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Jeffrey M. Shaman

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## Recommended Citation

Jeffrey M. Shaman, *Observations on the Theory of Government Accommodation of Religion*, 37 DePaul L. Rev. 347 (1988)  
Available at: <https://via.library.depaul.edu/law-review/vol37/iss3/3>

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## OBSERVATIONS ON THE THEORY OF GOVERNMENT ACCOMMODATION OF RELIGION

Jeffrey M. Shaman\*

Although the first amendment of the Constitution prohibits the government from establishing religion, Judge Adams has suggested here that under some circumstances the government may "accommodate" certain religious practices. Judge Adams's treatment of the theory of accommodation, like his judicial opinions, is informed, thoughtful, and scholarly. Indeed, Judge Adams has made many cogent points today. Certainly, there is much to be said for the claims of the conscientious objectors in *Gillette v. United States*,<sup>1</sup> of the Native Americans in *Bowen v. Roy*,<sup>2</sup> and of the Orthodox Jews in *Braunfeld v. Brown*,<sup>3</sup> all of which were noted and discussed by Judge Adams.

I would, however, offer a few words of caution about government accommodation of religious practices, especially because accommodation is difficult

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\* Professor of Law, DePaul University; Director, Center for Judicial Conduct Organizations, American Judicature Society.

These observations are adapted from Professor Shaman's comments at the Fourth Annual Lecture of the Center for Church/State Studies, Chicago, Thursday, April 2, 1987. Judge Arlin Adams, United States Court of Appeals for the Third Circuit, 1969-87, who is referred to in this article, also spoke at the Lecture. Judge Adams was assisted in his written summary of his speech, which appears in this volume, by Sarah Barringer Gordon.

1. 401 U.S. 437 (1971). The petitioner claimed he was entitled to an exemption from military service on the ground that his belief that the Viet Nam war was "unjust" qualified him for conscientious objector status. *Id.* at 439. The Court held that the exemption under the conscientious objector statute applies to those who oppose participation in war in any form and not to those who object simply because war is "unjust" even if objection is religious in nature. *Id.* at 448. The Court reasoned that the statute did not violate the establishment clause because it did not discriminate on the basis of religion and petitioner was unable to show that statute lacked neutral purpose. *Id.* at 451-52. Additionally, the statute did not violate the free exercise clause because the statute was not designed to interfere with religious practice and incidental burdens on religious practice were justified by substantial government interest in raising armies. *Id.* at 462.

2. 476 U.S. 693 (1986). In *Bowen*, Native Americans objected to the use of a child's social security number in food stamp and AFDC programs on ground that use of the number would impair the child's spirit. *Id.* at 696. The Court held that the government's use of the child's social security number did not violate the free exercise clause. The Court reasoned that regulation which calls for a choice between securing a government benefit and adherence to a religious belief is different from government action which criminalizes religious activity or compels conduct that some find objectionable on religious grounds. *Id.* at 706.

3. 366 U.S. 599 (1961). In *Braunfeld*, the petitioner sued to enjoin enforcement of a statute which forbade the retail sale of certain commodities on Sunday. Petitioner, an Orthodox Jew, challenged the statute on the grounds that the statute constituted a law respecting the establishment of religion and that it interfered with the free exercise of his religion because it imposed a serious economic hardship upon him if he adhered to the observance of his Sabbath. *Id.* at 601-02. The Court upheld the statute, reasoning that the purpose and effect of the statute was to advance the state's secular goal of providing a day of rest. *Id.* at 607-08.

to distinguish from government establishment of religion, which is, it bears emphasizing, expressly prohibited by the first amendment of the Constitution. The obscurity between accommodation of religion and impermissible establishment of religion is illustrated by the fact, mentioned by Judge Adams, that the Supreme Court has upheld the constitutionality of a program which allows the release of students from a portion of their regular school curriculum in order to receive religious instruction,<sup>4</sup> but it struck down another released time program as violating the establishment clause.<sup>5</sup>

Acute problems about government accommodation of religion arise because the United States is a pluralistic nation in many ways, including religiously. According to the 1984 census, there are more than 1,000 different religious denominations in this country.<sup>6</sup> These groups have, to put it mildly, an extremely wide variety of religious beliefs and practices. To mention but a few examples, there are denominations that worship a single god, those that worship several gods, and those that worship the divinity of the universe. There are groups that believe in silent prayer, while others believe in praying only when spiritually moved to do so. Muslims pray five times a day at designated hours while facing their sacred mosque at Mecca. Orthodox Jews pray in yarmulkes and tallathim, and some Christians believe that a prayer that makes no mention of Jesus Christ is not a prayer at all. Seventh Day Adventists believe that smoking and drinking are sinful, while Catholics believe that abortion and contraception are sins. Jehovah's Witnesses refuse blood transfusions, even when needed to save their lives, and Christian Scientists refuse virtually all medical treatment. Jehovah's Witnesses practice baptism, but only of adults, while Baptists and Presbyterians baptize children, and Methodists baptize infants. Protestants read the King James version of the New Testament, while Catholics read the Douay Version of it. Jews read the Torah, Muslims read the Koran, and Buddhists read the Sutra.

The list, of course, could go on and on, but the point is that in a country with as much religious diversity as our own, a thick wall of separation between church and state is necessary to prevent bitter strife and confrontation among religious factions competing for government's favor. A wall of separation between church and state is also necessary to protect the right of individuals to worship or not to worship according to their own faith. The government's imprimatur upon a particular religious practice exerts a

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4. *Zorach v. Clauson*, 343 U.S. 306 (1952) (program which allows students to leave public school during school hours to participate in religious instruction does not violate first amendment because program involves neither religious instruction in public schools nor expenditure of public funds).

5. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (program whereby public school provided religious instruction on school grounds for those pupils who chose to attend held violative of first amendment because of public school's use of tax dollars, public property and compulsory education system to support religious training).

6. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 51-53 (105th ed. 1985).

strong influence upon society and threatens the religious freedom of those who do not conform to the dictates of the state. Finally, as many devout persons have recognized, church and state should be kept apart because government control of religion, any religion, tends to degrade its spiritual vitality. As James Madison put it, "[R]eligion and government will both exist in greater purity the less they are mixed together."<sup>7</sup>

These are lessons that should have been learned by everyone as part of our national heritage. After all, this is a nation that came into being because many early colonists were forced to abandon their homes in England to escape a government that gave its official seal to the Book of Common Prayer and tried to impose it upon its citizens. It is also worth remembering that the King's and Parliament's approval of the Book of Common Prayer engendered intense conflict among various religious factions in England who wanted the book amended to comport with their own religious views.

It was this history that prompted the Framers of the Constitution to enact the establishment clause of the first amendment, barring government establishment of religion. Nonetheless, government officials have not always obeyed the establishment clause, and this has led to some unfortunate episodes in our own history. In the 1840s, for instance, Bishop Francis Henrick of Philadelphia petitioned that city's school board to allow Catholic students to use the Roman Catholic version of the Bible in school. The board's approval of the request led to months of controversy that erupted into riots. Catholic churches were attacked and burned, homes in Catholic neighborhoods were destroyed, and a number of persons were killed.<sup>8</sup>

In 1855, Massachusetts became the first state to enact a law requiring Bible reading in public schools (although no other state followed suit until 1910).<sup>9</sup> Catholics opposed the Massachusetts law, and in 1866 the state supreme court gave its approval to the expulsion of a student who had refused to bow her head during the reading of the Bible.<sup>10</sup> Similar events occurred in other states. As late as 1950, the Catholics' objection to the Protestant nature of prayer recitation in public schools did not stop an insensitive (not to mention uninformed) court in New Jersey from ruling that prayer recitations were not sectarian and hence not unlawful.<sup>11</sup>

The great diversity of religious beliefs and practices in the United States poses serious problems for the theory of government accommodation of religion. Clearly, if the government accommodates the religious practices of one group, it will have to accommodate the religious practices of other groups. After all, one of the cardinal principles of the first amendment, which the Supreme Court has reiterated time and again, is that the govern-

7. III Letters and Other Writings of James Madison 275 (J.B. Lippincott & Co. ed. 1865).

8. L. BUZZARD, SCHOOLS: THEY HAVEN'T GOT A PRAYER 99-100 (1983).

9. *Id.* at 99.

10. *Id.*

11. *Id.*

ment may not favor one religion over another.<sup>12</sup> As the Court recently put it, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."<sup>13</sup>

In *United States v. Lee*,<sup>14</sup> the Court refused a free exercise claim (or, to put it another way, refused an accommodation claim) to exempt a member of the Amish faith from the payment of social security taxes that were offensive to the tenets of that religion. In rebuffing the Amish claim, the Court pointed out that if a tax exemption was to be granted for the Amish, the first amendment would require that similar exemptions be granted to other religious groups, because the government may not favor one religion over another.<sup>15</sup> Similarly, in *Goldman v. Weinberger*,<sup>16</sup> the high Court held that a military dress code prohibiting the wearing of hats indoors did not violate the free exercise rights of an Orthodox Jewish chaplain to wear a yarmulke indoors as required by his religious beliefs. In a concurring opinion, it was noted that if an exception from the dress code was allowed for the chaplain (that is, if his religious beliefs were accommodated), similar exceptions would have to be allowed for Sikhs to wear turbans and for Rastafarians to wear dreadlocks in accordance with their religious beliefs.<sup>17</sup> In other words, the government may not grant special benefits to some religions while denying them to others.

In light of this principle, what are the consequences of government accommodation of religion? Is the government prepared, for example, to exempt the conscientious objectors of war based on the assertion of any religious objection? Apparently the answer to this question is no, because in the *Gillette* case the Supreme Court upheld the constitutionality of a federal statute allowing conscientious objector status to those persons who were opposed on a religious basis to participating in all war, while not allowing the same status to those persons who were opposed on a religious basis to participating only in those wars they believe to be immoral.<sup>18</sup>

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12. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (state statute which provided Sabbath observers with absolute and unqualified right not to work on their chosen Sabbath violates establishment clause because statute's purpose is not secular and statute has effect of advancing religion); *Larsen v. Valente*, 456 U.S. 228, 255 (1982) (statute which provides registration and reporting exemption for those religions that receive more than half of their contributions from members or affiliated organizations held violative of establishment clause because statute sets up denominational preferences); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (state statute which required posting of Ten Commandments in each public school classroom violates establishment clause because statute's purpose is promotion of judeo-christian religions); *Epperson v. Arkansas*, 393 U.S. 97, 103-09 (1968) (Court struck state statute which prohibited teaching of theory of evolution; statute's effect is to promote views of religious group that believes evolution theory conflicts with account of origin of man set forth in Bible).

13. *Larsen*, 456 U.S. at 244.

14. 455 U.S. 252 (1982).

15. *Id.* at 259-60.

16. 475 U.S. 503 (1986).

17. *Id.* at 1315-16 (Stevens, J., concurring).

18. *Gillette*, 401 U.S. at 460.

In *Wisconsin v. Yoder*,<sup>19</sup> the Supreme Court ruled that the Amish were entitled to a constitutional exemption from a compulsory education law, because their religious beliefs do not allow Amish children to attend school beyond the eighth grade. As a result of the *Yoder* decision, the question must be asked whether the government is prepared to exempt not just the Amish from compulsory education, but also the members of other religious groups who are offended by schooling as well. Apparently, the Supreme Court's ruling in *Yoder* has its limits, as evidenced by the Circuit Court's decision in *Mozert v. Hawkins County Public Schools*.<sup>20</sup> In *Mozert*, the court rejected the claim of a group of Fundamentalist parents who sought to gain the right to have their children opt out of certain required courses because they covered materials, such as *Huckleberry Finn*, *The Diary of Ann Frank*, and *Goldilocks*, which were offensive to their creed. The *Mozert* court was not prepared to accommodate the Fundamentalists by allowing them to remove their children from required courses in school.<sup>21</sup>

Government accommodation of religion also raises problems in regard to favoring religion in general as distinguished from other kinds of beliefs or practices. In several cases the Supreme Court has stated that the establishment clause not only prohibits the government from favoring one religion over another, it also prohibits the government from favoring or promoting religion in general.<sup>22</sup> In *Heffron v. International Society for Krishna Consciousness*,<sup>23</sup> the Court followed this principle in ruling that it did not violate the free speech clause of the first amendment to prohibit members of the Krishna religion from distributing religious literature at a state fair and soliciting funds for religious purposes at the fair except at booths at designated locations on the fairgrounds.<sup>24</sup> In so ruling, the Court noted that if an

19. 406 U.S. 205 (1972).

20. 827 F.2d 1058 (6th Cir. 1987).

21. See *id.* at 1068-70.

22. *Wallace v. Jaffree*, 472 U.S. 38, 58-60 (1985) (statute which authorized a period of silence for "meditation or voluntary prayer" violates establishment clause because purpose and effect of statute is to endorse religion generally); *Murray v. Curlett*, 374 U.S. 203, 223 (1963) (statute requiring that "ten verses from Holy Bible" be read in each public school classroom each morning has effect of endorsing religion and, therefore, violates establishment clause); *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (required prayer in public school violates establishment clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (use of denominationally neutral prayer composed by state officials has effect of endorsing religion generally and, therefore, violates establishment clause). See also *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (members of ISKCON, Krishna religious group, are not entitled to solicitation rights in public forum superior to the rights of social, political, or charitable organizations); *Welsh v. United States*, 398 U.S. 333 (1970) (distinction between theistic or nontheistic religious beliefs on one hand and secular beliefs on other are incompatible with the establishment clause); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) (author asserts thesis that principle underlying establishment clause was one of "perfect neutrality" toward religion; government neither discourages nor encourages any religious belief or practice).

23. 452 U.S. 640 (1981).

24. *Id.* at 654-55.

exception from this prohibition was granted to members of the Krishna faith, the first amendment would require that similar exceptions be granted not only to other religious organizations, but to nonreligious groups as well.<sup>25</sup> That is, under the Constitution the government may not favor religious practices over those practices nonreligious in nature.

What are the consequences of this principle for the theory of accommodation? In examining this issue, let us return again to the *Yoder* case. As previously mentioned, there is much to be said for the objections of the Amish in *Yoder* to compulsory education after the eighth grade. On the other hand, there is a degree of unfair discrimination in granting the exemption to the Amish while not doing the same for persons who are opposed to compulsory education on the basis of non-religious, but sincere, deeply-felt philosophic or political beliefs. The same reasoning applies to the *Mozert* case. If the Fundamentalists in *Mozert* had been allowed to have their children opt out of certain courses in school that are contrary to their religious beliefs, shouldn't the same be done for other parents whose philosophic or political beliefs are offended by what is taught in the public schools?

This sort of discrimination in favor of religion is even more dramatic in the conscientious objector cases. Is it fair to exempt conscientious objectors from military service on the basis of their religious views, and not do the same for persons who are conscientious objectors based on sincere, deeply-felt philosophic or political views? In times of war, military service can mean giving up one's life for one's country, and it may not be fair to exempt some conscientious objectors from this awesome obligation to one's nation, but not exempt other conscientious objectors. Apparently, the Supreme Court recognized this element of unfairness in the *Seeger* and *Welsh* cases by expanding the statutory definition of "conscientious objector" to include persons who do not believe in a supreme being and whose beliefs would not be considered religious in the traditional sense.<sup>26</sup>

Moreover, in the flag statute case referred to by Judge Adams, it is noteworthy that the Supreme Court ruled that school children could not be compelled to salute the flag because it violated not their religious rights, but rather their right to freedom of expression.<sup>27</sup> Thus, the government must treat equally those who are opposed to compulsory flag salutes on philo-

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25. *Id.* at 652-53.

26. *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) (objection to war is "religious" for purposes of conscientious objector status if based on moral, ethical, or religious beliefs held with strength of traditional religious convictions); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (test of religious belief for purposes of conscientious objector status is whether belief is sincere and meaningful, occupying in life of possessor a place parallel to that filled by God in possessor of traditional religious beliefs).

27. *See Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (West Virginia regulation which required school children to salute flag and pledge allegiance violates first amendment right to free expression of political and social views).

sophic, political, or religious grounds. More recently, the Supreme Court has followed the same approach in relying upon freedom of expression to uphold the right of individuals to obliterate a state motto on a license plate that was offensive to their beliefs.<sup>28</sup> This decision goes to the protection of philosophic and political views, as well as religious ones.

At any rate, these examples demonstrate that there exist some thorny problems that remain to be worked out about the theory of government accommodation of religion, and that there are some established constitutional principles that are not entirely consistent with government accommodation of religion.

There is no way of knowing whether the Framers of the Constitution would have approved of government accommodation of religion because, unfortunately, there are tremendous uncertainties in determining the Framers' intent about most constitutional issues, especially those pertaining to church and state.<sup>29</sup> First of all, the Framers were a collective body of 55 individuals who embraced a widely divergent and frequently conflicting set of values concerning church and state.<sup>30</sup> Amateur historians who are fond of relying upon the Framers as authority for state-sponsored religious exercises should tread lightly, because some of the Framers believed in a strict wall of separation between church and state.<sup>31</sup> There were also some religious doubters in the contingent of the Framers of the Constitution.<sup>32</sup> It was John Adams, for example, who wrote that "Twenty times, in of the course of

28. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (statute which makes it a misdemeanor to obliterate license plate motto challenged on ground that motto was repugnant to petitioner's religious beliefs; Court held statute violated petitioner's freedom of expression).

29. See Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603 (1978) (article presents thesis that meaning of a constitutional provision is too vital to be decided by any formula that would exclude modern day judgment); Brest, *The Misconduct Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) (author advances thesis that in resolving most constitutional disputes nonoriginalist adjudication better serves ultimate objectives of constitutional government); Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982) (author argues that judicial "creativity" is needed to furnish meaning for constitution, meaning which cannot be adequately derived from text of constitution or Framers' intent); tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitution Construction*, 27 CALIF. L. REV. 399 (1939) (article presents argument that theory of constitutional adjudication which is based upon stagnant constitution reflects misconception of what judicial process is designed to accomplish and that "intent" that Court is able to discern is determined by conclusion Court wants to reach); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964) (use of history to interpret constitution can help illuminate issue, but should not control current constitutional adjudication).

30. See Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) (author traces history of enactment of religion clauses); A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* ch. 2 (1964).

31. See A. STOKES & L. PFEFFER, *supra* note 30, at 39-63.

32. *Id.*

my late reading, have I been on the point of breaking out. 'This would be the best of all possible worlds if there was no religion in it.'"<sup>33</sup>

The Framers declined to pass a proposal to have a chaplain recite an opening prayer at the Constitutional Convention,<sup>34</sup> but later some of the Framers, as members of Congress, voted in favor of having a chaplain recite a prayer to open sessions of the legislature.<sup>35</sup> James Madison, who of course is considered the principal architect of the Constitution, voted as a member of the House of Representatives to approve a chaplain for the House, but later decided that appointment of the chaplain had been unconstitutional.<sup>36</sup> When he became President, Madison vetoed a measure which would have granted federally owned land to a Baptist congregation for a church site on the ground that it violated the establishment clause.<sup>37</sup> Madison also took the position that it would violate the establishment clause for the government to exempt church-owned property from taxation.<sup>38</sup>

The first four Presidents of the United States held inconsistent views about the relationship between church and state. Washington and Adams both proclaimed national days of prayer or thanksgiving.<sup>39</sup> Jefferson (and later Jackson) refused to do so, stating that it was a violation of the establishment clause.<sup>40</sup> Madison, as President, proclaimed a day of prayer, but was careful to circumscribe his proclamation to make it religiously neutral and merely recommendatory; even so, he had his doubts about its constitutionality.<sup>41</sup> The public, probably correctly, perceived the proclamations of both Adams and Madison as being motivated by partisan political purposes,<sup>42</sup> and thus gave credence to Madison's own observation (previously mentioned) that "Religion and government will both exist in greater purity the less they are mixed together."<sup>43</sup>

Further support for Madison's observation can be found in the experience of the Continental Congress, which, before the Constitution was adopted, selected a chaplain, the Reverend Jacob Duche, to open its legislative sessions with a prayer. Reverend Duche, however, did not last long in this post. Shortly after his appointment he resigned, but not before he urged rescission of what he described as the "hasty and ill-advised Declaration of Independence."<sup>44</sup> John Adams, for one, was not unhappy to see Reverend Duche go,

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33. Quoted in G. VIDAL, *THE SECOND AMERICAN REVOLUTION AND OTHER ESSAYS* 232 (1982).

34. See A. STOKES & L. PFEFFER, *supra* note 30, at ch. 2.

35. See *id.* at 84.

36. L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 170 (1967).

37. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall-A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 776.

38. See A. STOKES & L. PFEFFER, *supra* note 30, at 61.

39. See Van Alstyne, *supra* note 37, at 776-77.

40. See A. STOKES & L. PFEFFER, *supra* note 30, at 87-88.

41. *Id.* at 88.

42. *Id.* at 89.

43. See *supra* note 7.

44. See A. STOKES & L. PFEFFER, *supra* note 30, at 83.

describing him as "an apostate and traitor."<sup>45</sup> This early episode is but one example which demonstrates that politics and religion make for an ill-fated partnership.

But the point we should return to is that the Framers, being a collective body of 55 individuals, did not share a unitary intention about a matter as complex as the relationship between church and state. The fact is that the Framers as a group did not possess a definitive position about church and state.

Another factor that produces great uncertainty about the intent of the Framers is that conditions in the United States have changed considerably in the 200 years since the Constitution was framed. The Framers may have been wise men, but being human beings, they could not foresee the future. Therefore, there is no way of knowing whether the Framers would have favored or opposed such practices as school prayer or released time programs for the simple reason that in the days of the Framers public education was extremely rare. In other words, the Framers had no intention, either pro or con, about public school prayer or released time programs, because those things did not exist 200 years ago. The utility of their views, in deciding current church/state questions, is limited given the difference between the problems encountered by the Framers and those encountered by today's Court.

Judge Adams correctly points out that under the Constitution, as originally enacted, the states were not prohibited from establishing religion, because the Bill of Rights, which contains the first amendment's establishment and free exercise clauses, applied only to the federal government.<sup>46</sup> The fact remains, though, that the Supreme Court determined that the fourteenth amendment, enacted in 1866, incorporated the first amendment, resulting in the religious clauses' application to the states.<sup>47</sup> Over the years the high Court has adhered to this ruling again and again, most recently in *Wallace v. Jaffree*,<sup>48</sup> in which the Court held that state-sponsored silent prayers may not be conducted in public schools. In fact, in *Wallace* the Supreme Court dismissed the contention that a state is free to establish religion as "remarkable," and went on to observe that "This Court has confirmed and endorsed this elementary proposition of law (that a state may not establish

45. *Id.*

46. See *Barron v. Mayor & City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (constitution was established as limitation on government of United States and not as limitation on government of individual states).

47. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (statute authorizing district board of education to make rules and contracts respecting transportation of children to and from schools, other than private schools operated for profit, not violative of first amendment which is applicable to states through fourteenth amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (fundamental concept of liberty embodied in fourteenth amendment embraces liberties guaranteed by first amendment).

48. 472 U.S. 38 (1985).

religion) time and time again."<sup>49</sup> Thus, the Constitution prohibits the states as well as the federal government from establishing religion or abridging the free exercise of religion.

It is doubtful that many people would favor a return to the state of affairs prior to the application of the first amendment to the states, which would leave them free to establish particular religions and outlaw others. Consider, for instance, *Permoli v. First Municipality of New Orleans*,<sup>50</sup> a case decided in 1845 before the enactment of the fourteenth amendment, where the Court upheld the conviction of a Catholic priest for holding funeral services at an unlicensed chapel. Today, it is inconceivable and outrageous that a state would think to actually license churches and outlaw funeral services, but in *Permoli* the Supreme Court could do nothing but uphold the conviction, because, as the Court noted, the first amendment applied only to the federal government and therefore the states were entirely free under the Constitution to establish religion as well as to interfere with the free exercise of religion.<sup>51</sup> It was only through the fourteenth amendment's incorporation of the establishment and free exercise clauses that the Court was able to rule in *Pierce v. Society of Sisters*,<sup>52</sup> that the state could not, as Oregon had done, outlaw parochial schools. These cases demonstrate that a return to the pre-incorporation situation poses grave dangers to religious freedom.

Today, under our Constitution the states, no less than the federal government, are prohibited from establishing religion, and the most special care should be taken to insure that the theory of accommodation does not become the government establishment of religion.

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49. *Id.* at 48-49.

50. 44 U.S. (3 How.) 589 (1845).

51. *Id.* at 609.

52. 268 U.S. 510 (1925).