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The First Amendment: A Comparison of Nineteenth and Twentieth Century Supreme Court Interpretations

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In 1791, three scant years after the Constitution of the United States had been adopted, Congress approved and the several states ratified ten Amendments to that Constitution. The First Amendment read, in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,

From these cryptic phrases, presumably understood and well-intentioned by all those who voted for their adoption, has come monumental confusion. At the time this Amendment was passed, the United States was composed of thirteen states and slightly less than four million people. Today the U.S. population has mushroomed to some two hundred and twenty million people spread over fifty states. The situation to which this Amendment is supposed to apply has changed drastically in the almost two hundred years since its adoption. New states were carved out of the wilderness, new territories were acquired, and waves of immigrants have landed on our shores. Through all of that change, however, the words of the First Amendment have remained fixed and absolute. No one has waged a prolonged effort to amend, abolish or alter it.

To be an intellectual in America during the last half of the twentieth century is tantamount to being cognizant of the church-state controversy. It seems, moreover, that the United States Supreme Court has contributed to the confusion by interpretations since World War II which bear little resemblance to those decisions handed down in the first one hundred and sixty years of its existence. A comparison of those interpretations is the subject of this paper.

In order to make any judgment as to which set of decisions is harmonious with the original intent of the framers, it is necessary to examine the context in which the Constitution and its First Amendment were drafted.

The Constitutional Context

Without going into an exhaustive historical analysis, let me assert that it was not the Founding Fathers' intention to attempt the impossible separation of church and state.¹ When Congress and the thirteen states drafted the Constitution and then adopted the First Amendment, they simply and clearly stated that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

It should be noted that Congress was thereby prevented from designating an established church, for that was to remain the prerogative of the separate states. The church-state patterns which were prevalent in Europe also found their way to America. When the
Revolutionary War broke out in 1776, nine of the thirteen colonies had established, state-supported churches. The Congregational church was officially established in the New England colonies of Connecticut, Massachusetts, and New Hampshire. Elsewhere in the colonies the Anglican Church had become formally entrenched, with the governments of Delaware, Georgia, Maryland, New York, South Carolina, and Virginia designating the Church of England as the established body.²

In Virginia, the Anglican church had been established from the earliest days of the colony. In Maryland, though, the situation differed. Because of a rebellion involving some of the Catholic population in that colony, the Anglican church was made the official established church there in 1689. In Georgia and South Carolina the basic unit of colonial, and the later state, government was the parish. All the parishes, or congregational districts, were designated as the basic units of government, with a specified number of church members elected from each parish to form the colonial assembly. When the Georgia state constitution was later adopted, this practice was continued with the stipulation that “the representatives shall be of the Protestant religion.”³

Unique among the thirteen colonies was Rhode Island, originally named Providence Plantation. Because of the intervention of the Puritan Commonwealth from 1642 to 1660, the people in Providence received little attention and encouragement from England. When Charles II was restored to the throne, however, new efforts were made to formally recognize and establish this group of dissenters as the colony of Rhode Island. In 1663 Charles II issued a special charter in which he designated Benedict Arnold as Governor and named 12 Assistants, one of whom was Roger Williams.⁴ Recognizing that “some of the people and inhabitants—cannot—conforme to the publi­que exercise of re­lision, according—to the Church of Eng­land,” Charles II stipulated that it was his royal will “that all and everye per­son—may freelye and fullye have and enjoye” his religious and civil liberties to the fullest.⁵

When the Continental Congress signed the Declaration of Independence on July 4, 1776, each of the thirteen colonies became independent states. Since Virginia, South Carolina, and New Jersey had already made their separate proclamations, Congress put out a call requesting the remaining states to draft constitutions by which they could govern themselves.

Pennsylvania was quick to respond, with its state convention assembled at Philadelphia on July 15, 1776. Expressing a great deal of respect for their political traditions, the constitutional delegates closely patterned their constitution after the charter of 1701, using almost identical language in many of the articles. By September 28 the document was complete and ready for publication.

The Continental Congress’ call for state constitutions met with a different response in Connecticut. Instead of writing a new document, the General Court simply appended an introductory paragraph to the charter of 1662, in which they declared,

That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of
England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State.  

When the constitutional process was concluded, a majority of the states continued the tradition of established churches with which they had grown up. The divisions were as follows:  

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In the European tradition, establishment of religion usually meant that one denomination was given special, privileged status and became the sole recipient of the state tax monies. Other religious affiliations were labelled as dissenters and were either tolerated or declared to be illegal. Potentially harsh treatments were well-known to many of the colonists, causing them to incorporate into their constitutions public statements guaranteeing religious toleration.  

Qualifications for Holding Office  
The newly independent states that emerged from the War of Revolution were thoroughly and almost exclusively Protestant. Nowhere was this more apparent than in the criteria for holding public office. After 1776, most of the states decreed that one had to be a member of the Protestant faith in order to be eligible for any government position. Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, and South Carolina specified in their constitutions that all office-holders must be of "the Protestant Religion." Pennsylvania, in spite of its reputation for toleration, ruled that each member of the legislature, before taking his seat, shall make and subscribe to the following declaration:  

I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.

It was left to Delaware, however, to draft the most concise and most obviously Trinitarian criteria for their magistrates. Their constitution said that,  

Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take the following oath, or affirmation, if conscientiously scrupulous of taking an oath, to wit:  

I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wit-
tingly whereby the freedom thereof may be prejudiced. And also make and subscribe the following declaration, to wit:

I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.

The Northwest Ordinance of 1787

In June, 1783, before the peace treaty with Britain was signed, George Washington and Alexander Hamilton began making suggestions to Congress concerning the governance of the Northwest Territory, recently won from Britain.

The Congress which met during the summer of 1787 was materially affected by the sessions of the Constitutional Convention. While the process of drafting the Constitution moved ahead in Philadelphia, such delegates as Madison and Washington maintained a keen interest in various bills as they worked their way to the floor of Congress for final vote. The "Ordinance for the Government of the United States, Northwest of the River Ohio" was a topic of particular interest, for Washington had actively promoted it and Madison had served on the committee which drafted it. Framed very closely on the model of the Massachusetts Constitution, the law passed through second and third readings with only minor revisions in wording. Finally, in early July, 1787, the ordinance was taken up by the full Congress.

Intended "for the prevention of crime and injuries, and for the execution of process, criminal and civil," the law required that all of the lands north and west of the Ohio River be surveyed and divided into townships of 36 square miles each, with each township assuming the basic governmental functions for the people residing in it. Article one guaranteed religious toleration, but the most far-reaching section, and the most often quoted, was the third article, which began,

Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Ten days after Congress legislatively approved the Northwest Ordinance, the members met again to vote on enabling legislation which would define the terms of sale, for offers of purchase had already been received from the Ohio Company. On July 23, 1787, Congress approved "Powers to the Board of Treasury to Contract for the Sale of Western Territory," in which they stipulated various responsibilities and contractual obligations. Section 16 in each township was "to be given perpetually for the purposes contained in the said ordinance," defined there as being "religion, morality, and knowledge," the coterminous tasks of the school. Of equal importance was the requirement that section 29 in each township must "be given perpetually for the purposes of religion," in order that churches might be established and pastors' salaries paid.
Such was the environment in which the Constitution and its Ten Amendments were drafted. With a variety of religious persuasions and varying ethnic origins, the newly declared and victorious United States formed a heterogeneous mix that would create conflicts which would need resolution at the Supreme Court level.

**Nineteenth Century Court Decisions**

During the first decades of the nineteenth century, Connecticut was aflame with controversy and hostility between "democrats" and "federalists." The members of the Democratic-Republican party were followers of Jefferson and Madison, while the Federalists came from the tradition of Washington, Hamilton, and Adams. Although the Democrats had captured the presidency in 1800 and would retain it through the next three decades, the majority of voters in Connecticut continued their allegiance to the Federalists.

**The Dartmouth Case**

The controversy which had swirled through the country during the early 1800's finally worked its way up to the United States Supreme Court. What was judiciously decided in 1819, though, had its roots in the original Connecticut Charter of 1662, which had been retained as the "new" Constitution of 1776. From the very beginning of its statutory existence, Connecticut had declared that its primary reason for existence was to "win and invite the Natives of the Country to the Knowledge and Obedience of the only true GOD, and the Savior of Mankind, and the Christian Faith." 12

Dartmouth College was originally founded by Rev. Eleazor Wheelock in 1751 as a means of implementing that missionary mandate. Begun as an Indian Charity School in Lebanon, Connecticut, it was chartered by that colony's General Court and placed under its jurisdiction. In 1763, Rev. Wheelock petitioned the Assembly for funds to support his work and the more than twenty Indian youths who were studying to become missionaries to their own people. The Assembly reacted favorably and promised to release tax funds for this purpose, as well as to recommend the cause to all of Connecticut's churches for their support. 13

In 1770, New Hampshire took a special interest in Rev. Wheelock's program and enticed him to move his school to Hanover, New Hampshire. The governor offered a 3300 acre tract of land "freely given for the use of the college." In a letter of response dated August 23, 1770, Rev. Wheelock promised, I hope soon to be able to support by charity a large Number not only of Indian youths in Moor's charity school, which is connected and incorporated with the College, but also of English youths in the College, in order to their being fitted for missions among the Indians. 14

Rev. Wheelock had also received support from the Society for the Propagation of the Gospel, which was based in London, but that source of funds was cut off by the advent of the War. In 1778, Wheelock appealed for money from Congress and was granted $925.00 for ex-
penses incurred in "supporting a number of Indian youths at his school." For a number of years thereafter, appropriations for Dartmouth College and Rev. Wheelock's Indian mission efforts were regularly approved by Congress.

As the War of Revolution drew to a close, the program at Dartmouth attracted increasing attention. In 1781, the question was raised as to whether other students might enroll, but the answer was an emphatic "No," with the explanation that this school was reserved for evangelizing Indians and for training missionaries to the Indians. With its reputation spreading, monetary support increased. In 1789, the government of the state of Vermont made a generous donation of 23,000 acres "of wild land," in "consideration of its contiguity to that State." The same year the state of New Hampshire made a grant of 41,000 acres "of valuable land, adjoining the Connecticut River, near Hanover," and followed that in 1796 with another grant of 24,500 acres.

The historic Supreme Court case, known as Dartmouth v. Woodward, had its immediate roots in a political squabble within the Legislature of New Hampshire, which had come under the political dominance of the Democratic-Republican Party. As part of a political power struggle with the Federalists, the Democrats tried to wrest control away from the existing Board of Dartmouth College and to change its direction. The Democratic governor, with the support of the legislature, appointed a new Board of Trustees for the college and disbanded the existing Board. The college, in defiance of the governor, continued to operate as a college without state funds while the case was slowly working its way through the lower courts. Meanwhile, the State Legislature loaned $4,000 to William Woodward, their newly appointed Treasurer of the College, to pay his legal expenses.

When the Supreme Court, under Chief Justice Marshall, finally handed down its 5–1 decision on February 2, 1819, it was clear that the Democrats had lost and that the old Board of Trustees had won. The Supreme Court ruled against Woodward and ordered him personally to pay a $20,000 indemnity to the college. The original charter, which had articulated the college's purpose of evangelizing Indians and training missionaries, was guaranteed.

One of the clear implications of the Dartmouth decision was that charters and contracts were to be considered inviolate. The Supreme Court said, in effect, that the Constitution of the United States would protect the right of a college to consider its primary purpose that of propagating religion without interference from dissenting political or religious factions and that it had the right to receive state tax funds for such purposes.

Church of the Holy Trinity v. United States

Based on the absence of litigation reaching the Supreme Court, it can be assumed that the period from 1819 to 1892 was relatively tranquil on matters of church-state relationships. Surveys by various reviewers indicate no church-state cases at the federal level between the Dartmouth decision and that involving the Church of the Holy Trinity, which was submitted on January 7, 1892 and decided on
February 29 of that same year.

In response to high unemployment figures and excessive immigration pressures, Congress approved legislation on February 26, 1885 "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." "Any person, company, partnership, or corporation, in any manner whatsoever," was forbidden to assist or encourage the importation or migration of any foreigner for purposes of working in this country. The language was broad and all-inclusive.

Holy Trinity Church, however, needed a pastor. Rev. E. Walpole Warren, an alien residing in England, was selected as their preferred candidate, so a contract was issued in September, 1887. Mr. Warren accepted and moved to New York City to begin his duties. A complaint was filed, and Holy Trinity Church was not only charged with violating the 1885 act, but was also assessed a penalty prescribed by the act.

The facts and procedures of the case were never in question, so the U.S. District Court for the Southern District of New York ruled against the plaintiff. Holy Trinity appealed. The only question confronting the Supreme Court, therefore, was whether the District Court had erred in its conclusion.

The decision of the Supreme Court was unanimous and resounding. Yes, the court concluded, the acts of the church were within the terms and conditions of the law in question. The church had clearly violated the letter of the law, and pastors were definitely not in the specified exemption list. But, the Court concluded, "we cannot think Congress intended to denounce with penalties a transaction like that in the present case." "Offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish." Furthermore, the thoughts expressed in this act were aimed only at the manual laboring class, and no one reading the law "would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel."

After carefully and systematically dispensing with all the technicalities of the litigation, the Court got to the heart of the case. "Beyond all these matters," the opinion stated, "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

From that point to the conclusion, covering seven pages of detail and no less than twenty-six illustrations for evidence, the Court set out to prove "that this is a Christian nation." Quoting first from such colonial charters as those granted to Virginia, Massachusetts, Connecticut, and Pennsylvania, the Court worked its way up to the Declaration of Independence, which "recognizes the presence of the Divine in human affairs in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with Certain unalienable Rights.' 'We, therefore, the Representatives of the United States of America, (appeal) to the Supreme Judge of the world for the rectitude of our intentions.' (and express) 'a firm reliance
Continuing its historical progression, the Court said, "If we examine the constitutions of the various states we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four states contains language which either directly or by clear implication" insists that "the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality. These cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion and morality." To hammer home its point, the opinion quoted sections from the state constitutions of Illinois (1809), Indiana (1816), Maryland (1867), Mississippi (1832), and Delaware (1776).

Moving to the federal level, the Court asserted, "Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the States, as follows; 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"

In summing up all of the evidence to this point, the opinion went on to declare: "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning: they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in Updegraph v. The Commonwealth, it was decided that, 'Christianity, general Christianity, is, and always has been a part of the common law.'"

Having argued from colonial charters, the Declaration of Independence, various state constitutions, the U.S. Constitution, and sundry court decisions, the Supreme Court turned finally to a sweeping review of America's laws, customs, and societal practices. Wherever we look, they said, "we find everywhere a clear recognition of the same truth . . . that this is a Christian nation." In light of all that had been so forcefully presented, the judgment of the district court was reversed.17

Subsequent Decisions

The matter of church-state relations lay dormant for another seven years until the case known as Bradfield v. Roberts (175 U.S. 291) reached the Supreme Court in 1899. In that decision, the court upheld federal appropriations to a Catholic hospital in the District of Columbia. The majority decided that tax monies could constitutionally be appropriated for ward construction and for the care of indigent patients, because the hospital performed "a public service". In 1908 the Quick Bear v. Leupp (210 U.S. 50) decision was handed down, with the Court upholding the federal disbursement of funds, held in trust for the Sioux Indians, to Catholic schools designated by the Sioux for payment of tuition costs. Although the monies were intended for the benefit of the Indian students, the disbursements were made directly to the Catholic
schools for their use. In 1930 the court handed down still another decision which ruled in favor of religious establishments. In *Cochran v. Louisiana Board of Education*, the Court upheld Louisiana’s purchase of textbooks for pupils attending all schools, including private and parochial ones. Reflecting a slight shift in public mentality, the Supreme Court upheld the practice as constitutional on the grounds that the benefits went to the children involved and not to the institutions as such.

**Twentieth Century Turnarounds**

Since World War II, the courts in the United States have interpreted the First Amendment of the Constitution in ways that bear little resemblance to any of the decisions cited earlier. As we reflect briefly on them, we will need to address a major concern to the matter of interpretation by the courts. We will need to ask whether the judges who make legal pronouncements are morally and ethically bound by legal precedent and whether they should rule on the basis of original intent (strict construction) or whether it is permissible to interpret on the ground of current sentiment. That, however, will be left for the reader to decide, based on the evidence.

In 1947, the United States Supreme Court agreed to hear the case known as *Everson v. Board of Education* (330 U.S. 1, 67 S. Ct. 504). The issue in the litigation was the practice of a New Jersey township whereby they reimbursed, from tax revenues, the cost of sending children “on regular busses operated by the public transportation system” to and from schools, including the private and parochial schools in that township. Everson, a municipal taxpayer, filed a formal complaint charging that payment for Catholic parochial students’ transportation violated the establishment clause of the First Amendment. The plaintiff argued that the early Americans “fervently wished to stamp out” all forms of religious establishment and “to preserve liberty for themselves and for their posterity”.

If one read only Baptist histories or only the letters of Thomas Jefferson, one could certainly arrive at such a conclusion. It should be obvious, however, in the light of all the evidence submitted in the foregoing pages, that such a selective sampling of the extant literature would do a great disservice to the vast majority of early Americans and would grossly distort the meaning of the First Amendment. Yet Justice Hugo Black, writing the majority opinion in this watershed case, apparently was influenced significantly by the plaintiff’s argument and limited himself almost exclusively to the perspective that was promulgated by Thomas Jefferson. In the majority opinion, Justice Black detailed the Virginia practice of paying tithes and taxes “to support government sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters”. The abhorrence of these practices, Black argued, “reached its dramatic climax in Virginia in 1785–86” when “Madison wrote his great Memorial and Remonstrance” and “when the Virginia Assembly enacted the famous Virginia Bill for Religious Liberty.”

Black’s majority opinion argued that “the ‘establishment of
religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religion, or prefer one religion over another . . . No tax in any amount, large or small can be levied to support any religious activities or institutions . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State."

Without citing precedent or case, Black went on to write, "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty." Apparently impervious to the historical record, Black should have noted that Jefferson was in Europe throughout the period in question, serving as Ambassador to France, and had no direct involvement in drafting either the Constitution or the First Amendment.

In 1952 the Supreme Court upheld a New York City released time program in which the religious classes were held in church buildings. Because the religion classes were held in church buildings and not on public school grounds, the court saw no significant danger in such practice. Yet, the Court was also quick to remind the nation that, "The First Amendment reflects the philosophy that Church and State should be separated (and) within the scope of its coverage permits no exception; the prohibition is absolute". On the heels of such a pronouncement, in a curious and inconsistent rejoinder, the Court went on to add, "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State . . . Otherwise . . . municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment".

In 1962, when the Court rejected the New York Board of Regents prayer in Engel v. Vitale, it was once again Justice Hugo Black who wrote the majority opinion. In concluding his argument, Black asserted that a "union of government and religion tends to destroy government and to degrade religion". In making such a pronouncement, he not only contradicted what the Constitutional framers had repeatedly said about "religion, morality, and knowledge being essential to good government;" he also went well beyond what Madison and Washington had argued when they helped to formulate and enact the Northwest Ordinance of 1787. Instead of following Jefferson's pattern consistently and placing his Deism on the pedestal of prominence, the Court, under the guidance of Justice Black, had entrenched a philosophy of an irreligious state and secular public school system.

Since 1962 the church-state cases have become almost com-
monplace on the Supreme Court agenda. The topics have included Bible-reading in public schools, posting of the Ten Commandments, use of university facilities by religious clubs, abortion, and the funding of Christian schools. The issues and the decisions are well known to many of us and will not be analyzed here. Suffice it to say that most of the decisions have served to build and reinforce the "wall of separation" which was not intended or envisioned by the framers of the Constitution or the First Amendment. In the years since the Everson decision, a sacred-secular dichotomy has been imposed on the American republic, not because the Constitution demanded it, but because a myth was substituted for reality and was blessed by the judiciary.

FOOTNOTES

1 For a detailed formulation of this assertion, see DeJong, N., and Van Der Slik, J., Separation of Church and State: The Myth Revisited, Jordan Station, Ontario: Paideia, 1985, pp. 15-20.
4 Charter of Rhode Island, 1663, quoted in Poore, Vol. II, p. 1600. (Note: all subsequent references to state constitutions will be from Poore, Vol. I or II).
5 Ibid., p. 1596.
7 The date for disestablishment in Georgia is uncertain but probably does not extend past 1790.
8 Constitution of Pennsylvania—1776.
9 Constitution of Delaware—1776, Art. 22.
10 Preamble to the Northwest Ordinance, Journals of Congress, July 13, 1787.
11 For the complete original text of this act, see Appendix Journals of Congress, July 23, 1787. The Text is also included as Appendix E in DeJong, Separation of Church and State, pp. 197-8.
12 Constitution of Connecticut—1776, Par. 1.
13 For more detail, see Connecticut's Missionary Mandate, Appendix A, in DeJong, Separation of Church and State, pp. 187-188.
15 Journals of Congress, Dec. 18, 1778.
16 All subsequent quotations and information are derived directly from the printed Opinion of the Court, Church of the Holy Trinity v. United States, 143 U.S. 471 (1892) p. 457.
17 Thirteen years later, in a speech at Harvard College, David J. Brewer, an Associate Justice of the U.S. Supreme Court, reiterated this message when he said, "This Republic is classified among the Christian nations of the world. It was so formally declared by the Supreme Court of the United States . . . In the case of Holy Trinity Church v. United States, 143 U.S. 471.
19 Ibid.