1989, to mark the 50th anniversary of his appointment to the Supreme Court, a conference was convened of specialists in various areas of law to discuss Justice Douglas' legacy.<sup>11</sup> I was invited there to address

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8. 5 U.S. (1 Cranch) 137 (1803).

9. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

10. Justice Brennan himself pointed this out. 9 OXFORD J. LEGAL STUD. 425 (1989).

11. The papers that were presented at this conference have been published in *He*

the same subject I am addressing here: namely, the Justice's religion clause jurisprudence.<sup>12</sup> The positions that were espoused by Justices Douglas and Brennan were very similar, and Justice Douglas sat on the Supreme Court even longer than Justice Brennan. Nevertheless, Justice Douglas' opinions probably will not have nearly the lasting impact that Justice Brennan's will.

This is an important perspective. As law students and law professors, we tend to sit in our ivory towers and think about the perfect opinions that we would craft if we were on the Court, and to forget that the Court really is a political institution in important respects. For one thing, it is a collegial body — or, at least, it is a potentially collegial body; according to *The Brethren*,<sup>13</sup> the Court also is a potentially uncollegial body!

Justice Brennan is noted for his ability as a compromiser, his friendliness, his courteousness, his warmth, and his gregariousness. I have had the pleasure of meeting him in person, so I know that he oozes charm. It is not a false charm. You can see that Justice Brennan is the sort of person who genuinely gets along well with everybody. That is a quality that all of his colleagues on the bench — both those who agree with him and those who disagree — say he has been able to put to very good use to garner support for opinions, and to craft opinions that represent compromises.

In contrast, Justice Douglas was the quintessential rugged individualist, an eccentric, quixotic, charismatic character who dashed off his opinions by himself, not even deigning to consult his law clerks, let alone his brethren. For that reason, Justice Douglas has left us a series of brilliant, but probably isolated, statements of his views of the law. Even now, when he has not been off the Court that long, one is already hard-pressed to find Douglas opinions in the religion area, or indeed in other areas, that have been picked up and incorporated into the Court's mainstream jurisprudence.

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SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS (S. Wasby, ed. 1990).

12. See Strossen, *The Religion Clause Writings of Justice William O. Douglas*, in *HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS* 91-107 (S. Wasby, ed. 1990).

13. B. WOODWARD AND S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

One of Justice Brennan's geniuses is that many of his ideas and many of the jurisprudential directions that he charted may well survive, even as the Court becomes less receptive to his judicial philosophy. Indeed, we saw that already in the last few terms in which Justice Brennan participated. Time and again, he wrote opinions for a five-Justice majority in cases where it was not predictable that he would have been able to garner the fifth vote.

It is instructive to evaluate judicial rulings not only by assessing what would be absolutely the ideal opinion in the particular case. Instead, one should also assess an opinion in terms of whether it is likely to get five votes of the current Court. Moreover, looking to the future, when we are going to have Court that is increasingly unprotective of individual and minority group rights, one should ask whether the opinion is crafted in such a way that it is likely to withstand the test of time and shifting Court philosophies. I think that Justice Brennan's political skills are manifested in his having designed opinions on human rights issues that obtained majority votes even from the Statist Rehnquist Court. I have confidence, moreover, that these opinions will endure even through the Court's likely future shift further from civil liberties and civil rights.

## II. Justice Brennan's Religion Clause Jurisprudence

In the short time I have available to deal with the religion clauses, I will only be able to talk about a couple of cases. There are so many that one could dwell on. The first amendment contains two religion clauses, the free exercise clause<sup>14</sup> and the establishment clause.<sup>15</sup> I will focus on a major Brennan opinion regarding each of those to illustrate some of his important contributions in the area.

As many constitutional scholars and Supreme Court Justices have noted, there is some inherent tension between these two clauses.<sup>16</sup> On the one hand, the free exercise clause seems to

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14. That clause provides: "Congress shall make no law . . . prohibiting the free exercise of religion." U.S. CONST. amend. I.

15. See *supra* note 2.

16. See, e.g., *Walz v. Tax Comm.*, 397 U.S. 664, 668-69 (1970) (Burger, C.J.) ("The Court has struggled to find a neutral course between the two Religion Clauses both of

mandate special treatment of religion. After all, it does guarantee free exercise of religion, while it does not guarantee free exercise of any other kind of belief or ideology. On the other hand, the establishment clause prohibits the government from favoring religion. In short, these clauses impose governmental commitments, respectively, to give some special deference to religion, but not to treat religion specially.

In light of the tension between the two religion clauses, one of the interesting aspects of Justice Brennan's religion clause opinions is that they strongly enforced both clauses. He was as strict in construing and enforcing the free exercise clause as he was with respect to the establishment clause. I would like to describe a pair of opinions that illustrate Justice Brennan's vigorous enforcement of each clause, and then discuss whether and how those two strong positions could be reconciled, given the warring tendencies within the two clauses.

#### A. *Free Exercise Clause*

The free exercise case on which I will focus is *Sherbert v. Verner*,<sup>17</sup> which was decided in 1963. That was the case involving the Seventh-Day Adventist who could not work on Saturdays because that would violate her religious beliefs. When she lost her job and applied for unemployment compensation, the state applied its normal rule, which is enforced in most states' unemployment compensation programs: that if an applicant refuses to accept work for which she is available, then she is disqualified from receiving unemployment compensation. In this case, the Seventh-Day Adventist refused to accept a position that would require her to work on Saturday, because of her deeply held religious belief that she had to observe the sabbath on Saturday. In an opinion written by Justice Brennan, the Court ruled that, under the free exercise clause, the state was required to grant an exemption to its standard availability requirement for people whose sincere religious beliefs prevented them from taking a particular job.

Justice Brennan's majority opinion in *Sherbert* was inter-

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which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.")

17. 374 U.S. 398 (1963).

esting and important in a number of respects. For one, it was the first time the Supreme Court expressly had affirmed and protected the right to engage in a certain form of conduct that is consistent with one's religious beliefs. Earlier cases had drawn a distinction between belief and practice, saying that individuals have the right to their beliefs and the state may not interfere with those, but that it may limit the practices that are motivated by such beliefs.<sup>18</sup> As Justice Brennan pointed out in *Sherbert* and in subsequent cases, it seems odd to draw that distinction when the language of the first amendment itself talks about free "exercise."<sup>19</sup> That terminology seems to encompass practice and conduct, and not to be limited simply to belief.

Justice Brennan's *Sherbert* opinion was also significant in recognizing the practical impact of the state's policy. The opinion noted that this policy forced the applicant to choose between, on the one hand, violating her beliefs by working on Saturday, or on the other hand, giving up the essential economic sustenance provided by unemployment compensation.<sup>20</sup> So the *Sherbert* decision reflected a pragmatic, realistic approach. It acknowledged that although the state was not literally coercing the applicant to violate her religious beliefs, nevertheless, for all practical purposes, it was making her pay a very high price if she chose to abide by them. That recognition was significant, because it gave some reality to the idea of free exercise, making it into something we could integrate into our lives and work, without being asked to make economic or other practical sacrifices.

*Sherbert* laid the foundation for a whole series of decisions that followed in its wake, in which the Court time after time required religious exemptions from government measures.<sup>21</sup> This was true even if the measures were completely neutral, not written to discriminate against religion, and not intentionally

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18. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961).

19. *Sherbert*, 374 U.S. at 402.

20. *Id.* at 404.

21. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 702 (1989); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141-42 (1987); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707, 717 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Gillette v. United States*, 401 U.S. 437, 462 (1971).



targeted at religious beliefs. When states wrote the kind of unemployment statute at issue in *Sherbert*, they were not thinking of penalizing sabbatarians. The Court nonetheless said that even when a law is written in neutral terms, if it imposes a substantial burden on somebody's religious beliefs, then the state must make an exception unless the state can show that it has some compelling interest that will be undermined through this exemption. That showing could not be made in *Sherbert* itself.

The protective free exercise standard that Justice Brennan formulated in *Sherbert* was applied in many subsequent cases. One example is the opinion authored by then-Chief Justice Burger in 1972 in *Wisconsin v. Yoder*.<sup>22</sup> Following the principles Justice Brennan had enunciated in *Sherbert*, *Yoder* held that Wisconsin had to make an exception to its compulsory school requirement for the children of Amish parents whose religious beliefs were violated when their teenaged children were forced to attend a public school that inculcated secular values inconsistent with their religion.

The Court continued to adhere to Justice Brennan's analysis in *Sherbert* until 1990. In *Smith v. Employment Division*,<sup>23</sup> which is often referred to as the "peyote case," the Court in essence reversed, or at least made a very strong inroad into, *Sherbert* and its progeny.<sup>24</sup> Part of the reason why I decided to emphasize *Sherbert* is that, as indicated by the subtitle of your lecture series, we are exploring what foundation Justice Brennan laid for the future. A very serious question in that regard is whether *Sherbert* and its vigorous view of free exercise have been undermined by the *Smith* case, or whether we can instead view *Smith* as carving a limited exception to the *Sherbert* approach.

In many ways, *Smith* involved facts strikingly similar to those in *Sherbert*. *Smith* also involved the denial of unemployment compensation benefits. In this instance, Oregon refused to

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22. 406 U.S. 205 (1972).

23. *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

24. The author has discussed *Smith's* undermining of previous free exercise clause jurisprudence, as well as of individual rights jurisprudence more generally, in Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Enforcement of Constitutional Rights*, 42 HASTINGS L. J. 285, 381-388 (1991).

pay those benefits to two individuals who had been dismissed from their jobs because they had smoked small amounts of peyote in ceremonies at the native American Church. Oregon had a criminal statute that absolutely banned any use of peyote, and it did not make an exception for religious use. It was uncontroverted that the petitioners had used peyote only in small quantities for religious services. It was also uncontested that this ritualistic use of peyote did not have any adverse impact on petitioners' job performance.

The Supreme Court's ruling was very surprising because it reached issues that had not been argued by the parties. On its own, in a five-four decision, the Court abandoned the compelling state interest/strict scrutiny test that had been laid out in *Sherbert* and followed in subsequent cases. Instead, the Court ruled that as long as the government measure — in this case, the law prohibiting peyote use — did not deliberately and intentionally burden a religion, the fact that it inadvertently did so is not enough for it to violate the free exercise clause.<sup>25</sup>

The *Smith* ruling was enormously upsetting to not only Justice Brennan and the other dissenters, but also to a very wide spectrum of religious leaders and constitutional scholars around the country. A petition for rehearing was promptly submitted to the Supreme Court by a very unlikely coalition, including representatives of numerous religious denominations, liberal and conservative organizations, foundations that support religion, and the ACLU.<sup>26</sup> The *New York Times* story about the rehearing petition commented that it was supported by groups who probably did not agree on anything else, except that the robust meaning of the free exercise clause, which had been spelled out in *Sher-*

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25. 110 S. Ct. at 1606.

26. See, Petition for Rehearing, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).

Because the Court's far-reaching holding resolved an issue not briefed by the parties, because recent research on the history of the Free Exercise Clause demonstrates that the broader reading of the Clause rejected by the Court . . . was contemplated by the Framers of the First Amendment, and because assertions that the Court has "never held" that the Free Exercise Clause requires government to justify unintended burdens on free exercise must come as a surprise to the federal and state courts, state attorneys general, and treatise writers who have uniformly read this Court's free exercise decisions from as far back as at least *Sherbert v. Verner*, as holding precisely that, a rehearing is appropriate.

*bert v. Verner* and its progeny, was seriously undermined by *Smith*.<sup>27</sup>

The Court refused to grant the petition for rehearing in *Smith*.<sup>28</sup> However, as I am fond of telling my students, the Constitution as it is interpreted by the Supreme Court is only a floor for our individual rights. It is not a ceiling. If Congress, for example, believes that the Court has interpreted the Bill of Rights too narrowly, Congress can step into the breach. It looks as if this may happen in response to *Smith*. A bill called the Religious Freedom Restoration Act of 1991 has been introduced in Congress.<sup>29</sup> Like the petition for rehearing in *Smith*, this bill is supported by the most unlikely group of allies, from the most liberal to the most conservative, Republicans and Democrats, and people representing all strands of religious and secular beliefs. I am hopeful that, by enacting this proposed measure, Congress will reinstate Justice Brennan's legacy in *Sherbert v. Verner* into our law.

That last remark leads to a general observation: a Justice may be influential not only in terms of writing opinions that speak for the Court, but also through writing concurrences and dissents, as well as writing and speaking in public forums. Such a Justice may exert an impact on our legal system that goes far beyond Supreme Court doctrine. William Brennan was such a Justice.

For example, Justice Brennan was very active in the movement to make state court judges aware of the possibility of enforcing their state constitutions in ways that are more protective of individual rights than the Supreme Court has interpreted the corresponding provisions of the federal Constitution to be.<sup>30</sup> Through his writing both on the Court and off, in law reviews and public lectures, Justice Brennan has educated a whole generation of state court justices, including in his own native state of New Jersey, about this important role they can play to foster individual rights. He has taught them that they can take views

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27. See Greenhouse, *Court Is Urged to Rehear Case On Ritual Drugs*, N.Y. TIMES, May 10, 1990, at A16, Col. 1; National Desk.

28. 110 S. Ct. 2605 (1990).

29. H.R. 2797, 102nd Cong., 1st Sess. (1991).

30. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

expressed in dissenting opinions at the Supreme Court level and incorporate them into majority interpretations of their state constitutions. He also has influenced legislators at both the state and national level, who can translate his vision of individual rights into legislative guarantees, even if this vision is more rights-protective than the Supreme Court majority's view of federal constitutional law.<sup>31</sup>

Turning back to the *Smith* case, it is important to note the possibility that it could be construed relatively narrowly. For example, some scholars have argued that perhaps one should focus on the fact that *Smith* involved a criminal law prohibition. In contrast, *Sherbert v. Verner* involved an unemployment compensation statute and *Wisconsin v. Yoder* involved education regulations. Arguably, we can hold the line here, so there will be more deference to a state's criminal law prohibitions than to its other laws.<sup>32</sup> Perhaps *Smith* will be limited in this way. But it is a troubling development, which may signal further inroads into the free exercise guarantee in the future.<sup>33</sup>

## B. Establishment Clause

I would now like to address Justice Brennan's establishment clause jurisprudence. As I previously noted, Justice Brennan advocated the vigorous enforcement of both the free exercise and establishment clauses, despite the inherent tension between the two. Justice Brennan's vigorous enforcement of the establish-

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31. An important example of a Brennan opinion that apparently exerted this type of influence is his in *Rodriguez v. San Antonio School Dist.*, 411 U.S. 1, 62 (1973), which rejected the majority's conclusion that unequal school financing, throughout a state, does not violate the United States Constitution. Several states have implemented the equal financing advocated by Justice Brennan's dissent, either through judicial interpretations of state constitutions, or through legislative enactments. See, e.g., *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 90 (Tex. 1989); *Helena Elem. School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Dupree v. Alma School Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983).

32. For a helpful discussion of this theory, as well as other possible ways for confining *Smith's* adverse impact on free exercise doctrine, see Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 41-54 (1990).

33. For example, after analyzing potential limitations on the scope of the Court's cutback on free exercise rights in *Smith*, Professor Laycock concludes: "One function of judicial review is to protect religious exercise against . . . hostile or indifferent consequences of the political process. The Court has abandoned that function, at least in substantial part, and perhaps entirely." *Id.* at 68.

ment clause has been noted by University of Virginia law professor Dick Howard, who has advocated strict separation between government and religion. Given his separationist inclination, it is significant that Professor Howard has said that Justice Brennan "wrote opinions which are as separationist in their language as any I can think of."<sup>34</sup>

Justice Brennan is a devout Roman Catholic, and sometimes it strikes people as counterintuitive that a staunch religious believer would so strongly enforce what Thomas Jefferson described as the "wall of separation" between church and state.<sup>35</sup> Yet it has been my general experience that some of the most religious people believe they have the most at stake in maintaining that wall of separation, not only because they think that government should not be influenced by religion, but also because they think religion should not be influenced by government.

The case on which I will focus in the establishment clause area is *Aguilar v. Felton*<sup>36</sup>. It is one of the pair of so-called "parochial" decisions that Justice Brennan authored for a narrow five-four majority in 1985.<sup>37</sup> These decisions invalidated longstanding public assistance programs for parochial school students.

I have chosen to describe the *Aguilar* case because it involved a situation close to home, in New York City. At issue was a federal program designed to meet the needs of educationally deprived students from low-income families who happened to be attending parochial schools. At the time the case went to the Supreme Court, the program had been in existence for 20 years. Public school teachers went to parochial schools after regular school hours and offered to do remedial teaching in secular subjects for interested students. It was a voluntary program and the public school teachers were subject to monitoring to make sure they did not engage in any religious proselytizing.

After 20 years of experience with this program, nobody

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34. Fein, et al., *The Brennan Legacy: A Roundtable Discussion*, 77 A.B.A. J. 52, 56 (1991).

35. 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb ed. 1904).

36. 473 U.S. 402 (1985).

37. The companion case was *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

could give a specific example of how it had led to any inappropriate relationship between church and state. Nonetheless, in a controversial decision, writing for himself and four other Justices, Justice Brennan struck down this program, ruling that it violated the establishment clause because it would lead to an excessive entanglement between church and state. He explained that the program required "a permanent and pervasive state presence in the sectarian schools."<sup>38</sup> Similarly, he noted that the program required "frequent contacts between the regular parochial school teachers and the remedial teachers."<sup>39</sup>

The entanglement prohibition is one of the three prongs of the "*Lemon*" test, set forth in *Lemon v. Kurtzman*<sup>40</sup> in 1971. Under *Lemon*, a measure must have a secular purpose, its primary effect must not be either to advance or inhibit religion, and it must not entail excessive entanglement between government and religion. In *Aguilar*, Justice Brennan acknowledged that the first two *Lemon* requirements were satisfied. However, he said that monitoring the parochial program to ensure that there was no religious indoctrination led to unnecessary entanglement between the government and religion. As the dissenters pointed out, that analysis may leave a no-win situation for parochial schools; on the one hand, without the monitoring, the program may have the impermissible effect of advancing religion, but on the other hand, with the monitoring, the program will involve impermissible entanglement.<sup>41</sup>

A number of commentators criticized Justice Brennan for his *Aguilar* opinion, saying he was being insensitive to the educationally deprived students who happen to be going to parochial school, and thus carrying separation of church and state too far. It is not surprising that this decision was criticized by the Reagan Administration, which had argued against it through its Solicitor General, Rex Lee, who is now the Dean of the Brigham Young University Law School in Utah.<sup>42</sup>

What is more surprising is that the decision also has been

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38. 473 U.S. at 385.

39. *Id.* at 386.

40. 403 U.S. 602 (1971).

41. *Id.* at 666 (White, J., dissenting).

42. See Fein, *supra* note 34, at 54.

questioned by Burt Neuborne, now a Professor at NYU School of Law, who was at the time on leave of absence from NYU to serve as Legal Director of the ACLU.<sup>43</sup> The ACLU argued that this parochial program was unconstitutional. Burt tells the following story about his personal insight into the case. When *Aguilar* was before the Supreme Court, Burt's wife, Helen Neuborne, was the New York City government official responsible for directing this very program, which Burt was arguing to be unconstitutional. As he said, they had "full and fair exchanges" about the case at dinner a number of times!<sup>44</sup> When the Court decided to invalidate the program, the city changed its approach and built little quonset huts right outside the parochial schools, so the remedial teachers could pick the students up as they came out of school. And so, Burt says, his wife came home one night and said, "You know what you guys have done? You've got us with public school teachers in the bushes after school saying to kids, 'Psssst, wanna learn to read?'"!<sup>45</sup>

### C. *Reconciling Justice Brennan's Views on the Two Religion Clauses*

The foregoing discussion prompts the question whether there is some inconsistency between Justice Brennan's strong view of the establishment clause on the one hand, and his strong view of the free exercise clause on the other hand. I think the answer is that there is not necessarily an inconsistency. I would like to sketch out some theories as to how one might reconcile these views, which are seemingly in tension with each other.

First, I think what Justice Brennan himself would argue is that he was simply constructing a parity between the two clauses, because he viewed them as equally important. Moreover, he was likely relying on the original intent of framers such

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43. See, *id.*

LEE: But for the kind of wooden, checklist approach [set forth in *Lemon v. Kurtzman*], the congressional scheme in *Aguilar*, quite clearly would have survived. For 20 years [that scheme] had been successful. And you talk about an important and perfectly acceptable government objective. It was an affirmative action program.

NEUBORNE: Absolutely. It served minority children.

44. See Fein, *supra* note 34, at 54.

45. *Id.*

as James Madison and Thomas Jefferson, who took a very strict separationist view, as revealed in Madison's "Memorial and Remonstrance Against Religious Assessments" and Jefferson's Virginia Statute for Religious Freedom.

There is a second way in which Justice Brennan's free exercise and establishment clause decisions can be harmonized with each other: both sets of opinions reflect his strong belief in individual liberty — in the rights of the minority against the tyranny of the majority. On the one hand, Justice Brennan saw the majority intentionally imposing on minorities regarding Bible-reading in the public schools and in other examples of state support for religion. In these cases, Justice Brennan found an establishment clause violation. On the other hand, though, even when majorities were not *deliberately* imposing on religious minorities, Justice Brennan read the free exercise clause as giving minority religions special protection. Under his reading of the free exercise clause, minority religions were insulated even from the unintentional burdens that resulted from generally applicable laws. This vision was reflected in both Justice Brennan's majority opinion in *Sherbert* and the dissenting opinion that he joined in *Smith*.

Justice Brennan's attitude toward the interrelationship between the two religion clauses can usefully be contrasted with that of Justice Stevens, who cast the deciding vote in *Smith*. Justice Stevens can fairly be characterized as one of the Court's strictest separationists, stricter than Justice Brennan was. Along with Justice Brennan, Justice Stevens consistently joins in opinions finding that religious preferences constitute establishment clause violations. However, in contrast with Justice Brennan, Justice Stevens *also* concludes that the free exercise clause does not guarantee special exceptions to generally applicable laws as to which there are religious objections. That is because Justice Stevens views the establishment clause as prohibiting any such exceptions. What he in effect says is, "I'm not giving *any* preference to *any* religion under *any* circumstances."

In Justice Stevens' view, then, the *Smith* case involved a situation where Native American Church members were asking for favorable treatment because of their religion. Along with the other members of the current majority on this issue, Justice Stevens believes that the prevailing theme in the free exercise



clause is equal treatment.<sup>46</sup> That view seems to have eclipsed Justice Brennan's contrasting view that the free exercise clause was expressly intended precisely to give some special treatment to religion — namely, to protect it from any government measure that imposes substantial burdens, even if that measure does so unintentionally or indirectly.

I would like to offer a final possible way of harmonizing Justice Brennan's free exercise clause opinions with his establishment clause opinions. Professor Burt Neuborne arrestingly captured this theory when he said, "I think Brennan saw religion as the 1791 version of sex."<sup>47</sup> Is that self explanatory, or should I read the rest of Burt's statement?! He said:

Freud tells us that sex is this tremendous drive that makes people act in ways that we have to be concerned about. And when the founders drafted the Constitution, I think religion was seen as that kind of non-rational — in a nonprejorative way — a non-rational drive that made people act in particular ways because it was their religious destiny and religious need to do so. I think if you view religion that way as a non-rational, enormously important and potent force, but not a force that responds to reason, then Brennan's religion clause jurisprudence evolves directly from that. If religion is not rational, then individuals cannot control themselves in the usual way that we expect, with a cost-benefit analysis, careful weighing of benefits and burdens. So if the state comes down on somebody and says, "You can't do something" that your religion tells you you should, Brennan would then say that person is put in an impossible box.

That person cannot go through the Justice Holmes bad-man analysis: "Do I want to do it badly enough to take the consequences?" That person is driven to do it, and so Brennan would then build the largest possible dead space between the state and that person to allow him to act out his non-rational beliefs.

Similarly with the establishment clause, where you have well-meaning officials in power who are driven by their religious beliefs, they're not going to be able to stop themselves from propagating their religious beliefs. . . . I [agree with Rex Lee that Brennan's Establishment Clause jurisprudence applies a wooden analysis.]

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46. For an elaboration on this theme, see Strossen, *supra* note 24, at 382-88.

47. See Fein, *supra* note 34, at 54.

But that's because I think Brennan is trying to create a prophylactic position. . . . [H]e is afraid that once you allow a breach at all, the religious drive cannot be controlled by the usual rationalistic methods of law.

And I think there is a unity to his religion clause jurisprudence that will survive, because his vision is so clear as to the behavioral role religion plays in people's lives.<sup>48</sup>

I understand what Professor Neuborne is saying, since I have made a similar argument myself. I have said that some strict separationists view religion the way some fundamentalists, or politicians such as Jesse Helms, apparently view sex: as something so dangerous that you have to take prophylactic measures in dealing with it!

### III. Conclusion

In conclusion, I wanted to share one personal observation about Justice Brennan that transcends his important contributions to our understanding of the religion clauses. At NYU School of Law there is a prestigious lecture series on the Bill of Rights called the James Madison Lectures. Justice Brennan is the only person in history who has been invited to deliver two Madison Lectures. The first one was in the early 1960's, when I was still in grade school. The second was in 1986, and at that time I was teaching at NYU Law School, as a Supervising Attorney of its Civil Rights Clinic. So I had the great pleasure of attending this lecture, which was a very moving experience.

When Justice Brennan entered the large hall where the lecture took place, everybody in the room stood and gave him a prolonged standing ovation. Many people were crying, and many more had tears in their eyes. Since the audience included individuals with a wide range of viewpoints on legal issues, that ovation demonstrated that Justice Brennan was strongly admired even by people who did not agree with his ideas. This was true, for example, of David Souter. When he was asked during his confirmation hearings to state his opinion of Justice Brennan, then-Judge Souter gave an extremely ringing, moving endorsement. He could not have been more laudatory.

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48. *Id.*

If I am to explain what Justice Brennan has meant to me, and why I was standing there at NYU with tears in my eyes, along with many of my colleagues and students, it is this: Justice Brennan embodies the values that had inspired me to become a lawyer. I think he personifies the law's vast potential to respect and expand dignity, privacy, freedom, and equality for every human being.

Regardless of whether you have the fortune to meet Justice Brennan in person, and despite the fact that he is no longer writing his magnificent Supreme Court opinions, I know that you will continue to read his past opinions, and I also know that he will continue to serve as an inspiration for all of you and for generations to come. Accordingly, I want to thank Pace Law School and its Law Review for choosing to honor Justice Brennan. In this bicentennial year of the Bill of Rights, you could not have made a more appropriate choice. You have chosen to celebrate the person who has made the single greatest contribution in recent memory to making the Bill of Rights a reality.

Thank you very much.