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I. Historical Perspective

The development of the constitutional law of religion by the Supreme Court came at the end of a decisive shift in public values in the United States from Protestantism to secularism. From the founding era at the end of the 18th century until early in the 20th century, Protestant religion was thought to be a significant and legitimate component of American public life. By the 1940s, however, American public life had become largely secular, although large numbers of Americans remained committed to religion in their private lives. The Supreme Court's recent treatment of the religion clauses can be understood as the product of the Court's return to the 19th century relationship between church and state while retaining the rhetoric of 20th century secularism.

A. The De Facto Establishment

State religious establishments that existed during the founding era died a natural political death early in the 19th century. Even when combined with the establishment clause's prohibition on national establishments, however, the elimination of state establishments did not lead to a separation of religion from public life. Nineteenth century Americans understood the Constitution to require separation of church and state only at the institutional level. This meant that constitutionally prohibited establishments of religion were created when the government coerced funding of a particular denomination or

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conformity to its practices, but it did not require that government or politics be secular. Put a little more simply, 19th century Americans considered government interaction with religion that looked like the old Anglican establishment to be a constitutionally prohibited establishment of religion. Conversely, if an interaction didn't look like the Anglican establishment, then it generally wasn't considered an establishment.[1]

From shortly after the founding era until early in the 20th century, church-state relations in the United States were governed by what Mark DeWolfe Howe called the "de facto Protestant establishment."[2] The premise of the de facto establishment was that Protestant values were the foundation of civilized society. Accordingly, in public schools teachers led prayers and included scripture readings from the King James Bible in their lessons. Customs like legislative prayer became widespread among the states, Thanksgiving, Christmas, and Easter were officially recognized as holidays, and political rhetoric made frequent reference to the Almighty.[3] States enforced prohibitions on blasphemy, enforced the Christian Sabbath, and imposed civil disabilities upon nonProtestants and (especially) upon nonbelievers. Towards the end of the 19th century, Protestant fundamentalists in many states succeeded in passing temperance and anti-evolution laws. These same fundamentalists also were instrumental in building political support for the federal government's efforts in the latter part of the century to eradicate the Mormon practice of polygamy.

Under the de facto establishment, religious and governmental authority were aligned in a variety of ways, but always in a diffuse and generally nonsectarian sense. Because the de jure Anglican establishment of England exemplified for Americans the kind of establishment that was prohibited by the Constitution, the possibility that the more subtle alignments of religion and government that characterized the de facto establishment were also constitutionally prohibited was never taken seriously. In the minds of 19th century Americans, the separation of church and state demanded by the establishment clause

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1. THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 191-92 (1986).

2. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 11-15, 31, 98 (1965).

3. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 266 (1988).

was merely institutional. They honored that separation not only by refraining from establishing a national church, but also by having abandoned their state religious establishments. Beyond these measures, however, 19th century Americans saw no need to cabin the public influence of religion. On the contrary, they saw that influence as being critical to the creation and maintenance of civilized society.[4]

B. Secular Neutrality

The assumptions of the de facto establishment about the legitimacy and importance of public religious influence came under serious pressure early in the 20th century. Exactly how and why secularization came about is a complex issue. A number of influences have been identified, including the growth of science, Darwin's *On the Origin of the Species* (1859), the professionalization of American higher education, and the rise of legal realism.[5]

Whatever its source, secularization has been a powerful cultural phenomenon in this century. By the 1930s, the so-called "secularization hypothesis" was widely believed by intellectuals and academics in the United States. Under this hypothesis, the progressive secularization of society was seen as an inevitable and positive long term trend which would eventually end in the elimination of religion as a public influence. This hypothesis remains controversial but, as Steven Smith has suggested, it is wholly accurate to conclude that since the end of World War II, the creation of a "secular society" in the United States has been a genuine political and social option.[6]

By the late 1940s, the de facto establishment had become problematic. Edward Purcell describes how in the 20th century, religion "emerged as the preeminent symbol of everything that was bad in human society," whereas science "was inextricably tied up in the minds of most intellectuals with everything that was best in human society."[7] Rather than an indispensable foundation of civilized society, as presupposed by the de facto

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4. *See* FREDERICK MARK GEDDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE 41-45 (1991).

5. *See generally* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973).

6. Steven Smith, *Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 975 (1989).

7. PURCELL, *supra* note 5, at 61.

establishment, religion had come to be seen as a reactionary obstacle to secular progress.

II. THE FREE EXERCISE CLAUSE

Constitutional litigation under the free exercise clause has largely centered on whether the clause requires that a person be excused from complying with laws which contradict that person's religious beliefs. The constitutionally compelled free exercise exemption permits believers to ignore any law which requires them to perform an act which is prohibited by their religious beliefs, or which prohibits them from performing any act which is required by their religious beliefs.

A. The Belief-Action Doctrine

In *Reynolds v. United States*,[8] the Supreme Court refused to find a constitutionally compelled exemption for Mormon polygamists. Under the so-called belief-action doctrine which the *Reynolds* Court articulated, government is without constitutional authority to punish a person for his or her religious *beliefs*, but has full authority to regulate religiously motivated *actions* so long as it has a rational basis for doing so. Since the government can always meet this light burden of justification, the belief-action doctrine effectively forecloses the possibility of constitutionally compelled exemptions. Accordingly, the belief-action doctrine enabled state and federal government to regulate and even penalize any religion whose members strayed too far from the cultural baseline of Protestant piety under the de facto establishment.[9]

B. The Compelling State Interest Exemption Doctrine

Reynolds' belief-action doctrine was apparently dismantled by two modern decisions. In *Sherbert v. Verner*,[10] the Court ordered a state to pay unemployment benefits to a Seventh-Day Adventist even though she would not make herself available for work on Saturday (her Sabbath) as required by the state's unemployment compensation law. The state had argued that protecting the integrity of the unemployment insurance fund

8. 98 U.S. 145, 166-67 (1878).

9. PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 21-25 (1961).

10. 374 U.S. 398, 410 (1963).

against depletion by those who were not really looking for work was a sufficient reason to deny the benefits (as it probably was under the rational basis standard of *Reynolds*). However, the Supreme Court in *Sherbert* held that government could burden a fundamental right like the free exercise of religion only if it was protecting a compelling interest by the least intrusive means possible, and found the state's interest insufficient to justify the infringement. The Court has expressly reaffirmed this holding on numerous occasions.[11]

In the second case, *Wisconsin v. Yoder*,[12] the Court held that the Amish were not required to send their children to public schools past the eighth grade in violation of their religious beliefs, because the state could not show that its compelling interest would be significantly undermined by granting the Amish an exemption from compulsory attendance laws. Whereas *Sherbert* required only that the state justify the law that burdened free exercise by a compelling interest, *Yoder* required that the state justify its denial of an exemption to religious objectors by a compelling interest. Thus, the effect of *Yoder* was to raise substantially the government's burden of justifying any generally applicable law that incidentally burdened the free exercise of religion.

Both *Sherbert* and *Yoder* are consistent with the Warren and Burger Courts' respective emphases on individual rights. Whereas *Reynolds* clearly assumes that society is more important than the individual, the *Sherbert-Yoder* doctrine reflects the view that individual rights are prior to any claims that society as a whole may make on individual conduct. In terms of the 19th and 20th century models I have been discussing, the de facto establishment posited traditional Protestant values as the basis of society. Those who refused to conform to these values, like polygamous Mormons, were challenging the very foundations on which society was thought to be organized, and thus were not deserving of any relief from laws which burdened their subversive religious practices. By contrast, a regime of secular neutrality purports to remain aloof from the choices that religious Americans make in their private lives. In this view, the government has no business telling people how to live

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11. *E.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd, 450 U.S. 707 (1981).

12. 406 U.S. 205, 234 (1972).

their moral and religious lives. Accordingly, even idiosyncratic religious practices that would be considered subversive under the assumptions of the de facto establishment are protected by secular neutrality unless they clearly threaten important and legitimate state interests, which never include enforcement of private morals.

C. *Erosion of the* Sherbert-Yoder *Doctrine*

When combined with other holdings of the Court, the extraordinary protection of religious exercise afforded by the *Sherbert-Yoder* doctrine may have created a serious problem. In *United States v. Ballard*,[13] the Court had foreclosed judicial inquiry into the sincerity and reasonableness of religious beliefs. When read with *Ballard*, the *Sherbert-Yoder* doctrine appeared to require that a constitutional exemption from compliance with the law be granted to any religious objector who asked for one.[14]

The mandate of free exercise exemptions that followed from the *Sherbert-Yoder* doctrine did not pose a serious difficulty when the benefit to be gained from exemption was something few people would want, like receipt of unemployment benefits despite being unavailable for work on Saturday, or freedom from prosecution under compulsory school attendance laws. In *United States v. Lee*,[15] however, the Amish asked the Court to grant them a free exercise exemption from paying social security taxes. Perhaps fearing a tidal wave of exemption requests by people claiming that their religious beliefs prevented them from paying any kind of tax at all,[16] the Court found the government's interest in denying the Amish an exemption to be compelling.

Lee marked the beginning of the end of the *Sherbert-Yoder* doctrine. After *Lee*, the Court denied free exercise relief to an orthodox Jew who sought to wear a yarmulke in violation of Air Force uniform regulations in *Goldman v. Weinberger*,[17] a Native American tribe which sought to prevent construction of

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13. 322 U.S. 78 (1944).
14. William Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 Case W. Res. L. Rev. 357, 359 (1990).
15. 455 U.S. 252 (1982).
16. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 324-25.
17. 475 U.S. 503 (1986).

a highway that would prevent them from worshipping in *Lyng v. Northwest Indian Cemetery Protective Association*,[18] and to a televangelist who objected to state taxation of Bible sales in *Jimmy Swaggart Ministries v. Board of Equalization*.[19] Surveying these decisions, Mark Tushnet concluded that the Court was willing to protect religious exercise only when doing so either was relatively inexpensive or was otherwise consistent with secular constitutional norms like freedom of expression or due process of law.[20]

D. *Abandonment of the* Sherbert-Yoder *Doctrine*

In *Employment Division v. Smith*,[21] the Court brought free exercise jurisprudence full circle by reaffirming the belief-action doctrine of *Reynolds*. In *Smith*, a state denied two Native Americans unemployment compensation after they were dismissed from their jobs for smoking peyote as part of tribal religious rituals. Because use of peyote was a criminal offense under state law, the state ruled that the Native Americans had been dismissed for "work-related misconduct" which permitted benefits to be withheld. The Native Americans sued for the benefits, arguing that the free exercise clause prevented the state from applying the misconduct provision to them.

The Court in *Smith* effectively abandoned the *Sherbert-Yoder* doctrine. Noting that denial of unemployment compensation in *Sherbert* was not based on the plaintiff's commission of an illegal act, the Court held in *Smith* that the state's interest in ensuring the integrity of the unemployment insurance fund was sufficiently important to justify its refusal to pay benefits to claimants who were guilty of unlawful conduct. The majority opinion by Justice Scalia strictly confined *Sherbert* and its progeny to their facts, and recast *Yoder* from a free exercise opinion that protected freedom of religion into a substantive due process opinion that protected parental and family autonomy. The opinion expressly stated that the only independent protection offered by the free exercise clause lay in its prohibition of laws motivated by a desire to disadvantage religion, on the theory that such laws impose on religious exercise an intentional burden, rather than a merely incidental one. Even this

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18. 485 U.S. 439 (1988).
19. 493 U.S. 378, 392 (1990).
20. *See*, TUSHNET, *supra* note 3, at 249.
21. 494 U.S. 872, 890 (1990).

protection is redundant of other parts of the Constitution, however, since the Court had already held in *Larson v. Valente*[22] that legislation demonstrably intended to disadvantage particular religious denominations violates the establishment clause. Accordingly, *Smith* left the free exercise clause with no independent content or effect, effectively repealing it.

E. The Religious Freedom Restoration Act

Smith did approve the legislative practice of writing religious exemptions into laws, a practice which the Court had previously upheld.[23] Thus, although there is no longer any such thing as a constitutionally compelled exemption under the free exercise clause, there still remains a constitutionally permissible exemption under the establishment clause. What this means is that politically powerful religions will be able to lobby successfully for exemptions from burdensome legislation in Congress and the state legislatures, while the free exercise of politically powerless religions—those most in need of constitutional protection from the majoritarian political process—will be wholly dependent upon the goodwill of political majorities. *Reynolds* and *Smith* themselves are evidence that politically powerless religions will often fail to obtain legislative exemptions for their religious practices.

The current controversy over the proposed Religious Freedom Restoration Act[24] is a good example of how majoritarian politics can intrude upon the interests of minority religions. The Act is designed to re-establish the *Sherbert-Yoder* doctrine by statute. (So the reader can judge my biases, I disclose here that I am a supporter of the Act and have worked with LDS Public Communications to generate support for it.) Roman Catholics are opposing the Act in its present form because there is a possibility that it could be used to bolster abortion rights even if *Roe v. Wade*[25] is overturned. Now, I have generally admired Catholic activism on moral and social issues, but I can't help but think on this particular issue that if Catholicism were a minority religion it might give some higher priority to

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22. 456 U.S. 228, 255 (1982).

23. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

24. H.R. REP. NO. 2797, 102d Cong., 1st Sess. (1991); S. REP. NO. 2969, 102d Cong., 2d Sess. (1992).

25. 410 U.S. 113 (1973).

the Act. Because Catholics are politically powerful, however, they can afford to give politics a higher priority than survival. Those who have relatively little political power, like Mormons, probably make the calculus differently.

III. THE ESTABLISHMENT CLAUSE

A. Everson *and the "Wall of Separation"*

This shift from Protestantism to secularism that I've been discussing is evident in the Court's first establishment clause decision in the modern era, *Everson v. Board of Education*.[26] In *Everson*, the Supreme Court considered whether a city could pay for the bus transportation of school-aged children to parochial as well as to public schools. Along the way to holding that such funding was constitutionally permissible, the Court summarized the principal force behind the drafting of the establishment clause as the desire of the framers to eliminate the civil disorder and violent persecution that historically had accompanied the establishment of a single sect. Observing that early American colonials had brought with them the European tradition of the established church, the Court stressed the insult and indignity of the fact that religious dissenters in America were compelled to support government churches whose principal aim was "to strengthen and consolidate the established faith by generating a burning hatred against dissenters."[27] The Court stated that the establishment clause required an absolute neutrality on the part of government, both as between particular religions and as between religion and nonreligion. The decision closed with a flourish, quoting the Jefferson's now-famous (or infamous) phrase to the effect that the establishment clause "was intended to erect a 'wall of separation' between Church and State."[28]

With *Everson*, the Supreme Court clearly signalled that the de facto establishment would be abandoned as a guide to the establishment clause. Although governmental neutrality among particular Protestant sects was consistent with the de facto establishment, governmental neutrality between Protestants and nonProtestants and between believers and atheists was antithetical to it. Likewise, although the institutional separa-

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26. 330 U.S. 1 (1947).
27. *Id.* at 10.
28. *Id.* at 16.

tion of church and state was consistent with the de facto establishment, the more decisive political division implied by the "wall of separation" was not.

Perhaps most important, neutrality and separation both bespeak a conception of religion that is private and unconnected to government and other institutions of public life. The de facto establishment was built on the premise that religion is essential to civilized society. By contrast, the modern requirement that government remain detached and neutral with respect to the religious choices of its citizens suggests that a wholly secular society is not only possible, but even preferable. In this view, government can safely remain indifferent about how religious choice is exercised.

B. The Erosion of Secular Neutrality

One of the difficulties with secular neutrality is incoherence. It's not too hard to conceptualize a government that is neutral among religions, but to say that government must be neutral between religion and nonreligion presents severe conceptual difficulties. What is the position of neutrality between a proposition A and its negation, not-A? Or, to take an example a little closer to home, where is the neutral ground between pro-choice and pro-life positions on abortion?[29]

Of course, the Court's establishment doctrine has never been genuinely neutral, which is why I have chosen to call it *secular* neutrality. The Court proceeds on the modernist assumption that public life is and ought to be secular. Accordingly, it is "neutral" with respect to religion only so long as it remains confined to private life. Religion that manifests itself in public life is greeted with hostility.

This dichotomy between public secularism and private religion worked fairly well until the later years of the Burger Court. By this time, the political composition of the Court had changed to the point that it was now willing to permit fairly substantial interactions between religion and government in public life. However, the Court did not alter its commitment to secular neutrality as the rhetorical touchstone for constitutionality under the establishment clause. The result was absurd

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29. The Supreme Court seems to have come as close as anyone to articulating a compromise position in Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791 (1992).

arguments by the Court that actions which seemed indisputably religious were really not religious at all.[30]

In *Lynch v. Donnelly*,[31] for example, the Court approved a creche or nativity scene which was owned by a city and displayed on city property every Christmas. Chief Justice Burger argued that because the creche merely celebrated Christmas and depicted its historical origins, it was a secular display, sort of like hanging Dali's *Last Supper* in the National Gallery.[32] In a concurring opinion, Justice O'Connor argued that use of the creche was secular in that it lent solemnity to an historical and cultural event.[33]

In *Bowen v. Kendrick*,[34] the Court refused to strike down a facial establishment clause attack on the Adolescent Family Life Act, which appropriated funds to social service agencies who developed programs directed at reducing teenage pregnancy and teen sexual activity in general. A number of religious social service agencies received funds for programs centered around abstinence. The Court found that granting funds to these agencies was not a departure from secular neutrality because they were not "pervasively sectarian."[35]

Now, I suppose its true that if one goes into LDS Social Services, the social welfare arm of the Mormon church, he or she will not be subjected to the Joseph Smith story, at least not right away, so in that sense the "sectarianism" of the agency is not "pervasive." But surely one gets very different counselling about sexual activity, birth control, pregnancy and adoption at LDS Social Services than at, say, Planned Parenthood or a state counselling agency. In fact, I am fully confident that one gets counselling at Social Services that is consistent with the LDS faith, and that is probably inconsistent with the most common secular ways of dealing with teenage sexual activity. Funding religious as well as secular approaches to this problem seems to get at neutrality, but remember, it is the commitment to *secular* neutrality, rather than neutrality *simpliciter*, that puts the Court in the position of having to argue that religious social service agencies are not really religious.

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30. Tushnet, *supra* note 3, at 267-68.
31. 465 U.S. 668, 687 (1984).
32. *Id.* at 681, 684.
33. *Id.* at 687-94.
34. 487 U.S. 589, 622 (1988).
35. *Id.* at 624.

The same sort of dilemma presents itself in *Lee v. Weisman*,[36] the case in which the Supreme Court declared graduation prayer unconstitutional. Indeed, the Court's neutrality analysis virtually dictated the result, although I admit to being as surprised as anyone by the result. (Again, so that the reader can judge my biases, I disclose here that I believe graduation prayer is a bad idea both constitutionally and as a matter of policy.)

The lower court in *Weisman*, in a burst of candor, conceded that the only reason the prayer was prohibited was because it was addressed to God. In other words, had the rabbi in that case simply expressed the prayer as his own personal sentiments, no establishment clause issue would have been raised. In order to preserve *secular* neutrality while upholding graduation prayer, the Court would have somehow had to characterize the prayer as secular, which would have generated the same problems as before, only in much sharper relief—one might be able to argue that a creche or a social service agency is not pervasively sectarian, but if a prayer isn't sectarian, then what is? Moreover, the validation of graduation prayer on the theory that prayer is a secular practice would be an ironic victory indeed for religious conservatives.[37]

IV. THE UTAH CONSTITUTION

One way of characterizing the evolution of the Court's religion clause doctrine over the past 100 years is that it has gone from a weak free exercise and a weak establishment clause under the de facto establishment, to a strong free exer-

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36. 112 S. Ct. 2649 (1992).

37. An alternative approach had been advocated by Justice Kennedy, the author of the majority opinion in *Weisman*. In a concurring opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring), another creche case, Kennedy suggested abandoning neutrality for coercion as the rhetorical touchstone for the establishment clause. In other words, an interaction between religion and government would not be considered a violation of the establishment clause unless there was some element of government coercion of religious belief or practice inherent in the action. Thus, another option for the Court, and the one anticipated by most commentators, would have been to find that graduation prayers, short and platitudinous as they typically are, and given in a public ceremonial context with parents and friends present, are not either actually or potentially coercive. Although Justice Kennedy spent considerable time discussing the coercive effects of graduation prayer in *Weisman*, *see* 112 S. Ct. at 2658-2661, he explicitly reaffirmed the *Lemon* test as the appropriate means of determining constitutionality under the establishment clause, *see* 112 S. Ct. at 2655.

cise and a strong establishment clause under the regime of secular neutrality, and is now on the way back to a weak free exercise and a weak establishment clause under the Rehnquist Court.[38]

The Supreme Court has held that federal constitutional standards are in effect the minimum standards that the states must adhere to, but that they are free to institute more vigorous protections of individual rights if they so choose.[39] Accordingly, a state which chooses to constitutionalize as a matter of state law a strong free exercise clause and a strong establishment clause seems free to do so.

What I find interesting is that Utah seems to have such a constitutional provision already. The language in section 4 is absolutist for both free exercise and non-establishment rights.[40] Free exercise rights can *never* be infringed, which suggests that even compelling state interests may not justify violations of religious freedom. Moreover, there can be no union of church and state, or any funding for any religious worship, or any "domination" or "interference" by a church with respect to state government.[41]

This creates some very interesting interpretive possibilities with respect to abortion and graduation prayer. If a woman can persuade a court that her religion requires her as a matter of conscience to have an abortion in circumstances in which current law does not permit an abortion, then the text of section 4 would seem to require that she be exempted from the law and

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38. *Cf.* Ira C. Lupu, *The Trouble With Accomodation*, 60 GEO. WASH. L. REV. 743 (1992).

39. *E.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

40. *See* UT. CONST. art. I, § 4:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

41. The legislative history of this provision is contained in OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION 46, 212-51 *passim*, 363-65, 806-07, 1855-72 *passim* (Star Printing, 1898).

be permitted to obtain an abortion outside the statutory exceptions. Similarly, if one can show that public prayers in Utah are virtually always given by LDS people in the LDS style, then there would seem to be a strong argument that this constitutes interference or domination of the public function by a particular denomination, or perhaps even the funding of religious worship. Although litigation on both issues is suspended for the moment in light of recent Supreme Court decisions, one would expect them to resurface again in some form or another given the depth of feeling on both sides of both issues.

Now, it is hard for me to believe that Utah state court judges will interpret those provisions in the way I have described; they have not done so in the past, and contemporary political realities are simply against it. Nevertheless, these are live interpretive possibilities, which are likely to become even more vigorously pressed as the ACLU develops state law arguments in its challenges to restrictive abortion laws and public prayer. I have no idea how these challenges will turn out, but I will suggest that the most politically interesting religion clause controversies of the next few years may be not be centered in Washington, but in Salt Lake City.