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The Supreme Court and the Religion Clauses of the First Amendment: Trials and Tribulations in Constitutional Interpretation

I) Introductory Remarks
1. The First Amendment
2. Complementarity and Tension between the Two Clauses of the First Amendment
3. Original Intent and Interpretation of the First Amendment
4. Definition of Religion

II) Establishment Clause
1. Relationship between State and Church: Strict Separation; Neutrality; Accommodation/Equality
2. The *Lemon* Test
3. Freedom of Speech and Establishment Clause
   - Access to School Facilities on Part of Religious Organizations
   - Religious Symbols Placed on Public Space by Private Organizations
   - Prayer Before a School Sport Event
4. Religious Activities in Public Schools
   - Prayer at School
   - Curricula
5. Religious Symbols on Public Property
6. Funding Religious Schools

III) Free Exercise Clause
1. Overview
2. Most Relevant Cases before 1960 and Recent Changes

IV) The Rehnquist Court and the First Amendment

V) 2005: A Significant Year

VI) The New Court: Gonzales v. O Centro (2006)

I) Introductory Remarks

1. The First Amendment

The opening clauses of the First Amendment of the Bill of Rights provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] From these few words emanate both the constitutional protection of religious freedom and the principle of separation between state and church.

In a key decision for understanding this constitutional precept, Judge Hugo Black reminds us that, in several cases, early immigrants to the U.S. had fled countries where they were forced to abide by a state religion, and where,

> in efforts to force loyalty to whatever religious group happened to be … in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[2]

It was the emergence in the New World of some among the practices of intolerance from which several colonials had been escaping that led to the adoption of the First Amendment.[3] Of course, while

> the sweep of the absolute prohibition in the Religious Clauses may have been calculated … the purpose was to state an objective, not to write a statute.[4]

Moreover, even if the Founding Fathers' intent had been free from ambiguity – while, in fact, it was not[5] – the Fathers themselves could not possibly foresee the massive religious pluralism that constitutes nowadays one of the main features of American society; they could not possibly imagine the present system of public education, in which a great amount of controversy on the issue of the relationship between state and church has originated; nor could they predict the regulation of

matters such as unemployment compensation or the enforcement of anti-discrimination laws – all cases where matters concerning religious freedom often arise. American judges – the Supreme Court in the first place – face the increasingly difficult task of rejuvenating the thought of Thomas Jefferson, James Madison, and Roger Williams by means of their interpretation of the First Amendment.[6]

2. Complementarity and Tension between the Two Clauses of the First Amendment

The complementarity of the two clauses of the First Amendment is quite evident: both protect religious freedom – be such freedom manifested in speech or in acts. In several cases – allegedly the least problematic – activity on the part of a state administration will be interpreted as simultaneously violating both the Establishment Clause and the Free Exercise Clause. A common example is a state that not only institutionalizes an official creed but also enforces participation in its rites on the part of the citizens: both a violation of the principle of separation between state and church and a violation of the freedom to profess a chosen religion (or no religion at all) are evident in such a case. By the same logic, enforced prayer in public schools simultaneously bears on the relationship between state and church and on the religious freedom of those whose beliefs are not mirrored by the selected forms of prayer.[7]

Nevertheless, the two clauses of the First Amendment may in some cases develop a tension against each other.[8] For instance, administrative action aimed at protecting the exercise of religious freedom may be regarded as illegitimate state interference in religious matters; conversely, an Administration that intentionally refrains from "establishing" a creed can be accused of limiting its amount of liberty. For example, if the state appoints and remunerates ministers of religion for those who serve with the Army, the state itself can be accused of excessively consorting with religion; conversely, if that very state does not satisfy the

religious needs of those who serve with the Army, it can be accused of violating the Free Exercise Clause.[9]

It might be observed that the very parameter developed in the well-known decision *Lemon v. Kurtzman*[10] – repeatedly applied to verify the constitutional legitimacy of state action– indirectly points to the tension between the two parts of the First Amendment. According to the so-called *Lemon* test, the state violates the Establishment Clause in each of the following cases: when state action is especially aimed at promoting religion; when state action mainly results in either endorsing or inhibiting religion; when state action develops into an excessive entanglement with religion. That said, it is quite plain that, whenever the state intervenes to protect freedom of worship on behalf of a creed, its "primary aim" will be identified with the "promotion" of the creed itself; analogously, when the state endorses the exercise of religious freedom, the "main result" of state action may be identified with "helping" a certain creed. Another example might usefully clarify this point. If Congress enacts a law that generally regulates all groups engaged in a certain activity, and such law provides a special regulation for religious groups, Congress might be accused of violating the Establishment Clause; on the other hand, if Congress does not provide for any special discipline for religious groups, it is probably bound to clash with the Free Exercise Clause.[11]

The Supreme Court itself recognized the intrinsic tension in the First Amendment, and remarked how hard it is to find

> a neutral course between the two Religious Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.[12]

The aforementioned tension is not the only one to be observed in the First Amendment: another possible scenario presents a clash between the principle of separation between church and

state and freedom of speech – the latter being also emphatically protected by the first article of the Bill of Rights.[13] For example, permitting the endowment of financial aids to religious student associations[14] or granting them access to school facilities[15] can be interpreted as a violation of the Establishment Clause; on the other hand, denying a group of people access to aids or facilities because of the religious content of their expressions might contrast with their freedom of speech.

Accordingly, the Supreme Court must deal with difficult cases, where attempts at balancing different – and sometimes clashing – constitutional principles, together with different ideological positions on the part of the judges, have been producing a series of not always coherent decisions.

3. Original Intent and Interpretation of the First Amendment

A typical approach to constitutional interpretation lies in the historical search by the judges of the so-called "original intent" – namely, the "original meaning" of the Constitution. The two Clauses devoted to religion in the First Amendment are *not* excluded from such hermeneutical approach – which is, nonetheless, of especially hard implementation because, among the Founding Fathers, there existed probably *no* final consensus upon the intrinsic signification of the Establishment Clause and the Free Exercise Clause. Judge Brennan makes a very clear point on this:

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons … The historical record is at best ambiguous, and the statements can readily be found to support either side of the proposition.[16]

Nevertheless, judges continue to invoke both the history and the original intention of the Founding Fathers to support their own positions: Chief Justice Rehnquist argued in 1985 that "the

true meaning of the Establishment Clause can only be seen in its history."[17] In a more recent case, already mentioned, it was debated whether a public university might legitimately deny a religious student association access to funds reserved for student activity: both Justice Thomas and Justice Souter (albeit divided in their opinions on the merits of the issue) conspicuously quoted James Madison on religious freedom.[18]

In other words, the Founding Fathers' view of state and church relation was not unanimous. Laurence Tribe aptly sums up three different opinions at the Philadelphia Convention:

> At least three distinct schools of thought … influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that "worldly corruptions … must consume the churches if sturdy fences against the wilderness are not maintained"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by one.[19]

Among the doubts originated by the search of an original intent in religious clauses (doubts that may arise in any application of historicism) are those related to the massive changes occurred in America after the adoption of the First Amendment. This large country presents nowadays a much more diffused religious pluralism than in 1791. Here I find useful to quote once again Judge Brennan's acute observations:

> our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the nation is far more

> heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well as those who worship according to no version of the Bible and those who worship no God at all.[20]

Moreover, numerous cases that offer problems of interpretation of the Establishment Clause are grounded in contexts that were totally unknown in the age of the Founding Fathers. A common example is the public education system, which, of course, did not exist at the time when the Bill of Rights was ratified. In other words, how can we search for the intent of the Founding Fathers in situations and contexts they could not have possibly imagined in the first place?[21]

In spite of the difficulties inherent in any interpretative approach grounded in historicism – difficulties exacerbated, in the case of the Establishment Clause, not only by the brevity of a two-hundred-year-old constitutional document, but also by the fact that the very members of the constituency were not unanimous on the meaning of the relation between state and church– the debate on the original intent still informs a number of decisions that bear on the religious clauses.[22]

4. Definition of Religion

Taking into account the difficulty inherent in producing a definition of religion that might encompass the diversity of practices and worships in the United States nowadays, it is perfectly understandable that the Supreme Court has always refrained from offering a general explanation of the term – although the issue has emerged on several occasions with reference to both the Establishment Clause and the Free Exercise Clause.[23] (In this regard, the judges of the Supreme Court have demonstrated, perhaps, more wisdom than some Italian colleagues).[24] In fact, it has been observed that "there is no single characteristic or set of characteristics that all religions have in common that makes them religions."[25]

Moreover, any definition of religion that favors a perspective over another might itself be considered problematic with relation to the Establishment Clause.

To sum up: on the one hand, the need to interpret the Free Exercise Clause so as to maximize its potential for protecting religious expression may require a broad definition of "religion"; conversely, a more specific interpretation of that very concept might instead be appropriate with regard to the Establishment Clause, so as not to restrain state action excessively. This problem was faced by American courts when called to decide whether a school course in "transcendental meditation" might be envisioned as a violation of the Establishment Clause.[26] The wish to protect the right to exercise transcendental meditation may direct one toward a more encompassing definition of religion so as to include such activity; nevertheless, allowing public schools to offer such a course may lead, instead, toward a more restrictive definition of religion, so as to rule courses in transcendental meditation out of the classroom.

While the Supreme Court, as previously mentioned, never offered a clear definition of religion, it had nonetheless to face the issue on several occasions, and gave its opinion in three different contexts.

First, in cases concerning the Selective Service Act, the Court faced the problem of the definition of religion in order to decide when to consider conscientious objection legitimate: in *United States v. Seager*[27] and in *Welsh v. United States*[28] Justices have openly adopted an extensive interpretation, granting the petitioners, in both cases, the right to be exempted from military service.

Second, the Court established that, in their attempt at defining the scope of the constitutional protection of religion, judges should investigate the "sincerity" of a belief.[29]

Finally, the Court pointed out that a sincere religious belief must be protected by the First Amendment, even if the belief cannot be identified with an orthodox creed or an established church.[30]

II) Establishment Clause

1. Relationship between State and Church: Strict Separation; Neutrality; Accommodation/Equality

American case law and scholarship have contrived several theoretical approaches to the principle of separation between state and church – approaches that are strictly connected to *how* judges tend to solve issues related to the interpretation of the Constitution. Three main lines can be extrapolated: it seems to me that, with a few exceptions, these three tendencies have been forming a sequence in time and a process of development that I would like to redefine – after analyzing (albeit quite schematically) the decisions of the Supreme Court up to the end of the Rehnquist years.

According to the theory called "strict separation" – whose first and most illustrious advocate is, undoubtedly, Thomas Jefferson – church and state should be separated by a "wall":[31] in other words, absolutely *no* contact should take place between the public sphere and the private one – and the religious sphere should exclusively pertain to the latter. As argued in 1947 by the Supreme Court in the first well-known case in which it attempted to give a meaning to the Establishment Clause, through a move that definitely appropriated the great federalist's position: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[32]

Jefferson's famous statement – just like Madison's Remonstrance[33] – was directed against a decision by the State of Virginia to enact a tax that favored the church. Judge Rutledge, author of the majority opinion in *Everson v. Board of Education*, explicitly referred to those events in his exposition of the thought underlying the Establishment Clause:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to

> uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[34]

This is not the place to investigate the implications of such a strictly separatist thought. It can nevertheless be observed that, even at a time when judges' decisions in the U.S. allegedly proposed a strict interpretation of the relationship between state and church (thus buying into the "wall of separation" theory),[35] a cultural tradition profoundly marked by references to religion at the level of social structure was a source of inevitable contradictions. One only has to remember that the motto "In God we trust" has always been impressed on dollar bills, or that public hearings in front of the Supreme Court always begin with the invocation "God save this honorable Court."

According to yet another approach to the Establishment Clause, (originating in a fairly recent scholarship), the state should be "neutral" in its relationship with religion: in other words, the state should refrain from favoring religious over nonreligious behavior, or a creed over another.[36] The Supreme Court has adopted this "neutral" perspective on the Constitution, establishing that the state will be regarded as violating the First Amendment if it endorses (by any means, even symbolic) a particular religion, or endorses religious thought over secular thought. A strenuous advocate of this approach is Justice O'Connor (replaced by Justice Alito last January), who argues that "every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[37]

It goes without saying that a "neutral" interpretation of the Establishment Clause entails a difficulty in determining *which acts* constitute an illegitimate "symbolic endorsement" of religion.[38]

The Supreme Court tackled the issue in a highly controversial decision: *Capitol Square Review and Advisory Board v. Pinette* (1995).[39] The issue in *Pinette* regarded the constitutionality of the decision, on the part of the Ohio state administration, to prevent the Ku Klux Klan from placing a big cross on the lawn in front of the state house. Although the Court did not present a definite majority, seven judges argued that prohibiting the cross would have resulted in a violation of the Klan's freedom of expression – while, conversely, allowing it would have implied no violation of the Establishment Clause. Among the different views, Justice O'Connor's is worth mentioning (her opinion was also shared by Souter and Breyer): according to this view, the cross had to be permitted because it could not possibly be regarded as an endorsement of religion in the eyes of a "reasonable observer":

> "where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated";

yet, Justice O'Connor adds that, in this particular case, a "reasonable observer" could not read the cross as an endorsement of religion by the state, because "there was a sign disclaiming government sponsorship or endorsement and this would remove doubt about the State approval of the religious message."[40]

The "symbolic endorsement test" (like other famous tests elaborated by the Court) can be considered a useful tool for determining whether the state is indeed "neutral" or if, on the contrary, it endorses a religion. From such perspective, the Establishment Clause is aimed at avoiding discrimination of those who are not participants in the privileged religion: the "symbolic endorsement" test can be regarded as a tool for measuring individual reactions vis-à-vis state action.[41] Yet, the test can be subject to criticism: it presents itself as ambiguous and ill-defined,

because the same symbols can be differently experienced by different subjects. Consequently, the Court cannot but resort to a subjective evaluation of how different individuals react – subjectively – to different symbols. To this should be added that judges who partake of a "dominant" religion can remain insensitive to symbols that are poignantly perceived by those who profess a "minority" creed.[42]

Finally, a third (and most recent) interpretation of the Establishment Clause should be mentioned; such reading proposes to recognize the importance of religion in contemporary society and, consequently, to reconcile such importance with the state and its activity.[43] More specifically, according to this interpretation, state action violates the Constitution only if it institutes a church, forces citizens to take part in its rites, or endorses a religion over other creeds. For instance, Justice Kennedy argued that

> the Establishment Clause … guarantees a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tend to do so.[44]

In the most recent cases, the Court has been applying this (allegedly restrictive)[45] approach describing it, at the same time, in terms of equality: the state must deal with creeds and religious groups in the same way it deals with nonreligious ones.[46]

In this case, too, what is left is the problem of evaluating *in which cases* the state illegitimately forces its citizens to take part in religious activities. A revealing decision comes to mind: *Lee v. Weisman* (1992).[47] In *Lee*, the Court declared prayer led by a minister, on the occasion of a public graduation ceremony, to be invalid, arguing that such practice is intrinsically coercive, because it is accompanied by a high amount of pressure on students, who are encouraged to take part in the ceremony and be present

during prayer. In spite of this decision and the corresponding labeling of the religious activity as contrary to the Establishment Clause (though it could be here anticipated that the issue of prayer during school activities pertains to a very peculiar discipline),[48] the general impression is that the interpretive style of the Supreme court has widened considerably, and that it is now possible to tolerate situations in which church and state are all but "separated by a wall."

2. The Lemon *Test*

Although different judges have always relied on different theoretical interpretations of the Establishment Clause, there is practically no doubt that state action will be regarded as constitutionally invalid should any discrimination among religious groups take place.[49] On the other hand, when discrimination is absent, cases involving the relationship between state and church have long been decided through the application of the well-known *Lemon* test.

A tripartite test for measuring the legitimacy of state action was elaborated in *Lemon v. Kurtzman*.[50] According to the test, a law is to be considered invalid when it does not conform to (at least) one of the following parameters:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive governmental entanglement with religion.[51]

As the reader might already have inferred, the *Lemon* test tends to be favored by advocates of a strictly separatist approach to the Establishment Clause; it is occasionally applied by judges who privilege a "neutral" approach (although those judges tend to highlight whether the aim or the result of the law can be identified with a symbolic endorsement of religion); finally, judges

who advocate an interpretation of the First Amendment grounded in equality among different creeds (as well as among believers and non-believers) propose to overrule *Lemon v. Kurzman*.

Although the *Lemon* Test has never been explicitly overruled – quite the other way, it was applied on the occasion of some fairly recent cases[52] – its future is laced with uncertainty. In fact, the majority of judges making up the Court only a few months ago (prior to Robert's and Alito's new appointments) had openly criticized it. The test was not applied to a number of recent cases, such as *Santa Fe Independent School District v. Doe*,[53] *Mitchell v. Helms*,[54] and *Good News Club v. Milford.*[55]

3. Freedom of Speech and Establishment Clause

During the past two decades, a few important cases have raised the issue of balancing freedom of speech and the principle of separation between state and church – both protected by the First Amendment. In some cases presented to the Court, in fact, the state had been restraining freedom of speech in public spaces (as well as in private spaces maintained through public funding) in order to prevent violations of the Establishment Clause. In such cases, judges have always opted for endorsing freedom of speech – albeit with religious content – thus subscribing (at least indirectly) to a certain degree of "entanglement" between state and church.

A few examples – related to different issues – can prove helpful in clarifying the position of the Court.

a) Access to School Facilities on the Part of Religious Organizations

In *Widmar v. Vincent*,[56] a state university had been preventing some groups from using school facilities for religious or spiritual purposes: this practice has been defined as constitutionally illegitimate. More specifically, the University of Missouri at Kansas City granted student organizations access to its facilities,

but simultaneously forbade any religious use of those spaces. The Court argued that the University

> discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.[57]

The Court applied the *Lemon* test in 1981, arguing that abiding by the Establishment Clause must not result in a limitation of free speech. It was held that granting all groups free access to school facilities legitimately aims at providing students with spaces for discussion, while the endorsement of religion is merely accidental. Contact between religion and state is, in this case, neither inappropriate nor excessive, because the state, legitimating both religious and nonreligious organizations, ultimately refrains from operating any form of control on their activities.

The Court has applied an analogous reasoning to other cases.

In *Board of Education of Westside Community School v. Mergens*,[58] the Court (once again applying a tool developed in *Lemon v. Kurzman*) decided for the constitutionality of the Equal Access Act – namely, a law promulgated by Congress and addressed to all schools that are recipient of federal funding. The aforementioned Act provides that when those schools open their facilities to students for extracurricular activities, access cannot be restricted to single groups because of the political, religious, or philosophical content of their discussions.

In *Lamb's Chapel v. Center Moriches Union Free School District*,[59] the Court invalidated the practice of a school district that excluded only religious groups from access to school facilities in the evenings and on weekends. The school, in fact, opened its own facilities after school hours to a number of local organizations, yet simultaneously established that "school premises shall not be used by any group for religious purposes."[60]

In *Good News Club v. Milford*,[61] the Court held that a primary school should not deny religious groups access to its facilities after school hours because this violates the groups' freedom of speech.

According to a reasoning analogous to the one in *Widmar*, in *Rosenberger v. Rector and Visitors of the University of Virginia*[62] the Court declared a certain behavior of a state university to be unconstitutional. Such university excluded a school magazine with religious contents from funding while, at the same time, it still provided funding for school magazines of nonreligious inspiration.

I think it can be argued that in such cases, for the sake of protecting free speech, a certain amount of "contact" between state and church is accepted – an amount of contact that is quite other from the Jeffersonian "wall of separation."

b) Religious Symbols Placed on Public Space by Private Organizations

In the already mentioned *Capitol Square Review and Advisory Board v. Pinette*,[63] the Court, in an attempt to balance freedom of speech and the principle of separation between state and church, decided for the first to prevail. In such decision, as previously mentioned, the Justices held that the state could not legitimately restrain the Ku Klux Klan's freedom of expression by forbidding the erection of a big cross on the lawn in front of the state house. One should also keep in mind that, in spite of the lack of a clear majority opinion, some Justices have produced, on the occasion of this controversial case, opinions of high relevance. While O'Connor (as already observed) focuses her attention on the "symbolic endorsement test," Scalia (after explicitly mentioning *Widmar, Mergens*, and *Lamb's Chapel*) argues that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[64]

c) Prayer Before a School Sport Event

It may at this point be useful to cite a fairly recent decision (2000) showing that, also in recent times, attempts at balancing freedom of expression and the principle of separation between church and state often result in the former prevailing over the latter. In *Santa Fe Independent School District v. Doe*,[65] the Court explicitly rejected the appeal to freedom of speech by a school administration, arguing that the regular exercise of collective prayer by the students before football matches is unconstitutional. On the other hand, it should be remarked that the question pertains to a peculiar context – namely, public schools, which are treated by the Court in a special and autonomous way, following a sort of special jurisprudential path.

4. Religious Activities in Public Schools

Among the cases regarding the Establishment Clause that have been presented to the Supreme Court, several pertain to religious activities taking place in public schools: such cases, as already mentioned, seem to follow an autonomous path. Two main lines of investigation can be traced: prayers and curricula.

a) Prayer at School

Among the most controversial decisions in the history of the Supreme Court are the ones that have declared prayer and Bible readings in public schools to be constitutionally illegitimate.

The first case under examination is *Engel v. Vitale*:[66] the Court's decision invalidated the practice of a school that enforced, before the beginning of classes, recitation of a "non confessional" ("non denominational") prayer, composed by the state Board of Regents.[67] In fact, in an opinion written by Justice Black, the Court holds:

> there can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regent's prayer … Neither the fact that the prayer may be

> denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.[68]
>
> The establishment clause rests on the belief that a union of government and religion tends to destroy government and to degrade religion … The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too personal, too sacred, to holy, to permit its 'unhallowed perversion' by a civil magistrate.[69]

The Court, explicitly referring to the intention of the Founding Fathers (and, in so doing, assuming a perspective on the Establishment Clause that recalls the concept of "wall of separation") especially emphasizes the unconstitutionality of behavior of a state administration that actively provides schools with a text for prayer.

Only a year after *Engel*, in *Abington School District v. Schempp*,[70] the Court invalidates a state law enforcing, at the beginning of each school day, a reading of selected Bible verses and declamation of the Lord's Prayer by the students. Although *Schempp* (unlike *Engel*) does not involve a prayer composed by a state authority, the aforementioned law – enforcing the reading of a sacred text as part of school curricula – was held to be a violation of the Establishment Clause.

In *Wallace v. Jaffree* (1985),[71] the Court follows the well-known *Engel* and *Schempp* precedents and proclaims the unconstitutionality of an Alabama law enforcing a minute of silence for meditation or spontaneous prayer in public schools. With regard to this case, the Justices argue that the legislative history of such a measure openly reveals that the legislator's aim actually consisted in a surreptitious reintroduction of the prayers that had been previously ruled off the classroom.

Again, as previously mentioned, in *Lee v. Weisman*[72] the Court has enlarged its parameters of interpretation of the Establishment

Clause, holding that prayer guided by a minister during a graduation ceremony is not acceptable.

Finally, in the previously discussed case *Santa Fe Independent School District v. Doe*,[73] dealing with the relationship between freedom of speech and Establishment Clause, it was decided that guided student prayer before a football match is constitutionally invalid.

To sum up, it can be observed that in the case of prayer in (public) schools, the Court consistently appears to invalidate any form of contact between state and church.

b) Curricula

In two fairly recent as well as important decisions, presenting to American courts the same issues within a very short span of time, the Justices have labeled unconstitutional the practice of a number of state administrations that model school curricula on religious principles. More specifically, in *Epperson v. Arkansas*,[74] an Arkansas state law has been invalidated, because it forbade teachers and professors to lecture on theories claiming that human beings descend from animals. According to the Court, the Establishment Clause does not allow a state to found educational activities on principles or prohibitions of any sort. They argue:

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[75]

The same line was followed in *Edward v. Aguillard*:[76] the Court has declared a Louisiana law prohibiting the teaching of evolutionism – when not accompanied by creationism – in public schools to be constitutionally invalid.

5. Religious Symbols on Public Property

Although a few cases have already been discussed, it is worth reconsidering the issue of religious symbolism more thoroughly. This will prove helpful in tracing the overall position of the Court up to the end of the Rehnquist years, as well as in underlining the importance of two decisions (handed down in 2005) that will be subsequently analyzed.

The first case to be considered is *Lynch v. Donnelly*:[77] the Supreme Court argued for the constitutional legitimacy of a representation of the Nativity – accompanied by Christmas symbols such as a hut, a Santa Claus sleigh, and a fir decorated with multicolored lights – in a public park funded by a nonprofit organization.

After retracing several routes of penetration of religion into American society– from president Washington's discourse celebrating Thanksgiving to the motto "In God We Trust" on dollar bills – the Justices held that the Nativity Scene is legitimate because its motivations are ultimately secular – namely, to celebrate Christmas holidays.

The aforementioned position was held by the Court in 1984; in 1989, quite the other way, the intrinsically religious nature of Nativity scenes was (at least partially) recognized.

County of Allegheny v. American Civil Liberties Union[78] presents an issue analogous to the one in *Lynch*, concerning, this time, two different Christmas representations: the first consisted of a crib placed in a local court by members of the Catholic Church; the second was composed of a Christmas tree, a big menorah,[79] and a printed tag stating that the town saluted liberty, all placed in front of a governmental building. Although lacking a majority opinion, the Court declared the first representation to be invalid while it permitted the second one. An essential difference – at least according to Justice Blackmun and Justice O'Connor, whose vote was crucial – laid in the fact that, in the first case, the crib was the only symbol to be present – thus constituting a "symbolic endorsement" of Christianity – while, in the second case, the

menorah was accompanied by other symbols, not only religious but also secular.

In order to analyze the position of the Court prior to the aforementioned 2005 decisions – in which the Court, examining two similar cases, comes to different conclusions – it may be useful to report the opinions held by other judges on this controversial case. On the one hand, in fact, Stevens, Brennan, and Marshall regarded both representations as in contrast with the Establishment Clause; on the other hand, Kennedy, Rehnquist, Scalia, and White found both valid.

At this point, for the sake of accuracy, the case *Capitol Square Review v. Pinette*,[80] in which the Court legitimated the presence of a cross placed by the Ku Klux Klan on the lawn in front of the Ohio state house,[81] should be recalled.

6. Funding Religious Schools

A good number of cases concerning the interpretation and application of the Establishment Clause presented issues related to the legitimacy (or, conversely, illegitimacy) of governmental funding to religious schools. The Court has *not* always been consistent in the resolution of the issues – be they related to tax deduction, free coupons for book purchase, funding for services such as the transportation of kids, or other.[82]

Because case law on this issue is extremely diverse and cannot be easily subsumed into unity, I shall limit the discussion to a fairly recent and very important decision – a decision that aptly presents a differentiation among the positions of the various Justices that may be helpful in envisioning future developments.

The Court has often faced the necessity to draw a line that may clearly separate constitutionally legitimate state funding to religious schools from illegitimate funding. While recognizing the impossibility to trace a clear demarcation, the Court has, for a long time, applied the *Lemon* test – focusing, for instance, on whether a decision that endorses financial help is based on a secular motivation, or whether, conversely, it ultimately results in

an endorsement of religion; or, again, if funding in itself results in an excessively close relationship between state and church.[83]

In *Mitchell v. Helms* (2000),[84] the Court finally discards the *Lemon* test and, overruling several important precedents,[85] argues that the state can legitimately provide religious schools with learning instruments – such as, among other things, computers.

As it often happens with cases predicated on ideologically controversial issues, the *Mitchell* decision does not present a clear majority opinion. In a mere plurality opinion – also subscribed by Rehnquist, Scalia, and Kennedy – Justice Thomas argues that funding religious education should be permitted as long as different creeds are equally treated. Justice O' Connor, displaying a contrary opinion (also shared by Breyer) within the judgment, argues that funding is acceptable if it is not employed for religious purposes. Finally, Justices Stevens, Souter, and Ginsburg completely dissent, arguing that the Court should have followed its own precedents: according to those precedents, governmental funding cannot be considered legitimate when it could be employed in religious teaching.

Once again, the Court displays its own internal divisions.

III) Free Exercise Clause

1. Overview

Although, in 1961, Chief Justice Warren solemnly stated that "the freedom to hold religious beliefs and opinions is absolute,"[86] the Free Exercise Clause does tolerate a few limitations to freedom of worship. The Supreme Court, in fact, observed that the First Amendment contemplates two different possibilities – namely, the right to believe *and* the right to act according to one's faith: while the former is predicated on absolute freedom, the latter is not.[87] Consequently, the Court mentioned a

> distinction between the absolute constitutional protection against governmental regulation of religious beliefs on the

> one hand, and the qualified protection against the regulation of religiously motivated conduct.[88]

Although the state cannot possibly interfere with inner beliefs, it can, nonetheless, bear an influence on an individual's religious behavior; accordingly, on several occasions, the Court has been called to interpret and apply the Free Exercise Clause.

Lawmakers can, in some cases, forbid a behavior that is required by a certain religion. In *Reynolds v. United States*,[89] for instance, the Supreme Court declared a federal law banning polygamy to be constitutional, although Mormons argued that polygamous marriage was required by their creed.

Conversely, the Free Exercise Clause can be invoked if a state enforces a behavior that is contrary to a certain creed. For instance, the Court rejected an argument by a group of Amish, who opined that the obligation to a social security number and the corresponding obligation to pay taxes clashed with their faith.[90]

Again, the Free Exercise Clause becomes relevant when a law renders the practice of a certain creed harder or more vexing for individuals. In several cases, for instance, denying unemployment compensation by the state to those who lost their jobs on religious motives was held to be constitutionally illegitimate.[91]

2. Most Relevant Cases before 1960 and Recent Changes

Before 1960, the Supreme Court had never elaborated a clear-cut, distinctive hermeneutical approach to the Free Exercise Clause, although it had already invalidated laws that forbade domestic promotion of religion as well as laws that enforced taxes on such activity.

Finally, in 1963, in the famous case *Sherbert v. Verner*,[92] the Court explicitly argues that, in the examination of laws that bear an influence on the free exercise of religion, "strict scrutiny" must be applied – namely, a stricter constitutional examination that, more often than not, results into declarations of invalidity. For

instance, in *Sherbert*, denial by the state administration to grant unemployment compensation to a woman refusing to work on Saturdays – holidays according to her religion – was considered in contrast with the Free Exercise Clause.

For the twenty-seven years after *Sherbert*, the Court has still been applying the "strict scrutiny" test; yet, it rejected an argument by an orthodox Jewish military doctor, who opined that a working code preventing him from wearing his traditional hat during working hours amounted to a violation of his religious freedom.[93] Analogously, as already observed, the Court did not classify as contrary to the Free Exercise Clause laws that enforced taxation for the sake of social security.[94]

Nevertheless, during this span of time, judges have always favored the claims of individual faith over those of the state in two important domains: first, it was recognized that Amish children can leave school at the age of fourteen (instead of sixteen, as usually enforced by the law) because it is required by their religion; second, the right to unemployment compensation has always been recognized for those who lost their jobs for reasons connected to their creed.

A very important change takes place in 1990. In *Employment Division v. Smith*,[95] the Court decides that a "neutral" law – i.e., a law that is applicable to the totality of citizens – cannot be regarded as contrary to the Free Exercise Clause. According to *Smith*, a law that is *not* directly aimed at restraining a peculiar religious behavior or interfering with religion will not be considered unconstitutional – *not even* when it incidentally limits freedom of worship. One among the issues debated in *Smith* is still highly controversial: namely, whether a federal statute, prohibiting consumption of all kinds of drugs including peyote (a hallucinatory drug employed by Native Americans during their religious ceremonies), might be regarded as in contrast with the Free Exercise Clause. The Court held in 1990 that the statute cannot be regarded as unconstitutional, because it has a general scope and is not aimed at a particular creed.[96]

The use of drugs in religious ceremonies has been once again investigated by the Court on the occasion of an important decision, handed down only a couple of months ago.[97] Before turning to this decision, it might be once again useful to summarize – albeit schematically – the case law before February 2006.

While the statute prohibiting peyote consumption is validated in *Smith*, in *Church of the Lukumi Babau Aye, Inc. v. Hialeha* (1993)[98] an administrative ordinance prohibiting ritual animal sacrifice is declared to be contrary to the Free Exercise Clause, because structurally aimed at *only one* religious group.

A dual tendency emerges after those cases. On the one hand, a "general," widely applicable law will confront a relatively mild constitutional examination – and, consequently, the chances that it might be invalidated are very scanty;[99] on the other hand, a law that was intentionally directed against the customs of a single creed will be required to pass the harsh "strict scrutiny" test.

Facing this new situation, Congress adopts the Religious Freedom Restoration Act in 1993.[100] Congress's aim is restoring the "strict scrutiny" test for determining which acts might clash with religious freedom, as well as overruling the awkward *Smith* precedent. Nevertheless, in *City of Boerne v. Flores* (1997),[101] the aforementioned Act is declared to be invalid by the Court, because it was enacted outside the purview of the legislator's powers as conferred by §5, XIV Amendment of the Constitution.

After this episode – revealing a harsh contrast between federal judicial power on the one hand and executive/legislative power on the other – it is generally opined that the Religious Freedom Restoration Act should not be applied to state statutes, while, conversely, it can be applied to federal statutes: this implies that federal acts must be judged according to a very strict constitutional paradigm.[102]

Finally, in the year 2000 (i.e. during the Clinton administration, characterized by a strong penchant for protecting minorities) Congress enacted the Religious Land Use and Institutionalized

Persons Act:[103] this law was aimed at enforcing a "strict scrutiny" of all administrative acts that bear consequences on real estate property belonging to religious groups or on the freedom of worship of those who experience a limitation of personal liberty. The Act was held valid by the Supreme Court in 2005.[104]

IV) The Rehnquist Court

If we pay attention to the dates, we can remark that the cases described in the previous pages (although with some minor inconsistencies) point, quite clearly, to a change of direction by the Court with regard to the interpretation of the religious clauses of the First Amendment – a change starting with Chief Justice Rehnquist.[105]

The Warren Court[106] – maintaining an almost unchanged position during the years of Chief Justice Burger[107] – offered a wide-range interpretation of both the Establishment Clause and the Free Exercise Clause.

More specifically, with regard to the latter Clause, the "extensive" approach was grounded in the "strict scrutiny" applied to the legislation in case of a possible violation of religious freedom – even when the violation was grounded in general, widely applicable norms. Although the practical consequences of such approach were quite limited (courts were very strict with laws discriminating race or limiting free speech, and much milder in their protection of the religious freedom of small groups who claimed to be discriminated by laws of general application), related symbolic effects are not to be underestimated: respect and concern for minority creeds were brought to public attention. Within such frame, the aforementioned 1972 decision is particularly relevant: Chief Justice Burger argued that a Wisconsin law enforcing school age to sixteen could not be legitimately applied to Amish communities, because, according to their creed, education of children after they turn fourteen must take place within the family and according to traditional values.[108]

It is well known that, during the Burger years, the Court enforced the *Lemon* test to verify (alleged or doubted) compliance with the Establishment Clause. Moreover, though the "wall of separation" was perhaps not as solid as before, the test was scrupulously applied in order to protect the principle of separation between state and church.[109]

From the mid-1980s on, things have changed and a more restrictive interpretation of the religious Clauses has gained momentum. As we have seen, the Rehnquist Court would not contemplate any derogation to laws of general application, if the derogation was based on religious motives grounded in the Free Exercise Clause: the most controversial case is peyote consumption on the part of Native Americans.[110] It should nonetheless be remarked that this case was preceded by other cases that pointed to a change of direction – among them, for instance, is the case of the Jewish doctor who claimed the right to wear his traditional hat during working hours.[111]

With regard to the Establishment Clause, the position of the Court during the Rehnquist Presidency also changed: the *Lemon* test, though never formally nor openly rejected, was less and less applied: consequently, to determine the unconstitutionality of laws entailing an interpenetration of religious and state domains became more and more difficult.

With the exception of prayer at school (in those cases the Court is still highly prone to keep religious practice not only out of classes, but also out of football fields and graduation ceremonies), the Supreme Court has – often through the application of the mild "symbolic endorsement test" – permitted religious symbols in public spaces[112] (the most famous case is, undoubtedly, granting the Ku Klux Klan permission to erect a big cross on the Ohio state house lawn).[113]

The real breakthrough effected by the Rehnquist Court regards the funding of religious schools. Before 1983, the Court had been permitting access to state or federal funding by such schools, on strict condition that financial help be not directly used in the

school's religious activities. After that date, the Court has legitimated numerous cases of funding, regardless of how the money was subsequently used by the schools, thus indisputably (albeit indirectly) favoring religious education.[114]

V) 2005: A Significant Year

As repeatedly observed, 2005 is an extremely important year for the U.S. Supreme Court. During his second term, President Bush (who had not had the possibility to nominate any judge during his first term) appointed two new judges: Chief Justice Roberts was called to the position that had for a long time belonged to Rehnquist; Justice O'Connor – whose vote had for a long time been decisive in matters of relationship between state and church – was replaced by Justice Alito.

The importance of 2005 also emerges with relation to the religious clauses of the First Amendment: evidence shows that, although the most conservative members of the Republican Party (the so-called teocons) have been trying to influence the interpretation of the Establishment Clause and the Free Exercise Clause, they have not always succeeded in their intent. Quite the other way, a good number of federal and state jurisdictions – as well as the Supreme Court itself – have generally followed precedents and also handed down decisions in some respect not easily predictable.

Let us examine the issues one by one.

First: an organization whose aim was to introduce the teaching of "the intelligent design" in public school curricula was defeated in a federal court of Dover, Pennsylvania. The judge – albeit nominated by Bush himself – argued that such teaching was void of scientific value, thus merely constituting a sneaking reintroduction of creationism: accordingly, it presented itself as an open violation of the Establishment Clause.[115]

Second: the Supreme Court faced again the issue of religious symbols in public spaces. In *McCreary County v. ACLU*,[116] the Court argued that posting the Ten Commandments and a

declaration in favor of Christianity in a Kentucky courtroom amounts to a violation of the principle of separation between church and state and is therefore unconstitutional. Meanwhile, in *Van Orden v. Perry*,[117] the Court held that a granite monument with an incision of the Ten Commandments, donated by a philanthropic group and placed in front of the Texas state house, did not constitute an "endorsement" of religion by the administration and was to be regarded as constitutional. (Interestingly, the vote ultimately determining two different outcomes in those two similar cases was not O'Connor's but Breyer's).

In *Cutter v. Wilkinson*[118] (already briefly mentioned),[119] the Court endorsed the legitimacy of a section of the Religious Land Use and Institutionalized Persons Act advocating that prison codes that restrain prisoners' religious freedom must be examined through a very strict parameter of constitutionality – in other words, through the "strict scrutiny test."

Finally, a district federal Court in the Ninth Circuit, in California, decided on a case that had involved – with different outcomes – a number of American jurisdictions for a long time: according to this decision, the part that explicitly refers to God in the Pledge of Alliance to the flag is unconstitutional.[120] The issue is quite complex, but it deserves to be briefly reported here, not only as a lively example of the ongoing, vexed debate on the Establishment Clause, but also as a token of the good functioning of U.S. judicial federalism.

Mr. Newdow, an atheist whose daughter attends a primary school in the Elk Grove district, California, presents in March 2000 a petition to the trial court, arguing that having children recite the Pledge of Allegiance – which contains the expression "under God" – before classes contradicts both religious clauses of the First Amendment.[121]

The judge rejects the petition and Newdow files an appeal. In a first moment, the federal Court of appeal of the Ninth Circuit holds that both the federal law enforcing the Pledge of Allegiance

and the practice of its recitation required by the school district violate the Establishment Clause. Nevertheless, this very Court – after taking into consideration a number of procedural questions not worth reconsidering here, and after clearing some doubts raised by Newdow's divorced wife about the husband's standing to sue – adopts a new position that overlaps with the first, blurring its contours, and eventually leaving the issue of the constitutionality of the Pledge of Allegiance uncertain.

In June 2004, the Supreme Court considers Newdow's case and decides only that he has no standing. In other words, dealing with a case that had kindled a huge debate in public opinion, the Court prefers to hide behind a procedural problem, practically deciding *not* to decide.[122]

At this stage, Mr. Newdow associates with others in order to pursue a new and completely different legal action. On this second petition, Judge Karlton – a member of the aforementioned Californian federal district Court appointed by President Carter in 1979 – decides on 14 September, 2005.

Among the numerous issues faced by judge Karlton, one is especially interesting. After examining the scope and value of previous decisions taken by the Ninth Circuit Court of appeal, judge Karlton decides to follow the precedents and concludes that, while recitation of the Pledge of Allegiance and its reference to God during classes is unconstitutional – because, among other things, it violates the right of the pupils to be "free from coercive requirement to affirm God" – recitation of the same by parents during meetings at school is not.

Newdow's story has one more chapter. According to a pattern common to other recent (and controversial) decisions taken by the Supreme Court, a portion of public opinion mobilized its representatives and persuaded them to propose a law significantly titled "Pledge Protection Act," in order to prevent federal courts from deciding cases that involved the Pledge of Allegiance by limiting their jurisdiction. (As an instance of such pattern one could range the responses to *Lawrence v. Texas*,[123] a decision that,

invalidating the laws that punished sodomy between consenting adults, implicitly recognized the right of homosexuals to express their affectivity). Like in other similar cases the Pledge Protection Act – a law that openly presents itself as a political move that is already bound to fail[124] –had a very short life, but it contributed to highlighting the intensity of the present debate on the relation between church and state in the U.S.

VI) The New Court: Gonzales v. O Centro

The first case on matters of religious freedom decided by the Supreme Court in its new composition – with Chief Justice Roberts in place of Rehnquist and Justice Alito in place of Justice O'Connor – is *Gonzales v. O Centro Espirita Beneficiente União Do Vegetal.*[125]

In this case, the Court *unanimously* recognizes the right of a small religious sect to import a hallucinatory herb[126] required for its own rites, although the substance is included in a list of drugs prohibited by the federal government. (The decision comes – at least partially – unexpected, and unanimity itself elicits great surprise because, during the past two decades, decisions regarding the First Amendment had always been not only greatly controversial but also divided). The decision, authored in very clear terms by Roberts, is extremely important because, on the one hand, it clearly represents a case of application of the Religious Freedom Restoration Act: such Act requires the judges to examine through the lens of the "strict scrutiny" test any act that interferes with religious freedom.[127] In other words, the Freedom Restoration Act – albeit seen as illegitimate when applied to state action – is clearly validated at the level of the federal government.[128] On the other hand, the aforementioned decision can be read as an important clue, also envisioning possible future orientations on the part of the Court.

In the Chief Justice's opinion is argued that governmental defense – according to which the Controlled Substance Act, quite simply, does not contemplate any exception – clashes with the

Free Exercise Clause; moreover, it is observed that, for a long time, Native Americans have been allowed the use of peyote during their rites, although peyote contains an ingredient – mescaline – prohibited by the Controlled Substance Act as a potential threat to human health.[129] If the use of potentially harmful peyote is allowed

> for hundred of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 of so American members of the U.V.D. who want to practice theirs.[130]

Albeit Justice Alito could not actively participate in the *Gonzales* decision because he had not taken his oath yet when the public hearing of the case took place, if one compares the present situation with the decision on *Employment Division v. Smith*,[131] taken under Justice Rehnquist's guidance, it becomes evident that the judges have significantly changed their orientation. While, in 1990, the Controlled Substance Federal Act did not contemplate any exception, even though grounded in a consideration of religious freedom, an exception of this kind was granted in 2006 on behalf of a small congregation called O Centro Espirita Beneficiente União Do Vegetal.

The motives for this (partly) unexpected change might call for an investigation. But that would be another story.

NOTES

[1] United States Constitution, First Amendment.

[2] *Everson v. Board of Education*, 330 U.S. 1, 9 (1947).

[3] For example, Massachusetts Quakers, Baptists, and other religious minorities were penalized and taxed in order to favor the Congregationalist

Church. See L. W. Levy, *The Establishment Clause: Religion and the First Amendment*, New York: Macmillan, 1986, pp. 15-20.

[4] *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

[5] J.H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, in 41 U. Pitt. L. Rev., 1980, p 673 ss., p. 676.

[6] An effective résumé of the most recent case law on the First Amendment can be found in J.H. Choper, *A Century of Religious Freedom*, in 88 Cal. L. Rev. 2000, p. 1709 ff.

[7] See *Abington School District v. Schempp*, 374 U.S. 203, spec. 222 (1963) and *Engel v. Vitale*, 370 U.S. 421, spec. 431 (1962). On these two cases see infra text and notes 66-70.

[8] For an accurate description of the relationship between the two clauses, see I.C. Lupu, *Threading Between the Religion Clauses*, in 63 Law and Contemp. Prob., 2000, p. 439 ff.

[9] *Abington School District v. Schempp*, 374 U.S. 203 (1963); on p. 309 dissenting Justice Stewart cites this as an example of tension between the two clauses of the First Amendment.

[10] 403 U.S. 602 (1971). On this case see infra, text and notes 50-52.

[11] See S. Sherry, *Lee v. Weisman: Paradox Redux*, in Sup. Ct. Rev., 1992, p. 123 ff., where it is argued that the contrast between the Establishment Clause and the Free Exercise Clause is particularly hard to solve.

[12] *Walz v. Tax Comm.*, 397 U.S. 664, 668-669 (1970).

[13] "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for redress of grievances." United States Constitution, First Amendment.

[14] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 919 (1995).

[15] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

[16] *Abington School District v. Schempp*, 374 U.S. 203, 273 (1963).

[17] *Wallace v. Jaffree*, 472 U.S. 38 113 (1985).

[18] *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819, 854-858 (1995), Justice Thomas dissenting; id. pp. 868-863, Justice Souter dissenting. One is reminded of the Remonstrance in which James Madison argued against a decision, by the state of Virginia, to promulgate a tax in favor of the Church. Madison's position is analyzed in detail in the first – and most famous – case on the issue of separation between church and state: *Everson v. Board of Education,* 330 U.S. 1, 12 (1947). Also see infra text and note 34.

[19] L.H. Tribe, *American Constitutional Law*, Mineola, New York: The Foundation P, 2nd ed., 1988, pp. 1158-1160.

[20] *Abington School District v. Schempp*, 374 U.S. 203, 240 (1963).

[21] Once again, Justice Brennan's argument is very clear: "the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an 'establishment' offer little aid to decision." Id., p. 238.

[22] Debate on the issue is still very intense: see, for instance, P. Hamburger, A *Constitutional Right of Religious Exemption: An Historical Perspective*, in 60 Geo. Wash. L. Rev., 1992, p. 915 ff., and Id., *Separation of Church and State*, 2002, on which a very interesting review by K. Greenawalt, *History and Ideology: Philip Hamburger's Separation of Church and State*, in Cal. L. Rev., 2005, p. 367 ff., with M. McConnell, *Accommodation of Religion*, Sup. Ct. Rev. 1985, p. 1 ff.: both authors examine the constituency's intention with regard to the Establishment Clause. For a fairly recent contribution see also N. Feldman, *Divided by God*, New York: Farrar, Straus and Giroux, 2005, and M.A. Hamilton, *God v. the Gavel. Religion and the Rule of Law*, New York: Cambridge U P, 2005.

[23] A huge amount of criticism has attempted to offer a definition of religion. See, for example, S. Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, in 41 Stan. L. Rev., 1989, p. 233 ff.; J. *Choper, Defining "Religion" in the First Amendment*, in U. Ill. L. Rev., 1982, p. 579 ff.

[24] See Corte d'Appello di Milano, sentenza 2 dicembre 1996, riformata in Corte di cassazione, Sezione II penale, sentenza 8 ottobre 1997, both in Foro it., 1998, II, c. 395 ff.

[25] G.C. Freeman, *The Misguided Search for the Constitutional Definition of "Religion*," in 71 Geo. L. J., 1983, p. 1519 ff., a p. 1548.

[26] See *Malnak v. Yogi*, 592 F. 2d 197 (3rd Cir. 1978): it was decided that a "transcendental meditation" course violated the Establishment Clause.

[27] 380 U.S. 163 (1965).

[28] 398 U.S. 333 (1970).

[29] *United States v. Ballard*, 322 U.S. 78 (1944).

[30] *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Frazee v. Illinois Employment Security Department*, 489 U.S. 822 (1989).

[31] The famous "wall of separation" idea can be found in Thomas Jefferson, *Letters to Messers. Nehemiah Dodge and others, a Committee of the Danbury Baptist Association, Writings*, New York: The Library of America, 1984, p. 510.

[32] *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

[33] See supra, note 18.

[34] *Everson v. Board of Education*, 330 U.S. 1, 31-32 (1947).

[35] On this – with special reference to the 1947-1980 period – I.C. Lupu, *The Lingering Death of Separationism*, in 62 Geo. Wash. L. Rev:, 1994, 230 ff.

[36] Kurland, one of the first advocates of the "neutrality theory," writes that "the clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden," P. Kurland, *Of Church and State and the Supreme Court*, in 29 U. Chi. L. Rev., 1961, p. 1 ff., a p. 96. More recently, Laycock observes that "the religion clauses require government to minimize the extent to which it either encourages religious beliefs or disbelief, practice or non practice, observance or non observance," *Formal, Substantive and Disaggregated Neutrality Toward Religion*, in 39 DePaul L. Rev., 1990, p. 993 ff., a p. 1001.

[37] *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984). Elsewhere, Justice O'Connor advocated the importance of a neutral attitude on the part of the state: "As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion o a particular religious belief is favoured or preferred'. … if government is to be neutral in matters of religion, rather than showing either favouritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non adherents that they are outsiders or less than full members of the political community," *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627 (1989), Justice O'Connor, dissenting.

[38] On the "symbolic endorsement test" and its ambiguities see W.P. Marshall, *"We Know It When We See It," the Supreme Court and Establishment*, in 59 So. Cal. L. Rev., 1986, p. 495 ff.

[39] 515 U.S. 753 (1995).

[40] *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 776-777 (1995).

[41] On this J. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses*, Chicago: U of Chicago P, 1995, pp. 28-29. See also A.H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice* O'Connor *Insight*, in 64 N.C. L. Rev., 1986, p. 1049 ff.

[42] On this W.P. Marshall, *"We Know It When We See It,"* supra note 38, p. 537,

[43] For a hermeneutic approach that openly recognizes the importance of religion in contemporary society see M.W. McConnell, *Accommodation of*

Religion, Sup. Ct. Rev., 1985, p. 1 ff., and Id., *State Action and Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, in 28 Pepp. L. Rev., 2001, 681 ss.

[44] *Lee v. Weisman*, 505 U.S. 577, 587 (1992); my emphasis.

[45] A restrictive interpretation of the Establishment Clause has been criticized by M. Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, in 76 Geo. L.J., 1988, p. 1691 ff., and, more recently, by A.E. Brownstein, *Interpreting the Religious Clauses in Terms of Liberty, Equality, and Free Speech Values – A Critical Analysis of "Neutrality" Theory and Charitable Choice*, 13 Notre Dame J. of Law, Ethics, and Public Policy, 1999, p. 243 ff.

[46] On this *Mitchell v. Helms*, 530 U.S. 793 (2000).

[47] 505 U.S. 577 (1992).

[48] On this infra, text, and notes 66-67.

[49] See *Larson v. Valente*, 456 U.S. 228 (1982); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994): a violation of the Establishment Clause was recognized, because a certain religion had been favored by expressly tracing the borders of a school district so that all the children belonging to a certain group could attend a determinate school.

[50] 403 U.S. 602 (1971).

[51] Id., p.612.

[52] *Agostini v. Felton*, 521 U.S. 203, 218, 232 (1997); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993).

[53] 530 U.S. 290 (2000).

[54] 530 U.S. 793 (2000).

[55] 121 S. Ct. 39 (2001).

[56] 454 U.S. 263 (1981).

[57] Id., p. 269.

[58] 496 U.S. 226 (1990).

[59] 508 U.S. 384 (1993).

[60] Id., p. 387.

[61] 121 S.Ct. 2993 (2001).

[62] 515 U.S. 819 (1995).

[63] 515 U.S. 753 (1995).

[64] Id., p. 760.

[65] 530 U.S. 290 (2000).

[66] 370 U.S. 421 (1962).

[67] The short prayer goes like follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teacher and our country." 370 U.S. 421, 422 (1962).

[68] 370 U.S. 421, 430 (1962).

[69] Id., 431-432.
[70] 374 U.S. 203 (1963).
[71] 472 U.S. 38 (1985).
[72] 505 U.S. 577 (1992).
[73] 530 U.S. 290 (2000).
[74] 393 U.S. 97 (1968).
[75] Id., p. 103.
[76] 482 U.S. 578 (1987).
[77] 465 U.S. 668 (1984).
[78] 492 U.S. 573 (1989).
[79] A candelabrum employed during Chanukah celebrations.
[80] 515 U.S. 753 (1995).
[81] To sum up: after *Allegheny County* and *Pinette* there existed no clear majority on the issue of the constitutional il/legitimacy of religious symbols in public spaces. Five judges (Rehnquist, Scalia, Kennedy, and Thomas) tend to endorse any religious symbol; two judges (Stevens and Ginsburg) will probably regard any religious representation on public property as unconstitutional; three judges (O'Connor, Souter, and Breyer) advocate a "case-by-case" approach, grounded in the "symbolic endorsement" text. The positions of these last three judges were pivotal up to a short time ago. To keep in mind the attitude of the single judges is therefore quite important if one attempts to envision the new Court's future stance.
[82] At this point one cannot but remark that the Court's first case concerning the Establishment Clause dealt with the issue of funding religious schools. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court regarded as constitutionally illegitimate any case of refund by the state to families spending money for transporting their children to religious schools.
[83] *Lemon v. Kurzman*, 403 U.S. 602 (1971). On the case, and corresponding test, see supra text and notes 50-55.
[84] 530 U.S. 793 (2000).
[85] *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977): it was argued that the state was not entitled to provide funding for religious schools because the money might have been spent on religious purposes.
[86] *Braunfeld v. Brown*, 366 U.S. 509, 603 (1961).
[87] On this *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).
[88] *Employment Division v. Smith*, 485 U.S. 660, 670 n. 13 (1990).
[89] 98 U.S. 145 (1878). *Reynold v. United States* is the first occasion on which the Supreme Court is called to interpret the Free Exercise Clause.
[90] *United States v. Lee*, 455 U.S. 252 (1982).

[91] See, for example, *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); on this last case see infra, text, and notes.

[92] 374 U.S. 398 (1963).

[93] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

[94] *United States v. Lee*, 455 U.S. 252 (1982).

[95] 494 U.S. 872 (1990).

[96] The issue of peyote consumption by Native Americans during religious ceremonies was solved, at the federal level, with a law called "American Indian Religious Freedom Act Amendments of 1994," permitting, in section 2, "traditional Indian religious use of the peyote sacrament," v. 21 C.F.R. §1307.31 (2004). Some scholars speculate that such law might be constitutionally invalid, because it is aimed at a single religious group. M.A. Hamilton, *God v. the Gavel*, supra note 21.

[97] *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, decided on 2/21/2006, docket number 04-1084.

[98] 508 U.S. 520 (1993).

[99] A less severe constitutional examination than the "strict scrutiny" is usually identified with the so-called "rational basis review": a law can be regarded as valid when it is backed up by a rational purpose on part of the legislator.

[100] 42 U.S.C. §2000bb.

[101] 521 U.S. 507 (1997).

[102] See, for example, *Kikumura v. Gallegos*, 242 F.3d 950 (10th Cir. 2001); *In re Bruce Young*, 141 F.3d 854 (8th Cir. 1998), and now *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, supra note 97. On this last case see infra § IV.

[103] 42 U.S.C. §2000cc.

[104] *Cutter v. Wilkinson*, 544 U.S. (2005). This case – together with other cases 2005 term – is discussed infra text and note 118.

[105] William H. Rehnquist is appointed to the Supreme Court by Nixon in 1972; he becomes Chief Justice in 1986, with Reagan. His presidency ends in September 2005, when he is replaced by John G. Roberts, Jr. For an overview of the relation between the First Amendment and the Rehnquist Court, see K. Greenewalt, *Religion and the Rehnquist Court*, in 99 Northwestern U. L. Rev., 2004, p. 145 ff.

[106] Earl Warren is appointed Chief Justice in 1953 by President Eisenhower. He maintains the position until 1969.

[107] Warren E. Burger is appointed Chief Justice by President Nixon in 1969. He maintains the position until 1986.

[108] *Wisconsin v. Yoder*, 406 U.s. 205 (1972).

[109] See, for example, *Aguilar v. Felton*, 473 U.S. 402 (1985).

[110] *Employment Division v. Smith*, 494 U.S. 872 (1990). See supra, text and notes 95-96 .

[111] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

[112] See the case of the crib and other Christmas holiday symbols *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), reported supra, text and notes 78-79.

[113] *Capitol Square Review v. Pinette*, 515 U.S. 753 (1985). Also see supra, text and notes 39-42 .

[114] On this see *Agostini v. Felton*, 521 U.S.203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 693 (2002).

[115] See supra, text and notes 74-76.

[116] Case No. 03-1693. Argued March 2, 2005 -- Decided June 27, 2005.

[117] Case No. 03-1500. Argued March 2, 2005 – decided June 27, 2005.

[118] 544 U.S. (2005).

[119] See supra, text and note 104.

[120] *Newdow, et al. v. The Congress of the United States, et al.*, United States District Court, Eastern District of California, NO. CIV. S-07-17 LKK/DAD

[121] Here follows a brief story of the Pledge of Allegiance. In 1942, Congress, intending to "codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America," promulgated the Pledge of Allegiance to the flag, reading as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Twelve years later, the Congress amended the text by adding "under God" after "Nation." This last formula is still effective. See *Newdow, et al. v. The Congress of the United States, et al.*, United States District Court, Eastern District of California, NO. CIV. S-07-17 LKK/DAD, pp. 3-4.

[122] *Elk Grove School District v. Newdow*, 124 S. Ct. 2301 (2004).

[123] 123 S. Ct. 2472 (2003).

[124] President Bush, fearing that the decision taken in *Lawrence v. Texas* might develop into an endorsement of same-sex marriage, proposed a constitutional amendment that would provide for marriage to take place exclusively between a man and a woman. Such proposal of amending the federal Constitution resolved into nothing, yet a few amendments of this kind have been adopted by states.

[125] Decided on 2/21/2006, docket number 04-1084.

[126] "Hoasca," growing in the Amazonian rain forest.

[127] See supra, text and note 100.

[128] *City of Boerne v. Flores*, 521 U.S. 507 (1997). On this case see supra, text and note 101.

[129] See supra, note 96.
[130] See supra, note 125.
[131] 494 U.S. 872 (1990).