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Why Legislatures Should Accommodate Religious Freedom

I. ARGUMENTS FOR CONGRESS TO ACCOMMODATE RELIGIOUS FREEDOM*

1. We are not asking that the law be pro-religion. Rather, we are asking that the law be pro-religious freedom. This is like the First Amendment. It is pro-freedom of speech and pro-freedom of the press. Likewise, the First Amendment is pro-religious freedom.

2. That the First Amendment is pro-religious freedom is as true of the Establishment Clause as it is true of the Free Exercise Clause. Each protects religious freedom in its own way. Free exercise safeguards religiously informed conscience. No-establishment rightly orders the relationship between church and government. In popular speech we refer to this relationship as the "separation of church and state." We need not run away from the phrase "separation of church and state," but embrace it and labor to have it rightly understood.

3. When church-state separation is rightly understood, it protects both the body politic and religious freedom. The body politic does not get unnecessarily embroiled in religious division when the government is prohibited from taking sides in doctrinal disputes. Reciprocally, religious institutions are safeguarded from government regulation or other intrusions into the internal affairs of organized religion.

4. To accommodate religious freedom is not an act of shameful intolerance, but a laudable and positive act of liberty. This is totally unlike racism or sexism, which have no value in our Constitution. Religious freedom, on the other hand, is expressly valued in the Constitution. This is not only so with respect to the First Amendment, but also evident in the Religious Test Clause, U.S. CONST. art. VI, cl. 3 (no religious test may be imposed for holding federal office).

5. To accommodate a religious institution is to permit that organization to retain its essential character or identity. In addition to the two religious freedom clauses, this is also permitted as free speech of religious content and what the court's call "expressional association" as protected by the First Amendment.

6. Freedom of religion and free speech, as well as expressional association, undergird rather than undermine America's celebrated diversity and pluralism. Americans have always differed in their religious affiliations. Freedom allows these differences to not become a source of contention, but of civic unity. *E pluribus Unum.*

7. Just because a private-sector organization, religious or otherwise, accepts federal funds or in-kind assistance, it does not cease to be in the private sector and become an arm of the government. When an organization is an arm of government it is treated by the Constitution as a "governmental actor." The Supreme Court's case law is clear that a private-sector organization can get even 100% of its funding from the government (e.g., certain defense contractors) and still not be a "governmental actor."

8. When the government provides financial support to the nonprofit sector, religious and nonreligious institutions alike, on the basis of their providing secular services, it does not aid religion. It aids

education, health care, or child care. The aid is neutral as to religion *qua* religion. Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it is faith-based is to penalize it for being religious. It is a penalty whether the government excludes the religious institution from the program altogether, or requires the institution to secularize a portion of its essential character in order to qualify.

9. To exclude religious institutions from healthcare, education, or social-service funding for the delivery of services that are not explicitly religious only frustrates those ultimate beneficiaries who would choose to receive their benefits from a faith-based organization. Let's trust the beneficiaries to know what best meets their needs or those of their families.

10. To overly regulate, and thereby exclude, religious institutions from equal participation in health care, education, and social-service programs will ultimately hurt the poor and needy that would otherwise be served. There are some individuals that can best be reached by certain neighborhood-based religious organizations.

11. Religious charities, schools, and health clinics are not trying to foist their religion on others while using the taxpayer's dime, but ask only that the government not use its spending power to impose its alien values on them.

12. Denying the liberty of religious institutions to operate free of regulations that intrude into their internal affairs will require drastic and widespread changes in current American practices. If it isn't broke, why fix it?

[*] Some of these ideas are adapted from THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS (Esbeck, Carlson-Thies & Sider, 2004).

II. STATUTORY RELIGIOUS EXEMPTIONS AND THE ESTABLISHMENT CLAUSE*

Notwithstanding restraints in the Establishment Clause on church-state relations, most government actions[1] with respect to religion are left to the discretion of legislatures and public officials.[2] This is because the environment for church-state relations created by the First Amendment is far more permissive than it is prohibitive of discretionary religious accommodations. The case law bears this out. Moreover, while the topic of religious accommodations is important, we should guard against thinking it is overly complex. Some call the Supreme Court's cases confusing and contradictory, when that characterization is really a proxy for disagreement with the Court in some fundamental respects.

What follows is a summary list of the Black Letter Rules that fairly restates the Supreme Court's cases. Rule 1 is about what government may do, whereas Rules 6 through 10 are about what government may not do. A detailed discussion of the case law from which the Rules are drawn follows the summary list.

SUMMARY LIST

Rule 1: Government may refrain from imposing a burden on religion, while imposing the burden on others similarly situated.
Rule 6: Government may not purposefully discriminate among religions.
Rule 7: Government may not utilize classifications based on denominational or congregational affiliation to impose burdens or to extend benefits.
Rule 8: Government may not utilize classifications that single out a sect-specific religious practice (as opposed to language inclusive of a general category of religious observance) thereby favoring that practice.
Rule 9: Government may not delegate its sovereign authority to govern to a religious organization.
Rule 10: Government may not regulate the private sector with the purpose of creating an unyielding preference for religious observance over competing secular interests.

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Rule 1: Government may refrain from imposing a burden on religion, while imposing the burden on others similarly situated.

Instances of this sort are often identified as "religious exemption" cases. A religious individual or organization is relieved of a burden. A "burden" here typically means a regulation, a tax, or a criminal prohibition.

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* Excerpted from 110 W. Va. L. Rev. 359 (2007).

1 I am putting to one side government speech. Obviously government can use its power to speak in an attempt to accommodate religion, and in some such instances the government's speech will violate the Establishment Clause. For example, public school curriculum is government speech. Concerning curricula decisions, an accepted rule is that public schools may teach about religion but they may not engage in the teaching of religion. This is a useful rule, one originally suggested by Justice Goldberg, concurring in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963). On drawing the line between government speech and private speech, see *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

2 This essay is limited to constitutional constraints imposed by the Establishment Clause. Likewise, I am not addressing restraints in state law on church-state relations, the most important of which appear in the constitutions of the states.

The leading case is *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[3] *Amos* upheld a statutory exemption in Title VII of the Civil Rights Act of 1964, as amended in 1972,[4] permitting religious discrimination in employment by religious organizations.[5] Title VII prohibits employers from discriminating against their employees on various bases, such as race and national origin, including on the basis of religion. As originally adopted in 1964, Title VII had a narrow exemption that allowed religious employers to staff on a religious basis only when the duties of the job were religious. Congress expanded the exemption in 1972 to allow religious staffing with respect to all the jobs at a religious organization.

Mayson, a custodian employed at a gymnasium owned and operated by the Mormon Church, was discharged when he no longer was a church member in good standing. That Title VII classified using religious terms, including the challenged exemption being exclusive to religious organizations, gave the *Amos* Court little pause.[6] Rather, the salient distinction for the Supreme Court was between government being pro-religion, which is prohibited, and the government being pro-religious freedom, which is permitted,[7] perhaps even encouraged, by the Establishment Clause.

The Court in *Amos* began by reaffirming that the modern Establishment Clause means government must be "neutral" as to religion, meaning that the government must not "act with the intent of promoting a particular point of view in religious matters."[8] But the broader exemption supplied by Congress in the 1972 amendment was not "abandoning neutrality" with respect to religion, for "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[9] The Court acknowledged that "[u]ndoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment," but "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster."[10] Legislation that seeks to expand religious freedom, insisted the Court, "is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."[11] It is to be expected that a law seeking to protect religious freedom might be used by a church to advance its religion. However, "[f]or a law to have

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[3] 483 U.S. 327 (1987). *See also* Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prisoners, did not violate the Establishment Clause); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding property tax exemptions for religious organizations as not in violation of Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a release-time program for students to attend religious exercises off public school grounds); The Selective Service Draft Law Cases, 245 U.S. 366 (1918) (upholding, *inter alia*, military draft exemptions for clergy and theology students as not in violation of Establishment Clause).

In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion), a three-Justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating a religious faith. *Texas Monthly* is not contrary to *Amos* and the other cases cited in this note. The plurality expressly went out of its way to say that *Amos* and *Zorach* were distinguishable. *Id*. at 18 n.8. The plurality even opined that it would be constitutional if the U.S. Air Force adopted a religious exemption from the military's otherwise uniform rule on the wearing of official head gear. *Id*. The Air Force illustration was in reference to *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that Free Exercise Clause did not require accommodation by armed forces of rule against the wearing of religious head covering while on duty and in uniform).

[4] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[5] 42 U.S.C. § 2000e-1(a) (2006).

[6] *Amos,* 483 U.S. at 338. Thus, *Amos* is dismissive of law professor Philip Kurland's test which would not permit classifications on the basis of, or with reference to, religion. *See* PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH, STATE AND THE SUPREME COURT 18, 112 (1962).

[7] Permitted, that is, when pursued by the proper means. The proper means to that end are the subject of Black Letter Rules 6 through 10, in Part II, *infra*.

[8] *Amos,* 483 U.S. at 335.

[9] *Id*.

[10] *Id*. at 336.

[11] *Id*. at 337.

forbidden 'effects' [under the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence,"[12] not government merely having advanced religious freedom. "In such circumstances," reasoned the Court, "we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church."[13]

The *Amos* Court could be understood as making a distinction in reliance on the "state action" doctrine. Such a distinction will be helpful to some, but it may mislead others into thinking *Amos* is a "state action" ruling.[14] The Bill of Rights, including the Establishment Clause, checks only government, not the private sector such as a church. The adoption of the 1972 amendment was "state action," of course, but it is an action that does not violate the Establishment Clause. That is, although the Establishment Clause prohibits government from being pro-religion, it permits government to be pro-religious freedom. True, the Mormon Church here acted in a way that was pro-religion, but the church, being in the private sector, is not a state actor and thus is not restrained by the Establishment Clause. "Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job."[15]

Looking back over its prior cases, the *Amos* Court said it had never held that a statutory accommodation that "singles out" religion was unconstitutional, nor had the Court ever said that a religious exemption must be accompanied by a similar exemption for others. The Court was correct on both accounts.[16] So long as the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[17] Once again, a government that is properly "neutral as to religion" may be pro-religious freedom, albeit not pro-religion.

In *Amos*, a regulatory burden first imposed in 1964 was lifted in 1972.[18] This answers the so-called baseline issue, with a government's legislative "purpose" and "effect" on religious advancement to be measured against an original position of no government-imposed burden on religion.[19] Moreover, *Amos* makes it clear that for a government to "refrain from imposing a burden" is logically no different from "lifting a burden" imposed in the past. That is, a burden imposed in 1964 and lifted in 1972 does not move the baseline.

Finally, rather than "impermissibly entangl[ing] church and state," as Mayson argued was a consequence of the 1972 amendment, the Court found the obvious, namely: the expanded 1972 exemption "effectuates a more complete separation of the two and avoids the kind of intrusive inquiry

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12 *Id*.

13 *Id*.

14 Professor Greenawalt obliquely criticizes this way of thinking as allowing the government to avoid taking First Amendment responsibility for its legislative accommodations. Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 341, 353-54 (2007) [hereinafter "Greenawalt"]. While possibly misleading to some, I do not think it is wrong to note the parallel to "state action" doctrine, and it can be helpful. It is imperative that the Mormon Church here not be treated as a state actor. If the church were regarded as a state actor, then the church would be responsible for the religious coercion clearly suffered by Mayson and thus be in violation of the Free Exercise Clause. That is the sort of confusion that ensnared the federal district court in *Amos*.

15 *Amos,* 483 U.S. at 337, n.15.

16 *See supra* note 3 (collecting the cases).

17 *Amos,* 483 U.S. at 338.

18 *Id*. at 335-36.

19 For government to remain at the baseline is to be "neutral" with respect to religious advancement. It follows that when a legislature affirmatively moves to lift a religious burden imposed by the private sector the legislation is to be regarded as an affirmative step by government away from the baseline. Such an affirmative move makes the government's "purpose" or "effect" appear more supportive of religion. This in turn raises greater concern that the accommodation is "an establishment." However, this factor alone is not individually fatal. The baseline issue is again discussed later in this essay.

into religious beliefs that the District Court performed in this case."[20] The 1972 exemption ran to all religious staffing by the church, thus reinforcing the desired church-state separation by leaving organized religion where it found it, which is to say, unregulated with respect to religious staffing. Government does not establish a religion by leaving it alone.[21]

To reduce civic-religion tensions and to minimize church-state interactions are matters that enhance the separation so very prized by the modern Establishment Clause. This goes to the matter of church autonomy, one of two underlying purposes of the Establishment Clause. Less contact between church and state may not always be constitutionally required, but it does mean less opportunity for the regulatory state to interfere with those matters in the sole purview of the church. The potential for interference with the religious employer under the narrow 1964 exemption was "to require [the religious organization], on pain of substantial liability, to predict which of its [jobs] a secular court will consider religious"[22] and thus exempt, and which jobs are sufficiently nonreligious and thus subject to Title VII. The Court understood that fear of getting embroiled in litigation and incurring monetary liability "might affect the way an organization carried out . . . its religious mission" because of a real concern that a civil "judge would not understand its religious tenets and sense of mission."[23] By reinforcing the separation of church and state, the 1972 amendment was a win for religious freedom.

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The foregoing Rule 1 . . . was about what the government may do with respect to accommodating religion. The purpose or sought-after end must be to preserve or enlarge religious freedom. Notwithstanding the permissive nature of the government's power, the government must still select proper means to achieving this permissible end. What follows are Black Letter Rules 6 through 10 which state the case law of the modern Establishment Clause on how accommodations must be secured by proper means.

Rule 6: Government may not purposefully discriminate among religions.

A legislature may exempt religion from a burden imposed by general legislation, so long as the primary purpose is to serve religious freedom. That is Rule 1. However, legislative exemptions are hard to secure, especially for minority or unpopular religions. The safeguard for minority or unpopular religions is that the Establishment Clause operates much like the Equal Protection Clause does for racial and ethnic minorities. Accordingly, legislative exemptions cannot be granted to politically powerful religions without being extended as well to minority religions.[24] To permit government to favor one religion tends to establish that religion.

The Establishment Clause protects religious minorities at the same high level as those from large or powerful religious groups. That is, the clause is first and foremost about the matter of religious freedom versus government, not about the religiously powerful versus the religiously weak. Any claim that the clause is especially solicitous of religious minorities is mistaken. The fundamental value behind the Establishment Clause, as well as the Free Exercise Clause, is religious freedom for all religions, large

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[20] *Amos,* 483 U.S. at 339.

[21] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981) ("The state does not support or establish religion by leaving it alone.").

[22] *Amos*, 483 U.S. at 336.

[23] *Id*.

[24] Larson v. Valente, 456 U.S. 228 (1982) (finding unconstitutional discrimination against new religious movements); Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance permitting church worship services in park but not other religious meetings was a way of unconstitutionally preferring some religious groups over others based on a given sect's type of religious gatherings or occasion for delivering sermons); Niemotko v. Maryland, 340 U.S. 268 (1951) (unconstitutional to deny use of city park for Bible talks when permits were issued to other religious organizations and for Sunday-school picnics).

and small, powerful and weak. That said, however, in its application Rule 6 does often work to the benefit of the religious minority.

Rule 7: Government may not utilize classifications based on denominational or congregational affiliation to impose burdens or to extend benefits.[25]

The rationale for this rule is that the Supreme Court wants to avoid making membership in a religious denomination more or less attractive. If this was not the rule of law, then merely holding religious membership in a particular church would result in the availability of a desired civil advantage.[26] For example, it would violate Rule 7 if Congress were to confer conscientious objector draft status "on all Quakers," for that may induce conversions (real or *pseudo*) to Quakerism.[27] Although unintended, that would have establishment implications.

Rule 7 is not to be confused with defining the availability of an accommodation with respect to an individual's religious belief or practice. For example, Congress may confer conscientious objector draft status "on religious pacifists" based on an individual's religious opposition to all wars.[28] The latter exemption is pro-religious freedom, hence without establishment implications.

Rule 8: Government may not utilize classifications that single out a sect-specific religious practice (as opposed to language inclusive of a general category of religious observance) thereby favoring that practice.

For government to focus too narrowly on a particular religious observance or practice can have the effect of establishing that practice to the exclusion of other religious practices or observances similarly situated. For example, if Sunday is legislatively required to be accommodated, within reason, by employers as the Sabbath day of rest for employees, then all Sabbath days must be so accommodated. Equal freedom for all who suffer this type of religious burden avoids the implication of "an establishment" by favoring Sunday over Saturday as the proper day to observe the Sabbath. If a Kosher diet is required by the Federal Aviation Authority to accommodate those who are passengers on a commercial airline, then the dietary practices of Muslims must be so accommodated. If a student absence from a public school is excused for Good Friday observance, then absences for the holy days of others must be excused.[29]

Rule 9: Government may not delegate its sovereign authority to govern to a religious organization.

The separation of church and state has its parallel in the doctrine of separation of powers. Separation of powers is about constitutional structure keeping in right order three centers of authority, executive, legislative, and judicial. Rule 9 reflects a similar structural function. There are powers that are

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[25] Bd. of Educ. v. Grumet, 512 U.S. 687, 702-08 (1994) (plurality opinion); Gillette v. United States, 401 U.S. 437, 450-51, 454 (1971); *see Larson,* 456 U.S. at 246 n.23 (distinguishing and explaining *Gillette*).

[26] *Cf.* Frazee v. Illinois Dep't of Employee Sec., 489 U.S. 829 (1989) (holding that state could not deny free exercise claimant because he was not a formal member of a church or denomination that reserved Sunday as religious Sabbath).

[27] *Gillette,* 401 U.S. at 448-60; *see Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment).

[28] *See Gillette*, 401 U.S. at 454-60 (stating Congress is permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of the selective service system).

[29] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (three-Justice plurality struck down a state sales tax exemption available on purchases of sacred and other literature promulgating a religious faith). *Texas Monthly* is supportive of the rule here. The plurality suggests that one of the problems with the tax exemption is that it is too narrow. *Id*. at 15 n.4, 16 n.6. The sales tax exemption favored sacred writing and "writings promulgating the teaching of the faith," as opposed to an exemption for all religious writings. *Id.* at 5. As such, the exemption had a tendency to favor some religions and their sacred writings over the practices of other religions that do not have writings of this sort.

exclusively governmental and cannot be delegated to the church, just as there are powers that are exclusively religious and cannot be interfered with by the state.

The leading case for application of this rule of nondelegation is *Larkin v. Grendel's Den, Inc.*[30] In *Larkin*, a state had enacted a zoning statute that sought to protect houses of worship, schools, and hospitals from the tumult of close proximity to taverns and bars. Under the statute, when a proprietor applying for a liquor license selected a site within 500 feet of a house of worship, the affected church or synagogue was notified and permitted to veto the license's issuance.[31] The Supreme Court overturned the statute as exceeding the restraints of the Establishment Clause.[32]

The Court began by noting the mutual objectives internal to the no-establishment restraint. One objective is to prohibit government from propagating religion or sponsoring its sacerdotal activities. The complementary objective is to prohibit government from intruding into the precincts of the church.[33] Both objectives require vigilant boundary keeping, the jurisdictional task of the modern Establishment Clause. The statute in *Larkin* violated the first objective. The Court held that the sovereign power vested exclusively in the agencies of government could not be delegated to a religious organization, as in the veto power over liquor licenses assigned to churches by this zoning legislation.[34] Moreover, the manner of a church's exercise of the veto power was arbitrary, for there were no standards to which the church was to conform.[35]

The Court framed the prohibition in terms of forbidden "enmesh[ment],"[36] "fusion,"[37] or "union"[38] of religion and government. These characterizations of resulting illicit church-state relationships are alone not helpful. A better understanding follows from the Court's explication of the harm that the nondelegation rule is designed to prevent: "At the time of the Revolution, Americans feared . . . the danger of political oppression through a union of civil and ecclesiastical control."[39] In *Larkin*, the serious risk of political oppression took the form of ecclesiastical control over a valuable business license. Matters of commercial licenses are ordinarily for regulation pursuant to state police power; permits to engage in ordinary commerce are not civic favors to be doled out by a church.[40]

The rule in *Larkin* is that sovereign power ordinarily vested in government cannot be delegated to a religious organization. When viewed in combination with the Court's cases holding that a state must

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30 459 U.S. 116 (1982). *See also Grumet*, 512 U.S. at 689-702 (striking down the creation of public school district along religious lines).

31 459 U.S. at 120-22.

32 *Id*. at 123.

33 The Court in *Larkin* said:

> [T]he objective is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other. . . .
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> . . . The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

Id. at 126 (internal quotations and citations omitted).

34 *Id*. at 127 ("The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.").

35 *Id.* at 125. *See also id.* at 127 (The veto "substitutes the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards.").

36 *Id.* at 126, 127.

37 *Id*. at 126.

38 *Id.* at 127 n.10.

39 *Id*.

40 A violation of the nondelegation rule is infrequent because it is uncharacteristic for government (or any entity or individual for that matter) to attempt to give away its power. Hence, at the Supreme Court level only one case besides *Larkin* had nondelegation as a problem. *See Grumet*, 512 U.S. at 689 (stating the creation of a public school district to meet the needs of one particular Jewish sect is "tantamount to an allocation of political power on a religious criterion").

not interfere with the internal governance of a church,[41] the modern Establishment Clause is seen as a power-negating clause that arrests abuses running in either direction: neither government delegating away a public function to organized religion or government intruding into matters that are in religion's exclusive purview. These two types of abuses result in two different kinds of harm: the first is the political oppression (hence, harm to the body politic) that follows when government helps organized religion to aggrandize civic power, and the second is the undermining of religion and religious groups that follows from government's interference with matters exclusive to the church.

Conceptually, these reciprocal boundary-keeping objectives necessarily entail regarding the Establishment Clause as structural or jurisdictional, rightly ordering church and state. However, it is commonplace for government to delegate to the private sector. It is hard to imagine modern government without out-sourcing by way of contracts, grants, and similar arrangements. It is also difficult to define just when the government has "delegated a sovereign function" to religion, as distinct from the delegation of a lesser function which the government could do for itself, but which it would rather out-source. It may be of some significance that the delegation in *Larkin* was expressly to churches (along with schools and hospitals), as opposed to a general delegation to private sector organizations which also happen to included churches. The expressed singling out of churches for special regard is perhaps the reason for heightened scrutiny.

Illustrations of where the nondelegation rule likely would be violated are the vesting in a church of the power to tax, the power of eminent domain, or the power to issue municipal parking tickets for automobile parking near the church. However, describing just where to draw the line is of considerable theoretical difficulty. Nevertheless, the infrequency with which Rule 9 arises is such that perhaps we can more easily abide the ambiguity.

Rule 10: Government may not regulate the private sector with the purpose of creating an unyielding preference for religious observance over competing secular interests.

The leading case for this rule is *Estate of Thornton v. Caldor, Inc*.[42] In *Thornton*, the State of Connecticut had recently amended its Sunday closing laws to permit more retail stores to be open on Sunday.[43] Out of a concern for the many retail workers who would now be pressured to work on their Sabbath, the state adopted a law that addressed employees who desired to be observant. The statute read: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day."[44]

Donald Thornton was an employee for Caldor, Inc., a retail clothing department store. He was a Presbyterian and observed Sunday as his Sabbath. For several months after Caldor began opening its stores on Sunday, Thornton worked once or twice a month on Sunday. Thereafter Thornton invoked his right of accommodation under the Connecticut Sabbath statute. Caldor refused the Sabbath accommodation, and when an impasse was reached Thornton resigned. Thornton filed a grievance against Caldor, which in time led to a lawsuit filed on Thornton's behalf brought by the state Board of Mediation and Arbitration.[45] Caldor, *inter alia*, argued that the Connecticut statute violated the

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41 *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (civil courts are not to take jurisdiction over claims that cause them to probe into disputes over church polity or the removal of clerics); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (civil courts may not adjudicate disputes over matters of church doctrine, discipline, or polity).

42 472 U.S. 703 (1985). *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding that airline is not required as a reasonable accommodation under Title VII to let an employee work a four-day work week in order to avoid working on his Sabbath); *id*. at 90 (Marshall, J., dissenting) (observing that the constitutionality of the Title VII religious accommodation exemption is "not placed in serious doubt simply because it sometimes requires an exemption from a work rule"); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987) (finding that Title VII did not require employer to agree to an employee's preferred religious accommodation, just a reasonable accommodation).

43 *Thornton*, 472 U.S. at 703.

44 *Id*. at 706.

45 *Id*. at 705-07.

Establishment Clause. Caldor's standing to raise this claim was its economic harm.[46] The United States Supreme Court agreed with Caldor, finding that the law violated the Establishment Clause.

The Supreme Court observed that the Connecticut "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath."[47] The Court also noted that "the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates."[48] And, redundantly, the Court said that the law granted an "unyielding weighting in favor of Sabbath observers over all other interests."[49] Obviously, the Supreme Court was seized by the absolutist character of the statute. The unyielding nature of the accommodation worked a hardship, not for those who were distant abstractions, but for those well within the view of the Court: Thornton's employer and co-employees. The statute would "cause the employer substantial economic burdens" and it did not account for what an employer is to do "if a high percentage of an employer's workforce asserts rights to the same Sabbath."[50] Additionally, the Sabbath law did not supply a rule of reason or means to balance the requested accommodation against the nonreligious, yet weighty, preferences of other employees.[51] For example, employees with more seniority may want weekends off because those are the days a spouse also has off or the days when their children are not in school.[52]

Finally, the Court noted that Thornton, as the religious claimant, was not merely seeking to be left alone by the state. Rather, he sought the state's affirmative assistance so as to better secure his observance of the Sabbath. This is the baseline issue. The religious burden in *Thornton* was not imposed by the government, but was imposed by the commercial demands of the private sector. The Connecticut law clearly had the state "moving off the baseline" and siding with the religious claimant. The Court said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[53] Now that "fundamental principle" is contrary to some of the Court's prior holdings. For example, in *Trans World Airlines, Inc. v. Hardison*,[54] an employer was affirmatively required to make "reasonable accommodation" for the religious practices of employees—adjustments that will often affect co-employees. Accordingly, the baseline factor, while relevant, is not necessarily determinative on the constitutional question. Conversely, a religious claimant—such as the Mormon Church in *Amos*—that only wants to be left alone by the state—hence, no asking of the state to move off the baseline—will strengthen its argument for the constitutionality of the accommodation.

The task then becomes how to distinguish *Thornton* from other accommodation cases. Some assistance arrived two years later in *Hobbie v. Unemployment Appeals Commission of Florida*.[55] *Hobbie* was the third occasion for the Court to rule on the application of the Free Exercise Clause to an employee

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46 Unlike the Free Exercise Clause, which protects only against religious harm to those subscribing to a religion, the Establishment Clause protects against both religious harm and other sorts of harm. For example, there is standing to raise economic or property loss under the Establishment Clause (*see Thornton*, 472 U.S. at 703 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)), constraints on academic freedom and inquiry by teachers and students (*see* Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968)), and restraints on free-thinking atheists (*see* Torcaso v. Watkins, 367 U.S. 488 (1961)).

47 472 U.S. at 709.

48 *Id*.

49 *Id*. at 710.

50 *Id*. at 709-10.

51 *Id*.

52 *Id*. at 710 n.9.

53 *Id*. at 710 (internal citations and quotations omitted).

54 432 U.S. 63 (1977) (construing Title VII employer accommodation requirement with respect to religious practices of employees).

55 480 U.S. 136 (1987).

seeking benefits under a state's unemployment compensation law.[56] On each of the three occasions, the state had denied benefits because the employee in question declined out of religious duty to take a job for which the employee was qualified. In *Hobbie*, the employee was discharged when she refused to work on Saturday, her Sabbath. In the two prior cases, and in *Hobbie*, the Court sided with the religious claimant holding that the state's denial of unemployment compensation was a violation of the Free Exercise Clause.[57] The employer in *Hobbie*, as well as the State of Florida, argued that to accommodate the employee's Sabbath would violate the Establishment Clause. The state, citing the recent holding in *Thornton*, argued that to accommodate an employee's Sabbath would be unconstitutional. The Supreme Court rejected that argument, distinguishing *Thornton* from *Hobbie* as follows:

> In *Thornton*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.
>
> In contrast, Florida's provision of unemployment benefits to religious observers does not single out a particular class of such persons for favorable treatment and thereby have the effect of implicitly endorsing a particular religious belief. Rather, the provision of unemployment benefits generally available within the State to religious observers who must leave their employment due to an irreconcilable conflict between the demands of work and conscience neutrally accommodates religious beliefs and practices, without endorsement.[58]

Thus the statute in *Thornton* is said to have violated the boundary between church and state for two combined reasons. First, in lifting the religious burden, the accommodation favored the religious claimant in every instance, thus disregarding the interests of the employer and co-employees. Second, the nature of the accommodation had government leaving the "neutral" baseline by affirmatively moving to lift a burden on religion imposed in the private sector. For government to move off the baseline has greater implications in the nature of "an establishment." It is as if the government was actively taking sides in favor of religious observance. These two factors, when combined, brought down the Connecticut accommodation statute.

III. HOW THE RULES APPLY IN "HARD CASES."

Rule 1 and Rules 6 through 10 in this essay constitute a systematic approach to determining when a legislative accommodation for religion crosses the line separating church and state and is thus an unconstitutional establishment.

Professor Greenawalt observes in passing that no discretionary accommodation can survive unless it has the object of lifting a burden on the practice of religion,[59] as contrasted with lifting a purely economic or other nonreligious burden. This is because the First Amendment is foremost about religious freedom, not about reducing barriers to free enterprise or some other nonreligious objective. This is best

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[56] *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that denial of unemployment compensation because religious beliefs precluded continuing claimant's job violated Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398 (1963) (same).

[57] *Hobbie*, 480 U.S. at 139-44; *Thomas*, 450 U.S. at 717-19; *Sherbert*, 374 U.S. at 406-09.

[58] *Hobbie,* 480 U.S. at 145 n.11 (internal citations omitted) (brackets in original).

[59] Greenawalt, *supra note* 14, at 343, 346, and 347. In their article, Professors Lupu and Tuttle also emphasize that the accommodation must truly relieve a religious burden. *See* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 87, 107-08 (2007) [hereinafter "Lupu & Tuttle"].

illustrated by the three-Justice plurality in *Texas Monthly, Inc. v. Bullock*,[60] which involved a sales tax exemption for retail purchases of publications consisting of a religious group's teachings or the group's sacred writings. The plurality found the sales tax exemption in violation of the Establishment Clause. In significant part the tax exemption was held unconstitutional because the accommodation lifted a purely pecuniary burden on retail consumers rather than lifting a religious burden. The plurality wrote, "In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity."[61] And, again "because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications" by religious groups.[62] The state offered no evidence that the religious faith of any purchaser prohibited the paying of the sales tax. These findings by the plurality are consistent with the Court's dismissal of Free Exercise Clause claims in cases where the putative burden was purely economic rather than bearing on religiously formed conscience.[63]

Texas Monthly is also of interest because the plurality believed the tax exemption increased administrative entanglement by the text of the statute focusing on the religious literature being consistent (or not) with the teachings of the relevant religious group or was sacred to the religion.[64] That, in turn, cast tax authorities in the impossible role of having to determine whether, as a matter of religious doctrine, a particular book or magazine "consist[s] wholly of writings promulgating the teaching of the faith" or if the publications were "wholly of writings sacred" to the religion. To increase church-state entanglement is a strike against an accommodation. This is the reverse of *Amos*, where the accommodation in question reduced church-state entanglement and thereby enhanced the accommodation's likelihood of being constitutional.

Drawing on *Thornton* as explained in *Hobbie*, as well as cases such as *Texas Monthly, Amos*, *Hardison*, and *Larkin*, seven factors appear to be relevant to the Supreme Court in determining when a religious accommodation violates the Establishment Clause. **First**, does the accommodation pertain only to a single type of religious observance, or does it have within its scope a broader array of religious practices? **Second**, does the accommodation pertain only to religious claimants, or does it have within its scope a broader array of similarly situated nonreligious claimants? **Third**, is the accommodation absolute and unyielding, or is there a rule of reason where the competing nonreligious interests of others in the private sector can be weighed and given account? **Fourth**, is the religious claimant asking only to be left alone by the state, or is the claimant asking for the state's affirmative assistance to effectuate the desired religious observance notwithstanding contrary private-sector interests (i.e., the "neutral" baseline issue)? **Fifth**, does the accommodation result in increased administrative entanglement between church and state, or conversely does the accommodation reduce entanglement and thereby enhance the desired separation? **Sixth**, is the accommodation reasonably designed to lift a burden on religious practice, as contrasted with lifting a purely economic or other nonreligious burden? And, **seventh**, does the accommodation delegate civil authority to religious organizations to exercise power in an abusive manner unguided by standards and without due process? While none of these factors are individually fatal, the failure of multiple factors

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[60] 489 U.S. 1 (1989) (plurality opinion). Separate opinions concurring in the judgment were filed by Justice White and Justice Blackmun, the latter joined by Justice O'Connor. Being a plurality opinion, *Texas Monthly* "makes law" only on the facts as presented in the case. Accordingly, drawing broad legal rules from *Texas Monthly* is just not possible, except where the Supreme Court has elsewhere reaffirmed the same principle of law.

[61] *Id*. at 18.

[62] *Id*. at 24.

[63] *Compare* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (sales and use taxes on sales of religious literature do not impose a religious burden and hence claimant cannot state prima facie claim under the Free Exercise Clause), *with* United States v. Lee, 455 U.S. 252 (1982) (Amish employer stated prima facie claim under the Free Exercise Clause that social security tax imposed burden on the Amish practice of self-insurance).

[64] 489 U.S. at 20 (the exemption "appears, on its face, to produce greater state entanglement with religion than the denial of an exemption").

in a given case will lead the Court to conclude that the accommodation in question is unconstitutional.[65] And, of course, all seven factors will not likely be applicable in any one case.

Professor Greenawalt characterizes *Estate of Thornton v. Caldor, Inc.*,[66] as "the puzzle" of accommodation cases,[67] so I will begin with *Thornton* by way of illustrating the multifactor analysis. Donald Thornton's claim under the Connecticut Sabbath law came up short on factors 1, 2, 3, and 4. Factor 5 was not involved and, therefore, entanglement did not weigh in the religious claimant's favor or disfavor. Such a negative tally with respect to the seven factors doomed in the mind of the Court the Connecticut law as one that "has a primary effect that impermissibly advances a particular religious practice."[68] By way of contrast, the *Hardison* Court upheld the requirement in Title VII of the 1964 Civil Rights Act mandating employers to offer a reasonable religious accommodation to employees who make a request. That Title VII requirement rang up a positive tally with respect to factors 1, 2, 3, and 6. And, as with *Thornton*, factor 5 was not involved and thus entanglement did not weigh negatively or positively. Similarly, the statutory accommodation in *Amos* rang up a positive tally with respect to factors 1, 4, 5, and 6. This greatly helps to distinguish both *Hardison* and *Amos*, where the accommodations were upheld, from *Thornton*, where the accommodation was struck down. The accommodation in *Texas Monthly* likewise failed several of the factors, namely 1, 2, 3, 5, and 6.

In *Walz v. Tax Commission of the City of New York*,[69] the Court faced a claim that municipal property tax exemptions for churches and other houses of worship advance religion and thus violate the Establishment Clause. But the tax exemption causes the government to leave religion alone, a "neutral" baseline. And the exemptions are available to other secular nonprofits. Finally, the tax exemption avoids greater administrative entanglement between church and state. Because the accommodation in *Walz* rang up a positive tally with respect to factors 1, 2, 4, 5, and 6, it is not surprising that the Court upheld the constitutionality of the tax exemption.

Notwithstanding *Thornton* and *Texas Monthly*, many if not most religious accommodations will be found to be constitutional (e.g., *Hardison, Amos*, and *Walz*) so long as they do not, as did the Connecticut Sabbath law in *Thornton* or the sales tax exemption in *Texas Monthly*, ring up high negative tallies with respect to the seven factors. It follows that most religious accommodations are constitutional, provided that a proper classification or means (i.e., heeding Black Letter Rules 6 through 10) has been selected to achieve the desired accommodation. This is entirely consistent with the Establishment Clause being pro-religious freedom, and therefore meets our expectation stated in Part I that the First Amendment is generally permissive with respect to religious accommodations.

The seven factors have been identified by the Supreme Court based on its understanding of religious freedom as voluntaryism, which is to say that the Establishment Clause is violated when the government affirmatively aids or otherwise supports organized religion as religion. But the Establishment Clause is not violated when a religion is supported by the voluntary donations of its followers. This answers Professor Greenawalt when he says the Supreme Court appears to be guided by no "tenable theory" of church-state relations.[70] Voluntaryism assumes that persons who want religion in their lives can simply seek it out on their own—so there is no need for the government's financial help or other involvement. That is true in most places and most circumstances. However, if we have an environment where voluntaryism cannot operate freely (e.g., prisons, the armed forces, and children in

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65 Professors Lupu and Tuttle also identify multiple factors to test religious accommodations ("four criteria"), but their factors are less comprehensive than those identified here. Lupu & Tuttle, *supra* note 59, at 110-14.

66 472 U.S. 703 (1985).

67 Greenawalt, *supra* note 14, at 343.

68 472 U.S. at 710.

69 397 U.S. 664 (1970).

70 Greenawalt, *supra* note 14, at 341.

foster homes), then the seven factors will not govern with the same force.[71] Indeed, if the seven factors are followed without major adjustment for such unique confining environments like the military, application of the factors will lead to unintended and unjust results.[72]

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[71] For a recent case struggling with one such specialized environment, *see Freedom From Religion Found., Inc. v. Nicholson,* 469 F. Supp. 2d 609 (W.D. Wis. 2007) (upholding the constitutionality of chaplaincy program operated by the U.S. Veteran's Administration in Veteran's Hospitals). On appeal it was held that plaintiff lacked standing. 536 F.3d 730 (7th Cir. 2008).

[72] *Cf.* Lupu & Tuttle, *supra* note 59 (writing on military chaplaincies and questioning whether such chaplaincies qualify as permissible accommodations).