Law Review Articles

1. Church and State in the United States: Competing Conceptions and Historic Changes
Indiana Journal of Global Legal Studies
13 Ind. J. Global Legal Stud. 503

This article explains the separation of church and state in the United States.

2. Crowns and Crosses: The problems of Politico-Religious Visits as they Relate to the Establishment Clause of the First Amendment
Harvard Journal of Law and Public Policy
3 Harv. J.L. & Pub. Pol'y 227

This article examines whether the Pope or any similar leader should be treated as a head of state or as the representative of a religious group.

3. Damages and Damocles: The Propriety of Recoupment Orders as Remedies for Violations of the Establishment Clause
Notre Dame Law Review
83 Notre Dame L. Rev. 1385

In Americans United for Separation of Church & State v. Prison Fellowship Ministries, the court required "a private party, at the behest of another private party, to reimburse the public treasury when the government itself ha[d] not sought reimbursement" for a violation of the Establishment Clause. This Note offers background about taxpayer standing, restitution lawsuits, and background on the Establishment Clause.

4. Accommodation of Religion in Public Institutions
Harvard Law Review
100 Harv. L. Rev. 1639

This artcile examines establishment clause problems attaching to government efforts to recognize religion in public institutions under an 'accommodation' rationale. Section A introduces the justification for allowing government recognition of religion in public institutions and discusses the difficulty of applying traditional establishment clause analysis to actions taken under this justification. It then proposes that the ambiguities in establishment clause analysis should be explicitly resolved so as to prevent majoritarian infringements of the religious autonomy of minorities. Section B addresses the problem of government adoption of religious symbols or practices in public life

5. The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation
University of Pennsylvania Journal of Constitutional Law
8 U. Pa. J. Const. L. 585

At least the three competing accounts of the original meaning of the Establishment Clause inform church-state jurisprudence. More than fifty years after the Supreme Court first turned to the Framers to interpret the Establishment Clause, the Court remains divided over what the Framers actually meant. One might have expected that a half-century of legal scholarship and constitutional development would have clarified the historical record, but the opposite seems to have occurred. This failure of scholarship and jurisprudence may help explain why the Court's Establishment Clause jurisprudence remains, as Justice Thomas once described it, "in hopeless disarray."

6. The Position of the Holy See and Vatican City State in International Relations
University of Detroit Mercy Law Review
83 U. Det. Mercy L. Rev. 729

The section of this article examining the difference between the Holy See and Vatican City State might be beneficial to the group's topic.

News & Press Releases

1. Cape May backs away from decision to broadcast the Papal Mass

Americans United complained to officials that the city's sponsorship of the papal Mass broadcast at Cape May Convention Hall was in violation of the U.S. Constitution.

http://www.pressofatlanticcity.com/features/pope_francis/cape-may-backs-away-from-pope-francis-broadcast/article_4a706842-5c11-11e5-af79-ef678d416e7a.html

2. Ensuring Separation of Church and State

This article profiles M. Kelly Tillery and the lawsuit he filed against the city of Philadelphia before Pope John Paul II's visit in 1979.

http://articles.philly.com/2015-07-27/news/64884606_1_world-meeting-pope-francis-ken-gavin

3. What will the Pope's visit cost the American public?

Examines the cost to U.S. taxpayers might incur because of the Pope's visit.

http://www.nj.com/news/index.ssf/2015/09/what_will_the_popes_visit_cost_the_american_public.html

4. Suburbs cry foul over city deal on Papal bills

Philadelphia suburbs are incurring costs due to the Pope's visit, but they are not being reimbursed like the city of Philadelphia is for its costs.

http://www.philly.com/philly/news/pope/20150925_Suburbs_cry_foul_over_city_deal_on_papal_bills.html

5. Cities Hosting Pope Francis Must Take Pains To Protect Church-State Separation, Says Americans United

A press release from Americans United for Separation of Church and State explaining their concerns about the Pope's visit.

https://au.org/media/press-releases/cities-hosting-pope-francis-must-take-pains-to-protect-church-state-separation

6. Pope Problems: Papal Visit Incurs Significant Taxpayer Expense

This is a press release from Americans United for Separation of Church and State outlining the group's concern about taxpayer expenses due to the Pope's visit.

https://www.au.org/blogs/wall-of-separation/pope-problems-papal-visit-incurs-significant-taxpayer-expense

Other

This is a letter sent by Americans United for Separation of Church and State to the Mayors of New York, Philadelphia, Washington D.C. outlining the groups concerns with the Pope's visit.
https://au.org/files/pdf_documents/2015-08-31_PopeVisitLetter.pdf

Constitutional Meanings of Religion Past and Present

Select case law related to the issue of religious liberty

13 Ind. J. Global Legal Stud. 503

Indiana Journal of Global Legal Studies
Summer, 2006

Symposium: La Conception Américaine de la Laïcité
University of Paris II (Panthéon-Assas)--Paris, France, January 28, 2005

CHURCH AND STATE IN THE UNITED STATES: COMPETING CONCEPTIONS AND HISTORIC CHANGES

Douglas Laycock [a1]

ABSTRACT

This article, originally written for a French audience, attempts to explain the American law of church and state from the ground up, assuming no background information. Basic legal provisions are explained. The relevant American history is periodized in three alignments of religious conflict: Protestant-Protestant, Protestant-Catholic, and religious-secular. Some frequently heard concepts are explained, distinguished, and related to each other--separation, voluntarism, equality, formal and substantive neutrality, liberty, toleration, and state action. Finally, the principal disputes over religious liberty are assessed in three broad areas--funding of religiously affiliated activities, religious speech (with and without government sponsorship), and regulation of religious practice. These disputes are reviewed in historical, political, and doctrinal terms, with brief comparisons to the substantially different French solutions to the same problems.

This article, originally written for a French audience and published in French, [1] attempts to explain the American law of church and state from the ground up, assuming no background information of any kind. That turned out to be a useful exercise; explaining the underlying assumptions we generally take for granted revealed insights and connections previously overlooked. I hope English-speaking readers will also find it useful.

Except for rewriting the introduction and updating the treatment of the most recent developments, I have changed very little from the version I submitted to the French translators. I retain the comparisons of what I know in depth on the American side to what I think I understand superficially on the French side. I am pleased to report that my cautious observations on French law in this ***504** article passed through the hands of French editors without provoking argument or corrections. But no reader should make the mistake of thinking me an expert on the French system.

It is revealing to compare how two modern democratic societies, each proclaiming its commitment to liberty and equality, have come to fundamentally different resolutions of these issues on nearly every point. France and the United States share a commitment to religious liberty. But different histories and different distributions of religious opinion have led to different understandings of what religious liberty means in practice.

The one-word label for the French system is *laïcité*; American scholars were invited to Paris to explain the American conception of laïcité. But I am not sure there *is* a relevant American conception of laïcité. To fully understand laïcité, I suspect that one must be immersed in French law and French social and political practice. In French-English dictionaries, laïcité is often omitted; when it appears, it is commonly translated as "secularism." This is probably a simplification, but let us accept it as a starting point. Many Americans would say that the United States has a secular government, or that it aspires to have a secular government.

A minority of Americans would like to see a wholly secular society. But no one in the United States would use a word like "secularism" to summarize the American understanding of church-state relations.

There is no widely accepted single word to summarize the American system. Several such words have been suggested, but none of them is universally accepted. Probably the nearest equivalent in American usage is "separation of church and state," often shortened to "separation." This is a troublesome phrase even before translation; Americans dispute its meaning, and even dispute whether it describes one of our governing principles. But separation of church and state is probably the most common phrase for summarizing American church-state relations; again, let us accept it as a starting point.

Separation of church and state requires that government be separated from religion, and thus that government itself be secular. Separation means that government is not to sponsor religion, and also, although this point gets less emphasis in the rhetoric of separation, government is not to interfere with religion. Many religious believers support separation in part because they believe that religion will flourish best without government sponsorship, and that all sponsorship is a form of interference. So separation need not lead to secularism in civil society. To the contrary, many Americans believe that separation is one important reason why religious faith persists in the United States to a far greater extent ***505** than in most other industrialized democracies. Separation does not imply that religion is best kept out of public view, or even that private religious expression should be kept out of government institutions. I do not know the French system well enough to be sure, but I think that any correspondence between separation and laïcité is very inexact.

Other attempts to summarize the American system are that religion must be voluntary, and that government must be neutral as between religions and as between religion and religious disbelief. Each of these principles has applications that are highly controversial in the United States. Americans dispute the meaning of neutrality just as they dispute the meaning of separation. And of course, all such explanations are mere paraphrases of the operative language of the numerous constitutional and statutory provisions protecting religious liberty.

There may be no simple explanations of our system to citizens familiar with the French system, and no clearly equivalent words or phrases in our two languages for the central concepts. My only course is to explain the American system as simply and clearly as I can, with emphasis on answers to specific practical questions. I will necessarily have to generalize in places and omit important variations.

Keep in mind that on many important issues of religious liberty, there are at least two sides in the United States, with intense and sustained political and legal conflict. Our adversarial legal system, and our active system of judicial review of the constitutional validity of government practices, often enable the opposing sides in political and even religious arguments to translate their claims into legal arguments. At different times in American history, very different understandings of religious liberty have prevailed. The American conception of church-state relations is disputed, and it changes over time.

I. THE BASIC LEGAL PROVISIONS

The United States has many constitutional and statutory guarantees of religious liberty. Most important are two sentences in the Constitution of the United States. The first is the Test Oath Clause, in Article VI, clause 3, which provides: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." England had historically required office holders to swear an oath that they believed in essential doctrines of the Church of England, or of Protestantism more generally; several of the early American states had similar provisions. The Test Oath Clause prohibits any such requirement for federal office holders. Persons of any faith or of none may freely compete ***506** for federal office and hold the office if selected. But nothing prevents voters from considering religion when they vote, and nothing prevents the president from considering religion when he makes political appointments.

The more famous provision appears in the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” “Establishment” is a word that may not translate very well. I believe it is a cognate, and that in its general sense it means roughly the same thing in French and English. But as applied to religion, “establish” and “establishment” have a special sense in English. Early in the sixteenth century, King Henry VIII of England rejected the authority of the Pope, seized control of the structure and property of the Catholic Church in England, and had his Parliament enact a law making the King the head of the church. Later English legislation referred to this new church as “the Church of England by law established.” From this statutory phrase came a new English usage: An established church, or an established religion, is one supported and sponsored by the government.

To say that “Congress shall make no law respecting an establishment of religion” is thus to say that Congress shall not support or sponsor religion. This provision is commonly called the Establishment Clause. To say that Congress shall make no law “prohibiting the free exercise” of religion is more straightforward; Congress shall not prevent churches or individuals from exercising, or actively practicing, the religion of their choice. This provision is commonly called the Free Exercise Clause. The Establishment and Free Exercise Clauses together are called the Religion Clauses.

By their terms, these guarantees apply only to federal offices and to the federal Congress. But constitutional amendments after the American Civil War (1861-65) are now understood to equally protect these rights from interference by state and local governments. This is called “incorporation”; the early constitutional provisions protecting rights against the federal government are said to be “incorporated” into the Fourteenth Amendment, which protects rights against states and against local governments, which are created by states. So the Test Oath Clause, the Establishment Clause, and the Free Exercise Clause are now fully applicable to state and local governments. [2]

In addition, even before the Civil War, states guaranteed religious liberty in their own constitutions. (American states have much more autonomy than ***507** French provinces, and before the Civil War, states had far more autonomy than they do now. Each state has its own constitution and its own bill of rights.) These state constitutional provisions tend to be more detailed than the federal provisions. They are generally, but not always, similar in meaning.

Increasingly in recent years, there are state and federal statutes to protect religious liberty. Many of these statutes exempt religious practices from government regulation; they attempt to protect religious practice more effectively than the federal Free Exercise Clause.

The American legal system relies heavily on judicial precedent arising from the decision of individual cases. So these constitutional and statutory provisions are repeatedly interpreted by courts. In a process based on common law methods, these judicial opinions themselves become part of the law. The differences between state and federal Religion Clauses, or between statutes and the federal Free Exercise Clause, are only partly reflected in different constitutional and statutory text. To a great extent, these differences have emerged as differences in judicial interpretation. Judicial interpretation can change over time, in response to legal, political, social, or even religious developments. Judges can modify or overrule earlier judicial opinions; legislatures can amend the text of statutes. Constitutions can also be amended, but that is much more difficult.

II. SOME ESSENTIAL HISTORY: THREE ALIGNMENTS OF RELIGIOUS CONFLICT

A. Protestant-Protestant Conflict: The Founding and Its Consequences

The United States never had a dominant national church that exercised great power and provoked great reaction. No church in the United States has ever occupied anything like the place of the Catholic Church in France.

The story of church-state relations in the United States begins with the thirteen English colonies that later became the thirteen original states. Most of these colonies had an established church--a church sponsored and supported by the colonial government. In each case, the established church was a particular Protestant denomination.

The Church of England was established in five southern colonies and in parts of New York. In three New England colonies, the established church was chosen by local elections, which were nearly always won by the Congregational Church (the eighteenth-century descendants of the Puritans). These established churches did *not* have centuries of accumulated wealth. They did have a dominant ***508** social and political position; they were supported by taxes collected by the government; and they provoked substantial resentment. But their story has a very different ending from the story of the Catholic Church in France.

The dominant regional position of these two established churches was threatened by continued immigration of Protestants of many denominations. Members of the churches that were not established were called “dissenters,” because they dissented from the teachings of the established church. Beginning in the 1740s, Baptists, Presbyterians, and other dissenters greatly increased their numbers in a surge of religious enthusiasm known as “The Great Awakening.” Members of these dissenting churches were evangelical Protestants, more enthusiastic and less formal in their worship than the established churches, and more intense in their faith. They were the direct religious ancestors of the evangelical movement in the United States today.

In the wake of the American Revolution, each state and the new federal government wrote a constitution. The evangelical dissenters insisted that these new constitutions address issues of religious liberty. Immediately in most states, eventually in all states, the established churches were disestablished--deprived of government sponsorship and deprived of tax support. The details varied from state to state, but disestablishment was not the work of secular revolutionaries. It was mostly the work of evangelical religious dissenters.

In the free competition for religious adherents that followed, the formerly established churches did not fare well. The Congregational Church and the Episcopal Church (the new name for what was formerly the American branch of the Church of England), today retain a membership that is affluent and politically influential but small in numbers. Together, these formerly established churches are now only 2.4 percent of the population. [3] The remaining 97.6 percent include a remarkable diversity of other Christian denominations and also a diverse array of non-Christian faiths, nonbelievers, and other secularists.

The dominant issue in the founding-era debate over disestablishment was government financial support for churches. Churches that received tax support did not want to give it up; many citizens, and especially dissenters and the unchurched, did not want to pay the taxes. Defenders of the established churches proposed as a compromise that dissenters be allowed to pay their church tax to ***509** their own church, so that tax money would be equally available to all denominations. But in the end, every state rejected this compromise. This high-profile debate over tax support for churches has played a large role in the development of American understandings of religious liberty.

B. Protestant-Catholic Conflict: The Nineteenth and Early-Twentieth Centuries

The Catholic Church had a very small presence in the English colonies that became the United States. Even so, Americans inherited a fear of Catholicism from the English experience of Protestant-Catholic conflict. Beginning in the second quarter of the nineteenth century, and continuing until World War I, there was massive Catholic immigration to the United States, resulting in serious Protestant-Catholic conflict. This conflict raised two principal issues, closely related but distinct.

Both issues grew out of the treatment of religion in the public schools. Public schools in the United States are organized and operated by local governments and funded by state and local taxes; only since the 1960s has there been modest financial aid

from the federal government. Creation of public schools was mostly a nineteenth-century development, largely coinciding with the Catholic immigration.

Most of these public schools in the nineteenth century attempted to teach the Bible and the basic principles of Christianity, and to do so in a way that avoided disagreements among Christian denominations. They did not wholly succeed in avoiding disagreements among Protestants, but Protestants suppressed their disagreements in the face of what they viewed as the Catholic threat. From a Catholic perspective, the religious teaching in the schools was clearly Protestant in its scriptural translations, in its ritual practices, and in its theological presuppositions.

Catholics responded with two demands. One was to eliminate Protestant teaching in the public schools; the other was that government pay for privately run Catholic schools. In the Catholic view, they were simply demanding equality. Government paid for public schools that were Protestant; it should also pay for schools that were Catholic.

Protestants denied that the public schools were Protestant. They said that the religious exercises in the public schools were "nonsectarian," by which they meant neutral as among Christians, but that Catholic schools were "sectarian," teaching the doctrines of a particular sect. Protestants also refused to provide ***510** government funding for the small number of schools run by Protestant denominations; these schools too were sectarian. But everyone understood that Catholics were the principal target of this distinction between sectarian and nonsectarian schools.

Protestants argued that the principle from the founding--that government should not financially support churches--also meant that government should not financially support sectarian schools. Applying this principle to schools was in fact a significant extension. Catholic schools taught religion, but they also taught reading, writing, mathematics, and other secular subjects. Government could have paid for instruction in secular subjects and let the church add its own funds to pay for religious instruction. But Protestants were numerically dominant, so solutions that would permit partial funding of Catholic schools were not seriously considered. Moreover, political parties found it in their interest to agitate this issue from time to time. A majority of state constitutions were amended to forbid government financial support for sectarian schools; in 1876, a similar proposed amendment to the federal Constitution was narrowly defeated in Congress.

There was also a large Jewish immigration to the United States in the late-nineteenth and early-twentieth centuries. Of course, Jewish students also objected to Christian religious instruction in the public schools. The Jewish community's principal response, then and now, was to urge that the public schools be secularized. Most American Jews did not start their own schools, and those who did start schools did not seek government financial support.

World War I cut off the great flow of European immigration, and after the war, the United States restricted its resumption. Each succeeding generation of Catholics and Jews were more assimilated than their parents, and Protestant-Catholic tension gradually eased. In 1960, John Kennedy was the first Catholic to be elected president, and he and his family were personally attractive and widely popular. Shortly thereafter, the Second Vatican Council committed the Catholic Church to freedom of conscience. After these two events, lingering anti-Catholicism in the United States collapsed with remarkable speed. Even earlier, in 1955, a well-received book argued that Protestants, Catholics, and Jews were three great branches of a common civil religion in the United States. [4]

***511** *C. Religious-Secular and Left-Right Conflict: The Late-Twentieth Century and Today*

Other fault lines were emerging even as Protestant-Catholic conflict dwindled. The 1960s were a decade of great social change in the United States and elsewhere. The civil rights movement, the antiwar movement, and the sexual revolution were concentrated in the 1960s. There were race riots in many American cities. The Supreme Court delivered libertarian decisions expanding the

rights of free speech, of religious and racial minorities, and of criminal defendants. In 1973, the Court announced a constitutional right to abortion. [5]

These developments provoked a backlash, and part of that backlash was religious. Culturally conservative religious believers of all faiths-- evangelical Protestants, conservative Catholics, Orthodox Jews--resisted the sexual revolution, the general attitude of permissiveness, and the sense of social disorder associated with demonstrations, crime, and riots; they were especially horrified by the right to abortion. What came to be known as the Religious Right is part of the political coalition that has elected a series of increasingly conservative American presidents, beginning with Ronald Reagan in 1980.

This backlash had consequences for competing views of religious liberty. For most of American history, the most theologically conservative Protestants had been the most anti-Catholic, and therefore, evangelical Protestants had been among the most vigorous opponents of government funding for religious schools. But beginning in the 1960s, these conservative Protestants began building religious schools of their own. This movement began in response to racial desegregation in the public schools, but that issue eventually faded. Conservative Protestant schools have grown dramatically in numbers and show every sign of permanence, sustained by parents who view the public schools as secularized and hostile to religious faith.

At first the leaders of these Protestant schools were more concerned with avoiding government regulation than with attracting government funding. But after the regulatory issues were mostly resolved, parents in these schools increasingly resented paying taxes for public schools they felt they could not use, while also paying the full cost of creating a private alternative. Their situation was exactly that of Catholic parents a century before. And in the 1980s, evangelical Protestants changed their minds about government funding for religious ***512** schools. Since then, government funding for private schools has drawn the support of a coalition of Catholics, evangelical Protestants, secular conservatives arguing the benefits of competition in a free market, and a minority of black parents seeking alternatives to inner-city public schools that are often of low quality. As we shall see, the Supreme Court has responded; it has changed its interpretation of constitutional law about funding religious schools.

In the 1980s and later, the religious division in the United States began to look more parallel to the historic religious division in France, with intense believers arrayed against secularists. [6] But each side is a diverse coalition, difficult to accurately summarize. Both sides include people of many different faiths; the United States is further than ever from having a single dominant church. On one side are intensely religious, culturally conservative believers of all faiths. Conservative Protestants, Catholics, and Jews often find they have more in common with each other than with liberal adherents of their own religious tradition. These religious conservatives make effective alliances with secular conservatives in electoral politics and on issues of mutual interest. Occasionally, Muslims join in this coalition of the religiously conservative, but that collaboration was never well developed, and the tensions growing out of terrorist attacks and the invasion of Iraq have made Christian-Muslim cooperation more difficult for both sides.

On the left is a small but increasingly vocal population of nonbelievers, a large group of serious religious believers who are politically and theologically liberal, and a large group that I will call nominal believers. In opinion polls, 95 percent of Americans say they believe in “God or a universal Spirit.” But many of those 95 percent rarely attend church and appear to act on a thoroughly naturalistic worldview in their daily life. This is the group I am calling “nominal believers”; for them, God appears to be a very remote being, a metaphor, or perhaps a polite fiction. The religious affiliations of these liberal believers and nominal believers also cross the traditional divides among Protestants, Catholics, and Jews.

There has emerged among this secular and religious-left coalition a new form of anti-Catholicism. Historic anti-Catholicism in the United States was based in Protestantism, in theological disagreements, and in hostility to the papacy. This historic Protestant anti-Catholicism is now confined to a barely ***513** visible fringe. The new anti-Catholicism is based on resentment

of the Church's efforts to enact certain Catholic moral teachings into law--especially on sexual behavior and abortion--and it is just as hostile to conservative Protestants as it is to conservative Catholics.

There are many smaller religious groups that do not neatly fit on either side of the main line of religious conflict. The United States once again has high immigration rates, and most of this immigration comes from places outside Europe. Many of these immigrants are Christian, but in the United States, they are so far distinguished more by their ethnic identity than by their religious identity. Many are Muslim; some are Buddhist, Hindu, or adherents of smaller religions from around the world.

Unusual variations of Christianity and Judaism have survived and sometimes flourished in the United States. A few of these preserve nineteenth-century lifestyles (the Amish, for example); some are highly insular communities with unusual dress and customs (Hasidic Jews, for example); some live in quite conventional ways but have distinctive theologies (the Mormons, for example). There are groups such as the Hare Krishnas, the Scientologists, and the Unification Church, pejoratively called “cults” and euphemistically called “New Religious Movements.” Perhaps a more neutral description is that they seem very strange to most Americans and they make high demands on their members.

These unusual religious groups, including the recent immigrants, produce a greatly disproportionate share of litigation about the free exercise of religion. The more mainstream groups, on either side of the division between religious conservatives and secularized liberals, produce most of the litigation about government support for religion. [7]

III. SOME FREQUENTLY HEARD CONCEPTS

There have been many attempts to capture the essence of the American understanding of religious liberty in a word or a phrase. Some of these efforts have been used as political slogans; most of them have been analyzed and elaborated by academics. But there is no authoritative definition of these concepts, and no authoritative hierarchy among them, because the Supreme Court has not used them in any systematic way.

***514** These phrases appear in Supreme Court opinions when convenient or helpful, and the Court has given some of them inconsistent meanings over time. These words indicate broad approaches rather than precise principles for deductive reasoning, and on many issues, each side tries to claim that its position is consistent with most of these approaches. Some of these terms attempt to distinguish conflicting positions, but many of them describe different aspects of the same reality. Do not exaggerate the importance of these terms. Still, I think it useful to introduce them before turning to more specific controversies.

A. Separation

Separation of church and state has a range of meanings. [8] The narrowest meaning is institutional separation: Nearly all Americans agree that the institutions of the church should be separate from the institutions of the state. By general law the state provides legal structures under which churches can organize themselves; most churches are not-for-profit corporations, but some have trustees to hold their property, and some are unincorporated associations. Any church can organize itself under these structures; no form of license or advance permission is required, and the state has no voice in deciding which churches can exist, in appointing church personnel, or in developing religious doctrine. Conversely, no governmental powers can be delegated to a religious organization. [9]

Perhaps the most fundamental point of separation is that questions of religion are separated from the coercive power of government. Government cannot use its coercive power to support or oppose religion, either on its own initiative or at the request of a church.

Financial separation was established at the founding. Government does not financially support churches, and churches generally do not pay taxes. Church tax exemption is a legislative policy; it is constitutionally permitted [10] but not constitutionally required. [11] The remaining controversy over government financial support concerns whether and to what extent the ban on financial support applies to religious schools and social service providers.

***515** The most intense controversies are about the extent to which government functions must be separated from religious observance and ritual. For example, can government meetings open with prayer?

A longstanding minority in the United States interprets separation in a way that seeks to minimize the influence of religion. This minority sees any influence of religion on government as a contact that violates separation; they would exclude religious meetings from public places and religious arguments from political debate. This view has never attracted a majority of the Supreme Court; it is not a mainstream meaning of separation. But neither does it fade away.

B. Voluntarism

Nearly all Americans believe that religious belief and activity should be voluntary, and thus that government should not coerce it. A majority of the Supreme Court, and a minority of public opinion, believe that government should not encourage or discourage religious belief or practice even if it refrains from coercion. Voluntarism is closely related to separation. Separation is the more common phrase, but voluntarism is the older of the two ideas.

The dissenting Protestants in the founding era insisted on voluntarism as part of their attack on the established church. It is obvious why voluntarism appeals to dissenters and nonbelievers; if one does not wish to go to church (or to the established church), it is important for the state to recognize that religion should be voluntary. Less obviously, the idea of voluntarism originated with devout Protestants who concluded that coerced religious faith is ineffectual, so that it did no good to coerce people into church attendance. The religious rationale for voluntarism is that only voluntary religious commitments can please God or save souls.

C. Equality

The legal equality of all faiths was settled in the founding era, as a corollary of disestablishment. The established church was deprived of its preferred status, and all churches were guaranteed the same liberties. Those who accomplished this change were thinking mostly of the different Protestant denominations, but the principle has been extended to Catholics, Jews, and all the remarkably diverse faiths that have since appeared in the United States. In principle, and to a great extent in practice, this equal status for all faiths includes those high- ***516** demand religions that have drawn special regulation in some other countries, such as the Hare Krishnas and Scientologists. These small and unusual religions have the same rights as any other religious group. These groups have encountered some legal difficulties, mostly in the form of private lawsuits initiated by disgruntled former members, but they are not subject to any special regulation or supervision.

D. Neutrality

Religious neutrality is the appropriate government response to religious equality. The Supreme Court says that government should be neutral as between religious faiths, and that it should be neutral as between religion and religious disbelief. (The Court's usual phrase is neutral between “religion and nonreligion,” but I think that “religious disbelief” better explains what

the Court means by nonreligion.) There is very broad support for these propositions with respect to the coercive powers of government; Americans overwhelmingly agree that government should not penalize either believers or nonbelievers.

There is more controversy about neutrality with respect to government subsidies. Some Americans oppose any subsidy to any organization with a religious affiliation. Other Americans support subsidies to religious schools or social service providers, but tend to think that subsidies should be confined to religions that are not too different from their own. The Supreme Court's position is that subsidies to religious organizations are sometimes forbidden, but that when they are permitted, they must be equally available to all faiths, however unfamiliar.

The most controversial application of the Supreme Court's neutrality principle is to government expressions of opinion. The Court often says that government should express no views on religious questions--it should express no preference as between different faiths or between religion and religious disbelief. This rule is settled law with narrow exceptions, but a majority of Americans are unpersuaded.

Neutrality has also generated substantial arguments about what it means to be neutral. The Supreme Court usually speaks of neutrality without specifying a definition, and sometimes it shifts from one meaning to the other. Two principal meanings have been recognized. [12]

517** ***1. Formal Neutrality

Formal neutrality means government that is blind to religious differences. A law is formally neutral if it makes no distinctions on the basis of religion. Such a law applies equally to religious institutions and secular institutions, and it applies equally to the same conduct whether that conduct was done for religious reasons or secular reasons.

2. Substantive Neutrality

Substantive neutrality means that government seeks to govern in such a way that it neither encourages nor discourages religious belief or practice. Sometimes formal neutrality is also substantively neutral: If secular and religious speakers have equal rights to speak in the city park, government will treat them exactly the same (formal neutrality) and no one will be encouraged to make his message more or less religious (substantive neutrality). But supporters of substantive neutrality believe that, sometimes, neutrality requires government to take account of religious differences. A law that prohibits sex discrimination in employment, in most of its applications, regulates an unfair employment practice that has little or no commercial justification. But as applied to the employment of Catholic priests or Orthodox Jewish rabbis, such a law prohibits a religious practice, strongly discouraging that practice with threats of legal penalties. Exempting the employment of clergy permits the religious practice to continue, but it does not encourage anyone to become Catholic or to become an Orthodox Jew, nor does it encourage other churches to stop ordaining and employing women clergy. Exempting the religious practice may be more neutral in its effects than regulating religious and secular practices equally.

E. Liberty

Some American commentators say that the fundamental point of religious liberty is liberty, and that all the other concepts I have mentioned are instrumental at most, distractions at worst. The goal of guaranteeing religious liberty is to ensure that each American has as much liberty as possible to choose and act on his own religious commitments or his own rejection of religion. And some would say that we should pose that question directly--that the Court should seek to maximize religious liberty rather than separation, voluntarism, equality, or neutrality.

518** ***F. Toleration

In the early years in some American colonies, as in Europe at the same time, the established church suppressed all other churches. This suppression of other faiths gave way to "toleration," in which one church was established and others were tolerated. "Toleration" implied subordinate status and toleration by the grace of the established church; these connotations soon became unacceptable. Disestablishment and the equality of all faiths marked the end of toleration as an acceptable account of religious liberty, and the word fell into disuse. In 1689, England's "Toleration Act" guaranteed toleration to all Protestants; a century later, America's First Amendment guaranteed "free exercise" of religion to all faiths, without limitation to Protestants. Although the word "toleration" is no longer used, we shall see that the idea lingers in disputes over government expression of religious opinion.

G. State Action

State action is a general constitutional concept, not specific to religious liberty, but it has special relevance to religious liberty. American constitutions create and regulate the branches of government, defining the powers of each. Constitutional rights limit what the government can do to the people; these rights do not limit what the people can do to the government, or to each other. Constitutional rights apply only to actions done by the government, or by someone exercising governmental authority; the usual phrase is that constitutional rights protect only against state action.

It is sometimes said that separation of church and state prevents churches from taking over the government, or even from unduly influencing the government. But the state action requirement means that the Constitution does not restrict the efforts of churches or religious individuals to influence the government. The Constitution applies only when the government itself takes action, whether on its own initiative or at the request of a church. Moreover, state action is the difference between protected free exercise and prohibited establishment. Religious conduct by private citizens is free exercise of religion; religious conduct by government is, in most cases, an establishment of religion.

***519 IV. PRINCIPAL DISPUTES OVER THE MEANING OF RELIGIOUS LIBERTY**

Three great sets of practical issues produce persistent controversy over the meaning of religious liberty in the United States. Two of these controversies grow directly out of the nineteenth-century Protestant-Catholic conflict over schools: funding of religious schools, now generalized to funding of any religiously affiliated activity, and religious observances in public schools, now generalized to all religious speech with government sponsorship. The third great controversy, less publicized but in my view more fundamental, concerns regulation of religious practice. Organized interest groups on both sides support lawsuits seeking to advance their views on each of these disputed issues, so there is a remarkable volume of litigation. I will try to keep jargon to a minimum, but it is impossible to explain legal developments in the United States without reference to the names of cases.

A. Funding of Religiously Affiliated Activities

The founding-era principle that government should not directly fund the religious functions of churches has survived with little disagreement for more than two hundred years. The nineteenth-century controversy over the funding of religious schools has continued unabated to the present, and is actually expanding in scope. To the extent that any funding is permitted, it is subject to the principle of equality of all faiths; government money must be available on equal terms to all. These settled principles--that government should not fund churches and that any funding of other religious organizations must be distributed on equal terms--distinguish the United States from much of Western Europe.

The political fight over government money for religious schools continued for more than a century before it reached the Supreme Court. In most places the opponents of funding won politically, so there were no funding programs to challenge in court. And it was not plausible to file a lawsuit challenging the absence of such programs; no one thought that government might be *required* to fund religious schools.

In the mid-twentieth century, as Protestant-Catholic conflict declined, a few states and localities began to enact modest programs of aid to private schools. Then in the 1960s, economic and social forces--especially the decline of central cities--threw the Catholic school system into financial crisis. Public education officials feared that Catholic schools might close in large numbers, returning ***520** many thousands of students to the public schools and causing a financial crisis there. The states most affected began searching for ways to give money to private schools, and the pace of litigation greatly accelerated.

The relevant law has changed dramatically over time as the Supreme Court responded first to one, then to the other, of two conflicting principles. In 1947, the Court announced these conflicting principles in consecutive paragraphs in the first modern Establishment Clause case, *Everson v. Board of Education*. [13] On one hand was the no-aid principle: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." [14] On the other was the nondiscrimination principle: Government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." [15]

In the beginning, these two principles had been consistent. The eighteenth-century debates involved earmarked taxes levied exclusively for the funding of churches. In an era with few public welfare benefits, these taxes funded purely religious programs and funded those programs preferentially. As applied to that dispute, the no-aid and nondiscrimination principles did not conflict, and the no-aid principle served religious liberty. No-aid protected citizens from being forced to contribute to churches involuntarily; it protected the churches from financial dependence on government, and thus from government control. It prevented discrimination in favor of religion, and it did not discriminate against religion. As I have said, there is still substantial consensus that government should not fund the religious functions of churches.

The modern cases are very different. In all the modern cases, government is funding some secular service--usually education, but sometimes medical care, care of neglected children, or some other social service. Government offers the money on equal terms to religious and secular providers alike. In that context, the Court had to choose between its two principles. Either government money would flow through to religious institutions, or students in religious schools, and patients in religious hospitals, would forfeit instruction or services that the state would have paid for if they had chosen a secular school or hospital.

***521** The nondiscrimination principle prevailed in *Everson*, which upheld government-funded bus rides to a Catholic high school--but by a 5-4 vote. Two decades later, the Court allowed states to provide secular textbooks for use in religious schools. [16] Then the Court changed direction. In *Lemon v. Kurtzman*, [17] in 1971, the Court struck down a funding program for the first time, holding that states could not subsidize teachers' salaries in religious schools. The no-aid principle predominated from then until 1985.

But even in this period, the no-aid principle never completely triumphed. Instead, the Court made many fine distinctions. It permitted government support for most religious colleges, [18] but restricted aid to religious elementary and secondary schools. In the elementary and secondary cases, the Court drew distinctions that few observers would defend. The state could provide books, [19] but not maps; [20] it could provide bus rides to school, [21] but not bus rides to field trips. [22] Perhaps most absurd, the Court prohibited government-funded remedial instruction to low-income students in religious schools, [23] but permitted that

same instruction in vans parked nearby. [24] The cost of vans, and of dressing children to go back and forth in all weather between the school building and the vans, was a deadweight economic and educational loss, with benefits that were at most symbolic. This symbolism irritated the supporters of religious schools and completely failed to satisfy the objections of those who thought there should be no funding at all.

Few justices really believed in these awkward distinctions. They emerged in part because the Supreme Court has nine justices who cast independent votes and often have difficulty agreeing. [25] Some justices opposed nearly all aid to religious ***522** schools; some justices would have permitted nearly all aid to religious schools. And some justices searched for compromise, trying to permit some aid but not too much. Some of these justices in the middle were unwilling to overrule the earlier cases, preferring instead to draw artificial distinctions. And some of them were still trying to preserve each of the two competing principles of no-aid and nondiscrimination.

Lemon v. Kurtzman, the case that prohibited state subsidies for teacher salaries, is famous for announcing a three-part legal test that is often quoted but rarely decisive. The Court said that for a statute to comply with the Establishment Clause, three things must be true:
First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." [26]

This test embodies the conflict between the no-aid and nondiscrimination principles. Its first two elements are taken almost verbatim from the Court's earlier explanations of "wholesome neutrality" toward religion. [27] Its second element, prohibiting government actions that either advance or inhibit religion, is a statement of substantive neutrality. But in practice, justices invoking the *Lemon* test were much more concerned about government advancing religion than about government inhibiting religion. Through the 1970s and early 1980s, the Court struck down most new forms of financial aid to religious schools. The Court used the second and third elements of the *Lemon* test to create a dilemma for legislators: any aid diverted to religious uses advanced religion, and any government monitoring to prevent such diversion caused excessive entanglement. The aid the Court permitted was generally said to be incapable of religious uses, such as secular textbooks, standardized testing, [28] and diagnostic services. [29] With respect to the remedial instruction for low-income students, and other services provided by government employees to students in religious schools, the Court ***523** implausibly said that the government employees providing these services were less likely to be drawn into religious discussions with the children if they were isolated in vans instead of working in a classroom of the religious school. [30]

Beginning in 1986, the Court progressively elevated the nondiscrimination principle and subordinated the no-aid principle. Since 1986, the Court has upheld six programs that permitted government funds to reach religious institutions; [31] it has invalidated none. Four decisions from the *Lemon* era have been overruled in whole or in part. [32] The most important of the new decisions is *Zelman v. Simmons-Harris*, [33] which upheld vouchers that can be used to pay tuition at any public or private school, including religious schools. These vouchers represent a right to draw on government funds for the exclusive purpose of paying educational expenses. The government issues the vouchers to individual students or their parents, who spend them at the school of their choice; the school then redeems the vouchers and collects the government money. *Zelman* reasons that the government is not responsible for any resulting benefit to religion. The government supports the student; the student and his parents decide where to spend the money, and there is no state action in their choice of a school. If they choose a religious school, that is a private decision. The Court has also upheld long-term loans of equipment to private schools, including religious schools, if the equipment is distributed to all schools on the basis of enrollment. [34]

Lemon's ban on direct cash grants to religious institutions remains in effect. And the Court would be much more cautious about programs in which the government exercises discretion in deciding which private schools get government money. American law tends to presume that such discretion will be abused where sensitive constitutional rights are at stake--that favored religions will get money and minority religions will not. But at least in the school context, there is ***524** no reason for legislatures to authorize either direct cash grants or discretion in distributing funds. They can deliver as much money as they are willing to spend in the form of vouchers to students and their families.

The voucher decision means that a long political tradition of no government aid to religious schools has given way to a constitutional rule that permits such aid in essentially unlimited amounts, so long as certain formalities are observed. But courts do not enact programs or appropriate funds; *Zelman* gives voucher supporters only the chance to fight further battles in Congress and in the states. They face a broad coalition of voucher opponents: church-state separationists, teachers' unions and others who fear that resources will be diverted from public schools, fiscal conservatives who oppose new entitlements and the taxes to pay for them, and suburban parents who fear that voucher programs will open suburban public schools to low-income students who might be disruptive. No state has enacted a general voucher program for all students in elementary and secondary schools. Voucher programs remain mostly experimental and concentrated on low-income students or students in schools that fail to meet educational standards.

Even these narrow programs are routinely challenged under the relevant state constitution. Many state constitutions have detailed restrictions on financial aid to sectarian schools. Some state courts have upheld such programs, generally following the reasoning of the United States Supreme Court; [35] other state courts have held that such programs violate the state constitution. [36]

Supporters of aid programs have tried to achieve one more step in the federal courts. In a variety of specialized circumstances, some states aid secular private education but not religious private education. It was once thought that extending these programs to include religious education would violate the federal Establishment Clause, but after *Zelman*, that is clearly not true. And the Supreme Court generally says that government cannot discriminate against religion. So voucher supporters have begun to argue that states violate the Free Exercise Clause when they fund secular private education but refuse to fund similarly situated religious education.

The Supreme Court rejected that claim in the first case to present the question, *Locke v. Davey*. [37] The federal constitutional rule now appears to be that ***525** government funding of religious schools is permitted but not required, and that with respect to funding, government is permitted to discriminate against religion. Despite the traditional suspicion of government discretion in American constitutional law, government now has substantial discretion to fund religious education, or not to fund it, or even to fund it on condition that the student or the school comply with special regulations that apply only to those who accept government money. In part the Court deferred to the long American tradition of not funding religious institutions, treating that tradition as legitimate, although not constitutionally required. In part the Court deferred to the legislature's primary responsibility for allocation of government funds. Parts of the opinion suggest that its rule is confined to programs for the training of clergy; other parts of the opinion suggest that it will apply generally to any exclusion of religious institutions from state funding programs. New cases are already pending that present questions about the scope of *Locke v. Davey*.

For most of the twentieth century, this dispute over funding religious institutions was confined to schools. Religious hospitals and social service agencies received government funds with little controversy. That has changed with recent proposals for what is sometimes called “charitable choice,” or in the Bush administration, its “faith-based initiative.” These proposals, only some of which have been enacted, increased the visibility of government grants to religious charities, and they introduced new protections for the autonomy of religious charities accepting government funds. Agencies making grants would be forbidden to discriminate against religious charities; religious charities would not have to be separately incorporated from their sponsoring churches; and religious charities could retain their right to hire employees of their own faith even if they accepted government

funds. Some of these protections are significant changes from traditional practice; some appear to be mostly symbolic. The proposed employment rules resolve an existing ambiguity in favor of the religious charities. Each of these proposed changes has been politically controversial; there are continuing fights in Congress, and there is pending litigation.

Zelman and other recent cases on funding schools suggest that there is no constitutional barrier to government funding of religious charities. But some social services may require direct grants to agencies instead of vouchers to the intended beneficiaries, because legislators will be reluctant to give vouchers to neglected children, the mentally ill, or the drug addicted, and tell them to choose their own service providers. And these programs are not so well funded that government can support all providers of services; government has to choose ***526** which agencies to support. So these programs may present questions of discretionary direct grants to religious charities, questions that can be avoided in the school cases. And there will certainly be litigation over the right of the religious charity to hire persons of its own faith for government-funded positions. [38]

In short, the long-running American dispute over government funding of religiously affiliated activities continues. New issues continue to emerge, and issues that are settled in one forum become the subject of renewed dispute in other forums. It is settled that the government cannot fund the core religious functions of the church; how far that principle extends to other functions is the subject of continuing dispute.

B. Religious Speech, With and Without Government Sponsorship

Prayer and other religious observances at government functions, and government displays of religious symbols, have given rise to an intense and peculiarly American set of controversies. This dispute began with Protestant-Catholic conflict over religious instruction in the public schools, and schools are still at the heart of it, but the dispute has spread to prayer at government meetings and to religious displays in city parks and on courthouse lawns.

No such issues were debated in the founding period. There was probably more religious rhetoric in government affairs then, and many government meetings were opened with prayer. On the other hand, gratuitous government displays of religious symbols were probably rare, and public schools did not exist. The nation was overwhelmingly Protestant, and the disagreements among Protestant denominations were not great enough to make prayers by the established clergy seriously objectionable to evangelical dissenters.

In the nineteenth century, as we have seen, Protestant religious observances in public schools gave rise to bitter controversy between Protestants and Catholics. ***527** Late in the nineteenth century, a small but vocal group of secularists sought to eliminate all government support for religion, including prayer and Bible reading. [39] Recognizing that religious observances in the schools had become divisive, a few state courts and local school boards began to restrict them. [40] Religious instruction in the public schools very slowly declined over a period of decades.

In a pair of famous decisions in 1962 and 1963, the Supreme Court held that public schools violate the Establishment Clause when they lead students in prayer or Bible reading. [41] These decisions coincided with increasing acceptance of Catholics and Jews as fully equal and welcomed citizens, and perhaps--this is much harder to measure--with more of the population drifting toward secularism or nominal belief. But by 1962, Protestant-Catholic tension had declined so far that Catholics no longer objected to prayer and Bible reading in public schools.

The school prayer decisions were unpopular and difficult to enforce. The decisions outraged evangelical Protestants, who feel called to teach the Christian gospel to all humans, and who feel the need to seek God's blessing and guidance for any important activity, including education and government meetings. The school prayer decisions were a prime contributor to the religious

backlash in the 1960s and later, and to the growth of private evangelical schools. At the same time, these decisions raised expectations among Jews and other non-Christian religious minorities, and among nonbelievers and other secularists, that they would no longer be subjected to government-sponsored Christian religious observances.

The result has been an escalating series of provocations and legal claims from both sides. There have been innumerable proposals to amend the Constitution to permit school-sponsored prayer, none of which has passed Congress, and endless efforts to restore school-sponsored prayer while disguising and denying government sponsorship. The Supreme Court has held that teachers cannot invite students to lead the prayer, [42] and that school boards cannot conduct student elections to decide whether to have a prayer. [43] The original cases involved ***528** prayer in classrooms, but more recently the Court has invalidated prayer at graduation and at athletic events. [44] The Court has refused to invalidate prayer at legislative sessions, [45] principally because of long tradition: Congress had always opened its sessions with prayer, even in the First Congress, which had proposed the Establishment Clause.

The secular side opened a second front when it began challenging government-sponsored religious displays. The Supreme Court has held that public schools cannot display the Ten Commandments in classrooms, [46] and that a county cannot display a Nativity scene (a three-dimensional depiction of the events immediately following the birth of Christ) at a central location in its courthouse. [47] But it permitted a Nativity scene displayed alongside "secular" symbols of Christmas, such as Santa Claus, reindeer, and candy canes, [48] and it permitted a menorah (the principal symbol of the Jewish celebration of Hanukkah), next to a Christmas tree and a salute-to-liberty sign. [49] Most recently, the Court decided that Texas can maintain a large granite monument displaying the Ten Commandments on the lawn of its state capitol, [50] but that two Kentucky counties cannot display the Ten Commandments on courthouse walls, surrounded by patriotic documents and a statement claiming that the Commandments are the foundation of the western legal tradition. [51] Both decisions were 5-4; only Justice Breyer supported both results. He approved the Texas display mostly because it had been in place for forty years before it first aroused controversy; this suggested, at least to him, that the display contained both a religious and a secular message and that the secular message had predominated in public perception. He joined in the Court's opinion rejecting the much more recent Kentucky displays, in substantial part because local politicians had clearly stated their purpose to promote Christianity.

As the facts of these cases suggest, this legal and cultural battle is beginning to appear absurd. Each side aggressively pushes its position as far as logic will take it; each side takes advantage of every ambiguity in the Court's opinions. ***529** The ambiguities result from the Court's unwillingness to enforce an absolute rule. The Court has said that government cannot endorse religion or any religious teaching, but the Court will not carry that rule to its logical conclusion. The results would be too unpopular, do too much damage to the Court's credibility, and do too little good for religious minorities and nonbelievers. The Court will not order presidents to stop issuing Thanksgiving proclamations; it will not order the government to remove "In God We Trust" from the coins and the currency; it certainly will not order changes to all the religious place names that Spanish friars scattered across the American Southwest, from San Francisco to Santa Fe to Corpus Christi. The Court will not entirely ban government participation in the nation's celebration of Christmas. But the Court cannot draw a principled line between the modest religious statements it permits government to make and the longer or more sectarian statements that it will not permit government to make.

To avoid ordering an end to government celebration of Christmas, the Supreme Court said that Christmas is both a religious and a secular holiday. [52] The Court said that government can celebrate the secular aspects of the holiday, and that it would be discriminatory for government to celebrate *only* the secular aspects, so the government can mix religious and secular symbols of Christmas. But it cannot display religious symbols alone. [53] Nobody likes that compromise, but to the Court, the alternatives seemed worse.

You can now begin to see why the two Kentucky counties claimed that the Ten Commandments are the foundation of the western legal tradition. The counties claimed they had displayed the Commandments for their secular legal significance, not their religious significance. And they claimed that their display, like the Christmas displays the Court upheld, combined religious and secular documents. The claim that the Commandments were displayed for their secular legal significance and not for religious reasons was undoubtedly a lie, and it was based on an absurd reading of legal history. But the counties' real hope was that the Court would accept their rationalizations because the Commandments hanging on a courthouse wall might seem insignificant, not worth the inevitable cost of hostile public reaction to a decision ordering them removed. There were people on both sides who wished this lawsuit had never been brought--but who ***530** also thought, once it was in the Supreme Court, that it was important for their side to win.

The underlying conceptual disputes in these cases are about the scope of the government's obligation to be neutral. Opponents of government-sponsored prayers and religious displays say that government must be neutral as between religion and disbelief, and that government must be neutral in all that it says, even if no one is coerced. Some supporters of government prayers and religious displays concede that government should be neutral as between religions, so that government prayers and displays should refer to God only in general terms, and should avoid the specifics of different faiths. But they deny that government has any obligation to be neutral as between religion and disbelief. This is a modern version of the nineteenth-century position that government should teach “nonsectarian” religion in the public schools.

But of course many of these prayers and religious displays are not neutral as between religions. They are mostly Christian, and they tend to reflect evangelical Protestant beliefs and sensibilities. The deeper position of people who support government prayers and religious displays is that government need be neutral only when it exercises its coercive powers; government need not be neutral in what it says. Supporters of government expressions of religious belief say that government can promote religious belief so long as it does not punish people who decline to participate.

The Supreme Court has rejected this position at two levels. First, the Court says that if there is a public event that many people wish to attend for secular reasons, and then someone offers a prayer at that event, persons who attend are effectively coerced to participate in the prayer. [54] But that argument goes only so far; it is hard to find coercion in the case of a passive religious display. Whether or not there is coercion, the Court says government may not “endorse” a religious viewpoint. [55] Government must be neutral even in what it says about religion. This argument--whether the Establishment Clause restricts government endorsement or only government coercion--is at the heart of the dispute over government-sponsored prayer and religious displays. It is mostly irrelevant to other religious liberty issues.

***531** Those who support government prayers and religious displays are essentially urging a return to toleration as the measure of religious liberty, although they rarely argue the point in those terms. The dominant view among evangelical Christians is that minority religions and nonbelievers should be fully protected from penalties and civil disabilities, with full protection for the free exercise of minority religions. But evangelicals also think that religion should be included in all important government functions, that of course the religion included will be broadly consistent with the majority's religious beliefs, and that no one could reasonably expect otherwise. Religious dissenters do not have to attend formal worship services, but if they want to attend public meetings, or send their children to public schools, supporters of government prayer say that of course they should have to sit through brief observances of the majority religion. In that sense, the majority religion would be preferred and supported by government, and all other religions would be tolerated.

Although the Supreme Court tightly restricts government-sponsored religious speech, it vigorously protects religious speech by private citizens. Religious speakers have full rights of free speech, even in public schools or on government property, so long as they act voluntarily and without government sponsorship. “No government sponsorship” means they must be treated the same as other speakers; they cannot be given special access to facilities or to audiences assembled by the government. This

right to religious free speech means that student prayer clubs can meet in empty classrooms on the same terms as secular student clubs, [56] that students can urge their classmates to attend church or accept Christianity, and that religious groups--even the Pope--can hold services or offer Mass in public parks to the same extent that secular groups can hold meetings or rallies. [57] The Court has never held, in any context, that religious speech by private persons is subject to greater censorship or restriction because of its religious content.

The Court's restriction of government speech about religion, and its protection of private speech about religion, have been remarkably stable and persistent. But from 1994 to 2005, these two rules actually had the support of only two justices, Kennedy and O'Connor. Justices Rehnquist, Scalia, and Thomas would have permitted significant government sponsorship of religious speech, and Justices ***532** Stevens, Souter, Ginsburg, and Breyer would have imposed significant restrictions on private religious speech in public places. This persistent division on the Court enabled Kennedy and O'Connor to prevail; they generally had six votes to prohibit government sponsorship of religious speech, and at least five votes to invalidate government discrimination against private religious speech. But now of course, Rehnquist and O'Connor are gone. If President Bush has accomplished what he hopes with his first two appointments, Kennedy may be the new swing vote on these issues. And Kennedy had one important disagreement with O'Connor: He distinguished government-sponsored religious displays, which passers-by may just ignore, from government-sponsored religious exercises, which often trap a captive audience and which he generally voted to strike down. Eventually there will be more new justices, and these rules may change in more dramatic ways, just as the rules on funding of religious activities changed.

Many of the same political forces that support government funding of religious schools also support government-sponsored prayers and religious displays. In each of these disputes, much of the religious and conservative coalition is aligned against the secular and liberal coalition. Why has the Court changed its mind on funding, but not on prayers and religious displays?

The explanation again lies with Justices Kennedy and O'Connor, who see these two sets of cases as very different. The difference is best explained in terms of individual choice. In the funding cases, each family gets a voucher and each family can decide where to spend that voucher. Each family can choose a religious school or a secular school. In the private religious speech cases, each speaker can decide what to say and each person around him can decide whether to listen. Each student can decide whether to attend the meetings of the student prayer club.

But prayer at a government meeting, or a religious display in a government building, requires a collective decision. Either there will be prayer for everyone present, or a prayer for no one present. If there is a prayer, there will be only one, and it will be in a form more consistent with some religious traditions than with others. Either some government official must decide, or he must appoint someone to decide, and the person appointed will become a temporary agent of the government for that limited purpose. Everyone at the meeting will participate in, or at least politely sit through, the prayer that some government agent wrote or selected. No one gets to make an individual choice about whether to pray or how to pray.

Protecting individual choices about religion, and precluding government choices about religion, is consistent with nearly all the concepts used to describe ***533** religious liberty in the United States--with separation, voluntarism, equality, neutrality, and liberty. I think Justices Kennedy and O'Connor best implemented the American conception of religious liberty by permitting vouchers, protecting religious free speech, and restricting government prayers and religious displays. But in the current alignment of religious conflict in America, Kennedy and O'Connor have few supporters among politicians and interest groups. One side wants funding for private religious schools and prayer in public schools; the other side wants neither.

C. Regulation of Religious Practice

The final set of important and contested religious liberty issues is regulation of religious practice. In my view, this is the most fundamental and the least understood of the three sets of issues. It is most fundamental because it is only in these cases that individuals can be threatened with civil or criminal penalties for practicing their religion. It is least understood because the cases come in far greater factual variety than the funding cases or the government-sponsored religious speech cases, because many of the cases arise from nonrecurring conflicts between odd religious practices and odd regulations, because many of the victims are from small and little known religious groups and many of the burdensome regulations are equally obscure. The press finds these cases harder to report; the public finds it harder to take sides. But for fifteen years now, intense disagreement over these cases has divided the Supreme Court, divided the Court from Congress, and divided state legislatures. I will try to say enough about the facts of each case to give you a more concrete sense of these varied disputes.

From 1963 to 1990, the Supreme Court said that when a government regulation burdens a religious practice, government must either exempt the religious practice from the regulation, or show that applying the regulation to the religious practice is necessary to serve a compelling government interest. The first such case in the modern era was *Sherbert v. Verner*, [58] which held that a state could not refuse unemployment compensation to a Sabbatarian who lost her job because she was unavailable for work on Saturdays. In *Wisconsin v. Yoder*, [59] the Court held that a state could not require Amish children to attend high school when their parents preferred to educate them on Amish farms. Educating children ***534** might reasonably have been thought to be a compelling government interest, but the Amish were willing to send their children to public school through eighth grade, and Wisconsin required attendance only to age sixteen, which most children reach in the middle of tenth grade. The Court found no compelling advantage in that marginal increment to academic education as compared to Amish vocational education.

Despite these decisions, the Court did not actually exempt many religious practices from regulation. Prison and military regulations were subject to much more deferential standards. Deferring to prison authorities, the Court held that state prisons need not exempt Muslims from work assignments scheduled at the same time as a weekly Muslim worship service. [60] Deferring to military authorities, the Court held that the Air Force did not have to allow a Jewish officer to wear a yarmulke with his uniform. [61] The Court found a compelling interest in enforcing the military draft, so it allowed Congress to define the scope of conscientious objection, exempting those who objected to war in any form but not those who distinguished between just and unjust wars. [62] The Court found a compelling interest in collecting taxes, so it refused to exempt Amish employers and employees from the social security tax, even though they objected to social insurance schemes and refused to accept social security benefits. [63] The Court found a compelling interest in prohibiting racial discrimination in education, so it upheld a law refusing tax exemptions to private religious schools that discriminated against black students. [64]

I think these findings of compelling interest were entirely plausible; in each of these cases, there were reasons of secular self-interest to falsely claim the religious exemption, or even to genuinely convert to the religious belief that was entitled to the exemption. An exemption in these circumstances would thus encourage other citizens to join the exempted religion, and it would tend to greatly inflate the number of claims to exemption. But some commentators think these interests were not compelling, and that these cases suggest that the Court was not really serious about exempting religious behavior from nonessential regulation.

***535** In 1990, in *Employment Division v. Smith*, [65] the Court changed the rule. In *Smith*, the state had refused unemployment compensation to two workers who were discharged for consuming peyote, an hallucinogenic drug, at an American Indian religious ceremony. This ceremony, and the religion organized around it, has been part of American Indian practice in western North America since before the European settlement. The drug is relatively safe but not absolutely so; it has little recreational market; its religious use is associated with a decline in abuse of alcohol and other drugs among American Indians. [66] These facts cast doubt on the government's claim of compelling interest in prohibiting the peyote religion. But in the Court's new view, none of those facts mattered.

Smith introduced an additional requirement for litigants seeking religious exemptions: Is the law that burdens religious exercise "neutral" and "generally applicable"? If so, the burden on religion apparently requires no justification whatever. If not, the burden on religion is subject to the compelling interest test as before. The Court said that Oregon's ban on peyote was neutral and generally applicable, so it could be enforced against the Indian religious ceremony without regard to the religious importance of the ceremony or the regulatory importance of the law.

For convenience, call the rule from 1963 to 1990 the *Sherbert* rule, and call the new rule, announced in 1990, the *Smith* rule. Under the *Sherbert* rule, the religious claimant must prove a burden on his religion; government must then prove that it has a compelling interest in imposing that burden. Under the *Smith* rule, there is a third element. The religious claimant still must prove a burden on his religion; the court must decide whether the law imposing the burden is neutral and generally applicable; and only if the law is not neutral, or not generally applicable, must the government prove that it has a compelling interest in burdening the religious practice.

Since *Smith*, the Supreme Court has decided only one case under the *Smith* rule--a case called *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[67] *Lukumi* involved an Afro-Caribbean religion that sacrifices small animals, mostly goats and chickens, to its gods. Hialeah, a Florida city near Miami, prohibited the "sacrifice" of animals. The city argued that it had enacted a generally applicable ban on sacrifice. The church argued that the ordinances were a ban ***536** on killing animals for religious reasons, carefully drafted so as not to prohibit any killings of animals for secular reasons. The Court unanimously agreed with the church, holding that the ordinances were neither neutral nor generally applicable, and that they served no compelling government interest. *Lukumi* gives substance to *Smith*'s requirements of neutrality and general applicability, but the meaning of those requirements remains sharply disputed.

Government lawyers claim that nearly every law is neutral and generally applicable, and that the only exceptions are laws deliberately designed to single out a religious practice. This argument has some support in the facts of *Lukumi*, and some support in the language of the *Smith* and *Lukumi* opinions. Lawyers for religious claimants say that to be "generally applicable," a law must apply to all examples of the regulated conduct, without exceptions--or at least, with very few exceptions. On this view, many laws fail the requirement of general applicability, and thus are subject to the requirement of compelling government interest. This argument has some support in the facts of *Smith*, more support in the language of the *Smith* and *Lukumi* opinions, and much support in the way those opinions explain *Sherbert* and other earlier cases that have not been overruled. The Court in *Smith* and *Lukumi* distinguished these earlier cases, which means it gave them new explanations to show that their results were consistent with the *Smith* rule.

If the government lawyers are right, the *Smith* rule provides very little protection for religious liberty. Unless government is both hostile and clumsy, it can find a way to prohibit religious practices without openly singling out religion for special regulation, and thus without getting caught under the government understanding of the *Smith* rule. If the lawyers for religious organizations are right, the *Smith* rule provides substantial protection for religious liberty, but that protection is less inclusive, more complicated, and harder to invoke than the protection of the *Sherbert* rule. Either way, religious liberty is less protected under *Smith* than under *Sherbert*.

This reduction in protection for religious liberty provoked widespread disagreement among other branches and levels of government. Congress enacted the Religious Freedom Restoration Act[68] (RFRA) in an attempt to restore the *Sherbert* rule as a matter of statutory right.

***537** The Supreme Court held RFRA, as applied to the states, invalid as beyond the powers delegated to Congress.[69] But RFRA remains in effect as applied to the federal government,[70] and Congress has actually strengthened it.[71] The

first Supreme Court case interpreting RFRA gave the statute full and vigorous scope.[72] The case involved religious use of *hoasca*, a tea brewed from two Brazilian plants and containing small quantities of a hallucinogenic drug prohibited by the Controlled Substances Act. The tea has effects similar to those of peyote. RFRA expressly puts on government the burden of proving its compelling interest in individual applications of federal law to religious practice. The Court unanimously held that the government had not carried its burden, and it unanimously rejected the government's claim that it need only point to Congressional fact finding in the course of enacting the Controlled Substances Act. The government's interpretation would have nullified RFRA's allocation of the burden of proof; the Court's holding makes RFRA an important protection for religious liberty.

Thirteen states have adopted state RFRAs, and at least another twelve states-- arguably as many as seventeen states--have interpreted their state constitutions in ways more consistent with the *Sherbert* rule than with the *Smith* rule.[73] So in one way or another, a majority of states have rejected the *Smith* rule. But there has been remarkably little state-court litigation under these provisions, so the seriousness of state commitment to the *Sherbert* rule has not yet been tested.

Most recently, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA).[74] RLUIPA protects churches against local zoning laws that often make it difficult for new churches to buy or rent a place of worship. It applies only when the real estate transaction would affect interstate commerce, or when the zoning law is administered in an individualized rather than a generally ***538** applicable way. These restrictions on the application of RLUIPA are designed to confine the law's scope to specific delegations of power to Congress, and thus to avoid the excessive scope of regulation that led to invalidation of RFRA. RLUIPA also protects the free exercise rights of prisoners in state prisons that accept federal funds. State officials have bitterly resisted RLUIPA. The Supreme Court has unanimously rejected a claim that the prison provisions violate the Establishment Clause by giving preferred treatment to religion;[75] states are also arguing in the lower courts, mostly unsuccessfully, that both the prison and the land use provisions exceed the scope of powers delegated to Congress. RFRA, RLUIPA, and other legislative enactments to protect the free exercise of religion[76] reveal the depth of disagreement on issues of regulating religious practice.

I have emphasized the ambiguity of *Smith*'s requirement that laws regulating religion be “generally applicable,” but in some applications, the meaning of that phrase is clear. A recent French example makes a helpful illustration. My point here is not to evaluate the French law, but to use this much-publicized French example to illustrate the relevant American concepts.

The new French law that prohibits students from wearing conspicuous religious items in public schools would *not* be a generally applicable law in the United States, even though it applies to all religions. It does not single out Muslims, or scarves or veils. But it singles out religious behavior and regulates that behavior because it is religious, without regulating equivalent secular behavior. If I understand the law correctly, a student can wear conspicuous secular jewelry but not conspicuous religious jewelry; a student can wear a scarf as a fashion statement but not as a religious statement. Despite intense disagreement on regulation of religious practice in the United States, this law is beyond the range of the American debate. I think that all informed American lawyers would say this law singles out religion and is not generally applicable.

Such a law might still be justified as serving a compelling government interest, but when a law openly discriminates against religion, the compelling interest test is hard to satisfy. A compelling interest in regulating only religion would normally mean the need to prevent some imminent and tangible harm. Creating ***539** or preserving a more secular environment would not be a compelling interest; probably, in the American view of these issues, it is not even a legitimate interest. Accelerating the assimilation of Muslims might be compelling if assimilation is essential to addressing the problem of terrorism. But the usual response of American constitutional law to such problems is to punish individuals who violate the law, and not try to control large groups that contain some terrorists and many innocent people. And certainly courts would doubt whether the law will

actually accelerate assimilation; it may just drive Muslim girls out of public schools. Protecting young Muslim women from coercion by their parents is an interest of doubtful legitimacy for minors; for adult women, it would require clear evidence that coercion is a widespread problem. I think the law would not serve compelling interests by American standards. But the compelling interest test is malleable and poorly defined; an American judge inclined to uphold such a law might persuade himself that one or more of these interests is compelling.

Finally, some American lawyers would argue that the law does not substantially burden religion, because it permits students to wear religious symbols that are inconspicuous. Some American judges seem to believe that government does not burden religion unless it interferes with a religious practice that is compulsory in the claimant's faith tradition. A Christian student wearing a large cross might be viewed as having made an individual choice, not mandated by her religion, so that limiting her to a small cross would not be a burden on her religion. [77] This is a minority view in the United States; the Supreme Court's cases tend to the view that any religiously motivated behavior is an exercise of religion. [78] But this disagreement would likely not matter with respect to yarmulkes or Muslim scarves; most students who wear one of these would say that their religion requires it, and that any interference with this religious obligation is a substantial burden on their exercise of religion.

The underlying American argument over regulating religious behavior involves multiple issues, and the two sides only partly correspond to the two sides in the cases on government funding and government-sponsored religious speech. Supporters of the *Smith* rule tend to think that neutrality is the fundamental principle in religious liberty cases, and by neutrality, they mean formal neutrality. Supporters of the *Sherbert* rule tend to think that liberty is the fundamental principle, or that neutrality should be understood as substantive neutrality, ***540** which brings neutrality more in line with liberty. From the perspective of the claimants in *Smith* and *Lukumi*, whose central religious rituals were subject to criminal penalties, it matters little whether the law was neutral and generally applicable. What matters is that it suppressed their religious liberty, and supporters of the *Sherbert* rule think that government should not do that without a very good reason.

Religious conservatives tend to support the *Sherbert* rule, because it better protects religious liberty. Secular conservatives tend to support the *Smith* rule, because it better preserves social order, it reduces the occasions for judges to invalidate laws on behalf of dissenters and minorities, and it saves judges from having to balance competing interests. Many secular liberals support the *Sherbert* rule, because it better protects individual liberty. But some support the *Smith* rule, because they see religion as a generally conservative cause in the United States, and because they think the *Sherbert* rule discriminates against nonbelievers. A religious conscientious objector to a law may get exempted under the *Sherbert* rule; a secular conscientious objector usually will not. During the Vietnam War, the Court interpreted the military conscientious objection statute to protect deeply held conscientious beliefs that lacked a conventional religious basis, [79] and that approach goes far to solve the problem of discriminating against secular conscience. But it aggravates the fears of disorder, of excessive judicial intervention, and of difficult judicial decisionmaking. Current American judges are unlikely to protect secular conscience under statutes or constitutional provisions protecting the free exercise of religion. Realistically, the current struggle is over whether and to what extent they will protect the exercise of religion as religion has traditionally been understood.

CONCLUSION

Americans agree that government should not penalize any belief about religion, and that government should not pay for core religious functions. Beyond that, the United States has competing conceptions of religious liberty. Simplifying very greatly in order to summarize, one broad coalition would have government give nondiscriminatory financial support to religious schools and charities, give verbal support to mainstream religious faith, and regulate religiously motivated behavior only when absolutely necessary. An opposing coalition would ***541** permit no government money for any religiously affiliated activity, would permit no government statements for or against religion, and would regulate religious behavior on substantially the

same terms as nonreligious behavior. Each side is winning on some issues, losing on others. These coalitions are shifting and overlapping; important allies on one of these issues are often opponents on another. I examine all three sets of issues in greater depth in a recent article. [80]

I have emphasized the arguments in American law, and not just the rules. The arguments will persist; the rules are not so stable. Justices of the Supreme Court age, retire, and die; new justices will be appointed. The Court is deeply divided on all three sets of contested issues. The rules on funding religious institutions and regulating religious practice have changed in important ways in the last twenty years. The rules on religious speech have been more stable, but as I explained, those rules had the support of only two justices and now face an uncertain future.

American judges are not career employees in a specially trained branch of the civil service; federal judges are appointed by the president and confirmed by the Senate. In the short run, the American judiciary is insulated from politics. But in the long run, if an issue arouses intense and sustained public interest, the Supreme Court eventually responds to large changes in public opinion. So the arguments will continue, and the rules may change. But if you understand the arguments, you will be able to understand the changes in the rules.

Footnotes

a1 Alice McKean Young Regents Chair, The University of Texas School of Law. J.D. 1973, University of Chicago; B.A. 1970, Michigan State University.

1 Douglas Laycock, *La religion et l' État aux États-Unis: affrontement des théories et changements historiques*, *in* LA CONCEPTION AMÉRICAINE DE LA LAÏCITÉ 35 (Elisabeth Zoller ed., 2005). I know what I said in English; I have to take the French translation as a matter of faith.

2 Torcaso v. Watkins, 367 U.S. 488 (1961); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3 *See* BARRY A. KOSMIN, EGON MAYER & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2001, at 12 exh.l (2001), *available at* http:// www.gc.cuny.edu/faculty/research_studies/aris.pdf.

4 WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

5 Roe v. Wade, 410 U.S. 113 (1973).

6 *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW & EDUCATION (1995).

7 For a more detailed account of the constitutional effects of religious change, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

8 Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)).

9 *See* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

10 Walz v. Tax Comm'n, 397 U.S. 664 (1970).

11 Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990).

12 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559-64 (1993) (Souter, J., concurring).

13 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

14 *Id*. at 16.

15 *Id*. (emphasis omitted).

16 Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

17 Lemon v. Kurtzman, 403 U.S. 602 (1971).

18 *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

19 *Allen*, 392 U.S. 236.

20 Meek v. Pittenger, 421 U.S. 349, 362-66 (1975), *overruled in part by* Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality opinion with O'Connor, J., concurring in the overruling).

21 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

22 Wolman v. Walter, 433 U.S. 229, 252-55 (1977), *overruled in part by Mitchell*, 530 U.S. at 808 (plurality opinion with O'Connor, J., concurring in the overruling).

23 Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203, 235-36 (1997).

24 *Wolman*, 433 U.S. at 244-48; Walker v. San Francisco Unified Sch. Dist., 46 F.3d 1449 (9th Cir. 1995). *Wolman* has not been overruled on this point.

25 For analysis of why it is so difficult for the Court to render consistent decisions over time, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

26 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

27 Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963).

28 Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); *Wolman*, 433 U.S. at 238-41.

29 *Wolman*, 433 U.S. at 241-44.

30 *Id*. at 247.

31 Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school voucher program); Mitchell v. Helms, 530 U.S. 793 (2000) (federal aid to state education agencies which goes, in part, to parochial schools); Agostini v. Felton, 521 U.S. 203 (1997) (public school teachers providing remedial education in parochial schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (interpreters for the deaf); Bowen v. Kendrick, 487 U.S. 589 (1988) (grants for teenage sexuality counseling); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (state vocational rehab for the blind).

32 *See* cases cited *supra* notes 20, 22, & 23. The fourth case is *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled in part by Agostini*, 521 U.S. 203.

33 *Zelman*, 536 U.S. 639.

34 *Mitchell*, 530 U.S. 793.

35 Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999); Simmons-Harris v. Goff, 711 N.E.2d 203, 211-12 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

36 Bush v. Holmes, 919 So. 2d 392 (Fla. 2006); Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).

37 Locke v. Davey, 540 U.S. 712 (2004).

38 The most complete descriptions and analyses of these programs and pending proposals appear in IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW-2005: LEGAL DEVELOPMENTS AFFECTING PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS (2005); IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW-2004: PARTNERSHIPS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS (2004); IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW-2003: DEVELOPMENTS IN THE LAW CONCERNING PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS (2003); IRA C. LUPU & ROBERT W. TUTTLE,,, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: STATE OF THE LAW (2002). These books are all available at The Roundtable on Religion and Social Welfare Policy, Roundtable Legal Publications, http://www.religionandsocialpolicy.org/legal/legal_ publications.cfm (last visited Apr. 12, 2006).

39 *See* Laycock, *supra* note 8, at 1683-84.

40 Early court decisions are collected in *School District of Abington Township v. Schempp*, 374 U.S. 203, 275 n.51 (1963) (Brennan, J., concurring).

41 *Schempp*, 374 U.S. 203; Engel v. Vitale, 370 U.S. 421 (1962).

42 Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

43 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

44 *Id.*; Lee v. Weisman, 505 U.S. 577 (1992).

45 Marsh v. Chambers, 463 U.S. 783 (1983).

46 Stone v. Graham, 449 U.S. 39 (1980).

47 County of Allegheny v. ACLU, 492 U.S. 573 (1989).

48 Lynch v. Donnelly, 465 U.S. 668 (1984).

49 *Allegheny*, 492 U.S. 573.

50 Van Orden v. Perry, 125 S. Ct. 2854 (2005).

51 McCreary County v. ACLU, 125 S. Ct. 2722 (2005).

52 *Lynch*, 465 U.S. 668.

53 *Allegheny*, 492 U.S. 573.

54 Lee v. Weisman, 505 U.S. 577 (1992).

55 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); *Allegheny*, 492 U.S. at 592-94; Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

56 *E.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

57 Fowler v. Rhode Island, 345 U.S. 67 (1953); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

58 Sherbert v. Verner, 374 U.S. 398 (1963).

59 Wisconsin v. Yoder, 406 U.S. 205 (1972).

60 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

61 Goldman v. Weinberger, 475 U.S. 503 (1986).

62 Gillette v. United States, 401 U.S. 437 (1971).

63 United States v. Lee, 455 U.S. 252 (1982).

64 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

65 Employment Div. v. Smith, 494 U.S. 872 (1990).

66 *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7-8.

67 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

68 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), *amended by* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

69 City of Boerne v. Flores, 521 U.S. 507 (1997).

70 Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998).

71 The exercise of religion protected by RFRA is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7) (2000); *see also* 42 U.S.C. § 2000bb-2(4) (2000).

72 Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006).

73 These state laws and decisions are collected in Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004).

74 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

75 Cutter v. Wilkinson, 544 U.S. 709 (2005).

76 *See* American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a (2000); Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183 (codified as amended at 11 U.S.C. §§ 544, 546, 548, 707, 1325) (protecting churches and other charities from most claims of creditors of persons who contributed to the charity and subsequently went bankrupt).

77 *See* Warner v. City of Boca Raton, 887 So. 2d 1023 (Fla. 2004).

78 Thomas v. Review Bd., 450 U.S. 707 (1981).

79 Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

80 Laycock, *supra* note 73.

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Note

CROWNS AND CROSSES: THE PROBLEMS OF POLITICO-RELIGIOUS VISITS AS THEY RELATE TO THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT [d1]

Samuel Pyeatt Menefee [a1]

Introduction

Pope John Paul II's visit to the United States in October of 1979 raised problems concerning the interpretation and implementation of the Establishment Clause of the First Amendment to the Constitution. This clause provides "Congress shall make no law respecting an establishment of religion," [1] an implicit call for government neutrality toward religion. Pope John Paul II is not only religious leader of the Roman Catholic Church, but on a secular level he is also head of the Vatican City State. While this entity is not officially recognized by the United States, most other nations do accord diplomatic recognition to the Vatican City and our own government has in recent years maintained informal contact through a personal Presidential representative. [2] The combination of political and religious roles here raises the general issue of whether the Pope or any similar leader should be treated as a head of state or as the representative of a religious group. If the latter classification is more appropriate, governmental actions similar to those taken in connection with the Papal visit might well be held to ***228** violate the Establishment Clause. The Supreme Court has yet to directly address this issue; in the meantime, the area is ripe for legal analysis.

I. POLITICO-RELIGIOUS VISITS: POTENTIAL PROBLEMS

At first glance the problems raised by a politico-religious visit might appear to be academic and of limited scope. The first trip to the United States by a reigning pontiff occurred only as recently as 1965. At that time, Pope Paul VI visited New York for fourteen hours to address the United Nations General Assembly on the subject of peace and disarmament, to celebrate Mass at Yankee Stadium and to confer with President Johnson. [3] No objections seem to have been made concerning possible First Amendment violations, and even during Pope John Paul II's 1979 visit legal protests were confined to only a few cities on his itinerary. [4] As the Pope has indicated that he hopes to return to visit the southern and western United States, [5] however, these problems may well recur.

Similar church-state questions could arise in connection with other political leaders. Queen Elizabeth II, for example, is both ruler of the United Kingdom and titular head of the Anglican Church. [6] The Ayatullah Khomeini is not only an important Shi'ite Imam, but the new theocratic arbiter or *laqih* of Iran's constitutional government. [7] The Bishop of Urgel, in Spain is Co-prince of the Principality of Andorra, [8] while many former political leaders in recent years have also held religious positions. [9]

Another aspect of the problem involves those heads of government who possess a religious significance for only some small minority of individuals. Haile Selassie, the former Emperor of Ethiopia (deposed in 1974, and now deceased) held a central position ***229** in Rastafarian belief. [10] Ian Fleming, in his travelogue *Thrilling Cities*, notes the existence of a small sect in Lausanne, Switzerland, that worships Queen Elizabeth II, believing her to be a descendant of the biblical King David. She is destined, they feel, to become world ruler and bring on the millenium. [11] More attenuated politico-religious connections could be seen in other millenial beliefs such as "Marching Rule," which occurred in the Solomon Islands following World War II. On one of these islands it was felt that the British would be forced to cooperate with the native inhabitants when the Pope sent his army; on another, the U.S. Marines were awaited. [12] It is difficult to tell whether these and similar cargo cult beliefs would be accepted by United States courts as "religious" in a broad Constitutional sense or whether they would be viewed merely as an incorrect perception of real world power politics. [13]

***230** On a different political level many clergymen, both foreign and domestic, hold elective office. Several members of the Israeli Knesset are rabbis, [14] while the Rev. Ian Paisley, a Free Presbyterian minister, is both a British M.P. and a representative in the European Parliament. [15] Our own Congress has four Representatives ***231** and one Delegate who are ordained priests or ministers. [16] In *McDaniel v. Paty*, the Supreme Court specifically held unconstitutional a provision of the Tennessee Constitution disqualifying such individuals from membership in that state's legislature. [17]

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will ***232** necessarily exercise their powers and influences to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality ... [T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts. [18]

Because of such language, it may now be assumed that there is no legal bar to religious leaders holding political office. The problem of their *activities*, however, still remains. To a greater or lesser extent, the national government and each state government represent potential spawning-grounds for controversies involving politico-religious visits. Surprisingly, no such cases seem to have been brought before the Papal tour focused public attention on this problem. [19] The decisions cited as precedents in the cases inspired by the Pope's recent visit are thus not directly in point and deal largely with state aid to religious education and the display of religious symbols. To analyze the questions raised by such visits, it therefore seems most useful to examine in detail the legal aspects of the Papal visit of 1979, which will provide future precedents in this area.

II. THE PAPAL VISIT OF 1979

Pope John Paul II's seven day journey through the United States illustrates some of the problems of a politico-religious visit. ***233** The trip included stopovers in Boston, New York, Philadelphia, Des Moines, Chicago and Washington, D.C. [20]

In Boston, it was initially believed that the visit would cost one million dollars, and a privately financed Papal Visit Fund was set up to defray expenses. While the planned disbursements from this fund were not fully disclosed, it was supposed to cover some transportation, telephone and housing costs. [21] A cost estimate for the visit of $825,000 was made by the City Budget Director; later this amount was reduced to $700,000 in a request made to the Boston City Council for funds. [22] Plans included a civic reception under the direction of the Chief of Protocol of the Department of State at Logan Airport where the pontiff was to be met by Mrs. Carter, the President's personal emissary. A motorcade through Boston would follow with a prayer service at the Cathedral of the Holy Cross, and a public Mass on Boston Common. [23]

The first controversy related to the holding of the Mass on the Common. In a hearing before the Boston City Council, objections were raised concerning city participation in preparations for the ceremony. Ernest Winsor, President of the American Civil Liberties Union of Massachusetts; Rev. Charles Harper and Dr. Kenneth Claus, United Church of Christ ministers; and William Baird, a pro-abortion activist, claimed that some of the projected uses of public money violated the Constitution's Establishment Clause. [24] Specific attention was focused on the $100,000 to $150,000 of public funds set aside for the construction of a platform for the Mass, the provision of lighting, a sound system and security. Carpeting for the occasion was to be a special shade of red specified by the Vatican; numerous flowers, shrubs and 325 portable toilets were to be bought or rented for the occasion, and a trailer where the Pope could change into his vestments was to be made available for his convenience. [25] Winsor claimed to have no ***234** quarrel with the money devoted to security, only with that allotted to the "religious ceremony." Baird threatened suit to halt this expenditure. [26]

In a subsequent statement, Mayor Kevin White announced that the Roman Catholic Church would meet the cost of the altar, and all other expenses associated with religious events. The city, for its part, would be responsible for the costs of all nonreligious preparations. [27] Discussion then ensued as to whether the platform served any security purpose. [28] In negotiations between lawyers for Baird and the Mayor, an out-of-court agreement was reached allowing the use of Boston Common for the Mass and the expenditure of municipal funds for the various platforms, crowd control devices and sound equipment deemed necessary. [29] This left only one major point in issue, the establishment of a reserved access section holding 18,000-20,000 people which was to be located in front of the altar. [30]

Baird brought suit against the Mayor in Federal District Court, seeking to enjoin the Mayor from permitting access to the part of the Common limited to ticketholders. [31] The plan for reserved seating contemplated places for 150 representatives of ethnic groups, 120 civic leaders, 250 leaders of other religions, 100 handicapped individuals chosen by lot and 20-30 bishops. Standing room was also provided for 6000 priests and members of religious orders, 10,000 youths (not restricted by religion although 8,000 were to be selected by parish priests and 2,000 by Roman Catholic chaplains in various schools and colleges) and 2,000 "invited guests" (security ***235** personnel and prominent Catholic laity). [32] While the Mass was to be celebrated by the Pope and certain of the bishops, the remaining people in the area and to a lesser degree on the rest of the Common were claimed to be *participants* rather than *spectators*. [33] The plaintiffs, basing their argument on the Establishment Clause, suggested that the First Amendment would be violated if the City permitted the Archdiocese to decide who should be admitted to the restricted area adjacent to the Papal altar. The defendants, however, argued that both the Establishment and Free Exercise Clauses would be contravened if the City, after having granted the permit for the Mass, interfered in the way in which the permit was to be exercised. [34] Not only would the City be hindering the Roman Catholic Church from celebrating a Mass in the way it saw fit, but in effect it would be making a rule regarding the practice of religion which could be considered to be an "establishment." [35]

The plaintiffs suggested that the court use a three-pronged test developed by the Supreme Court in *Committee for Public Education v. Nyquist*. This test requires a court to determine whether the action being scrutinized had (1) a clearly secular purpose; (2) a primary effect which did not induce or inhibit religion; and (3) no excessive government entanglement with religion. [36] This approach was not taken by the court. The defendant argued that interference would be like regulating the conduct of marchers in a parade. The plaintiffs responded by saying that state interference could instead be likened to regulating the conduct of parade *spectators* on the sidewalks. Judge Skinner dealt with the defendant's argument in a few words:

> This is an interesting analogy, but I do not find it wholly apposite. It ignores the fact that by permitting these ticketing arrangements, the city is implicitly allowing preferential access to a section of public land to those who in overwhelming majority ***236** are members of, or invitees of, a specific religious institution.

> The city is thus arguably violating the establishment clause by permitting the Archdiocese to determine admission to the Boston Common. [37]

Despite this, Judge Skinner held for the City, basing his decision on *Zorach v. Clauson*. [38] *Zorach* upheld the constitutionality of New York City's "day-release" program, which allowed students to leave school and attend religious centers for religious or devotional exercises. In that case, the Supreme Court had noted:

> We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. [39]

Judge Skinner therefore observed:

> Implicit in the grant of a permit for a papal Mass is the right of the celebrants to have the appropriate officials attend the Pope in the performance of his offices. The free exercise clause arguably requires the city to allow the celebrants to carry out the religious purpose of a public Mass by insuring that those in immediate proximity to the celebration be sympathetic and knowledgeable communicants who will be able to respond appropriately to the celebrants at the various stages of the ceremony. [40]

While he had some question as to whether this argument could be applied to a group of such a size, the judge felt if the Church was ***237** not permitted to make the decision, that this duty would thus fall to the City or the court.

> [A]ny such intervention in the exercise of the permit would constitute a threat to the spirit of accommodation mandated in *Zorach* ... which outweighs the risks that the temporary ecclesiastical control of access to part of the Common might lead to the evils against which the 'wall of separation' has been erected. [41]

Baird considered but rejected the idea of an appeal. [42] In *Baird v. White*, therefore, the court upheld the Church's right to set aside and control access to an area reserved for the Papal service, but did not directly address itself to the problem of the Pope's politico-religious role.

Most problems in other cities visited by the Pope followed a similar pattern. In New York negotiations were held between City and Church officials to decide who should be responsible for various costs. [43] In Philadelphia, despite the Church's offer to bear costs, the City took responsibility for the construction of a large outdoor platform from which the Pope was to say Mass. Hilda Silverman, Director of the Philadelphia Office of the American Civil Liberties Union, felt that this construction using public money was a violation of citizens' rights, and threatened to sue. [44] City Solicitor Sheldon Alberts, however, maintained that the Pope would be treated like any other head of state. [45] In a meeting attended by lawyers for the parties, it was agreed that the City ***238** should complete construction of the platform and that if final judgment in the case was found for the plaintiffs, the Archdiocese of Philadelphia would reimburse the City for all platform construction costs. [46]

The case of *Gilfillan v. City of Philadelphia*, arising out of this Philadelphia controversy, was in fact decided after the Papal visit. [47] Judge Raymond J. Broderick of the United States District Court found for the plaintiffs, holding that City financing of the platform was a violation of the Establishment Clause. [48] The celebration of Mass on public property, the expenditures for security and crowd control, and the limiting of access to the area surrounding the platform to ticketholders were not challenged. [49] Instead, objection centered on those public funds "expended for labor and materials used to construct the platform and to provide shrubbery, trees and flowers surrounding the platform, together with an amplification system, carpeting and seating." [50] Plaintiffs noted that only Roman Catholic clergy and laity were present on the platform during the celebration of the Mass, and that civic officials were not present. [51] The court rejected defense arguments that:

> [A]lthough the platform was used for a religious service, the City had no religious purpose in constructing it. It is the City's position that the Pope is an international dignitary and head of state, and, in view of the extraordinary public interest in seeing and hearing him, the City planned and constructed the platform in the interest of the Pope's security, the safety of the crowd and the maximum possible access for those who wished to see and hear the Pope. [52]

Judge Broderick noted in a footnote: "The Pope's status as head of state is not relevant to the Constitutional issue before the Court. ***239** A religious service conducted by a head of state is nonetheless a religious service." [53]

The court then conducted an analysis along the lines of the *Nyquist* three-pronged test mentioned above, basing its reasoning on similar criteria stated in *Lemon v. Kurtzman*. [54] The court first noted that the assertion of an "incidental secular purpose" did not save an action which would otherwise violate the Establishment Clause. [55] It found that, "the actions of the City of Philadelphia in constructing and decorating the platform amount to public sponsorship of a religious service. The secular purposes expressed by the City are incidental to this non-secular purpose." [56]

City architects designed the platform, the most prominent feature of which was a 36 foot high cross, the most sacred symbol of the Catholic faith. City officials knew from the time that they began to plan the structure that it would be used for the celebration of a Roman Catholic Mass. The design and structure of the platform emphasizes its religious nature. The City in effect ceded control of the Logan Circle area to the Archdiocese of Philadelphia, which had the sole responsibility for distributing tickets for admission to area [sic] in the vicinity of the platform. [57]

While the court found that the plaintiffs would win on this ground alone, it continued its analysis according to the other prongs of the test. The second prong, that the primary effect of the government assistance in question must be to "neither advance nor inhibit religion," [58] also caused a finding for the plaintiffs. In connection ***240** with the third part of the test, excessive government entanglement with religion, the court noted, "it would appear that the planning for the platform by City officials with the concurrence of Archdiocese officials constitutes an impermissible entanglement." [59] Additionally, a tendency for state assistance to promote divisiveness among and between religions, [60] often a sign of entanglement, appeared here: "in this case ... applicants for intervention, members of various religious groups, have sought to raise equal protection claims that they have not been afforded assistance equivalent to that received by the Catholic Church." [61] Finding that the City's expenditure of public funds for the platform failed all parts of the Supreme Court's three-pronged test, Judge Broderick held that the municipal action had violated the Establishment Clause and noted, "while we do not suggest that First Amendment violations can be absolved by reimbursing the government for unconstitutional expenditures, we do find that, under the circumstances in this case, reimbursement of the City for the net cost is an appropriate remedy." [62] Thus, while the issue of the Pope's politico-religious role was raised in *Gilfillan*, the court did not see fit to investigate this problem, preferring to decide the case on other grounds.

There appears to have been little controversy about costs of the Papal visit in Des Moines or Chicago; the Church assumed all religiously-oriented construction fees while the cities remained responsible for police overtime, trash pickup and large-scale transportation arrangements. [63] In Chicago, however, an unusual politico-religious problem appeared. The Pope prevented police ***241** from arresting an unidentified twenty-year-old man who shouted, "Holy father, I love you," and jumped over a fence at Lincoln Park in order to get closer to the Pope. Noticing the commotion, the pontiff told authorities not to arrest the man but to "[B]ring him to me." Acting Police Superintendent Joseph G. DiLeonardi complied: "When our Holy father pardons someone, you can't intercede ... the pope is our supreme commander." [64] One hesitates to imagine the possible First Amendment implications ....

In Washington, D.C. the allocation of costs was solved by the government accepting responsibility for police, transportation and some trash pickup, while the Washington Archdiocese and the Arlington Diocese paid for the altar and assisted in the cleanup of the Mall area. [65] Madelyn Murray O'Hair, a prominent atheist, [66] nonetheless filed suit in United States District Court to block the holding of the Mass on the government-owned Mall.

In the resulting case, *O'Hair v. Andrus,* [67] the basis of the defendants' argument was that such a permit could be granted under an appropriate National Park Service regulation which was neutral in content where First Amendment rights were involved. [68] The ***242** only governmental expenditure contemplated was for the sort of services provided at any other large public gathering. [69] Cases were cited to make the point that the Park Service could not monitor the content or purpose of a demonstration, or differentiate between acceptable and unacceptable organizations. [70] An amicus brief filed by the American Civil Liberties Union agreed, suggesting that this should be viewed as a free speech case. [71] Against these arguments the plaintiffs contended that while the regulation was non-discriminatory, it was being administered in a discriminatory manner which amounted to governmental aid to religion. [72] The court did not directly deal with this contention but rejected the plaintiffs' analogy to the facts of *Nyquist,* in which state legislation providing for the repair and maintenance of nonpublic schools and tax and tuition rebates for the parents of children attending these institutions was held to be unconstitutional. Here, said the District Court, the regulation was clearly neutral, allowing religious and secular organizations equal and non-discriminatory use of the Mall. [73] *Fox v. City of Los Angeles,* [74] a case in which the lighting of a cross on a city hall was held to be unconstitutional, was also rejected as a binding precedent for a similar reason. [75] *Lemon,* too, was deemed inapplicable; no showing of entanglement was made by the plaintiffs and the government was not contributing to the event in excess of its normal services. [76] In denying the injunction, Judge Gasch stressed the necessity to consider both the Establishment and the Free Exercise Clauses of the First Amendment as well as the freedom of assembly which it protected. [77] His finding that the granting of the permit for the Mass was legal was mandated, he indicated, by *Allen v. Morton*. In that case, the Court of Appeals ruled against government sponsorship for the Christmas Pageant of Peace, a display which included a ***243** creche. [78] The Court of Appeals, however, had suggested that the government could avoid future First Amendment problems under the Establishment Clause by severing its connection with the event and treating the Pageant like any other applicant for the use of park land. [79]

O'Hair appealed the decision. [80] In the course of oral arguments on the appellate level, Judge George MacKinnon of the United States Court of Appeals noted that religious services were held at Arlington National Cemetery and that the Salvation Army preaches in public streets throughout the country; he was quoted as saying, "You'd stop George Washington from conducting a masonic service when he laid the cornerstone of the Capitol." [81] Because the hearing for this appeal was held on Friday,

October 5, and the Mass was supposed to take place on Sunday, time constraints caused O'Hair to ask for a writ of certiorari from the Supreme Court. This was refused without comment.[82] The Mass on the Mall was celebrated, and the Pope was able to meet with President Carter before departing the country.[83]

When the Court of Appeals rendered their decision in *O'Hair*, they affirmed the judgment of the District Court. According to Judge Leventhal, O'Hair had requested an injunction pending appeal or, in the alternative, an injunction "until such time as the Roman Catholic Archidocese [sic] of Washington guarantees that it will pay the United States for all funds expended in support of the activity on the Mall ...."[84] The parties stipulated that the expenses would be "no different from those regularly incurred with any large public gathering, and a comparable level of services and facilities would be extended by the Interior Department to any group of similar size which possesses a permit to use park land."[85] All parties further agreed that both religious and non-religious applications ***244** for permits were treated in the same manner, without preference.[86] While meetings were held between the government and the Archdiocese, these preparations would have been undertaken with any group of similar size.[87] The Archdiocese had agreed that attendance at the service would be open to the public without regard to religious preference or belief.[88]

In its argument the court pointed out the identification of parks with free speech and free assembly,[89] noting that the park regulations in question were neutral, and were applied alike to religious activity and its non-religious counterparts.[90] This brought the problem under the controlling influence of *Fowler v. Rhode Island*, in which the court held that a public park in Pawtucket could be opened to religious exercises as long as it was equally available to all religious groups.[91] Dispensing with the appellants' arguments, the court declined to find any distinction between a Mass and a sermon, noting that they were both protected as free speech and that any attempt to separate them would run afoul of the entanglement test.[92] No message of governmental approval was being sent by the issuing of the permit, so that the Establishment Clause was not being violated.[93] Nor would the granting of such a permit necessarily lead to excessive use of the Mall by religious groups.[94] The cases involving elementary and secondary school children cited by the appellants were not in point because lower education's unique position in American life made it particularly prone to religious influence.[95] Finally, the Archdiocese was bearing much of the financial burden of the Mass, while the state had an interest in permitting large assemblies in outdoor ***245** parks by citizens.[96] The court held that, "To strike down a regulation rooted in neutrality so as to deny access to the Pope for a mass-cum-sermon would thwart First Amendment values underlying communication and religious freedom."[97] Judge MacKinnon concurred, saying that the injunction should not be granted as the appellants, in his opinion, had no likelihood of prevailing on the merits.[98] *O'Hair* thus denied an injunction, which would have prevented the holding of a Papal Mass on publicly owned parkland, without addressing the problem of the Pope's politico-religious role. In all of the above cases, what is noteworthy is the courts' reluctance to recognize a problem in the very nature of this dichotomy.

III. LEGAL CONSIDERATIONS

The cases connected with the Papal visit have suggested some of the difficulties involved in the application of the First Amendment to visits of politico-religious leaders. While Judge Broderick noted in *Gilfillan* that the Pope's status as head of state was irrelevant to the issue being considered, "A religious service conducted by a head of state is nonetheless a religious service,"[99] this appears to be an oversimplification. Although appropriate to the case in point, it could cause serious problems in the future. Few people would disagree that Mass, because of its sacramental nature, is a central part of Roman Catholic dogma. It does not seem so easy, however, to make similar clear-cut identifications of religious activity in all cases. Often it might be precisely the *role* of the person which provides the crucial clue in identifying the nature of the act: the difference

between a rabbi and a representative touring a military hospital, between a minister or a master of ceremonies calling for a moment of silence to remember a departed friend, between a priest and a politician visiting a religious shrine. Or the *source* of an activity might be equally crucial: the difference between ***246** giving alms and Social Security or between offering sacramental wine, and procuring liquor. Some form of preliminary balancing test seems called for in which the individual's political position and status would be weighed against his religious position before the prongs of the *Nyquist* test were applied. A similar methodological model is already used for the Equal Protection Clause in which preliminary group classifications are analyzed to determine whether strict scrutiny of the legislation being tested is appropriate. [100]

The first prong of the *Nyquist* test, determining whether the action had a clearly secular purpose, [101] might certainly be influenced by a finding of fact that the individual involved had filled a religious capacity. In cases of doubt, the characterization of the action could well depend upon this determination. A good example of this is the Bicentennial church service attended by Queen Elizabeth II during her stay in Boston. [102] If the Queen was considered to be acting in her capacity as head of the Anglican Church, the purpose of the activity should clearly be characterized as religious, and public monies expended on her presence would be subject to strict scrutiny to ensure that they did not amount to a First Amendment establishment of religion. If, on the other hand, the Queen was attending the service in her political capacity as a head of state, the historical purpose of the celebration might appear to be paramount, with a consequent relaxing of the scrutiny necessary to ensure that public expenditures in connection with her visit met Constitutional guidelines. Thus, were the Vatican City to be recognized by the United States, under the first prong of the *Nyquist* test the Pope's status as a head of state could well be crucial in determining the constitutionality of at least some state actions.

In any preliminary balancing, the executive and legislative branches of government would appear to play an important role in the determination of political position, with an avenue of appeal ***247** being left open to the courts. [103] Here, despite occasional problems, the lines of definition would appear to be fairly bright and clear. The government is arbiter of its own political positions, leaving only the question of *who* holds any particular position and which *external* positions, conferred by other states, are to be recognized. A problem arises, however, when analysis shifts to the question of religious status. Certainly the executive and legislative branches would be held in violation of the Establishment and Free Exercise Clauses were they to make such determinations, but there also seems to be a major question as to how the courts should deal with this matter. [104] How then can a court determine the religious status of an individual who also holds a political position? Although no fully satisfactory solution seems possible, a “face value” approach could generally be determinative in these cases. As the religious role of a party can only penalize him in any legal action involving those state acts deemed to be in support of religion, the personal acknowledgement of a religious role should be allowed to stand unless it *conflicts* with a governmental determination made concerning political position. This approach would be analogous to an admission or a declaration by a party against interest. [105] It would, of course, be necessary that any such declaration did not benefit the party in another way. In any case, the reliance on a person's own definition of his religious role would eliminate the unfairness ***248** in ascribing religious significance to a person who considers himself in a purely secular light.

A similar argument could be made for introducing a preliminary politico-religious balancing test to help determine the effect of a state action, the second prong of the *Nyquist* test. [106] This balancing would have to be applied separately from that mentioned above under the first prong, as there might not always be a flush fit between purpose and effect. In *Tilton v. Richardson,* for example, the court noted that a building constructed as a school with Federal aid might later be put to an impermissible religious use. [107] Again, people who possessed religious significance for others, rather than a self-proclaimed religious role, should not be deemed to have religious status in a Constitutional sense.

The third prong, impermissible entanglement, [108] is a slightly different matter. Here, individuals who were both domestic government officials and religious representatives would be liable to particularly strict scrutiny regarding any governmental actions which involved them. The use of a preliminary balancing test could again determine the weight to be given to evidence of entanglement. For any one of these prongs, therefore, the preliminary determination that the individual was acting in a religious rather than a political capacity would trigger a higher level of proof required to show that the conduct involved did not violate the First Amendment.

If this reasoning had been used in *Baird v. White*, the decision might have been different. Because of the non-recognition of the Vatican City State, the Pope should clearly have been considered a religious figure. [109] This would have resulted in a stricter scrutiny under the prongs of *Nyquist*. Upon examination, what was said in *Baird* appears to be a judicial sleight of hand; that while the Archdiocese's action, creating the plan for admission to the restricted area, was religious in nature, any attempt to regulate the permit ***249** granted by the City was felt to be an impermissible entanglement of government and religion. The court said: "[I]f the Church is not permitted to decide the size of that group, then the city or court must make the decision." [110] First the purpose and effect of the City's decision to turn over control of access to part of the Common to the Archdiocese must be examined. The purpose of this action, presumably to give the Church some control over choosing the participants or spectators at the Mass, must surely be deemed religious. A similar characterization may be made of its effect. The presence of 6,000 priests, 10,000 (possibly non-Catholic) youths picked by parish priests and Catholic chaplains, 1,000 Catholic laity, and 20-30 bishops weighs heavily in the balance against the 250 leaders of other religions, the only *specifically* non-Catholic individuals included in the reserved access plan. Even the presence of these latter might be argued by some to have given the ceremony a *religious* bias. [111] The religious effect of the plan is further underscored when one considers the number of security personnel, ethnic representatives, civic leaders, and handicapped individuals who might also have been Catholic, thus increasing the percentage of Catholics in the reserved area. [112] *To the extent that the state was aware* of the religious purpose and effect of this access plan, the first and second prongs of *Nyquist* might have been held to have been violated by any grant of the state's police power to the Archdiocese.

This grant would also have run afoul of the third prong of *Nyquist*, as it would have constituted an excessive entanglement of church and state. The court in *Baird* noted, "Implicit in the grant of a permit for a Papal Mass is the right of the celebrants to have the appropriate officials attend the Pope in the performance of his offices." [113] Here, the clash between plaintiff and defendant in the use of the parade analogy appears to be particularly instructive. To the extent that the state must prevent *interference* with freedom of ***250** religion, the City's obligation to allow the Church to conduct the Mass as it sees fit seems logical, just as marchers in a parade should be free from harassment. Thus far, there would be no impermissible entanglement in the City's conferring its police power on the Archdiocese. But the Boston Common is a public area, and cannot be treated in the same manner as a church or private property. The very necessity for a permit suggests the existence of countervailing public rights which are not necessarily abated by the permit's issuance. It would appear that a weaker "property interest" is invoked by the permit when one moves further from the geographical center (or the primary purpose) of the ceremony. The court itself subscribed to this view when it noted in a finding of fact that the Mass was to be celebrated by the Pope and certain bishops only, but that people within the enclosure *and to a lesser degree* all those on the Common would be particpants. [114] The question then is where does the temporary property interest which the Archdiocese acquired by the permit become outweighed by countervailing public interests, for it is at this point that the City's grant of police power to the Archdiocese becomes impermissibly entangled. The power to draw this line belongs to the state -- this is implicitly recognized in the granting of the permit. Obviously this decision would vary on a case-to-case basis, depending on the facts, and would be reviewable by the judiciary. In *Baird*, the emphasis is put on the duty of the city "to allow the celebrants to carry out the religious purpose of a public Mass by insuring that those in immediate proximity to the celebration be sympathetic and knowledgeable communicants who will be able to respond appropriately to the celebrants at the various stages of the ceremony." [115] To the extent that the enclosed area was restricted to Roman Catholic use, a case might be made for the exclusion of those believing in other

religions. To the extent, however, that non-Catholics were included in the reserved access plans, this ***251** argument is seriously undermined. [116] How can "appropriate responses" be ensured by the presence of 250 diverse religious leaders, 120 politicians, or 150 ethnic representatives? At this point, it could be argued, the Church was infringing on residual public rights, and the state grant of the power to *reserve* [117] access for *specific* [118] individuals constituted impermissible entanglement in an action having both a religious purpose and effect.

Against this it is argued that if the city or court made the decision concerning the size (and presumably the composition) of the reserved access section, "any such intervention in the exercise of the permit would constitute a threat to the spirit of accommodation mandated in *Zorach* ... which outweighs the risk that the temporary ecclesiastical control of access to part of the Common might lead to the evils against which the 'wall of separation' has been erected." [119] This ignores a viable alternative. Given that state *dictation* of access arrangements might involve an impermissible entanglement between religion and government, why is the court unwilling to exercise a *veto* over any access scheme which it finds unconstitutional through use of the *Nyquist* test? While this might have the practical effect of denying control of access to the Archdiocese, it appears to be the theoretically sounder constitutional ruling. Thus, using a preliminary politico-religious balancing test and the *Nyquist* test, an argument could be made that *Baird* was incorrectly decided.

Gilfillan, as has been noted, dismissed the relevance of the Pope's politico-religious significance, but went on to apply the *Nyquist* test. Because of the nature of the facts, the use of public funds to construct the platform for a religious ceremony, this ***252** opinion appears to have been correctly decided. The issue is not so close that a preliminary politico-religious balancing would effect the outcome. A similar clarity of issues might be thought to be characteristic of *O'Hair*, but here strict scrutiny using *Nyquist* indicates a hidden merit in part of the plaintiffs' plea which the court overlooked. While police protection, fences and barriers, maintenance and trash removal all qualify as secular under the three-prong test, the same is not necessarily so of the provision of electricity. While the point is not made clearly in the majority opinion, Judge MacKinnon's concurrence notes that the cost includes "the electrical current for loud speakers used to broadcast the service to the crowd." [120] In no way can this be characterized as having a predominately secular purpose or result. Using strict scrutiny, this would run afoul of the first two prongs of *Nyquist*. Despite the fact that similar allocations of electricity had properly been made for political rallies formerly held on the Mall, payment in this instance by the government would violate the First Amendment, providing a good reason to grant the injunction on this ground.

IV. CONCLUSION

The problem of politico-religious visits as it is now emerging from First Amendment theory requires a change from the Supreme Court's simple three-pronged test enunciated in *Nyquist*. A preliminary balancing test, characterizing an individual's role as essentially political or religious should be made separately for each prong. Religious orientation would require strict scrutiny in applying the relevant prong of *Nyquist*, which, in practical terms, would result in a greater burden of proof being necessary to overcome the presumption that certain actions were religious in their Constitutional significance. In many cases, preliminary balancing might well prove decisive, [121] but the fact that an individual had religious ***253** significance would not replace the central importance of the *Nyquist* test in deciding First Amendment issues dealing with the Establishment Clause. [122]

Cases arising out of the Papal visit did not directly address themselves to the politico-religious problem, but use of the preliminary balancing test in connection with the three-pronged test of *Nyquist* suggests that both *Baird* and *O'Hair* should have been decided differently. Problems similar to Pope John Paul II's visit seem likely to recur, both because of his future ministries and the probability of visits by other similarly situated foreign leaders. The presence of religious leaders in positions of authority in our own state and national governments suggests that even local campaign rallies and other seemingly innoccuous social

events should be scrutinized for Establishment Clause conflicts. In the future courts must directly address the problems caused by politico-religious roles; the use of a preliminary balancing test offers one possible solution.

Footnotes

d1 I wish to thank Mr. John Florescu of the Boston Globe, Mr. Stephen H. Galebach, Father O'Mally, S.J., the Under Consul General of Israel in Boston, and the Philadelphia Branch of the American Civil Liberties Union for their help in obtaining sources.

a1 Member of the Class of 1981 at Harvard Law School.

1 U.S. CONST. amend. I.

2 Boston Globe, Sept. 13, 1979 at 1; and personal communication from Father O'Mally, S.J., Boston, Mass., 1980.

3 This was a fourteen hour visit on October 4. Granfield, *Paul VI*, BRITANNICA BOOK OF THE YEAR 1966 at 143 (1966).

4 Boston Globe, Sept. 13, 1979 at 1.

5 Boston Globe, Sept. 29, 1979 at 2.

6 Boston Globe, Sept. 13, 1979 at 1.

7 TIME, Jan. 7, 1980, at 13.

8 Smogorzewski, *Andorra*, BRITANNICA BOOK OF THE YEAR 1978 at 181 (1978).

9 These include former President William Tolbert of Liberia, who was a Baptist minister, NEWSWEEK, April 21, 1980, at 63; former Prime Minister Abel Muzorewa of Zimbabwe-Rhodesia, who is also a bishop, TIME, March 3, 1980, at 39; and Archbishop Makarios III of Cyprus, Collins, *Cyprus*, BRITANNICA BOOK OF THE YEAR 1978 at 275 (1978). Francois Duvalier, former President for Life of Haiti, who was rumored to be adept at voodoo, might be another example. Bastien, *Voudoun and Politics in Haiti*, in H. COURLANDER AND R. BASTIEN, RELIGION AND POLITICS IN HAITI 56-62 (1966).

10 Based mainly in Jamaica, and to a lesser extent in Black communities such as Harlem, the Rastafarians, who take their appellation from Selassie's name previous to his coronation, believed that the Emperor was a living god, the returned Messiah. Africa is their Zion and they feel that their sojourn in Jamaica is temporary, a punishment by God for some sin they committed. The sect, dating from after 1930, is drawn mainly from the poorer members of the community. S. AND E. HURWITZ, JAMAICA A HISTORICAL PORTRAIT 190-91 (1971); M. CARLEY, JAMAICA THE OLD AND THE NEW 138 (1963); I. FLEMING, IAN FLEMING INTRODUCES JAMAICA 89-92 (M. Cargill ed. 1965); and L. BARRETT, THE RASTAFARIANS (1977).

11 I. FLEMING, THRILLING CITIES 198 (New American Library ed. 1964).

12 “Marching Rule” involved rumors of approaching American ships, imminent entry by believers into Paradise, and the replacement of government chiefs by indigenous authorities. The use of “security forces” to run towns accompanied a revival of ancient customs and nationalist attitudes. Practical aspects of the belief included the concentration of villages and the cultivation of larger gardens. P. WORSLEY, THE TRUMPET SHALL SOUND 175-76 (1957). The Pope's army was expected on South San Cristobal; the marines on Ulawa. G. COCHRANE, BIG MEN AND CARGO CULTS 90 (1970).

13 Many of these beliefs were based on the notion that “cargo,” the material goods which Europeans appeared to gain effortlessly, without working, had been unfairly diverted from the natives; its “restoration” would result in a “golden age.” In an early Solomon Island cult, the Germans were said to be bringing the cargo. P. WORSLEY, *supra* note 12, at 119. In the Madang District of New Guinea, circa 1942, it was believed that God-Kilibob would return with his ships full of Cargo; “These he would hand over to the spirits of the dead, who would appear in the guise of Japanese servicemen. They would bring the goods to the natives by airplane and help them drive out the Europeans, missionaries included.” P. LAWRENCE, ROAD BELONG CARGO 102 (1964). In the “Vailala

Madness," a cult typified by forms of spiritual possession which was found in the Gulf Division of Papua circa 1919, "a 'faded but martial portrait of George V' was displayed as Ihova Yesu-nu-ovaki: Jehovah, the younger brother of Jesus." P. WORSLEY, *supra* note 12, at 83. In the "John Frum" movement, characterized by moral injunctions against idleness, the encouragement of communal gardening and cooperation, and dancing and kava-drinking, "It was prophesied that large numbers of black Americans were coming to rule over the natives. Their dollars would become the new money; they would release the prisoners, and pay wages." This belief was found in the New Hebrides during World War II; even as late as the 1950's, "the recently-arrived British Delegate was said to be an avatar of Noah, who was now equated with John Frum," *id*. at 154, 157, and 160. One individual proclaimed himself to be John Frum, as well as king of America and Tanna. "He planned to construct an aerodrome. An American liberation army soon to be sent by his father would land there. Anyone who refused to work was threatened with destruction by aerial bombing." F. STEINBAUER, MELANESIAN CARGO CULTS 87 (1979). The Letub Cargo movement claimed that an influential native then living happily in the Madang District, "had been killed during the war, had visited the King in Australia and God in Heaven, and had received God's promise that the Cargo would arrive soon. He then returned to earth as a spirit." P. WORSLEY, *supra* note 12, at 216. Ten years later, in 1956, a village headman in the Rai Coast area claimed to have died and gone to heaven where he had visited God and King George before returning to earth. F. STEINBAUER, *supra* at 53. Of particular interest for its Constitutional implications is the "Johnson Cult" of New Hanover in the Bismarck Archipelago, which surfaced in 1964 at the time of the first elections to the Papua-New Guinea House of Assembly.

Somehow they had heard of the American president Lyndon B. Johnson and hoped to obtain a better government through him. The question was how to persuade Johnson to become a candidate for Lavongai, or better still, how could he be persuaded to bypass the whole electoral procedure and come directly to the island. According to their means, limited insights and concepts the leading men saw a frank approach to Johnson, and a corresponding financial offer, as the only way. They began to boycott the election, to collect ten shillings ($1) from each of the movement's followers and to send the money to the USA. A large sack of shillings was delivered to the local priest of the Catholic mission, and he was asked to transmit the money so that President Johnson might be purchased, or at least his travelling costs be covered.

Id., at 73-74. *See also* note 104.

14 Personal communication from the Under Consul General of Israel, Boston, Mass., 1980. Being a rabbi does not necessarily imply having a religious function in Judaism. *Id*.

15 *Paisley, Rev. Ian,* in DOD'S PARLIAMENTARY COMPANION 1979 (New Parliament ed.), at 542-43. *See also* A. STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 626 (1950), which notes the presence of Anglican bishops holding ex officiis membership in the House of Lords and of Roman Catholic clergymen who serve in Parliaments on the Continents. Three Spanish priest, for example, are Socialist Party members in the Cortes Gersoules, and a fourth is Communist mayor of a town in Barcelona. NEWSWEEK, May 19, 1980, at 31. In Nicaragua, Ernesto Cardenal (S.J.) is Minister of Culture, Miguel D'Escoto (Maryknoll) is Foreign Minister and four or five other priests hold high governmental posts, including membership on the Council of State, Washington Post, May 8, 1980, at A33; TIME, May 19, 1980 at 30; and Boston Sunday Globe, May 18, 1980, at 92. The South Americans have been told by their bishops that they will have to turn over their jobs to lay people, Boston Sunday Globe, May 18, 1980, at 92, and the status of other priestly office-holders has been thrown into doubt by the recent Papal enforcement of a ban on such participation in politics. *See* note 16.

16 These are: Rep. John H. Buchanan (R-Ala.), a Baptist minister; Delegate Walter E. Fauntroy (D-D.C.), a Baptist minister; Rep. Tennyson Guyer (R-Ohio), a minister of the Church of God; Rep. William H. Gray, III (D-Pa.), a Baptist minister, Rep. Robert F. Drinan (D-Mass.), an ordained Jesuit priest, M. BARONE, G. UJIFUSA, AND D. MATTHEWS, THE ALMANAC OF AMERICAN POLITICS 1980, at 14- 15, 168, 683, 747 and 401 (1979). *See also id.*, May 7, 1980, at 13 and TIME, May 19, 1980 at 30; *see also* A. STOKES, *supra* note 15, at 626-28 (1950) and NEWSWEEK, May 19, 1980 at 31, for other examples of national and state officials who have held religious positions (including at least one Lieutenant Governor and a U.S. Senator). In May, 1980, Rep. Drinan was informed of a final decision by the Vatican that he would not be permitted to run for re-election, Boston Globe, May 5, 1980, at 22. Similarly, former Wisconsin Rep. Robert Cornell, also a priest, was ordered to desist in his attempt to stage a political comeback, *id.*, May 6, 1980, at 1. This was based on a 1971 decree by the Bishops' Synod in Rome which stated that, except with the approval of church superiors, "leadership or active militancy on behalf of any political party is to be excluded by every priest." *Id*. at 8 and 10 and by Article 139 of the Canon Law. TIME, May 19, 1980, at 30. It is believed that nuns, or lay people, would not be affected by the decision to implement this rule; the position of such political figures as Sister Carolyn Farrell (Mayor of Dubuque, Iowa), Sister

Elizabeth Morancy (member of the Rhode Island legislature) and Sister Mary Barbara Sullivan (member of City Council and Mayor pro tern of Belmont, North Carolina), would therefore remain the same. Boston Globe, May 6, 1980, at 8 and May 7, 1980, at 15. While Pope John Paul II's directive might seem to solve Establishment Clause problems as far as the Catholic Church is concerned, it raises as many questions as it answers. Permission for a cleric to seek or hold public office could theoretically be granted at any time in the future and, as the Boston Globe noted in an editorial, this action by the Pope raises serious questions about the Church's potential for influencing the political process. *Id.* at 12. *See also id.*, May 7, 1980, at 13 and TIME, May 19, 1980, at 30.

17 435 U.S. 618 (1978). This disqualification was adopted from England by seven of the original states; later six new states had similar exclusions. *Id.* at 622. New York, Delaware and South Carolina barred clergymen from civil office while Maryland, Virginia, North Carolina and Georgia excluded them from the legislature. L. PFEFFER, CHURCH, STATE AND FREEDOM 118 (rev. ed. 1967). Only Maryland and Tennessee continued such qualifications into this century. 435 U.S. at 625.

18 *Id.* at 628-29 (majority holding) (footnote omitted). The majority distinguished this case from Torcaso v. Watkins, 367 U.S. 488 (1961) by claiming that it deals with *status* rather than *belief*. 435 U.S. at 626-27. Justices Brennan (concurring) at 634-35 and Stewart (concurring) at 642-43, rejected this distinction. If this case were seen to be related to Torcaso and to Sherbert v. Verner, 374 U.S. 398 (1963), as Justice Brennan argues in his concurrence at 633, MacDaniel would appear to be less of an advance from previously enunciated Court positions. This line of cases is identical to that cited by the District Court in Kirkley v. Maryland, 381 F. Supp. 327, at 330 (1974), which struck down Maryland's constitutional disqualification.

19 *See* Boston Globe, Sept. 14, 1979 at 13, which notes that similar objections were not made when Queen Elizabeth II visited Boston.

20 NEWSWEEK, Oct. 15, 1979 at 38-53 and TIME, Oct. 15, 1979 at 14-30.

21 Boston Globe, Sept. 6, 1979 at 1.

22 *Id.*, Sept. 7, 1979 at 1 and Sept. 11, 1979 at 17.

23 TIME, Oct. 15, 1979 at 16 and NEWSWEEK, Oct. 15, 1979 at 42-43.

24 Boston Globe, Sept. 11, 1979 at 17.

25 The flowers and shrubs included 2000-3000 yellow chrysanthemums, several hundred juniper bushes and small yews. *Id.*, Sept. 7, 1979 at 3. Additional logistical problems involved the press entourage of 800-1000 reporters needing telephones, tables, chairs and special cabling facilities. Boston City Hall (closed for the day) was to provide one newscenter, while the Hynes Auditorium and the underground garage at the Common were considered as further locations. *Id.*

26 *Id.*, Sept. 11, 1979 at 28.

27 *Id.*, at 1 and Sept. 13, 1979 at 1.

28 *Id.*, Sept. 14, 1979 at 1.

29 Baird v. White, 476 F. Supp. 442, at 443 (1979).

30 *Id.*, 443, which gives the number of people as 18,000-19,000. Boston Globe, Sept. 27, 1979 at 2, gives the number as 20,000.

31 This was argued before Judge W. J. Skinner. Boston Globe, Sept. 26, 1979 and 476 F. Supp. at 442.

32 476 F. Supp. at 443.

33 *Id.*

34 *Id.*

35 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....” U.S. CONST. amend. I.

36 413 U.S. 756 (1973).

37 476 F. Supp. at 444.

38 343 U.S. 306 (1952).

39 *Id*. at 313-14, quoted in 476 F. Supp. at 444-45.

40 476 F. Supp. at 445.

41 *Id*.

42 Boston Globe, Sept. 26, 1979, at 1. Other problems also arose in Boston. Jewish celebrants of Yom Kippur, which also took place on the day the Mass was scheduled, objected to the idea of identification cards to facilitate their access to synagogues in the downtown area. While the question of constitutionality does not appear to have arisen in the Massachusetts legislature when they passed a state-declared holiday corresponding with the date of the Papal visit, an injunction asking that the holiday be declared an unconstitutional advancement of religion was filed by Mr. John L. Saltonstall, Jr. on behalf of Americans United for Separation of Church and State. *Id.*, September 29, 1979, at 1. This was dismissed by U.S. District Court Judge A. Mazzone, who ruled that the primary purpose of the holiday was secular -- to benefit public safety and convenience. *Id*.

43 *Id.*, Sept. 13, 1979 at 1.

44 *Id*.

45 *Id.*, Sept. 14, 1979 at 1.

46 Gilfillan v. City of Philadelphia, No. 79-3377, slip. op. at 2 (E.D. Pa. Nov. 9, 1979).

47 *Id*. at 1.

48 *Id*. at 4. The court specifically did not consider equal protection claims raised by several individuals who sought to intervene as parties plaintiff, but said that these could be the subject of a separate action. *Id*. at 3.

49 *Id*. at 1 and 5, n.3.

50 *Id*. at 2, n.1.

51 *Id*. at 6. Even had civic officials been *present* on the platform, an argument could have been made that there had been an impermissible mixing of church and state.

52 *Id*.

53 *Id*. at 6, n.4.

54 403 U.S. 602, at 615 (1971), cited in No. 79-3377, *supra* note 46, at 10.

55 No. 79-3377, *supra* note 46, at 10.

56 *Id*. at 11.

57 *Id*.

58 *Id*. at 12. This was tested by analogy with several Supreme Court decisions, all of which dealt with one of two issues. The first of these was aid to church schools and universities: Tilton v. Richardson, 403 U.S. 672 (1971) (building constructed with Federal aid might impermissibly be used for religious purposes at a later date); Nyquist, *supra* note 36 (grants to nonpublic schools to maintain and repair facilities and equipment to ensure health, welfare and safety of students might be used to heat and light the school chapel

or classrooms in which religion was taught); and Lemon, *supra* note 54 (reimbursement to nonpublic schools for cost of teaching mathematics, modern foreign languages and the physical sciences). The second issue was religious "intrusions" into public schools: School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (reading of Bible and recitation of the Lord's Prayer); Engel v. Vitale, 370 U.S. 421 (1962) (in-class recitation of "non-denominational prayer"); Tudor v. Board of Education, 14 N.J. 31 (1953), *cert. denied*, 348 U.S. 816 (1954) (free distribution of the Gideon Bible); and McCollum v. Board of Education, 333 U.S. 203 (1948) (released time program). In fact the display cases cited in No. 79-3377, *supra* note 46, at 12 seem far more to the point in providing analogous instances.

59 No. 79-3377, *supra* note 46, at 15.

60 *Id*.

61 *Id*. at 9, n.7.

62 *Id*. at 16.

63 Boston Globe, Sept. 13, 1979 at 1.

64 Daily Progress (Charlottesville, Va.), Oct. 6, 1979 at A8.

65 Washington Post, Oct. 9, 1979 at B1.

66 O'Hair is known for her filing of similar suits on First Amendment matters: Murray v. Curlitt, 374 U.S. 203 (1963) (forbidding recitation of the Lord's Prayer in the schools); O'Hair v. U.S., 281 F. Supp. 815 (D.D.C. 1968) (challenge to the constitutionality of the Commerce Act of 1934, based on the fact that radio stations refused to broadcast O'Hair's atheistical views as a counterpoint to the religious programming); O'Hair v. Paine, 312 F. Supp. 434 (W.D. Tex. 1969); 432 F.2d 66 (5th Cir. 1970); *appeal dis.*, 397 U.S. 531 (1970); and *cert. denied*, 401 U.S. 955 (1971) (attack on the religious statements made by astronauts on television and the carrying of personal religious objects on their flight); O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978) (alleging that the national motto "In God We Trust" and its use on coins and currency was unconstitutional).

67 No. 79-2462 and No. 79-2463 (D.D.C. Oct. 3, 1979). This was a consolidation of two suits, one against the Secretary of the Interior, who had issued a permit for the Mass, and the other against the Pope himself. Along with the Secretary of the Interior, William Cardinal Baum, Archbishop of the Archdiocese of Washington, Bishop Thomas W. Lyons, and the District of Columbia were cited as co-defendants. The Pope was dropped as a defendant because he was not the holder of the permit and could not be served and sued in his position as head of the Vatican City State due to the Foreign Sovereign Immunities Act 28 U.S.C. § 1601 *et. seq*. (1976). *Id*. at 2. Note that according to 28 U.S.C. § 1603(a), a "foreign state" may include a political subdivision of a foreign state; thus the applicability of this to the Pope would not necessarily depend upon recognition of the Vatican City State by the United States.

68 No. 79-2462, *supra* note 67, at 2.

69 *Id*. at 3.

70 *Id*. at 4.

71 *Id*.

72 *Id*.

73 *Id*. at 5.

74 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

75 No. 79-2462, *supra* note 67, at 5.

76 *Id*.

77 *Id*. at 6.

78 495 F.2d 65 (D.C. Cir. 1973).

79 No. 79-2462, *supra* note 67, at 6.

80 Daily Progress (Charlottesville, Va.), Oct. 6, 1979 at A6 and O'Hair v. Andrus, No. 79-2170 (D.C. Cir. Oct. 5, 1979).

81 Daily Progress (Charlottesville, Va.), Oct. 6, 1979 at A8.

82 O'Hair v. Andrus, 100 S. Ct. 197 (1979).

83 TIME, Oct. 15, 1979 at 28.

84 No. 79-2170, *supra* note 80, at 2.

85 *Id*. at 4.

86 *Id*. at 3.

87 *Id*. at 4.

88 *Id*. at 5.

89 *Id*. at 6. The court specifically cited Hague v. CIO, 307 U.S. 497 (1939); Kunz v. New York, 340 U.S. 290 (1951); and Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975).

90 No. 79-2170, *supra* note 80, at 7.

91 345 U.S. 67 (1953), cited in No. 79-2170, *supra* note 80, at 9.

92 No. 79-2170, *supra* note 80, at 10.

93 *Id*.

94 *Id*.

95 *Id*. at 11.

96 *Id*.

97 *Id*. at 13.

98 *Id*. at 4 (MacKinnon, J., concurring).

99 No. 79-3377, *supra* note 46, at 6, n.4.

100 L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1000-03 (1978).

101 413 U.S. at 773.

102 Boston Globe, Sept. 14, 1979 at 13.

103 Relevant sections of the U.S. CONST. include art. I § 5; art. II §§ 2 and 3; art. III § 2; and amend. X.

104 *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) for a discussion of this problem, particularly at 1071-72. The definition of what constitutes “religion” for the purposes of the First Amendment has recently been expanded. Thus Torcaso, *supra* note 18, held humanism to qualify; Transcendental Meditation's teaching in public schools has been

held to violate the Establishment Clause in Malnak v. Yogi, 440 F. Supp. 1284 (D.C. N.J. 1977); 592 F.2d 197 (C.A. N.Y. 1979); and Scientology has been held to be a religion in Founding Church of Scientology v. United States, 409 F.2d 1146 (C.A. D.C.), *cert. denied*, 396 U.S. 163 (1969).

105 FED. R. CIV. P. 8(d) and 16 state that failure to deny averments to which a responsive pleading is required constitutes an admission and that issues for trial are limited to those not disposed of by admissions or agreements of counsel. The rationale behind this rule is that it is fair to hold a party to his statements in an adversarial legal system such as the American one. FED. R. EVID. 801(d)(2) admits a statement against interest by a party-opponent which might otherwise be excluded as hearsay. The theory for this is that no one would state something against his own interest unless he knew or believed it to be true.

106 413 U.S. at 773.

107 403 U.S. at 683.

108 413 U.S. at 773.

109 This determination is supported by the religious purposes of his visit. Boston Globe, Sept. 13, 1979 at 1; NEWSWEEK, Oct. 8, 1979 at 37; TIME, Oct. 15, 1979 at 15-16; and NEWSWEEK, Oct. 15, 1979 at 52-53.

110 476 F. Supp. at 445. *See* text at *infra* note 119, which refutes this argument.

111 *See* note 51 *supra*.

112 476 F. Supp. at 443.

113 *Id*. at 445. *See infra* note 115.

114 *Id*. at 443.

115 *Id*. at 445. The court neglected to put forward an ecumenicalism argument which might have been held to justify the presence of non-Catholics at the Mass.

116 There is also an argument that the inclusion of the civic leaders might itself have constituted an impermissible entanglement. *See* text at *supra* note 51 and note 111.

117 One could argue that this plan was more intrusive as regards the remaining public interest which attached to the Common than would have been the case if the Church had reserved an area with no seats, or had provided seats without stipulating who could use them.

118 Again, the Church's action might have been considered to be less intrusive had a ticketing system not been used.

119 476 F. Supp. at 445.

120 No. 79-2462, *supra* note 67, at 2 (MacKinnon, J., concurring).

121 *See* L. TRIBE, *supra* note 100, at 1000. *But see* Korematsu v. United States, 323 U.S. 214 (1944), in which state action involving an explicitly racial classification (a military order excluding Americans of Japanese origin from designated West Coast areas) was upheld.

122 The fact that a preliminary balancing test has so often proved decisive in other fields could be held merely to reflect the small number of cases in which the issues are so finely balanced as to make a resort to both the preliminary test and to the *Nyquist* test necessary.

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Notes

DAMAGES AND DAMOCLES: THE PROPRIETY OF RECOUPMENT ORDERS AS REMEDIES FOR VIOLATIONS OF THE ESTABLISHMENT CLAUSE

David T. Raimer [a1]

Introduction

In June 2006, the United States District Court for the Southern District of Iowa handed down its decision in Americans United for Separation of Church & State v. Prison Fellowship Ministries. [1] The case involved the constitutionality of a faith-based prison rehabilitation program, which, while operated by a private organization (Prison Fellowship), was funded in part by public monies. [2] Notably, the party bringing suit was the eponymous public interest group--not the State of Iowa. Had the court simply found the program violated the Establishment Clause--which it did--the case would have received little attention. Courts had previously found similar programs to be unconstitutional with little fanfare. [3] At most, concerned parties on the left and the right would have viewed the case respectively as either upholding the doctrine of strict separation between church and state or as yet another example of a concerted effort to banish religion from the public square. Judge Pratt, however, did more than declare the program unconstitutional. In addition to enjoining the continued operation of the program, [4] the court also filed a recoupment order, requiring Prison Fellowship to repay over $1,500,000 to the State of Iowa. [5] The order was unprecedented. [6] Never before had a federal ***1386** court required "a private party, at the behest of another private party, to reimburse the public treasury when the government itself ha[d] not sought reimbursement" for a violation of the Establishment Clause. [7] While this particular recoupment order was eventually overturned on appeal, the reviewing court did not preclude the use of such orders in future cases. [8] Moreover, at least one other circuit has indicated that recoupment is indeed a valid remedy. [9]

This Note argues that the use of such recoupment orders in the context of the Establishment Clause is not only constitutionally questionable, but also ill-advised from an equitable perspective. While the Supreme Court's recent decision in Hein v. Freedom from Religion Foundation, Inc. [10] marginally cabins the application of this remedy to legislatively appropriated funds, a very real potential for abuse remains. Hein's limiting effect notwithstanding, the doctrine articulated by the district court in Americans United I and by the Seventh Circuit in Laskowski v. Spellings [11] hangs a veritable sword of Damocles over religious groups that receive public funding, essentially forcing them to wager their existence on their understanding of the Supreme Court's Establishment Clause jurisprudence.

Part I contains a synopsis of the taxpayer standing doctrine articulated in Flast v. Cohen, [12] and a brief recitation of cases in which it has been used to seek restitutionary relief. Part II addresses the relevant constitutional issues, first questioning whether actions for reimbursement of funds to a government treasury can properly be brought under Flast and then assessing the suitability of this remedy in light of concerns regarding the separation of powers and federalism. Part III discusses the equitable considerations involved in using restitution as a remedy for a violation of the Establishment Clause, and proceeds to

detail the potential deterrent effect recoupment orders could have on faith-based organizations who seek public funds in order to provide ***1387** social services. Part IV concludes with the assertion that if recoupment orders are not stricken from the list of remedies for Establishment Clause violations, at the very least, courts should provide a safe haven akin to qualified immunity for religious groups who contract with government entities.

I. The History of Restitution as a Possible Remedy for Establishment Clause Violations

Until recently, the thought of using restitution to remedy an Establishment Clause violation was unheard of. Bringing such an action in the form of a private taxpayer suit would have been even more unthinkable. In fact, even now "restitution[] hardly figures into constitutional remedies at all." [13] This is largely due to the simple fact that for nearly two hundred years of our nation's history, taxpayers lacked standing to bring suit for a violation of the Establishment Clause. [14] The Supreme Court's 1968 ruling in Flast dramatically altered this landscape. [15]

Flast arose from a request to enjoin the expenditure of federal funds received by religious schools. [16] The schools used these funds to finance educational programs and purchase schoolbooks, allegedly in violation of the Establishment Clause. [17] Initially, the lower courts ruled that the taxpayers bringing suit lacked standing to proceed. [18] With Chief Justice Warren writing for the majority, the Supreme Court reversed, finding an exception to the general rule against taxpayer ***1388** standing. The Court set out a two-part test, stating that first, taxpayers "must establish a logical link between [their taxpayer] status and the type of legislative enactment attacked." [19] For the Court's purposes, this means that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." [20] Second, "taxpayer[s] must establish a nexus between [their taxpayer] status and the precise nature of the constitutional infringement alleged." [21] The Court clarified that this requires the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." [22] Finding the Establishment Clause to be a "specific constitutional limitation" on Congress' power to tax and spend, the Court granted taxpayers standing to sue for its violation. [23]

Even with the ruling in Flast, however, there have been few cases in which taxpayers have sought restitution to a government treasury. [24] Indeed, "[w]hile . . . restitution orders are fairly common in government contract law . . . those orders are highly unusual in cases involving the First Amendment's Establishment Clause." [25] The few cases addressing the question are discussed below.

A. American Jewish Congress v. Bost

American Jewish Congress v. Bost [26] appears to be the first case in which the issue of restitution was discussed in a taxpayer suit. Plaintiffs challenged a contract between Texas and a nonprofit group of businesses and churches under the state's Charitable Choice program. [27] The complaint alleged that the $8000 grant involved had ***1389** been used to purchase Bibles and sponsor religious instruction in connection with the faith-based group's job training program. [28] Since the suit was not brought until after the funds had been expended and the contract had not been renewed, [29] the district court mooted the plaintiff's claims for declaratory and injunctive relief. [30] As the case was moot, the court did not consider the plaintiff's request that the funds expended be returned to the public treasury. While the Fifth Circuit agreed with the lower court's decision on the declaratory

and injunctive claims, in a two-paragraph unpublished per curium opinion, it nonetheless remanded the case for a consideration of whether restitutionary relief would be proper. [31] The implications of the court's decision to consider restitutionary relief even where the underlying claim was moot would later be made plain in Laskowski. [32]

On remand, the district court, in a brief opinion, "wholly reject[ed]" the plaintiffs claim for recoupment, [33] finding "no case law to support plaintiffs' tenuous position that taxpayer standing allows a suit for the damages plaintiffs seek." [34] The court based its ruling largely on standing grounds, distinguishing Flast by noting that it had dealt only with prospective injunctive relief. [35] Moreover, the court noted that even if the plaintiffs did have standing, an order for recoupment should not be issued when the relief sought is essentially de minimis. [36] In a footnote, the court elaborated: "To mix metaphors, plaintiffs are attempting to place an imaginary cart before a pygmy horse (after all, the total contract was only $8,000 dollars out of [a] state budget of over $41 billion in fiscal year 1999) that has long since left the barn." [37]

B. Laskowski v. Spellings

Bost appeared to be nothing more than a blip on the radar screen of Establishment Clause case law. However, Laskowski signaled what has the potential to be a sea change in First Amendment jurisprudence. Laskowski originated as an attempt to prevent Secretary of Education Margaret Spellings from issuing a grant to the University of ***1390** Notre Dame. [38] The $500,000 grant was specifically earmarked by Congress to fund the Alliance for Catholic Education (ACE), a training program for teachers in Catholic schools. [39] The taxpayers bringing suit alleged that ACE's religious components violated the Establishment Clause. [40] As was the case in Bost, since the one-time grant had already been expended, prospective injunctive relief was impossible. The district court accordingly dismissed the case as moot, finding that no meaningful relief could be granted. [41]

The Seventh Circuit, however, vacated the district court's ruling with Judge Posner writing the opinion. [42] Though the plaintiffs had not asked for restitutionary relief, the court raised the issue sua sponte. [43] Noting that "we cannot think of any reason why such relief should not be possible," the court went on to indicate that "[r]estitution is a standard remedy . . . in public-law as well as private-law cases." [44] Indeed, the court argued that restitution had to be a remedy available under the Establishment Clause. Otherwise, the court hypothesized, Congress could authorize direct aid for proselytization and the Treasury Department could disperse the funds the next day. [45] In such a scenario, plaintiffs would not be able to obtain an injunction in time to halt the expenditure of federal funds for patently unconstitutional purposes. [46]

***1391** With restitution on the table, the court then considered how such a remedy could be implemented. As indicated previously, the government has always been authorized to seek reimbursement for funds received illegally. [47] Moreover, executive branch officials are generally authorized by statute to seek restitution for grant monies spent in an unconstitutional manner. [48] However, an executive branch agency has unreviewable discretion as to whether to take such enforcement action. [49] As Secretary Spellings had no desire to pursue an enforcement action, the court could not order her to do so. Instead, Judge Posner reasoned that the district court could "simply order Notre Dame to return the money to the treasury." [50] The court analogized the situation to "a case of money received by mistake and ordered to be returned to the rightful owner," [51] dismissing Notre Dame's [52] argument that such relief would be improper because a private entity (the University) cannot violate the Establishment Clause. [53] Since restitution was available, the case was no longer moot, as plaintiffs could now recover some form of "meaningful relief" even if an injunction would have no effect. [54]

The court also briefly noted a variety of common law defenses to restitution. Most notably, if the recipient of the "illegal" funds did not "know[] or have . . . reason to know" it was receiving funds in violation of the Constitution and reasonably relied to its detriment on that belief, the recipient would not be liable. [55] As it did not decide the case on the merits, the court did not rule on the reasonableness of Notre Dame's belief in the constitutionality of its actions. [56]

***1392 C. Americans United for Separation of Church & State v. Prison Fellowship Ministries**

With the holding in Laskowski that "there is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them, either in establishment clause cases or in any other class of cases," [57] it was only a matter of time before a case arose in which a court would order restitutionary relief. That case wasAmericans United I--the first case in which a court, absent special circumstances, [58] "ordered a faith-based group to repay monies to the state or federal government after a finding that the payment was in violation of the Establishment Clause." [59]

As discussed earlier, Americans United brought the case as a challenge to a faith-based prison rehabilitation program created pursuant to a contract between the State of Iowa and Prison Fellowship Ministries. [60] In a lengthy and highly fact-specific decision, the court concluded that the program was "pervasively sectarian," and thus was ineligible to be supported by government funds. [61] For the purposes of this Note, the court's reasoning with regard to the remedy ordered is of particular significance.

With the constitutional violation established, the court still had to decide whether to award the restitutionary damages requested by the plaintiffs. Not surprisingly, the court relied heavily on Laskowski in ***1393** making this determination. [62] The question ultimately came down to the reliance defense articulated in Laskowski. The court agreed with Prison Fellowship that
"the propriety of relief . . . must be measured against the totality of the circumstances and in light of the general principle that, absent contrary directions, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith, and by no means plainly unlawful." [63]

In an effort to demonstrate its reliance interests, Prison Fellowship pointed to the intricate nature of Establishment Clause jurisprudence, the complexity of the factual situation at issue (as demonstrated by the fact that the case actually went to trial as opposed to being resolved at the summary judgment stage), and its "good faith effort" over the years "to comport with developing law." [64] Nevertheless, the court found several "compelling arguments" that "weigh[ed] in favor of recoupment." [65] First, the court decided that the severity of the Establishment Clause violation was "extraordinary." [66] Characterizing the program as an "intentional choice by the state of Iowa and InnerChange to inculcate prisoners as treatment for recidivist behavior," the court noted that Prison Fellowship's "reliance on the esoteric nature of Establishment Clause law can carry them only so far." [67] The court also determined that while the "financial burden [the recoupment order would impose on] Prison Fellowship will not be insignificant, . . . it [would] not be unmanageable." [68] Finally, the complexity of the case at hand failed to demonstrate that Prison Fellowship's reliance was reasonable. Given Prison Fellowship's access to competent counsel and the fact that similar faith-based prison rehabilitation programs had been struck down, the court reasoned that the defendants had sufficient notice that their conduct might be unconstitutional. [69] Thus, the court concluded that
[t]he type of constitutional violation here, the substantial nature of that violation, the degree of knowledge of the Defendants about the risk associated with the program, and the financial impact of the judgment on the Defendants, taken together, outweigh the reliance ***1394** InnerChange and Prison Fellowship had on the contract in this case. [70]

This holding, however, did not stand for long. Prison Fellowship appealed to the Eighth Circuit and a three judge panel (including former Supreme Court Justice Sandra Day O'Connor [71]), unanimously struck down the recoupment order. [72] The court found that the district court, while articulating the proper standard, [73] abused its discretion when applying that standard. [74] In this case, there were specific statutes on which Prison Fellowship validly relied that authorized its funding. [75] There was no finding of bad faith on the part of Iowa, nor could Prison Fellowship be considered to have had "clear notice [that] the program was plainly unlawful." [76] Moreover, the lower court ***1395** failed to give due deference to state officials statements that the program was beneficial. [77] The recoupment order could not stand under these circumstances. Significantly, however, the court nowhere disavowed the use of such orders in future cases. [78]

II. Constitutional Concerns

By importing restitution into Establishment Clause jurisprudence, the cases discussed above raise a variety of constitutional issues. If the doctrine formulated in Laskowski and Americans United I is not repudiated, [79] it could mark a major shift in the manner in which constitutional violations are enforced. Even now, those cases have significant implications for traditional standing doctrine as well as basic principles of separation of powers and federalism.

A. The Flast Doctrine Does Not Extend to the Use of Restitution as a Remedy

In the years since Flast was decided, it has proven to be a "limited exception to the general rule that citizens lack standing to sue in federal court on generalized grievances about the conduct of government." [80] Indeed, the Supreme Court "has steadfastly refused to expand Flast and has never recognized private party repayment to the Treasury as an appropriate remedy for an Establishment Clause violation in a suit based on taxpayer standing." [81] The doctrine articulated in Laskwoski and Americans United I, however, has the potential to lead to a "dramatic expansion of taxpayer standing." [82]

***1396** 1. The Implications of Hein v. Freedom from Religion Foundation, Inc.

Before further analysis of the fit between traditional taxpayer standing doctrine and restitutionary relief, a brief discussion of the Supreme Court's recent decision in Hein is warranted. Hein began as a taxpayer suit challenging various executive branch agencies' use of funds in furtherance of President Bush's "Faith-Based Initiative." [83] However, all expenditures were drawn from general executive branch appropriations--there was no explicit congressional appropriation. [84] This distinction proved decisive. Justice Alito, announcing the judgment of the Court, noted that "[t]he expenditures challenged in Flast . . . were funded by a specific congressional appropriation and were disbursed . . . pursuant to a direct and unambiguous congressional mandate." [85] It was this "'logical link"' [86] that the Court found to be "missing" in Hein. [87] Flast, the Court stated, allowed challenges "'only [to] exercises of congressional power"' [88] --in Hein, the "expenditures resulted from executive discretion, not congressional action." [89] The Court therefore concluded that Flast stood only for the principle that taxpayers had standing to challenge direct legislative appropriations [90] --it did not allow taxpayers to do the same for funds distributed at the whim of the executive. [91]

***1397** While this ruling insulates most participants in the White House's Faith-Based Initiative from suit and potential recoupment orders, there are still many organizations that receive government funds pursuant to congressional action. [92] Under Hein, these organizations are still subject to suit by taxpayer plaintiffs. [93]

Ultimately, while Hein is no doubt a landmark case in the area of taxpayer standing, it is of limited relevance to the question at hand. Hein dealt with the type of appropriation that could be challenged--it did not purport to address the type of remedies available to a taxpayer who successfully brought suit. However, by clarifying the scope of the Flast doctrine, the Court did (albeit inadvertently) reduce the number of faith-based organizations potentially subject to recoupment orders. The case also signaled that in some Justices' minds, the very notion of taxpayer standing rests on tenuous grounds. [94]

2. Taxpayer Standing Principles and Recoupment

Even when limited to challenges to legislatively appropriated funds, the doctrine of restitutionary relief does not fit within the Supreme Court's established taxpayer standing jurisprudence. It is an ***1398** elementary principle of law that before a court will exercise subject matter jurisdiction to decide a case on the merits, the party bringing the suit must have standing. [95] Constitutional standing requires, "at an irreducible minimum," that the party invoking the court's authority "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." [96]

The burden is on the plaintiff to affirmatively demonstrate standing "'separately for each form of relief sought.'" [97] In fact, a lack of jurisdiction is presumed prior to such a showing. [98] Thus in a taxpayer suit for restitution, a plaintiff must show that she has standing to bring not only a claim for a violation of the Establishment Clause, but also that she has standing to seek a recoupment order. While a taxpayer plaintiff can establish the former, she cannot demonstrate the latter.

At the most basic level, a plaintiff cannot show any injury which can be redressed by a recoupment order. In Hein, Justice Scalia provides a helpful framework for understanding the type of "injury" courts will find sufficient for taxpayer standing purposes. [99] "Wallet Injury," he argues, "is the type of concrete and particularized injury one would expect to be asserted in a taxpayer suit, namely, a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action." [100] Alternatively, the taxpayer could attempt to claim an injury from the use of his tax dollars to support religious indoctrination. Justice Scalia refers to this type of "injury" as "Psychic Injury"--injury "consist[ing] of the taxpayer's ***1399** mental displeasure that money extracted from him is being spent in an unlawful manner." [101]

However, it is unclear how either injury is sufficient to establish standing to seek restitutionary relief. "Wallet Injury" of this kind is neither traceable nor redressable. [102] Indeed, the Supreme Court has emphatically rejected the notion that such an injury is sufficient to establish standing. In Frothingham v. Mellon, [103] the Court held that a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others [and] is comparatively minute and indeterminable." [104] The effect of a purportedly unconstitutional act on an individual citizen's tax burden is too "remote, fluctuating and uncertain" [105] to rise to the level of the "actual injury" necessary for standing purposes. [106] Nothing in Flast purports to give taxpayers an interest in the public treasury. [107] To the contrary, "taxpayers in [those] suits are not vindicating losses sustained by the Treasury." [108]

Assuming, arguendo, that "Psychic Injury" is sufficient grounds for taxpayer standing, [109] restitutionary relief is still not proper. If taxpayer standing under Flast is designed to ensure "'that the taxing and spending power [is not] used to favor one religion over another or to support religion in general,"' [110] plaintiffs can prevent this "'evil[]"' by seeking prospective injunctive relief and consequently bringing the unconstitutional action to a halt. [111] As Justice Scalia noted, "Psychic Injury is directly traceable to the improper use of taxpayer funds, and ***1400** it is redressed when the improper use is enjoined." [112] Elsewhere, the Supreme Court has indicated that Flast is limited by its express terms to curtailing the exercise of the congressional taxing and spending power. [113] Taxpayer plaintiffs are allowed to seek an injunction to curb the unconstitutional exercise of this power--their standing does not extend to restoring any expended funds to the public treasury. [114]

Indeed, it is neither necessary nor appropriate to seek a recoupment order once an injunction is obtained. Again, the injury sustained by the taxpayer in this scenario is the use of his tax dollars in an allegedly unconstitutional manner. That injury is redressed by an injunction preventing any future use of the funds in such a manner. Any "Psychic Injury" to the plaintiff ceases at that point. Seeking a recoupment order in addition to the injunction can do nothing to redress the injury suffered. Once appropriated funds are expended towards an allegedly unconstitutional purpose, the damage, so to speak, has been done. A recoupment order cannot, for example, erase the memory of those subjected to unconstitutional government-sponsored proselytization. The bell cannot be unrung.

Even if a plaintiff could demonstrate actual injury of one form or another, there is yet another reason why that injury could not be redressed by a recoupment order. Just as the injury to the plaintiff must be personal, the "redress" provided by the court must likewise be personal. But in the case of a recoupment order, even if plaintiffs were to succeed on the merits, the relief afforded would be reimbursement of the contested funds to the public treasury. [115] The plaintiff derives no personal benefit from such action. [116] Thus, restitution is a particularly inapt remedy to "redress" the type of violation [117] at issue in the Establishment Clause context. Indeed, standing of this sort would empower "federal courts to adjudicate cases where plaintiffs are suffering no injury and have no financial stake in a favorable resolution," ***1401** [118] making a mockery of Article III's case or controversy requirement.

B. Separation of Powers and Federalism Concerns

Even assuming a taxpayer has standing to seek a recoupment order in this arena, a variety of other considerations militate against allowing such a remedy. [119] From a constitutional perspective, perhaps the most serious concern is the effect such a doctrine would have on principles of separation of powers and federalism.

1. Separation of Powers

In the federal separation of powers sphere, the court in Laskowski correctly noted that the decision of whether to seek reimbursement to the public treasury has traditionally been the province of the political branches, specifically, the executive branch. Such decisions are "immune" from judicial review. [120] In Heckler v. Chaney [121] the Supreme Court noted that "an agency's refusal to institute [enforcement] proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict--a decision which has long been regarded as the special province of the Executive Branch." [122] The Court reasoned that this authority flowed from the fact that "it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed."' [123] Consequently, in no circumstances could a court order an executive branch agency to take enforcement actions seeking recoupment of funds.

Laskowski attempted to avoid this potential constitutional controversy by allowing courts to order the private party receiving the government funds to make restitution. [124] However, this effort to "cut[] out the middleman" [125] does not alleviate the constitutional concern. ***1402** Indeed, the court itself noted that this shift was of no "practical significance." [126] The fact remains that the court is ordering the executive branch to receive the proceeds of a de facto enforcement action. Such a position allows courts to take an end run around Heckler any time they see fit. By acting directly on the subject of the potential enforcement action, courts could reduce executive discretion to a mere apparition. The majority in Laskowski characterized such action as a "routine instance[] of restitution," [127] but the dissent correctly pointed out that "such an order would be neither simple nor routine. In the context of a taxpayer suit alleging an Establishment Clause violation, such an order would be extraordinary and unprecedented." [128]

2. Federalism

While separation of powers concerns prevent federal or state courts from ordering their colleagues in their respective executive branches from taking actions inherently discretionary in nature, principles of federalism likewise prevent federal courts from attempting to order state political branches to take such action. Justice Thomas articulated this point in the context of school desegregation in Missouri v. Jenkins, [129] explaining that

what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers. There simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running [state] school systems or prisons and courts running [federal] Executive Branch agencies. [130]

Here, the question is not whether an executive branch agency--at the federal or state level--has discretion to allow unconstitutional activity to continue. The question is whether the executive has discretion over the type of enforcement action it will pursue and the type of remedy it will seek. If a state executive branch agency wants to seek prospective injunctive relief rather than a recoupment order, a federal court cannot tell it otherwise. Principles of federalism constrain the power of federal courts over state executives in this realm of discretionary ***1403** action. Again, just as separation of powers principles prevent federal courts from usurping what are essentially prosecutorial functions of the executive branch, [131] principles of federalism prevent them from doing the same to state executives.

This usurpation is perhaps most evident in Americans United I. Far from seeking recoupment, Iowa was more than satisfied with the services provided to it by Prison Fellowship. [132] Charged as a defendant itself (and hence, on the losing side of the district court opinion), Iowa also supported Prison Fellowship in its appeal. In doing so, the author of the state's brief wryly pointed out the irony in the court's action, noting that "[p]robably in no other case has the State 'lost' the decision, but won restitution of all monies paid." [133] Iowa went on to indicate, in no uncertain terms, that it did not want the money. Rather than adhering to the state's wishes "[t]he . . . Court simply order[ed] all monies returned, in direct contradiction to the unanimous testimony of finance officer Baldwin, former Warden Mathes, current Warden Mapes, Deputy Warden Weitzell, and former Director Kautzky." [134]

III. Equitable and Policy Concerns

In addition to the constitutional concerns discussed above, the issuance of recoupment orders in the Establishment Clause context is also problematic from an equitable perspective and in light of public policy considerations. Such orders ultimately turn

traditional common ***1404** law restitution analysis upside down, while placing humanitarian-minded religious organizations in an untenable position.

A. Equitable Considerations

As Judge Sykes noted when dissenting in Laskowski, "[A]dapting the common law doctrine of restitution to fashion a remedy in a taxpayer suit for an alleged Establishment Clause violation is like trying to pound the proverbial square peg into a round hole." [135] The veracity of this statement is apparent from the anomalies this doctrine creates.

1. Private Actors Cannot Violate the Establishment Clause

To begin with, Laskowski states that "restitution is among the remedies that a federal court can order for a violation of federal law." [136] However, one must ask, what "federal law" has been broken? Perhaps a better question is what federal law could have been broken. It could not have been the Establishment Clause--at least, the faith-based organization could not have violated the Clause. It is a basic principle of First Amendment law that only the government can violate the Establishment Clause. [137] If nothing less, this reality is evident from the axiomatic notion that only a "state" can establish a "state" religion. In taxpayer suits of the kind brought in Laskowski and Americans United I, it is the government who has violated the Establishment Clause. [138]

***1405** This raises one of the most glaring concerns in allowing recoupment orders in the case of Establishment Clause violations--such orders completely ignore the fact that the faith-based group has done no wrong. Indeed, in a very real sense, it is being severely penalized (in the case of Americans United I, ostensibly to the tune of millions of dollars) for committing a crime that, by definition, it cannot commit. [139]

***1406** 2. Unjust Enrichment

The inequity is further compounded by the fact that, invariably, the contractor or grant recipient will have provided the government with valuable consideration in exchange for the funds. For instance, in Americans United I, Iowa insisted that Prison Fellowship had provided it with essential services. In blunt terms, the state admitted, "we got our monies [sic] worth--we got a lot of 'bang for the buck[] value."' [140] Whether or not there was an Establishment Clause violation involved does not diminish the fact that at some level, the state received secular services from the faith-based group ordered to make restitution. To name just one example, in Americans United I, Prison Fellowship had provided the state with training and counseling services for prisoners. The recoupment order took no notice of these services rendered. [141] Thus, there is nothing stopping a government entity from knowingly contracting with a private party in violation of the Establishment Clause, receiving services from the private organization, ***1407** and then awaiting a taxpayer suit for reimbursement of the funds expended. This notion becomes even more absurd when one considers that in the end, the government would have its money and the benefit of the services rendered, but it would be in that position only because it violated the Constitution. [142] In essence, recoupment orders in this context "reward the Government for its allegedly unconstitutional behavior." [143] The government would, for all intents and purposes, be judicially empowered to have its cake and eat it too.

To analogize to the realm of contract law, allowing restitution in such a case is akin to a situation in which an individual hires a caterer to provide food for a party, lets the caterer complete the task, and then is reimbursed by the caterer for her failure to comply with local health codes. At that point, the individual has his meal and his money--and in the process found an exception to the rule that there is no such thing as a free lunch.

It is for this reason that Judge Sykes noted that attempting to fit the equitable remedy of restitution into Establishment Clause jurisprudence was ill-advised. [144] Restitution, by its very nature, is predicated on unjust enrichment. [145] In other words, restitution is "the conferral of a benefit by the plaintiff on the defendant under circumstances in which the retention of the benefit would be unjust." [146] In this scenario, however, the faith-based group has not been unjustly enriched--all funds received from the state are in fact used for the benefit of the state. The only party that is potentially unjustly enriched is the state--it receives all benefits provided by the faith-based group free of cost. Hence, application of restitution to this area of law effectively "turn[s the] doctrine on its head." [147]

Indeed, restitutionary relief in the Establishment Clause context makes nonsense of the common law understanding of restitution. The purpose of equitable restitution is "to restore to the plaintiff particular funds or property in the defendant's possession." [148] In the case of a recoupment order, the plaintiff does not have a right to any ***1408** of the funds possessed by the defendant. [149] Even if the plaintiff did have an interest in the money allocated to the defendant, clearly, no "funds or property" are "restored" to the plaintiff. All monies are returned to the public treasury. The plaintiff therefore fails to satisfy the two most basic elements of a common law restitution claim. As Judge Sykes indicated in Laskowski, "Such a claim is unknown to the law." [150]

3. The Complexity of Establishment Clause Jurisprudence

There are defenses to restitution, as Judge Posner noted in Laskowski, [151] and as Judge Pratt detailed in Americans United I. [152] However, because these defenses are inextricably linked to the concept of reliance, they can be insufficient when placed in the Establishment Clause context. Due to the lack of clarity in Establishment Clause jurisprudence, there is little to rely on in this area of law. [153]

To say the least, the Court's Establishment Clause jurisprudence is far from an "exact science" [154] --a fact not lost on the Justices themselves. Justice Breyer has remarked that "in respect to the First Amendment's Religion Clauses . . . there is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'" [155] Justice Thomas has stated that "the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, ***1409** governments, and believers and nonbelievers alike confused--an observation that is hardly new." [156]

This confusion in Establishment Clause jurisprudence is no less evident when the Court specifically addresses funding to faith-based organizations. For example, in the first Lemon case, [157] the Court noted that "the line of separation [between permissible and impermissible allocations of funds], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." [158] If the Supreme Court "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," [159] can one truly expect a faith-based organization to do any better?

The situation in Americans United I is again illuminating. As noted above, Prison Fellowship sought to rest its defense on its best understanding of Establishment Clause jurisprudence at that time. The court was not persuaded, pointing to a Texas case in which a faith-based rehabilitation program had been struck down. [160] Ironically, this only further exemplifies what a "variable barrier" the Establishment Clause has become. In Williams v. Lara, [161] the Texas Supreme Court found a faith-based prison rehabilitation program to be unconstitutional. [162] However, Prison Fellowship's InnerChange program was also operating in

Texas at that time. Post-Williams, InnerChange continued to operate "without legal incident." [163] At least to a layman, such a result might well indicate that Prison Fellowship's program passed constitutional muster.

***1410 B. A "Chilling Effect" on Faith-Based Organizations**

From a policy perspective, there is every reason to believe that if Laskowski and Americans United I stand, faith-based organizations will be deterred from seeking government funding. Indeed, supporters of the decision in Americans United I referred to the ruling as a "body blow to so-called faith-based initiatives." [164] If that proves to be true, the American public's access to a variety of invaluable and highly respected social service providers will be jeopardized.

The contributions of faith-based organizations to civil society cannot be understated. The White House Office of Faith-Based and Community Initiatives has noted that while their actions often go unnoticed, "faith-based grassroots groups play large and vital roles everywhere." [165] The services they provide are as diverse as the organizations which offer them. These groups can include "local congregations offering literally scores of social services to their needy neighbors; small nonprofit organizations . . . created to provide one program or multiple services; and neighborhood groups that spring up to respond to a crisis or to lead community renewal." [166]

Many faith-based organizations are small nonprofits that rely almost exclusively upon charitable donations for funding. In all likelihood, there are few that possess sufficient capital to survive a recoupment order of the magnitude issued in Americans United I. [167] A sum of ***1411** that amount would dwarf the annual budgets of most faith-based groups. [168]

Additionally, neither Laskowski nor the Americans United opinions provide any readily apparent deadline beyond which an organization may not be held liable for past expenditures. [169] For example, had the recoupment order stood, Prison Fellowship would have been forced to repay funds it received over a period reaching back seven years. [170] Laskowski sets perhaps a more disturbing precedent in that it dealt with a one-time grant which had been long-since expended. [171] This leaves open the potential for faith-based groups to find themselves forced to repay funds spent years, or perhaps even decades, in the past. When assessing whether or not to compete for a government grant, there is no doubt that these considerations would factor into an organization's decisionmaking process. When coupled with the difficulties already facing faith-based organizations seeking government funds, [172] it is easy to see how such groups could choose to refrain ***1412** from seeking funding rather than run the risk of finding themselves liable for restitution years later. [173]

Thus, under this line of cases, every time a faith-based organization accepts government funds, the group is essentially betting its existence on its understanding of Establishment Clause jurisprudence. [174] At worst, this requires faith-based entities "to do the impossible: accurately predict when the government is violating the Establishment Clause." [175] At best, religious organizations are now forced to think twice before seeking government funding for their charitable efforts. In other words, those "who take faith-based funding may find that they've made an expensive misjudgment if their faith-based funding is challenged." [176]

In the wake of Americans United I, several events occurred which lend credence to this perception. In October 2006, the Federal Bureau of Prisons officially canceled its request for proposals for a faith-based prison rehabilitation program. [177] The program was originally intended to be adopted in as many as six federal prisons. [178] While the Bureau had suspended its request in May of 2006 following a lawsuit challenging its constitutionality, the proposal was not definitively shelved until after the ruling in Americans United I. [179] The Bureau did not comment on the reason for its withdrawal, but it is at least plausible that its decision

was motivated by the decision out of Iowa. Not only is the constitutionality of faith-based prison programs now increasingly in doubt, but there is also the possibility that fewer faith-based groups will even be willing to risk participation in such programs.

Moreover, there is evidence that plaintiffs are making use of the doctrine articulated in Laskowski and Americans United I. In August of 2006, a federal district court in Pennsylvania allowed a taxpayer suit to proceed against a prison rehabilitation program similar to the one ***1413** challenged in Americans United I. [180] Notably, the taxpayer plaintiffs in that case sought "monetary damages for the recoupment of the funds used for religious purposes." [181] In its ruling, the court cited Americans United I as one of the grounds for refusing to dismiss the case. [182] Similarly, in an employment discrimination case pending in the Western District of Kentucky, a plaintiff sought to amend her complaint in order to pursue a recoupment order from a faith-based children's home. [183] That order would have exposed the orphanage "to a liability of somewhere from $30 to $100 million dollars." [184] Needless to say, an order of that magnitude would bankrupt that--or any other--faith-based entity. [185]

This trend jeopardizes executive and congressional policy expressed in various statutes and Executive Orders. Congress has passed legislation--most notably, the Charitable Choice Program [186] --designed to make federal funding available to faith-based groups. [187] President Bush's Faith-Based Initiative is likewise designed to ensure that federal agency and department heads structure their grant programs in such a way that they "ensure equal protection of the laws for ***1414** faith-based and community organizations" [188] who seek to obtain those funds. Post-Hein, it appears likely that participants in the Faith-Based Initiative will be insulated from suit. [189] As the case law now stands, however, faith-based organizations receiving legislatively appropriated funds are still subject to taxpayer suit under Flast. [190] Only time will tell, but participation in such programs by faith-based groups may very well decline as few organizations will be willing to make their survival contingent on what amounts to a constitutional roll of the dice. Indeed, it was in the interest of the integrity of these programs that the United States intervened as amicus curiae in the Americans United I appeal. [191]

These policy considerations may also give rise to constitutional issues. The Supreme Court has suggested, in a similar context, that those participating in government programs should not be forced to proceed at "peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional." [192] In another area of First Amendment law, the Court will consider striking down statutes that might have a "chilling effect" on the freedom of speech. [193] One could make a colorable argument that an analogous protection should apply to scenarios akin to those presented in Laskowski and Americans United I. Just as speech may be chilled by indirect and undue burdens, free exercise of religion may well be jeopardized by a sword of Damocles in the form of restitutionary liability.

IV. Potential Solutions

For the reasons discussed above, restitutionary relief is wholly out of place in Establishment Clause jurisprudence. Its application violates basic principles of standing, separation of powers, and federalism; leads to the inequitable resolution of cases; and deters religiously affiliated institutions from exercising their right to compete with other organizations for federal funding. Courts would be best served ***1415** to reject any further use of these orders in the context of the Establishment Clause.

At the very least, if courts continue to find such remedies appropriate, faith-based organizations receiving government funds should be afforded protections similar to those a state official would have in the case of a civil rights action under 42 U.S.C. § 1983 [194] --namely, qualified immunity. Under that defense, "government officials performing discretionary functions [] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [195] Even while permitting recoupment orders to be

issued, the Seventh Circuit suggested a similar defense in Laskowski. [196] In fact, the Supreme Court itself, when discussing the reliance of private institutions on government contracts, hinted at such a standard, indicating that reliance was reasonable so long as the unconstitutional nature of the action was not "clearly foreshadowed" [197] or "plain from the outset." [198] By striking down the recoupment order in question while leaving the door open for identical orders to be issued in the future, the Americans United II court took several steps towards implementing such a regime, at least in the Eighth Circuit. [199]

This defense should be available to the religious organization regardless of whether or not it is found to be engaging in "state action" for the purposes of § 1983. [200] While the Supreme Court has previously rejected the qualified immunity defense for private entities ***1416** engaging in state action, [201] it has left open the possibility for a "good faith" defense. [202] Whatever the name, a defense should be available to a private organization receiving government funds when actions it reasonably believed to be constitutional are challenged in court.

Conclusion

Ultimately, if faith-based organizations are to continue to play a role in providing social services to the public, they must be reassured that they will not be held liable for their good faith actions. The Laskowski and Americans United line of cases undermine the ability of these organizations to effectively participate in public affairs on a level playing field. Eliminating the use of recoupment orders in the context of the Establishment Clause, or at a minimum, providing a qualified immunity-like defense, is the only resolution to this problem. As the United States argued in its amicus brief in the Americans United I appeal, Just as government officials should not be forced to "stay their hands until newly enacted state programs are 'ratified' by the federal courts" at the risk of "draconian, retrospective decrees," private contractors or grant recipients should not have to forgo the opportunity to participate in government programs at the risk of the drastic and financially crippling remedy of recoupment should the program later be held unconstitutional. [203]

Footnotes

a1 Candidate for Juris Doctor, Notre Dame Law School, 2008; B.A., Political Science, Pepperdine University, 2004.

1 (Ams. United I), 432 F. Supp. 2d 862 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007).

2 See id. at 864-66.

3 See, e.g., Williams v. Lara, 52 S.W.3d 171, 194-95 (Tex. 2001).

4 See Ams. United I, 432 F. Supp. 2d at 935.

5 See id. at 941.

6 Prior to this case, the Seventh Circuit, in an opinion by Judge Posner, discussed infra Part I.B, had indicated that restitution was a viable remedy under the Establishment Clause. See Laskowski v. Spellings, 443 F.3d 930, 934-36 (7th Cir. 2006), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007). However, the court did not actually grant restitutionary relief, but rather remanded the case back to the district court. Id. at 939.

7 Brief for the United States as Amicus Curiae Supporting Appellants at 5-6, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 3098141 [hereinafter Brief for the United States].

8 Ams. United II, 509 F.3d at 426-28. The Eighth Circuit held that there was indeed an Establishment Clause violation, but concluded that the district court had abused its discretion in ordering restitutionary relief. See id. at 423-28.

9 See Laskowski, 443 F.3d at 934-36.

10 127 S. Ct. 2553 (2007); see infra Part II.A.1.

11 443 F.3d 930; see infra Part I.B.

12 392 U.S. 83 (1968).

13 Doug Rendleman, Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court's Establishment Clause Legacy?, 59 Wash. & Lee L. Rev. 1343, 1353 n.40 (2002); see also Bradley Thomas Wilders, Note, Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?, 71 Mo. L. Rev. 1199, 1218 n.158 (2006) (noting that "refund[s]" are "rarely sought in Establishment Clause cases").

14 Taxpayers' lack of standing to challenge the constitutionality of a federal statute was confirmed in Frothingham v. Mellon, 262 U.S. 447 (1923). It has always been understood, however, that the government could seek restitution for improperly obtained government funds. "Congress... is the custodian of the national purse.... [I]t is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend... securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries...." United States v. Standard Oil Co., 332 U.S. 301, 314-315 (1947).

15 See Debra L. Lowan, A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action, 30 Seattle U. L. Rev. 651, 654 (2007) (noting that in Flast, "the Court reversed over four decades of standing jurisprudence and for the first time backpedaled ... and created a separate standing doctrine for certain taxpayer suits").

16 See Flast, 392 U.S. at 85.

17 See id. at 85-86.

18 See id. at 88.

19 Id. at 102.

20 Id.

21 Id.

22 Id. at 102-03.

23 See id. at 103.

24 However, "[t]here is no per se rule that the recipient of illegal funds who has spent them cannot be forced to repay them through a restitution order." 42 C.J.S. Implied Contracts § 11 (2007).

25 Claire Hughes, Embattled Christian Prison Program Asserts Its Legality, Roundtable on Religion & Soc. Welfare Pol'y, Oct. 10, 2006, http:// www.religionandsocialpolicy.org/news/article.cfm?id=5221.

26 37 F. App'x 91 (5th Cir. 2002).

27 See Am. Jewish Cong. v. Bost, No. A-00-CA-528-SS, 2002 WL 31973707, at *1 (W.D. Tex. July 16, 2002).

28 See id.

29 See id.

30 See Bost, 37 F. App'x at 91.

31 See id.

32 See infra Part I.B.

33 Bost, 2002 WL 31973707, at *3.

34 Id. at *2.

35 See id.

36 See id. at *3.

37 Id. at *3 n.4.

38 See 443 F.3d 930, 933 (7th Cir. 2006), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

39 See id.

40 See id.

41 See id.

42 Id. at 939.

43 Id. at 941 n.1 (Sykes, J., dissenting); Brief for the Federal Respondent at 6, Notre Dame, 127 S. Ct. 3051 (No. 06-582), 2006 WL 3609968 (noting that the Seventh Circuit's “extraordinary ruling” was made “without the benefit of briefing or argument on the question by the parties”).

44 Laskowski, 443 F.3d at 934 (majority opinion).

45 See id..

46 See id. The dissent responded by arguing that political safeguards were more than sufficient to address such an implausible situation, noting that there would clearly be electoral consequences for any politician who took such action. See id. at 946 (Sykes, J., dissenting) (“The hypothetical is far-fetched. Assuming such a flagrantly unconstitutional appropriation could escape notice during the entire Article I lawmaking process, any congressman or senator who voted for it would have some serious explaining to do in the next election cycle after it was discovered. The checks and balances of the ballot box are an effective disincentive against such unlikely and obvious congressional misuses of taxpayer money. Separation of powers requires the judicial branch to assume the general competence of Congress to enact laws that are constitutional.”).

47 See supra note 14.

48 See, e.g., Laskowski, 443 F.3d at 934 (majority opinion).

49 Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (noting that, for various reasons, “an agency's decision not to take enforcement action should be presumed immune from judicial review”).

50 Laskowski, 443 F.3d at 934.

51 Id. at 934-35.

52 Notre Dame had voluntarily intervened in the case as a defendant. See id. at 933.

53 See infra notes 136-39 and accompanying text.

54 Laskowski, 443 F.3d at 934.

55 Id. at 936.

56 Following the Seventh Circuit's ruling, Notre Dame filed a petition for certiorari with the Supreme Court. See Petition for a Writ of Certiorari, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3043822. Four days after its ruling in Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553 (2007), see infra Part II.A.1, the Court granted the petition for certiorari, vacated the opinion below, and remanded the case for further proceedings in light of Hein. See Notre Dame, 127 S. Ct. at 3051 ("Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Hein v. Freedom From Religion Foundation, Inc." (citation omitted)). Oral arguments before a Seventh Circuit panel were held November 5, 2007. See Laskowski v. Spellings, No. 05-2749 (7th Cir. Sept. 10, 2007) (docket).

57 Laskowski, 443 F.3d at 936.

58 The case of Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980), is the reason for the "absent special circumstances" caveat. In preparation for the visit of Pope John Paul II, Philadelphia announced its plans to erect a platform upon which the Pope could celebrate Mass. See id. at 927. A group of taxpayers brought suit on Establishment Clause grounds. See id. "[T]he parties stipulated to an order under which construction was allowed to proceed, but the Archdiocese agreed to reimburse the City for the cost of the platform and related construction should there be a final judgment that the City could not constitutionally pay for the items." Id. at 927. The expenditure was subsequently found to be in violation of the Establishment Clause, and the Archdiocese was ordered to reimburse the city, per the terms of the agreement. See id. at 934.

59 Ira C. Lupu & Robert W. Tuttle, Americans United for Separation of Church and State (and Others) v. Prison Fellowship Ministries (and Others), Roundtable on Religion & Soc. Welfare Pol'y, June 13, 2006, http:// www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=49.

60 See supra notes 1-5 and accompanying text.

61 432 F. Supp. 2d 862, 920 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007).

62 See id. at 938.

63 Id. at 939 (quoting Lemon v. Kurtzman (Lemon II), 411 U.S. 192, 209 (1973)).

64 See id.

65 Id.

66 Id.

67 Id. at 939. "InnerChange" is the name given to the rehabilitation program which operates under the auspices of Prison Fellowship. See id. at 871.

68 Id. at 940.

69 See id.

70 Id. at 941.

71 See Tim Townsend, Ex-Justice O'Connor on Panel Hearing Prison Ministry Case, St. Louis Post-Dispatch, Feb. 14, 2007, at B5; see also Peter Slevin, Ban on Prison Religious Program Challenged, Wash. Post, Feb. 25, 2007, at A13 ("A trio of appellate judges, including former Supreme Court Justice Sandra Day O'Connor, is reviewing a lower court's decision that the [Prison Fellowship] program violates the separation of church and state."). Prison Fellowship's attorneys had requested reversal on standing grounds in light of Hein. See Anne Farris, Controversial Christian Prison Program Cites Recent Supreme Court Ruling in Its Appeal, Roundtable

on Religion & Soc. Welfare Pol'y, July 2, 2007, http:// www.religionandsocialpolicy.org/newsletters/article.cfm?id=6699 (“‘The Supreme Court has now vacated and remanded Laskowski to the 7th Circuit with instructions to reconsider its ruling in the light of Hein,’ stated a letter to the U.S. Court of Appeals for the Eighth Circuit from Anthony Picarello, an attorney from the Becket Fund for Religious Liberty, who is representing InnerChange and Prison Fellowship Ministries. ‘Thus, the anomalous legal basis for allowing private, taxpayer plaintiffs to compel restitution to the government is gone, and the decision below granting that remedy should be reversed.”’). This request was not granted, as the court found that essentially all of the taxpayer plaintiffs maintained standing, even in light of Hein. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406, 419-20 (8th Cir. 2007).

72 See Ams. United II, 509 F.3d at 426-28. The court did find, however, that Prison Fellowship had been operating in violation of the Establishment Clause at the time of the suit. See id. at 423-26.

73 See id. at 427 (taking into account “‘the totality of the circumstances and ... the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.”’ (quoting Lemon v. Kurtzman (Lemon II), 411 U.S. 192, 208-09 (1973))); supra note 63 and accompanying text.

74 Ams. United II, 509 F.3d at 428 (“Given the totality of the circumstances, the district court abused its discretion in granting recoupment for services rendered before its order.”).

75 See id. at 427. The court indicated that Prison Fellowship's reliance was further strengthened by the fact that “plaintiffs did not seek interim injunctive relief to prevent payment [of the state funds] during litigation.” Id. at 428.

76 Id. at 427.

77 Id. at 427-28. These statements, the court stated, did not “insulate the prison administrators' decisions from judicial review. However, in shaping equitable relief, a court should consider the views of prison administrators, which oppose recoupment in this case.” Id. at 428.

78 See infra Part IV.

79 See supra notes 56, 71.

80 Laskowski v. Spellings, 443 F.3d 930, 939 (7th Cir. 2006) (Sykes, J., dissenting), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007); see also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (noting the Court's “narrow application” of Flast in prior cases); Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (remarking on the “narrow exception” created by Flast to the “general rule against taxpayer standing”); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 481 (1982) (discussing the “rigor with which the Flast exception” should be applied).

81 Laskowski, 443 F.3d at 939 (Sykes, J., dissenting).

82 Id.

83 See Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2560-61 (plurality opinion). Like Laskowski, this case originated in the Seventh Circuit in an opinion written by Judge Posner. See Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006), rev'd sub nom. Hein, 127 S. Ct. 2553.

84 See Hein, 127 S. Ct. at 2560 (plurality opinion).

85 Id. at 2565.

86 Id. (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)).

87 Id. at 2566.

88 Id. at 2564 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982)).

89 Id. at 2566.

90 See id. at 2568. In a footnote, the Court indicated that informal legislative "earmarks" are not sufficient grounds for taxpayer standing. Specific statutory appropriations are required. See id. at 2568 n.7 ("Nor is it relevant that Congress may have informally 'earmarked' portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures are at issue here. '[A] fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency."' (alternation in original) (citation omitted) (quoting Lincoln v. Vigil, 508 U.S. 182, 192 (1993))).

91 See infra notes 186-90.

92 See Hein, 127 S. Ct. at 2568 (plurality opinion) ("In short, this case falls outside the the [sic] narrow exception that Flast created to the general rule against taxpayer standing established in Frothingham. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite logical nexus between taxpayer status and the type of legislative enactment attacked." (internal quotation marks and citations omitted)).

93 For example, while the Court ordered the Seventh Circuit to reconsider its ruling in Laskowski in light of Hein, see Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051, 3051 (2007) (mem.), its applicability is not immediately evident. Laskowski involved a specific legislative appropriation. See Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-262 (earmarking "$500,000 for the University of Notre Dame for a teacher quality initiative"); Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), vacated mem. sub nom. Notre Dame, 127 S. Ct. 3051. As Hein permits taxpayers to challenge disbursements "expressly authorized or mandated by [a] specific congressional enactment," Hein, 127 S. Ct. at 2568 (plurality opinion), the plaintiffs in Laskowski would still appear to possess standing.
The situation in Americans United was slightly different. There, only a portion of the funds were appropriated at the behest of the legislature. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries (Ams. United I), 432 F. Supp. 2d 862, 885-87 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007). The remainder of the monies was dispensed to Prison Fellowship at the discretion of executive branch agencies. See id. Ultimately, the Eighth Circuit found sufficient grounds to maintain taxpayer standing. See Ams. United II, 509 F.3d at 419-20 (8th Cir. 2007).

94 See Hein, 127 S. Ct. at 2573-84 (Scalia, J., concurring).

95 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) ("The 'core component' of the requirement that a litigant have standing to invoke the authority of a federal court 'is an essential and unchanging part of the case-or-controversy requirement of Article III."' (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))).

96 Laskowski, 443 F.3d at 942 (Sykes, J. dissenting) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

97 Id. at 941 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)).

98 See DaimlerChrysler, 547 U.S. at 342 ("'[W]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record."' (quoting Renne v. Geary, 501 U.S. 312, 316 (1991))).

99 See Hein, 127 S. Ct. at 2574 (Scalia, J., concurring).

100 Id.

101 Id.

102 See id. (“It is uncertain what the plaintiff's tax bill would have been had the allegedly forbidden expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.”).

103 262 U.S. 447 (1923).

104 Id. at 487.

105 Id.

106 See Laskowski v. Spellings, 443 F.3d 930, 943 (7th Cir. 2006) (Sykes, J., dissenting) (noting that “the effect of a congressional enactment on an individual citizen's tax burden is too minute, and a taxpayer's interest in money in the Treasury is too diffuse, to support standing to sue in federal court”), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

107 See id.

108 Id.

109 See Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2575 (2007) (Scalia, J., concurring) (“[W]e have never explained why Psychic Injury, however limited, is cognizable under Article III.”).

110 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (quoting Flast v. Cohen, 392 U.S. 83, 103 (1968)).

111 Id.

112 See Hein, 127 S. Ct. at 2574 (Scalia, J., concurring) (second emphasis added).

113 See DaimlerChrysler, 547 U.S. at 348 (indicating that taxpayer standing under Flast is limited to seeking “an injunction against” the “‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion” (alteration in original) (quoting Flast, 392 U.S. at 106)); Laskowski, 443 F.3d at 943 (Sykes, J., dissenting).

114 See Laskowski, 443 F.3d at 943.

115 Contrast this to an action seeking an injunction. In that case, the injury to the plaintiff is the unconstitutional exercise of the taxing and spending power. An injunction halts that exercise, thus redressing the injury.

116 This is especially true in light of the Court's pronouncements on the lack of individual taxpayer interest in the public treasury. See supra notes 103-07 and accompanying text.

117 Here, the unconstitutional exercise of the federal taxing and spending power.

118 Petition for a Writ of Certiorari, supra note 56, at 8.

119 Cf. Jennifer Mason McAward, Congress' Power to Block Enforcement of Federal Court Orders, 93 Iowa L. Rev. (forthcoming 2008) (manuscript at 24), available at http://ssrn.com/abstract=997879 (noting that in addition to “develop[ing] justiciability doctrines in order to define and delimit the central prerogatives of the judicial Branch,” federal courts have also “developed separation-of-powers principles that set the parameters for the proper exercise of the judicial power”).

120 See supra note 49 and accompanying text.

121 470 U.S. 821 (1985).

122 Id. at 832.

123 Id. (quoting U.S. Const. art. II, § 3).

124 See supra note 50 and accompanying text.

125 Laskowski v. Spellings, 443 F.3d 930, 935 (7th Cir. 2006), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

126 Id.

127 Id.

128 Id. at 940 (Sykes, J., dissenting).

129 515 U.S. 70 (1995).

130 Id. at 132-33 (Thomas, J., concurring); cf. Anthony J. Bellia Jr., Congressional Power and State Court Jurisdiction, 94 Geo. L.J. 949 (2006) (discussing potential constraints on Congress' "largely ... unchecked" power over state courts).

131 See supra note 122 and accompanying text.

132 See infra note 140 and accompanying text.

133 State Appellants' Brief at 49, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 2840607.

134 Id. at 49. The irony of a private actor trying to force a state to take money it does not want was (perhaps intentionally, perhaps unintentionally) made apparent by Justice O'Connor during the oral arguments before the Eighth Circuit in Americans United II. As the lawyer for Americans United was beginning his argument, Justice O'Connor interrupted him and inquired into the party he was representing. See Oral Argument, Ams. United II, 509 F.3d 406 (No. 06-2741) (audio recording available at http://www.ca8.uscourts.gov/; follow "Oral Arguments" hyperlink, then follow "Case Number" hyperlink; search for "06-2741"; then follow "Play" hyperlink) ("You're here representing Americans United for Separation of Church and State, not the state as such.... You're not here representing the state, as such?").
Ultimately, in reversing the recoupment order, the Eighth Circuit ruled that the lower court had not given due deference to the opinions of state officials with regard to the beneficial nature of the services rendered. See Ams. United II, 509 F.3d at 427-28. It did not, however, style its critique in terms of separation of powers or federalism, deferring instead to the officials' expertise in the field of prison administration. See id.

135 Laskowski v. Spellings, 443 F.3d 930, 941 (7th Cir. 2006) (Sykes, J., dissenting), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

136 Id. at 935 (majority opinion).

137 See id. at 943 (Sykes, J., dissenting) ("Such a claim [for restitution] is unknown to the law, probably because private parties cannot be held liable for Establishment Clause violations. The majority [casually] dismisses this rather fundamental objection ....").

138 See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) ("[T]he 'injury' alleged in Establishment Clause challenges to federal spending [is] the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion...." (alterations in original) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968))). This point raises additional implications in the area of standing. Since the government is the only entity that can breach the Establishment Clause, it would seem evident that any attempt by taxpayers to seek redress for the violation of the Clause should be against the government. However, if taxpayers are seeking restitution, such a claim is incoherent. The government cannot reimburse itself--it is no longer in possession of the challenged funds. The only possible remedy the court could order in such a scenario would be to direct the government to seek restitution against a third party through its own enforcement action. However, as discussed supra Part II.B, such an action would violate principles of separation of powers and federalism. The Supreme Court has long held that if no remedy is available against the wrongdoer due to various constitutional limitations (sovereign immunity, etc.), it will not adjudicate the case. See Petition for a Writ of Certiorari, supra note 56, at 18-19. As no redress is possible,

the plaintiff would lack standing to proceed. A court order acting directly on the third party does not eliminate this constitutional infirmity. See supra notes 124-28 and accompanying text.

139 It is true that in Americans United I, the court--in a footnote-- concluded that Prison Fellowship was a state actor and thus subject to the provisions of the Establishment Clause. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries (Ams. United I), 432 F. Supp. 2d 862, 865 n.3 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406. As with the Seventh Circuit's ruling on the availability of restitutionary relief in Laskowski, see supra note 43 and accompanying text, this issue was decided though "[t]he parties did not actively litigate, at any stage of the case, whether the Plaintiffs established that, under [42 U.S.C.] § 1983, the challenged actions of the private corporate Defendants, InnerChange and Prison Fellowship, were committed under the color of law," Ams. United I, 432 F. Supp. 2d at 865 n.3. The court nevertheless determined that

[t]he contractual agreement between InnerChange, Prison Fellowship, and the Iowa Dept. of Corrections, and the executing of its terms is sufficient to show that the Defendants engaged in a joint action for the purposes of § 1983. Additionally, the rehabilitative treatment provided by InnerChange is a function traditionally and exclusively reserved to the state, thereby qualifying InnerChange's rehabilitation treatment as a state action under the public function doctrine.

Id.

The court went on to note that the "counseling and security services" the faith-based group provided "within the confines of the Newton Facility" created "a relationship, from the perspective of the inmates, in which the differences between private and state actions by InnerChange and Prison Fellowship [were] nonexistent." Id.; see also id. at 919-20 ("InnerChange and Prison Fellowship, in this case, are not private actors--they are state actors. As a state actor, InnerChange speaks on behalf of the government. It is not simply another voice in a forum opened for a discussion of the best rehabilitation programs for state prisoners.... [A]s state actors, InnerChange and Prison Fellowship employees cloak themselves in the mantel of government. As providers of a state-funded treatment program, they are burdened with the same responsibilities of any state employee: to respect the civil rights of all persons, including the First Amendment's prohibition on indoctrinating others in their form of religion." (footnote omitted)). On appeal, the Eighth Circuit was likewise persuaded that Prison Fellowship was a state actor. Ams. United II, 509 F.3d at 421-23.

Traditionally, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself."' Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)). The Court has admitted that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient," id., but broadly speaking, state action may be found when a

private actor operates as a willful participant in joint activity with the State or its agents. We have treated a nominally private entity as a state actor when it is controlled by an agency of the State, when it has been delegated a public function by the State, when it is entwined with governmental policies, or when government is entwined in [its] management or control.

Id. at 296 (alteration in original) (internal quotation marks and citations omitted).

Leaving questions as to the validity of the courts' assessment of Prison Fellowship's status to the side, at the very least, it is a limit case. One would be hard pressed to find a similar "close nexus" between most faith-based organizations receiving public funds and the government. Such a ruling obviously does not speak to private actors such as the University of Notre Dame, nor the host of other faith-based service providers who operate at arm's length from the government and whose functions are not traditionally "public." Indeed the Court has repeatedly held that neither entering into a government contract nor the receipt of government funds de facto transforms a private actor into a state actor. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1010-11 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982). Ultimately, a finding that a faith-based organization running a prison rehabilitation program is a state actor does nothing to establish whether faith-based organizations providing, for example, food to the homeless, counseling services, or educational facilities are engaging in state action.

140 State Appellants' Brief, supra note 133, at 49.

141 When striking down the recoupment order, the Eighth Circuit cited the lower court's failure to give due deference to state officials' opinions on the benefits of the Prison Fellowship program. See Ams. United II, 509 F.3d at 426-28.

142 See supra note 137 and accompanying text.

143 Petition for a Writ of Certiorari, supra note 56, at 2.

144 See supra note 135.

145 See Restatement of Restitution § 1, at 12 (1937).

146 Laskowski v. Spellings, 443 F.3d 930, 943-44 (7th Cir. 2006) (Sykes, J., dissenting), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

147 Brief of Defendants-Appellants Prison Fellowship Ministries & InnerChange Freedom Initiative at 57, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406 (8th Cir. 2007) (No. 06-2741), 2006 WL 2788099 [hereinafter Brief of Defendants-Appellants].

148 Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002).

149 See supra notes 103-07 and accompanying text.

150 Laskowski, 443 F.3d at 943 (Sykes, J., dissenting).

151 See id. at 936 (majority opinion).

152 See Ams. United for Separation of Church & State v. Prison Fellowship Ministries (Ams. United I), 432 F. Supp. 2d 862, 935-41 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406. The Eighth Circuit eventually found a version of such a defense persuasive on appeal. See Ams. United II, 509 F.3d at 426-28.

153 See Steven G. Gey, Reconciling the Supreme Court's Four Establishment Clauses, 8 U. Pa. J. Const. L. 725, 725 (2006) (“It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess--both hopelessly confused and deeply contradictory. On a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases. At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards. Many of the Justices have endorsed several different--and often conflicting--constitutional standards. Justice O'Connor alone authored or signed opinions that relied on five different (and again, often contradictory) standards for enforcing the Establishment Clause.”).

154 Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766 (1976) (plurality opinion).

155 Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

156 Id. at 694 (Thomas, J., concurring); see also Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring) (“Our jurisprudential confusion has led to results that can only be described as silly.”); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (suggesting that the Court's “Establishment Clause jurisprudence is in hopeless disarray”); Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (speaking of attempts “to justify our embarrassing Establishment Clause jurisprudence”).

157 Lemon v. Kurtzman (Lemon I), 403 U.S. 602 (1971).

158 Id. at 614.

159 Id. at 612.

160 See supra note 3.

161 52 S.W.3d 171 (Tex. 2001).

162 Id. at 194-95. The Eighth Circuit found that this case was insufficient to put Prison Fellowship on notice that its actions were “plainly unlawful.” See Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406, 427 (8th Cir. 2007).

163 Brief of Defendants-Appellants, supra note 147, at 56.

164 Press Release, Ams. United for Separation of Church & State, Federal Court Strikes Down Tax Funding of Iowa Prison Program (June 3, 2006), available at http://www.au.org/site/News2?abbr=pr&page=newsArticle& id=8245&security=1002&news_iv_ctrl=1941.

165 White House Office of Faith-Based & Cmty. Initiatives, Unlevel Playing Field 3 (2001) [hereinafter Unlevel Playing Field], available at http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf.

166 Id.; see also Ram A. Cnaan et al., The Newer Deal 275-76 (1999) ("[R]eligious organizations represent a major part of the American welfare system. Tens of thousands of people in the Philadelphia area [alone] are being helped by all kinds of programs, from soup kitchens to housing services, from job training to educational enhancement classes. One can only imagine what would happen to the collective quality of life if these religious organizations would cease to exist.").

167 The implications of the court's choice of words notwithstanding. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries (Ams. United I), 432 F. Supp. 2d 862, 932 (S.D. Iowa 2006) (using the term "coffers" twice), aff'd in part, rev'd in part, 509 F.3d 406; cf. Richard W. Garnett & Benjamin P. Carr, 10 Green Bag 2d 299, 305 (2007) (suggesting that using the term "coffers" to describe the financial accounts of faith-based organizations "demeans and distracts more than it describes").

168 It is true that the court in Americans United I considered the financial stability of Prison Fellowship before ordering relief. See supra note 68 and accompanying text. However, the court failed to give any meaningful benchmark as to when a faith-based group could demonstrate financial hardship sufficient to preclude a recoupment order. Even in Americans United I, the court only looked at the organization's ability to pay. It did not look at the potentially devastating impact such a payment could have on the organization's normal operations.

169 Decisions such as these impose
a severe disincentive on religiously-affiliated institutions from receiving public aid, for fear that they may be haled into court many years later to return the long-spent money, solely because a court determines that the public officials making the grant did not impose some unspecified level of "appropriate conditions" on it.
Petition for a Writ of Certiorari, supra note 56, at 10.

170 Ams. United I, 432 F. Supp. 2d at 941.

171 See Laskowski v. Spellings, 443 F.3d 930, 933 (7th Cir. 2006), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

172 See Brief of Amici Curiae We Care America, Evangelicals for Social Action, Center for Neighborhood Enterprise, and the Center for Public Justice in Support of Petitioner at 5, Notre Dame, 127 S. Ct. 3051 (No. 06-582), 2006 WL 3449038 [hereinafter Brief of Amici Curiae We Care America et al.] ("FBOs [faith-based organizations] already 'often face serious managerial and political obstacles' to helping fulfill 'the Nation's social agenda.' FBOs must wade through the bureaucratic red-tape that accompanies government programs, jump through extra hoops because they are faith-based, worry how their religious-based hiring policies will open them to liability, and endure restrictions on their religious activities that are not prohibited by the Constitution." (citation omitted) (quoting Unlevel Playing Field, supra note 165, at 3)).

173 This is not a theoretical exercise. Several faith-based organizations filed amicus briefs in the Notre Dame case asserting as much. See Brief of Amici Curiae We Care America et al., supra note 172, at 6 ("The knowledge that a grant, once taken, can be the subject of an action for restitution years later will likely make seeking government funding for charitable work more trouble than it is worth for many [faith-based organizations].").

174 A dubious prospect. See supra notes 151-59 and accompanying text.

175 See Brief of Amici Curiae We Care America et al., supra note 172, at 8.

176 Press Release, Ams. United for Separation of Church & State, supra note 164.

177 Neela Banerjee, Proposed Religon-Based Program for Federal Inmates Is Canceled, N.Y. Times, Oct. 28, 2006, at A11.

178 See id.

179 See id.

180 See Moeller v. Bradford County, 444 F. Supp. 2d 316 (M.D. Pa. 2006).

181 See id. at 319.

182 See id. at 321-22.

183 See Brief of Amicus Curiae The Thomas More Law Center in Support of Petitioner at 3, Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007) (No. 06-582), 2006 WL 3462958.

184 See id. at 4 (emphasis added).

185 See id. The court, however, denied the plaintiffs motion to file an amended complaint. See Pedreira v. Ky. Baptist Homes for Children, Inc., No. 3:00CV-210-5, 2007 WL 316992, at *2 (W.D. Ky. Jan. 29, 2007). Notably, the court cited the excessive delay in filing, not the unavailability of the remedy as grounds for its decision. See id.

186 42 U.S.C. § 604a(b) (2000) (“The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement ... on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.”).

187 See, e.g., Community Services Block Grant Act of 1998, 42 U.S.C. § 9920 (2000) (indicating that in dispersing the grant funds authorized by the act, federal, state, and local governments may not “discriminate against an organization... on the basis that the organization has a religious character); Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858n(2) (2000) (indicating that nothing in the Act bars the use of federal funding for “sectarian child care services”); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (2000) (indicating that religious organizations may receive federal grant monies under the Temporary Assistance to Need Families program “on the same basis as any other private organization”).

188 Exec. Order No. 13,279, 3 C.F.R. 258 (2003), reprinted in 5 U.S.C. § 601 note (Supp. V 2005).

189 See supra Part II.A.1.

190 See supra Part II.A.1.

191 See Brief for the United States, supra note 7, at 2-3. The United States also expressed this concern in its brief in the Notre Dame case. See Brief for the Federal Respondent, supra note 43, at 17.

192 Lemon v. Kurtzman (Lemon II), 411 U.S. 192, 207 (1973).

193 See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 611-18 (1973); id. at 630 (Brennan, J., dissenting).

194 At least one court has chosen to consider the faith-based organization receiving government funds a state actor. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries (Ams. United I), 432 F. Supp. 2d 862, 865 n.3 (S.D. Iowa 2006), aff'd in part, rev'd in part, 509 F.3d 406 (8th Cir. 2007); supra note 139.

195 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

196 Laskowski v. Spellings, 443 F.3d 930, 936 (7th Cir. 2006) (suggesting a possible defense to restitution if the recipient of the funds did not “know[] or have ... reason to know” that the action was unconstitutional), vacated mem. sub nom. Univ. of Notre Dame v. Laskowski, 127 S. Ct. 3051 (2007).

197 Lemon II, 411 U.S. at 206 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)).

198 Id. at 207.

199 See supra Part I.C. The court did allow for a type of good faith reliance test, but it gave little specific instruction beyond requiring an assessment of the totality of the circumstances. See Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc. (Ams. United II), 509 F.3d 406, 426-428 (8th Cir. 2007).

200 See supra note 139.

201 See Richardson v. McKnight, 521 U.S. 399, 412 (1997) (concluding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case"); Wyatt v. Cole, 504 U.S. 158, 168-69 (1992) (holding that "qualified immunity ... is [not] available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute").

202 See Richardson, 521 U.S. at 413-14 (emphasizing the narrowness of its holding, and refraining from ruling on a potential "good faith" defense); Wyatt, 504 U.S at 169 (leaving, "for another day," "the possibility that private defendants faced with § 1983 liability ... could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens").

203 Brief for the United States, supra note 7, at 12 (citation omitted) (quoting Lemon II, 411 U.S. at 207-08).

100 Harv. L. Rev. 1639

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Developments In The Law — Religion And The State

III. ACCOMMODATION OF RELIGION IN PUBLIC INSTITUTIONS

As part of the enterprise of safeguarding religious liberty against state encroachment, the religion clauses regulate government efforts to recognize religion in the public sphere, including official adoption of religious symbols or practices, [1] and religious exercises or instruction in public schools. [2] When such actions signal state preference among religions or prescribe orthodoxy in matters of belief, the religious autonomy of individuals and groups who do not adhere to the preferred faith is undermined by the message of exclusion from the political community and the accompanying pressure to conform to preferred practices and beliefs. [3] Moreover, when the state introduces religious practices into its institutions, it may become the sponsor of coercive pressure exerted by adherents of favored religions against nonadherents, even though the state does not intend to establish religious orthodoxy. Establishment clause limitations on state adoption or promotion of religion thus complement the free exercise clause's protection of religious activity from government interference by prohibiting ***1640** the imposition of religious beliefs upon unwilling minorities by political majorities. [4]

This Part examines establishment clause problems attaching to government efforts to recognize religion in public institutions under an 'accommodation' rationale. Section A introduces the justification for allowing government recognition of religion in public institutions and discusses the difficulty of applying traditional establishment clause analysis to actions taken under this justification. It then proposes that the ambiguities in establishment clause analysis should be explicitly resolved so as to prevent majoritarian infringements of the religious autonomy of minorities. Section B addresses the problem of government adoption of religious symbols or practices in public life. This Section contends that the Supreme Court's emerging 'accommodation' theory focuses excessively on the perspective of the religious majority—whose 'widely held' [5] beliefs are recognized by government to the ***1641** exclusion of minority beliefs—and ignores the impact such state actions have on nonadherents of the majority faith. Section C discusses efforts to reintroduce religious practices and instruction into public education under the theory of promoting religious liberty and avoiding government hostility to religion. It concludes that such efforts, insofar as they are inevitably partial to particular religions and create conditions under which nonadherent children will feel pressure to adopt officially approved religious beliefs, inhibit rather than promote religious autonomy.

A. Public Sphere Accommodation of Religion and the Shortcomings of Traditional Establishment Clause Analysis

1. Accommodation of Religion in the Public Sphere

Despite modern trends toward secularization of society and the state, religion remains a powerful force in broad sectors of society. [6] Religion's continued vitality, paradoxically coupled with the omnipresent prospect of its marginalization, is the source of the recurring effort to allow government to recognize and affirm the importance of religious values in society. Underlying that effort lies a complex mixture of motives and rationales. Part of the impetus behind efforts to 'keep Christ in Christmas' [7] and to allow children to pray in schools has certainly been the belief that America is a Christian country and should recognize

itself as such.[8] It is essential to recognize, however, that efforts to maintain a place for religion in civic life are not motivated solely by a desire to create state-supported orthodoxy in religious matters. For many, such efforts are a way to accommodate the religiosity of 'a religious people,'[9] a religiosity to which the religion clauses grant affirmative protection. Government recognition of religious beliefs in public life, according to this view, does not inherently prescribe orthodoxy and hence restrict religious freedom, but rather ***1642** increases religious freedom by making the public sphere receptive to religious belief and practice. Accordingly, it has been argued that the policy of 'strict separation' of church and state, if read to mean a 'naked public square,'[10] manifests an unnecessary hostility to religion, inconsistent with the protected status of religion in the constitutional scheme.[11]

The 'accommodation of religion' rationale purports to govern the gray area between state concessions to religion required by the free exercise clause and those prohibited by the establishment clause. Its premise is that between these polar restrictions on government activity 'there exists a class of permissible government actions toward religion, which have as their purpose and effect the facilitation of religious liberty.'[12] These actions may take the form not only of 'exempt ing . . . from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed,'[13] but also of creating 'an atmosphere in which voluntary religious exercise may flourish.'[14] Recently, the Supreme Court has ***1643** advanced the latter concept of accommodation to justify state efforts to secure the place of religion in public life through public recognition of religious beliefs and symbols.[15] Some justices and commentators have also invoked this rationale in favor of permitting religious activity in the public schools in order to make schools receptive, rather than hostile, to religion.[16] Accommodation in this broader sense—referring not to religious exemptions, but to efforts to make public institutions more open to religion—shall be referred to as 'public sphere accommodation' of religion.

As developed by members of the Court and by commentators, public sphere accommodation serves three essential purposes that justify relaxed establishment clause scrutiny. First, and most importantly, it attempts to encourage and promote the free exercise of religion in civic life.[17] Second, it strives to recognize and commemorate the importance of religion in America's historical traditions and cultural heritage.[18] Third, it serves the state's interest in promoting social cohesion and community identity by admitting shared symbols and values into the civic sphere.[19] Because public sphere accommodations are aimed at protecting religious freedom and preserving social ***1644** unity and cultural values—rather than promoting religious orthodoxy—they are seen as permissible.

The central problem addressed by this Part is the challenge that this accommodation rationale poses to establishment clause analysis. As will be discussed in this Section, the traditional analysis derived from *Lemon v. Kurtzman*[20] is not well-suited to assess public sphere accommodations, largely because it fails to encompass adequately the underlying value of religious autonomy it purports to serve. That is, a public sphere accommodation of religion, when viewed in terms of its accommodationist objectives, may survive *Lemon* scrutiny, and yet violate the underlying establishmen clause purpose of avoiding majoritarian imposition of religion on nonadherents. This Section argues that the *Lemon* test falters in this manner because it fails to refer to the perspective of religious minorities in addressing the majority's effort to accommodate religion. Drawing on Justice O'Connor's reformulation of *Lemon*, this Section concludes that public sphere accommodations must be evaluated for their probable impact on religious minorities whose beliefs are not benefitted by the accommodation.

2. The Establishment Clause Framework

(a) The Problem of Applying Lemon.—For fifteen years, establishment clause analysis has been governed by the tripartite test developed in *Lemon v. Kurtzman*.[21] Under *Lemon*, in order to pass establishment clause scrutiny a challenged government

action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion.[22] Notwithstanding its long and continued use, the test has provoked considerable dissatisfaction, both on the Court and among commentators.[23] Particularly acute are the criticisms offered by proponents of accommodation, who argue that the rigid formulation of the test is out of touch with the establishment clause goal of preserving religious liberty and, hence, is excessively restrictive ***1645** of efforts to promote the values encompassed by the accommodation rationale.[24]

Even when the test is accepted as controlling, however, applying the *Lemon* formulation to public sphere accommodations is problematic, because it yields fundamentally ambiguous results. Notwithstanding its evident strictness, the broad mandate of *Lemon* does *not* by its terms foreclose all public sphere accommodations of religion,[25] because the goals that such accommodations purport to serve do not themselves run afoul of *Lemon*'s stricture against government advancement of religion. These goals—promoting free exercise of religion, recognizing the historical significance of religion in American culture, and promoting social cohesion[26]—can plausibly be labelled 'secular' purposes, distinct from state promotion of religion in the sense of creating an 'official' religion.[27] Similarly, when these objectives are ***1646** achieved, they may be considered the action's primary—and secular—effects. Application of the *Lemon* test thus depends entirely on the characterization of the government's actions; when characterized in accordance with the 'secular' ends encompassed by the accommodation rationale, government actions may pass muster under *Lemon*'s purpose-effect test.[28]

Characterization, however, is a matter of perspective. A government action permitting some religious practices within public institutions may be seen as an accommodation justified by secular objectives when viewed from the standpoint of the government and the political majority behind it. Those whose creeds benefit from an accommodation may well believe that the action promotes legitimate secular objectives and allows religious values to flourish of their own accord. To persons who do not adhere to the accommodated beliefs, however, the state-sanctioned presence of religion in public institutions may create pressures to conform to majority beliefs, or send messages of exclusion from the community, despite the fact that these are neither intended nor even perceived by the majority.[29] From the perspective of those whose beliefs are not included in the government's attempts to promote religious freedom and community self-definition, the 'accommodation of religion' may mean state favoritism among creeds or, at a minimum, state-created conditions under which majority creeds achieve de facto orthodoxy. For the religious minorities, this is the opposite of accommodation of *their* religions. *Lemon* takes no account of this divergence between the perceptions of accommodated and unaccommodated religious groups, and thus lends itself to the dominance of majority perceptions in evaluating public sphere accommodations. To the extent that a court allows the viewpoint of adherents of majoritarian beliefs to govern the characterization of an action, ***1647** without taking into account the perspective of the outsider, its conclusion that the action does not violate *Lemon* may be in effect a roundabout way of stating that the majority finds its own action acceptable and freedom-enhancing.

(b) Justice O'Connor's Reformulation of Lemon.—Justice O'Connor has recently reformulated the *Lemon* test[30] in an effort better to achieve the establishment clause's core purpose of prohibiting government 'from making adherence to a religion relevant in any way to a person's standing in the political community.'[31] Justice O'Connor replaces the general question of whether the government 'advances' religion with the question of whether the government 'endorses' or exhibits a preference for religion.[32] This reformulation properly suggests that establishment clause inquiry should focus on the impact of state actions on nonadherents of benefitted creeds, lest the state place a "badge of inferiority" on these citizens because of their beliefs.[33]

Justice O'Connor may be credited with redirecting *Lemon* toward the establishment clause value of avoiding imposition of religious belief—the primary danger of state efforts to make religion a part of civic life. [34] Signalling a preference for religion in the public sphere carries exclusionary messages and exerts a pressure to conform that is fundamentally at odds with religious autonomy. [35] However, her reliance on the perspective of an 'objective observer' [36] to decide whether the government impermissibly promotes religion suffers from the same disability as the original 'advancement' test under *Lemon*. It ignores the fact that the question of whether government is imposing a particular religion on nonadherents by 'accommodating' that religion in public institutions is perspective-dependent. Consequently, to the extent that Justice O'Connor's 'endorsement' inquiry presupposes a unitary 'objective' meaning of government actions, independent of perspective, it suffers from the same indeterminacy as traditional *Lemon* analysis in dealing with public sphere accommodations. The objective observer approach, like the abstract 'advancement of religion' test in ***1648** the *Lemon* formulation, may allow a finding for or against a government action, depending on whether the action is viewed from the perspective of the accommodated majority or from the perspective of the outsider who does not share the accommodated beliefs. [37] If it is to protect nonadherents against coercion or exclusion, O'Connor's 'objective observer' test must explicitly take into account the probable perceptions of the outsider.

(c) Refocusing the Inquiry.—The *Lemon* test and Justice O'Connor's reformulation both leave open, yet depend for their outcome on, the question of whose perspective a court should adopt in deciding whether public sphere accommodations offend the establishment clause. Yet insofar as application of *Lemon* is governed by the perspective of the majority, it will be inadequately sensitive to the impact of government actions on religious minorities, thereby in effect basing the protection of religious minorities on the judgment of the very majority that is accused of infringing the minority's religious autonomy. If the establishment clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received *by the minority or nonadherent.*

Limiting the inquiry to majority perceptions is substantively incomplete. When government makes religion a part of civic life, the absence of an official intention to influence or coerce religious belief does not negate the message that adherence or participation is a precondition to full membership in the community; thus, the guiding question should be whether the action is likely, from the perspective of the nonadherent, to carry coercive pressures or exclusionary messages. [38] The disparity between the perceptions of the majority that ***1649** is 'accommodating' religion and those of religious minorities who do not benefit from the action must be resolved in favor of the latter. [39]

***1650** Application of the minority perspective standard to public sphere accommodations of religion proves quite restrictive, despite the fact that such accommodations purport to promote religious liberty. Placing the symbols of a particular faith in the public square [40] or adapting the routine and curriculum of public schools to the beliefs or practices of certain creeds [41] is likely to cause nonadherents of the accommodated faiths to feel that full membership in the community is contingent on acceptance of such creeds. Because public sphere accommodations are likely to be preferential toward majority religious beliefs and practices [42] and to send the message that religion is significant to membership in the community and participation in public institutions, these accommodations carry an inherent potential for creating coercive or exclusionary pressures on nonadherents of favored religions. Therefore, to the extent that, in practice, they are partial to certain creeds, public sphere accommodations of religion—as opposed to exemptions mandated by the free exercise clause [43]—should be forbidden, notwithstanding the majority's intention to promote religious freedom. The aim of keeping the public square or the classroom free from government-sponsored—in contrast to privately undertaken—religious expression is not to suppress such expression, but to make it more pluralistic by leaving it a matter of individual choice.

1651** ***B. Government Adoption of Religious Symbols or Practices in Public Life

1. The 'Civil Religion' and the Establishment Clause

(a) The Dual Character of Civil Religion.—The entrenchment of religion in American public life—its presence in the dominant moral, social, and cultural fabric of society [44]—has been termed a '*de facto* establishment of religion prevail ing throughout the land.' [45] Against this background, government recognition of religion in public life takes a variety of forms, ranging from enactments of practices that carry religious significance or have historical roots in religion [46] to adoption of symbols or precepts carrying some religious significance as part of the emblems of civic life. [47]

Observers, however, have long commented on the ambiguous nature of public religion in America. [48] The American 'civil religion' [49] is comprised in part of strands of traditional sectarian faiths; yet it also consists of essentially social and political values—'a celebration of American ways' [50] with little sectarian significance notwithstanding the sacral imagery in which they are cast. [51] As such, the civil religion promulgated by government reflects both the absorption of ***1652** 'Christian ethnocentrism' [52] into public institutions, and a "ceremonial deism" [53] that links democratic ideals and institutions to transcendent aspirations. [54] References to God in the Pledge of Allegiance [55] and the national motto 'In God We Trust,' [56] though by definition theistic, are arguably as expressive of patriotic ideas as of religious commitments. [57] Similarly, the recognition of Thanksgiving and Christmas as official holidays [58] may reflect their role as secular folk traditions as well as their religious roots.

(b) Civil Religion as Expression of Secular Values.—The ambiguous character of civil religion makes it especially difficult to classify in establishment clause terms. On the one hand, state adoptions of the religious motifs inherent in 'In God We Trust' and in the Thanksgiving holiday may impose theistic beliefs on nonadherents by granting such beliefs a central symbolic place in the national life. 'God Save the United States and this Honorable Court,' the phrase used to open the Supreme Court's sessions, arguably grants preference to theistic beliefs by 'directly t[ying] God to country.' [59] On the other hand, it might be argued that, given the contexts in which 'In God We Trust' and 'God Save this Honorable Court' appear, the invocation of a deity serves essentially as a surrogate for patriotic rather than religious values, the sacral language serving primarily to confer solemnity and 'a special resonance and power.' [60] Similarly, adoption of holidays ***1653** with historical roots in religion arguably stands not as enactments of religious belief, but as recognitions of traditions that have become essentially secular in nature. From the standpoint of the establishment clause objectives of avoiding state imposition of religion on nonadherents and preventing the state from making religion relevant to standing in the community, state promotion of such patriotic values and secularized traditions is acceptable, provided that religious content is truly lacking. [61]

This line of analysis—distinguishing between symbols that have religious content and symbols that have become 'secularized' or are devoid of religious meaning—has ordinarily been the approach of courts considering challenges to official adoption of assertedly religious symbols or practices. Cases involving government-adopted symbols have generally turned on the question of whether the symbol was religious in nature, [62] or was expressive of primarily secular values, ***1654** notwithstanding some religious references. [63] On the premise—whether correct or not—that they possess a 'patriotic or ceremonial character' with little sectarian or theological import, [64] or recognize customs no longer exclusively connected with their religious roots, [65] elements of the state-sponsored civil religion are regarded as permissible by the courts. [66]

Yet precisely because genuine religious significance is lacking—or at least heavily diluted—in the symbols of civil religion, their ratification by the courts is unsatisfactory to proponents of greater government recognition of religion in public life. State recognitions of religion that confine themselves to symbols that have shed their religious content hardly qualify as meaningful accommodations to religion.[67] For proponents of accommodation in the public sphere, it ***1655** is a hollow victory if the government may only recognize religion in the form of a bland 'civic piety,'[68] or must artificially suppress the religious elements of holidays.[69] The heart of the public sphere accommodation issue, then, is whether government is permitted to adopt symbols with genuine religious content, albeit for purposes other than promoting orthodoxy of religious belief.

2. Beyond Civil Religion: Government 'Acknowledgment' of Sectarian Faiths

(a) Public Sphere Accommodation in Marsh *and* Lynch.—Recently, the Supreme Court has interpreted the establishment clause and *Lemon* to permit government adoption of symbols with essentially undisputed religious content, under the accommodation rationale of recognizing the role of religion in the country's cultural heritage, promoting social cohesion, and encouraging free exercise in public life.[70] In *Marsh v. Chambers*,[71] the Court employed this rationale to uphold the practice of opening state legislative sessions with state-sponsored prayer. In *Lynch v. Donnelly*,[72] the Court upheld on similar grounds the maintenance of state-sponsored nativity scenes as part of a Christmas display on public property. Viewing the actions in terms of the accommodation goals they purported to serve, the Court, fully cognizant of the actions' sectarian content, permitted the government to align itself with the symbols and practices of particular faiths. The Court's insistence on the objectives of recognizing widely shared beliefs and promoting communitarian values, however, appears to entail a corresponding decrease in sensitivity to the perceptions of religious minorities who do not share the beliefs the majority chooses to accommodate.

In *Marsh*, the Court upheld legislative prayer[73] largely on the basis of its widepread acceptance since the time of the First Congress.[74] The Court conceded the religious nature of the practice, rather than ***1656** attempting to cast it as secular.[75] Confronting the argument that allowing invocational prayer in the legislature places the state's imprimatur on one religious view, the Court responded that because the practice is 'part of the fabric of society,' it is not 'an 'establishment' of religion' but 'simply a tolerable acknowledgement of beliefs widely held among the people of this country.'[76] While recognizing that historical patterns do not themselves justify under the establishment clause the government's adoption of an overtly religious ceremony,[77] the Court allowed historical acceptance *indirectly* to validate the practice by reclassifying the practice—precisely by virtue of its widespread acceptance—as an 'acknowledgement' rather than a promotion of religion. Yet relying on a religious ceremony's entrenched status to conclude that it is merely a passive 'acknowledgement' of beliefs flatly disregards the fact that, from the perspective of nonadherents, the ceremony gives preferential status to the religious beliefs of the majority. Such reasoning equates majority acceptance with constitutional acceptability. The establishment clause object of protecting religious minorities from majoritarian imposition of religion is undermined if the majority's views govern the determination of whether the majority's accommodation of its own 'widely held' religious beliefs violates the clause's guarantee.

This problem reappears in *Lynch*, in which the Court adduced the three main strands of the public sphere accommodation rationale in support of a city's inclusion of a Christian nativity scene in its annual Christmas display. Freely conceding that 'the creche is identified with one religious faith,'[78] the Court argued that, first, the creche served the purpose of "respect ing the religious nature of our people"[79] by making public institutions receptive to religious expression.[80] Second, when viewed in the context of the Christmas holiday celebration, the display—depicting the religious and historical origins of the holiday—could be viewed as part of the nation's cultural heritage, and thus a worthy object of government recognition.[81] Finally, the creche had the secular purpose of instilling a 'friendly community spirit of good will in keeping with the season.'[82] In

light of these objectives, the Court found that the city's display of the creche satisfied the *Lemon* test as essentially secular in purpose and effect. [83]

***1657** The Court's finding that the creche served these 'accommodation' purposes without impermissibly promoting religious belief rested, as in *Marsh*, on an appeal to popular consensus. The Court assumed that the public holiday context of the creche would make clear to observers that the creche was primarily a 'reminder' of the country's religious heritage and, as such, was intended as no more than an 'acknowledgement' of religious beliefs. [84] The Court's evaluation of the symbolic import of the creche, however, ignored the substantial evidence produced at trial that religious minorities regard the creche as an unambiguous promotion of, and preference for, Christianity over other religions. [85] To these minorities, the fact that the overtly religious symbolism contained in the nativity scene—signifying a central belief in the Christian faith [86]—is part of a wider secular celebration (with roots in the same religion) does not dilute the inevitable impression that the government is endorsing the beliefs associated with the creche; nor does it alter the message that minority religious beliefs 'are not similarly worthy of public recognition nor entitled to public support.' [87] Perhaps members of the Christian majority, whose beliefs are recognized by the display, may view the display as did the Court and conclude that it accommodates their beliefs without infringing the religious autonomy of nonadherents. Non-Christians, however, are likely to receive the message that, in failing to share the majority's creed, they are outsiders who do not fully belong in the community. [88]

(b) Criticism of the Accommodation Rationale.—The shortcomings of *Marsh* and *Lynch* demonstrate that the objectives subsumed under the public sphere accommodation rationale, when invoked to justify the formal, public honoring of religious beliefs by the state, cannot be squared with the protection of the religious autonomy of minorities. First, the free exercise value purportedly served by state-sponsored religious activity—the attempt to make civic life more receptive to religious belief and practice—seems fundamentally inconsistent with special treatment for certain beliefs. Only those whose beliefs are singled out for recognition will think that public sphere accommodations promote conscientious autonomy and free exercise values; others will instead be given the impression that nonadherence ***1658** to the preferred creed means being less than a full member of the political community. To the Christian majority, adopting the Presbyterian prayers of the Nebraska chaplain may perhaps appear to be nothing more than an 'acknowledgment' of its beliefs pursuant to a broader goal of leaving open a place for religion—all religion—in government. To the outsider, it appears as a signal that Presbyterian beliefs are the preferred beliefs of the state, and that other creeds are not worth of equal respect. This message obstructs, rather than promotes, the accommodationist policy of combatting 'the notion that citizens must leave behind their religious convictions and practices whey they enter the (ever-expanding) realm of the state.' [89]

Similar problems arise when the symbols of particular creeds are accorded a central place in public institutions for the purpose of honoring 'our religious heritage.' [90] The dominance of a symbol or practice in society should not in itself justify its adoption by government. With the exception of symbols or practices that, although religious in origin, have become 'secularized' and have thus acquired an independent nonreligious significance, [91] the widespread acceptance of particular religious symbols or practices in society simply indicates the dominance of certain religions. Their adoption by government is thus a bow to the majority beliefs and is not softened by the fact that it is accompanied—as in the example of a creche that forms part of a broader secular Christmas celebration—by the promotion of other secular elements of that culture. When courts rely on the cultural entrenchment of a symbol or practice in order to determine whether its promotion by government endorses religion, majority acceptance becomes the touchstone for establishment clause inquiry.

Finally, the objective of promoting social cohesion through coalescence around shared symbols, when invoked to justify state adoption of religious symbols, is also suspect. [92] This goal runs at odds with the premise that pluralism in matters of religion is both a social fact and a value to be respected. Only by positing a consensus on religious beliefs can a court conclude

that fostering community around religious symbols will not have coercive or exclusionary effects on disfavored groups and individuals. Yet the religion clauses presume that such a consensus does not exist, and they prohibit government from attempting to create or maintain one. Government efforts at structuring group identity around religious symbols carry inherently ***1659** exclusionary messages to those who do not share the beliefs forming the religious fulcrum established by the state. The objective of community self-definition is a spurious justification for the state's introduction of religion into civic life, because it conditions full membership in the community on acceptance of the defining symbols. Government-imposed unity around religious beliefs is, by its own terms, at odds with the ideal of protecting pluralism and respect for religious diversity.

In *Lynch* and *Marsh*, the appeal to historical practice and communitarian values and the adoption of the majority perspective in deciding whether the government has impermissibly endorsed religion are complementary. Each is directed toward recognizing the majority's rights of community self-definition around common beliefs and symbols, notwithstanding the inherent exclusionary impact of such symbols on nonadherents. When certain beliefs form part of the dominant self-image of society, the logic seems to be, its adoption by government is an acceptable accommodation, because it is already a part of public life and is not being 'imposed' by government. Yet this ignores the significant symbolic impact that official sanctioning of religion may itself have, independent of broader social patterns, in enforcing religious uniformity; moreover, it is difficult to see why the fact of a creed's dominance in society should permit government to implicate itself in fostering prejudice among the majority and feelings of exclusion among the minority. [93] The Court's approach in *Lynch* and *Marsh* thus represents an inversion of the principle that the religion clauses protect unpopular minorities against exercises of majority will in matters of religion.

C. Religion and Public Education

The Supreme Court has found an establishment clause violation in every instance of state-sanctioned religious expression in public schools that it has considered. [94] The Court's rationale for prohibiting the presence of religion in public education appears to lie in the nature ***1660** of the public school as the locus of socialization as well as of the transmission of knowledge. [95] The schools' function of promoting tolerance and respect for difference—preconditions for protecting religious liberty in a pluralistic society—demands that the classroom remain scrupulously free of divisive sectarianism or majoritarian orthodoxy. [96] At the same time, a paramount concern is the particular vulnerability of school children to indoctrination and coercion, especially given the public schools' compulsory attendance requirement. [97] Courts have repeatedly expressed the fear that children's impressionability might lead them to perceive the presence of religious expression in school as signifying the school authorities' approval of such expression and, consequently, to feel pressure from teachers and fellow students to conform to majority practice, with the prospect of alienation as a price for nonconformity. [98]

Advocates of accommodation, however, have argued that permitting some religious expression in the schools and adapting the curriculum to students' religious values promote free exercise values [99] and prevent the establishment of a 'secularist' religion or antireligion in public education. [100] These arguments have generated the two principal areas of legal controversy: the effort to restore devotional activities to the schools, and the effort to eliminate the assertedly antireligious bias in the secular curriculum.

1. School Prayer

(a) School Prayer as Accommodation of Religion.—The Court's decisions in *Engel v. Vitale* [101] and *Abington Township v. Schempp*, [102] which declared unconstitutional state-conducted recitation of prayers and devotional Bible reading, overturned a deeply entrenchedcustom. [103] ***1661** The rulings provoked a massive public outcry and have met with steady resistance since their announcement. [104] Outright noncompliance with the decisions at the local level has been considerable. [105] In addition, a

number of states have simply enacted laws authorizing voluntary spoken prayer, in defiance of the decisions. [106] Proponents of school prayer have long argued for a constitutional amendment specifically authorizing voluntary organized prayer in the public schools. [107]

There is ample evidence that many base their support for prayer laws on the beliefs that America is a Christian nation and that organized prayer furthers the asserted educational goals of instilling the nation's traditional values in children and forestalling atheism. [108] From a jurisprudential standpoint, however, the reason that the constitutionality of school prayer remains at issue twenty-five years after *Engel* and *Schempp* is that permitting prayer may plausibly serve accommodation purposes rather than simply creating an official state religion. [109] Voluntary prayer exercises have been defended as promoting the religious child's interest in freedom to engage in religious expression, an accommodation that does not infringe the freedom of nonadherents so long as participation remains voluntary. [110] Viewed ***1662** in this manner, laws organizing or setting aside time for prayer complement actions taken pursuant to the state's obligation under the free exercise clause to accommodate the compelling religious needs of individuals, even though prayer laws are not themselves mandated by the free exercise clause. [111]

(b) 'Moment of Silence' Statutes.—This argument in favor of permitting religious activity in the schools appears particularly compelling when invoked in support of a mandatory 'moment of silence' for reflection or prayer. Unlike statutes providing for state-composed or teacher-led prayer, which put the stamp of official authority on the content of a particular religious belief or practice, [112] laws providing for a moment of silence may plausibly be defended as accommodating individual religious beliefs without imposing them on nonadherents. [113] Accordingly, such statutes have emerged in recent years as a legislative vehicle for accommodating religion in public schools while consistent with the Court's prohibition of organized spoken prayer. [114]

In *Wallace v. Jaffree*, [115] the Supreme Court struck down one such statute [116] as manifesting an impermissible preference that prayer take place during the moment of silence [117] —a ruling that the dissent criticized as ignoring the statute's fundamental purpose of promoting religious freedom in the classroom. [118] An exclusive focus on the ***1663** purported objectives behind 'moment of silence' statutes, however, misses the central issue of their probable impact on children. [119] Even assuming the absence of an intention to promote religious conformity, the accommodation rationale proffered in support of opening the classroom to prayer must be tested against the realities of the classroom in which it is implemented. For although a moment of silence, in contrast to officially composed prayer, does not directly place the state's imprimatur on a particular religious content, *any* organized prayer in the schools—whether spoken or silent—creates an environment in which majority religious practices become the devotional norm, imposing unacceptable coercive and exclusionary pressures on nonadherents. The *Engel* Court's insistence that government-supported religious exercises exert a coercive pressure on those who prefer not to participate, irrespective of the fact that participation is 'voluntary', [120] applies with equal force to devotional activities carried out in silence.

In practice, even organized prayer that is intended merely as an accommodation for the student who wishes to pray is, for the nonadherent of the faiths accommodated by the measure, [121] a source of pressure to conform to the religious practices of the majority. [122] Particularly when the teacher or a large number of students believe that ***1664** the moment of silence should be used for prayer, [123] the activity may acquire the traits of a ritual in which children feel strong pressure to participate. [124] Whereas to the adherent such a program may send a message that the state is promoting religious freedom, to the nonadherent it signals that the state approves of an environment in which she feels that full acceptance in the classroom is conditional on her adoption of the devotional norm. The purported voluntary nature of the prayer, and the state's claim not to identify with the religious activity in question, therefore, are largely illusory in the sensitive setting of the public school. Given the state's

responsibility for monitoring student relations at school, its indifference to the pressure exerted on the nonadherent stands in marked contrast to the ideal of religious autonomy that is thought to be fostered by the state's introduction of prayer in the first place.

To the extent that this form of accommodation to religion threatens to burden the religious autonomy of students who do not adhere to the faiths that benefit from the moment of silence, [125] it is antithetical to the purported object of promoting religious freedom and should be prohibited irrespective of the intentions of the majority. The pressure on nonadherents to conform to majority practice during moments of silence through the encouragement of teachers or pressures of fellow classmates threatens the ideal of religious autonomy just as much as impermissible legislative purposes. These inevitable pressures should constitute independent grounds for invalidation. [126] The coercive impact ***1665** of organized religious exercises, and the degree to which the state appears to align itself with such practices, must be evaluated from the standpoint of the individuals whose beliefs are not accommodated by the state.

2. Religion and the Public School Curriculum

(a) Attempted Correctives to the 'Secularist' Bias of Public Education.—The first amendment 'does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.' [127] Accordingly, instruction in the teachings of sectarian faiths has long been forbidden under the establishment clause. [128] Despite its abstract clarity, the Court's mandate against promoting religious beliefs in classroom instruction poses pressing difficulties in application. Education, both in transmitting moral values and in providing instruction in literary or scientific subjects, may naturally intersect at some level with religion: even if the schools avoid instruction in sectarian faiths, they may transmit norms or ideas that conflict with the precepts of certain faiths and hence be accused of showing hostility to those faiths or of establishing an ***1666** antireligion. The question then becomes whether schools should shape their curriculum to accommodate the offended faiths by either introducing the faiths' precepts into the curriculum or eliminating elements of the curriculum that contradict their precepts. [129]

This question has acquired a pressing urgency in connection with the fundamentalist response to the secularization of education. Religious groups have charged that secular public education promotes the antitheistic faith of 'secular humanism' [130] both by excluding religious teachings from the curriculum and by instructing in particular subjects—including evolution, sex education, literature, and values education—deemed inconsistent with certain traditional religious beliefs. [131] Accordingly, parents and religious groups have sought to correct perceived secularist biases in the schools and force some accommodation to traditional religion through litigation, legislation and influencing school board decisions. [132] The result is a 'crossfire' [133] in which public education is caught between competing assertions that instruction from ***1667** traditional religious perspectives, as well as instruction from a nonreligious viewpoint, is forbidden. A subtle dialectic emerges in which secular instruction infringes the religious values of some, while accommodations may infringe the autonomy of the rest.

Legal challenges to secular education, based on claims that the public schools promote antireligious beliefs, have been unsuccessful for many years. [134] In a recent decision, however, a federal district court banned the use in Alabama schools of forty-four textbooks judged to be biased against theistic religions and espousing the religion of secular humanism. [135] The decision suggests that when secular education conflicts with the precepts of a particular religious faith, the establishment clause may be invoked to bring the curriculum in line with the faith's precepts. [136]

At the same time, some state legislature and school boards have attempted to counteract the allegedly secularist bias in schools by setting restrictions on the teaching of subjects deemed hostile to religion and by introducing instruction more compatible with certain faiths. [137] The most notable instance is legislation regulating the teaching of evolution. [138] Since the Supreme Court ruled unconstitutional laws banning the teaching of evolution, [139] legislative efforts have focused on limiting the exclusive teaching of evolution as the explanation of human origins through laws requiring that equal time be devoted to creation-based accounts of human origins. [140] These 'equal ***1668** time' or 'balanced treatment' statutes have been struck down as manifesting the purpose of propagating religious doctrine. [141] Courts have not yet ruled on the constitutional status of teaching creationism in itself, [142] however, and although laws overtly limiting instruction in evolution have been viewed with suspicion by the courts, state educational authorities have been able to accomplish some of the same ends of 'balanced treatment laws' through instructional guidelines and textbook selection policies. [143] The 'comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools' [144] is thus double-edged—insulating the state from parental interference at the judicial level, [145] yet according influential groups the power to shape education along religious lines at the school board level without judicial scrutiny. [146] Decisions of school authorities are not easily overturned, whether by those seeking to relax the secular orientation of public education or by those seeking to preserve it. [147]

(b) Secular Education as Hostility to Religion.—The Supreme Court has remarked in dictum that the establishment clause prohibition on religious instruction in public schools does not entitle the state to 'establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who believe.' [148] The thrust of the fundamentalist challenge to public education is that the moral and ***1669** scientific precepts taught in public schools promote an antitheistic human-centered religion. [149] The claim that the religion of secular humanism has been established in public education is difficult to sustain, however, given the sweeping manner in which the term is used. [150] Application of the term has not been limited to beliefs that are expressly atheistic or hostile to religion as such and that accordingly should not be taught in schools. [151] Rather, the fundamentalist challenge has been broadly leveled at materials and values thought to be inconsistent with the precepts of a particular religion, and to the absence of religion from the classroom. [152]

***1670** There are several problems inherent in the argument that when a school imparts knowledge or values inconsistent with the teachings of a religion, it must either expurgate the objectionable material or offer instruction in the offended religious doctrine. Many ideas central to scientific, political, and cultural discourse, including values—such as social equality and religious tolerance—arguably embedded in the Constitution itself, appear to be at variance with certain religious precepts. [153] A policy of expurgating secular materials whenever they offend religious values effectively gives veto power to religious objectors over any action of the state not consistent with the objector's religious beliefs, [154] thus permitting the objector to shape the curriculum according to a single creed. It further confronts courts and school authorities with the choice of either ordering that the curriculum conform to the precepts of all religions—a manifest impossibility [155] —or catering instruction to certain preferred faiths.

The argument for eliminating the secularist bias in schools equates inconsistency between school curriculum and religious precepts, or failure to inculcate religious precepts in the curriculum, with hostility to religion. Such a conclusion confuses hostility to religion with nonsectarianism. [156] The flaw in this equation is its implicit premise that whatever is not religious is antireligious. As one court has pointed out, however, the establishment clause presupposes a third category of *non*religious activity, into which falls the secular government activity permitted under the clause. [157] Secular education, comprising the advancement of both secular ideals and secular knowledge, is not ***1671** inherently antireligious, in the sense of intruding on the individual's private choice of religious belief; indeed, it is plausibly viewed as the precondition for such choice, because it

minimizes state identification with particular religious beliefs. Absence of religion and presence of religion, therefore, are not congruent in terms of their 'establishment' effects, because the former leaves open the possibility of private choice. [158]

Moreover, teaching students to be tolerant of diversity—which has been challenged by some opponents of secular humanism as promoting moral relativism—is consistent with protection of religious choice, even though in substance it may offend some religious views. [159] As the Supreme Court has conceived it, secular education has as its purpose 'the preparation of individuals for participation as citizens' and the 'inculcat ion of fundamental values necessary to the maintenance of a democratic political system.' [160] Some of the values challenged as inculcating secular humanism are those considered to be at the heart of a democratic, pluralistic society: basic concepts of ***1672** social and political equality and 'tolerance of divergent political and religious views.' [161] Instilling these values is antireligious only in the sense of refusing to give primacy to religious views that reject their validity; [162] more importantly, transmission of these values is essential for the protection of the religious autonomy of disfavored religious groups.

By contrast, state sponsorship of religion to counteract the secular orientation of public education accomplishes the opposite result, selectively exposing students to the teachings of particular religious creeds that receive state approval. [163] The 'balanced treatment' laws—notwithstanding the fact that they purport to limit themselves to 'scientific' aspects of creationist accounts of human origins—are attempts to offset the exclusively secular tenor of evolution instruction, which is considered objectionable precisely because it refuses to offer a supernatural account of human origins. [164] Creation theories, even if supported by some scientific evidence, are essentially religious in nature; [165] this is why their introduction into the curriculum is thought ***1673** to protect the religious freedom of those who accept them. [166] Balanced time requirements may be viewed as attempts to promote religious freedom by making classrooms accessible to, rather than hostile to, religious beliefs. [167] As with the moment of silence, however, this accommodation of students whose religious values are offended by the exclusion of religion from the classroom promotes the religious freedom only of those whose beliefs are incorporated into the curriculum. Those who reject the Genesis account of creation—which is generally the theory contemplated by balanced treatment statutes [168]—see their religious freedom curtailed rather than enhanced, because the state elevates one set of religious beliefs over others. [169]

The proposition that secular education is not antireligious, but rather—as 'the training ground for habits of community' [170]—is a precondition for religious freedom, may seem overly pious. [171] It is undeniable that the content of secular education may trample on certain religious beliefs; the response—that those whose autonomy is infringed may seek exemption from objectionable classes [172] or attend private schools at their own expense [173]—must seem unsatisfactory to those who seek public recognition of their beliefs. Yet the idea that the secular orientation of the public school curriculum is itself a religion or antireligion is, in practice, a paradox the establishment ***1674** clause cannot afford to accept; it leads to a fundamental incoherence, for government neutrality itself becomes susceptible to challenge as antireligious. For courts or school officials to invoke this reasoning as the basis for reintroducing religion into the curriculum is to adopt precisely the intolerance the establishment clause seeks to prevent.

D. Conclusion

Public sphere accommodation is defended on the grounds that the establishment clause does not require—indeed, prohibits—government hostility to religion in public institutions, and that it permits government 'acknowledgment' of widespread religious beliefs when taken for the purpose of furthering free exercise values and other secular interests. [174] This Part has attempted to show that, as arguments for introducing religion into public institutions, neither of these assertions is tenable. Forbidding

governmental adoption of religious practices and keeping organized religion out of public schools are not antireligious policies. Rather, they follow from the recognition that keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to 'flourish according to the zeal of its adherents and the appeal of its dogma.' [175] If preventing preferential treatment of dominant or politically appealing religions is 'hostile' to religion, it is so only in refusing to place state approval on majoritarian religious belief; it is not hostile to the value of religious pluralism.

The central flaw in the public sphere accommodation rationale is that it conceives of 'religion' as a unitary cluster of faiths, such that accommodation of certain creeds is considered to accommodate 'religion' generally and to enhance the religious freedom of all. Such a conception ignores the diversity of faiths in contemporary society; [176] it further ignores the divergence in perspectives between adherents and nonadherents of accommodated faiths, for what to the 'accommodated' majority is merely a recognition of its beliefs or an opportunity to express its beliefs may, to nonadherents, be both a vivid reminder that their beliefs are not favored and a source of pressure to conform or be excluded.

Because the establishment clause's stricture against majoritarian imposition of religion presupposes that political majorities will seek to advance their own religious interests without taking into account the interests of unpopular creeds, majority efforts at self-accommodation ***1675** should be viewed with skepticism. [177] Inasmuch as certain faiths or practices receive preferential treatment by the state, accommodation achieves precisely the opposite of its purported object of removing constraints on religious expression and practice, except for the fortunate groups that benefit from the preferential treatment. Those whose creeds are given public recognition, or whose practices or beliefs are made part of the public school program, find their religious freedom increased; those who do not adhere to the preferred creeds are more likely to find their religious commitments burdened. The inherent partiality underlying efforts to secure a place for religion in public institutions belies the accommodation rationale by creating exclusionary and coercive pressures on many. This is the irony of the Court's shift from 'separation of church and state' toward a policy of 'accommodation' of the sense described in this Part: [178] adopting publicly the beliefs of some creates a graphic separation of government from the beliefs of the rest and makes the public sphere less accommodating to the outsider's religion than it was before. By singling out certain religions for favored treatment, public sphere accommodation remains a policy of separationism—but only on a discriminatory basis.

Footnotes

1 *See infra* pp. 1651 -59.

2 *See infra* pp. 1659 -74.

3 *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (noting that state endorsement of religion 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'); Engel v. Vitale, 370 U.S. 421, 431 (1962) ('When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.').

4 In focusing on the danger of majoritarian imposition of religious values—and the corresponding potential for exclusion or stigmatization of nonadherents of majority faiths—this Part grounds its view of the establishment clause on the objective of protecting religious liberty. Such an emphasis arguably ignores the entire strain of establishment clause theory holding that the clause aims to ensure the mutual autonomy of government and religion, for the sake not only of protecting religion from government interference but also of preserving the integrity of civic life by protecting it from the strife or disunity engendered by religious conflict. This idea has been present in the Supreme Court's jurisprudence since its early articulation of establishment clause doctrine. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 8-11, 15-16 (1947); McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (Frankfurter, J.,

concurring). It persists in the 'excessive government entanglement with religion' prong of the test established in Lemon v. Kurtzman, 403 U.S. 602, 613 (1971), one aim of which is to guard against 'political division along religious lines.' *Id.* at 622.

The rationale of protecting the integrity of the civic sphere, however, is highly problematic. It is unclear why political controversy over religion is a greater evil than controversy over other issues. Indeed, vigorous partisan debate on issues of public concern is ordinarily considered healthy, and to limit this debate raises serious first amendment problems. *See infra* Part IV p. 1685. Perhaps because of this ambiguity, the potential for political division is not currently regarded as a dispositive element of the establishment clause test. *See infra* Part IV pp. 1685-86. Moreover, the Court's application of the 'entanglement' prong of *Lemon* has been confined to the narrow class of cases involving government aid to parochial schools and other religious institutions. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232, 3237-39 (1985); *infra* Part IV pp. 1688-89.

Less controversial is the objective of promoting religious freedom, arguably the central motivating concern of the religion clauses. *See* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810 (1978); *supra* Part II pp. 1638-39. 'Religious freedom,' however, must be understood to mean protection of religious minorities from imposition of majority religious belief. The actions of political majorities may be justified as promoting religious freedom, but often it is the majority's *own* freedom that is enhanced, while the freedom of minorities—whose religious values are not reflected by the political majority—is restricted. Accordingly, this Part emphasizes the establishment clause's protection of disfavored groups, tracking a broader view of the Bill of Rights as extending protection to groups in society whose interests are not adequately taken into account by government. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 151 (1980).

5 Marsh v. Chambers, 463 U.S. 783, 792 (1983).

6 *See supra* Part II pp. 1612 -13.

7 Donnelly v. Lynch, 525 F. Supp. 1150, 1173 (D.R.I. 1981) (quoting Mayor of Pawtucket, R.I., on the rationale for the city's maintenance of a nativity scene in a public park), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

8 Some strands of the Christian fundamentalist movement, rejecting the premise that the state may not prescribe orthodoxy in religious matters, are predicated on the idea that certain religious beliefs should be made the nation's official creed. This is not, however, universally true of evangelical Christianity. *See generally* R. FOWLER, RELIGION AND POLITICS IN AMERICA 203-25 (1985); R. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 311-31 (1985). State promotion of Christianity has been defended by some as consonant with the religion clauses. *See, e.g.*, Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 2-3 (1978).

9 Zorach v. Clauson, 343 U.S. 306, 313 (1952) ('We are a religious people whose institutions presuppose a Supreme Being.').

10 *See* R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

11 *See* Lynch v. Donnelly, 463 U.S. 668, 673 (1984); *see also* Brief for the United States as Amicus Curiae Supporting Reversal at 2, *Lynch* (No. 82-1256) [hereinafter Brief for the United States] (arguing that excluding religion from public occasions 'mandates an artificial and undesirable sterility in public life, in which one important and enriching aspect of our history and culture is treated as illegitimate and therefore nonexistent'). The Court has long characterized government hostility to religion as a fundamental evil under the establishment clause. *See, e.g.*, *Lynch*, 463 U.S. at 673; Zorach v. Clauson, 343 U.S. 306, 315 (1952).

12 McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3.

13 McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment). The Supreme Court has most often endorsed the accommodation idea in instances in which the government voluntarily creates a religious exemption from the obligations it imposes on the citizenry, even though such an exemption may not be required by the free exercise clause. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 453, 461 n.23 (1971) (upholding Congress' conferral of conscientious objector status on those who oppose war for religious reasons). The Court has interpreted the free exercise clause to mandate exemptions from generally applicable requirements if the exemption is necessary to a person's religious practice and does not conflict with a compelling state interest. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987) (overturning a denial of unemployment compensation to a Seventh Day Adventist who refused to work on Saturdays); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating as applied

a statute that compelled Amish parents to send their children to school until age 16). *See generally infra* Part V (discussing free exercise accommodation).

14 *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in the judgment). It is essential to recognize the distinction between the two types of accommodation described by the quoted passages. Broadly stated, both involve voluntary state efforts to facilitate the free exercise of religion. The first type, however, refers to relief from regulations that, although facially neutral, in application have a significantly harmful impact on the religious practice of individuals. Exemption from the military of the kind upheld in *Gillette*, 401 U.S. 437, provides an example. The purpose of such relief frequently is to avoid state interference with the private practice of religion. The second type of accommodation, on the other hand, consists of state efforts to facilitate the exercise of religion in the public sphere by making public institutions open to, or reflective of, religious values. Statutes setting aside time for prayer in public schools, such as the one struck down in Wallace v. Jaffree, 472 U.S. 38 (1985), are one example.
Although the line between the two types of accommodation is sometimes blurred, it is important to identify as a special class those government actions that assign a public significance to religious values or incorporate religion into public institutions, because these actions in particular threaten to impose majoritarian religious beliefs on religious minorities and to send a message that adherence to the preferred faith is a prerequisite to full membership in the political community. This Part is exclusively concerned with the second, public, type of accommodation.

15 *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (upholding a government-sponsored nativity scene as part of an annual Christmas display and stating that the Constitution not only does not 'require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religious, and forbids hostility toward any') (citations omitted).

16 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 88-89 (1985) (Burger, C.J., dissenting) (arguing that a law requiring a 'moment of silence' for prayer in public schools 'affirmatively furthers the values of religious freedom and tolerance that the Establishment clause was designed to protect'); Note, *Freedom of Religion and Science Instruction in Public Schools*, 83 YALE L.J. 515 (1978) (arguing that teaching of creationism promotes religious freedom by combatting the secularist orthodoxy created by the exclusive teaching of evolution); McConnell, *supra* note 12, at 42-50; Note, *The Myth of Religious Neutrality By Separation in Education*, 71 VA. L. REV. 127 (1985).

17 *See, e.g., Lynch*, 465 U.S. at 673; McConnell, *supra* note 12, at 14-34.

18 *See, e.g., Lynch*, 465 U.S. at 677; Marsh v. Chambers, 463 U.S. 783, 786 (1983); Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.Y.U. L. REV. 509, 547-55; *cf.* Engel v. Vitale, 370 U.S. 421, 445 (1962) (invalidating organized spoken prayer in public schools) (Stewart, J., dissenting) (arguing that 'to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation').

19 *See, e.g., Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); Crabb, *supra* note 18, at 511-15; Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1245-46 (1986).

20 403 U.S. 602 (1971); *see infra* pp. 1644-46.

21 403 U.S. 602 (1971).

22 *See id.* at 612 -13.

23 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-23 (1978).
Although the Court has on occasion declined to apply the *Lemon* test in analyzing an establishment claim, *see* Marsh v. Chambers, 463 U.S. 783 (1983); Larson v. Valente, 456 U.S. 228 (1982), it has recently reaffirmed that the *Lemon* criteria should guide establishment clause inquiry, *see* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3223 (1985).

24 Those arguing for public sphere accommodation do not regard *Lemon*' s criteria of religious purpose and effect as dispositive, because the values served by accommodation justify some 'violations' of these prongs: there are 'good' and 'bad' religious purposes and effects, depending on whether or not they are consonant with religion clause objectives. *See* McConnell, *supra* note 12, at 6. From

the accommodation perspective, even if governmental acknowledgment of religion in public life or in the public schools is 'religious' in purpose and effect, such acknowledgement furthers rather than defeats the values of the establishment clause, because it attempts to promote religious freedom. Given this line of argument, it begs the question simply to invoke the *Lemon* test against public sphere accommodations of religion: *Lemon*'s strictures, insofar as they prohibit governmental efforts to make civic life receptive to religious beliefs, are precisely what the rationale rejects. *See* Brief of the United States as Amicus Curiae Supporting Affirmance at 12-13, Wallace v. Jaffree, 472 U.S. 38 (1985) (No. 83-812) (arguing that *Lemon* should not apply in cases in which the state attempts to promote free exercise values); McConnell, *supra* note 12, at 58-59 (arguing that the *Lemon* test is 'irrelevant' in accommodation cases).

To some degree, this criticism misconstrues the Court's decisions under the establishment clause, which have been indicated that promotion of free exercise values is itself a permissible purpose of government action. *See infra* note 27. The criticism is valid, however, insofar as a court applying *Lemon* might go no further than to find that a government act has the purpose of benefitting religion, and thus violates the 'secular purpose' requirement of *Lemon*, without ever addressing the argument that the action's purpose is consonant with *Lemon*'s underlying values. This has been a principal criticism, for example, of the decision in *Wallace*, which struck down a statute requiring a moment of silence for prayer or reflection. *See* 472 U.S. at 81-83 (O'Connor, J., concurring in the judgment); *id.* at 89 (Burger, C.J., dissenting); *infra* pp. 1662-65.

Presumably, *Lemon* analysis should take into account whether the state's purpose is to promote free exercise rather than to impose religious values. At this Part argues, however, the fact that the state's purpose is to promote free exercise or other permissible values, or the fact that the majority views the action as accomplishing these objectives, should not color judicial inquiry into the probable impact of the action on religious minorities whose beliefs are not 'accommodated' by the action.

25 This conclusion has emerged as a matter of law in the Court's application of *Lemon* in Lynch v. Donnelly, 465 U.S. 668, 679-85 (1984), in which the Court upheld a city's maintenance of a Christian nativity scene. *See infra* pp. 1656-57.

26 *See supra* p. 1643.

27 At least one strand of establishment clause jurisprudence maintains that the clause permits the government to promote the free exercise of religion by 'respect[ing] the religious nature of our people and accommodat[ing] the public services to their spiritual needs,' lest the Constitution require 'that the government show a callous indifference to religious groups.' Zorach v. Clauson, 343 U.S. 306, 314 (1952) (upholding a 'released time' program in which public school students were regularly excused during the school day to attend religious services); *accord* Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1051 (1987); Gillette v. United States, 401 U.S. 437, 453 (1971) ('[I]t is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'' (quoting United States v. Macintosh, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting))); Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970); Sherbert v. Verner, 374 U.S. 398, 409 (1963). Accordingly, the object of promoting free exercise and 'accommodat [ing] the public in its spiritual needs' has been explicitly held to be a secular legislative purpose under *Lemon*. Lanner v. Wimmer, 662 F.2d 1349, 1357 (10th Cir. 1981) (upholding a 'released time' program).

28 For reasons indicated in note 4 above, this discussion leaves to one side the 'entanglement' prong of *Lemon*.

29 *See* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*?, 98 HARV. L. REV. 592, 611 (1985) ('When the government dons religious robes, those vestments are least visible to those who wear the same colors.').

30 Justice O'Connor has developed her views in Lynch v. Donnelly, 465 U.S. 668, 687-90 (1984) (O'Connor, J., concurring), Wallace v. Jaffree, 472 U.S. 38, 68-70, 74-76 (1985) (O'Connor, J., concurring in the judgment), Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring), and Witters v. Washington Department of Services, 106 S. Ct. 748, 755 (1986).

31 *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

32 *See id.* at 690.

33 Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1051 (1986) (quoting Plessy v. Ferguson, 163 U.S. 537, 551 (1896)).

34 *See supra* pp. 1639 -40.

35 *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *supra* note 3.

36 *Thornton*, 472 U.S. 703 at 711-12 (O'Connor, J., concurring in the judgment); *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

37 *Cf.* Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 859-60 (arguing that Justice O'Connor's adoption of the perspective of the 'public at large' may amount to adopting the view of the 'reasonable Christian man").

38 This perspective-based approach, premised on the idea that adequate protection of a group can only be achieved if contested events are viewed from the protected group's perspective, parallels recent arguments in areas outside the religion clause context. For example, in the equal protection context, Justice Stevens has recently suggested that in assessing the impact of a government action on an assertedly burdened class, courts must take account of how the class would view the action, rather than relying on the government's (often substantially diverging) view. In City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985), in which the Court overturned as applied a zoning ordinance requiring a special-use permit for a group home for the mentally retarded, Justice Stevens argued that the question whether the city had mistreated the plaintiffs could not be judged by reference to the city's purported aim of aiding the plaintiffs precisely because political majorities have often shown themselves to be insensitive to the needs and perceptions of the handicapped. *See id.* at 3261-62 (Stevens, J., concurring). *See generally* Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 128-35 (1987) (discussing the significance of adopting the perspective of burdened classes as part of the legal protection of 'difference'); J. ELY, *supra* note 4, at 158-64 (arguing that classifications based on 'us-them' stereotypes cannot be assessed by reference to the perspective of the majority creating the classification, because legislation disadvantaging 'them' groups will be based on distorted perceptions of its effects).

Similar arguments have been made in the context of legal protections of women, such as rape laws and prohibitions against sex discrimination. *See* S. ESTRICH, REAL RAPE 60-66 (1987) (arguing that courts have relied on typically 'male' indicia of the presence of force in rape cases—losing sight of the fact that women may perceive and react to force differently than men—and thereby have unfairly removed from the purview of rape laws assaults in which women do not act according to 'male standards'); Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RIGHTS L. REP. 149, 155-57 (1978) (arguing, in connection with women's use of the self-defense justification in criminal law, that courts have defined 'apprehension of imminent danger' in terms of typically male perceptions of what type of aggression justifies a violent response); Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part) (arguing that the court should explicitly adopt a woman's perspective in evaluating claims of sexual harassment, because 'the perspective of a reasonable person fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men').

These arguments share in common the warning that the substantive protections that the law grants to vulnerable or disfavored groups may be undercut if courts substitute the perspective of the 'dominant' group for that of the protected groups in addressing challenged actions. Allowing the dominant group's viewpoint to set the terms of the law's application means that actions of the dominant group deemed acceptable under those terms will be permitted, irrespective of the harm suffered by the class of persons the law attempts to protect.

39 The problem this standard raises for establishment clause inquiry is that it appears to allow disaffected religious minorities to veto *any* government action that they view as imposing religious values on them—even those actions thought by most people not to involve religion at all. This prospect has acquired particular force in light of the challenge posed by Christian fundamentalist groups who charge that the secularization of public education has established an antitheistic religion of 'secular humanism.' *See infra* pp. 1665-73. Along the same lines, both the flag salute and government support of racial equality have been challenged as promotions of offensive religious beliefs. *See* Board of Educ. v. Barnette, 319 U.S. 624, 629 (1943) (discussing, in granting exemption from compulsory flag salute, Jehovah's Witnesses' belief that the flag salute is a bowing before idols); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (rejecting the argument that because antimiscegenation was a religious precept for a sectarian university, the government's opposition to antimiscegenation established an opposing religion).

The typical response to arguments alleging establishment of such 'religions' or antireligions is that society's concept of religion must control in establishment clause cases. Thus, if the values in question are not generally regarded as religious, then the state

cannot be held to be imposing religious belief. *See, e.g.*, Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686 (1968). However, any such solution raises the profound problem of distinguishing religion from nonreligion. *See supra* Part II pp. 1622-31; Choper, *Defining 'Religion' in the First Amendment*, 1982 U. ILL. L. REV. 579; Freeman, *The Misguided Search for the Constitutional Definition of 'Religion,'* 71 GEO. L.J. 1519 (1983); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). Moreover, this solution allows majority views as to what is 'religious' guide the application of the establishment clause, which arguably undermines the countermajoritarian premise of the perspective-based approach suggested here. It is impossible to say with finality that government refusal to comport with a given religion's beliefs, or its promulgation of values at odds with such beliefs, is not in itself a 'religious' statement. Accordingly, this Part does not attempt to 'prove' the falsity of the perception that the secularization of the state and the teaching of secular values themselves promote a 'religion' or antireligion. Instead, it is argued that this perception does not justify the introduction of religion by government into public institutions. To the extent that such a remedy is partial to some religions over others, it merely reproduces the problem of official preference for certain religions. Moreover, maintaining a secular orientation in government and education that may conflict with the content of certain creeds seeking official recognition is not in itself hostile to religion, but rather is consistent with free private choice in religion; by contrast, preferential treatment for some creeds infringes the autonomy of outsiders. That is, there is an essential asymmetry for establishment clause purposes between government efforts to make religion a part of civic life and its choice to keep religion a matter of private choice. *See infra* pp. 1668-73.

40 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a city's maintenance of a nativity scene as part of its annual Christmas display); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding a state legislature's practice of opening its sessions with prayer); *infra* Section B.

41 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional a statute mandating a moment of silence for prayer); Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985) (overturning a law requiring 'balanced treatment' of creationism and evolution in public schools), *prob. juris. noted*, 106 S. Ct. 1946 (1986); *infra* Section C.

42 *See* Note, *supra* note 19, at 1246 (noting that ' [t]he inherent selectivity of what religion to acknowledge and in what manner will of necessity throw the weight of government behind certain sects and factions at the expense of others').

43 *See supra* notes 13 -14.

44 *See supra* Part II pp. 1612 -22.

45 M. HOWE, THE GARDEN AND THE WILDERNESS 11 (1965).

46 *See, e.g.*, 5 U.S.C. § 6103(a) (1985) (declaring Thanksgiving Day and Christmas Day national holidays); 36 U.S.C. § 185 (1985) (authorizing National Day of Prayer).

47 *See, e.g.*, 36 U.S.C. § 186 (1985) (declaring 'In God We Trust' the national motto); Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting) (noting religious statements in 'The Star-Spangled Banner'); Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (en banc) (invalidating the inclusion of a cross in a county seal), *cert. denied*, 106 S. Ct. 2890 (1986). *See generally* Crabb, *supra* note 18, at 512-14, 526-27.

48 *See generally* W. HERBERG, PROTESTANT CATHOLIC JEW (1955); AMERICAN CIVIL RELIGION (R. Richey & D. Jones eds. 1974); S. MEAD, THE NATION WITH THE SOUL OF A CHURCH (1975); J. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE (1979); Bellah, *Civil Religion in America*, DAEDALUS, Winter 1967, at 21.

49 Borrowing from Rousseau, sociologist Robert Bellah introduced the term 'civil religion' to describe the hybrid of traditional Protestant beliefs and political and social values growing out of the American historical experience. *See* Bellah, *supra* note 48.

50 J. WILSON, RELIGION IN AMERICAN SOCIETY: THE EFFECTIVE PRESENCE 178 (1978).

51 *See* Note, *supra* note 19, at 1249 -51. The civil religion encompasses both 'civic piety,' J. WILSON, *supra* note 48, at 83, and 'a faith not confined to the denominations, but one which emerges from the life of the folk and is manifested in loyalties, values, and ideas expressed in everyday life concerning the national purpose, society's value, its morals, and its traditions. It exists concretely in 'shrines'

at Gettysburg and Arlington and in 'sacred' anniversaries such as Memorial Day, Thanksgiving, the Fourth of July, and the birthdays of Washington and Lincoln.' J. WILSON, *supra* note 50, at 177; *cf.* A. WALLACE, RELIGION: AN ANTHROPOLOGICAL VIEW 77 (1966) (characterizing the American civil religion as a 'religio-political cult').

52 Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE, L.J. 770, 786.

53 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (Brennan, J., dissenting) (quoting Dean Rostow's 1962 Meiklejohn Lectures delivered at Brown University).

54 *See* Note, *supra* note 19, at 1249 -51.

55 *See* 36 U.S.C. § 172 (1982).

56 *See* 36 U.S.C. § 186 (1985).

57 *See* Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) (upholding the use of the motto 'In God We Trust' on national currency, coinage, and official documents).

58 *See supra* note 46.

59 Loewy, *supra* note 33, at 1058. The Court has on several occasions pointed to this invocation as the paradigmatic instance of acceptable state incorporation of religious symbolism. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983) (citing the invocation in support of its decision upholding use of Presbyterian minister to open sessions of state legislature), Zorach v. Clauson, 343 U.S. 306, 313 (1952) (discussing, in support of a decision upholding a public school district's program of granting pupils 'released time' for religious activity, the possibility that '[a] fastidious atheist or agnostic could even object to the supplication with which this Court opens [its] session'). As Professor Loewy notes, however, 'God Save this Honorable Court' is to nontheists what 'Christ Save this Honorable Court' or 'Allah Save this Honorable Court' is to nonadherents of Christianity or Islam, respectively. Loewy, *supra* note 33, at 1055.

60 Note, *supra* note 19, at 1251; *accord* Abington School Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (arguing that such invocations of a deity on official occasions 'no longer have a religious purpose or meaning'); *cf.* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connon, J., concurring) (arguing that 'government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society').

61 This Note does not necessarily accept this assumption. Both the invocations of a deity as part of 'civio piety' and the official recognition of 'secularized' religious holidays suggest state preference for particular forms of religious belief, in keeping with the American civil religion's historical foundation in Protestant Christianity. *See* C. ALBANESE, AMERICA: RELIGIONS AND RELIGION 283-309 (1981). The ceremonial deism of 'God Save this Honorable Court' lends support—however innocuous or perfunctory—to the dominant tradition of Judeo-Christian monotheism. *See* Van Alstyne, *supra* note 52, at 786. It tells those who reject the tradition, as well as those who take its religious meaning very seriously and believe such perfunctory invocations to debase it, that their beliefs are unimportant to the government. *See id.* at 771, 787 (arguing that 'the movement from 'E Pluribus Unum' to 'In God We Trust" makes outcasts of those who reject the state's brand of monotheism); *see also* Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (noting the danger of 'the trivialization and degradation of religion by too close an attachment to the organs of government'). Insofar as the government may confer solemnity and a sense of transcendent values on important occasions without explicitly invoking a deity, *see* Note, *supra* note 19, at 1256, the sacral terms of ceremonial deism seem an unnecessary source of exclusionary messages to those who do not share the religious beliefs they draw upon.

Similarly, granting official recognition to Christmas and Thanksgiving singles out discrete religious traditions for state-sponsored public celebration, to the exclusion of other religions whose adherents are thereby told that their beliefs are less deserving of state support. Government recognition of these holidays (holi-days) is consistent with the establishment clause objective of avoiding imposition of religious belief only on the premise that they have lost much of their religious content, an assumption that is belied by the fact that much of their appeal lies in their connection to religious faith.

However, whether or not ceremonial deism and holidays such as Christmas and Thanksgiving are in fact essentially secular notwithstanding their link to religion, it must be understood that they are—according to the argument suggested thus far—acceptable under the establishment clause only on the assumption that they are nonreligious. Thus, even accepting this assumption about these strands of the 'civil religion,' their acceptability under the establishment clause tells us nothing about the permissibility of introducing *admittedly religious* symbols and practices into public institutions—which is what proponents of public sphere accommodation advocate. *See infra* pp. 1654-55.

62 A finding that a symbol's content is religious is ordinarily sufficient to strike down its adoption by government. *See* Estate of Thornton v. Caldor, Inc. 472 U.S. 703 (1985) (striking down as preferential to sabbatarian religions a law prohibiting employers from forcing employees to work on their chosen sabbath); Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985) (en banc) (invalidating the depiction of a cross in a county seal), *cert. denied*, 106 S. Ct. 2890 (1986); ACLU v. Rabun County Chamber of Commerce, 698 F.2d 1098 (11th Cir. 1983) (invalidating the display of a cross in a city park); Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980) (striking down the city's sponsorship of a papal mass); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980) (invalidating the printing of a 'Motorist's Prayer' on a state map published and distributed by the North Carolina Department of Transportation), *cert. denied*, 450 U.S. 965 (1981). *But see* Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (upholding the public display of a monolith depicting the Ten Commandments and other religious insignia).

63 *See* Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (upholding the use of the motto 'In God We Trust' on national currency, coinage, and official documents as patriotic rather than religious); *cf.* McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws, concluding that they had lost their religious significance).

64 *Aronow*, 432 F.2d at 243.

65 *See* Lynch v. Donnelly, 465 U.S. 668, 709 (1984) (Brennan, J., dissenting) (noting that Christmas has 'traditional, secular elements' that may be celebrated by the state).

66 Of course, it may be argued that government support of the values embodied in the civil religion, even if they are not 'religious' in nature, serves to isolate and exclude those who reject the values. The government's authority to propagate nonreligious ideological values has been called into question recently by commentators who urge that the first amendment be read to limit the government's influence over both religious and nonreligious beliefs. *See, e.g.*, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980). Government's authority to take actions connected with maintaining a community identity is an uneasy one; to define society around common symbols is to exclude those who reject the symbols. *See generally* Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1454 (1986) (discussing use of loyalty oaths to define 'Americanness'); Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504 (1986) (discussing discrimination against noncitizens in efforts to maintain the political community). Government power to establish orthodoxy in matters of politics or other nonreligious areas, and to exclude (in real or symbolic terms) nonadherents, is an issue beyond the scope of this Note. From the standpoint of the establishment clause, however, government authority to promote values that carry exclusionary messages toward those who reject those values appears to be foreclosed only when the government promotes religion.

67 *See* Brief for the United States, *supra* note 11, at 3 ('The traditional religious references and reminders that fill American public life should not depend, for their validity, on the dubious assertion that they are wholly perfunctory and meaningless.').

68 J. WILSON, *supra* note 48, at 83.

69 *See* Crabb, *supra* note 18, at 545 -53; *cf.* Donnelly v. Lynch, 525 F. Supp. 1150, 1173 (D.R.I. 1981) (discussing, in a suit challenging the city's inclusion of a nativity scene in its Christmas display, the city's argument that confining official celebration of Christmas to nonreligious aspects of the holiday "amount[s] to an establishment of irreligion" (quoting the city)), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984).

70 *See supra* pp. 1641 -44.

71 463 U.S. 783 (1983).

72 465 U.S. 668 (1984).

73 The case involved the Nebraska state legislature's practice of beginning each session with prayers offered by a Presbyterian minister who was paid out of public funds. *See* 463 U.S. at 782-83.

74 *See id.* at 787 -95.

75 *See id.* at 791 -93. The record indicated that the chaplain's prayers had in the past appealed explicitly to Christian beliefs. *See id.* at 823 (stevens, J., dissenting).

76 463 U.S. at 792.

77 *See id.* at 790.

78 Lynch v. Donnelly, 465 U.S. 668, 685 (1984).

79 *Id.* at 678 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

80 *See id.* at 675 -78.

81 *See id.* at 679 -80.

82 *Id.* at 685.

83 *See id.* at 680 -85.

84 *See id.* at 685.

85 *See* Donnelly v. Lynch, 525 F. Supp. 1150, 1156-61 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984). A child psychiatrist testified that 'a child of a non-Christian family, upon seeing the creche as part of a public display, would wonder whether he and his parents were normal.' *Id.* at 1159.

86 *See Lynch v. Donnelly*, 465 U.S. at 708 (Brennan, J., dissenting) ('For Christians, of course, the essential message of the nativity is that God became incarnate in the person of Christ.').

87 *Id.* at 701.

88 *See* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 360 (1986).

89 McConnell, *supra* note 12, at 49.

90 *Lynch*, 465 U.S. at 686.

91 *See supra* pp. 1651 -54.

92 *See, e.g.*, Crabb, *supra* note 18, at 511 (arguing that religious 'symbols and traditions help to satisfy a basic human need to belong to a group and to share common ties with members of the group'); *cf.* Dorsen & Sims, *supra* note 37, at 860 (criticizing state adoption of this purpose as 'unfaithful to the origins and continuing role of the establishment clause').

93 *See* Van Alstyne, *supra* note 52, at 787; *cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (discussing the impact of government sanctioning of segregation, independent of the impact of private segregation).

94 *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a statute requiring a moment of silence for prayer); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (invalidating a statute requiring the posting of the Ten Commandments in public school classrooms); Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a statute that forbade the teaching of evolution); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating bible reading and recitation of the Lord's Prayer); Engel v. Vitale, 370 U.S. 421 (1962)

(invalidating daily reading of a prayer composed by the state); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (overturning a 'released time' program in which religious teachers provided sectarian instruction in public schools).

95 *See generally* R. WEISSBERG, POLITICAL LEARNING, POLITICAL CHOICE, AND DEMOCRATIC CITIZENSHIP (1974).

96 *See Schempp*, 374 U.S. at 242 (Brennan, J., concurring); *McCollum*, 333 U.S. at 216; *id.* at 231 (Frankfurter, J., concurring); S. SARASON, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE 7 (2d ed. 1982).

97 *See, e.g.*, Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 379 (1983).

98 *See, e.g., McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring); Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also* Freund, *The Legal Issue*, in P. FREUND & R. ULICH, RELIGION AND THE PUBLIC SCHOOLS 15 (1965); *cf. infra* Part IV p. 1691 (discussing impressionability of school children in connection with state involvement with parochial schools).

99 *See, e.g.*, McConnell, *supra* note 12, at 49; *supra* note 16.

100 *See, e.g.*, Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177; *infra* pp. 1665-74.

101 370 U.S. 421 (1962).

102 374 U.S. 203 (1963).

103 Prayer and other devotional exercises at the beginning of the school day were a common feature of public education from the time of its development in the nineteenth century. *See generally* W. GRIFFITHS, RELIGION, THE COURTS AND THE PUBLIC SCHOOLS 1-46 (1966).

104 *See generally* A. REICHLEY, *supra* note 8, at 147-49; W. MUIR, PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967).

105 Studies conducted since the invalidation of audible prayer and Bible reading indicate that the practices are still common in many areas, although noncompliance was strongest in the years immediately following the decisions. *See, e.g.*, Dierenfield, *Religious Influence in American Public Schools*, RELIGION & PUB. EDUC., Summer 1986, at 41. *See generally* K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971); R. JOHNSON, THE DYNAMICS OF COMPLIANCE (1967); S. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 230-32 (1978) (citing studies).

106 *See* Note, *supra* note 97, at 366 (listing statutes). Each of these has been struck down. *See id.* at 367 (citing cases).

107 Over 200 such amendments have been presented to Congress, but none has secured the two-thirds majority necessary for passage. *See* Note, *supra* note 97, at 365. The Reagan Administration has voiced consistent support for such an amendment. *See, e.g.*, President's State of the Union Address, 23 WEEKLY COMP. PRES. DOC. 63 (Feb. 2, 1987). Congressional efforts to restore prayer in the public schools have also taken the form of bills seeking to eliminate the Supreme Court's jurisdiction over school prayer cases. Moreover, the federal government has never acted to enforce the prayer rulings, and Congress has on occasion voiced its support for prayer in the schools by denying federal agencies the authority or resources to enforce the Supreme Court's prayer decisions. *See* Note, *supra* note 97, at 366 & n.16.

108 *See* W. GRIFFITHS, *supra* note 103, at 47-58.

109 *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 309-20 (1963) (Stewart, J., dissenting).

110 *See, e.g.*, Karen B. v. Treen, 653 F.2d 897, 903-04 (5th Cir. 1981) (Sharp, J., dissenting) (arguing that a law authorizing prayer led by students or the teacher at the beginning of the day advances not religious beliefs but 'freedom to engage in a religious exercise'), *aff'd mem.*, 455 U.S. 913 (1982).

111 The free exercise clause requires the individual to show that state conduct has a 'coercive effect' that 'operates against him in the practice of his religion.' *Schempp*, 374 U.S. at 223. Because individual students are presumably free in the classroom to pray silently of their own accord, as well as to engage in organized prayer outside the school setting, it is unlikely that a school's failure to sponsor devotional exercises is sufficiently coercive to warrant free exercise relief. *See* Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980).

112 *See, e.g., Karen B.*, 653 F.2d at 905 ('A program of voluntary religious exercise does not have the primary effect of advancing religious freedom if the government establishes the substantive content of the exercise.').

113 *See* McConnell, *supra* note 12, at 42.

114 About 25 states have enacted such statutes in the past decade. *See* Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1874 n.1 (1983) (citing statutes). The language of such statutes varies; some explicitly mention prayer, while others are silent on the issue. *See id.* at 1875.

115 472 U.S. 38 (1985).

116 The challenged Alabama statute required public schools to observe 'a period of silence not to exceed one minute in duration . . . for meditation or voluntary prayer, and during such period no other activities shall be engaged in.' *Id.* at 40 n.2 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

117 *See id.* at 60-61. The factual setting of the statute's enactment was central to the Court's analysis. The statute authorizing silence with prayer had been tacked onto a preexisting statute already authorizing a moment of silence, and formed part of a legislative scheme that provided for teacher-led recitation of a state-composed prayer. Moreover, the case record was replete with evidence that organized spoken prayer was common in the public school system in which the suit originated. *See id.* 42-45.

118 *See id.* at 85-87 (Burger, C.J., dissenting).

119 In *Wallace*, the Court based its decision on its finding that the statute indicated an impermissible purpose of elevating prayer as the preferred activity, rather than simply accommodating it in the classroom. *See id.* at 60-61. The Court hence found it unnecessary to reach the question of the statute's practical effect. *See id.* at 61. As a consequence, the Court arguably avoided the main problem presented by statutes authorizing moments of silence. Although these statutes may be said to facilitate the free exercise of religion —itself a permissible purpose, *see id.* at 82 (O'Connor, J., concurring in the judgment); *supra* note 24—the moment of silence, in implementation, may exert coercive pressure on students who choose not to pray. It is thus irrelevant whether or not the *legislature* specifically intends that the moment of silence be used for prayer. *See supra* note 114.

120 *See* Engel v. Vitale, 370 U.S. 421, 431 (1962); *supra* note 3.

121 It has been observed that a moment of silence is particularly suited to Christian prayer to the exclusion of devotional exercises of non-Christian faiths. Prayers in non-Christian religions may require a period of longer than one minute or may require vocalization or gesticulations that are prohibited by the moment of silence. *See* May v. Cooperman, 572 F. Supp. 1561, 1575 (D.N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985); Note, *supra* note 114, at 1886 n.76.

122 The nonadherent child may feel that she risks displeasing her teacher, or being labelled an outsider by her peers, by not participating in prayer. *See* Note, *supra* note 114, at 1892. It is not difficult to imagine the possibilities in this regard. Teachers may suggest or give the impression that prayer is the appropriate activity, by showing favoritism toward students who pray or by discussing religion in connection with the moment of silence. Nonparticipating students may receive encouragement by other students to pray or to participate, in order to avoid identification as someone who does not wish to pray. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 208 n.3 (1963) (noting parent's fears that children would be 'labeled as 'odd balls" or 'un-American' if they refused to participate in morning prayer exercises); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ('The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend [religious exercises].').

123 In Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982), *appeal dismissed, vacated & remanded sub nom.* Beck v. Alexander, 718 F.2d 1098 (6th Cir. 1983), for example, the court struck down a statute requiring a moment of silence for 'meditation or prayer or personal beliefs,' stating:

Unavoidably, students will understand that they are being encouraged not only to be silent, but also to engage in religious exercises. It cannot be seriously argued, and certainly cannot be assured, that nice distinctions concerning the potential meanings of 'meditation' and 'personal beliefs' will naturally arise in the minds of public school students.

548 F. Supp. at 1165.

124 *See* Note, *supra* note 114, at 1891.

125 *See supra* note 121.

126 A similar analysis should apply when public schools adopt programs for prayer outside the classroom. One such arrangement is the 'released time' program, which allows public school children to be excused from regular secular instruction for religious instruction, while nonparticipants remain in school for the usual period of secular instruction. This arrangement was approved by the Court in Zorach v. Clauson, 343 U.S. 306 (1952). Although such programs advance the free exercise interests of students who wish to participate, they are not mandated by the free exercise clause, except for students whose religions require them to engage in devotional activity during the school day. *See supra* note 111. At the same time, nonparticipants have testified as to pressure to participate. *See* L. PFEFFER, CHURCH, STATE, AND FREEDOM 356-66 (2d ed. 1967). Commentators have reported very high participation rates in some released-time programs; often children of minority faiths have enrolled in religious classes of the majority in order to avoid being ostracized. *See* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 388, 396-97 (1963).

A related problem is allowing student religious clubs the use of classrooms to conduct prayer meetings. Federal courts have thus far struck down school policies allowing religious clubs access to facilities. *See* Bell v. Little Axe School Dist., 766 F.2d 1391 (10th Cir. 1985) (invalidating a school's grant of access to prayer groups); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1326 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1981); *cf.* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (upholding against a free exercise challenge a school board's denial of classroom access to student religious groups). Public schools are a tightly structured and controlled environment; given their impressionability, students are likely to conclude from the presence of religious groups that school authorities endorse their activity. *See Brandon*, 635 F.2d at 978. Indeed, one case presented evidence—both from experts and from affected children—of pressure to participate. *See Bell*, 766 F.2d at 1397.

Released-time and classroom-access programs, like school prayer generally, advance the free exercise interests only of those students who wish to participate, while exerting a potentially coercive effect on nonparticipants. Accordingly, courts should view with suspicion accommodationist justifications of these adaptations of the school routine to religious practice, because they achieve free exercise objectives for some at the expense of others.

127 Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (striking down a statute forbidding the teaching of evolution); *accord* Stone v. Graham, 449 U.S. 39 (1980) (overturning a statute requiring the posting of the Ten Commandments in public schoolrooms). Although indoctrination or proselytization is forbidden, the bible and other religious matters are permissible subjects of instruction from a literary, cultural, or historical perspective, as the Court has indicated in dictum on numerous occasions. *See, e.g., Stone*, 449 U.S. at 42; *Epperson*, 393 U.S. at 106; Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). The operative distinction, as Justice Goldberg has put it, is between 'teaching *of* religion' and 'teaching *about* religion.' *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) (emphasis in original).

128 *See generally* M. McCARTHY, A DELICATE BALANCE: CHURCH, STATE, AND THE SCHOOLS 30-35 (1983).

129 A third possibility is to exempt students from religiously objectionable classes. State legislatures or local school authorities often provide exemptions to students who object on religious grounds to instruction in particular subjects. *See, e.g.*, M. McCARTHY, *supra* note 128, at 59-60 (discussing statutory religious exemptions from sex education classes). Alternatively, families whose religious beliefs are burdened by curricular offerings may seek judicial relief from mandatory attendance requirements under the free exercise clause. *See* Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986) (ordering free exercise exemption from classes for children whose religious beliefs were offended by instruction from certain state-selected textbooks). This Part does not

address either type of exemption, except to note that each raises serious countervailing concerns against the free exercise interests of the religious objector: voluntary state-created exemptions may run afoul of the establishment clause when they are preferential among religions or entail significant costs in implementation, whereas the disruption created by judicially mandated exemptions may significantly hamper school authorities' ability to carry out their functions. *See generally* Strossen, '*Secular Humanism' and 'Scientific Creationism': Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 389-96 (proposing guidelines for granting religious exemptions from curricular offerings); *infra* Part V pp. 1737-39 (discussing establishment clause problems attaching to the creation of religious exemptions from generally applicable government requirements). This Part confines its discussion to the assertedly antireligious bias of secular education and to the proposed 'accommodation' solutions of either introducing religion or expurgating objectionable material from the curriculum.

130 Increasingly, advocates of organized religion in the classroom have used this term to describe the cluster of assertedly antireligious values they believe to predominate in modern secular education. In effect, these advocates argue that traditional religious beliefs and values have been replaced in the classroom—as a result of secularization of society and, more narrowly, of Supreme Court decisions expurgating organized religious expression from the schools—by a secularist 'religion' hostile to traditional theistic faiths. *See generally* LaHaye, *The Religion of Secular Humanism*, in PUBLIC SCHOOLS AND THE FIRST AMENDMENT 1 (S. Elam ed. 1983); Whitehead & Conlan, *supra* note 8; *infra* pp. 1666-70.

131 *See generally* Strossen, *supra* note 129, at 336-54 (surveying attacks on the teaching of secular humanism and evolution in public schools).

132 *See generally* M. McCARTHY, *supra* note 128, at 76-100.

133 *See* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE (1981).

134 *See, e.g.*, Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.) (refusing to order the removal from the public school curriculum of books allegedly promoting the religion of secular humanism), *cert. denied*, 106 S. Ct. 85 (1985); Williams v. Board of Educ., 388 F. Supp. 93, 95 (S.D. W. Va.) (rejecting a challenge to inclusion of allegedly 'anti-religious materials, matter offensive to Christian morals'), *aff'd mem. on rehearing*, 530 F.2d 972 (4th Cir. 1975); Cornwell v. State Board of Educ., 314 F. Supp. 340 (D. Md. 1969) (dismissing an action under the religion clauses to block implementation of a sex education program), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972) (dismissing a challenge to teaching the theory of evolution as fact without reference to creationist theories), *aff'd*, 486 F.2d 137 (5th Cir. 1973) (per curiam), *cert. denied sub nom.* Brown v. Houston Indep. School Dist., 417 U.S. 969 (1974).

135 *See* Smith v. Board of School Comm'rs, Civ. Action No. 82-0544-BH (S.D. Ala. Mar. 4, 1987) (available on LEXIS, Genfed Library, Dist file). Equally novel is the decision in Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), which exempted children from mandatory reading classes because it was shown that the textbook series selected by the state contained ideas contrary to the children's religious views and that their religion forbade exposure to such ideas. This form of relief raises issues beyond the scope of this Note. *See supra* note 129.

136 *See infra* pp. 1668-70.

137 *See generally* M. McCARTHY, *supra* note 128, at 32-33, 79-88.

138 *See generally* E. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION (1985); D. NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME (1977).

139 *See* Epperson v. Arkansas, 393 U.S. 97 (1968).

140 Legislation requiring that equal emphasis be given to the Genesis-based creation account in any public school that teaches evolution has been introduced in about half the states. *See* Cole & Scott, *Creation-Science and Scientific Research*, 63 PHI DELTA KAPPAN 557, 558 (1982).

141 *See* Aguillard v. Edwards, 765 F.2d 1251, 1256-57 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986); Daniel v. Waters, 515 F.2d 485, 489 (6th Cir. 1975), McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1265 (E.D. Ark. 1982).

142 *See* M. McCARTHY, *supra* note 128, at 83. To date, only one court has addressed the teaching of creationism itself, as opposed to laws *requiring* the teaching of creationism. In Hendren v. Campbell, No. S577-0139 (Super. Ct. Ind. Apr. 14, 1977), the Indiana Superior Court invalidated the use of a biology textbook in which the only theory of origins presented favorably was biblical creationism.

143 Numerous state and local boards of education and textbook commissions have either required or approved the teaching of creationism. *See* E. LARSON, *supra* note 138, at 139-46. Moreover, even in the absence of explicit directives to teach creationism, studies indicate that teachers fearful of stirring up controversy either avoid the subject of evolution or teach creationism alongside it. *See* D. NELKIN, THE CREATION CONTROVERSY: SCIENCE OR SCRIPTURE IN THE SCHOOLS 154-56 (1982); Levit, *Creationism, Evolution and the First Amendment: The Limits of Constitutionally Permissible Scientific Inquiry*, 14 J. LAW & EDUC. 211, 219 (1985).

144 Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969).

145 *See supra* note 134.

146 *Cf.* Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580, 585-86 (E.D. Mich.) (deferring to the state's authority to shape curriculum, notwithstanding an establishment clause challenge to the state's prohibition on discussion of birth control in public schools), *aff'd mem.*, 419 U.S. 1081 (1974).

147 *See* Strossen, *supra* note 129, at 354-55.

148 Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

149 *See* M. McCARTHY, *supra* note 128, at 89-92; Strossen, *supra* note 129, at 336-38.

150 The term is, in effect, a receptacle for grouping, with greater or lesser breadth, those values considered unacceptable to fundamentalist Christianity. It has been called a philosophy based on ‘amorality, evolution, and atheism.’ LaHaye, *supra* note 130, at 2. It is often a term of political polemic, depicting a range of views on political or social issues, ranging from wealth redistribution and disarmament to homosexual rights and abortion. *See, e.g.*, Strossen, *supra* note 129, at 337 n.18 (quoting sources). It may also refer to a philosophy emphasizing human reason, self-sufficiency, and progress. *See, e.g.*, Whitehead & Conlan, *supra* note 8, at 37-46.

151 Those arguing that secular humanism is an antireligious ‘faith’ rely heavily on the publications of the American Humanist Association, which advocate abandonment of traditional theism. *See A Humanist Manifesto I*, NEW HUMANIST, May-June 1933, at 1; *Humanist Manifesto II*, HUMANIST, Sept.-Oct. 1973, at 4; Whitehead & Conlan, *supra* note 8, at 31-37. The *Humanist Manifesto II* asserts that God, religion, and the supernatural are irrelevant concerns and that beliefs in a separate human ‘soul’ or immortality are dangerous impediments to human progress. *See* 33 *Humanist Manifesto II*, *supra*, at 4-9. Certainly state ptomotion of any such position affirmatively disavowing religious belief should be forbidden in public schools. It does not follow, however, that values *consonant* with such a theological position—for example, the intrinsic dignity of humans, the utility of scientific reasoning, or pluralism in ethics—should be barred from public education. These values do not necessarily derive from the rejection of religious belief generally and, indeed, may coexist with such belief. Similarly, the scientific explanations for natural phenomena contained in evolutionary theory do not in themselves deny the possibility of a divine being and hence are not inherently antireligious.

152 *See, e.g.*, Strossen, *supra* note 129, at 345 n.72. The materials banned from the Alabama schools in *Smith v. Board of School Commissioners, supra* note 134, appear to have been objectionable largely for teaching the values of self-reliance and independence of thought, which the court treated as equivalent to the antireligious position that ‘salvation is through one's self.’ Pointing to passages from home economics textbooks that assertedly promulgated such a belief (for example, ‘We can direct our own lives instead of letting others do the directing for us. Each of us can become the kind of person we want to be.’), the court concluded:
If this court is compelled to purge ‘God is great, God is good, we thank Him for our daily food’ from the classroom, then this court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a deity.
Boston Globe, Mar. 5, 1987, at 3, col. 4; N.Y. Times, Mar. 5, 1987, at A12, col. 1.
The materials challenged in Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), in which the plaintiffs were granted a free exercise exemption from mandatory reading classes, were passages in a basic reading textbook that depicted boys cooking and girls reading. The plaintiffs argued that such passages “preach[ed]' secular humanism' by ‘plant[ing] in the first graders

[sic] mind that there are no God-given roles for the different sexes.' Letter of plaintiff Robert Mozert to the editor of the Kingsport, Tennessee Times News, Oct. 18, 1983, *quoted in* Strossen, *supra* note 129, at 340 n.44.

153 *See* Strossen, *supra* note 129, at 374-77.

154 For example, Judge Hand, who issued the decision in the *Smith* case, *supra* note 135, has cited as an instance of impermissible promotion of secular humanism the appearance in a fourth grade reading textbook of the word 'Goddamn.' *See* Jaffree v. James, 544 F. Supp. 727, 732 (S.D. Ala. 1982), *rev'd in part*, 705 F.2d 1526 (11th Cir. 1983), *aff'd sub nom.* Wallace v. Jaffree, 472 U.S. 38 (1985). The court explained: 'it can be clearly argued that as to Christianity [this word] is blasphemy and is the establishment of . . . humanism, secularism or agnosticism. If the state cannot teach or advance Christianity, how can it teach or advance the Antichrist?' *Id.* It is not difficult to see how this argument could be extended to all instructional materials that to some religion constitute 'blasphemy,' including teachings as to equality of the races and sexes, evolution, religious tolerance, or *any* proposition inconsistent with the precepts of a particular religion.

155 As far back as 1948, Justice Jackson observed:
Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.
Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

156 *See* Mead, *The 'Nation with the Soul of a Church,'* in AMERICAN CIVIL RELIGION, *supra* note 48, at 45, 54-55.

157 *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1536 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985).

158 This conclusion comports with the sociological conclusion that secularization, 'the process by which sectors of society and culture and removed from the domination of religious institutions,' P. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 107 (1967), is coextensive with the development of religious pluralism. *See id.* at 135; Hadden, *Religion and the Construction of Social Problems*, in RELIGION AND RELIGIOSITY IN AMERICA 17, 19 (J. Hadden & T. Long eds. 1983). Secularization of state institutions, to the extent that it promotes pluralism, is consonant with preserving the religious freedom of the adherents of the multiplicity of sects in contemporary society described in Part II pp. 1613-16. Accordingly, secularization is not hostile to religion as such, but only to the claim of particular creeds to state-recognized primacy.

159 A frequent object of debate is the problem of nonreligious values instruction in the schools, which was directly challenged in the *Smith* case. *See supra* note 135. Instruction in 'values clarification' and other approaches to ethics that do not rest on traditional religious concepts is increasingly common in public schools. *See, e.g.*, Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105, 113-17 (1978). Such approaches often adopt a relativistic stance to moral problems —encouraging students to clarify their own values and tolerate those of others—with at least implicit criticism of absolutist value systems characteristic of traditional religions. Teachings about the innate worth of human beings and imparting the idea that there are no inherently correct standards of right and wrong conflict directly with religious faiths predicated on conceptions of spirituality, innate sinfulness, and absolute moral standards. The danger that values clarification may in some instances explicitly intrude upon and attempt to replace religious faith by addressing spiritual questions or offering a comprehensive view of life has been discussed extensively. *See generally* Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196 (1982). However, it should not be a compelling objection to 'values clarification' that, in encouraging tolerance for diversity, the education contradicts sectarian teachings. Such a conflict is unsurprising, because absolutist moralities—no more than one of which could be taught by the schools, to the exclusion of others—by definition do not tolerate dissent on moral questions.

160 Ambach v. Norwick, 441 U.S. 668, 676-77 (1979); *cf.* M. YUDOF, WHEN GOVERNMENT SPEAKS 39 (1983) (arguing that democratic values 'must be nurtured by government: men and women do not inevitably adopt democratic and liberal values when left to their own devices').

161 Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986); *accord* Shiffrin, *supra* note 66, at 652 ('Our society has constitutionalized some basic conceptions of equality, freedom, and political democracy. It has a stake in seeing that its citizens are

at least exposed to its point of view.'). This is, of course, precisely what objectors to secular humanism find offensive. For example, in Mozert v. Hawkins County Public Schools, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd & remanded*, 765 F.2d 75 (6th Cir. 1985), the court noted:

[Plaintiffs contend] that the books, as a whole, tend to instill in the readers a tolerance for man's diversity. It is this underlying philosophy that offends the plaintiffs who believe that Jesus Christ is the only means of salvation . . .. They also strongly reject any suggestion . . . that all religions are merely different roads to God . . ..

582 F. Supp. at 202.

162 As Justice Brennan has observed:

It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions . . .. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Abington School Dist. v. Schempp, 374 U.S. 203, 241-42 (Brennan, J., concurring) (emphasis in original).

163 Most proponents of purging the public schools of secular humanism and the exclusive teaching of evolution appear to espouse fundamentalist Protestant faiths. *See* Strossen, *supra* note 129, at 337-54.

164 The argument that evolutionary theory is a matter of religious or antireligious 'faith' has been uniformly rejected by courts and by organizations of scientists. *See, e.g.*, McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1274 (E.D. Ark. 1982); M. McCARTHY, *supra* note 128, at 82.

165 *See* Aguillard v. Edwards, 765 F.2d 1251, 1256 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986); Daniel v. Waters, 515 F.2d 485, 489 (6th Cir. 1975); *McLean*, 529 F. Supp. at 1265. These rulings have turned on the conclusion that theories positing a creator or supreme being are essentially religious, irrespective of whether there is some evidence to support the creationist account. The debate over the scientific validity of 'creation science,' as some of its proponents label it, is beyond the scope of this Note. *See generally* M. LAFOLLETTE, CREATIONISM, SCIENCE AND THE LAW: THE ARKANSAS CASE (1983). However, to the extent that the introduction of creation science into the schools is defended as an accommodation of religion, it appears paradoxical to maintain that creationsim is not religious in nature.

166 *See, e.g.*, Note, *supra* note 16 (arguing for balanced treatment of creationism and evolution, on the grounds that the exclusive teaching of evolution infringes the freedom of those who believe in biblical creation).

167 *See, e.g.*, Aguillard v. Edwards, 778 F.2d 225, 228 (5th Cir. 1985) (en banc) (Gee, J., dissenting from a denial of rehearing).

168 *See Daniel*, 515 F.2d at 489; *McLean*, 529 F. Supp. at 1265. Unlike the statutes in these earlier cases, the statute at issue in *Aguillard* makes no reference to the particular theory of creation to be taught. *See* LA. REV. STAT. ANN. §§ 17:286.1-.7 (West 1982). As with the moment of silence, however, the wording of the statute makes no difference if students and teachers understand it to approve the teaching of particular religious dogma. *See supra* TAN 121-125. Moreover, whether or not the statute results in the teaching of overtly Genesis-based accounts of human origins, it effectively requires teaching about a divine creator.

169 Because most religions have a theory of human origins, many widely divergent from the others, some preference among theories is inevitable. *See* Daniel v. Waters, 399 F. Supp. 510, 512 (M.D. Tenn. 1975) (noting that because '[e]very religious sect, from the worshippers of Apollo to the followers of Zoroaster, has its belief or theory' concerning origins, creation instruction would be skewed in favor of certain faiths). It seems likely that biblical theories acceptable to the political majority would govern.

170 Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948).

171 *See, e.g.*, Schwarz, *supra* note 4, at 701 (arguing that in 'limit [ing] itself to secular frames of reference, thereby belittling religion,' secular education represents 'a choice of general antireligionism as an evil lesser than the alternative of discrimination among religions').

172 *See supra* note 129.

173 *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (overturning a statute prohibiting attendance at private schools for children under age sixteen).

174 *See supra* pp. 1641-44.

175 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

176 *See generally* C. ALBANESE, *supra* note 58 (contrasting the ‘manyness' of religions in America with the ‘oneness' conception of American religion, created by the historical dominance of Protestant Christianity); *supra* Part II pp. 1613-16.

177 *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963) (‘[T]he Free Exercise Clause . . . has never meant that a majority could use the machinery of state to practice its beliefs.’); *infra* Part V pp. 1737-39 (contending that majority self-accommodation in the form of permissive exemptions from government requirements should generally not be allowed).

178 *See supra* notes 11, 15.

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THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE AND THE IMPOSSIBILITY OF ITS INCORPORATION

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Introduction

No aspect of constitutional law has been dominated more by "originalism" than First Amendment Establishment Clause jurisprudence. [1] Although not every decision and not every approach invokes the Founding Fathers, [2] their presence in modern church-state court opinions is unparalleled. [3] Yet despite repeated appeals to James Madison and Thomas Jefferson, both the original intention and the contemporary meaning of the Establishment Clause remain sharply ***586** contested. [4] Among contemporary scholars and jurists, in fact, less agreement exists now about the Establishment Clause's original meaning than when the Supreme Court first attempted to decide the matter in Everson v. Board of Education. [5] The more historical research devoted to the subject, it seems, the more contentious the debate becomes.

Not only has the debate continued, it has become increasingly complicated. In the 2004 Elk Grove Unified School District v. Newdow case, Justice Clarence Thomas advanced a federalist construction of the Establishment Clause, [6] a position he reasserted in the 2005 Ten Commandments case Van Orden v. Perry. [7] According to Justice Thomas, "the Establishment Clause is best understood as a federalism provision--it protects state establishments from federal interference but does not protect any individual right." [8] In Newdow, Thomas implicitly rejected his earlier "non-preferentialist" interpretation, [9] an approach that he had shared with Chief Justice William Rehnquist. In the 1985 case Wallace v. Jaffree, then-Associate Justice Rehnquist argued that the Framers intended to allow governmental support of religion as long as the state did not prefer one sect over others. [10] Rehnquist's "non-preferentialist" construction itself was challenged on originalism grounds by Justice David Souter, who championed a ***587** "strict-separationist" interpretation in Lee v. Weisman, the 1992 public-school graduation prayer case. [11] Souter argued that the "Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion," [12] an interpretation he further developed three years later in Rosenberger v. Rector & Visitors of University of Virginia. [13]

At least the three competing accounts of the original meaning of the Establishment Clause inform church-state jurisprudence. More than fifty years after the Supreme Court first turned to the Framers to interpret the Establishment Clause, the Court remains divided over what the Framers actually meant. One might have expected that a half-century of legal scholarship and constitutional development would have clarified the historical record, but the opposite seems to have occurred. This failure of scholarship and jurisprudence may help explain why the Court's Establishment Clause jurisprudence remains, as Justice Thomas once described it, "in hopeless disarray." [14]

What, then, are we to make of the original meaning of the Establishment Clause? Is that meaning, as some scholars claim, impossible to decipher? [15] Is Justice Thomas's attention to federalism historically ***588** accurate? Is Justice Rehnquist's "non-preferential" approach or Justice Souter's "strict-separationist" interpretation correct? This Article addresses these questions by reexamining the original meaning of the Establishment Clause. Part I reviews the leading "originalist" interpretations that have been set forth by members of the Supreme Court. Part II begins my attempt to recover the original meaning of the Establishment Clause through an investigation of the historical and political context in which the Establishment Clause emerged. [16] Part III offers a detailed analysis of the drafting of the clause in light of the historical and political contexts described in Part II. I conclude that Justice Thomas's federalism interpretation most accurately captures the Establishment Clause's original meaning. In his Newdow opinion, however, Justice Thomas failed to consider the implications of his federalist construction. Part IV focuses on those implications, concluding that the Founders' original concern with federalism necessarily means that the original meaning that animated the adoption of the Establishment Clause cannot be applied to modern day incorporated "no-establishment" jurisprudence.

I. The Supreme Court's Quest for the Original Meaning of the Establishment Clause

A. The Building of the "Strict-Separationist" Wall: Everson v. Board of Education

Historical scholarship on the original meaning of the Establishment Clause remains influenced by Everson, the Supreme Court's first modern Establishment Clause case. In Everson, the Court upheld, 5-4, a local New Jersey school district policy that reimbursed transportation costs incurred by parents of children attending parochial schools. [17] Everson's lasting impact lies not in its result, however, but in Justice Hugo Black's majority opinion and Justice Wiley Rutledge's dissent, both of which invoked the Founders to interpret the Establishment Clause as requiring the "strict separation" of church and state.

Justice Black's opinion presents the adoption of the Establishment Clause as the result of the revolutionary movement for religious freedom ***589** that "reached its dramatic climax in Virginia in 1785-86," [18] when the Virginia Assembly, led by James Madison, adopted Thomas Jefferson's "Virginia Bill for Religious Liberty." [19] Justice Black turned to 1785-86 Virginia, and not the First Federal Congress, because "[t]his 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 as the Virginia statute." [20]

Given the central importance of the Virginia Statute to his interpretation, Justice Black, surprisingly, failed to offer any direct exegesis of the text of Jefferson's bill. Instead, he treated Jefferson's and Madison's thoughts as self-explanatory, presenting only an extended quotation from Jefferson's bill [21] and a one-sentence summary of ***590** Madison's "Memorial and Remonstrance." [22] From these citations, Black derived his sweeping interpretation of the Establishment Clause:

> 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 religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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." [23]

Despite this expansive separationist reading, Justice Black concluded that the First Amendment was not violated by the school district's policy of refunding the transportation costs of children attending Catholic schools. [24]

In his dissent, Justice Rutledge agreed that the Founding Fathers intended the Establishment Clause to enact a "wall of separation" between church and state, and, for that reason, he concluded the school district's policy violated the Constitution. [25] Rutledge's opinion ***591** begins with the seemingly awkwardly phrased text, "respecting an establishment." [26] The Framers, Justice Rutledge explained, meant that "[n]ot simply an established church, but any law respecting an establishment of religion is forbidden." [27] As interpreted by Justice Rutledge, "respecting an" means "tending toward"--that is, the Founders not only intended to prohibit a traditional establishment like the Church of England, they also sought to prohibit anything tending toward such an arrangement. Interpreted this way, "respecting an" expands the prohibition against religious establishments. Justice Rutledge thus concluded that the Framers meant "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." [28]

To support this reading, Justice Rutledge turned to the "generating history" of the religion clauses, which he claims includes the proceedings of the First Congress and "also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the [First] Amendment was the direct culmination." [29] Whereas Justice Black emphasized Jefferson's Virginia Statute and his "wall of separation" letter to the Danbury Baptists, Justice Rutledge focused upon James Madison and his "Memorial and Remonstrance." The "Memorial," he explained, is "the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion."' [30] Madison's views take precedence above all others, moreover, because "[h]e epitomized the whole of that tradition in the [First] Amendment's compact, but nonetheless comprehensive, phrasing." [31]

As interpreted by Justice Rutledge, Madison advanced a categorical separation between church and state: "With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that [religious] freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever." [32] The "Memorial" contains "a broadside attack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective." [33] Madison was "unrelentingly absolute . . . in opposing state support or aid [to ***592** religion] by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose." [34] In short, "Madison opposed every form and degree of official relation between religion and civil authority." [35]

Justice Rutledge did pause to consider the debates in the First Congress surrounding the drafting of the First Amendment. But these debates, he found, "reveal only sparse discussion." [36] The First Congress had little to debate because "the essential issues had been settled. Indeed, the matter had become so well understood as to have been taken for granted in all but formal phrasing." [37] The First Congress was little more than a mark-up session, Justice Rutledge suggested, because the Founders had adopted Madison's absolute separation principle as articulated in the "Memorial and Remonstrance."

B. The "Non-Preferentialist" --" Strict-Separationist" Debate: Wallace v. Jaffree, Lee v. Weisman, and Rosenberger v. Rector & Visitors of University of Virginia

After Everson, various Justices sprinkled references to the Founding Fathers in their Establishment Clause opinions. [38] No single opinion, however, contained anything like Everson's historical analysis until then-Associate Justice William Rehnquist's fiery dissent in Wallace v. Jaffree. [39] Armed with then-recent scholarship, Justice Rehnquist launched a full-scale assault on Everson's historical accuracy and the "wall of separation" interpretation built upon it. His strategy was not to reveal Everson's

inaccuracies point-by-point, but rather to show that ***593** Justices Black and Rutledge looked in the wrong place to find the Establishment Clause's original meaning.

Justice Rehnquist's dissenting opinion began by dismissing the relevance of Jefferson and questioning the applicability of statements made by Madison as a Virginia state legislator.[40] Justice Black asserted that Jefferson played a "leading" role in the drafting and adoption of the First Amendment;[41] but Jefferson, Rehnquist pointed out, was in France at the time and was not involved in the drafting or adoption of the First Amendment.[42] Jefferson's letter to the Danbury Baptists--from which the phrase "the wall of separation" comes--was written fourteen years after Congress passed the Bill of Rights.[43] Madison, Justice Rehnquist admitted, composed the first draft of what would become the Bill of Rights and shepherded the proposed amendments through the First Congress.[44] However, the Madison who secured the passage of the First Amendment, according to Justice Rehnquist, was not the same Madison who led the battle for religious freedom in Virginia.[45] In the First Congress, Madison spoke "as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."[46] Madison's original proposed text--"nor shall any national religion be established"--and his subsequent modifications and comments in the House debates--that the proposed language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion"--reveal, according to Justice Rehnquist, "that [Madison] saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects."[47] Madison may have defended and defined the "wall of separation" in Virginia (Justice Rehnquist did not comment on the matter), but those statements are irrelevant to interpreting the meaning of the First Amendment.

***594** Justice Rehnquist failed to make the point explicitly, but his opinion contains a methodological assumption fundamental to his argument. To grasp the meaning of the First Amendment, he assumed that one must look to the intentions of those who drafted it within the context of its actual adoption. Only the debate over the text of the amendment in the First Congress is relevant, then, not the establishment of religious freedom in Virginia. In this way, Justice Rehnquist made Madison's statements as a Virginia state legislator--including the "Memorial and Remonstrance"--inapposite to determine the Establishment Clause's original meaning. He concluded, accordingly, that Everson was based "upon a mistaken understanding of constitutional history."[48] The Court made a jurisprudential error when it derived the meaning of the First Amendment from the Virginia debates on religious freedom. "[N]othing in the Establishment Clause," Justice Rehnquist asserted, "requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."[49]

To reinforce the point, Justice Rehnquist presented various examples of the ways that the Founding Fathers' public policy explicitly favored religion. The First Federal Congress--the same body that drafted the First Amendment-- passed the Northwest Ordinance, which stated that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[50] Presidents Washington, Adams, and Madison issued official proclamations declaring official days of prayer and thanksgiving.[51] President Jefferson, who thought such proclamations were unconstitutional, signed a treaty with the Kaskaskia Indians that provided annual cash support for the Tribe's Roman Catholic priest and church.[52] Justice Rehnquist resoundingly declared that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in Everson."[53]

Justice Rehnquist's Jaffree dissent, which itself largely followed historian Robert Cord's work,[54] launched a wave of historical scholarship on the Founders and religious liberty. Some of the work most critical ***595** of Rehnquist would be utilized by then-newly appointed Justice David Souter in the public-school graduation prayer case, Lee v. Weisman.[55] Weisman involved

the constitutionality of a non-denominational prayer composed and recited by a rabbi at a public middle school graduation. [56] Concurring with the Court's decision to strike down the prayer, Justice Souter approached the Establishment Clause much in the same manner as Justice Rehnquist, focusing on the intentions of its drafters. [57] But whereas Rehnquist focused on Madison's initial proposal and subsequent revision and comments, Souter examined both the text the First Congress proposed and also the text it rejected. [58] In examining what the First Congress considered but rejected, Justice Souter claimed to find the key that unlocks the Framers' true intentions.

According to Souter's historical excavation, the Framers considered but rejected a prohibition only against preferential aid to religion. Madison's original proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." [59] The text went through various amendments and revisions in the House until the following was sent over to the Senate: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." [60] The Senate first considered the language: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." [61] It rejected this language and chose a provision identical to the House's proposal, but without the "rights of conscience" clause. [62] Six days later, however, the Senate ***596** adopted the narrow language, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." [63] The Senate sent this text to the House.

Justice Souter reached his final conclusion from what happened next. A joint conference committee was established to reconcile the differences between the House and Senate versions of the future Establishment Clause. To repeat, the House had adopted the more general language, "Congress shall make no law establishing Religion," while the Senate had adopted the more narrowly restrictive text, "Congress shall make no law establishing articles of faith or a mode or worship." [64] "The House conferees," Souter claimed, "ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" [65] The narrow prohibitions against only the establishment of "one religious sect" or specific "articles of faith" were dropped. According to Souter, "[t]he Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to the state support for 'religion' in general. Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated." [66]

Regarding Justice Rehnquist's citations to the Founders' actions in support of religion, Souter offered two responses. He countered Washington's, Adams's, and Madison's presidential proclamations of official days of prayer and thanksgiving with Jefferson's refusal to issue them because of doubts regarding their constitutionality. [67] After Madison left the presidency, moreover, he claimed that official days of prayer and thanksgiving violated the Constitution. [68] More fundamentally, the practices supporting religion, Souter claimed, "prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, ***597** could raise constitutional ideals one day and turn their back on them the next." [69]

Three years after Weisman, Justice Souter in Rosenberger resumed his reconstruction of an "originalist," "strict-separationist" interpretation of the Establishment Clause. [70] In Rosenberger, a group of University of Virginia students challenged a school policy that excluded religious groups from receiving student body funds. [71] According to Justice Souter, the case raised the legal question of whether state money could be used to fund core, sectarian religious activity. [72] To explain why such funding

unquestionably violated the First Amendment, he returned to the Founding Fathers, this time focusing on the struggle in Virginia over religious liberty. [73]

In the "Memorial and Remonstrance," Souter claimed, Madison squarely addressed the question of using public funds for religious purposes. [74] In Article 3, Madison asks rhetorically, "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" [75] Since Madison was writing against a background in which most colonies had exacted a tax for church support, Justice Souter reasoned that Madison meant to indicate that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." [76] The same point, Justice Souter continued, was also made by Jefferson in his "Virginia Bill for Establishing Religious Freedom." The bill, which was passed after Madison orchestrated the defeat of Patrick Henry's general assessment bill, declared that "to compel a ***598** man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." [77]

In his Jaffree dissent, Justice Rehnquist questioned the relevance of Jefferson (at all) and Madison (in the context of the Virginia debate) for discerning the Establishment Clause's original meaning. [78] Justice Souter never addressed these points thematically; instead, he simply cited and reasserts Everson's contention that
We [the Supreme Court] have "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 as the Virginia statute." [79] Souter also cited three leading church-state scholars--Douglas Laycock, Thomas Curry, and Jesse Choper--who, subsequent to Everson, supported its conclusions. [80]

Justice Souter's return to Virginia in Rosenberger was matched by Justice Clarence Thomas who, for the first time, entered the "originalist" church-state fray. Concurring with the majority and responding to Justice Souter, Justice Thomas claimed that a proper understanding of Madison does not, in fact, lead to the "wall of separation" but rather to the principles of neutrality and non-discrimination. [81]

Justice Thomas's opinion began by establishing the context of Madison's "Memorial and Remonstrance." [82] Madison wrote the "Memorial" in response to Patrick Henry's proposed religious assessment tax bill. [83] Henry's proposal, however, was not a generally- ***599** available subsidy program, as Justice Souter's dissent suggested; [84] it explicitly favored Christians over non-Christians. "Madison's objection to the assessment bill," Justice Thomas thus explained, "did not rest on the premise that religious entities may never participate on equal terms in neutral government programs." [85] Madison opposed the sectarian favoritism in the bill, which is why Article 4 of the "Memorial" claims that the bill "violate[d] that equality which ought to be the basis of every law." [86] According to Justice Thomas, "[e]ven assuming that the Virginia debate on the so-called 'Assessment Controversy' was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion." [87] As interpreted by Justice Thomas, Madison's principle of religious liberty prohibits only preferential government policies that single out religious entities for special benefits. [88] And even if Madison did make comments more in line with Souter's analysis, Justice Thomas repeated Justice Rehnquist's position that "there is no indication that at the time of the framing [of the Establishment Clause] he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies." [89]

The Souter-Thomas dispute over the meaning of Madison's "Memorial and Remonstrance" seems to have come to a draw. [90] Neither Justice, obviously, persuaded the other, and neither Justice persuaded enough members of the Court to write a majority opinion firmly built upon his understanding of Madison. Perhaps in part because of this deadlock, the Court drifted away from invoking the Founding Fathers for its Establishment Clause jurisprudence from 1995-2003. Most notably, ***600** the Court all but neglected the Founders in Zelman v. Simmons-Harris, its contentious 2002 school voucher case. [91]

C. The Federalist Alternative: Elk Grove Unified School District v. Newdow

The Founders returned in a surprising manner in 2004 in Elk Grove Unified School District v. Newdow, the Pledge of Allegiance case. [92] The case raised but failed to resolve the question of the constitutionality of the words "under God" in public school teacher-led recitations of the Pledge. [93] More significantly from an Establishment Clause jurisprudential standpoint was Justice Thomas's abandonment of Justice Rehnquist's "non-preferentialism" and embrace of a federalist interpretation of the Establishment Clause.

According to Justice Thomas's Newdow opinion, "[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments." [94] The Framers, he suggested, "made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." [95] Unlike the Free Exercise Clause, "[t]he Establishment Clause does not purport to protect individual rights," [96] and thus "it makes little sense to incorporate [it]." [97]

Given that Justice Thomas altered his interpretation, he surprisingly presented little evidence for his new approach. To demonstrate that the Establishment Clause does not protect an individual right, he offered less than one full paragraph of textual analysis. His primary argument was to contrast the wording of Establishment Clause with the other provisions of the First Amendment. "The Free Exercise Clause," Justice Thomas stated, "plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from 'abridging [particular] freedom[s].'" [98] But "respecting an," Justice Thomas continued, connotes a different understanding than "abridging." [99] Why or how we are to understand this ***601** difference Thomas did not explain. He failed to address directly the construction of "respecting an" offered by Justice Rutledge in Everson and he neglected to analyze the words themselves. Instead, Justice Thomas merely asserted that his textual analysis "is consistent with the prevailing view that the Constitution left religion to the States." [100] For "the prevailing view," he referred to Justice Joseph Story's Commentaries on the Constitution of the United States and Akhil Amar's The Bill of Rights. [101] Story and Amar may correctly capture "the prevailing view" of the Founders, but citations to them alone seem inadequate to demonstrate correctness of the assertion.

Justice Thomas also asserted that "[h]istory . . . supports this [federalist] understanding." [102] "At the [time of the] founding," he pointed out, "at least six States had established religions." [103] While factually correct, those states eventually disestablished their establishments. [104] Might they have ended their establishments to comply after the fact with the constitutional principle set forth in the Establishment Clause--an ideal that only applied to the national government until the adoption of the Fourteenth Amendment but which was adopted by states individually prior to the Civil War? Other states at the time of the founding, moreover, ended their establishments on account of their perceived abridgment of the principle of religious freedom. [105] The mere fact that state establishments existed at the ***602** time of the drafting of the Establishment Clause is insufficient in itself to demonstrate that the Framers were exclusively concerned with federalism when they adopted the Establishment Clause. These reservations do not imply that Justice Thomas's federalist thesis is incorrect, but given that he challenged the basic

assumptions that guided more than fifty years of jurisprudence, we might expect him to offer more than a handful of paragraphs to demonstrate the persuasiveness of his position.

The remainder of this Article, in fact, argues that the Federalist interpretation most accurately captures the original meaning of the Establishment Clause. Justice Thomas could have drawn on a long (albeit sporadic) history of constitutional scholarship arguing that the original meaning of the Establishment Clause pertains to federalism. [106] That he failed to do so suggests the need for a reinvigoration ***603** of this position. Recent scholarship, moreover, has rejected the Federalist thesis on historical grounds. [107] Prior scholars, furthermore, have not sufficiently placed the drafting of the Establishment Clause in its historical and political context. [108] Specifically, the failure to appreciate ***604** the Founders' diversity of approaches to church-state arrangements has led to a failure to articulate with precision the Anti-Federalists' criticisms that led to the adoption of the Bill of Rights. This failure, in turn, has led to misinterpretations of the original meaning of the Establishment Clause and, correspondingly, the application of erroneous historical narratives to modern church-state cases. [109]

II. The Historical Context of the Drafting of the First Amendment

To understand the original meaning of the Establishment Clause, we have to understand the historical context in which the First Amendment emerged and the particular circumstances that led to the adoption of the Bill of Rights. The fundamental fact that almost all scholars and jurists overlook is that the Founders did not share a uniform understanding of the proper relationship between church and state. After the American Revolution, various states adopted different church-state arrangements. [110] When the Constitution was proposed to form a new national government, fears emerged that the new Congress would impose one form of church-state relations throughout the nation. [111] Anti-Federalists both articulated and exacerbated this fear in their arguments against the Constitution's ratification. [112] The Establishment Clause was crafted by Federalists to quell these concerns and to silence their Anti-Federalist critics.

To understand the original meaning of the Establishment Clause, then, we first must describe the two leading approaches to church-state relations present during the founding era. This investigation sheds light on Anti-Federalist criticisms of the Constitution and their proposed amendments. With the Anti-Federalists' positions set forth, we can approach the actions of the First Federal Congress in its historical context. That context reveals the original meaning and clear intention expressed in the text of the First Amendment's Establishment Clause. The First Federal Congress did not constitutionalize one proper relationship between church and state, but rather it reaffirmed ***605** the Constitution's federal arrangement regarding church-state matters.

A. Church-State Relationships During the Founding Era

In revolutionary America, the relationship between church and state was anything but settled. In states where the Church of England had been established, the necessity of new arrangements was particularly acute. [113] But even in those states that had not established Anglicanism, reevaluation of church-state relations was part of the enormous project of constitution writing. “During the Revolutionary era, every colony-turned-State altered the Church-State arrangements it had inherited from colonial times.” [114]

Because state governments possessed primary legislative power over matters of education and morals, extensive debate over the proper relationship between church and state occurred at the state level. [115] Virginia's approach to religious freedom has received the most legal and scholarly attention, but contrary to Justice Black's assumption in Everson, it was not the only or even the most common understanding in the new nation.

In general, two leading positions emerged. Some states, like Virginia, abolished official state establishments and ended direct government funding of religious clergy. What I shall call the "Virginia Understanding" effectively privatized religion. In other states, particularly in New England, religion as such remained an object of public funding and state concern. The "Massachusetts Way," as I will call it, sought to use public funding and public endorsement of religion as a means to nurture and to encourage good citizenship. The labels "Virginia Understanding" and "Massachusetts Way" are not meant to suggest that everyone within the respective states agreed with the position, or that the understanding belonged exclusively to that state. The "Virginia Understanding" was contested within Virginia, as was the "Massachusetts Way" in Massachusetts. Some of the most able defenders ***606** of the "Massachusetts Way" were Virginians, including Patrick Henry and George Washington; some of the strongest advocates for Virginia-like separation came from Massachusetts. [116] Nonetheless, the positions are associated with these two states because each enshrined in its law one of the leading founding-era approaches to church-state relations. [117]

1. The "Massachusetts Way"

The "Massachusetts Way" is revealed in the 1780 Massachusetts State Constitution. Article III of that document states:
As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality, and as 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: Therefore, To [sic] promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily. [118] At the heart of the "Massachusetts Way" lies a simple syllogism: republican government requires a virtuous citizenry; the cultivation of virtue depends on religion; therefore, supporters of republican government ought to support religion. These ideas were echoed most famously by President George Washington in his Farewell Address. "'Tis substantially true," Washington states, "that virtue or morality is ***607** a necessary spring of popular government." [119] But virtue and morality, he warns, require religion: "And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." [120] Therefore, "[o]f all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens." [121]

Because religion was believed to be essential to the development of republican citizenship, the "Massachusetts Way" authorized taxpayer support of religion, including the direct subsidization of religious ministers. [122] State endorsement of religion was understood not only to be good public policy but an essential public good. [123] All citizens, including non-religious citizens, were thought to benefit from the general diffusion of religious morality. [124]

Religious liberty required only that an individual not be punished for exercising his or her religion as such. As stated in the 1780 Massachusetts Constitution: "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the ***608** manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments . . . ." [125]

An individual's liberty of conscience, accordingly, was not understood to be violated by religious taxes. Massachusetts, furthermore, could claim that "no subordination of any one sect or denomination to another shall ever be established by law," [126] because all taxes for the support of religion would be directed by the taxpayer to "the public teacher or teachers of his own religious sect or denomination." [127]

2. The "Virginia Understanding"

Whereas Massachusetts represents one pole in the Founders' world of church-state relations, Virginia occupies the other. Prior to 1776, Virginia had established the Church of England. Anglican ministers were dependent on the state for financial support. [128] Minister salaries were paid by the government and financed by local taxation. [129] Certain rights and privileges, moreover, were legally reserved to Anglican clergymen--only they, for example, could perform legal marriages. [130] Ministers of dissenting religions, mostly Presbyterians and Baptists, were licensed, as were their meeting houses. [131] To clarify church-state arrangements, Patrick Henry in 1784 proposed a property tax to fund religious ministers. [132] Similar to legislation anticipated by the 1780 Massachusetts Constitution, each property owner was to specify the Christian denomination to which he wished ***609** his tax directed. [133] Tax dollars were to be used to support "a Minister or Teacher of the Gospel . . . or the providing places of divine worship, and to none other use whatsoever." [134] But unlike Massachusetts, which was dominated by Congregationalists, in religiously diverse Virginia, the general assessment met legislative defeat. [135] Shortly thereafter, James Madison proposed and the Virginia legislature adopted Thomas Jefferson's "A Bill for Establishing Religious Freedom." [136]

Jefferson's bill declared "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . ., [and] that all men shall be free to profess, and by argument to maintain their opinion in matters of religion." [137] "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical . . . ." [138] Forcing an individual to support his own church was not declared a violation of the individual's rights, but it was denounced as a deprivation "of the comfortable liberty of giving his contribution to the particular pastor whose morals he feels most persuasive to righteousness." [139] The legislation concluded "that the rights hereby asserted are of the natural rights of mankind," [140] and thus could not be repealed legitimately without violating "natural right." [141]

While Jefferson's bill states its position as a matter of principle, the reasons behind it also include prudential judgments. [142] James ***610** Madison summarized this perspective years later when reflecting on Virginia's experiment in separating church and state. "We are teaching the world the great truth," he wrote to Edward Livingston in 1822, "that [governments] do better without Kings [and] Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of [government]." [143] In 1821, Madison wrote to F. L. Schaeffer: "The experience of the United States is happy disproof of the error so long rooted in the unenlightened minds of well-meaning Christians, as well as in the corrupt hearts of persecuting usurpers, that without a legal incorporation of religious and civil polity, neither could be supported." [144]

Madison saw evidence of what supporters of the "Massachusetts Way" thought could not be true: religion does not need government support to flourish and, therefore, republican government does not need to support religion. Madison argued that religiously-inspired moral character was nurtured better by limiting government's influence on religion. To the extent that ecclesiastical and political authority were united, both were corrupted. "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits?" Madison asked rhetorically in his "Memorial and Remonstrance." [145] His answer: "More or less in all places, pride and indolence in the Clergy, ignorance and servility in the

laity, in both, superstition, bigotry and persecution." [146] The effect of ecclesiastical establishments on civil society was similarly baneful: "In some instances [ecclesiastical establishments] have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instances have they been seen the guardians of the liberties of the people." [147] Led by Jefferson and Madison, Virginia ended ***611** most state regulation of religion and embraced a libertarian approach to church-state matters. [148]

For purposes of ascertaining the original meaning of the Establishment Clause, it is unnecessary to decide whether the "Massachusetts Way" or the "Virginia Understanding" was more authentically American or more fully adopted the principle of religious liberty. What must be understood is that at the time of the American founding two distinct approaches to church-state relations emerged. [149] The more traditional and conservative understanding emphasized the indispensable role of religion for the cultivation of republican citizenship. Those who embraced the "Massachusetts Way" promoted governmental endorsement and equal support of religion as good public policy. They believed direct funding of religious ministers through religious taxes furthered the common good. [150] Such an understanding guided church-state relations in much of New England, including Connecticut, New Hampshire, and Vermont. [151] The newer, more libertarian ***612** approach that emerged in Virginia rejected the idea that government needed to support religion financially for religion to flourish. [152] Leaders of the "Virginia Understanding" sought to end the unification of governmental and ecclesiastical authority by ending the monopolistic position that established denominations enjoyed. [153] They sought to let religious societies stand on their own, just like any other non-governmental organizations. Virginia produced the most philosophical defense of this position, which was also adopted in Rhode Island and New York. [154]

***614 B. The Anti-Federalists' Criticisms of the Constitution**

In the minds of most Anti-Federalists, the loose collection of individuals opposed to constitutional ratification, the differences in church-state arrangements at the state level signaled the impossibility of a harmonious, consolidated union. [155] Employing a number of different arguments (some of which contradicted one another), Anti-Federalists claimed that the proposed constitution threatened religious freedom. They lacked sufficient strength to defeat the Constitution outright, but they managed to extract the promise that amendments would be considered. [156] The Establishment Clause, in particular, was adopted to alleviate fears among the general population aroused by Anti-Federalist criticisms. [157] To understand the Establishment Clause's original meaning, then, requires that we address the Anti-Federalists' criticisms of the Constitution.

On the point of religion, Anti-Federalists had an immediate and distinct advantage in the ratification debate. The proposed constitution was nearly silent regarding religion, [158] which allowed Anti- ***615** Federalists to appeal to fear of the unknown and to parade the possibility of numerous potential abuses of powers. The primary criticism the Anti-Federalists leveled was that the proposed Congress, through its power to make all laws "necessary and proper," could impose uniformity of religious practice through the establishment of a national religion. [159] According to "Deliberator," a Pennsylvania Anti-Federalist:
Congress may, if they shall think it for the "general welfare," establish an uniformity in religion throughout the United States. Such establishments have been thought necessary, and have accordingly taken place in almost all the other countries in the world, and will, no doubt, be thought equally necessary in this. [160] Most Anti-Federalists did not object to religious establishments per se, but feared a national establishment because of the religious diversity in the nation. Given such diversity, "A Countryman" explained that a national religious establishment would "make every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not." [161] "Agrippa," one of the most articulate of Massachusetts' Anti-Federalists, summarized the matter as follows:

Attention to religion and good morals is a distinguishing trait in our [Massachusetts] character. It is plain, therefore, that we require for our ***616** regulation laws, which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us. Unhappiness would be the uniform product of such laws; for no state can be happy, when the laws contradict the general habits of the people, nor can any state retain its freedom, while there is a power to make and enforce such laws. We may go further, and say, that it is impossible for any single legislature so fully to comprehend the circumstances of the different parts of a very extensive dominion, as to make laws adapted to those circumstances. [162] The warning against a national religious establishment was part of the Anti-Federalist argument that a country as large as the United States could not remain free under a set of uniform laws. Influenced by Montesquieu's maxim that republican government can encompass only a small territory and that rule in large territories necessarily tends towards tyranny, [163] Anti-Federalists claimed that the new constitution would result in centralization, consolidation, and--through enforced uniformity--despotism. [164]

Anti-Federalists also criticized the Constitution's failure to protect explicitly the “liberty of conscience” or “free exercise of religion” from infringement by the proposed national government. The charge was part of the Anti-Federalist condemnation of the Constitution for its lack of a bill of rights. [165] Anti-Federalists typically grouped “liberty of conscience” or “free exercise of religion” with other individual rights they thought insecure, such as unreasonable search and seizure. “The Federal Farmer,” one of the most able Anti-Federalist essayists, set forth the charge as follows:

> It is true, we [the people of the United States] are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact. There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search ***617** warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons. [166] “Liberty of conscience” and “free exercise of religion” were used interchangeably by Anti-Federalists-- terms that, unfortunately, they did not define with precision. [167] What is clear, however, is that Anti-Federalists understood “liberty of conscience” or “free exercise of religion” to be an individual right. [168] Equally important to note is that Anti-Federalists never championed a right or principle of “no establishment.” [169] Anti-Federalists disparaged religious establishments only in connection with a consolidated, unlimited national government. Because of the religious diversity in America, they argued, any sectarian national religious establishment inevitably would contradict the habits of at least some of the people. [170] But Anti-Federalists did not argue that non-establishment was necessary to protect free exercise at the local level.

A third Anti-Federalist criticism, advanced most strenuously in New England, concentrated on the absence of a clear endorsement of religion within the Constitution. “Samuel,” a Massachusetts Anti-Federalist, charged that “all religion is expressly rejected, from the Constitution.” [171] “If civil rulers won't acknowledge God, he won't acknowledge them . . . .” [172] “Samuel” focused on the Constitution's specific prohibition of religious tests for office, suggesting that it evinced a design to subjugate, if not eliminate, religion. Like many proponents of the “Massachusetts Way,” he argued that republican government requires religion, and, therefore, he condemned the proposed ***618** Constitution for failing to nurture explicitly religious sentiment. [173] This third criticism was advanced most strenuously in New England. Insofar as it implicitly demanded that the national government take cognizance of religion, it stood in tension with the Anti-Federalist arguments that sought to limit the proposed national government's jurisdiction over religious matters. [174]

During the ratification debates, Federalists responded to these criticisms by repeatedly arguing that the proposed federal government possessed only delegated powers and that no power was delegated concerning religion. The Constitution, they therefore claimed, did not need to be amended to safeguard religious freedom. James Iredell, in North Carolina's ratifying convention, offers an example of the standard Federalist argument:

[Congress] certainly ha[s] no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, "Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation." [175] ***619** Since the Constitution did not grant authority to Congress over religion, Federalists claimed, Congress could not establish a religion or disestablish an existing establishment in the several states. State governments retained complete jurisdiction over such matters, and the federal government posed no threat to religious liberty. [176]

C. Proposed Religion Amendments to the Constitution

As mentioned, the Anti-Federalists lacked the support to defeat ratification outright, but they did manage to obtain the promise of amendments. Seven states included amendments with their official notices of ratification. [177] Two types of alterations were submitted: structural amendments that limited (or explicitly recognized the implicit ***620** limits of) congressional power, and declarations of personal rights. Every state that proposed alterations (except for New Hampshire, the first state to submit amendments) divided their proposals into two distinct lists, labeling those pertaining to structure, "amendments," and labeling those pertaining to individual rights, "declaration of rights."

Five states submitted alterations touching on religion. [178] Within its "declaration of rights" (the list of alterations relating to personal rights), Virginia proposed:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others. [179] North Carolina and Rhode Island repeated Virginia's proposal in their "declarations of rights." [180] New York's ratifying convention declared: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others." [181] New Hampshire, which provided a single list of constitutional amendments, offered the following: "Congress shall make no laws touching religion, or to infringe the rights of conscience." [182]

***621** The alterations proposed by the state ratifying conventions reflect two distinct approaches to address Anti-Federalist concerns. New Hampshire's proposal emphasized the limits on the new government's power by declaring Congress's lack of power to make "laws touching religion." [183] The blanket prohibition seems to have been intended to ensure that the states would retain plenary power over religious matters. The explicit use of the word "Congress" seems to have been intended to emphasize that body's limited powers and to reaffirm the federal character of the new nation. It clearly prohibited federal interference with state religious establishments or the lack thereof. New Hampshire's amendment also prohibited Congress from making laws that "infringe the rights of conscience," [184] thus addressing the Anti-Federalist concern over the Constitution's lack of an

explicit recognition of this fundamental personal right. Virginia's proposal stated similarly that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," [185] which was a modification of Article XVI of the Virginia Declaration of Rights. [186]

Despite this similarity, a significant difference existed between the two states' proposals. Virginia's amendment was not explicitly federal. It aimed to regulate how Congress might exercise its power by including the following no-preference provision: "no particular religious sect or society ought to be favored or established, by law, in preference to others." [187] New York followed Virginia's lead and also proposed a no-preference amendment: "no religious sect or society ought to be favored or established by law in preference to others." [188] Whereas New Hampshire appears to have sought to recognize Congress's lack of power, Virginia and New York seem to have sought to regulate how Congress would exercise its expansive powers. That is, instead of reaffirming federalism and thereby denying Congress jurisdiction over church-state matters, Virginia and New York seem to have conceded that Congress likely would legislate on matters regarding religion and sought, therefore, to prevent the federal government from preferring one sect over others. [189]

***622** The difference between New Hampshire's federal amendment and Virginia's no-preference proposal can be traced to Patrick Henry, a dominant figure in Virginia's Ratifying Convention and the probable author of Virginia's proposed amendment. [190] A vehement opponent of the proposed Constitution, Henry insisted that the new national government was not one of limited, delegated powers. [191] Virginia's Federalists had argued that no amendment relating to religion was necessary because, in James Madison's words, "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation." [192] Henry thought such assurances were insufficient. To rebut the Federalists' delegated powers argument, he highlighted the explicit limitations on federal power listed in Article I, Section 9 of the Constitution. [193] Those reservations, Henry explained, were like a bill of rights; but that the Philadelphia Convention itself thought it necessary to protect some rights explicitly belied the Federalist argument that a bill of rights was not necessary. [194] The existence of stated reservations on Congress's power, "reverses the position of the friends of this Constitution, that every thing is retained which is not given up." [195] The inclusion of a minimal bill of rights reveals the truth of the matter: that "every thing which is not negatived [sic] shall remain with Congress." [196] The inclusion of express reservation in Article I, Section 9 "destroys [the Federalists'] doctrine." [197] Disbelieving that the new national government's powers would remain limited, Henry argued that a bill of rights was absolutely necessary to protect religious freedom. [198]

***623** Henry and Virginia's Anti-Federalists sought, accordingly, to regulate how Congress would exercise power over religion. As mentioned above, the Virginia Ratifying Convention proposed a modified version of Section 16 of Article XVI of the Virginia Declaration of Rights. The modifications, excluding punctuation, were as follows (with additions in italics):
That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men <<strike through>>are equally entitled<<end strike through>> have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that <<strike through>>it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other<<end strike through>> no particular religious sect or society ought to be favored or established, by law, in preference to others. [199] The inclusion of the adjectives "natural" and "unalienable" emphasized the fundamental nature of the right to religious free exercise. More significantly, Article XVI was rewritten to include the no-preference provision that "no particular religious sect or society ought to be favored or established, by law, in preference to others." [200] The introduction of the new concept of "no preference" suggests the author's deliberate intention to regulate congressional power over religion. [201]

III. The Drafting of the Establishment Clause

When James Madison collected the various states' proposals for amendments to begin work on what would become the Bill of Rights, he must have noticed that a tension existed between New Hampshire's and Virginia's proposed religion amendments. Whereas New Hampshire ***624** aimed to limit federal power, Virginia's proposal might be read to expand it. [202] Virginia's non-preferential language could be interpreted to imply that Congress possessed authority to pass religious legislation if it did so in a non-preferential manner. Virginia's Anti-Federalists, in their desire to control federal authority, proposed an amendment that could be read to increase the very power that they feared--the same power that New Hampshire's proposed amendment sought to limit.

One can only imagine Madison's frustration with Patrick Henry in particular and the Anti-Federalists in general. The important work of establishing the new national government was being sidetracked to address proposals like New Hampshire's, which Madison considered unnecessary, and a proposal like Virginia's, which was inconsistent with many of the Anti-Federalists' self-professed position. [203] Nonetheless, Madison took charge of the amendment process in the First Federal Congress. One of his reasons for doing so is easy to understand. In the state ratifying conventions, Anti-Federalists exerted considerable influence; even with the promise of amendments, Virginia ratified the Constitution only by a vote of eighty-nine to seventy-nine. [204] If a second constitutional convention was called, Anti-Federalists likely would play a significant role. [205] Federalists, however, controlled the First Federal Congress. [206] If the drafting of amendments stayed within Congress, they would shape the results. Proposing amendments thus became Madison's focus in the first months of the First Congress. [207] Like almost all Federalists, he did not think amendments were necessary to correct flaws in the Constitution, but ***625** he did see them as essential to quell fears excited by the Anti-Federalists. [208]

On June 8, 1789, Madison proposed the following as one of his amendments: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” [209] Madison did not propose language corresponding to his principle of “non-cognizance,” which he had set forth in his “Memorial and Remonstrance.” [210] Instead, he proposed text that directly targeted Anti-Federalist arguments. He specifically addressed the Anti-Federalists' concern over a uniform national religion by prohibiting Congress from establishing one. Madison included a statement extending blanket protection to the rights of conscience and, moreover, he further specified that civil rights would not be abridged on account of religion.

Madison, furthermore, rejected Virginia's no-preference approach, as can be seen by the omission in his text of anything like Virginia's proposed no-preference provision. [211] For the same reasons Madison led the opposition against Henry's general assessment bill in Virginia, he presumably would have objected to a non-preferential legislation at the national level. Madison's proposed text, however, most likely had nothing to do with prohibiting or allowing federal non-preferential aid to religion as such. As he made clear in the Virginia ratifying convention, because the national government possessed only the powers delegated to it, Madison believed there was “not a shadow of right in the general government to intermeddle with religion.” [212] The national government's “least interference” with religion, he declared, “would be a most flagrant usurpation.” [213] Since Madison did not think Congress possessed power to aid religion as such--whether in a non-preferential manner or not--he may have ***626** feared that no-preference text too easily could have been misconstrued to suggest that Congress possessed jurisdiction over religion. We ought to remember that although Madison was a nationalist in 1789, he would not remain one for long. [214] Whatever the reason, Madison did not introduce for congressional consideration anything like the no-preference text proposed by Virginia.

The House responded to Madison's proposal with irritation and opposition. [215] Most members did not want to be bothered with something they thought unnecessary and a waste of time. [216] Sensing that he would get nowhere with the full House, Madison managed to have consideration of amendments moved to committee. [217] In committee, his original text was modified to state: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." [218]

As described in the first section of this Article, the First Congress's debate over the text of what would become the Establishment Clause has received exhaustive academic and judicial scrutiny. The nature of that debate, however, has been completely misperceived. The debate was not between those who favored non-preferential aid on the one hand and those who opposed any government aid on the other. In fact, to use the term "debate" is something of a misnomer. The records of the First Congress would be described more accurately as a brief, Federalist-dominated discussion over how to phrase an amendment that would not alter Congress's power yet would satisfy the Constitution's critics.

After more pleading from Madison, the full House finally took up consideration of amendments on August 15, 1789. The committee's text met two immediate criticisms. Congressman Sylvester feared that the text might be misconstrued so as "to abolish religion altogether." ***627** [219] Congressman Huntington, similarly, worried that it might "be extremely hurtful to the cause of religion." [220] Roger Sherman, on the other hand, "thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the [C]onstitution to make religious establishments." [221] Madison's response applied equally to both reservations. He is recorded as saying that

> he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions. [222]

Madison made clear that the purpose of his amendment was to recognize restrictions on congressional power. He meant to assure Sylvester and Huntington that the amendment would not abolish state establishments, which seems to have been their fear. Madison all but conceded Sherman's point that, strictly speaking, the amendment is unnecessary, but he reminded his Federalist colleagues that it had been demanded along with ratification. [223] Madison went on to suggest that reinserting the word "national" before religion (as he had originally proposed), would "point the amendment directly to the object it was intended to prevent," namely that one or two sects might gain pre-eminence "and establish a religion to which they would compel others to conform." [224]

Regardless of Madison's specific intentions, at this point the First Congress made a decisive turn away from his proposed language. Samuel Livermore, who "did not wish them to dwell long on the subject," proposed New Hampshire's text: "Congress shall make no laws touching religion, or infringing the rights of conscience." [225] New Hampshire's language more clearly acknowledged Congress's lack of power to make a national establishment or to violate the rights of conscience and to recognize state sovereignty over establishments. [226] ***628** After an Anti-Federalist rant by Elbridge Gerry, New Hampshire's text was immediately adopted on August 15, 1789. [227]

Thereafter, no substantive discussion is found in the House records regarding the language that would become the Establishment Clause. On August 20, 1789, the text was altered to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." [228] The replacement of "establishing" for "touching" more clearly focused attention on establishments, but why the House made the change is not illuminated by the available record. Perhaps Congress was leery of "no laws touching religion" because such language conceivably could have been interpreted to reduce Congress's then-existing powers. Under Livermore's language, if Congress, pursuant to its Article I powers, passed a law that

did not amount to an establishment but that "touched religion"--for example, a law exempting conscientious religious objectors from federal military service--the law's constitutionality conceivably could have been challenged. But whether any member of Congress voiced such a concern is a matter of speculation. More important to note is that the general structure of the text remained unchanged. The House followed New Hampshire's federal formulation, adopting text that recognized Congress's lack of power over religious establishments. It never considered anything like Virginia's "no preference" proposal because Madison dismissed it from the outset.

On September 3, 1789, the Senate began considering the language approved by the House. [229] Inferences about senators' intentions must be drawn tentatively, because no record exists of their debate. It appears that the Senate engaged in deliberation over how extensively Congress's powers should be circumscribed. They immediately rejected three narrow alterations that would have limited Congress's power only to establish "one religious sect or society in preference to others," "establishing any religious sect or society," or "establishing any particular denomination of religion in preference to another." [230] Each of these proposals was a version of Patrick Henry's Virginia submission. Each could have been interpreted to augment congressional power, implicitly allowing Congress to legislate on religious matters so long as it did so in a non-preferential ***629** manner. In something of a reversal, on September 9, 1789, the Senate adopted language even narrower than that suggested by the Virginia Ratifying Convention: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ." [231] It sent this language back to the House. [232]

When the House received the Senate's version, they called for a joint committee to resolve the differences between the House and Senate versions. [233] Justice Souter, it will be recalled, bases his strict-separationist interpretation of the Establishment Clause in Lee v. Weisman on that committee's rejection of the narrow Senate proposal. [234] But Souter misconceives the nature of the alternatives faced by the joint committee. They did not, as he claims, face a choice between non-preferential language on the one hand and strict-separationism on the other. Rather, the committee had before them the two types of Anti-Federalist amendments that emerged from the state ratifying conventions: the House-proposed, New Hampshire-inspired federalism text and the Senate-proposed, Virginia-inspired regulation language. Congress faced the choice between adopting text that would recognize its lack of power (the House proposal) or language that would regulate its power and thereby, arguably, augment it (the Senate proposal).

No record exists of the joint committee's deliberations, but the outcome speaks for itself. The committee adopted language that was unmistakably federal: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise ***630** thereof . . . ." [235] The key to unlocking the meaning of the Establishment Clause lies in understanding the words "respecting an," [236] which were added by the joint committee. Then, as now, the present participle "respecting" means "with reference to, [or] with regard to." [237] The added words reveal a precise intention-- to indicate that Congress lacked power with reference or regard to a religious establishment. By adopting "respecting an," the joint committee drafted a solution to the problem of how to craft language that would specify that Congress lacked power to legislate a national establishment or to interfere with existing state establishments (or lack thereof) without implicitly granting to Congress power to pass church-state legislation short of the stated prohibition. [238] To restate the problem, if the committee drew a specific line that Congress could not pass (as proposed in the Senate), future congressional members might interpret their power to include everything short of that line. "Respecting an" offered a precise solution to this problem by indicating that Congress lacked power in the entire realm of religious establishments. Unlike the other First Amendment participles "prohibiting" and "abridging," which regulate but do not categorically deny Congress power, "respecting" indicates Congress's lack of jurisdictional authority over an entire subject matter. The Establishment Clause thus made clear that Congress lacked power to legislate a national establishment or to pass legislation directly regarding state establishments (or the lack thereof). [239] Of course, Federalists in the First Congress, such as Roger Sherman, thought this was how the matter stood without an amendment. [240] With the addition of "respecting an,"

Congress found language that did not affect the existing power of Congress (from the ***631** Federalists' viewpoint) yet would satisfy the fears aroused by Anti-Federalist criticisms that the Constitution threatened religious freedom. It was a remarkable feat of constitutional craftsmanship.

IV. Implications of the Establishment Clause's Original Federal Meaning

A. The Impossibility of Incorporating the Establishment Clause's Original Meaning

The Framers adopted the precise wording "respecting an establishment" [241] to convey their intention of leaving the question of religious establishments to the states. With the Establishment Clause, the First Congress did not adopt a principled understanding of the proper relationship between church and state. It did not constitutionalize a personal right of "non-establishment." The original meaning of the Establishment Clause, in fact, is neutral toward religious establishments as it protects state establishments (or lack thereof) while also acknowledging the lack of federal power over religion. When the Everson Court interpreted the Establishment Clause to erect a "wall of separation" between church and state, and applied that interpretation against the states, [242] it departed from the Founding Fathers' original meaning.

The Everson Court necessarily had to discard the Establishment Clause's original meaning to apply the provision against the states. Because the original meaning only recognizes a jurisdictional boundary that protects state authority, it cannot logically be incorporated to apply against state governments. The doctrine of "incorporation" set forth by Justice Benjamin Cardozo in Palko v. Connecticut holds that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment protects those "fundamental" rights "implicit in the concept of ordered liberty." [243] No shortage of debate exists over the question of what rights are "fundamental" and "implicit in the concept of ordered liberty"; but for any provision of the Bill of Rights to be eligible for incorporation, it must protect a personal right--some ***632** substantive right must exist that can be applied against the states. [244] As adopted by the Framers, the Establishment Clause fails to meet this criterion because it does not protect a personal right of "non-establishment" or contain a substantive right to live under a government with the "separation of church from state." In this way, the Framers' Establishment Clause is different than the provisions of the First Amendment that protect the personal rights of freedom of speech and assembly. Like the Tenth Amendment, which reserves to the states and to the people the powers not delegated to the federal government, the Establishment Clause's original meaning pertains to jurisdiction, and, therefore, cannot be applied against the states.

B. The Limited Relevance of the Founding Fathers for Incorporated Establishment Clause Jurisprudence

A construction of the Establishment Clause strictly faithful to its original meaning would require disincorporation and the overturning of nearly sixty years of "no-establishment" jurisprudence. Following the Framers' intentions, the Establishment Clause only would prohibit the federal government from encroaching upon state authority to legislate on matters of religion. States would be free to aid or not to aid religion, subject only to their own constitutions and other incorporated provisions of the federal Constitution, including the First Amendment's free exercise and free speech protections. Landmark cases that banned prayer in public schools, [245] disallowed public funding of religious schools, [246] and prohibited public religious displays [247] (to take a few leading examples) could not be sustained as Establishment Clause violations. [248] A disincorporated Establishment ***633** Clause would be jurisdictional, serving as a reminder that the federal government is one of limited, delegated powers, and that direct legislation on matters pertaining to religion is not one of those powers.

While disincorporation is logically possible, no sitting Supreme Court Justice, except Clarence Thomas, [249] has suggested that he or she would entertain such a massive change in constitutional law. Incorporation has long been accepted and the sheer

force of time would seem to ensure that the Establishment Clause will remain applicable against the states. [250] The Supreme Court has failed to acknowledge, however, that incorporation necessarily means that the original meaning of the Establishment Clause cannot be applied to modern cases. With incorporation, an "originalist" approach to the Establishment Clause requires a partial or distorted recreation of history.

An "originalist" approach to an incorporated Establishment Clause, in fact, should lead inquiry away from the Founding Fathers and to the thoughts and intentions of those who drafted the Fourteenth Amendment. If the framers of the Fourteenth Amendment intended to apply the Establishment Clause against the states, then their understanding of what principle they incorporated becomes authoritative from an "originalist" perspective. Whether the framers of the Fourteenth Amendment did intend to incorporate any part of the Bill of Rights is a matter of long-running dispute that exceeds the scope of this Article. [251] With regard specifically to the Establishment ***634** Clause, however, little evidence exists to suggest that they clearly did intend to apply a personal right of "non-establishment" against the states. During the period surrounding the adoption of the Fourteenth Amendment, the different congressmen who catalogued the personal rights protected by the First Amendment (and thus arguably by the Fourteenth Amendment) spoke only of "free exercise" or of "freedom of conscience;" none spoke of a personal right of "non-establishment." [252] So even if the framers of the Fourteenth Amendment understood the "privileges and immunities" of United States citizenship (or "due process") to include the personal rights protected by the Bill of Rights, it is not clear that they identified "non-establishment" as such a right. [253]

The proposal and rejection of the Blaine Amendment in 1875, moreover, further suggests that the Fourteenth Amendment was not understood to have incorporated the Establishment Clause. The amendment, which passed in the House but failed to win approval in the Senate, would have prohibited states from making any law "respecting an establishment of religion or prohibiting the free exercise thereof." [254] Such language would have been redundant if the Fourteenth Amendment had already applied the Establishment Clause ***635** against the states. [255] The Blaine Amendment, furthermore, was debated in Congress only seven years after the ratification of the Fourteenth Amendment. The Congress that debated it included twenty-three members of the Congress that had approved the Fourteenth Amendment (including Blaine himself), two members who had been on the committee that drafted the Fourteenth Amendment, [256] and more than fifty members who had served in the legislatures of the states that considered the Fourteenth Amendment in 1867 and 1868. [257] This overlap suggests that, at a minimum, a significant portion of those who drafted and ratified the Fourteenth Amendment did not understand it to incorporate the Establishment Clause.

If the framers of the Fourteenth Amendment did not intend to apply the Establishment Clause against the states, then no legislative intention or original meaning exists that an "originalist" approach can adopt for incorporated "no-establishment" jurisprudence. Stated differently, if it is impossible to deduce a non-jurisdictional principle of "no-establishment" associated with either the original meaning of the ***636** First Amendment or the adoption of the Fourteenth Amendment, an "originalist" approach to the incorporated Establishment Clause becomes impossible.

Such a historical lacuna, ironically, could lead "no-establishment" jurisprudence back to the Founding Fathers. Incorporation requires the construction of a judicial principle of "no-establishment." Given that the Founders were immersed in the task of Constitution writing and that they extensively debated the proper relationship between church and state, they might be considered a natural place to begin the sustained reflection necessary to construct a sound constitutional principle of church-state relations. A return to the Founders, however, could only begin--not end--deliberation. As discussed above, leading Founders disagreed over the proper relationship between church and state. Some founders, like George Washington and Patrick Henry, defended non-sectarian support of religion of the sort that was adopted in the Massachusetts Constitution of 1780. [258] Other founders, like Thomas Jefferson and James Madison, railed against state support of religion as such. [259] So if the Founding

Fathers are consulted and a Washingtonian or Madisonian approach to church-state questions is adopted, it would not and could not reflect the Establishment Clause's original meaning or the intentions of those who adopted the text. Incorporation, accordingly, strips the Founders of their special authorial status; with incorporation the original meaning of the Establishment Clause cannot be adopted.

Conclusion

Justice William Brennan once criticized "originalism" as "little more than arrogance cloaked as humility." [260] While not directed at Establishment Clause jurisprudence specifically, his criticism accurately describes the Supreme Court's twentieth century "originalist" Establishment Clause jurisprudence. The precise and clear intention and meaning of those who drafted the Establishment Clause has been lost on the modern Supreme Court, which, with the recent exception of Justice Thomas, has failed to appreciate the Founders' original concern with federalism. [261] The modern Court's "originalist" failures ***637** can be traced in part to the Justices' lack of attention to basic facts from the history of the American founding. Aside from Justice Thomas's Newdow concurrence, every significant "originalist" church-state opinion has assumed that the Framers shared a uniform principle of "no establishment" or "separation" and that they set forth this principle in the Establishment Clause. [262] The Court has ignored the historical context that led to the adoption of the Bill of Rights, which has led it to overlook the Founders' concern with federalism.

Perhaps the most distressing implication of uncovering the Founders' concern with federalism is that it reveals the modern Supreme Court's alarming misuse of history. In Everson, the Court assumed, seemingly without consideration, that the Establishment Clause could be incorporated to apply against the states. [263] Nothing in that case indicates that Justices Black or Rutledge paused to consider that the framers of the First Amendment might have been primarily concerned with federalism. [264] The unreflective manner by which the Everson Court incorporated the Establishment Clause is illustrated by Justice Black's deficient historical analysis. [265] He mistakenly asserted that Jefferson played a leading role in the drafting and adoption of ***638** the First Amendment. [266] He failed, moreover, to provide any evidence for the linchpin of his opinion--that the First Federal Congress intended to provide the same protection of religious liberty as Jefferson's Virginia Statute. [267] Justice Rutledge compounded Justice Black's errors by his interpretation of "respecting an." He missed the federal meaning of the phrase, interpreting it instead to mean that "not simply an established church, but any law respecting an establishment of religion is forbidden." [268] Justice Rutledge thus transformed a statement of federalism into an expansive principle of separation.

On the contemporary Court, Justice Souter has accepted Everson's incorporation framework, and, to that extent, his Establishment Clause opinions suffer from the same fatal misconceptions as Justices Black's and Rutledge's. To his credit, Justice Souter has made a serious attempt to ground his interpretations in the historical record, but he has approached that record in light of the late twentieth-century "strict-separationist" /"non-preferentialist" paradigm. As such, he distorts the Framers' intentions, fitting their positions into modern-day jurisprudential categories with which the First Congress was ultimately unconcerned. Perhaps because he has become aware of the problems with his earlier historical claims, Justice Souter in the 2005 Ten Commandments case, McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, depicted his "neutrality" interpretation of the Establishment Clause as only reflecting "[a] sense of the past," not as capturing the text's original meaning simply. [269]

Like Justice Souter, Justice Rehnquist never reconsidered Everson's primary assumption that the Establishment Clause contains within it a principle of "no establishment." Thus, he too failed to set forth an interpretation that accurately reflects the Founders' federal intentions. Justice Thomas alone has approached the Establishment Clause with historical accuracy, although he has not offered an adequate ***639** account as to why the Framers were concerned with federalism. Justice Thomas's Newdow

opinion, moreover, fails to address the sweeping implications of what a return to the Founders' intentions would require for Establishment Clause jurisprudence.

A jurisprudence that seeks to return to the original meaning of the Establishment Clause requires the disincorporation of the provision. Barring this, the Founding Fathers cannot be cited authoritatively for an “originalist” approach to the First Amendment's Establishment Clause.

Footnotes

a1 Assistant Professor of Political Science at Tufts University. The author would like to thank Walter Berns, Eric Claeys, Daniel Dreisbach, Philip Hamburger, Richard Garnett, Michael Greve, Robert Goldwin, Nicholas May, Michael McConnell, Bryan McGraw, Kathryn Mims, Johnathan O'Neill, Adam Rick, Kate Rick, and David Tubbs for their comments on earlier drafts of this Article. All errors, of course, are the responsibility of the author.

1 For a recent history of “originalism” that notes the importance of the First Amendment in its development, see Johnathan O'Neill, Originalism in American Law and Politics: A Constitutional History 86-90, 151-52 (2005) (discussing how the mid-twentieth century First Amendment cases resulted in a greater focus on originalism).

2 For examples of Establishment Clause jurisprudence that do not rely on originalist intent, see Justice Kennedy's “Coercion” test in Lee v. Weisman, 505 U.S. 577, 586-88 (1992), Justice O'Connor's “Endorsement” test in her concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 688, 690 (1984), and Justice Burger's “Lemon” test in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

3 According to Donald L. Drakeman, approximately 100 federal and state court decisions have highlighted James Madison's role in crafting the religion clauses of the First Amendment. Donald L. Drakeman, James Madison and the First Amendment Establishment of Religion Clause, in Religion and Political Culture in Jefferson's Virginia 219, 219 (Garrett Ward Sheldon & Daniel L. Dreisbach eds., 2000). Even Justice William Brennan, no champion of “originalism,” claimed that in the context of prayer in public schools, “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). In the same case, however, Justice Brennan also stated that he “doubt[ed] that [Madison and Jefferson's] view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases” and that “[a] too literal quest for the advice of the Founding Fathers...seems to me futile and misdirected.” Id. at 236-37.

4 For a discussion of Jefferson's and Madison's roles in the Supreme Court's religion jurisprudence, see David Reiss, Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence, 61 Md. L. Rev. 94 (2002).

5 330 U.S. 1, 8-13 (1947) (summarizing the history of and purpose behind the First Amendment's enactment); see also infra Part I.A for a discussion of Everson v. Board of Education.

6 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (“I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.”).

7 See Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) (“I have previously suggested that the Clause's text and history ‘resis[t] incorporation’ against the States. If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.” (citation omitted)).

8 Newdow, 542 U.S. at 50 (Thomas, J., concurring). It should be noted that Justice Thomas had suggested this position in passing in Zelman v. Simmons-Harris stating: “The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government.” 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

9 See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 861-63 (1995) (Thomas, J., concurring) (arguing that the Establishment Clause does not "compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants" but rather permits the participation of religious entities in neutral, evenhanded programs).

10 Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment..., States are prohibited as well from establishing a religion or discriminating between sects.").

11 Lee v. Weisman, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring) ("[H]istory neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.").

12 Id. at 613.

13 Rosenberger, 515 U.S. at 868-74 (Souter, J., dissenting).

14 Id. at 861 (Thomas, J., concurring).

15 See, e.g., Daan Braveman, The Establishment Clause and the Course of Religious Neutrality, 45 Md. L. Rev. 352, 375 (1986) (arguing that the "historical evidence...does not provide many answers, and...a literal quest for the Framers' intent may be both futile and misdirected"); William P. Marshall, Unprecedential Analysis and Original Intent, 27 Wm. & Mary L. Rev. 925, 930-31 (1986) (arguing that the historical record is ambiguous in regard to whether the Establishment Clause was intended to allow accommodation of religion or require strict separation between church and state); Mark Tushnet, Religion and Theories of Constitutional Interpretation, 33 Loy. L. Rev. 221, 229 (1987) ("[D]ifficulties with originalist theories of the establishment clause simply exemplify the general problem of originalism, which is that social change makes it a theory of constitutional interpretation that regularly fails to provide guidance on matters of contemporary constitutional controversy because it disregards the complexities of both the historical record and the current situation."); see also Daniel O. Conkle, Constitutional Law: The Religion Clauses 26 (2003) (claiming that "the original understanding is an overrated source of constitutional values in this area [(religious establishment)]"); Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. Rev. 346, 417 (2002) (asserting that "an accurate account of the intellectual origins of the Establishment Clause does not, and cannot, provide a definitive answer to the question of what exactly the Establishment Clause prohibited then or prohibits now"); Steven G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75, 129 (1990) ("At most, Rehnquist's originalist arguments prove that history provides support for two alternative traditions concerning the role of religion in our political culture....Although history helps to define the choices between these alternative traditions, it cannot make this choice for us."); Frank Guliuzza III, The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case, 42 Drake L. Rev. 343, 372 (1993) (noting originalism's failure to resolve historical contradictions when it comes to the adoption of the religion clauses).

16 This Article attempts to uncover the "original meaning" of the Establishment Clause consistent with what Vasan Kesavan and Michael Stokes Paulsen call "original public meaning textualism." It should be noted, however, that the Establishment Clause's "original meaning" is consistent with the phrases "original intention" and its "original understanding." For a discussion of the different types of originalism, see Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113 (2003).

17 Everson v. Bd. of Educ., 330 U.S. 1, 16-17 (1947).

18 Id. at 11.

19 Id. at 12.

20 Id. at 13. Justice Black offered only the following citations to substantiate his assertion that the Court previously recognized that the First Amendment had the same objective and was intended to provide the same protection against governmental intrusion on

religious liberty as the Virginia Statute: Reynolds v. United States, 98 U.S. 145, 164 (1878); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Davis v. Beason, 133 U.S. 333, 342 (1890). Id. Checking Justice Black's references does not support his assertion. In Reynolds, the landmark Mormon polygamy case, the Court suggested that "[t]he controversy upon this general subject [of religious establishment]...seemed at last to culminate in Virginia" and the passing of Jefferson's Virginia Statute. Reynolds, 98 U.S. at 163. However, the opinion then suggested that Jefferson's letter to the Danbury Baptist Association--not the Virginia Statute--"may be accepted almost as an authoritative declaration of the scope and effect of the [First] [A]mendment." Id. at 164. Watson v. Jones lacks a single reference to the Virginia Statute; it is unclear why Justice Black cites it. Checking Justice Black's citation to Davis v. Beason, similarly, fails to reveal a reference to the Virginia Statute or its relationship to the First Amendment. Justice Field's majority opinion in the case quoted Justice Waite's opinion in Reynolds at length, but it fails to refer to Jefferson's Virginia Statute. Davis, 133 U.S. at 343-44 (quoting Reynolds, 98 U.S. at 165-66). However, in the free exercise case Jones v. Opelika, Justice Murphy, in dissent, wrote that "[a]n arresting parallel exists between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in the American colonies for religious liberty which culminated in the Virginia Statute for Religious Freedom, the Northwest Ordinance of 1787, and the First Amendment." 316 U.S. 584, 622 (1942) (Murphy, J., dissenting). Why Justice Black failed to cite Jones v. Opelika is unclear. A previous Court opinion thus had mentioned the Virginia Statute, but did not claim that the First Amendment had "the same objective" as the Virginia Statute. The references to the Virginia Statute, moreover, occurred in the context of interpreting the Free Exercise Clause, not the Establishment Clause. Justice Black thus failed to substantiate his assertion that the Court had previously recognized that the original meaning of the Establishment Clause had the same objective as Jefferson's Virginia Statute.

21 Justice Black cites the following from Jefferson's Virginia Statute:
Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either ...; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern....
That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief....
Everson, 330 U.S. at 12-13 (citation omitted).

22 Justice Black noted:
In ["Memorial and Remonstrance"], [Madison] eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.
Id. at 12.

23 Id. at 15-16.

24 Id. at 17 ("Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").

25 Id. at 56-57 (Rutledge, J., dissenting); see also id. at 19 (Jackson, J., dissenting) ("[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.").

26 Id. at 28 (Rutledge, J., dissenting).

27 Id. at 31.

28 Id. at 31-32. This interpretation of "respecting" was subsequently instrumental to Chief Justice Burger's majority opinion in Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

29 Everson, 330 U.S. at 33-34 (Rutledge, J., dissenting).

30 Id. at 37.

31 Id. at 39.

32 Id. at 40.

33 Id. at 37.

34 Id. at 40.

35 Id. at 39.

36 Id. at 42.

37 Id.

38 See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 233-35 (1963) (Brennan, J., concurring) (discussing the Framers' purpose in enacting the Establishment Clause and noting that the Clause was intended "to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not...make of religion, as religion, an object of legislation"); Engel v. Vitale, 370 U.S. 421, 446-47 n.3 (1962) (Stewart, J., dissenting) (discussing the historical tradition, beginning with the Founders, among all three branches of government to use prayer in opening sessions and in assumption of office); Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."); Id. at 244-48 (Reed, J., dissenting) (determining that the Illinois school district did not violate the Establishment Clause when it permitted religious instructions to be given in public school buildings through relying on Jefferson's annual report to the University of Virginia authorizing religious education at public universities and rejecting the applicability of Madison's "Memorial and Remonstrance").

39 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

40 Id. at 92-94 ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.... [W]hen we turn to the record of the First Congress..., including Madison's significant contributions thereto, we see a far different picture than the highly simplified 'wall of separation'....").

41 Everson, 330 U.S. at 13.

42 Jaffree, 472 U.S. at 92 (Rehnquist, J., dissenting).

43 Id.

44 Id.

45 See id. at 93-94 ("Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate to the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good.").

46 Id. at 98.

47 Id.

48 Id. at 92.

49 Id. at 113.

50 Id. at 100 (quoting the Northwest Ordinance of 1787, art. III, 1 Stat. 50, 52 (1789)).

51 Id. at 103.

52 Id.

53 Id. at 106.

54 Justice Rehnquist cites Robert L. Cord only once in his opinion (id. at 104) but his entire opinion seems to closely follow Cord's argument in Separation of Church and State: Historical Reality and Current Fiction (1982).

55 505 U.S. 577 (1992). Academic literature cited by Justice Souter included Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986) and Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986).

56 Weisman, 505 U.S. at 580 ("The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religious Clauses of the First Amendment....").

57 See id. at 612-16 (Souter, J., concurring) (reviewing the Establishment Clause's enactment and finding that "the history of the Clause's textual development [provides] a more powerful argument [than Rehnquist's Jaffree dissent] supporting the Court's jurisprudence following Everson").

58 See id. at 612 (describing the various religion clause versions considered, amended, and rejected by both the House and the Senate).

59 Id. at 612 (quoting 1 Annals of Cong. 434 (Joseph Gales ed., 1790)).

60 Id. at 613 (quoting 1 Documentary History of the First Federal Congress of the United States of America: March 4, 1789-March 3, 1791, at 136 (Linda Grant de Pauw ed., 1972) [hereinafter Documentary History]).

61 Id. (quoting Documentary History, supra note 60, at 151).

62 Id. at 614.

63 Id. (quoting Documentary History, supra note 60, at 166).

64 Id. at 613-14.

65 Id. at 614.

66 Id. at 614-15.

67 See id. at 623 ("President Jefferson...steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he though they violated the Religion Clauses.").

68 See id. at 624-25 ("Upon retirement,...he concluded that '[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed ..., they imply a religious agency, making no part of the trust delegated to political rules."' (citation omitted)). For Madison's later reflections on the constitutionality of presidential proclamations declaring official days of prayer and thanksgiving, see Elizabeth Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Q. 534, 560 (1946).

69 Weisman, 505 U.S. at 626.

70 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 868 (1995) (Souter, J., dissenting).

71 See id. at 827 (majority opinion) ("[The student publication] filed suit...[and] alleged that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law.").

72 See id. at 863-64, 868 (Souter, J., dissenting) (“The Court today, for the first time, approves direct funding of core religious activities by an arm of the State.”).

73 See id. at 868-72 (discussing the role of Madison in ensuring the defeat of the Virginia tax assessment bill and the passage of Jefferson's Virginia Bill for Establishing Religious Freedom).

74 See id. at 868 (“Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance....”).

75 Id. (quoting James Madison, Memorial and Remonstrance Against Religious Assessments P3 (1785), reprinted in Everson v. Bd. of Educ., 330 U.S. 1, app., at 65-66 (1947) [hereinafter Madison, Memorial and Remonstrance, reprinted in Everson]).

76 Id. at 869 (quoting Everson, 330 U.S. at 11).

77 Id. at 871 (quoting Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), reprinted in 5 The Founders' Constitution 77 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter The Founders' Constitution]).

78 See Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting that Jefferson was not an “ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment”).

79 Rosenberger, 515 U.S. at 871 (Souter, J., dissenting) (quoting Everson, 330 U.S. at 13).

80 Id. at 871-72 (citing Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses 16 (1995)); Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 217 (1986); Laycock, supra note 55, at 923.

81 See Rosenberger, 515 U.S. at 854, 858, 863 (Thomas, J., concurring) (“Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards....Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality....”).

82 Id. at 854.

83 See James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in The Founders' Constitution, supra note 77, at 82 [hereinafter Madison, Memorial and Remonstrance] (“We the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill...entitled ‘A Bill establishing a provision for Teachers of the Christian Religion,’ and conceiving that the same if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State to remonstrate against it....”).

84 See Patrick Henry, A Bill Establishing A Provision for Teachers of the Christian Religion (Dec. 24, 1784), in Journal of the Virginia House of Delegates (proposing a tax to be assessed for the support of Christian religious educators).

85 Rosenberger, 515 U.S. at 854 (Thomas, J., concurring).

86 Id. (citing Madison, Memorial and Remonstrance, reprinted in Everson, supra note 75, at P4)(alteration in original).

87 Rosenberger, 515 U.S. at 853 (Thomas, J., concurring).

88 See id. at 854-55 (“The assessment violated the ‘equality’ principle not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits.”).

89 Id. at 856-57.

90 For an interpretation of Madison that disagrees with both Justice Souter and Justice Thomas, see Vincent Phillip Muñoz, James Madison's Principle of Religious Liberty, 97 Am. Pol. Sci. Rev. 17, 31 (2003) [hereinafter Muñoz, Madison's Principle of Religious Liberty] (“A Madisonian interpretation of the Establishment Clause would prevent the state from supporting religion as an end in

itself, but it also would prevent the state from excluding religious individuals and organizations from generally available benefits supporting a secular purpose.”).

91 536 U.S. 639 (2002).

92 542 U.S. 1 (2004).

93 The Court, instead of reaching the First Amendment issue, concluded that respondent Michael Newdow lacked standing to invoke the jurisdiction of the federal courts. Id. at 6.

94 Id. at 49 (Thomas, J., concurring).

95 Id. at 50.

96 Id.

97 Id. at 49.

98 Id. at 50 (alterations in original).

99 Id. at 49-50.

100 Id. at 50.

101 Id. Justice Thomas's full citation is as follows: “See, e.g., 2 J. Story, Commentaries on the Constitution of the United States §1873 (5th ed. 1891); see also Amar, The Bill of Rights, at 32-42; id., at 246-257.” Id.

102 Id. at 50.

103 Id.

104 The year of disestablishment in the various states depends on how one defines a religious establishment. Carl H. Esbeck, who defines a religious establishment as the legal authority to assess taxes for church support, identifies the following dates for disestablishment in the original states: Pennsylvania (no history of an establishment), Rhode Island (no history of an establishment), Delaware (1776), New Jersey (1776), North Carolina (1776), New York (1777), Virginia (1776-1779), Maryland (1785), South Carolina (1790), Georgia (1798), Connecticut (1818), New Hampshire (1819), and Massachusetts (1832-1833). Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 BYU L. Rev. 1385, 1457-58. For a general discussion of what constitutes an establishment, see Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105 (2003).

105 For example, Virginia's Act for Establishing Religious Freedom, which was adopted in 1785 and effective as of January 16, 1786, declared of the “natural rights of mankind”:
[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.
Act for Establishing Religious Freedom (Va. 1785), reprinted in The Founders' Constitution, supra note 77, at 84, 85.

106 See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 34 (1998) (stating that the Establishment Clause was not intended to prevent individual states from establishing a religion but rather was “pro-states' rights” and “simply calls for the issue to be decided locally”); Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 69 (2002) (“Jefferson's ‘wall,’ like the First Amendment, affirmed the policy of federalism. This policy emphasized that all governmental authority over religious matters was allocated to the states.... Insofar as Jefferson's ‘wall,’...was primarily jurisdictional (or structural) in nature, it offered little in the way of a substantive right or universal principle of religious liberty.”); Wilber G. Katz, Religion and American Constitutions 8-10 (1964) (arguing that the First Amendment “embodied a principle of federalism” as it “operated, and

was intended to operate, to protect from Congressional interference the varying state policies of church establishment"); Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 18 (1995) ("The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism."); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1157-58 (1991) (arguing that since the Establishment Clause, in addition to its congressional prohibition on establishing churches, prohibited Congress from disestablishing official state and local churches, incorporating the clause against the states via the Fourteenth Amendment becomes "quite awkward"); Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1132-35 (1988) (concluding that the Establishment Clause served as a compromise between those states with anti-establishment policies and those with official churches by "mak[ing] it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states"); Edward S. Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Probs. 3, 10 (1949) ("[W]hat the 'establishment of religion' clause does, and all that it does, is to forbid Congress to give any religious faith, sect, or denomination a preferred status...."); Esbeck, supra note 104, at 1576 ("[The Establishment Clause] acted as a restraint on the national government from interfering with the states and how each state's law dealt with the matter of religion."); Mary Ann Glendon & Raul F. Yanes, Structural Free Exercise, 90 Mich. L. Rev. 477, 481-82, 541 (1991) ("For the historical record is clear that when the religious language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place."); Clifton B. Kruse, Jr., The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L.J. 65, 66 (1962) ("[The Establishment Clause's] inclusion was intended as an implied grant of power over religion to the states as it affirmatively denied the federal government power to make any law respecting a state establishment."); Philip B. Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 13-14 (1978) ("The primary purpose of the amendment was to keep the national government out of religious matters....The states were to be unaffected by the amendment.... [T]here is no part of the history of the fourteenth amendment that provides any guidance whatsoever for the application of the religious clauses to the states."); Kurt T. Lash, Power and the Subject of Religion, 59 Ohio St. L.J. 1069, 1116 (1998) ("Congress had no power whatsoever over the subject of religion..., power over the same being reserved to the states."); Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1085, 1089-92 (1995) [hereinafter Lash, Rise of the Nonestablishment Principle] (agreeing with other scholars that the Establishment Clause was about federalism, in that the amendment intended only to prevent the federal government from interfering with churches established by individual states); Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106, 1111-12 (1994) [hereinafter Lash, Religious Exemptions Under the Fourteenth Amendment] ("[T]he First Amendment begins a theme that runs as a leitmotif throughout the original Bill of Rights, that of federalism."); William K. Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DePaul L. Rev. 1191, 1191 (1990) (stating that the Establishment Clause created a "framework of federalism" that allowed states to make their own decisions regarding religion); James McClellan, Hand's Writing on the Wall of Separation: The Significance of Jaffree in Future Cases on Religious Establishment, in How Does the Constitution Protect Religious Freedom? 43, 48 (Robert A. Goldwin & Art Kaufman eds., 1987) ("The [First Amendment] was framed, considered, and adopted with federalism in mind, and it applied only to the federal government. Not even Madison wished to apply the establishment clause to the states...."); Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 317 (1986) (arguing that the Establishment Clause was intended "to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion"); William C. Porth & Robert P. George, Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause, 90 W. Va. L. Rev. 109, 136-39 (1987) (noting that the Establishment Clause was intended to prevent the federal government from disestablishing or interfering with official state churches); Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L.Q. 371, 372-73, 406-07 ("[T]he Establishment Clause...should not, and historically and logically cannot, be incorporated into the liberty protected by the Fourteenth Amendment."); Note, Rethinking the Incorporation of the Establishment Clause: A Federalist View, 105 Harv. L. Rev. 1700, 1701 (1992) (arguing that before Everson v. Board of Education in 1947, "the Establishment Clause did not restrain the states from promoting religion or even establishing one").

In an early religious liberty case, the Supreme Court itself recognized that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties." Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845).

107 See, e.g., Feldman, supra note 15, at 407-08 (noting the lack of historical support in the debates for the Federalist interpretation).

108 For an example of legal scholarship that reflects a lack of contextual analysis, see William C. Porth & Robert P. George, Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause, stating that:
The obvious meaning of "respecting an" establishment of religion, then as now, is "regarding," or "having to do with," or "in reference to" such an establishment. And these words are broad enough to cover both a possible national establishment and actual (and potential) state establishments. They call particular attention to the constitutional disentitlement of the federal government to make any law setting up an established church at the federal level or interfering with established churches (and the right of the people to opt to establish churches) at the state level.
Porth & George, supra note 106, at 136-37.

109 See, e.g., infra text accompanying notes 263-69 (discussing how the Everson Court, in both Justice Black's majority opinion and Justice Rutledge's dissent, and Justice Souter's contemporary approach apply a historically-inaccurate view of the First Amendment in determining the scope of the Establishment Clause).

110 See infra Part II.A (discussing the two leading church-state positions: the "Massachusetts Way" and the "Virginia Understanding").

111 See infra Part II.B (discussing the Anti-Federalists' criticisms of the Constitution, including the fear that the proposed Congress could impose uniformity of religious practice in the United States).

112 See infra Part II.B (noting the different statements articulated by the Anti-Federalists to warn against a national religious establishment).

113 See, e.g., Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1436 (1990) (stating that "[t]he Church of England was discredited during the Revolution by its connection to the Crown and the loyalist sympathies of most of its clergy"). Prior to 1776, Virginia, South Carolina, North Carolina, Maryland, Georgia, and some localities in New York had established the Church of England and taxed residents for its support. Id.

114 Curry, supra note 80, at 134.

115 See G. Alan Tarr, Church and State in the States, 64 Wash. L. Rev. 73, 85 (1989) (noting that between the Declaration of Independence and the ratification of the Constitution "each of the original thirteen states reconsidered the relationship between church and state within its borders"). For a discussion of church-state arrangements in the founding era state constitutions, see John K. Wilson, Religion Under the State Constitutions, 1776-1800, 32 J. Church & St. 753 (1990).

116 Isaac Backus, for example, was an evangelical Baptist from Massachusetts who, believing that religion is a matter solely belonging between God and the individual, fought for the separation of church and state. See, e.g., Isaac Backus, An Appeal to the Public for Religious Liberty (1773), reprinted in Political Sermons of the American Founding Era: 1730-1805, at 329, 331 (Ellis Sandoz ed., 1991) (arguing that government must not interfere with "true and full [religious] liberty").

117 It also should be noted that the church-state debate was not simply between pious citizens who sought government support of religion and the non-believers who sought separation. Among the most strident advocates for disestablishment were devout Baptists, such as Isaac Backus. See Thomas C. Berg, Minority Religions and the Religion Clauses, 82 Wash. U. L.Q. 919, 933 (2004) ("Baptist leaders, such as Isaac Backus in Massachusetts and John Leland in Virginia, took the lead in calling for an amendment guaranteeing religious freedom against the federal government."). It would, thus, be a mistake to characterize the debate over church-state relations during the founding as one between religious faith and secular reasoning.

118 Mass. Const. of 1780, pt. 1, art. III, reprinted in The Founders' Constitution, supra note 77, at 77-78.

119 George Washington, Farewell Address (Sept. 19, 1796), in George Washington: A Collection 521, 521 (W. B. Allen ed., 1988).

120 Id.

121 Id.

122 George Washington, it should be noted, did not call directly for the tax support of religion as such in his Farewell Address. During the dispute in Virginia over Patrick Henry's proposed general assessment, however, Washington said he was not opposed in principle to religious taxes. See Vincent Phillip Muñoz, George Washington on Religious Liberty, 65 Rev. Pol. 11, 13-14 (2003) (arguing that George Washington, while not personally opposed to religious assessment, was opposed to Henry's measure because "the bill caused unnecessary political turmoil").

123 In a letter to James Madison, Richard Henry Lee, President of the Continental Congress, captured the same sentiment:
Refiners may weave as fine a web of reason as they please, but the experience of all times shews [sic] Religion to be the guardian of morals--And he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support.
Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), in 2 The Letters of Richard Henry Lee 304, 304 (James Curtis Ballagh ed., photo. reprint 1970) (1914).

124 For a good example of a contemporaneous defense of the "Massachusetts Way," see Worcestriensis, Number IV, Mass. Spy, Sept. 4, 1776, reprinted in 1 American Political Writing During the Founding Era: 1760-1805, at 449, 449-54 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Worcestriensis compares citizens who pay taxes to support religions they do not favor to citizens who pay taxes to support wars they believe unnecessary or imprudent. Disagreement alone, he suggests, does not exempt one from supporting public policy made by legitimate authorities. Id. at 453.

125 Mass. Const. of 1780, pt. 1, art. II, reprinted in The Founders' Constitution, supra note 77, at 77.

126 Id. at art. III, reprinted in The Founders' Constitution, supra note 77, at 78.

127 Id.

128 See Thomas E. Buckley, S.J., Church and State in Revolutionary Virginia, 1776-1787, at 11 (1977) ("[I]t was a ministry totally dependent upon the state for its financial support.").

129 See id. (explaining how Virginia law required that every parish provide its minister with an annual salary of 16,000 pounds of tobacco, which the town raised by collecting taxes from each head of a household within the parish boundaries).

130 See id. at 36 ("Certain privileges, such as the exclusive right to perform marriages, were still retained by these ministers.").

131 See id. ("The legislators had not officially yielded their authorization to license meetinghouses and dissenting preachers.").

132 From 1776 to 1784, various church-state arrangements were proposed but none adopted definitively. They ranged from Thomas Jefferson's "A Bill for Establishing Religious Freedom," which would have ended all legally-compelled support of religion and official religious tenets, to "A Bill Concerning Religion," proposed in 1779, which would have declared Protestant Christianity the state's established church, legally mandated five articles of faith for all incorporated and established religious societies, and taxed all citizens for the support of Christianity. See id. at 47-48, 56-57 (discussing the different bills considered by the Virginia legislature, including Jefferson's proposal and the "Bill Concerning Religion"). The strongest action the House of Delegates took during this period was to suspend, starting in 1776, the tax that provided salaries for Anglican clergy. See id. at 48 ("[A]s had been its custom since 1776, the Assembly voted once again to suspend the salaries of the established clergy for another session.").

133 See id. at 58 ("[E]ach person could determine which religious society, among those belonging to the establishment, would receive his allotment.").

134 A Bill "Establishing a Provision for Teachers of the Christian Religion" (1784), reprinted in Buckley, supra note 128, app. 2 at 189. If a taxpayer failed or refused to specify a Christian society, his tax would go to the public treasury "to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning...and to no other use or purpose whatsoever." Id. An exception to this rule was made for Quakers and Mennonites who, because they lacked the requisite clergy, were allowed to place their distribution in their general funds "to be disposed of in a manner which they shall think best calculated to promote their particular method of worship." Id.

135 See 1 Anson Phelps Stokes, Church and State in the United States 383 (1950) (noting that the issue of a general religious assessment was "finally killed" in the Virginia legislature in October 1785); see also Buckley, supra note 128, at 144-55 (describing the political effort and situation that led to the defeat of Patrick Henry's bill in 1785).

136 See Buckley, supra note 128, at 162-63 (describing the passage in 1786 of Jefferson's bill).

137 Thomas Jefferson, A Bill for Establishing Religious Freedom (drafted in 1777, adopted in 1786), reprinted in The Portable Thomas Jefferson 251, 253 (Merrill D. Peterson ed., 1977).

138 Id. at 252.

139 Id.

140 Id. at 253.

141 Id.

142 Commentators on the Virginia Statute have emphasized its indebtedness to Locke's political philosophy. S. Gerald Sandler sets forth a side-by-side comparison of Locke's A Letter Concerning Toleration, Jefferson's notes on the Letter, and Jefferson's A Bill for Establishing Religious Freedom, which demonstrates Jefferson's indebtedness to Locke. See S. Gerald Sandler, Lockean Ideas in Thomas Jefferson's Bill for Establishing Religious Freedom, 21 J. Hist. Ideas 110, 110 (1960) ("[T]here is probably no single document in American religious history which exemplifies [Locke's] influence more clearly than Thomas Jefferson's A Bill for Establishing Religious Freedom."). A more theoretical explanation of Jefferson's debt to Locke has been set forth by Sanford Kessler. See Sanford Kessler, Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom," 25 J. Church & St. 231, 232 (1983) ("While there is considerable disagreement among scholars over the theoretical origins of the Declaration of Independence, it is generally believed that the primary sources for Jefferson's ['Bill for Establishing Religious Freedom'] are the writings of John Locke.").

143 Letter from James Madison to Edward Livingston (July 10, 1822), in 9 The Writings of James Madison: 1819-1836, at 98, 102-03 (Gaillard Hunt ed., 1910).

144 Letter from James Madison to F. L. Schaeffer (Dec. 3, 1821), in 3 Letters and Other Writings of James Madison: 1816-1828, at 242, 242-43 (New York, R. Worthington 1884).

145 Madison, Memorial and Remonstrance, supra note 83, at 82, 83.

146 Id.

147 Id. For an explanation of Madison's argument regarding the harmful effects resulting from the unification of ecclesiastical and political authority, see Vincent Phillip Muñoz, Religious Liberty and the American Founding, 138 Intercollegiate Rev. 33, 38-39 (2003).

148 See Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 22-23 (2000) (arguing that the Framers separated church and state because to do otherwise would not only create discord and persecution, but would also weaken the religious group that was the beneficiary of governmental establishment).

149 See supra Parts II.A.1-2 (discussing the Massachusetts and Virginia approaches).

150 See supra notes 122-24 and accompanying text (expressing the idea that supporting religion was viewed as being part of promoting the public good).

151 Until 1818, Connecticut functioned under its Colonial Charter of 1662, which erected a congregational establishment. For a discussion of the "enormous" social and political influence of the established Congregational ministry, see Stokes, supra note 135, at 408-14. The sixth article of New Hampshire's bill of rights declared:
As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated

through a society by the institution of the public worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this state have a right to impower, and do hereby fully impower the legislature to authorize from time to time, the several towns, parishes, bodies corporate, or religious societies within this state, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality....

N.H. Const. of 1784, pt. I--The Bill of Rights, art. VI, reprinted in 4 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2453, 2454 (Francis Newton Thorpe ed., 1909) [hereinafter 4 Federal and State Constitutions]

Vermont's Constitution of 1777, similarly, declared:

Laws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force; and provision shall be made for their due execution; and all religious societies or bodies of men, that have or may be hereafter united and incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct.

Vt. Const. of 1777, ch. II, §XLI, reprinted in 6 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3737, 3748 (Francis Newton Thorpe ed., 1909) [hereinafter 6 Federal and State Constitutions].

152 See supra notes 143-47 and accompanying text (discussing the view that government support is not needed for religion to thrive).

153 See supra notes 128-31 and accompanying text (explaining the monopoly that some denominations enjoyed).

154 Until 1842, Rhode Island continued under its Colonial Charter of 1663, which declared as part of its “livlie [sic] experiment” that no person

shall bee [sic] any wise molested, punished, disquieted, or called in question, for any differences in opinione [sic] in matters of religion, and doe [sic] not actually disturb the civill [sic] peace of our sayd [sic] colony; but that all and everye [sic] person and persons may, from tyme [sic] to tyme [sic], and at all tymes [sic] hereafter, freelye [sic] and fullye [sic] have and enjoye [sic] his and theire [sic] owne [sic] judgments and consciences, in matters of religious concernments.

Charter of Rhode Island and Providence Plantations--1663, reprinted in 6 Federal and State Constitutions, supra note 151, at 3211, 3212-13.

New York's 1777 Constitution declared,

whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

N.Y. Const. of 1777, art. XXXVIII, reprinted in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2623, 2636-37 (Francis Newton Thorpe ed., 1909) [hereinafter 5 Federal and State Constitutions]. New York's Constitution of 1777 also abrogated all parts of the common and statutory law of England and of colonial statutes and acts that “may be construed to establish or maintain any particular denomination of Christians or their ministers.” Id. at art. XXXV, reprinted in 5 Federal and State Constitutions, supra, at 2635-36.

Other states sought to take a position somewhere between the poles of Massachusetts and Virginia. Pennsylvania's Constitution of 1776, for example, made no provision for a religious establishment and recognized “[t]hat all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding.” Pa. Const. of 1776, Declaration of Rights, art. II, reprinted in 5 Federal and State Constitutions, supra, at 3081, 3082. However, the constitution further mandated that each member [of the House of Representatives], before he takes his seat, shall make and subscribe the following declaration, viz: 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.

Id. at The Frame of Government, §10, reprinted in 5 Federal and State Constitutions, supra, at 3081, 3085. Georgia's Constitution of 1777, similarly, provided that “[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own

profession," but that members of the House of Assembly--the state legislature--had to be "of the Protestant religion." Ga. Const. of 1777, arts. VI, LVI, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 777, 779, 784 (Francis Newton Thorpe ed., 1909) [hereinafter 2 Federal and State Constitutions]. It appears that Pennsylvania and Georgia sought, at least among office holders, to maintain the religious character believed necessary for republican government while, at the same time, limiting direct governmental financial support for religion.

Other states introduced non-preferential restrictions regarding an establishment but maintained sectarian limits on office holding. New Jersey's Constitution of 1776, for example, recognized the rights of conscience and prohibited the establishment of one religious sect over others, but limited office holding to Protestants. See N.J. Const. of 1776, arts. XVIII-XIX, reprinted in 5 Federal and State Constitutions, supra, at 2594, 2597-98. Delaware's Constitution of 1776, similarly, prohibited the establishment of any one sect in preference to another but required office holders to subscribe to the following declaration: "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." Del. Const. of 1776, arts. 22, 29, reprinted in 1 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 562, 566-68 (Francis Newton Thorpe ed., 1909) [hereinafter 1 Federal and State Constitutions]. North Carolina's Constitution of 1776 abolished the "establishment of any one religious church or denomination in this State, in preference to any other." N.C. Const. of 1776, art. XXXIV, reprinted in 5 Federal and State Constitutions, supra, at 2787, 2793. The same constitution, however, barred from public office or place of trust any one "who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State." Id. at art. XXXII.

In 1835, North Carolina amended its constitution to bar from office anyone who denied the truth of the "Christian" religion. See Gary R. Govert, Something There Is that Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office, 64 N.C. L. Rev. 1071, 1085 (1986) ("[T]he convention approved a compromise amendment and substituted the word 'Christian' for 'Protestant' in article XXXII."). "The [North Carolina Constitutional] [C]onvention of 1868 adopted a religious test disqualifying from office 'all persons who shall deny the being of Almighty God."' Id. at 1086 (quoting N.C. Const. of 1868, art. VI, §5). "[W]hen the North Carolina General Assembly presented a new constitution to the electorate in 1970, the religious test remained intact." Id. at 1087 (footnote omitted). To this day, article VI, section 8 of the North Carolina Constitution disqualifies from elective office "any person who shall deny the being of Almighty God." N.C. Const. art. VI, §8.

The Maryland Constitution of 1776 explicitly authorized the state legislature to tax citizens "for the support of the Christian religion." Md. Const. of 1776, A Declaration of Rights, art. XXXIII, reprinted in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1686, 1689 (Francis Newton Thorpe ed., 1909) [hereinafter 3 Federal and State Constitutions]. However, when a general assessment was proposed in 1784, it failed. In 1795, Maryland adopted a constitutional amendment requiring all office holders to "subscribe a declaration of his belief in the Christian religion." Id. at art. LV, reprinted in 3 Federal and State Constitutions, supra, at 1700.

South Carolina was something of an outlier within the early state constitutions. Article XXXVIII of its 1778 Constitution explicitly stated, "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." The article then proceeded to list five articles of faith to which all religious societies petitioning for establishment and incorporation had to subscribe. S.C. Const. of 1778, art. XXXVIII, reprinted in 6 Federal and State Constitutions, supra note 151, at 3248, 3255-56. In 1790, South Carolina adopted a constitution that omitted provisions regarding an establishment or articles of faith and declared: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind...." S.C. Const. of 1790, art. VIII, §1, reprinted in 6 Federal and State Constitutions, supra note 151, at 3258, 3264.

155 See infra text accompanying notes 159-64 (noting the fears among Anti-Federalists that a national religious establishment would be coercive due to the religious diversity in the United States).

156 Even with the prospect of amendments, the Constitution nearly met defeat: Massachusetts ratified by a vote of 187-168; New Hampshire, 57-46; Virginia, 89-79; New York, 30-27. See Va. Comm'n on Constitutional Gov't, The Constitution of the United States of America: With a Summary of the Actions by the States in Ratification of the Provisions Thereof 24 (James J. Kilpatrick ed., 1961) (summarizing the ratification votes).

157 For a superb recent history of ratification politics, see Robert A. Goldwin, From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution (1997).

158 The Philadelphia Convention spent very little time addressing church-state matters. With little recorded debate, the delegates prohibited religious tests or qualification for any federal office. Charles Pinckney first proposed the ban on August 20, 1787. See Journal (Aug. 20, 1787), reprinted in 2 The Records of the Federal Convention of 1787, at 334, 335 (Max Farrand ed., rev. ed. 1966) [hereinafter The Records of the Federal Convention of 1787] ("No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States...."). It was referred to the committee of five, and then on August 30, 1787, a slightly modified version of Pinckney's proposal passed unanimously. See Journal (Aug. 30, 1787), reprinted in 2 The Records of the Federal Convention of 1787, supra, at 457, 461 (documenting passage of the Article VI ban on religion-tested federal positions). See generally Chester James Antieau et al., Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses 92-97 (1964) (documenting the common use of religion tests in the colonies); Gerald V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself, 37 Case W. Res. L. Rev. 674, 678-79 (1987) (asserting that the Article VI religion test ban was not meant to indicate a "constitutional philosophy" of religious freedom, but instead to allow that freedom to develop naturally); Daniel L. Dreisbach, The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban, 38 J. Church & St. 261, 293-94 (1996) ("[Article VI is] a clause deliberately calculated to ensure sect equality before the law and promote institutional independence of civil government from ecclesiastical domination at the federal level."); James E. Wood, Jr., "No Religious Test Shall Ever Be Required": Reflections on the Bicentennial of the U.S. Constitution, 29 J. Church & St. 199, 201 (1987) (noting that the religion test ban was without historical precedent and was "at variance with the prevailing patterns and practices in all of the original colonies, and during their early years of statehood"). Toward the end of the convention, a proposal by James Madison and Charles Pinckney to grant Congress power "to establish an University, in which no preference or distinctions should be allowed on account of religion" was defeated. Madison (Sept. 14, 1787), reprinted in The Records of the Federal Convention of 1787, supra, at 612, 616. The provision regarding religion, however, does not appear to have played any part in that vote. The only recorded debate on the matter includes two sentences in opposition by New York delegate Gouverneur Morris, who claimed such a university was unnecessary. See id. (recording a vote of four delegates in favor and six opposed, with one divided).

159 But see Gary D. Glenn, Forgotten Purposes of the First Amendment Religion Clauses, 49 Rev. Pol. 340, 341-42 (1987) (providing a different account of the Anti-Federalists' objections to the Constitution and how they influenced the drafting of the Establishment Clause by arguing that Anti-Federalists demanded the clause to counter the anti-religiousness of the original Constitution).

160 Essay by Deliberator, Freeman's J. (Philadelphia), Feb. 20, 1788, reprinted in 3 The Complete Anti-Federalist 176, 179 (Herbert J. Storing ed., 1981).

161 Letters from a Countryman (V), N.Y. J., Jan. 17, 1788, reprinted in 6 The Complete Anti-Federalist 86, 87 (Herbert J. Storing ed., 1981).

162 Letters of Agrippa (XII), Mass. Gazette, Jan. 11, 1788, reprinted in 4 The Complete Anti-Federalist 93, 94 (Herbert J. Storing ed., 1981).

163 See Charles de Secondat, Baron de Montesquieu, The Spirit of Laws 122 (Prometheus Books 2002) (1748) (positing a connection between population size and despotic rule in that "[a] large empire supposes a despotic authority in the person who governs"). Whether the Anti-Federalists interpreted Montesquieu properly is an altogether separate question.

164 See generally Herbert J. Storing, What the Anti-Federalists Were for 15-37 (1981) (discussing the Anti-Federalist concern with unlimited (in their view) powers of the national government and the consolidation that such powers would bring).

165 See id. at 64 (noting that the Anti-Federalists stressed three kinds of rights in their call for a bill of rights: "common law procedural rights in criminal prosecutions, liberty of conscience, and liberty of the press").

166 Letters from the Federal Farmer (IV) (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981). See generally Herbert J. Storing, Introduction to Letters from the Federal Farmer, 2 The Complete Anti-Federalist, supra, at 214-17 (discussing the authorship and merits of the "Federal Farmer" letters).

167 See, e.g., McConnell, supra note 113, at 1488 ("[I]n many of the debates in the preconstitutional period, the concepts of 'liberty of conscience' and 'free exercise of religion' were used interchangeably."). The interrelatedness of the terms pre-dates the founding period. William Penn, for example, defined "liberty of conscience" in 1670 as follows:
By Liberty of Conscience, we understand not only a meer [sic] Liberty of the Mind, in believing or disbelieving this or that Principle or Doctrine, but the Exercise of our selves in a visible Way of Worship, upon our believing it to be indispensibly [sic] required at our Hands, that if we neglect it for Fear or Favour of any Mortal Man, we Sin, and incur Divine Wrath....
William Penn, The Great Case of Liberty of Conscience (1670), reprinted in The Political Writings of William Penn 79, 85-86 (Andrew R. Murphy ed., 2002).

168 See Storing, supra note 164, at 64 (describing the Anti-Federalists' call for a bill of rights to protect the "liberty of individual conscience").

169 Id. at 23 (noting that "[m]any Anti-Federalists supported and would even have strengthened the mild religious establishments that existed in some states").

170 See supra text accompanying notes 161-62 (discussing the Anti-Federalists' arguments against a nationally-established religion).

171 Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston), Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, supra note 162, at 191, 195.

172 Id. at 196.

173 For an elaboration of this argument, see Letter by David, Mass. Gazette, Mar. 7, 1788, reprinted in 4 The Complete Anti-Federalist, supra note 162, at 246, 246-48.

174 See Storing, supra note 164, at 65 (noting that the Anti-Federalists' emphasis on the necessity of a bill of rights "reflects the failure of the Anti-Federalists" insofar as it "implied a fundamental acceptance of the 'consolidated' character of the new [federal] government").

175 James Iredell, Statement at the North Carolina Ratifying Convention (July 30, 1788), reprinted in 4 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 192, 194 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 4 Debates in the Several State Conventions]. For further example of commentary made at the state conventions, see Edmund Randolph, Statement at the Virginia Ratifying Convention (June 10, 1788), reprinted in 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 194, 204 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 3 Debates in the Several State Conventions] (arguing that "no power is given expressly to Congress over religion," but rather that the "exclusion of religious tests is an exception from this general provision, with respect to oaths or affirmations"); Edmund Randolph, Statement at the Virginia Ratifying Convention (June 15, 1788), reprinted in 3 Debates in the Several State Conventions, supra, at 463, 469 (asserting that religious freedom is protected by the omission of additional provisions in the Constitution); James Bowdoin, Statement at the Massachusetts Ratifying Convention (Jan. 23, 1788), reprinted in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 81, 87 (Jonathan Elliot ed., J.B. Lippincott Co. 1901) (1836) [hereinafter 2 Debates in the Several State Conventions] ("[I]t would require a volume to describe [the rights of particular states], as they extend to every subject of legislation, not included in the powers vested in Congress."); James Madison, Statement at the Virginia Ratifying Convention (June 12, 1788), reprinted in 3 Debates in the Several State Conventions, supra, at 328, 330 (citing the plurality of religions in the United States as a safeguard against religious tyranny, as part of a larger argument against a bill of rights); Theophilus Parsons, Statement at the Massachusetts Ratifying Convention (Jan. 23, 1788), in 2 Debates in the Several State Conventions, supra, at 88, 90 ("It has been objected that the Constitution provides no religious test by oath, and we may have in power unprincipled men, atheists and pagans. No man can wish more ardently...that all our public offices may be filled by men who fear God and hate wickedness; but it must be

filled with the electors to give the government this security."). For further discussion of the Federalist response in the state ratifying conventions, see Snee, supra note 106, at 373-77. The most well-known Federalist explanation of the Constitution's lack of a bill of rights, of course, is offered by Alexander Hamilton in The Federalist No. 84. See also James Wilson, Statement at the Pennsylvania Ratifying Convention (Oct. 28, 1787), reprinted in 2 Debates in the Several State Conventions, supra, at 434, 435-37 (asserting that a bill of rights would interfere with the reservation of personal powers that ensures protection of rights).

176 As his remarks continued, Iredell offered a second response characteristic of the Federalist argument contrasting the Constitution's guarantee of a republican form of government with its absence of a guarantee of religious freedom:
It has been asked by that respectable gentleman (Mr. Abbot) what is the meaning of that part, where it is said that the United States shall guaranty to every state in the Union a republican form of government, and why a guaranty of religious freedom was not included. The meaning of the guaranty provided was this: There being thirteen governments confederated upon a republican principle, it was essential to the existence and harmony of the confederacy that each should be a republican government, and that no state should have a right to establish an aristocracy or monarchy. That clause was therefore inserted to prevent any state from establishing any government but a republican one. Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it....It is, then, necessary that the members of a confederacy should have similar governments. But consistently with this restriction, the states may make what change in their own governments they think proper. Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.
Iredell, Statement at the North Carolina Ratifying Convention (July 30, 1788), supra note 175, at 194-95.

177 Those states are Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island.

178 Those states are New Hampshire, Virginia, New York, North Carolina, and Rhode Island (belatedly). I omit from discussion South Carolina's proposal, which sought to amend the no-religious-test clause in Article VI to read, "no other religious test shall ever be required." John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties 303 n.29 (2000) (emphasis added) (noting the irrelevance of South Carolina's proposal as it "received no support each time it was raised"). In two other states (Pennsylvania and Maryland), the minority that lost the ratification fight outright published proposed amendments, though these lacked the states' official sanctions. See Religious Liberty in a Pluralistic Society 79 (Michael S. Ariens & Robert A. Destro eds., 2d ed. 2002) (providing the proposed amendments concerning religion from the Pennsylvania and Maryland minorities).

179 Proposed Amendments to the Constitution, Virginia Ratifying Convention (June 27, 1788), reprinted in The Founders' Constitution, supra note 77, at 15, 16 [hereinafter Virginia Ratifying Convention].

180 See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788), reprinted in The Founders' Constitution, supra note 77, at 17, 18 (duplicating Virginia's religion clause in North Carolina's resolution of the Declaration of Rights).

181 New York Ratification of Constitution (July 26, 1788), reprinted in The Founders' Constitution, supra note 77, at 11, 12.

182 New Hampshire Ratification of the Constitution (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) (1836) [hereinafter 1 Debates in the Several State Conventions].

183 Id.

184 Id.

185 Virginia Ratifying Convention, supra note 179, at 16.

186 See Virginia Declaration of Rights, §16 (June 12, 1776), reprinted in The Founders' Constitution, supra note 77, at 70 (laying a foundation for the State's religion amendment that followed two years later).

187 Virginia Ratifying Convention, supra note 179, at 16.

188 New York Ratification of Constitution, supra note 181, at 12.

189 See Storing, supra note 164, at 65 (noting that the Anti-Federalists' emphasis on the necessity of a bill of rights "reflects a failure of the Anti-Federalists" insofar as it "implied a fundamental acceptance of the 'consolidated' character of the new [federal] government").

190 See infra note 201 (discussing how Patrick Henry was likely responsible for Virginia's proposed religion amendment).

191 See, e.g., Patrick Henry, Statement at the Virginia Ratifying Convention (June 15, 1788), reprinted in 3 Debates in the Several State Conventions, supra note 175, at 460, 461 (arguing that the explicit reservations of power in Article I, Section 9 of the Constitution implied that "every thing which is not negatived [sic] shall remain with Congress").

192 Madison, Statement at the Virginia Ratifying Convention, supra note 175, at 330.

193 See Henry, Statement at the Virginia Ratifying Convention, supra note 191, at 461-62 (arguing that the explicit reservations of power in Article I, Section 9 of the Constitution implied that those powers not expressly reserved were granted).

194 Id.

195 Id. at 461.

196 Id.

197 Id. On the same day, Governor Edmund Randolph offered the Federalist response to Henry's criticism, namely that "every exception [Article 1, Section 9] mentioned is an exception, not from general powers, but from the particular powers therein vested." Randolph, Statement at the Virginia Ratifying Convention (June 15, 1788), supra note 175, at 464.

198 See Henry, Statement at the Virginia Ratifying Convention, supra note 191, at 462 ("My mind will not be quieted till [sic] I see something substantial come forth in the shape of a bill of rights.").

199 Virginia's proposed religion amendment can be found in the Virginia Ratifying Convention, supra note 179. The original text of Article XVI of the Virginia Declaration of Rights can be found at The Founders' Constitution, supra note 77, at 70.

200 Virginia Ratifying Convention, supra note 179, at 16.

201 It appears that Patrick Henry was responsible for these revisions. On June 24, 1788, the day before the Virginia Convention voted in favor of ratification, Henry proposed a list of amendments to the Constitution. At this point, Elliot records the following:
Here Mr. Henry informed the committee that he had a resolution prepared, to refer a declaration of rights, with certain amendments to the most exceptionable parts of the Constitution, to the other states in the confederacy, for their consideration, previous to its ratification. The clerk than [sic] read the resolution, the declaration of rights, and amendments, which were nearly the same as those ultimately proposed by the Convention....
3 Debates in the Several State Conventions, supra note 175, at 593. Henry, of course, supported non-preferential aid to religion and did not believe that non-preferential establishments violated an individual's liberty of conscience. In 1784, he had proposed the non-preferential general assessment in Virginia, which was defeated by a Madison-led coalition. See supra text accompanying note 132. Given Henry's leadership in the Virginia Ratifying Convention and the unmistakable parallel between the proposed amendment and his political record, all evidence points to Henry's authorship of Virginia's proposed religion amendment.

202 See supra notes 179-89 and accompanying text (discussing the difference between Virginia's no preference proposal and New Hampshire's federal amendment).

203 For Madison's original opposition to a bill of rights, see Madison, Statement at the Virginia Ratifying Convention, supra note 175. For a general discussion of how Madison came to champion the Bill of Rights, see Goldwin, supra note 157, at 75-82.

204 Va. Comm'n on Constitutional Gov't, supra note 156.

205 A second constitutional convention was a distinct possibility, and calls for one had started even before the Philadelphia Convention finished its work. Goldwin, supra note 157, at 23-26. During the Philadelphia Convention, Edmund Randolph repeatedly proposed a motion for a second convention. Id. On May 5, 1789, just four weeks into the first session of the First Congress, Theodore Bland, a congressman from Virginia, introduced a motion calling for a convention pursuant to Article V of the Constitution. Id. at 76. The next day, John Laurance of New York presented an application from the New York legislature for a second constitutional convention. Id. at 77.

206 See id. at 82 (identifying the Anti-Federalists as "the vocal minority" in the First House of Representatives). According to Thornton Anderson, Anti-Federalists occupied only ten seats in the House and two seats in the Senate in the First Federal Congress. See Thornton Anderson, Creating the Constitution: The Convention of 1787 and the First Congress 176 (1993) ("Only Virginia sent Antifederalists to the Senate, and a mere ten were elected to the House.").

207 See Goldwin, supra note 157, at 80-82 (discussing Madison's strategy in changing his focus toward enacting a bill of rights).

208 See, e.g., McConnell, supra note 113, at 1476-77 ("Like other proponents of the Constitution of 1787, Madison initially lacked enthusiasm for adding a Bill of Rights, though he came to recognize the need for one to assuage the demands of the Antifederalist opposition.").

209 1 Annals of Cong. 451 (Joseph Gales ed., 1790).

210 See, e.g., Philip Hamburger, Separation of Church and State 105 (2002) (noting that Madison's proposed 1789 constitutional amendments were "a far cry from Madison's position in 1785 that religion was 'wholly exempt' from the cognizance of civil society"). Vincent Philip Muñoz sets forth Madison's "non-cognizance" position in his article James Madison's Principle of Religious Liberty, supra note 90. Muñoz defines Madison's role in drafting the First Amendment at the First Federal Congress as influential, but restrained by the emphasis on compromise. Id. at 25-27. For a competing interpretation that views Madison as the driving force behind the drafting, see Irving Brant, Madison: On the Separation of Church and State, 8 Wm. & Mary Q. 3, 14-15 (1951).

211 See supra text accompanying notes 187-89 (discussing Virginia's proposed no-preference amendment).

212 James Madison, Statement at the Virginia Ratifying Convention, supra note 175, at 330.

213 Id.

214 For a general discussion of the consistency and change in Madison's thought, see Marvin Meyers, The Mind of the Founder: Sources of the Political Thought of James Madison (1973).

215 See Goldwin, supra note 157, at 77-78 (summarizing the reaction to Madison's attempt to introduce what would become the Bill of Rights as follows: "[Madison's] motion generated an immediate storm of complaint and opposition. One member after another rose to object to any delay of their important legislative business").

216 Samuel Livermore, for example, objected that "he could not say what amendments were requisite, until the [new national] Government was organized." 1 Annals of Cong. 465 (Joseph Gales ed., 1790). Roger Sherman claimed, "It seems to be the opinion of gentlemen generally, that this is not the time for entering upon the discussion of amendments: our only question therefore is, how to get rid of the subject." Id. at 466. John Vining repeated the standard Federalist argument "that a bill of rights was unnecessary in a Government deriving all its powers from the people." Id. at 467.

217 See Goldwin, supra note 157, at 79 ("Madison...brought this heated procedural controversy to an abrupt end by simply ignoring it. He withdrew his motion to go into a committee of the whole, moved instead that a select committee be appointed....").

218 1 Annals of Cong. 757 (Joseph Gales ed., 1790).

219 Id.

220 Id. at 758.

221 Id. at 757.

222 Id. at 758 (emphasis added).

223 See Goldwin, supra note 157, at 40 (concluding that the promise to consider amendments immediately after ratification "almost certainly saved the Constitution from ultimate defeat").

224 1 Annals of Cong. 758-59 (Joseph Gales ed., 1790).

225 Id. at 759. Livermore was instrumental in bringing about New Hampshire's ratification of the Constitution.

226 According to Justice Souter, "Livermore's proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it." Lee v. Weisman, 505 U.S. 577, 612-13 (1992) (Souter, J., concurring). Justice Souter seems not to have considered that federalism might relate to the original purpose of the Establishment Clause in general or Livermore's proposal in particular.

227 See 1 Annals of Cong. 759 (Joseph Gales ed., 1790) ("[T]he question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.").

228 Id. at 796.

229 1 Journal of the First Session of the Senate of the United States of America 70 (Gales & Seaton 1820) (1789).

230 Id.

231 Id. at 77.

232 Despite recognizing that "in many of the debates in the preconstitutional period, the concepts of 'liberty of conscience' and 'free exercise of religion' were used interchangeably," Michael McConnell claims that the First Congress's adoption of the latter over the former is "of utmost importance." McConnell, supra note 113, at 1488-89. "Free exercise," he claims, extends the First Amendment's guarantees beyond "liberty of conscience" in three ways: (1) "free exercise" protects religiously-motivated conduct (in addition to belief); (2) it encompasses the corporate or institutional aspects of religious belief (in addition to individual judgment); and (3) it singles out religion alone (as opposed to non-religious, deeply held convictions) for special treatment. Id. at 1488-91. I believe that McConnell is mistaken to the extent that he ascribes such distinctions to the Framers of the First Amendment. From the Framers' contemporaneous uses of the terms, no evidence exists to distinguish "liberty of conscience" or "rights of conscience" from "free exercise of religion." The joint committee most likely employed the term "free exercise" instead of "liberty of conscience" or "rights of conscience" because the last formulation adopted by the Senate employed this phrase.

233 1 Annals of Cong. 939 (Joseph Gales ed., 1790).

234 See Lee v. Weisman, 505 U.S. 577, 614-15 (1992) (Souter, J., concurring) ("The House conferees [of the joint committee] ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: 'Congress shall make no law respecting an establishment of religion....' What is remarkable is that...[t]he Framers repeatedly considered and deliberately rejected...narrow language and instead expanded their prohibition to state support for 'religion' in general.").

235 U.S. Const. amend. I.

236 Id.

237 2 New Shorter Oxford English Dictionary 2565 (4th ed. 1993).

238 Noah Feldman claims that "there is no evidence in the debates that the last-minute change of language to 'respecting an establishment of religion' was intended to protect existing state establishments." Feldman, supra note 15, at 407. Feldman does not comprehend, however, the political context that led to the Bill of Rights. Specifically, he fails to consider the Anti-Federalist criticisms that led to

the drafting of the Establishment Clause. He thus also fails to understand why the drafters of the First Amendment sought to reaffirm the federal character of the Constitution regarding religious establishments.

239 See, e.g., Porth & George, supra note 106, at 136-37 (“The obvious meaning of ‘respecting an’ establishment of religion, then as now, is ‘regarding,’ or ‘having to do with,’ or ‘in reference to’ such an establishment. And these words are broad enough to cover both a possible national establishment and actual (and potential) state establishments. They call particular attention to the constitutional disentitlement of the federal government to make any law setting up an established church at the federal level or interfering with established churches (and the right of the people to opt to establish churches) at the state level.”).

240 See supra text accompanying note 221 (quoting Roger Sherman for the proposition that the First Amendment was unnecessary as Congress could only act where the Constitution delegated power).

241 U.S. Const. amend. I.

242 See Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (“Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups.... [T]he clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.”’ (citation omitted)).

243 302 U.S. 319, 325 (1937). For a general overview of the concept of “incorporation,” including the various understandings of it, see Henry J. Abraham & Barbara A. Perry, Freedom and the Court: Civil Rights and Liberties in the United States 47-91 (7th ed. 1998).

244 For a discussion of this point specifically in reference to the jurisdictional character of the Establishment Clause, see Smith, supra note 106, at 22-26.

245 See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (holding that a state law mandating daily Bible reading in public schools violated the Establishment Clause).

246 See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (striking down as unconstitutional two state statutes that provided financial support of private school teachers' salaries and education supplies for the instruction of certain secular subjects).

247 See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 601-02 (1989) (prohibiting the display of a crèche during the holiday season in a county courthouse as violating the Establishment Clause).

248 Even though Akhil Amar finds that the Establishment Clause is not incorporable, he concludes that
it turns out that the question--should we incorporate the establishment clause?--may not matter all that much, because even if we did not [incorporate the Establishment Clause], principles of religious liberty and equality could be vindicated via the free exercise clause (whose text, history, and logic make it a paradigmatic case for incorporation) and the equal-protection clause (which frowns on state laws that unjustifiably single out some folks for special privileges and relegate others to second class status.
Amar, supra note 106, at 254. Amar assumes that the principles of religious liberty and equality protected by the Free Exercise and Equal Protection Clauses are the same as those articulated by the modern Supreme Court under its incorporated no-establishment jurisprudence. His breezy treatment of the matter, though, understates the significance of non-incorporability of the Establishment Clause. Amar's conclusions should be compared to Andrew Koppelman's, who discards as “unpersuasive” Amar's conclusion that the non-incorporability of the Establishment Clause would not have significant implications for “no-establishment” jurisprudence. See Andrew Koppleman, Akhil Amar and the Establishment Clause, 33 U. Rich. L. Rev. 393, 402, 404 (1999) (reviewing Amar, supra note 106) (“[I]f Amar's theory is accepted..., the present Establishment Clause constraints on the states must be abandoned....A general problem with originalism [or] textualist [theories]...is that it may produce prescriptions that radically disrupt the status quo with no practical payoff other than greater fidelity to the theory. Amar's theory, if taken as a complete theory of incorporation, would give no weight to the fact that...the law is well settled and nobody is particularly anxious to change it.”).

249 See supra Part I.C for a discussion of Justice Thomas's federalist interpretation of the Establishment Clause.

250 On the settled nature of incorporation in general, see, for example, Albright v. Oliver, 510 U.S. 266, 275 (1994), in which Justice Scalia, in his concurrence, stated that incorporation is “an extension I accept because it is both long established and narrowly limited,”

and Robert H. Bork, The Tempting of America: The Political Seduction of the Law 94 (1990), in which Bork conceded that "as a matter of judicial practice the issue [of incorporation] is settled."

251 See, e.g., Raoul Berger, The Fourteenth Amendment and the Bill of Rights 9-19 (1989) (discussing the "selective incorporation" of the Fourteenth Amendment and arguing that it was intended to be narrow in scope); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 167-70 (1986) (analyzing the claim that the Framers of the Fourteenth Amendment intended it to apply to the states and restrict their action); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 86-87 (1949) (citing the actions of New Hampshire in an effort to analyze whether the Fourteenth Amendment was intended to incorporate the Bill of Rights).

252 Amar, supra note 106, at 253. Akhil Reed Amar provides the following endnote to support his statement that the congressmen spoke only of "free exercise" and "freedom of conscience" and failed to discuss "nonestablishment":
Cong. Globe, 36th Cong., 1st Sess. 198 app. (1860) (remarks of Rep. W.E. Simms); Cong. Globe, 38th Cong., 1st Sess. 1202 (1864) (remarks of Rep. James Wilson); Cong. Globe, 39th Cong., 1st Sess. 105-58, 1072, 1629 (1866) (remarks of Rep. John Bingham, Sen. James Nye, and Rep. Roswell Hart); Cong. Globe, 42nd Cong., 1st Sess. 84-85 app., 475 (1871) (citing the remarks of Reps. John Bingham and Henry Dawes); see also M. Curtis, supra note 9, at 135, 139-40 (quoting similar speeches outside of Congress by Judge Lorenzo Sherwood and Judge Preston Davis); United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (Woods, J.) (stressing speech, press, assembly, and free exercise rights as Fourteenth Amendment privileges and immunities while omitting mention of establishment clause).
Id. at 385 n.91; see also Lash, Rise of the Nonestablishment Principle, supra note 106, at 1146-49 (arguing that suggested amendments spoke of the friction between Catholic and Protestant religions rather than the issue of incorporation against the states).

253 But c.f. Lash, Rise of the Nonestablishment Principle, supra note 106, at 1088 (arguing that the Framers of the Fourteenth Amendment did intend to incorporate the Establishment Clause and meant for it to prohibit any government from either supporting or suppressing religion as religion).

254 The text of the Blaine Amendment read in full:
No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.
H.R. Res. 1, 44th Cong. (1875).

255 The significance of the Blaine Amendment for the general debate over incorporation has been exhaustively treated elsewhere. See Curtis, supra note 251, at 169-70 (critiquing scholars' claims that the Framers of the Fourteenth Amendment failed to intend for the amendment to require the Bill of Rights to apply against the states); Raoul Berger, Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response, 44 Ohio St. L.J. 1, 16-17 (1983) ("The Blaine Amendment constitutes striking, contemporary testimony that the fourteenth amendment was not considered to embrace the Bill of Rights."); Raoul Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 Ohio St. L.J. 435, 464-65 (1981) (discussing how the proposal of the Blaine Amendment served as the "clincher" in proving that the Framers of the Fourteenth Amendment did not intend it to incorporate the Bill of Rights); Raoul Berger, The Fourteenth Amendment: Light from the Fifteenth, 74 Nw. U. L. Rev. 311, 346-47 (1979) (claiming that the Blaine Amendment served as proof that Justice Black's interpretation of incorporation was "not generally shared and w[as] untenable"); Michael Kent Curtis, Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights, 43 Ohio St. L.J. 89, 114-15 (1982) (arguing that the Blaine Amendment does not prove a consensus among the Fourteenth Amendment Framers on the incorporation debate); Lash, Rise of the Nonestablishment Principle, supra note 106, at 1145-50 (arguing that the Blaine Amendment's rejection serves as only weak evidence against incorporation, but rather that "it is questionable that the Blaine Amendment had anything to do with the principles of nonestablishment or Free Exercise"); Alfred W. Meyer, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939, 941 (1951) (discussing the importance of the Blaine Amendment in discrediting the idea that the Fourteenth Amendment was intended to incorporate religious provisions of the First Amendment); F. William O'Brien, The Blaine Amendment 1875-1876, 41 U. Det. L.J. 137, 195-205 (1963) (providing an extensive analysis of the Blaine Amendment and its history); Note, Rethinking the Incorporation of the Establishment Clause, supra note 106, at 1713 (stating that "[i]f the Fourteenth Amendment had incorporated the Establishment Clause, the Blaine Amendment would

have been superfluous" and, therefore, its defeat "casts considerable doubt upon the proposition that the Fourteenth Amendment was intended to incorporate the Establishment Clause").

256 See Meyer, supra note 255, at 941 n.14 (listing the members of the Congress).

257 See F. William O'Brien, The States and "No Establishment": Proposed Amendments to the Constitution Since 1798, 4 Washburn L.J. 183, 208 n.105 (1965) (noting that many of the legislators who had voted on the Blaine Amendment had also debated ratification of the Fourteenth Amendment).

258 See, e.g., text accompanying notes 116, 119-21, 132 (discussing Washington's and Henry's views that religion ought to receive government support).

259 See, e.g., text accompanying notes 136-48 (noting Jefferson's and Madison's efforts to end state involvement in religion).

260 William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, in Interpreting the Constitution: The Debate over Original Intent 23, 25 (Jack N. Rakove ed., 1990).

261 It should be noted that Justice Potter Stewart, in a short dissenting opinion that did not attempt to elaborate fully the Establishment Clause's original meaning, also recognized the Framers' concern with federalism: "[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments." Sch. Dist. v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting).

262 See supra Part I.

263 See Glendon & Yanes, supra note 106, at 481 ("As a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government.").

264 See Esbeck, supra note 104, at 1576 ("Scholars delight in pointing out this [federalism] purpose, for it is an embarrassment to the U.S. Supreme Court, which completely overlooked this federalism feature in deciding Everson v. Board of Education. The no-establishment restraint was said by the Everson Court to be applicable to state and local governments under the Due Process Clause of the Fourteenth Amendment, a complete inversion of this first purpose of the Establishment Clause."); Glendon & Yanes, supra note 106, at 491-92 ("With hindsight, incorporation in the 1940s posed formidable legal-political challenges that should have called forth every ounce of energy, wit, technical skill, and legal imagination available to the Court. Yet it is hard to escape the impression in reading the decisions of that era that--regardless of outcomes--serious issues were overlooked, important claims and arguments were rather lightly dismissed, and practical implications for the lives of countless Americans were regularly ignored. The Court skipped carelessly over formidable problems of interpretation that required sustained attention to the language, history, and purposes of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and the relation among them in the modern regulatory state.").

265 See, e.g., Smith, supra note 106, at 5 (referring to the Court's "dismal historical performance" in Everson). According to Hugo Black's biographer, Justice Black did not peruse the proceedings of the First Congress until "[a]fter Everson was decided." Roger K. Newman, Hugo Black: A Biography 365 (1994).

266 See Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (noting that "Jefferson played [a] leading role[]" in the drafting and adoption of the First Amendment).

267 Justice Black applied, furthermore, an interpretation of Jefferson's "wall of separation" metaphor that has been undermined by recent historical scholarship. See, e.g., Dreisbach, supra note 106, at 56 (arguing that the "wall" was intended to create two distinct separations: one between the federal government and religious institutions, and another between federal and state governments on matters concerning religion and thereby preventing federal influence on religious practices endorsed by state governments); Daniel Dreisbach, Another Look at Jefferson's Wall of Separation: A Jurisdictional Interpretation of the "Wall" Metaphor (2000), available at http:// www.frc.org/get.cfm?i=WT00G4 ("Jefferson's 'wall' was a metaphoric construction of the First Amendment, which governed relations between religion and the national government. His 'wall,' therefore, did not specifically address relations between religion and state authorities.").

268 Everson, 330 U.S. at 31 (Rutledge, J., dissenting).

269 McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005).

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THE POSITION OF THE HOLY SEE AND VATICAN CITY STATE IN INTERNATIONAL RELATIONS

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Introduction

From time to time, people wonder about the status of the Vatican. After the death of Pope John Paul II, not only religious leaders, but also heads of state and government officials traveled to Rome to attend his funeral. The same occurred for the inauguration of his successor, Pope Benedict XVI. How is it possible that a religious leader has the same prerogatives of and is treated as a head of state? Some action groups and some politicians will occasionally debate the status of the Vatican and urge for a revision of that status. At present, Catholics for a Free Choice is still campaigning to change the status of the Holy See at the United Nations. [1] They claim that the Holy See represents a religion and not a country and should therefore not be a Non-Member State Maintaining Permanent Observer Mission at U.N. Headquarters. According to this campaign, which started in 1999, the status of the Holy See at the United Nations should be reduced to the status of a non-governmental organization (hereinafter "NGO"). The campaign had quite an amount of world wide press coverage. Supporters of the campaign wrote public opinions in newspapers, sometimes asking for a revision of the status of the Vatican and some governments were urged to break their diplomatic relations between their country and the Vatican. [2] Yet this is problematic, since a country does not have diplomatic relations with the Vatican, but with the Holy See. In another example in 2005, several members of the Dutch House of Representatives - Van Bommel, [3] Timmermans en Koenders [4] en Van der Laan [5] - asked the Dutch minister of foreign affairs some questions about alleged protection offered by the Vatican to a war criminal. [6]

***730** The few examples given above clearly show us that most people are not aware of the fact that the Vatican and the Holy See are two separate entities and thus they fail to make the distinction between the Vatican or Vatican City State and the Holy See. The nature of the Vatican on the one hand and the Holy See on the other hand is not at all very clear in international law, nor is their relation clear either. In this contribution, we will try to offer some insights and clarify this issue. The core problem seems to be that, according to a classic understanding of international law, only states can be subjects of international law. Other entities are hard to define and do not fit in the system. But is this true?

In the first part of this contribution, we will try to clarify some concepts and offer a historical overview. What is the difference between the Holy See and Vatican City State? How can we explain the current situation from a historical point of view? After the terminological and historical part, we will deal with papal legates as a visible presence of the Holy See on the international scene. In the third part, we will focus on Vatican City State. In the fourth and final part of this contribution, we will present the position of the Holy See and Vatican City State in the current international law.

I. What's in a Name: Some Remarks About Terminology and History

A. The Holy See and the Vatican: A First Clarification

The terms ‘Holy See’ and ‘Vatican’ or ‘Vatican City State’ are easily used as mutually interchangeable. This is however, incorrect. The denomination ‘Apostolic See’ or ‘Holy See’ is used to refer to the Pope and the Roman Curia, and thus to the central governance of the Roman Catholic Church, as we can read in canon 361 of the Code of Canon Law, promulgated by Pope John Paul II in 1983:

> In this Code, the term Apostolic See or Holy See refers not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words.[7] ***731** The Vatican, or better, Vatican City (State) on the other hand, is the mini state which was created by the Lateran Treaty, signed on 11 February 1929 between the Holy See and the kingdom of Italy, and ratified on 7 June 1929.

The fact that we have two entities - Holy See and Vatican City State - is due to historical reasons, mainly because in the past popes were claiming temporal power. When they lost temporal power at a certain moment, a solution had to be sought in order to safeguard the independence of the Pope. The following is a short historical overview.

B. The Pope As Temporal Ruler

Until 1870, the Pope was also sovereign of the so-called Papal States. From that perspective, there was no problem to accept his role in international law, since he was a head of state as any other head of state. The idea of the Pope as a temporal ruler gradually grew during the centuries, although not without difficulties.

During the first three centuries, the followers of Christ were often persecuted and at least considered as a group of outlaws. This changed when Emperor Constantine I in 313 declared, in the so-called Edict of Milan, that the Roman Empire would be neutral with regard to religious worship. It gave to Christianity a status of legitimacy and ended officially all government persecution. Confiscated Church property was returned to the Church. Emperor Constantine is said to have donated the Lateran Palace himself, and other donations to the Church would follow. This is the so-called donation of Constantine, but the document in which Constantine presents the Pope Rome and a large territory was later proven to be a forgery. The basis for the Papal States as a sovereign political entity was laid in the sixth century, when the Byzantine emperor was not able to reestablish his power around the city of Rome and to the north of Italy. The Frankish ruler, Pippin the Younger, conquered much of northern Italy and presented the possessions in 756 as a gift to the Pope. This is the so-called donation of Pippin. The papal territory expanded during the Renaissance, and the Pope became the most important secular ruler in Italy, although his territories were not unified and he didn't have any genuine control over them until the sixteenth century. The French Revolution was disastrous for the Papal States: the possessions in France were annexed by France in 1791. In 1798, the Papal States were invaded by French forces and a Roman Republic was declared. Pope Pius VI died in exile in 1799 in ***732** France. The Papal States were restored in 1800, but the French invaded them again in 1808. After the fall of Emperor Napoleon, the Papal States were restored in 1814. In 1860, the unification process of Italy started. The Papal States were clearly an obstacle for this process. The French Emperor, Napoleon III, sent troops to protect the Pope, but had to withdraw them for the French-German War in 1870.[8]

On 20 September 1870, the Italian forces enter Rome: the Pope loses his last temporal power. The Italian government offers the Pope control over the Leonine city (the part of Rome on the West bank of the Tiber, including Vatican City, but larger than

that). Pope Pius IX refuses this offer and considers himself a prisoner of the Vatican and protests against the confiscation of the ecclesiastical possessions. Although the Pope is no longer a head of state, the various states that already had diplomatic relations with the Holy See continue these relations. [9] The Italian government does not object. Moreover, the government wants to reach a solution for the conflict with the Pope and thus a special law - the so-called Law of Guarantees of 13 May 1871- is approved. Accordingly, the Pope and the Roman Catholic Church were given a lot of privileges. [10] The most important ones state:

• The person of the Pope is holy and inviolable and royal honors are to be paid to him.

• Italy will pay a yearly tax-free sum to the Holy See of 3,225,000 lire as indemnity for the loss of sovereignty and territory.

• The Pope will have the free use of the Vatican and Lateran apostolic palaces, as well as of Castel Gandolfo. Those places are inalienable and free of taxes.

***733** • The personal freedom of the cardinals is guaranteed during the vacancy of the See, and the government will make sure that the place of a conclave or an ecumenical council is free of external violation. The government will likewise ensure that the place of the conclave and of ecumenical councils will not be disturbed by external violence.

• Legates of foreign governments to the Pope will enjoy all privileges and immunities diplomatic agents enjoy according to international law.

However, the pope refuses to accept this arrangement, and claims the necessity for independence of any political power in his exercise of spiritual jurisdiction. The Roman Question is born. [11] It will take almost sixty years to solve the problem.

C. The Roman Question

Pope Pius IX does not accept this law. In his encyclical Ubi Nos of 15 May 1871, he publicly rejects the settlement, offered by the Italian government:
Meanwhile indeed, the Piedmont government is on the one hand bent on making the city the talk of the world. On the other hand, to deceive the Catholics and calm their anguish, it has promoted certain empty immunities and privileges, commonly called “guarantees.” These guarantees are compensation for stripping Us of Our civil rule; this they accomplished by a lengthy series of machinations and their unholy arms. We have already delivered, venerable Brothers, Our judgment on these immunities and provisions, and stigmatized their absurdity, cunning and mockery in Our letter of last 2nd March to Constantine Patrizi, cardinal of the holy Roman Church, dean of the Sacred College, and Vicar of Our Authority in the City. [12] ***734** Moreover, Pius IX claims that the Roman Pontiff can never be subject to any ruler or civil power:

Divine Providence gave the civil rule of the Holy See to the Roman Pontiff. This rule is necessary in order that the Roman Pontiff may never be subject to any ruler or civil power, but may be able to freely exercise his supreme power and authority of feeding and ruling the entire flock of the Lord, and of looking after the greater good of this Church, its well-being, and its needs. [13]

Pope Leo XIII makes an allusion to the capture of the Papal States and to the usurpation of the temporal powers of the Popes by King Victor Emmanuel II in 1870 in his encyclical Inscrutabili Dei consilio on the evils of society of 21 April 1878, when he writes:
Thereby, public institutions, vowed to charity and benevolence, have been withdrawn from the wholesome control of the Church; thence, also, has arisen that unchecked freedom to teach and spread abroad all mischievous principles, while the

Church's claim to train and educate youth is in every way outraged and baffled. Such, too, is the purpose of the seizing of the temporal power, conferred many centuries ago by Divine Providence on the Bishop of Rome, that he might without let or hindrance use the authority conferred by Christ for the eternal welfare of the nations. [14] ***735** However, the situation gradually improves. Pius X and Benedict XV no longer claim the absolute restoration of their territorial sovereignty. On 1 November 1914, barely two months after his election on 3 September 1914, Pope Benedict XV publishes his encyclical Ad beatissimi Apostolorum Principis. In this writing, he renews the protests of his predecessors:

For a long time past the Church has not enjoyed that full freedom which it needs-never since the Sovereign Pontiff, its Head, was deprived of that protection which by divine Providence had in the course of ages been set up to defend that freedom. Once that safeguard was removed, there followed, as was inevitable, considerable trouble amongst Catholics: all, from far and near, who profess themselves sons of the Roman Pontiff, rightly demand a guarantee that the common Father of all should be, and should be seen to be, perfectly free from all human power in the administration of his apostolic office. And so while earnestly desiring that peace should soon be concluded amongst the nations, it is also Our desire that there should be an end to the abnormal position of the Head of the Church, a position in many ways very harmful to the very peace of nations. We hereby renew, and for the same reasons, the many protests Our Predecessors have made against such a state of things, moved thereto not by human interest, but by the sacredness of our office, in order to defend the rights and dignity of the Apostolic See. [15]

***736** Although he renews the protests of his predecessors, the pope also seeks reconciliation. After World War I, the Holy See and Italy come close to a solution: in May 1919, Cardinal Gasparri presents to the Italian Prime Minister Orlando a solution, which would have attributed to the enclosed Vatican the character of a sovereign state. This led to a projected concordat, but the discussion ended with the fall of Orlando's government in June 1919. [16] In spite of this failure, the reconciliation attempts continue. In his encyclical Pacem, Dei munus pulcherrimum of 23 May 1920, Pope Benedict XV announces a relaxation of the measure against heads of catholic states that were received in audience by the Italian King and therefore refused an audience by the Pope. [17] He writes:

And this concord between civilized nations is maintained and fostered by the modern custom of visits and meetings at which the Heads of States and Princes are accustomed to treat of matters of special importance. So then, considering the changed circumstances of the times and the dangerous trend of events, and in order to encourage this concord, We would not be unwilling to relax in some measure the severity of the conditions justly laid down by Our Predecessors, when the civil power of the Apostolic See was overthrown, against the official visits of the Heads of Catholic states to Rome. But at the same time We formally declare that this concession, which seems counseled or rather demanded by the grave circumstances in which to-day society is placed, must not be interpreted as a tacit renunciation of its sacrosanct rights by the Apostolic See, as it is acquiesced in the unlawful situation in which it is placed. Rather do we seize this opportunity to renew for the same reasons the protests which Our Predecessors have several times made, not in the least moved thereto by human interests, but in fulfillment of the sacred duty of their charge to defend the rights and dignity of this Apostolic See; once again demanding, and with even greater insistence now that peace is made among the nations that "for the Head of the Church, too, an end may be put to that abnormal condition which in so may ways does such serious harm to tranquility among the peoples." [18]

***737** With the election of Pius XI on 6 February 1922, a new era begins. Unlike his immediate predecessors, Pius XI imparts his first Apostolic Blessing Urbi et Orbi on the day of his election from the external loggia of the Vatican Basilica, whereas his predecessors did this from the internal loggia in order to protest against the occupation of the Papal States by Italy. [19] More significant is the encyclical Ubi Arcano Dei Consilio of 23 December 1922. Pius XI quotes his predecessor, Benedict XV, who spoke of the treaties asked for or proposed to the Pope by various states. [20] After quoting this consistorial allocution of Benedict XV, Pius XI continues and writes in his encyclical that among the various nations willing to enter into agreements with the Holy See, one is missing:

It is scarcely necessary to say here how painful it is to Us to note that from this galaxy of friendly powers which surround Us one is missing, Italy, Our own dear native land, the country where the hand of God, who guides the course of history, has

set down the Chair of His Vicar on earth, in this city of Rome which, from ***738** being the capital of the wonderful Roman Empire, was made by Him the capital of the whole world, because He made it the seat of a sovereignty which, since it extends beyond the confines of nations and states, embraces within itself all the peoples of the whole world. The very origin and divine nature of this sovereignty demands, the inviolable rights of conscience of millions of the faithful of the whole world demand that this sacred sovereignty must not be, neither must it ever appear to be, subject to any human authority or law whatsoever, even though that law be one which proclaims certain guaranties for the liberty of the Roman Pontiff. [21] According to the pope,

[t]he true guaranties of liberty, in no way injurious, but on the contrary of incalculable benefit to Italy, which Divine Providence, the ruler and arbiter of mankind, has conferred upon the sovereignty of the Roman Pontiff here below, these guaranties which for centuries have fitted in so marvelously with the divine designs in order to protect the liberty of the Roman Pontiff, neither Divine Providence itself has manifested nor human ingenuity has as yet discovered any substitute which would compensate for the loss of these rights; these guaranties We declare have been and are still being violated. Whence it is that there has been created a certain abnormal condition of affairs which has grievously troubled and, up to the present hour, continues to trouble the consciences of the Catholics of Italy and of the entire world. [22] ***739** Pius renews also the protests of his predecessors against the occupation of the Papal States:

We, therefore, who are now the heirs and depositories of the ideals and sacred duties of Our Venerated Predecessors, and like them alone invested with competent authority in such a weighty matter and responsible to no one but God for Our decisions, We protest, as they have protested before Us, against such a condition of affairs in defense of the rights and of the dignity of the Apostolic See, not because We are moved by any vain earthly ambition of which We should be ashamed, but out of a sense of Our duty to the dictates of conscience itself, mindful always of the fact that We too must one day die and of the awful account which We must render to the Divine Judge of the ministry which He has confided to Our care. [23] He finally adds that Italy should not be afraid of the Holy See:

At all events, Italy has not nor will she have in the future anything to fear from the Holy See. The Pope, no matter who he shall be, will always repeat the words: “I think thoughts of peace not of affliction” (Jeremias xxix, 11), thoughts of a true peace which is founded on justice and which permits him truthfully to say: “Justice and Peace have kissed.” (Psalms lxxxiv, 11) It is God's task to bring about this happy hour and to make it known to all; men of wisdom and of good-will surely will not permit it to strike in vain. When it does arrive, it will turn out to be a solemn hour, one big with consequences not only for the ***740** restoration of the Kingdom of Christ, but for the pacification of Italy and the world as well. [24]

The positive attitude of the pope and his words of reconciliation lead to the start of secret negotiations in 1926. These negotiations will result in the so-called Lateran Treaty between the Italian Kingdom and the Holy See, signed on 11 February 1929.

D. A Solution to the Roman Question: The Lateran Treaty (1929)

As a result of the secret negotiations between the Holy See and the Italian government, the Roman Question is solved on 11 February 1929, when the two parties sign the so-called Lateran Treaty. The same day, a concordat between the Holy See and Italy is concluded. [25]

Italy recognizes the sovereignty of the Holy See in the international field as an inherent attribute of its nature, in conformity with its tradition and the exigencies of its mission in the world. [26] Italy also recognizes full possession and exclusive and absolute power and sovereign jurisdiction of the Holy See over the Vatican, as constituted in 1929, with all its appurtenances

and endowments, creating Vatican City. [27] The confines of Vatican City are indicated on a plan, which constitutes a first annex to the treaty and forms an integral part of it. However, Saint Peter's Square, as part of Vatican City, will continue to be open to the public and will be ***741** subject to the police powers of the Italian authority. The power of the Italian authorities ceases at the foot of the steps leading into the basilica. Furthermore, the contracting parties confirm that the sovereignty and exclusive jurisdiction which Italy grants the Holy See implies that there cannot be any interference whatsoever on the part of the Italian government and that within Vatican City there will be no other authority besides the Holy See. [28]

As a compensation for the loss of the Papal States, Italy agrees to pay to the Holy See the sum of 750,000,000 Italian lire and at the same time to hand over to the Holy See, Italian five-percent negotiable consolidated bonds for a nominal value of one milliard Italian lire. [29] Apart from this financial arrangement, the Holy See also has the full possession of a number of buildings, such as the patriarchal basilicas of St. John of the Lateran, St. Mary Major and St. Paul Outside the Walls and their annexed buildings, the pontifical palace and the Villa Barberini in Castel Gandolfo, [30] and some other buildings. Those buildings enjoy the privilege of extra-territoriality, i.e. the immunity recognized by international law to ***742** seats of diplomatic agents of foreign States, are tax-exempted and cannot be expropriated without the preceding agreement of the Holy See. [31] Other buildings, such as the Gregorian University and the Biblical Institute, do not have the privilege of extra-territoriality, but are tax-exempted and cannot be expropriated for public utility without the preceding agreement of the Holy See. [32] In conformity with the regulations of international law, aircraft of any kind are prohibited from flying over Vatican territory. [33] Italy recognizes the active and passive right of legation of the Holy See according to the rule of international law. [34]

II. Confitebor Tibi in populis [35] : Papal Legates

The most visible sign of the ecclesiastical presence on the international scene is papal diplomacy [36] and the papal legates, also known under the title ‘papal nuncio.’ Six canons of the 1983 Code of Canon Law ***743** deal with the role of papal legates. International law gives them a status as well.

Already early in history, the Popes claim that one of the fundamental consequences of their spiritual primacy is their right to send legates over the entire world, separately from temporal rulers. Their legates represent them and exercise jurisdiction in their name. From the fourth until the seventh century, there are legates, apostolic vicars and apocrisiarii or responsales or even responsores. The latter represent the Pope to the Byzantine emperor, but will disappear after some time. Legates and apostolic vicars continue to exercise their tasks somewhat longer. Legates are sent by the Pope to represent him during an ecumenical council, while apostolic vicars have to make sure that the authority and the supremacy of the Pope is recognized also in somewhat distant territories. During the fifteenth and sixteenth century, the so-called nuntiatures emerge and permanent nuncios are sent to look after the interests of the Church. They have a double role: they not only represent the person of the Pope, temporal sovereign of the Papal States, but also the Pope as head of the Roman Catholic Church and sovereign in the spiritual order. [37]

The current task description is the result of a request of the fathers of the Second Vatican Council to define better the office of papal legates: “The fathers also desire that, in view of the very nature of the pastoral office proper to the bishops, the office of legates of the Roman Pontiff be more precisely determined.” [38] Pope Paul VI first implemented this desire in his motu proprio Sollicitudo omnium Ecclesiarum of 24 June 1969. [39] This document formed the basis for the current norms in the 1983 Code of Canon Law.

As the first among the bishops and the head of the college of bishops, the Pope sends representatives or legates to represent him to particular Churches - mostly dioceses, but not exclusively - or to states and public ***744** authorities. According to the

Code of Canon Law, the Pope not only has the fundamental right to appoint and send legates, he can send them to particular Churches, to states or public authorities or to both. Canon 362:
The Roman Pontiff has the innate and independent right to appoint, send, transfer, and recall his own legates either to particular churches in various nations or regions or to states and public authorities. The norms of international law are to be observed in what pertains to the mission and recall of legates appointed to states. [40] Canon 363:

§ 1. To the legates of the Roman Pontiff is entrusted the office of representing the Roman Pontiff in a stable manner to particular churches or also to the states and public authorities to which they are sent. [41]

§2. Those who are designated as delegates or observers in a pontifical mission at international councils or at conferences and meetings also represent the Apostolic See. [42]

A papal legate has some important tasks, since he is the link between the Pope on the one hand and particular Churches and/or states or public authorities on the other hand. Canon 364:
The principal function of a pontifical legate is daily to make stronger and more effective the bonds of unity which exist between the Apostolic See and particular churches. Therefore, it pertains to the pontifical legate for his own jurisdiction:

***745** 1° to send information to the Apostolic See concerning the conditions of particular churches and everything that touches the life of the Church and the good of souls;

2° to assist bishops by action and counsel while leaving intact the exercise of their legitimate power;

3° to foster close relations with the conference of bishops by offering it assistance in every way;

4° regarding the nomination of bishops, to transmit or propose to the Apostolic See the names of candidates and to instruct the informational process concerning those to be promoted, according to the norms given by the Apostolic See;

5° to strive to promote matters which pertain to the peace, progress, and cooperative effort of peoples;

6° to collaborate with bishops so that suitable relations are fostered between the Catholic Church and other Churches or ecclesial communities, and even non-Christian religions;

7° in associated action with bishops, to protect those things which pertain to the mission of the Church and the Apostolic See before the leaders of the state;

8° in addition, to exercise the faculties and to fulfill other mandates which the Apostolic See entrusts to him. [43] ***746** He must inform his supervisor concerning the situation of the particular Churches in his territory and he also is to carry out certain special assignments. The papal legate must also assist the bishops in his territory and he is to support the conference of bishops. The papal legate fulfills a key role when new bishops are appointed: he will send a list to Rome with the names of possible candidates and he will take care of the information process on the candidates for appointment. [44]

The papal legate, who at the same time acts as a legate to states, according to the rule of international law, [45] must promote and foster the relations between the Apostolic See and the authorities of that state. Canon 365:

§1. It is also the special function of a pontifical legate who at the same time acts as a legate to states according to the norms of international law:

1° to promote and foster relations between the Apostolic See and the authorities of the state;

2° to deal with questions which pertain to relations between Church and state and in a special way to deal with the drafting and implementation of concordats and other agreements of this type.

§ 2. In conducting the affairs mentioned in §1, a pontifical legate, as circumstances suggest, is not to neglect to seek the opinion and counsel of the bishops of the ecclesiastical jurisdiction and is to inform them of the course of affairs. [46] ***747** The legate has in particular the task to take care of the relations between Church and State and to deal with the drafting and implementation of concordats and other agreements. When doing this, he should, as much as possible, consult with the bishops in his territory.

Precisely because it is a legate of the Pope, he has some privileges according to canon law: his see is exempt from the power of governance of the local bishop and his vicars and he can perform liturgical celebrations in all churches of his legation. Canon 366:
In view of the particular character of the function of a legate:

1° the seat of a pontifical legation is exempt from the power of governance of the local ordinary unless it is a question of celebrating marriages;

2° after he has notified in advance the local ordinaries insofar as possible, a pontifical legate is permitted to perform liturgical celebrations in all churches of his legation, even in pontificals. [47] When the See of Rome is vacant - because of the death or the resignation of the Roman Pontiff - the function of a papal legate does not cease. Canon 367:

The function of a pontifical legate does not cease when the Apostolic See becomes vacant unless the pontifical letter establishes otherwise; it does cease, however, when the mandate has been fulfilled, when the legate has been notified of recall, or when the Roman Pontiff accepts the legate's resignation. [48] ***748** Papal diplomats are usually trained at the Pontificia Accademia Ecclesiastica, the papal school for diplomats in Rome, founded by Pope Clemens XI in 1701. [49] The Fathers of the Second Vatican Council expressed the desire that the legates of the Roman Pontiff, as far as possible, be more widely taken from various regions of the Church, not just from Italy or Europe. [50] The cardinal-secretary of state supervises the office and work of the legates of the Holy See. [51] Legates that are head of diplomatic missions are usually titular archbishops.

Although in the motu proprio Sollicitudo omnium Ecclesiarum a distinction was made between the various types of papal legates, such a distinction is not included in the 1983 Code of Canon Law. According to the motu proprio, there is a distinction between a nuncio, a pro-nuncio, an internuncio, an apostolic delegate, a regent, a chargé d'affaires with credentials, a chargé d'affaires ad interim, a delegate and an observer. A nuncio is a papal ambassador with the right of acting as dean of the diplomatic corps, while the pro-nuncio is a papal ambassador to a government that does not recognize the precedence of the papal representative. The internuncio is the papal representative who is sent to countries where it is not possible to send a nuncio or pro-nuncio. An apostolic delegate is the representative of the Pope to a local Church and has no representative functions to the government. The title of pro-nuncio is no longer used. Since more and more countries engage in diplomatic relations with the Holy See, the number of apostolic delegates has decreased as well. The most commonly used title at this moment is the one of nuncio. Another frequently used title is the one of chargé d'affaires ad interim, especially when the head of the legation

is absent (often after transfer or resignation) and the new head of the legation has not arrived and has not offered his Letter of Credence. Delegates and observers are papal representatives to international organizations or conferences. The distinction between the two is whether the Holy See is member of the international organization or not or whether the Holy See participates in a conference with or without the active right to vote. According to Sollicitudo omnium Ecclesiarum, lay persons can be sent as delegates or observers to an international organization or a conference. A special ***749** category of legates are the cardinals to whom the Pope entrusts the function of representing him in a solemn celebration or meeting as a legatus a latere (i.e. as his alter ego) or to whom the Pope entrusts the fulfillment of a certain pastoral function as his special envoy. [52]

The papal nuncio, as the representative of the Holy See, is quite often also dean of the diplomatic corps. This is an ancient custom, confirmed by an appendix to the Treaty of the Congress of Vienna (1815), [53] and the Vienna Convention on Diplomatic Relations (1961). [54] According to article 16 of the latter, "heads of mission shall take precedence in their respective class in the order of the date and time of taking up their functions," but this is "without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See." [55] The papal nuncio is dean of the diplomatic corps in seventeen of the twenty-seven member states of the European Union (Austria, Belgium, the Czech Republic, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia and Spain), while he is treated in the other member-states (Bulgaria, Cyprus, [56] Denmark, Estonia, Finland, Great Britain and Northern Ireland, Greece, Latvia, the Netherlands, and Sweden) as any other ambassador.

*750 III. Vatican City State

A first constitution or fundamental law was promulgated by Pius XI on 7 June 1929. [57] Pope John Paul II replaced this first constitution with a new one on 26 November 2000. [58] The new constitution entered into force on 22 February 2001.

According to this constitution, the Pope has the fullness of legislative, executive and judiciary power. [59] When the See of Rome is vacant, the College of Cardinals exercises these powers, but can only do so in a case of necessity to promulgate new laws. Those laws are valid only for the duration of the vacancy, unless the newly elected pontiff decides to confirm this legislation. [60]

The representation of the State in the relations with foreign states and other subjects of international law for diplomatic relations and the concluding of concordats are reserved to the Pope. He will exercise this competence through the Secretariat of State. [61] The latter is part of the Roman Curia, and thus the Holy See. This is yet another example of the close relation between the Holy See and Vatican City State. This point will be dealt with later.

The legislative power is exercised, unless the Pope decides otherwise, by a commission, composed of a cardinal president and other cardinals. [62] ***751** The president of that commission exercises the executive power, assisted by a secretary general and deputy secretary general. [63] Judicial power is exercised in the name of the Pope by the institutions provided for by law. [64]

***752** Finally, Vatican City State also has its own flag, coat of arms and seal, [65] as well as a national anthem, called the Papal Hymn. These are only ***753** external signs of sovereignty, but not determining elements for obtaining juridic personality under international law.

IV. The Holy See and The Vatican in International Law Today

When considering the close relation between the Holy See and Vatican City State on the one hand and the traditional criteria of international law on the other hand, it is not that easy to determine the nature of the Holy See and Vatican City State. In international legal doctrine, several opinions are defended.

A. The General Ideas: An Overview

Much has been published on the international position of the Holy See, the Roman Catholic Church and Vatican City State. [66] In the older doctrine, one can find the idea that the Holy See and the Roman Catholic Church do not have legal personality, although the political and social role of the Holy See is recognized, as is the possibility for having diplomatic relations. The Italian lawyer G. Arangio Ruiz writes in 1925 that the old doctrine, according to which only states have legal personality in international law, is obsolete. However, this does not mean that the Holy See therefore has immediate legal personality in international law. [67] ***754** Another Italian lawyer, A.C. Jemolo, does not accept this theory and claims that this question can be solved rather easily. If states and the Holy See wish for their relations to be subject to international law, it is to be accepted that the Holy See is a subject of international law. [68]

The discussion becomes even more complex when the so-called Roman Question is solved: by creating Vatican City State, a new element is brought into the discussion. What is now the added value of Vatican City State, and what is its relation to the Holy See? The French canon lawyer Roland Minnerath, formerly in diplomatic service of the Holy See, before being appointed professor at the University of Strasbourg and currently archbishop of Dijon, after a careful analysis, can make a distinction between several theories. According to the dualistic theory, a second subject of international law is created by the Lateran Treaty in 1929, separate from the already existing subject of international law (the Holy See): Vatican City State. This is however only one theory. According to the monistic theory, there is only one subject of international law, although it is not clear what this subject is. There are three possible candidates. In the first hypothesis, the Holy See is the only subject of international law. Vatican City State is only a territory with extra-territorial rights, but not a separate subject of international law. The second hypothesis is exactly the opposite: because of the Lateran Treaty, the Holy See is no longer a subject of international law - only Vatican City State is a subject of international law. The Holy See however can use the advantages of Vatican City State. A third hypothesis is somewhat related to the first one, at least with regard to the result: Vatican City State is not a subject, but an object of international law, because all its competences are taken over by the Holy See. [69]

The key issue is thus the point of reference: in order to have a subject of international law, we need, at least according to the traditional doctrine, a state. A definition of a state can be found in the Montevideo Convention of 1933: a state has a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states. [70] In many manuals on international law, these will be the criteria used to define a state. Consequently, the authors have difficulties defining the status of the Holy See and Vatican City State. When dealing with subjects ***755** of international law and international personality, some authors will agree that the status of the Holy See as an international person was accepted by its partners and that Vatican City State, although closely linked with the Holy See, can be considered as a state. [71] Others will categorize both entities as entities sui generis, [72] comparable to the Sovereign Order of Jerusalem and Malta, [73] and yet others will catalogue them under the subject heading “Other entities - Selected anomalies,” together with the already mentioned Sovereign Order of Malta. [74] It is not uncommon any more to defend the position that the Holy See is a subject of international law and has international legal personality, not because the Pope is sovereign of Vatican City State, but because first and foremost he is the head of the Roman Catholic Church. [75]

We could conclude thus far that both the Holy See and Vatican City State are subjects of international law and have international legal personality. The link between both is the Pope, and the connecting factor is the Lateran Treaty. The whole situation

is sometimes summarized as follows: Vatican City State was created as a mini-state to safeguard the absolute freedom and independence of the Holy See. [76]

B. The Practical Aspects

In practice, we see that Vatican City State will never act as such, but always through the Holy See. States have diplomatic relations with the Holy See, not with Vatican City State. This is a consequence of the constitution of Vatican City State. At this very moment, the Holy See has diplomatic relations with 175 countries, [77] including the United States of ***756** America. [78] The Holy See also has diplomatic relations with the European Union and the Sovereign Military Order of Malta and relations of a special nature with the Russian Federation and the Organization for the Liberation of Palestine (OLP). The Holy See participates in various international and ***757** regional intergovernmental organizations and bodies, [79] sometimes in the name and on behalf of Vatican City State. [80]

A good number of states want to keep their embassy to the Holy See or open one, because it is an interesting diplomatic crossroad where useful and vital information can be exchanged and contacts can be made. In his allocution on 31 August 1978 to the Diplomatic Corps accredited to the Holy See, Pope John Paul I said:

> Certainly, among the various diplomatic posts, the function which is yours here is “sui generis”, as are the mission and competence of the Holy See. We have evidently no temporal goods to exchange, no economic interest to discuss, as your States have. Our possibilities of diplomatic interventions are restricted and particular. They do not interfere in the purely temporal, technical and political affairs, which are reserved to your Governments. In this sense, our diplomatic representatives to the highest civil Authorities, far from being a relic of the past, witness at the same time our respect for the legitimate temporal power, and the very lively interest in human interests which this power is intended to promote. Also, you are here the spokespersons of your Governments and the vigilant witnesses of the spiritual work of the Holy See. On both sides, there is presence, respect, exchange, collaboration, without confusion of competences. [81]

***758** International treaties or concordats are concluded with the Holy See and not with Vatican City State. [82] A good example is the monetary agreement between the Italian Republic, on behalf of the European Community, and the Vatican City State and, on its behalf, the Holy See, concerning the use of the euro as official currency in Vatican City State. [83] The agreement deals with the introduction of the euro in Vatican City State, yet the agreement is signed by the Holy See, representing Vatican City State.

C. The Holy See and the United Nations

In spite of the criticism, the position of the Holy See within the United Nations is not questioned. On 1 July 2004, the General Assembly of the UN adopted a resolution on the participation of the Holy See in the work of the United Nations. [84] The status of the Holy See is recalled - a Permanent Observer State since 6 April 1964 according to the Resolution - as is the fact that the Holy See is a party to diverse international instruments and enjoys membership in various United Nations subsidiary bodies, specialized agencies and international intergovernmental organizations.

The General Assembly acknowledges that the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under

the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex to the resolution. These rights are:

1. The right to participate in the general debate of the General Assembly;

2. Without prejudice to the priority of Member States, the Holy See shall have the right of inscription on the list of speakers under agenda items at any plenary meeting of the General Assembly, after the last Member State inscribed on the list;

3. The right to make interventions, with a precursory explanation or the recall of relevant General Assembly resolutions being made only once by the President of the General Assembly at the start of each session of the Assembly;

***759** 4. The right of reply;

5. The right to have its communications relating to the sessions and work of the General Assembly issued and circulated directly, and without intermediary, as official documents of the Assembly;

6. The right to have its communications relating to the sessions and work of all international conferences convened under the auspices of the General Assembly issued and circulated directly, and without intermediary, as official documents of those conferences;

7. The right to raise points of order relating to any proceedings involving the Holy See, provided that the right to raise such a point of order shall not include the right to challenge the decision of the presiding officer;

8. The right to co-sponsor draft resolutions and decisions that make reference to the Holy See; such draft resolutions and decisions shall be put to a vote only upon request from a Member State;

9. Seating for the Holy See shall be arranged immediately after Member States and before the other observers when it participates as a non-member State observer, with the allocation of six seats in the General Assembly Hall;

10. The Holy See shall not have the right to vote or to put forward candidates in the General Assembly. [85]

Remarkably enough, the text of the resolution refers to the status of the Holy See as an Observer State, and not a Non-Member State Maintaining Permanent Observer Mission. Is this by mistake? Or is the whole resolution an answer to the campaign of the organizations that try to change to role of the Holy See within the United Nations?

Concluding Remarks

The position of the Holy See in international law is not easy to define, at least not at first sight. Although the traditional elements - a permanent population, a defined territory, a government and the capacity to enter into relations with the other states - are not present as they are for the usual subjects of international law, it is therefore too easy to claim that the Holy See and Vatican City State do not have international legal personality. History should be recognized as well, and from that perspective, the Holy See has a lot more credentials than other subjects of international law. Moreover, the lack of territory and population between 1870 and 1929 did not cause any problems for the Holy See to continue its already existing diplomatic relations.

***760** From a historical, practical and logical point of view, it is best to consider the Holy See and Vatican City State as two separate subjects of international law. The link between the two is the Bishop of Rome. Vatican City State was created to solve

an embarrassing problem. It can be seen as the territorial basis for the operations and a guarantee for the independence of the Holy See. Therefore, Vatican City State will always have to operate on the international scene under the supervision of the Holy See. The idea that the Holy See is the sovereign of Vatican City State, and thus that diplomatic relations are ultimately established with Vatican City State and not with the Holy See, might solve a potential internal constitutional problem, but does not seem to be correct.

Footnotes

a1 Assistant Professor, School of Canon Law, The Catholic University of America.

1 This campaign has its own website: http://www.seechange.org.

2 Some Dutch members of the European Parliament called on the government of the Netherlands to break diplomatic relations with the Vatican. L. van der Laan et al., Doorbreek machtspositie Vaticaan, Trouw, 18 Nov. 2000 (Neth.).

3 Aanhangsel Handelingen II, No. 170 (2005-2006).

4 Aanhangsel Handelingen II, No. 171 (2005-2006).

5 Aanhangsel Handelingen II, No. 172 (2005-2006).

6 Carla del Ponte, the chief prosecutor of the United Nations international criminal tribunal for the former Yugoslavia, was reported to have said that she believed the Vatican was hiding Croatian general Ante Gotovina, indicted on charges of crimes against humanity and war crimes. David Rennie, Vatican Accused of Shielding 'War Criminal', Telegraph, Sept. 20, 2005, available at http://www.telegraph.co.uk/news/main.jhtml?xml=/ news/2005/09/20/wponte20.xml.

7 1983 Code c.361. Canon 361: "Nomine Sedis Apostolicae vel Sanctae Sedis in hoc Codice veniunt non solum Romanus Pontifex, sed etiam, nisi ex rei natura vel sermonis contextu aliud appareat, Secretaria Status, Consilium pro publicis Ecclesiae negotiis, aliaque Romanae Curiae Instituta." Id.
The English translation used for the purpose of this article is Code of Canon Law, Latin-English Edition: New English Translation (CLSA 1998). All subsequent citations of the 1983 Code will be from this source, unless otherwise indicated.
Cf. 7 Dictionnaire de Droit Canonique 837-39 (1965) (Fr.) (s.v. "Saint-Siège").

8 XIII New Catholic Encyclopedia 655 (1967) (s.v. "States of the Church"); 1 Sacramentum Mundi 337 (1968) (s.v. "Church and State"); Wim Akveld, De Geschiedenis van de Kerkelijke Staat [The History of the Ecclesiastical State] (Bergboek 2004) (Neth.); Heinrich Benedikt, Kirchenstaat: Kirche-Staat, in Österreichisches Archiv für Kirchenrecht [Austrian Archive for Church Law] 1, 1-16 (1960) (Austria); Uta-Renate Blumenthal, The Investiture Controversy: Church and Monarchy from the Ninth to the Twelfth Century (Univ. Penn. Press 1988); Johann Englberger, Gregor VII. Und die Investiturfrage, Quellenkritische Studien zum angeblichen Investiturverbot von 1075 [Gregory VII and the Investiture Controversy, Critical Source Studies on the So-Called Investiture Ban of 1075] (Böhlau Verlag 1996) (Ger.); Ennio Innocenti, Storia del potere temporale dei papi [History of the Temporal Power of the Pope] (Grafite 2001) (Ger.); François-Charles Uginet, Papal States, in 2 The Papacy: An Encyclopedia 1096, 1096-1107 (Philippe Levillain ed., Routledge 2002).

9 Robert A. Graham, The Rise of the Double Diplomatic Corps in Rome: A Study in International Practice (1870-1875) (Martinus Nijhoff 1952).

10 Gazz. Uff. No. RU 00214 01014, 15 Maggio 1871 (Italy), Le Leggi No. 214, 13 maggio 1871 (Italy). Sulle Prerogative del Sommo Pontefice e della Santa Sede, e sulle Relazioni dello stato con la Chiesa.

11 Giuseppe Branzoli, La spedizione garibaldina del 1867 contro lo stato ponteficio, 23 Rivista Militare 1119, 1119-32 (1967) (Italy); Jean-Marc Ticchi, Ubi Roma, ibi papa: les projets de fuite du pape hors de Rome sous Léon XIII (1878-1895), 87 Rassegna Storica

del Risorgimento 355, 355-400 (2001) (Italy); Tullio Aebischer, Le ipotesi territoriali nella Questione Romana dal 1870 al 1929, Rassegna Storica del Risorgimento 87(3), 411-30 (2000) (Italy).

12 Pius IX, Ubi Nos, 15 maii 1871, in 3 Codicis Iuris Canonici Fontes 60-61 (Petrus Gasparri ed., Typis Polyglottis Vaticanis 1925):
Interea vero subalpinum Gubernium dum ex una parte Urbem properat Orbi facere fabulam, ex altera ad fucum catholicis faciendum et ad eorum anxietates sedandas, in conflandis ac studendis futilibus quibusdam immunitatibus et privilegiis quae vulgo guarentigie dicuntur, elaboravit eo consilio ut haec Nobis sint in locum civilis principatus, quo Nos longa machinationum serie et armis parricidialibus exuit. De hisce immunitatibus, et cautionibus, Venerabiles Fratres, iam Nos iudicium Nostrum protulimus, earum absurditatem, versutiam ac ludibrium notantes in Litteris die 2 Martii pr. pr. Datis ad Venerabilem Fratrem Nostrum Constantinum Patrizi Sanctae Romanae Ecclesiae Cardinalem, sacri Collegii decanum ac Vicaria Nostra potestate in Urbe fungentem ....
Id. For the letter to Cardinal Patrizi, see Epistola Sanctissimi Patris ad Eminentissimum Cardinalem Urbis Vicarium data die 2 Martii 1871, quae commemoratur in litteris encyclicis modo relatis, Acta Sanctae Sedis [Acts of the Holy See], martii 1871, at 264-68.

13 Pius IX, supra note 12, at 63.
[C]ivilem S. Sedis Principatum Romano Pontifici fuisse singulari divinae Providentiae consilio datum, illumque necessarium esse, ut idem Romanus Pontifex nulli unquam Principi aut civili Potestati subiectus supremam universi Dominici gregis pascendi regendique potestatem auctoritatemque ab ipso Christo Domino divinitus acceptam per universam Ecclesiam plenissima libertate exercere ac maiori eiusdem Ecclesiae bono utilitati et indigentiis consulere possit.
Id.

14 Leo XIII, Inscrutabili Dei consilio, 21 apr. 1878, in 3 Codicis Iuris Canonici Fontes 110 (Petrus Gasparri ed., Typis Polyglottis Vaticanis 1925).
[H]inc effectum ut a salutari Ecclesiae moderamine publica instituta, caritati et beneficentiae consecrata, subducerentur; hinc orta effrenis illa libertas prava quaeque docendi et in vulgus edendi, dum ex adverso modis omnibus Ecclesiae ius ad iuventutis institutionem et educationem, violatur et opprimitur. Neque alio spectat civilis Principatus occupatio, quem divina Providentia multis abhinc saeculis Romano Antistiti concessit, ut libere ac expedite potestate a Christo collata, ad aeternam populorum salutem uteretur.
Id.

15 Benedictus XV, Ad beatissimi Apostolorum Principis, Acta Apostolicae Sedis, novembris 1914, at 580-81.
Ecclesia sane iam multo diutius non ea, qua opus habet, plena libertate fruitur; scilicet ex quo caput eius Pontifex Romanus illo coepit carere praesidio, quod, divinae providentiae nutu, labentibus saeculis nactus erat ad eamdem tuendam libertatem. Hoc autem sublato praesidio, non levis catholicorum turbatio, quod necesse erat fieri, secuta est: quicumque enim Romani Pontificis se filios profitentur, omnes, et qui prope sunt et qui procul, iure optimo nexigunt ut nequeat dubitari, quin communis ipsorum Parens in administratione Apostolici muneris vere sit et prorsus appareat ab omni humana potestate liber. Itaque magnopere exoptantes ut pacem quamprimum gentes inter se componant, exoptamus etiam ut Ecclesiae Caput in hac desinat absona conditione versari, quae ipsi tranquillitati populorum, non uno nomine, vehementer nocet. Hac igitur super re, quas Decessores Nostri pluries expostulationes fecerunt, non quidem humanis rationibus, sed officii sanctitate adducti, ut videlicet iura ac dignitatem Sedis Apostolicae defenderent, easdem Nos iisdem de causis hic renovamus.
Id.

16 New Catholic Encyclopedia 322 (2d ed. 2003) (s.v. “Roman Question”).

17 Carlo Cardia, La soggettività internazionale della Santa Sede e i processi di integrazione europea, Ius Ecclesiae 301, 303-05 (1999) (Italy); 7 Dictionnaire de Droit Canonique 838 (1965) (Fr.) (s.v. “Saint-Siège”).

18 Benedictus XV, Pacem, Dei munus pulcherrimum, Acta Apostolicae Sedis, iunii 1920, at 215-16.
Quoniam vero hanc excultarum gentium concordiam tuetur multumque promovet ea, quae hodie increbruit, consuetudo ut ad maiora negotia expedienda inter se visitent conveniantque civitatum gubernatores ac principes, Nos, omnia reputantes et mutata rerum adiuncta et magnas communium temporum inclinationes, eiusdem concordiae adiuvandae causa, ne ab eo quidem consilio alieni essemus aliquid remittendi de illarum severitate conditionum, quas, ob eversum Apostolicae Sedis civilem principatum, iure Decessores Nostri statuerunt, ut catholicorum principum solemniores ad Urbem adventus cohiberent. Apertissime autem profitemur hanc Nostrae rationis indulgentiam, quam humanae societatis gravissima praeter modum tempora suadere atque adeo

postulare videntur, nequaquam interpretandam esse tamquam Apostolicae Sedis abdicationem tacitam iurium sanctissimorum, quasi in praesenti, quo utitur, abnormi statu ea tandem acquieverit. Quin potius hanc ipsam Nos occasionem nacti "quas Decessores Nostri pluries expostulationes fecerunt, non quidem humanis rationibus, sed officii sanctitate adducti, ut videlicet iura ac dignitatem Apostolicae Sedis defenderent, easdem Nos iisdem de causis hic renovamus," denuo graviusque postulantes ut, pace inter gentes composita, etiam "Ecclesiae Caput in hac desinat absona conditione versari, quae ipsi tranquillitati populorum, non uno nomine, vehementer nocet."
Id.

19 Kurt Martens, De paus en zijn entourage 47 (Davidsfonds 2004) (Neth.).

20 Benedictus XV, Sacrum Consistorium. Allocutio SS. D. N. Benedicti PP. XV, Acta Apostolicae Sedis, novembris 1921, at 522:
[I]n pactiones huiusmodi Nos minime passuros ut quidquam irrepat quod sit ab Ecclesiae alienum dignitate aut libertate; quam quidem salvam esse et incolumen vehementer interest, hoc maxime tempore, ad ipsam civilis convictus prosperitatem. ["We cannot possibly permit that anything harmful to the dignity or liberty of the Church creep into these treaties, for it is all-important that the safety and freedom of the Church be guarded at all times, and especially in our own days, and this in the lasting interests of human society itself."].
Id.

21 Pius XI, Ubi arcano Dei consilio, Acta Apostolicae Sedis, decembris 1922, at 698-99.
Quae cum ita sint, quo animi dolore in tot nationum numero, quae cum hac Apostolica Sede amicitiae vinculis continentur, Italiam deesse videamus, vix opus est dicere; Italiam inquimus, patriam Nobis carissimam, a Deo ipso, qui rerum omnium temporumque cursum atque ordinem sua providentia gubernat, delectam, in qua Vicarii sui in terris sedem collocaret, ut haec alma urbs, domicilium quondam imperii, amplissimi sed tamen certis quibusdam circumscripti terminis, iam totius orbis terrarum caput evaderet; quippe quae divini Principatus sedes, omnium gentium nationumque fines sua natura transcendentis, populos omnes nationesque complectatur. At vero tum huius Principatus et origo et divina natura, tum universitatis Christifidelium in toto orbe degentium ius sacrosanctum postulat, nulli ut idem sacer Principatus humanae potestati, nullis legibus (licet hae Romani Pontifics libertatem quibusdam praesidiis seu cautionibus communire polliceantur) obnoxius esse videatur, at sui penitus iuris ac potestatis et sit et manifesto appareat.
Id.

22 Id. at 699.
Verum illa libertatis praesidia, quibus divina ipsa Providentia, humanarum rerum gubernatrix atque arbitra, non solum sine detrimento, sed magno cum Italiae emolumento, Romani Pontificis auctoritatem communiverat; praesidia illa quae tot saeculis divino eiusdem libertatis tutandae consilio apte responderant, quorum nec divina hodiedum Providentia indicavit neque hominum consilia quidquam simile invenerunt quod eadem praesidia congruenter compensaret; praesidia illa hostili vi protrita atque etiamnum violata absonam eam Romano Pontifici vitae condicionem effecerunt quae omnium Christifidelium per orbem universum animos gravi perpetuaque tristitia perfundat.
Id.

23 Id.
Nos igitur, decessorum Nostrorum heredes ut consiliorum ita et officiorum, eademque praediti auctoritate, cuius solius est de re tanti momenti decernere, non equidem inani quadam terreni regni cupiditate adducti, qua vel leviter moveri prorsus Nos puderet, verum de humano exitu Nostro cogitantes, memores severissimae rationis, quam divino Iudici reddituri sumus, pro Nostri sanctitate officii, quas iidem decessores Nostri ad iura Apostolica Sedis dignitatemque defendendam expostulationes fecerunt, easdem Nos hoc loco renovamus.
Id.

24 Id. at 699-700.
Ceterum nihil erit umquam Italiae ab hac Apostolica Sede metuendum detrimenti; siquidem Pontifex Romanus, quicumque demum ille fuerit, is profecto semper erit qui illud Prophetae ex animo usurpet: Ego cogito cogitationes pacis et non afflictionis (Ier. xxix, 11), pacis, inquimus, verae ac propterea minime a iustitia seiunctae, ut iure possit subdi: Iustitia et pax osculatae sunt. (Ps. lxxxiv, 11) Dei autem omnipotentis miserentisque erit efficere ut haec laetissima dies tandem illucescat, bonorum omnium fecundissima

tum regno Christi instaurando tum Italiae rebus universique orbis componendis: ne vero id frustra fiat, omnes qui recte sentiunt, dent operam diligenter.
Id.

25 Trattato fra la Santa Sede e l'Italia, Acta Apostolicae Sedis, iunii 1929, at 209-95 (Italy). For an English translation of the treaty, the concordat and the other documents see Hyginus Eugene Cardinale, The Holy See and the International Order 319-40 (Colin Smythe 1976).

26 Trattato fra la Santa Sede e l'Italia, art. 2, Acta Apostolicae Sedis, iunii 1929, at 210 ("L'Italia riconosce la sovranità della Santa Sede nel campo internazionale come attributo inerente alla sua natura, in conformità alla sua tradizione ed alle esigenze della sua missione nel mondo.").

27 Id. art. 3 ("L'Italia riconosce alla Santa Sede la piena proprietà e la esclusiva ed assoluta potestà e giurisdizione sovrana sul Vaticano, com'è attualmente costituito, con tutte le sue pertinenze e dotazioni, creandosi per tal modo la Città del Vaticano ....").

28 Id. Article 3:
I confini di detta Città sono indicati nella Pianta che costituisce l'Allegato I° del presente Trattato, del quale forma parte integrante. Resta peraltro inteso che la piazza di San Pietro, pur facendo parte della Città del Vaticano, continuerà ad essere normalmente aperta al pubblico e soggetta ai poteri di polizia delle autorità italiane; le quali si arresteranno ai piedi della scalinata della Basilica ....
Id. Article 4:
La sovranità e la giurisdizione esclusiva, che l'Italia riconosce alla Santa Sede sulla Città del Vaticano, importa che nella medesima non possa esplicarsi alcuna ingerenza da parte del Governo Italiano e che non vi sia altra autorità che quella della Santa Sede.
Id. art. 4.

29 Allegato IV, Convenzione finanziaria, Acta Apostolicae Sedis, iunii 1929.
Art. 1. L'Italia si obbliga a versare, allo scambio delle ratifiche del Trattato, alla Santa Sede la somma di lire italiane 750.000.000 (settecento cinquanta milioni) ed a consegnare contemporaneamente alla medesima tanto Consolidato italiano 5% al portatore (col cupone scadente al 30 giugno p.v.) del valore nominale di lire italiane 1.000.000.000 (un miliardo).
Id. art. 1.
Art. 2. La Santa Sede dichiara di accettare quanto sopra a definitiva sistemazione dei suoi rapporti finanziari con l'Italia in dipendenza degli avvenimenti del 1870.
Id. art. 2.

30 Id. art. 13 ("L'Italia riconosce alla Santa Sede la piena proprietà delle Basiliche patriarcali di San Giovanno in Laterano, di Santa Maria Maggiore e di San Paolo, cogli edifici annessi (Alleg. II, 1, 2 e 3)."). Id. art. 14 ("L'Italia riconosce alla Santa Sede la piena proprietà del palazzo pontificio di Castel Gandolfo con tutte le dotazioni, attinenze e dipendenze (Alleg. II, 4) ...."). See also annex II to the Treaty: Allegato II. Immobili con privilegio di extraterritorialità e con esenzione da espropriazioni e da tributi.

31 Allegato IV, supra note 29, art. 15.
Art. 15. Gli immobili indicati nell'art. 13 e negli alinea primo e secondo dell'art. 14, nonchè i palazzi della Dataria, della Cancellaria, di Propaganda Fide in Piazza di Spagna, il palazzo del Sant'Offizio ed adiacenze, quello dei Convertendi (ora Congregazione per la Chiesa Orientale) in piazza Scossacavalli, il palazzo del Vicariato (Alleg. II, 6, 7, 8, 10 e 11), e gli altri edifici nei quali la Santa Sede in avvenire crederà di sistemare altri suoi Dicasteri, benché facenti parte del territorio dello Stato italiano, godranno delle immunità riconosciute dal diritto internazionale alle sedi degli agenti diplomatici di Stati esteri.
Id.

32 Id. art. 16.
Gli immobili indicati nei tre articoli precedenti, nonchè quelli adibiti a sedi dei seguenti istituti pontifici: Università Gregoriana, Istituto Biblico, Orientale, Archeologico, Seminario Russo, Collegio Lombardo, i due palazzi di Sant'Apollinare e la Casa degli esercizi per il Clero di San Giovanni e Paolo (Alleg. III, 1, 1 bis, 2, 6, 7, 8), non saranno mai assoggettati a vincoli o ad espropriazioni per causa di pubblica utilità, se non previo accordo con la Santa Sede, e saranno esenti da tributi sia ordinari che straordinari tanto verso lo Stato quanto verso qualsiasi altro ente.

Id. See also annex III to the Treaty: Allegato III. Immobili esenti da espropriazioni e da tributi.

33 Allegato IV, supra note 29, art. 7 (“In conformità alle norme del diritto internazionale, è vietato agli aeromobili di qualsiasi specie di trasvolare sul territorio del Vaticano.”).

34 Id. art. 12 (“L'Italia riconosce alla Santa Sede il diritto di legazione attivo e passivo secondo le regole generali del diritto internazionale.”).

35 Psalm 108:4 (“I will praise you among the peoples, Lord.”). Archbishop Celestino Migliore, permanent observer of the Holy See to the United Nations, has chosen this verse as his episcopal motto. It (partially) reflects the task of a papal representative.

36 James Hennesey, Papal Diplomacy and the Contemporary Church, 46 Thought 55-71 (1971); Mario Oliveri, The Representatives: The Real Nature and Function of Papal Legates (Van Duren 1980).

37 7 Dictionnaire de Droit Canonique 840 (1965) (Fr.) (s.v. “Saint-Siège (représentation diplomatique)”); Michael F. Feldkamp, La diplomazia pontificia (Milano Jaca Book 1998) (Italy); Mario Oliveri, Natura e funzioni dei legati pontifici nella storia e nel contesto ecclesiologico del Vaticano II (Libreria Editrice Vaticana 1982); Angelo Sodano, Les relations internationales du Saint-Siège, in Joël-Benoît d'Onorio, La Diplomatie de Jean-Paul II 32-33 (Cerf 2000); Knut Walf, The Nature of the Papal Legation: Delineation and Observations, 63 Jurist 85, 85-88 (2003).

38 Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de pastorali episcoporum munere in ecclesia Christus Dominus, Acta Apostolicae Sedis, octobris 1966, para. 9 [hereinafter Sacrosantum] (“Exoptant pariter ut, ratione habita muneris pastoralis episcoporum proprii, Legatorum Romani Pontificis officium pressius determinetur.”).

39 Paulus VI, Sollicitudo omnium Ecclesiarum. Litterae apostoclicae moto proprio datae de muneribus Legatorum Romani Pontificis, Acta Apostolicae Sedis, augusti 1969, at 473.

40 1983 Code c.362. Canon 362:
Romano Pontifici ius est nativum et independens Legatos suos nominandi ac mittendi sive ad Ecclesias particulares in variis nationibus vel regionibus, sive simul ad Civitates et ad publicas Auctoritates, itemque eos transferendi et revocandi, servatis quidem normis iuris internationalis, quod attinet ad missionem et revocationem Legatorum apud Res Publicas constitutorum.
Id.

41 1983 Code c.363, § 1. Canon 363, section 1:
§ 1. Legatis Romani Pontificis officium committitur ipsius Romani Pontificis stabili modo gerendi personam apud Ecclesias particulares aut etiam apud Civitates et publicas Auctoritates, ad quas missi sunt.
Id.

42 1983 Code c.363, § 2. Canon 363, section 2:
§ 2. Personam gerunt Apostolicae Sedis ii quoque, qui in pontificam Missionem ut Delegati aut Observatores deputantur apud Consilia internationalia aut apud Conferentias et Conventus.
Id.

43 1983 Code c.364. Canon 364:
Praecipuum munus Legati pontifici est ut firmiora et efficaciora in dies reddantur unitatis vincula, quae inter Apostolicam Sedem et Ecclesias particulares intercedunt. Ad pontificium ergo Legatum pertinet pro sua dicione:
1° ad Apostolicam Sedem notitias mittere de condicionibus in quibus versantur Ecclesiae particulares, deque omnibus quae ipsam vitam Ecclesiae et bonum animarum attingant;
2° Episcopis actione et consilio adesse, integro quidem manente eorundem legitimae potestatis exercitio;
3° crebras fovere relationes cum Episcoporum conferentia, eidem omnimodam operam praebendo;
4° ad nominationem Episcoporum quod attinet, nomina candidatorum Apostolicae Sedi transmittere vel proponere necnon processum informativum de promovendis instruere, secundum normas ab Apostolica Sede datas;
5° anniti ut promoveantur res quae ad progressum et consociatam populorum operam spectant;

6° operam conferre cum Episcopis, ut opportuna foveantur commercia inter Ecclesiam catholicam et alias Ecclesias vel communitates ecclesiales, immo et religiones non christianas;
7° ea quae pertinent ad Ecclesiae et Apostolicae Sedis missionem, consociata cum Episcopis actione, apud moderatores Civitatis tueri;
8° exercere praeterea facultates et cetera explere mandata quae ipsi ab Apostolica Sede committantur.
Id.

44 Normae de promovendis ad episcopale ministerium in Ecclesia Latina, Acta Apostolicae Sedis, ianuarii 1972, at 386; René Metz, Papal Legates and the Appointment of Bishops, 52 Jurist 259, 259-84 (1992); Carlos Corral, Response to René Metz, 52 Jurist 285, 285-93 (1992).

45 See Vienna Convention on Diplomatic Relations and the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, April 18, 1961; Vienna Convention on Consular Relations, April 24, 1963, in Cardinale, supra note 25, at 393.

46 1983 Code c. 365. Canon 365:
§ 1. Legati pontificii, qui simul legationem apud Civitates iuxta iuris internationalis normas exercet, munus quoque peculiare est:
1° promovere et fovere necessitudines inter Apostolicam Sedem et Auctoritates Rei Publicae;
2° quaestiones pertractare quae ad relationes inter Ecclesiam et Civitatem pertinent; et peculiari modo agere de concordatis aliisque huiusmodi conventionibus conficiendis et ad effectum deducendis.
§ 2. In negotiis, de quibus in § 1, expediendis, prout adiuncta suadeant, Legatus pontificius sententiam et consilium Episcoporum dicionis ecclesiasticae exquirere ne omittat, eosque de negotiorum cursu certiores faciat.
Id.

47 1983 Code c.366. Canon 366:
Attenta peculiari Legati muneris indole:
1° sedes Legationis pontificae a potestate regiminis Ordinarii loci exempta est, nisi agatur de matrimoniis celebrandis;
2° Legato pontificio fas est, praemonitis, quantum fieri potest, locorum Ordinariis, in omnibus ecclesiis suae legationis liturgicas celebrationes, etiam in pontificalibus, peragere.
Id.

48 1983 Code c.367. Canon 367: “Pontificii Legati munus non exspirat vacante Sede Apostolica, nisi aliud in litteris pontificiis statuatur; cessat autem expleto mandato, revocatione eidem intimata, renuntiatione a Romano Pontifice acceptata.” Id. The same rule is confirmed by the special law on the vacancy of the See of Rome and the election of a new Pope. See Ioannes Paulus II, Constitutio apostolica Universi Dominici Gregis de Sede Apostolica vacante deque Romani Pontificis electione, Acta Apostolicae Sedis, aprilis 1996, at 305, 318 (more precisely para. 21: “Item non cessant Pontificiorum Legatorum munus et potestas.”).

49 Since its foundation, five future popes graduated from this academy: Clemens XIII (1758-1769), Leo XII (1823-1829), Leo XIII (1878-1903), Benedict XV (1914-1922) and Paul VI (1963-1978).

50 Sacrosanctum, supra note 38, para. 10.

51 Ioannes Paulus II, Constitutio Apostolica De Romana Curia Pastor Bonus, Acta Apostolicae Sedis, iunii 1988, at 841, art. 41 § 1, art. 46, § 3.

52 Cf. 1983 Code c.358.
Cardinali, cui a Romano Pontifice hoc munus committitur ut in aliqua sollemni celebratione vel personarum coetu eius personam sustineat, uti Legatus a latere, scilicet tamquam eius alter ego, sicuti et illi cui adimplendum concreditur tamquam ipsius misso specialis certum munus pastorale, ea tantum competunt quae ab ipso Romano Pontifice eidem demandantur.
[A cardinal to whom the Roman Pontiff entrusts the function of representing him in some solemn celebration or among some group of persons as a legatus a latere, that is, as his alter ego, as well as one to whom the Roman Pontiff entrusts the fulfillment of a certain pastoral function as his special envoy (missus specialis) has competence only over those things which the Roman Pontiff commits to him.]
Id.

53 For the text of this agreement, see Cardinale, supra note 25, at 391-92. The French original is as follows: “Règlement sur le rang entre les Agens diplomatiques, Annexe XVII à l'Acte du Congrès: Article IV - Les Employés diplomatiques prendront rang entre eux dans chaque classe, d'après la date de la notification officielle de leur arrivée. Le présent règlement n'apportera aucune innovation relativement aux représentans du Pape.”

54 Vienna Convention on Diplomatic Relations, April 18, 1961, in Cardinale, supra note 25, at 393.

55 Id. art. 16.

56 In Cyprus, the apostolic nuncio has the rank of pro-nuncio: he is ambassador, but is not the dean of the diplomatic corps.

57 Pio XI, Legge fondamentale dello Stato della Città del Vaticano, Acta Apostolicae Sedis, giugno 1929. Supplemento per le leggi e disposizioni dello Stato della Città del Vaticano 1-4 (1929) (Italy).

58 Giovanni Paolo II, Legge fondamentale dello Stato della Città del Vaticano, Acta Apostolicae Sedis, novembre 2000. Supplemento per le leggi e disposizioni dello Stato della Città del Vaticano 75-83 (2000) (Italy).

59 Id. art. 1.1. Il Sommo Pontefice, Sovrano dello Stato della Città del Vaticano, ha la pienezza dei poteri legislativo, esecutivo e giudiziario. Id.

60 Id. art. 1.2. Durante il periodo di Sede vacante, gli stessi poteri appartengono al Collegio dei Cardinali, il quale tuttavia potrà emanare disposizioni legislative solo in caso di urgenza e con efficacia limitata alla durata della vacanza, salvo che esse siano confermate dal Sommo Pontefice successivamente eletto a norma della legge canonica. Id.

61 Id. art. 2. La rappresentanza dello Stato nei rapporti con gli Stati esteri e con gli altri soggetti di diritto internazionale, per le relazioni diplomatiche e per la conclusione dei trattati, è riservata al Sommo Pontefice, che la esercita per mezzo della Segreteria di Stato. Id.

62 Id. arts. 3.1- 4.1.
Art. 3.1. Il potere legislativo, salvi i casi che il Sommo Pontefice intenda riservare a Se stesso o ad altre istanze, è esercitato da una Commissione composta da un Cardinale Presidente e da altri Cardinali, tutti nominati dal Sommo Pontefice per un quinquennio.
2. In caso di assenza o di impedimento del Presidente, la Commissione è presieduta dal primo dei Cardinali Membri.
3. Le adunanze della Commissione sono convocate e presiedute dal Presidente e vi partecipano, con voto consultivo, il Segretario Generale ed il Vice Segretario Generale.
Art. 4.1. La Commissione esercita il suo potere entro i limiti della Legge sulle fonti del diritto, secondo le disposizioni di seguito indicate ed il proprio Regolamento.
2. Per l'elaborazione dei progetti di legge, la Commissione si avvale della collaborazione dei Consiglieri dello Stato, di altri esperti nonché degli Organismi della Santa Sede e dello Stato che possano esserne interessati.
3. I progetti di legge sono previamente sottoposti, per il tramite della Segreteria di Stato, alla considerazione del Sommo Pontefice. Id.

63 Id. arts. 5.1- 14.
Art. 5.1. Il potere esecutivo è esercitato dal Presidente della Commissione, in conformità con la presente Legge e con le altre disposizioni normative vigenti.
2. Nell'esercizio di tale potere il Presidente è coadiuvato dal Segretario Generale e dal Vice Segretario Generale.
3. Le questioni di maggiore importanza sono sottoposte dal Presidente all'esame della Commissione.
Art. 6. Nelle materie di maggiore importanza si procede di concerto con la Segreteria di Stato.
Art. 7.1. Il Presidente della Commissione può emanare Ordinanze, in attuazione di norme legislative e regolamentari.
2. In casi di urgente necessità, egli può emanare disposizioni aventi forza di legge, le quali tuttavia perdono efficacia se non sono confermate dalla Commissione entro novanta giorni.
3. I1 potere di emanare Regolamenti generali resta riservato alla Commissione.
Art. 8.1. Fermo restando quanto disposto agli artt. 1 e 2, il Presidente della Commissione rappresenta lo Stato.
2. Egli può delegare la rappresentanza legale al Segretario Generale per l'ordinaria attività amministrativa.

Art. 9.1. Il Segretario Generale coadiuva nelle sue funzioni il Presidente della Commissione. Secondo le modalità indicate nelle Leggi e sotto le direttive del Presidente della Commissione, egli:
a) sovraintende all'applicazione delle Leggi e delle altre disposizioni normative ed all'attuazione delle decisioni e delle direttive del Presidente della Commissione;
b) sovraintende all'attività amministrativa del Governatorato e coordina le funzioni delle varie Direzioni.
2. In caso di assenza o impedimento sostituisce il Presidente della Commissione, eccetto per quanto disposto all' art. 7, No. 2.
Art. 10.1. Il Vice Segretario Generale, d'intesa con il Segretario Generale, sovraintende all'attività di preparazione e redazione degli atti e della corrispondenza e svolge le altre funzioni a lui attribuite.
2. Egli sostituisce il Segretario Generale in caso di sua assenza o impedimento.
Art. 11.1. Per la predisposizione e l'esame dei bilanci e per altri affari di ordine generale riguardanti il personale e l'attività dello Stato, il Presidente della Commissione è assistito dal Consiglio dei Direttori, da lui periodicamente convocato e da lui presieduto.
2. Ad esso prendono parte anche il Segretario Generale ed il Vice Segretario Generale.
Art. 12. I bilanci preventivo e consuntivo dello Stato, dopo l'approvazione da parte della Commissione, sono sottoposti al Sommo Pontefice per il tramite della Segreteria di Stato.
Art. 13.1. Il Consigliere Generale ed i Consiglieri dello Stato, nominati dal Sommo Pontefice per un quinquennio, prestano la loro assistenza nell'elaborazione delle Leggi e in altre materie di particolare importanza.
2. I Consiglieri possono essere consultati sia singolarmente che collegialmente.
3. Il Consigliere Generale presiede le riunioni dei Consiglieri; esercita altresì funzioni di coordinamento e di rappresentanza dello Stato, secondo le indicazioni del Presidente della Commissione.
Art. 14. Il Presidente della Commissione, oltre ad avvalersi del Corpo di Vigilanza, ai fini della sicurezza e della polizia può richiedere l'assistenza della Guardia Svizzera Pontificia.
Id.

64 Id. arts. 15.1- 19.
Art. 15. 1. Il potere giudiziario è esercitato, a nome del Sommo Pontefice, dagli organi costituiti secondo l'ordinamento giudiziario dello Stato.
2. La competenza dei singoli organi è regolata dalla legge.
3. Gli atti giurisdizionali debbono essere compiuti entro il territorio dello Stato.
Art. 16. In qualunque causa civile o penale ed in qualsiasi stadio della medesima, il Sommo Pontefice può deferirne l'istruttoria e la decisione ad una particolare istanza, anche con facoltà di pronunciare secondo equità e con esclusione di qualsiasi ulteriore gravame.
Art. 17. 1. Fatto salvo quanto disposto nell'articolo seguente, chiunque ritenga leso un proprio diritto o interesse legittimo da un atto amministrativo può proporre ricorso gerarchico ovvero adire l'autorità giudiziaria competente.
2. Il ricorso gerarchico preclude, nella stessa materia, l'azione giudiziaria, tranne che il Sommo Pontefice non l'autorizzi nel singolo caso.
Art. 18. 1. Le controversie relative al rapporto di lavoro tra i dipendenti dello Stato e l'Amministrazione sono di competenza dell'Ufficio del Lavoro della Sede Apostolica, a norma del proprio Statuto.
2. I ricorsi avverso i provvedimenti disciplinari disposti nei confronti dei dipendenti dello Stato possono essere proposti dinanzi alla Corte di Appello, secondo le norme proprie.
Art. 19. La facoltà di concedere amnistie, indulti, condoni e grazie è riservata al Sommo Pontefice.
Id.

65 Id. arts. 20.1- 20.3.
Art. 20.1. La bandiera dello Stato della Città del Vaticano è costituita da due campi divisi verticalmente, uno giallo aderente all'asta e l'altro bianco, e porta in quest'ultimo la tiara con le chiavi, il tutto secondo il modello, che forma l'allegato A della presente Legge.
Art. 20.2. Lo stemma è costituito dalla tiara con le chiavi, secondo il modello che forma l'allegato B della presente Legge.
Art. 20.3. Il sigillo dello Stato porta nel centro la tiara con le chiavi ed intorno le parole “Stato della Città del Vaticano”, secondo il modello che forma l'allegato C della presente Legge.
Id.

66 For a detailed overview, see Giovanni Barberini, Le Saint-Siège, Sujet souverain de droit international 10-20 (Cerf 2003). Also in American doctrine, one can find quite a few publications. By way of example, but without claiming a complete overview: C.G.

Fenwick, The New City of the Vatican, 23 Am. J. Int'l L. 371 (1929); Gordon Ireland, The State of the City of the Vatican, 27 Am. J. Int'l L. 271 (1933); Herbert Wright, The Status of the Vatican City, 38 Am. J. Int'l L. 452 (1944); Horace F. Cumbo, The Holy See and International Law, 2 Int'l L.Q. 603 (1949); Josef L. Kunz, The Status of the Holy See in International Law, 46 Am. J. Int'l L. 308 (1952); Yasmin Abdullah, The Holy See at United Nations Conferences: State or Church?, 96 Colum. L. Rev. 1835 (1996); Robert John Araujo, The International Personality and Sovereignty of the Holy See, 50 Cath. U. L. Rev. 291 (2001); Matthew N. Bathon, The Atypical International Status of the Holy See, 34 Vand. J. Transnat'l L. 597 (2001). See also Robert John Araujo & John A. Lucal, Papal Diplomacy and the Quest for Peace. The Vatican and International Organization from the Early Years to the League of Nations (Sapientia Press 2004).

67 G. Arangio Ruiz, Sulla personalità internazionale della Santa Sede, Rivista di diritto pubblico e della pubblica amministrazione in Italia 423 (1925).

68 A.C. Jemolo, Sulla personalità internazionale della Santa Sede, Rivista di diritto pubblico e della pubblica amministrazione in Italia 428 (1925).

69 Roland Minnerath, l'Église et les États concordataires (1846-1981), la souverainete spirituelle 65, 65-81 (Cerf 1983) (1978).

70 Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097 (“Article 1. The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”).

71 Malcolm N. Shaw, International Law 172 (Cambridge Univ. Press 3d ed. 1991) (1947).

72 Ian Brownlie, Principles of Public International Law (Clarendon Press 4th ed. 1990) (1966).

73 Patrick De Pooter, Les Vassaux du Christ: de Jérusalem aux confines de la terre ou le statut de l'Ordre de Malte selon le droit international public, Apollinaris 221, 221-45 (1995) (Fr.).

74 Rebecca M.M. Wallace, International Law: A Student Introduction 77, 77-78 (Sweet & Mawell 3d ed. 1997).

75 P.H. Kooijmans, Internationaal publiekrecht in vogelvlucht 38 (Kluwer 2002).

76 Cardinale, supra note 25, at 101; G. Arangio-Ruiz, On the Nature of the International Personality of the Holy See, Belgisch Tijdschrift voor Internationaal Recht 354, 354-69 (1996).

77 The following countries have diplomatic relations with the Holy See: Albania; Algeria; Andorra; Angola; Antigua and Barbuda; Argentina; Armenia; Australia; Austria; Azerbaijan; The Bahamas; Bahrain; Bangladesh; Barbados; Belarus; Belgium; Belize; Benin; Bolivia; Bosnia and Herzegovina; Brazil; Bulgaria; Burkina Faso; Burundi; Cambodia; Cameroon; Canada; Cape Verde; Central African Republic; Chad; Chile; China; Colombia; Democratic Republic of Congo; Republic of Congo; Cook Islands; Costa Rica; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Djibouti; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Equatorial Guinea; Eritrea; Estonia; Ethiopia; Fiji; Finland; France; Gabon; Gambia; Georgia; Germany; Ghana; Greece; Grenada; Guatemala; Guinea; Guinea-Bissau; Guyana; Haiti; Honduras; Hungary; Iceland; India; Indonesia; Iran; Iraq; Ireland; Israel; Italy; Ivory Coast; Jamaica; Japan; Jordan; Kazakhstan; Kenya; Kiribati; Republic of Korea; Kuwait; Kyrgyzstan; Latvia; Lebanon; Lesotho; Liberia; Libya; Liechtenstein; Lithuania; Luxembourg; Former Yugoslav Republic of Macedonia; Madagascar; Malawi; Mali; Malta; Marshall Islands; Mauritius; Mexico; Federated States of Micronesia; Moldova; Monaco; Mongolia; Republic of Montenegro; Morocco; Mozambique; Namibia; Nauru; Nepal; The Netherlands; New Zealand; Nicaragua; Niger; Nigeria; Norway; Pakistan; Palau; Panama; Papua New Guinea; Paraguay; Peru; Philippines; Poland; Portugal; State of Qatar; Romania; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Samoa; San Marino; Sao Tome and Principe; Senegal; Seychelles; Sierra Leone; Singapore; Slovakia; Slovenia; Solomon Islands; South Africa; Spain; Sri Lanka; Sudan; Surinam; Swaziland; Sweden; Switzerland; Syria; Tajikistan; Tanzania; Thailand; Republic of Timor East; Togo; Tonga; Trinidad and Tobago; Tunisia; Turkey; Turkmenistan; Uganda; Ukraine; United Kingdom; United States of America; Uruguay; Uzbekistan; Vanuatu; Venezuela; Yemen; Yugoslavia; Zambia; Zimbabwe.

78 George Barany, A Note on the Prehistory of American Diplomatic Relations with the Papal States, 47 Cath. Hist. Rev. 508, 508-13 (1961-1962); Martin Hastings, United States-Vatican Relations, Records of the American Catholic Historical Society of Philadelphia 20, 20-55 (1958); Thomas J. Reese, Diplomatic Relations with the Holy See, Am. 215, Mar. 16, 1985; Thomas J. Reese, Three Years Later: U.S. Relations with the Holy See, Am. 29, Jan. 17, 1987. See also Am. United for Separation of Church and State v. Ronald W. Reagan, 607 F. Supp. 747 (E.D. Penn. 1985). The case was before the United States District Court for the Eastern District of Pennsylvania after the United States and the Holy See decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America, and Nunciature on the part of the Holy See, as of 10 January 1984. Plaintiffs claimed that such relations violated the First Amendment because "the arrangement (a) establishes a formal relationship with a church, (b) amounts to a preference of one church over all other churches, (c) provides special benefits to one church to the detriment of all others, (d) produces excessive entanglement of the government in church affairs and vice-versa, and (e) creates religious divisiveness." Plaintiffs' Complaint and Plaintiffs' First Amendment Complaint were dismissed. Id.
According to the U.S. government, although the Holy See is part of the Catholic Church, it is also the sovereign authority of Vatican City, a state with international character, and the U.S. diplomatic relations with the Holy See are with it as sovereign of Vatican City and not with it as head of the Catholic Church. One can wonder whether this interpretation, in itself very practical to face allegations of violation of the First Amendment, could be accepted by experts in international law, let alone by the Holy See.

79 The Holy See is a member of the International Atomic Energy Agency in Vienna, a member of the Organization for the Prohibition of Chemical Weapons in The Hague and an Observer to the United Nations Organization in New York, Geneva and Vienna. For a complete list, see Kurt Martens, De paus en zijn entourage 169, 169-71 (Davidsfonds 2003).

80 The Holy See is a member, also in the name and on behalf of Vatican City State, of the European Conference of Postal and Telecommunications Administrations (CEPT). For a complete list, see Martens, supra note 78, at 169-71.

81 John Paul I, Allocution to the Diplomatic Corps Accredited to the Holy See of 31 August 1978, Acta Apostolicae Sedis, augusti 1978, at 706-07.
Certes, dans l'éventail des postes de diplomates, la fonction qui est ici la vôtre est sui generis, comme le sont la mission et la compétence du Saint-Siège. Nous n'avons évidemment aucun bien temporel à échanger, aucun intérêt économique à discuter, comme en ont vos États. Nos possibilités d'interventions diplomatiques sont limitées et particulières. Elles ne s'immiscent pas dans les affaires purement temporelles, techniques et politiques, qui relèvent de vos Gouvernements. En ce sens, nos Représentations diplomatiques auprès des plus hautes Autorités civiles, bien loin d'être une survivance du passé, témoignent à la fois de notre respect pour le pouvoir temporel légitime, et de l'intérêt très vif porté aux causes humaines que ce pouvoir est destiné à promouvoir. De même, vous êtes ici les porte-parole de vos Gouvernements et les témoins vigilants de l'oeuvre spirituelle du Saint-Siège. Des deux côtés, il y a présence, respect, échange, collaboration, sans confusion des compétences.
Id.

82 For an analysis of the concordats, concluded during the pontificate of John Paul II, see Joël-Benoît d'Onorio, La diplomatie concordataire de Jean Paul II, in d'Onorio, supra note 37, at 251-301.

83 Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Vatican City State and, on its behalf, the Holy See. Council Monetary Agreement (EC) No. 299/2001 of 25 Oct. 2001, 2001 O.J. (C 299) 1, 1-4.

84 G.A. Res. 58/314, U.N. Doc. A/RES/58/314 (Jul. 16, 2004).

85 Id.

U.S. PAPAL VISIT
SEPTEMBER 22-27, 2015

Cape May backs away from Pope Francis broadcast

Story Comments Print Font Size:

Posted: Tuesday, September 15, 2015 9:21 pm

NICOLE LEONARD Staff Writer

CAPE MAY — The city of Cape May has backed out of plans to sponsor a live stream of an upcoming papal Mass, but the show will go on.

City officials and Americans United for Separation of Church and State, a legal and educational group based in Washington D.C., resolved a dispute over the city's plans to broadcast Pope Francis' public Mass in Philadelphia on Sept. 27.

"The city attorney sent us a letter yesterday that confirmed the city would no longer be a sponsor of the event and will no longer be distributing tickets at City Hall," said Alex Luchenitser, Americans United's associate legal director.

Americans United complained to officials Sept. 10 that the city's sponsorship of the papal Mass broadcast at Cape May Convention Hall was in violation of the U.S. Constitution, which prohibits government bodies from taking any action that communications a message of endorsement of religion.

The group threatened to file a lawsuit against city officials if they did not amend their plans.

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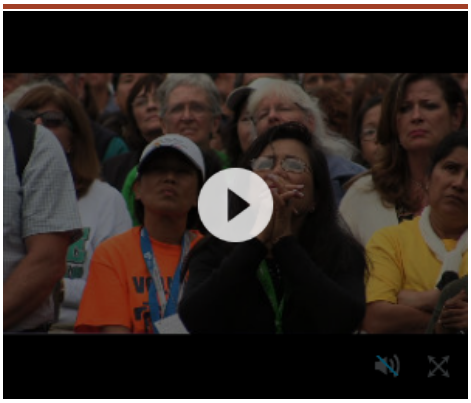

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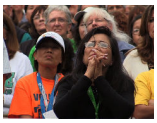

The group gave the city until Tuesday to consider its recommendations, which included disassociating itself from the event, finding an outside sponsor and charging the regular rental rate at Conventional Hall.

Cape May Mayor Edward J. Mahaney Jr. said the Cape May Ministerium, a group of clergy members representing churches of different denominations in the greater Cape May area, will now be the sole sponsor of the event. Tickets will still be available for the 4 p.m. Sunday Mass at Convention Hall and Cape May churches.

Regarding the rental charges for the venue, Anthony Monzo, Cape May's attorney, said last week that the event should remain free. Informational and education nonprofit events held in the past at Convention Hall, which is funded by taxpayers, have been free of charge, regardless of religious affiliation.

Monzo submitted a list of such events to Americans United and Luchenitser said he thought it satisfied concerns about the papal Mass being a free event.

"There's no need for litigation, but we'll continue watching the situation to make sure the city lives up to its word and continues to remain separate from the sponsorship of the event," he said.

Mahaney said he and the city appreciated the support of the papal broadcast from city residents, business owners and local organizations. He expects there will be a large crowd for the event.

Pope Francis' visit to the United States begins Sept. 22 in Washington and will continue to New York City and Philadelphia in the following days. With less than two weeks to the pope's arrival, Luchenitser said, the group will be on the lookout for any more issues.

"Sometimes government bodies might be about to commit constitutional violations because they might not be fully aware of what the law is," he said. "We'll continue to monitor what other cities are doing in regards to the pope's visit and continue to be on the lookout for violations of separation of church and state."

Contact: 609-272-7022 NLeonard@pressofac.com Twitter @ACPressNLeonard

Posted in Pope francis, News, Breaking, Press, Cape may on *Tuesday, September 15, 2015 9:21 pm.*

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Janice Rael

This is a victory for the First Amendment and for the protection of our religious freedom. The government must remain neutral on matters concerning religion and faith. Thank you Americans United for your help in guiding Cape May to remain neutral regarding celebrating the Pope's Mass.

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Kenny Leary · Cable Tech at XFINITY

Just goes to show you how messed up the govermment is. Broadcasting such an event is NOT violation of the US Constitution. Separation of Church and State is not and never was meant to be what these clowns are saying it is. Broadcast of a historical event is NOT an official endorsement of religion. I bet you if it was some leader promoting an Episcopal gay 'wedding with communion service' they would all be falling over backwards to broadcast it.

Like · Reply · 2 · Sep 16, 2015 5:55am

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Ensuring separation of church, state

M. Kelly Tillery in Logan Square. Tilley in 1979 started a lawsuit over the use of public funds to build a stage for John Paul's Mass in Logan Square. (CLEM MURRAY / Staff Photographer)

GALLERY: PopeJohn Paul II in Philadelphia. The city fought the suit...

By Julia Terruso, Inquirer Staff Writer

POSTED: July 27, 2015

M. Kelly Tillery was a 24-year-old recent Penn law graduate in September 1979 when he heard Mayor Frank Rizzo announce on the evening news that he would build a huge cylindrical platform atop Logan Square, for Pope John Paul II to say Mass.

Tillery couldn't believe what he was hearing. By funding the platform for a Mass, Rizzo wasn't separating church and state - he was marrying them.

Tillery stayed up all night drafting a federal lawsuit against Philadelphia over what he considered its blatant violation of the First Amendment's Establishment Clause.

"I had just read every First Amendment Supreme Court case ever issued," Tillery, now 60, said. "I could not believe a mayor of a modern American city would have the audacity to say something so clearly unconstitutional. He basically said, 'I'm going to build an outdoor church for my pope.' "

Not only did Rizzo say it - he paid it. The city dished out $205,569 ($675,710 in 2015 dollars) for the stage, its decorations, and a 30-foot-high cross, now at St. Charles Borromeo Seminary.

Tillery, now a partner at Pepper Hamilton L.L.P. specializing in intellectual-property law, is still known by friends as "the man who sued the pope." That's not quite accurate - he passed the case on to the American Civil Liberties Union - but his story reaffirms some of the reasons September's visit by Pope Francis will not come at taxpayers' expense.

City officials provide assurances that the estimated $45 million in expenses for the papal event will be paid by the World Meeting of Families Philadelphia 2015 - covering all religious and nonreligious aspects of the visit.

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"The city is not sharing costs. We will present a bill to the World Meeting of Families, which has a plan for the events," city spokesman Mark McDonald said. He said that bill would include costs incurred for police, fire, the Office of Emergency Management, Streets (both Sanitation and Transportation), Parks and Recreation, L&I, Health, Water, Fleet, Public Property, and Information Technology.

Ken Gavin, spokesman for the Archdiocese of Philadelphia, confirmed that no public money would finance the papal event. The archdiocese has partnered with the World Meeting of Families.

"The WMOF entity is responsible for bearing the burden of all costs associated with the events," Gavin said. That includes all security costs. The event is a National Special Security Event, but that designation does not include any federal funding, he said.

The Philadelphia Convention and Visitors Bureau estimates the city's economic benefit at $418 million from the World Meeting and the papal appearances.

Tillery's first draft of the lawsuit, typed out on 81/2-by-14-inch paper, landed in the hands of Hilda Silverman, the then-director of the ACLU and a tireless Middle East peace activist. Silverman died in 2008.

Tillery couldn't lead the legal challenge himself; he still was awaiting the results of his bar exam. And besides, he had another reason to distance himself - a job offer waiting at Obermayer Rebmann Maxwell & Hippel L.L.P. - where one of the senior partners was Martin Weinberg, former city solicitor under Rizzo.

Thirty years later, the case is still legendary at the ACLU Philadelphia office, where a new generation of attorneys now works.

"It was a really egregious thing at the time and it was a total snub to the populace," said Mary Catherine Roper, the current legal director of the ACLU of Pennsylvania. She wasn't working at the agency in '79 but is familiar with the case.

"The problem wasn't that the city spent money on the pope's visit but that the city spent money specifically to build him a platform to say Mass - no one has suggested that anything remotely like that is happening this time," she said.

Pope Francis is expected to say Mass on an elaborate, canopied altar built on Eakins Oval at the base of the Art Museum. The evening before, that space will serve as a stage for the Festival of Families entertainment.

The first step in the lawsuit proceedings was finding a plaintiff. Silverman turned to her friend and neighbor Susan Jane Gilfillan, a high school anthropology teacher from Minneapolis who had moved to the city three years earlier. Gilfillan agreed to sue, along with a second taxpayer, the Rev. Mary Anne Forehand, in what would be known as *Gilfillan v. the City of Philadelphia*.

Gilfillan, then 37, refers to herself as a "fallen Catholic," and said that growing up with people from all religions inspired her to get involved.

"I was raised Catholic, went to public high school where we had Lutherans, all kinds of Protestants, some Greek Orthodox kids, a few Jewish kids - we didn't go after each other or argue about religion, we sort of just compared."

A lifelong activist, Gilfillan, now 74, was a teacher during the Vietnam War and pushed back on a principal who wanted to mandate the singing of the national anthem every morning. She taught evolution when parents were pulling their students out of the course for religious reasons. And she has since fought the city of Philadelphia on zoning issues in Germantown, where she lives with her husband and son.

The city didn't just push back on the lawsuit - it fought tooth and nail, spending hundreds of thousands of dollars in legal fees to defend the cost of the altar. There was public outcry on both sides. Silverman, of the ACLU, told newspapers at the time that she had received death threats.

The city argued the stage was included in event-planning costs related to logistics and security for a dignitary or head of state. It kept the pope visible and safe. What's more, the city argued, many of the things on the stage - from flowerpots to candles - could be reused for secular purposes.

"I don't think their intentions were to violate a law; they just wanted a great, first-class event in Philadelphia," said former Councilman Frank Rizzo Jr., who recalled watching with his father as Pope John Paul II celebrated Mass. "I think the decision was made more for the sake of the event than religious reasons. My dad was very, very proud."

Washington also hosted John Paul during his 1979 U.S. visit. The Archdiocese of Washington paid for the $400,000 platform erected there.

The case was heard in U.S. District Court and the U.S. Court of Appeals for the Third Circuit; both courts found the city's action was "public sponsorship of a religious service." The city appealed to the U.S. Supreme Court, which declined to take the case. The archdiocese reimbursed the city for the cost of the altar.

This time is different from 1979.

"Here we have a circumstance 30-plus years later, in which we have a different mayor, we have a different pope, we have a different head of the archdiocese," Tillery said. "Hopefully all of us have learned from that experience back in 1979."

Tillery's work in intellectual-property law has led him to represent musicians ranging from Black Sabbath to Madonna. From his office at 18th and Arch, where a portrait of Abraham Lincoln hangs, he can almost peer down at Logan Square.

When it was announced that Pope Francis would visit Philadelphia, Tillery wrote a letter to Mayor Nutter, enclosing a narrative of the 1979 lawsuit he wrote for Philadelphia Lawyer magazine.

Tillery went to Jesuit High School in New Orleans, but when asked if he is Catholic, he quotes his hero: "I, like Abraham Lincoln, have never belonged to any church."

Tillery said that if city officials say the city will be reimbursed for expenses from the Pope Francis events, he believes them. But he hopes there will be some independent audit to guarantee the payments. "There should be some independent look at this to ensure

the right thing is being done," he said. "This is going to be a remarkable event, but the First Amendment has been around a long time. Someone ought to be watching."

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6 • Share ›

r a leon ➚ puma.will.pounce • 2 months ago
So much hatred and so little time.
2 • Share ›

Charliefog ➚ r a leon • 2 months ago
It is unreal how much hatred they have
• Share ›

DrBri ➚ Charliefog • 2 months ago
...hatred they have. Stop it! Be kinder in speaking to the needy followers of false gods.
1 • Share ›

r a leon ➚ puma.will.pounce • 2 months ago
You are ignoring this Pope's reform efforts. It will take time to clean up the dirty laundry.
• Share ›

Charliefog ➚ puma.will.pounce • 2 months ago
They are free thinkers because they read the "book". Lolololollo
• Share ›

mg3212 • 2 months ago
Tillery, you are a national treasure. Thank you for all your hard work here! We need more people like you in this world!
22 • Share ›

DocPhilly ➚ mg3212 • 2 months ago
His resemblance to the "Feral Kid" in the "Mad Max" movie is really uncanny ...google it, its worth it.
9 • Share ›

fightins4ever ➚ DocPhilly • 2 months ago
Erik Arneson sans glasses.
• Share ›

Johnny Domino ➚ fightins4ever • 2 months ago
A typical lawyer, but I thought he was great in "Mask".
2 • Share ›

dennis mitchell ➚ mg3212 • 2 months ago
Tillery is a real strapper, the founding fathers thought process was basic, the government cannot force citizens into a religion of its choice! The founding fathers came from England where citizens were forced into the Church of England. Here it is as written, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; People like Tillery manipulate the Constitution so it jives with their warped thinking!
11 • Share ›

dennis mitchell ➚ dennis mitchell • 2 months ago
So in the warped minds of the left, no religion should be allowed to hold a convention at the Pennsylvania Convention Center because this center was built with tax-payer dollars!
5 • Share ›

Well_Read ➚ dennis mitchell • 2 months ago
that's silly. as long as the convention center doesn't turn down other religions and atheists for the same use, it's fine.
10 • Share ›

dennis mitchell ➚ Well_Read • 2 months ago
Silly? Yes it's silly that's my point! But in the minds of leftist like Tillery, this is

what they believe, anything associated with government or tax payers money is illegal if religion is involved! The tax payers own the Convention Center

1 · Share ›

deerintheheadlights ➚ dennis mitchell · 2 months ago

Wrong. First off, you don't know Tillery so you have no idea what his personal beliefs are. Second, from a constitutional law perspective a government owned and operated building used for a variety reasons, which may include hosting a religious event, is completely distinct from the government specifically funding a religious event. Jesus Christ, how do rightists not see the difference?

11 · Share ›

dennis mitchell ➚ deerintheheadlights · 2 months ago

I bet the house Tillery is a left winger it is what he does for a living Take a hike lib

2 · Share ›

deerintheheadlights ➚ dennis mitchell · 2 months ago

Haha. I'm a Republican, but I'm also educated. Which means, unlike you apparently, I understand that there are constitutional law justifications for the lawsuit brought by Tillery. See what you perhaps you aren't seeing is the fact that when lawsuits like this are brought not only do they benefit the parties to the litigation, but they also benefit the whole of society to ensure that all rules of law are applied neutrally.

From your other posts I gather you are a god-fearing Catholic, but yet you pass judgment on those for beliefs you don't agree with. I thought judgment of others was reserved for your maker. You're a hypocrite and it sounds like a bad Catholic. And I'll take a leap here. My guess is that if Mayor Nutter decided he was going to use city funding to build a stage specifically used for an Islamic religious event you would be citing the same exact constitutional law principles that Tillery cited back in his 1970s (or 80s, whatever the case may be) litigation. Because of an attorney like Tillery you would be entitled to do that. Jesus Christ!

7 · Share ›

quercus ➚ deerintheheadlights · 2 months ago

Great points, thanks. Seems like a number of folks on this forum don't understand the Establishment Clause, both it's execution and complex implications. I'm no legal expert, and I know there's a BIG interpretive reality, but certain cases are cut & dry, like Mayor Rizzo funding a Vatican event with Philly taxpayer $$$.

Here's a case of "unintended consequences" in the state of Oklahoma, regarding a Ten Commandments statue on state grounds: the "Satanic Temple" was ready to fight for installation of a "Baphomet " sculpture, a goat-headed deity, with adoring children at his side, a la Norman Rockwell. When OK Supreme Court withdrew justification for the 10 C's, Satanic Temple withdrew Baphomet plans.

Now, the debate has moved to Arkansas, with 10 C's statue firmly rooted (for now anyway) on state grounds. In addition to the Satanic Temple's proposal to put Baphomet on AK state grounds, now Hindus & vegans are joining the fray.

Soon, AK will have to knock down half their Capital building, to make way for an expansive sculpture garden....

4 · Share ›

christine ➚ deerintheheadlights · 2 months ago

Stop with the 'passing judgement' canard. We all pass judgement, like passing gas. Looking down your nose on others and thinking you are better than them- that's a no-no.

Not only do we pass judgement -but there are times when 'fraternal correction' is necessary. We are not to stand by and watch someone make a grave error.

· Share ›

i_smell_pie ➚ deerintheheadlights · 2 months ago

Don't be smug about your "education." Just because someone isn't

knowledgeable about one thing doesn't mean he or she isn't knowledgeable about something else. I'm educated in history and can probably teach someone a thing or two about it, but if you ask me about nuclear physics, I'll show you nothing but a stoner face. Don't be a jerk.

Share ›

Vincent Gaitley deerintheheadlights · 2 months ago

Except that Philadelphia could argue that the pope is a foreign head of state, and the platform is a necessary convenience for his speech and public safety. That he says Mass on it too is just coincident to his visit. And as a guest in the nation, the pope's free exercise of his religion cannot be stopped. That keeps it nice and secular. Besides, the City can show a financial gain, perhaps enough to offset any expenses.

Share ›

dennis mitchell deerintheheadlights · 2 months ago

You are as Republican as Arlen Spector, keep tooting your own horn, it shows how uneducated you are Now beat it, you are so boring

Share ›

Charles Darwin dennis mitchell · 2 months ago

"You're as republican". Learn basic grammar before calling people uneducated.

5 Share ›

dennis mitchell Charles Darwin · 2 months ago

Oh look a liberal English major hahaha beat it monkey boy dope

Share ›

Charles Darwin dennis mitchell · 2 months ago

You also spelled "Specter" wrong.

Share ›

quercus Charles Darwin · 2 months ago

Hey, aren't you the darn troublemaker that started all this darn church and state stuff with yer monkey theories?

Share ›

Boots! dennis mitchell · 2 months ago

If this story was about tax money spent on a Muslim event you would have flown into a self righteous rage railing against the idea.

1 Share ›

middleoftheroader065 deerintheheadlights · 2 months ago

Because they choose to remain deliberately ignorant. To become factually informed takes them out of the right wing media induced mental and emotional comfort zone they need to be in, in order to survive in a country and a world that is changing around them.

1 Share ›

dennis mitchell middleoftheroader065 · 2 months ago

The left chooses to interpret the laws of this land to their agenda so call me ignorant because the left doesn't give a crap about what is moral and right. Now Beat it lefty

1 Share ›

obender79 deerintheheadlights · 2 months ago

They're dumb. They believe in religion.

Share ›

dennis mitchell deerintheheadlights · 2 months ago

So in your thought process I can hold a religious event in City Hall maybe the courthouse etc etc etc without some leftist nut filing a lawsuit to stop me. Yeah

courthouse etc etc etc without some leftist nut filing a lawsuit to stop me. Yeah right dude

Share ›

Alan Turner ➚ dennis mitchell • 2 months ago

Sure, the taxpayers own the Convention Center. And anyone who wants to use it has to pay the rent. And the mayor doesn't get to use the city's money to fit it out for for his favorite, charity, church, or band event, either.

1 Share ›

deerintheheadlights ➚ dennis mitchell • 2 months ago

Your taking the thought a step too far. There is a major difference between the two. Relax with the lefty, right stuff. That too is unrelated.

9 Share ›

dennis mitchell ➚ deerintheheadlights • 2 months ago

This is all the work of left my man

3 Share ›

Boots! ➚ dennis mitchell • 2 months ago

Any group can rent the PCC as long as the have the money. That is the purpose of convention centers.
That is different than this story where government tax money was spent on a religious group.

Share ›

SteveMG ➚ dennis mitchell • 2 months ago

You're missing the point, or more likely, warping it. The article above makes it obvious that the structure the city was building years ago was an altar. The Convention Center is not an altar. If somebody wants to rent it for the purpose of holding a religious service, they're welcome to. It isn't that unusual.

Share ›

Ronnie Rayguns ➚ dennis mitchell • 2 months ago

So the government should not spend taxpayer money to build a stage, choke the streets of Philly with plastic pope idols and sponsor a religion? I agree with you. Good point dennis. If a private group wants to spend the money they are welcome to.

1 Share ›

ed wasterfield ➚ mg3212 • 2 months ago

Lawyers are not national treasures. Caitlyn Jenner is a national treasure.

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Saint_Barry ➚ ed wasterfield • 2 months ago

Meek Mill is a national treasure.

Share ›

KDH ➚ mg3212 • 2 months ago

If anybody thinks city money is not paying for the upcoming visit they are out of their minds. The city just reaps the benefit of $418 mil into their coffers? Come on. I am a practicing Catholic, and do think the Pope coming to Philly is terrific. But I'm also a realist. To put this guy Tillery out there as a national treasure or even somebody who brought any sort of justice after JPII's visit in '79.. all he did was make a name for himself (kudos).

Share ›

James Badley ➚ KDH • 2 months ago

Too bad big Frank didn't whip this little boy Tilley with his old night stick.

1 Share ›

Alan Turner ➚ James Badley • 2 months ago

He tried to, and wound up costing the city more than it spent on building an altar for the Pope.

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quercus James Badley · 2 months ago
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It's comedy. SOmetimes you just have to laugh.
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Charliefog Guest · 2 months ago
Because who better to understand the hypocrisy of the Catholic Church than a reformed catholic?
19 · Share ›

StevieToo Charliefog · 2 months ago
Here, here.
8 · Share ›

gjd741 StevieToo · 2 months ago
It's true the most virulent anti-Catholic bigotry comes from lapsed Catholicss. My experience is that most of them seem to have gaps in what they believe about The Church. For example, a few that I've run in with seem to believe The Church is an abusive parent bullying them into behavior they don't want to comply with. Those are the ones who forget The Church's mission is to help teach us how to best LOVE God and each other. St. Paul makes an anaology about Christianity being similar to training for a race or a boxing match. That is to say there are certain things to do that help you reach peak form. If you want to be a less than best version of yourself, by all means go it alone. You probably won't finish the race and win the crown. Just remember God gaves you the freedom to choose & you chose to spend your life being upset about how somebody was mean to you when you were 10YO or how somebody asked you to do something you didn't like
6 · Share ›

StevieToo gjd741 · 2 months ago
I have NO intentions of challenging your beliefs, I respect them.
Freedom of choice; God is Omnificent and Omnipotent therefore he knows all and is in power of all. He knows what you are going to do before you do it. So why did he allow humanity (his creation) to follow a path of destruction when he KNEW it would happen? (Hitler just on example)
Why does he selectively intervene: destroying Sodom and Gomorra, telling Noah to build an ark, enlisting Moses to challenge the Egyptians...too many other contradictions to cite. And why did he allow the papacy to degenerate Pope Leo 10h is just one example.
And finally why would he create a world and life form that biblical prophecy (his book) tells us he will destroy three times?.
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Wok StevieToo · 2 months ago
Well said. I knew we'd eventually become allies on an issue.

The most interesting thing of all is how many righties fear Sharia Law in the US yet don't like the concept of separation of church and state.
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Outside the 69th Street Transportation Center. (APRIL SAUL/Staff)

Laura McCrystal, *INQUIRER STAFF WRITER* *lmccrystal@phillynews.com*
610-313-8116 @Lmccrystal

LAST UPDATED: Thursday, September 24, 2015, 5:53 PM

Mayor Nutter had good news for Philadelphia taxpayers this week when he announced the city will be reimbursed for the estimated $12 million cost of hosting the pope.

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Our comprehensive guide on navigating the Pope's visit in Philly.

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- **Papal zone towing, deadlines**

The Inquirer

Suburban taxpayers might not be as fortunate.

Officials said costs for emergency operations and police overtime could total hundreds of thousands of dollars in Lower Merion Township, where the pope will stay, and in townships where thousands of visitors will board SEPTA trains to Center City.

"For the last five months we were asked to be regional partners," said Upper Darby Mayor Tom Micozzie. "You're a regional partner up to the point where [Mayor Nutter] sits at the table and negotiates $12 million for the city."

After hearing this week about the city's contract with the World Meeting of Families, which is putting on the papal events, Micozzie sent a letter to the organization asking if Upper Darby also could be reimbursed for its expenses – which he estimates could be as much as $250,000.

The township will be affected by road closings, and a regional rail station, Primos, and the 69th Street Transportation Center, will be in use during the weekend.

Micozzie said he has not received a response.

Costs could be even greater in Lower Merion, where Pope Francis is staying at St. Charles Borromeo Seminary.

No estimate has been totaled for the township, said spokesman Thomas Walsh, but police overtime alone will likely cost more than $115,000.

Walsh said Lower Merion is honored to host the pope, but officials have notified the World Meeting of Families that they will send an invoice after Pope Francis leaves.

"It's much different than say a presidential visit, when he's in an out of here in a number of hours," Walsh said. "This is a little unprecedented. So it's difficult to figure out where to recoup the money, but there will be a very good effort to do so."

Several municipalities in the Philadelphia region have declared local states of emergency for the weekend. That designation allows them to make emergency purchases without going through bidding processes, said Ruth Miller, spokeswoman for the Pennsylvania Emergency Management Agency. But a declaration of emergency does not come with government aid.

Montgomery County will seek reimbursement for expenses if possible, according to spokesman Frank Custer. But Custer said the county has not yet identified any funding source from which to seek repayments.

Delaware County officials estimated its municipalities will spend hundreds of thousands of dollars this weekend on overtime, road signs, and other expenses.

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"We have encouraged local governments to track their additional costs in the event that subsequent federal, state, or event financial assistance becomes available," Delaware County Councilman John McBlain said in a statement.

Some municipalities may spend less than initially expected; officials scaled back their plans when SEPTA did not sell all of its train passes.

Officials in Middletown Township, Bucks County, had planned to pay police officers overtime to set up overnight Friday around the Woodbourne Station. But after learning that fewer than half the 10,000 available train passes were sold for each day, police Chief Joseph Bartorilla changed his plans.

"We're going to have additional officers working," he said. "But we're not going to know the total cost until after the weekend and because we're really going to make a lot of game time decisions."

Laura McCrystal
INQUIRER STAFF WRITER lmccrystal@phillynews.com
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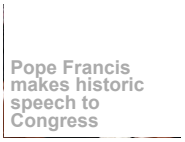
Signe sketches the Pope's visit


Philadelphia prepares for Pope Francis' visit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What will the pope's visit cost the American public?

Two men paint a mural of Pope Francis on the wall of a New York high-rise building. Some of the costs of the papal visit will be picked up by event organizers, but the federal government is expected to cover most of the security expenses. (Jewel Samad | AFP/Getty Images)

By Ted Sherman | NJ Advance Media for NJ.com
Email the author | Follow on Twitter
on September 21, 2015 at 8:07 AM, updated September 21, 2015 at 4:55 PM

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NEW YORK—Hosting a pope is no cheap date.

With an itinerary that includes **three cities in six days,** the upcoming papal visit to the United States will mean huge logistical and security costs. Philadelphia plans to be all but locked down for the two days Pope Francis is in the City of Brotherly Love. New York and Washington are imposing their own restrictions, along with a heavy police presence from Central Park and the United Nations to Capitol Hill.

Some of the costs of the pope's visit will be covered by event organizers and donations.

But like any national security event—such as the visit of a president, or a high profile game like the Super Bowl—taxpayers will be picking up the

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Train traffic higher on 2nd day of Pope Francis' visit, but no problems with mass exodus

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Two men paint a mural of Pope Francis on the wall of a New York high-rise building. Some of the costs of the papal visit will be picked up by event organizers, but the federal government is expected to cover most of the security expenses. (Jewel Samad | AFP/Getty Images)

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rest.

Mark McDonald, a spokesman for Philadelphia Mayor Michael Nutter, said the city has no estimates yet on its costs, but expects to have much of it covered by the **World Meeting of Families**—the worldwide triennial convention of Catholic families being held in Philadelphia this year—as well as the federal government.

"We will present a bill to the WMOF based on our costs," said McDonald.

A WMOF-Philadelphia spokeswoman said they have a goal to raise $45 million.

"This figure covers a wide range of costs, from infrastructure, to scholarships for socioeconomically challenged dioceses to attend, to the printing of an official program book," said Meg Kane. "This goal also includes costs of certain services, which will be provided by the City of Philadelphia."

While they continue planning with the city, she said it was too early to provide an estimate. "What we can say is that we continue to move positively toward our fundraising goal," Kane said.

Federal assistance

Because the visit is designated a national special security event by the U.S. Department of Homeland Security, some security funding is expected to be provided through federal grants from the department as well as the U.S. State Department.

Heads of state and other high-ranking visiting dignitaries to the United States are afforded protection by the United States government through state and local authorities in the cities visited, which is typically reimbursed through the State Department's Protection of Foreign Missions and Officials legislation, officials said.

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In New York, the pope plans to visit the site of Ground Zero in Lower Manhattan. But the Port Authority of New York and New Jersey, which spent $100,000 in police overtime this year to provide security for President Obama's trips to the city, had no estimates for its costs for the papal visit. A spokesman for the Port Authority referred all questions to the Vatican and the Secret Service.

The New Jersey State Police is anticipating added costs for the visit as well.

Representatives of various law enforcement agencies, and the National Guard, gather downtown at Police Headquarters New York for security preparations surrounding the upcoming visit of Pope Francis at the NYPD's Joint Operations Center. (AP Photo/The New York Times, Chang W. Lee, Pool)

"Even though this is on the Philly side, we know that it will have a large impact on South Jersey," said Capt. Stephen Jones, a State Police spokesman. "We will certainly have all hands on deck, specifically on Sunday, when we also have a high- profile football game at MetLife Stadium." The Eagles are playing the Jets in the Meadowlands.

Jones said it was premature to project security costs, but the agency will be looking to work deployments into the week's schedule to eliminate as much overtime as possible and some troopers may be working under mutual aid

much overtime as possible and some troopers may be working under mutual aid agreements to help other agencies, where salaries could be reimbursed.

A church and state issue

Americans United for Separation of Church and State, a Washington-based advocacy group, said there is a fine line between providing public assistance for a papal visit, and funding a religious event.

ALSO: Who paid the cost of putting on the Super Bowl?

"The basic legal rule is that government bodies can provide assistance for a papal visit that is similar to what they provide for other similar nonreligious events," said Alex Luchenitser, the group's associate legal director. "There are things that raise concerns for us, but nothing so far that seems a clear and obvious church-state violation. It's a difficult issue."

Luchenitser said it is reasonable for the government to assume the costs of security and police protection for the pope, just as it would if Queen Elizabeth or any other major public official came to town. But using public funds for a specific religious purpose—such as building a cross -- would be a violation of the Constitution, said Luchenitser. He cited the legal case filed in 1979 after Philadelphia built a platform and cross at a cost of more than $200,000 to be used in a papal Mass **for the visit of Pope Paul II.** The American Civil Liberties Union took the city to court for violation of the First Amendment's Establishment Clause, and won.

Papal spillover?

Meanwhile, with more than one million people planning to see the pope, some hope for an economic spillover for the host cities. Hotels reservations in the host cities are hard to come by, pope-themed merchandise is on the shelves and T-shirts already for sale. The Philadelphia Convention and Visitors Bureau has estimated the city could realize economic benefit at $418 million from the World Meeting and the papal appearances.

But while a hot ticket, the upcoming papal visit may not pack quite the economic punch of the world's biggest sporting event, others say.

"You may get a million people in, but they are not going to be big spenders," remarked Victor Matheson, a professor of economics at the College of the Holy Cross in Worcester, Mass. "The vast majority who come are going to be local residents who are not doing anything but seeing the Pope."

Unlike the Super Bowl, which typically brings in fans with deep pockets—some arriving on corporate jets and staying in four-star hotels—a papal visit to this country brings the faithful, some will travel by bus.

"There's not going to be a huge orgy of spending," Matheson said. "People are not likely to drop huge amounts of money."

*Ted Sherman may be reached at **tsherman@njadvancemedia.com**. Follow him on Twitter **@TedShermanSL**. Find **NJ.com on Facebook**.*

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FOR SEPARATION OF CHURCH AND STATE

Press Release

Cities Hosting Pope Francis Must Take Pains To Protect Church-State Separation, Says Americans United

Cities Hosting Pope Francis Must Take Pains To Protect Church-State Separation, Says Americans United

Aug 31, 2015

Officials in Philadelphia, New York and Washington, D.C. should take care to respect separation of church and state during the upcoming visit of Pope Francis, says Americans United for Separation of Church and State.

In a letter sent today to officials in the three cities as well as federal agencies, Americans United noted that during previous papal visits, government officials have attempted to divert tax money for religious purposes. That must not happen when the pope visits in late September, says Americans United.

"Although the pope is considered a head of state, he is in a unique position because he also leads a major religious group," said the Rev. Barry W. Lynn, executive director of Americans United. "As a result, government officials must be very careful not to spend taxpayer dollars for any of the pope's religious activities while he is in the United States."

Americans United asserts in its letter: "[G]overnment bodies must not provide any aid to a Pope's religious activities that goes beyond the provision of services — such as police, safety, and security — that are regularly given for comparable public events of a similar size."

Americans United is concerned about possible taxpayer expenditures related to the pope's visit because this has been a problem in the past. Multiple church-state violations arose when Pope John Paul II came to America in 1987.

For example, Dade County, Fla., closed its schools on the day of a papal mass in Miami and may have leased school buses to transport people to the religious service; a 100-foot cross was put up for two weeks on state-owned land in Miami and public employees in the city sold tickets to papal events.

During a visit to Philadelphia by Pope John Paul II in 1979, officials in Philadelphia spent taxpayer money to construct a large platform for an outdoor mass and rented chairs, a sound system and decorations for it. A federal appeals court later ruled that these expenses were unconstitutional.

Americans United is sending public-records requests to the cities and federal bodies involved in this year's visit to monitor whether they are complying with constitutional restrictions.

"City and federal officials should take care not to repeat the unconstitutional mistakes that were made during past papal visits," said Americans United Associate Legal Director Alex J. Luchenitser. "We'll be watching

them to ensure that they do not do so."

The letter and records requests were written by Luchenitser and Americans United Legal Fellow John McGinnis.

Americans United is a religious liberty watchdog group based in Washington, D.C. Founded in 1947, the organization educates Americans about the importance of church-state separation in safeguarding religious freedom.

Tags:
Pope Francis, Catholic Church, Philadelphia, New York City, Washington DC
Issues:
Other Government Subsidies of Religious Institutions, U.S.-Vatican Diplomatic Relations

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AMERICANS UNITED
FOR SEPARATION OF CHURCH AND STATE

Wall of Separation

Pope Problems: Papal Visit Incurs Significant Taxpayer Expense

Sep 23, 2015 by Sarah Jones in Wall of Separation

> For example, public funds will be used to pay for millions of dollars in security costs incurred by the Secret Service and other federal agencies.

Pope Francis has landed and American taxpayers are footing the bill.

According to the Philadelphia *Inquirer*, the World Meeting of Families agreed on Friday to shoulder Philadelphia's costs for hosting the pope. The Meeting is sponsored by the Holy See's Pontifical Council for the Family and is held every three years in a different world city. This year, it's located in Philadelphia.

"The contract is backdated Sept. 10 and states that the nonprofit was to have provided the city with a security deposit of $2.5 million on Sept. 14," wrote the *Inquirer*'s Brian Moran. The fees will cover various police, emergency, sanitation, and other city services, as well as a license for a papal parade down public highways.

But taxpayers will also incur substantial costs for the pope's American tour, which will include stops in Philadelphia, New York City, and Washington, D.C. For example, public funds will be used to pay for millions of dollars in security costs incurred by the Secret Service and other federal agencies.

At *Fortune* magazine, Michal Addady notes that the federal government typically foots the bill for D.C.'s security needs, but that there's a real chance the $4.5 million annually budgeted for this purpose won't be enough to cover the cost of the pope's visit.

"The cities will be expected to provide certain services that will potentially be reimbursed, but it's likely that citizens will be stuck paying for a portion," Addady wrote.

These costs raise an interesting church-state separation question: Is it unconstitutional for cities to subsidize the cost of hosting Francis?

Not necessarily.

Francis belongs to a legal category distinct from that occupied by most other religious leaders because he's considered a head of state. (Queen Elizabeth II of England also shares that distinction, as she heads the Church of England in addition to her duties as the nominal head of state.)

As I wrote previously for *Church & State*, the Reagan administration formalized diplomatic ties with the Holy See in 1984. Americans United sued to stop the move, but we were unsuccessful. A federal court tossed the suit on technical grounds.

It's legal, then, for Francis to address Congress. In fact, religious leaders who don't moonlight as heads of state have done the same. It's also most likely legal for public schools to cancel classes for the visit, as some districts have already done, so long as they do so for secular reasons like insurmountable traffic difficulties--

and not to encourage children to attend religious events.

But funding is a slightly more complicated matter.

Millions of Catholics are scheduled to descend on D.C., Philadelphia and New York City to see Francis; that's in addition to a high number of media professionals assigned to cover the event. As we explained in an August 31, 2015 letter to the city and federal officials involved, cities are within their legal rights to use public funds for security concerns and other secular needs, so long as they provide similar funding for comparable non-religious events.

But it is illegal for cities to subsidize religious activity. D.C. can't fund today's mass at the Basilica of the National Shrine of the Immaculate Conception, for example; Philadelphia cannot subsidize the World Meeting of Families. The same rules apply to the pope's activities in New York City.

Security and safety costs are the inevitable consequence of hosting a religious figure sacred to 1.2 billion people. It's entirely proper, though, for the Meeting to reimburse Philadelphia, and it should have done so sooner—especially when experts say the visit doesn't actually offer much economic benefit to the affected cities.

Francis' visit is a historic moment for U.S. Catholics. It's a shame it comes at such high cost to taxpayers.

Tags:
Pope Francis, Vatican, Catholic Church, Holy See
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August 31, 2015

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Pasquale T. Deon, Sr., Chairman
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Re: Papal Visit

Dear Mayor Nutter, Mayor de Blasio, Mayor Bowser, Director Jarvis, Director Clancy, and Chairman Deon:

We have received numerous inquiries expressing concerns about the elaborate preparations for — and potential cost to taxpayers of — Pope Francis's visit to the United States, which is scheduled to include Washington, D.C., New York, and Philadelphia. In addition to the Pope's visit, the City of Philadelphia is also hosting the World Meeting of Families, a self-described "international event of prayer, catechesis, and celebration." *About the Event*, World Meeting of Families, http://www.worldmeeting2015.org/about-the-event/faqs/ (last visited Aug. 21, 2015).

In particular, concerns have been expressed to us about several aspects of Philadelphia's plans: The City intends to impose travel and access restrictions during the Pope's visit and the World Meeting of Families that are not comparable to anything the City has done before. A significant portion of the City will be turned into a "traffic box" that vehicles will not be permitted to enter once they

leave; a smaller portion of the city, as well as some bridges and certain streets, will be closed entirely. City offices will be closed or providing limited services for several days, trash service will be suspended, and public schools will be closed fully. And it appears that, for its Regional Rail Service on September 26 and 27, the Southeastern Pennsylvania Transportation Authority ("SEPTA") will honor one-week passes that were only available as part of a registration package for the World Meeting of Families; standard one-week or other long-term passes will not be accepted, and people who did not register for that religious conference will only be able to ride Regional Rail on those days by purchasing one-day passes in person at SEPTA stations.

We write to provide guidance on the constitutional limitations on governmental support of and involvement with the papal visit. Specifically, government bodies must not provide any aid to a Pope's religious activities that goes beyond the provision of services — such as police, safety, and security — that are regularly given for comparable public events of a similar size.

That is because the Establishment Clause of the First Amendment to the U.S. Constitution prohibits government bodies from taking any action that communicates a message of endorsement of religion. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000). Instead, the government must maintain "neutrality . . . between religion and nonreligion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

The Establishment Clause thus prohibits the provision of public aid for religious activity, such as worship or religious instruction. *See Mitchell v. Helms*, 530 U.S. 793, 857, 861 (2000) (O'Connor, J., concurring)[1]; *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–55 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Nor may government funds be used to pay for items that are themselves secular, but are used to support religious programming. *See, e.g.*, *Mitchell*, 530 U.S. at 837–39 (O'Connor, J., concurring)

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[1] The holdings of *Mitchell* are set forth not in Justice Thomas's plurality opinion, but in a concurrence authored by Justice O'Connor and joined by Justice Breyer, for those two Justices provided the deciding votes in the case while concurring in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Horn v. Thoratec Corp.*, 376 F.3d 163, 175 (3d Cir. 2004); *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418–19 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

(Establishment Clause prohibits use of federal funds for secular materials and equipment, such as computers, to advance a parochial school's religious mission); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 418–19, 424–25 (8th Cir. 2007) (payments to religious program — which were used in part for telephone, mailing, computer, copying, and other administrative costs — ultimately and unconstitutionally supported religious indoctrination).

Accordingly, in *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 927–28 (3d Cir. 1980), the U.S. Court of Appeals for the Third Circuit ruled that Philadelphia violated the Establishment Clause by spending taxpayer funds to build a platform for a papal mass, as well as renting chairs and a sound system for the event, planting shrubbery and flowers for it, and building a smaller platform for the event's choir. The court noted that these were "extraordinary expenditures, all a kind never offered to other organizations, religious or non-religious." *Id.* at 928. The court explained that the aid "connote[d] the state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent." *Id.* at 930; *see also Doe v. Vill. of Crestwood,* 917 F.2d 1476, 1478 (7th Cir. 1990) (concluding that city may not hold Mass during town-sponsored festival because a "religious service under governmental auspices necessarily conveys the message of approval or endorsement").

On the other hand, in *O'Hair v. Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979), the court upheld the provision of police protection, crowd and traffic control, utilities, and trash services for an outdoor papal mass performed on the National Mall. The court explained that the expenditures incurred by the government were "no different from those regularly incurred with any large public gathering, and a comparable level of services and facilities would be extended by the [government] to any group of similar size which possesses a permit to use [the] land." *Id.* (footnotes omitted). Unlike in *Gilfillan*, the local Archdiocese itself paid for "any possible incremental sums ascribable to the Mass as a religious worship, including the building of the platform for the altar." *Id.* at 936.

We urge all governmental officials involved to pay heed to and comply with the constitutional principles and authorities we have described. Contemporaneously with this letter, we are sending public-records requests to the government bodies involved to monitor their plans for the visit. If you have any

questions or would like to discuss this issue further, please do not hesitate to contact us.

Sincerely,

Alex Luchenitser, Associate Legal Director
John McGinnis, Legal Fellow*

**Admitted in Maryland only. Supervised by Alex Luchenitser, a member of the D.C. bar.*

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Article

CONSTITUTIONAL MEANINGS OF 'RELIGION' PAST AND PRESENT: EXPLORATIONS IN DEFINITION AND THEORY

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The United States, like never before in its history, has become a country that is religiously heterogeneous. A society that was once predominantly Protestant, Roman Catholic, and Jewish now includes swelling numbers from Islam, Buddhism, Hinduism, and many other religions as well. [1] The shift from a largely homogeneous society to one that is religiously and culturally diverse has resulted in formidable problems of communication and understanding. [2] In addition, national practices and traditions are being questioned. The words "under God" [3] in the ***90** Pledge of Allegiance are a case in point. Growing segments of the population believe in multiple deities, one deity above others, or no deity at all. Historical explanations for monotheism do not alone answer the question of relevance.

The founders guaranteed religious freedom to all within the federal union. Yet it was clear that Congress, not the States, was the entity enjoined from invading that freedom. In the twentieth century, long after the Fourteenth Amendment had been ratified in 1868, the rights guaranteed by the First Amendment were made applicable to the States through the Fourteenth. [4] No State legislature was allowed to do what Congress could not. The advent of the Fourteenth Amendment, combined with the proliferation of social welfare programs, [5] has contributed to an increasingly active jurisprudence of religion.

The number of cases in which a claim of religion will be made is likely to rise exponentially as the explosion of immigrants from the Far and Middle Eastern parts of the world continues. The United States Supreme Court will be intensely challenged to address novel issues involving the intersection of law and religion. As the jurisprudence of religion escalates in urgency and importance, the Court will be impelled to answer a fundamental question it has assiduously sought to avoid; i.e., how is religion to be defined under the Constitution? [6]

***91** This essay will examine the Court's attempts to define the meaning of the term as well as some of the notable efforts by lower courts to do so. The essay will then proceed to describe and to analyze views of religion held by past and present members of the Court as interpreted through the lens of the political theory reflected in their jurisprudence. Lastly, conclusions followed by a postscript will be offered, more in the spirit of an invitation to further research and discussion than as the defense of a position adamantly held.

I. In Search of a Definition

The First Amendment of the United States Constitution declares, in part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." [7] This succinct mandate is the bedrock upon which the so-

called 'jurisprudence of religion' in this country is based. The term "religion" appears nowhere else in the Constitution [8] and is not defined within its four corners. It might seem that, throughout the historical development of the jurisprudence of religion, the term would have acquired a "black letter" meaning, but it has not done so. The United States Supreme Court has demonstrated an aversion to the task. The same cannot be said of some lower courts, which have been bold enough to wrestle with the issue.

A. The Free Exercise Clause: Supreme Court Cases

1. Religion and Polygamy

In 1879, Chief Justice Waite delivered the opinion of the Court in Reynolds v. United States, [9] a case in which a Mormon had been indicted for bigamy and argued that it was his religious duty to have multiple wives. In the course of his opinion, the Chief Justice reflected upon Madison's "Memorial and Remonstrance," [10] which had been written in response to a Virginia bill that sought to provide payment "for teachers of the Christian religion." [11] Madison referred to religion as "the duty we owe to the Creator." [12] The Chief Justice then considered Jefferson's famous letter to the Baptist Association in Danbury, Connecticut, a letter in which its author maintained that the First Amendment forever divides church and state by "a wall of separation," that religion is, in Lockean terms, "a matter which lies solely between a man and his God." [13] The Chief Justice concluded that the function of government ***92** reaches actions only and not beliefs. [14] The Mormon practice of polygamy, like that of human sacrifice, he reasoned, fell within the jurisdiction of government and could not be excused on the basis of religious belief. [15] So religion, as understood in Reynolds, may be conceptualized in theistic and individualistic terms. Its sole protected content is that of intellectual belief.

Another Mormon, in Davis v. Beason, [16] had been indicted in the Ohio Territory in 1889, because he swore that he was not a polygamist, did not teach the practice, and had nothing to do with any organization that did. The Court took up the question of whether the allegations against him, if true, were sufficient to give the territorial court jurisdiction to try him. [17] The Court responded to the question in the affirmative and in so doing addressed the meaning of the term "religion." [18] Speaking through Justice Field, the Court was careful not to limit religion to "one's views of his relations to his Creator," but to emphasize that the term also refers to "the obligations [those views] impose of reverence for [the Creator's] being and character, and of obedience to his will." [19] An individual, inspired by religious belief, may comport himself as he desires unless it be injurious to the rights of others or results in "acts inimical to the peace, good order and morals of society." [20] The Court underscored the point that the free exercise of religion "must be subordinate to the criminal laws of the country . . . ." [21] Religion was again conceived in a typically Protestant fashion, to include the ingredients of deity, worship, and duty toward others. It is clear in this case that the prohibitions of criminal law, as "recognized by the general consent of the Christian world in modern times," [22] defined the parameters of permissible religious fellowship and outreach.

2. Religion and the Duty to Bear Arms

In United States v. Macintosh, [23] the issue was whether Macintosh, a Canadian, might become a naturalized citizen of the United States while averring that the duty to bear arms in its defense is conditional upon his personal moral beliefs. [24] Because Macintosh maintained that it is immoral to bear arms in a war that is not justified, the Court disqualified him for citizenship. [25] The right of conscientious ***93** objection, it explained, is a privilege bestowed by Congress only after one has applied for naturalized citizenship and has categorically agreed to bear arms. [26] Chief Justice Hughes, in a thoughtful dissent, asserted that Macintosh had articulated a belief that is "axiomatic in religious doctrine" as well as one that had been upheld throughout the

country's history; specifically, that the duty of conscience trumps any duty to the state. [27] Drawing upon the Court's view of religion in Davis, he wrote, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." [28] The domain of religion, Hughes maintained, is one centered upon belief that inspires the practice of moral duty, which in turn takes precedence over the positive law of the state. [29]

3. Religion and Patriotism

The Court again, in 1940, took a position far different from that of Chief Justice Hughes when deciding Minersville School District v. Gobitis. [30] Two children of the Jehovah's Witnesses faith had been expelled from school for refusing to participate in the daily exercise of saluting the American flag. [31] They believed, in accordance with their religion, that the flag-saluting exercise was tantamount to idolatry. [32] The Court held that this compulsory exercise, although violating the children's faith, was justified. [33] Religion, as "the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it," was placed by the founders outside "the reach of law." [34] Justice Frankfurter, who wrote for the majority, insisted that "[g]overnment may not interfere with organized or individual expression of belief or disbelief. Propagation of belief--or even of disbelief in the supernatural--is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse." [35]

But the Justice made it clear that the right to follow one's conscience is not boundless. The right does not relieve "the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [36] Religious conviction must not, in other words, conflict with legitimate political concern and responsibility.

In contrast to the opinions in Reynolds, Davis, and Macintosh, the Gobitis Court did not render the meaning of religion in traditional Protestant terms. A ***94** religious issue was, for this Court, one involving "ultimate mystery" and, most significantly, might be addressed either positively or negatively, depending upon one's preference. [37] But the citizen's response to a religious issue affords no license to transgress rules and regulations which promote political goals like national unity in the face of a looming threat like the Third Reich.

Three years after Gobitis, the Court in West Virginia State Board of Education v. Barnette [38] reconsidered the issue of compulsory flag-saluting by Jehovah's Witnesses. Gobitis was overruled. [39] Justice Frankfurter, in a lengthy and scorching dissent that stressed judicial restraint in the face of a State statute "promoting good citizenship and national allegiance," [40] argued that religion boils down to "claims of conscience." [41] The consciences of the minority, he declared, are not "more sacred and more enshrined in the Constitution" than those of the majority. [42]

4. Religion and Objective Truth

In United States v. Ballard, [43] the respondents had been indicted for and convicted of using the mails to defraud. [44] Specifically, they had communicated to others the religious teachings of the so-called 'I Am' movement, the most questionable claim of which was that respondents had become endowed with supernatural powers. [45] The trial court had made the Ballards' good faith, or lack thereof, as opposed to the objective truth of their religious beliefs, the central issue in their conviction. [46] The Court of Appeals had held that the objective truth of their beliefs was at issue. [47] The Supreme Court accepted the case in order to decide whether civil courts can adjudicate the objective truth of religious doctrines. Responding in the negative, it opined

that the "law knows no heresy and is committed to the support of no dogma and the establishment of no sect." [48] This case is significant because it marks the first time that the Court applied a sincerity test to religious beliefs. No matter how fantastic and extraordinary a religious belief may be, the test of its authenticity has nothing to do with objective, evidentiary warrants, but with only the sincerity by which it is held. [49]

***95** 5. Religion and Deity

Following Ballard, the Court continued to demonstrate its inclination to interpret "religion" broadly in Torcaso v. Watkins, [50] where it considered the case of a man in Maryland who had been denied his office as a notary public because he would not declare a belief in God. [51] The Court in 1961 allowed the complainant to receive his notary commission and in footnote 11, perhaps the most (in)famous portion of its opinion, stated the following: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." [52]

The footnote trenchantly illustrated the Court's new awareness, which had been germinating since Gobitis, that nontheistic systems of belief can be labeled "religion." The footnote further set the stage in 1965 for the advent of United States v. Seeger, [53] in which the Court would provide its most expansive definition of religion in connection with free exercise. As we shall also see, the footnote would serve later to cast a pall of doubt over the prevailing reasoning surrounding establishment issues, including prayer and Bible-reading in public schools.

In Seeger the Court adjudicated a constitutional challenge to the Universal Military Training and Service Act of 1958. [54] Section 6(J) of the Act allowed for conscientious objection in accordance with one's "religious training and belief," [55] defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." [56] Seeger had applied for conscientious objector status, but had been unwilling to pronounce upon whether he believed in a supernatural deity. [57] He would profess only his devotion to goodness and virtue for their own sake and to religious faith of an entirely ethical nature. [58] He had been denied conscientious objector status under the Act and had launched both an establishment and free exercise attack against it. [59] The Court, speaking through Justice Clark, held in Seeger's favor, deciding that the test of belief "in relation to a Supreme Being" is whether the belief in question is "sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by the God of those admittedly qualifying for the exemption . .. ***96** ." [60] The Court accepted Paul Tillich's functional definition of religion as "ultimate concern," [61] apparently renouncing once and for all any view of religion that would identify it exclusively with theism or traditionally accepted world religions. [62]

Following upon the heels of Seeger was Welsh v. United States, [63] in which a man had been tried and convicted for refusing to submit to induction. He claimed to be conscientiously opposed to military warfare in any form although not for religious reasons. [64] The facts of the case left no room for doubting Welsh's sincerity and depth of conviction. The Court explained that he was entitled to conscientious objector status since his beliefs were deeply held and rested on considerations other than mere policy, pragmatism, or expediency. [65]

So in 1970, religion, at least with respect to the Free Exercise Clause, consisted of any "ultimate concern," the content of which was a belief deeply and fervently held for reasons neither opportunistic nor in negative response to government policy.

6. Religion and Community

Within two years of Welsh, the Court appeared to signal a retreat from its new liberal view of religion. In Wisconsin v. Yoder, [66] the issue before the Court was whether Amish parents are required, pursuant to State statute, to send their children to school through the age of sixteen years. The Court exempted Old Order Amish children from the statute, allowing them to leave school following the eighth grade. Chief Justice Burger, writing for the majority, noted that formal high school education beyond the eighth grade would serve to imbue Amish children with values, which were radically at variance with those of their community. [67] He found the Amish's claim that their religious faith and mode of life were inseparable and independent [68] supported by their "almost 300 years of consistent practice, and ***97** strong evidence of a sustained faith . . . ." [69] The Chief Justice praised the Amish for being "law-abiding and generally self-sufficient members of society." [70] In a most remarkable statement, the Chief Justice also explained that they are to be distinguished from Henry David Thoreau who, for philosophical as opposed to religious reasons, isolated himself at Walden Pond to demonstrate his rejection of secular values. [71] Chief Justice Burger accented as a point of special significance that Amish beliefs are embodied in and "shared by an organized group." [72]

The Yoder opinion suggested that religious beliefs should be distinguished from mere personal or philosophical ones and that at least one essential characteristic of religion is that it comprises an "organized" community practicing a distinct way of life which is in turn based on its particular values. The Court could have subscribed to the functional definition of religion propounded in Seeger and Welsh, but refrained from doing so, perhaps because they were based upon construing a statutory provision regarding conscientious objection, while Yoder concerned the education of children. In any case, it was as if the Court, deliberately turning its back on its own most recent pronouncements about religion, had decided to commence the task of formulating a conservative content-based definition of it. Yoder has remained an island unto itself.

7. The Prevailing Rule of Free Exercise

No definition of religion was adopted or even suggested when the Court formulated its most recent test for free exercise in Employment Division, Department of Human Resources of Oregon v. Smith, [73] a case concerning the religiously inspired use of the drug "peyote" by the Native American Church. The Court upheld the denial of unemployment benefits to two Native Americans, who ***98** were fired because of their use of an illicit drug in a traditional religious ritual. The Court stated that, when there is a "valid and neutral law of general applicability," [74] violating it on the basis of religious observance does not trigger free exercise protection under the First Amendment. [75] How religious neutrality is possible or what precisely it entails were questions the Court never answered.

One can hardly contend, based upon the foregoing exposition of cases, that the Court has wrestled in a probing, interdisciplinary manner with the meaning of the term "religion." It is much closer to the truth to say that the Court, in its free exercise jurisprudence, has usually, if not always, addressed the definition of religion in an oblique and fragmentary way.

B. The Establishment Clause: Supreme Court Cases

1. Overcoming an Initial Objection

The tendency to provide short shrift to this definitional issue is also reflected in establishment cases. An establishment act or practice almost always concerns or is related to that which is admittedly "religious," including but not limited to prayer, devotional Bible-reading, symbolic displays on public property, or financial aid to parochial or church-related institutions. One

may object that there is little reason for the Court to consider whether such issues involve religion or to formulate a definition of it in conjunction with their adjudication, which would amount, after all, to reaching a matter not in controversy.

The problem with the objection is that the Court has sought not only to prohibit establishments of religion, but also to foster a "secular" state. In Everson v. Board of Education, [76] the Court explicated the meaning of the Establishment Clause in terms of strict separation between religion and the state.

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 religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or ***99** institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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." [77]

In any separationist ideology, the question arises regarding the difference between the "religious" purposes and practices promoted by religion and "the secular" ones advanced by the state and how to discern the difference so as to keep them separate. Indeed, if a secular state is one that seeks to purge itself of any religious connection, as the Court forcefully expressed in Everson, [78] the terms ***100** "secular" and "religious" are in antonymous relation to each other. It would thus appear that, in order for the Court to understand the purposes and effects of "secular" governance, it must also have a commensurate understanding of the "religious" governance. How else can the boundary between the two be demarcated?

2. Religious versus Secular

This very issue reared its head in Abington Township School District v. Schempp, [79] in which the Court in 1963 upheld complaints from Pennsylvania and Maryland citizens that recitation of the Lord's Prayer and Bible-reading in public schools offended the Establishment Clause and did so on the ground that the statute enabling the practices was enacted with a religious purpose and preferred the Christian religion. In response to a counter-argument regarding the establishment of the "religion of secularism," Justice Clark wrote:

It is insisted [by the districts] that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe" . . . We do not agree, however, that this decision in any sense has that effect. [80]

The Court went on to say that the study of the Bible in public schools is permissible "when presented objectively as part of a secular program of education . . . ." [81] Yet what precisely does the term "secular" entail? This compelling question was not addressed.

In Board of Education v. Allen, [82] the issue before the Court was whether a New York statute that required public school authorities to lend textbooks free of charge to all students, public and private, in grades seven through twelve, violated the Establishment Clause. The Court made negative response to the question and stated that, in order to determine an Establishment Clause violation, one must look at whether there is a secular legislative purpose and whether the primary effect of the statute is

advancement or inhibition of religion.[83] The "secular" versus "religious" distinction was again in the forefront of the Court's reasoning but the majority left the meaning of each term unexplored and undefined.[84]

In an intellectually provocative dissenting opinion, Justice Douglas argued ***101** that the New York statute violated the Establishment Clause. He insisted that there is no reliable standard by which "secular" and "religious" textbooks can be distinguished from each other.[85] Citing Justice Jackson, Douglas opined that it is difficult to say "where the secular ends and the sectarian begins in education."[86] Were the Crusades, for example, an attempt "to save the Holy Land"[87] from Muslim Turks, or were they "a series of wars born out of political and materialistic motives" ?[88] How should such events as the Reformation, the Inquisition, or the colonial effort in New England to establish a church without a bishop be taught?[89] "Is the slaughter of the Aztecs by Cortez to be lamented for its destruction" of a culture or forgiven because he and his explorers carried Christianity to a "barbaric people?"[90] "Is Franco's revolution in Spain to be taught as a crusade against anti-Catholic forces or as an effort by reactionaries to regain control of the country?"[91] The majority was apparently untroubled by such questions and avoided them.[92]

In 1968, the same year that Allen was decided, the Court in Epperson v. Arkansas[93] considered whether a State's proscription of the teaching of evolution offended the religion clauses of the First Amendment. Evolution, the Court held, could not be disallowed in public school curricula simply by virtue of its conflict with religious teaching.[94] Yet Justice Black, while concurring with the majority, wondered whether, since evolution is an anti-religious doctrine, there is not a question about the authority of a State to teach it.[95] He believed that the State had no more right under the Everson rule to inhibit religion than to advance it.[96] Black's judicial rumination touched again on the distinction between "secular" and "religious"; that is, whether a secular theory like evolution has religious implications and, if so, by what authority the theory can be taught.[97] To put the matter another way, if there is a boundary between these terms, where precisely is it and how can it be upheld? Black correctly observed that this was an issue the majority ignored.[98]

The Court closed the circle on this chapter of its establishment jurisprudence in Walz v. Tax Comm'n of New York.[99] In Walz, tax exemptions were granted by the New York Constitution to religious organizations for religious properties used ***102** for worship.[100] Walz argued that the exemption grant indirectly required him to make a monetary contribution to such organizations in violation of his rights under the Establishment Clause.[101] The Court upheld the constitutionality of the exemption, maintaining that the religious organizations which profited from it fostered "moral or mental improvement"[102] and social benevolence[103] and noting that there was a long historical precedent for a state attitude of "benevolent neutrality" toward churches.[104] In what was perhaps the most significant portion of the opinion, the Court cautioned, "[w]e must also be sure that the end result--the effect--is not an excessive government entanglement with religion."[105] This was an acknowledgement that the "religious" and the "secular" are invariably entangled with each other. The caveat concerned only "excessive entanglement."

3. The Advent of a Test for Establishment

Finally, in Lemon v. Kurtzman,[106] a case in which State statutory programs providing for financial support to nonpublic schools was at issue, the Court knitted together the three strands of its thinking concerning the Establishment Clause.[107] In doing so, it advanced the so-called "Lemon test."[108] First, the act or practice in question must have a "secular" purpose.[109] Second, its primary effect must neither advance nor inhibit "religion."[110] Third, it must not foster an excessive entanglement

between "religious" and civil concerns. [111] Nowhere in the Kurtzman opinion is there so much as an intimation concerning which matters are "secular" and which are "religious." Perhaps Justice Douglas came closest to addressing the issue, when he asserted in a concurring opinion joined by Justice Black, that "religion" in a sectarian school permeates the entire curriculum and that the instruction given to their students can never be completely secularized. [112] In the end, Douglas was content merely to "indicate how pervasive is the religious control over the [sectarian] school and how remote this type of school is from the secular school." [113]

***103** The "Lemon test," with its undefined terms, has since its advent been the one used most frequently by the Court to adjudicate establishment issues. [114] The test has suffered stringent criticism for multiple reasons and on various fronts. [115] Some of the justices on the Court have even suggested alternative tests, although no solid consensus has yet emerged. [116]

II. Notable Lower Court Cases and Other Commentary

The Supreme Court has been modest in its efforts to come to grips with defining the term "religion" in the First Amendment jurisprudence. It has unabashedly used the term along with others it has not defined, such as the words "religious" and "secular." Some lower courts have, by contrast, attempted to rise to the challenge. Several of these cases deserve our attention.

A. An Analogical Definition for Religion

In Malnak v. Yogi, [117] secondary school students who had taken an elective course in the "Science of Creative Intelligence--Transcendental Meditation" had been required to attend a puja on a Sunday, whereupon they stood or sat in front of a table while the teacher sang a chant and made offerings to a deified "Guru ***104** Dev." [118] The ceremony lasted between one and two hours. [119] Since the course was taught in a public high school, the question was whether it constituted an establishment of religion. [120] The Court of Appeals for the Third Circuit heard the case and found an unlawful establishment of religion. [121] The most captivating part of the case was Judge Arlin Adams' concurring opinion, in which he proposed analogical guidelines for determining whether an act or practice is "religious." [122] Judge Adams maintained, first, that the "ultimate nature of the ideas presented" is the most significant evidence of whether they should be treated as religious. [123] Second, he stated that one must consider whether the subject belief system is broad and comprehensive [124] and, third, whether there are formal, external, or surface signs which may be analogized to accepted religions, such as formal services, ceremonial functions, the existence of clergy, the structure and organization of the movement, efforts at propagation of its beliefs, and observation of holy days. [125] Judge Adams emphasized that these criteria should be regarded as guidelines and should not be understood as "a final test." [126]

B. Application of the Malnak Definition

Subsequently, the Judge received an opportunity to apply his proposed guidelines. In Africa v. Pennsylvania, [127] Judge Adams considered whether Frank Africa, an inmate in a Pennsylvania prison, was entitled for religious reasons to a diet consisting entirely of raw foods. The prisoner styled himself a "naturalist minister" for the MOVE organization, which had no formal structure or hierarchy and espoused the three paramount goals of bringing about peace, stopping violence, and ending corruption everywhere. [128] The organization had many environmental concerns, but endorsed no existing regime or lifestyle. [129] MOVE viewed society as impure, unoriginal, and blemished. [130] The organization practiced no ceremonies or rituals; it kept no special religious days; and it honored no ethical commandments. [131] Judge Adams found that MOVE did not satisfy any of the three

criteria for "religion." [132] It did not address ultimate questions, such as life and death, right and wrong, and good and evil. [133] It had no comprehensive belief- ***105** system other than an idea of philosophical naturalism. [134] Finally, it lacked all formal identifying characteristics common to most recognized religions. [135]

It should be noted that Judge Adams' criteria were first formulated in an establishment case and then applied in a free exercise case. [136] The judge's "definition" of religion, formulated by analogy, can be utilized to adjudicate cases under either or both clauses. He regarded this result as preferable to Harvard constitutional scholar Laurence Tribe's suggestion that "religion" be interpreted broadly for purposes of free exercise but narrowly for those of establishment. [137]

The same criteria were applied by the Court of Appeals for the Ninth Circuit in Alvarado v. City of San Jose, [138] where citizens brought a § 1983 action against the city alleging that its installation and maintenance of a sculpture representing Quetzalcoatl or the "Plumed Serpent" of Aztec mythology offended the Establishment Clause. [139] The Court stated that neither Malnak nor Africa supported the contention that there was a cognizable religious interest at issue. [140]

The Court of Appeals for the Tenth Circuit addressed the definitional issue in the context of criminal charges pertaining to the possession and distribution of marijuana in United States v. Meyers. [141] The defendant interposed the defense that he was the founder and minister of the "Church of Marijuana," in which it was his duty to use, possess, grow, and distribute marijuana for the good of mankind and the planet earth. [142] Denying that the defendant had made a prima facie claim under ***106** the Religious Freedom Restoration Act (RFRA), [143] the court paid particular attention to what it called "indicia of religion." [144] The presence of a religion, the court opined through Senior Circuit Judge Barrett, is indicated by
(1) ultimate beliefs "having to do with deep and imponderable matters;" (2) metaphysical beliefs the content of which transcends the physical and immediately apparent world; (3) a moral or ethical system; (4) comprehensiveness of beliefs; (5) accoutrements of religion which accent (a) a founder, prophet, or teacher; (b) important writings; (c) gathering places; (d) keepers of knowledge; (e) ceremonies and rituals; (f) structure or organization; (g) holy days; (h) diet or fasting; (i) appearance and clothing; and the (j) propagation of beliefs and practices. [145]

C. Isolating the "Common Factors" of Religions

Brevard Hand, Chief Judge of the United States District Court in the Southern District of Alabama, approached the definitional problem by seeking, in Smith v. Board of School Commissioners, [146] to isolate those "factors common to all religious movements" in order to determine whether secular humanism is a religion for establishment purposes." [147] The factors isolated were the following: (1) the existence of a supernatural and/or transcendent reality; (2) a view of the nature of humanity; (3) a vision or concept of the ultimate end, goal, or purpose of human existence, both individually and collectively; and (4) a vision of the purpose and nature of the universe. [148] Judge Hand found that secular humanism addressed the question of the existence of a supernatural or transcendent reality (although admitting none), put forth a particular view of the nature and purpose of human existence, possessed a belief system and a moral code about the purpose and nature of the universe, and was, hence, a religion under the First Amendment. [149]

D. Other Content-Based Definitions

Jesse Choper, a leading authority on the First Amendment, proposes a content-based definition of religion. [150] Formulating a precise meaning for the term, he admits, "is a formidably complicated task." [151] He points out that several requirements should be met. Any proposed definition should be informed by most theological and lay ideas about the term, although being sufficiently flexible to include new sects as well as traditional ones. [152] Moreover, the definition should be ***107** able to fulfill the goals of the religion clauses of the First Amendment, while not being abstract or esoteric. [153] The definition should be able to frame "the structure of our secular government which, although granting 'religion' a special place for certain purposes, nonetheless forbids that greater weight in its lawmaking process be accorded to values simply because they have religious origins." [154] To meet these difficult criteria, Choper suggests that religion be defined as a belief in "extratemporal consequences." [155] He argues that, because this definition looks only to the supposed effects of beliefs, it is not tied down to a particular content; i.e., it allows room for growth in accordance with that which is new and unconventional. [156] The definition is, in addition, not abstract or theologically esoteric, but is readily understandable by and available to lay analysis. [157] Finally, the definition provides helpful content to the religion clauses of the First Amendment, while limiting the role of "religion" in government. [158]

Jeffrey L. Oldham, another legal commentator, provides an additional content-based definition of religion. [159] He contends that religion "is a faith-based system of beliefs and actions that makes reference to a supernatural reality that dictates the believers' perception of good and evil, and answers questions arising from the existence of such forces." [160] To those who charge that the definition is too exclusive because it does not include beliefs which are not supernatural, Oldham responds that such criticism is simply evidence that the beliefs in question are not religious. [161] He defends as "extremely significant" the relationship of the belief system to the ideas of good and evil, because that feature of the definition is in accord with the intuitive nature of religion by providing a moral guide for adherents that informs decision-making. [162] Oldham maintains that courts would apply the definition by first analyzing whether a subject belief system is "faith-based" and, upon finding that it is, then would ask whether it involves "assumptions regarding supernatural realities that assert notions of good and evil and whether those forces of good and evil motivate human behavior." [163]

***108 E. An "Organic" Definition**

Eduardo Peñalver, informed by Ludwig Wittgenstein's philosophy of language, cautions against the adoption of a "dictionary-style" definition of religion, one that elevates to particular prominence a single moment in the life of the word. [164] Peñalver insists that words have an organic, evolutionary development and are more than "category-concepts." [165] They embody custom and practice such that the meaning of a word is none other than the way it is used. [166] With this fluid, evolutionary understanding of language, he proposes that, when considering whether a phenomenon is a religion, judges must first determine a "baseline for comparison." [167] They should, in other words, consider items which are already included within the boundaries of the term's usage, but should take meticulous care not to yield to western bias. To this end, judges should refrain from deciding that a belief system is not a religion because it may not include a concept of deity, does not possess institutional features, or fails to focus on sacred, spiritual, supernatural, or other-worldly matters. [168] Judges should, accordingly, include within their baseline both western and nonwestern faiths and should always compare the belief system in question with at least one theistic religion, one nontheistic religion, and one pantheistic religion. [169]

F. Other Options

Some legal scholars, like George C. Freeman, III, have urged that "religion" is a term that has no universal essence and, hence, no definition. [170] Anita Bowser has made the case that classifying a phenomenon as a religion is inherently and dangerously arbitrary. [171] Even scholars of religion, like Wilfred Cantwell Smith, have suggested that the term "religion" be abandoned and replaced by the terms "faith" and "cumulative tradition." [172]

III. Analysis

A. The Need for Definitional Exploration

If the United States Supreme Court's jurisprudence of religion underscores a single truth, it is that the body of law the Court has crafted to elucidate and to safeguard religious freedoms guaranteed by the First Amendment does not turn on ***109** an explicit definition of religion or of any related term. This glaring fact ought to give one pause. How can the Court propound tests for the free exercise and establishment of "religion" unless it seeks first to understand the term sufficiently to venture a definition of it? If the Court's goal in establishment cases is to foster a "secular" state, understood as the polar opposite of a "religious" one, then the meaning of both terms must be explored in order to facilitate the goal. Without rising to this stellar challenge, the Court's legal reasoning will appear uninformed and seem characterized by uncritical assumption, unwitting bias, inconsistency, unpredictability, and a gaping chasm between jurisprudential tests on the one hand and the reality of the religious spirit on the other.

There is little doubt that, when a justice speaks of "religion," he or she at least tacitly bestows upon the word some definition. Assuming there is a meaning in mind, the problem is that, by failing to disclose to the citizenry what precisely that meaning is, it will stand beyond public criticism and the hope of improvement. Thoughtful citizens will be left to wonder about the philosophic underpinnings of judicial pronouncements regarding matters rightly regarded to be of the gravest importance. Undefined and unsupported judicial pronouncements will, while inscrutable, still be legally binding, yet they will be so merely by virtue of the fact that "the Court so held." Fiat, not reason, will typify the judicial function. Such troubling concerns pervade the jurisprudence of religion.

Perhaps when understood in its most practical and concrete terms, the challenge is not so much to find a suitable definition of religion as it is to understand the numerous problems involved in the pursuit. While a profound recognition of these problems may not culminate in a universally accepted definition, the recognition ought to result in a jurisprudence that, whenever it cannot circumvent a particular difficulty, manages to address it with an admirable depth of wisdom and insight. It is this depth that has been conspicuously absent in the Court's pronouncements on the subject.

The fact that Department of Human Resources v. Smith speaks of statutes that are "neutral" with respect to religion highlights the point. [173] Even the most elementary study of religion demonstrates that a religious community may regard particular trees, buildings, animals, real property, myths, symbols, or even intoxicants as having sacral significance, [174] while another religious group may have diametrically opposite beliefs. When there are countless religious values and lifestyles, how can a law that offends any of them be described as "neutral" ? The religiously inspired use of peyote for some Native Americans has as much claim to being labeled "religious" as does the use of wine for Christians in the Eucharist. Likewise, allowing a public right of easement through New York City's Riverside ***110** Church, from Riverside Drive to Amsterdam Avenue, would be no less alarming for Christians who worship there than the government's construction of a logging road through the Chimney Rock of the Western United States was for Native American tribes in that area. Yet the Court in Lyng v. Northwest Indian Cemetery Protective Association [175] decided against Native Americans in their claim of religious infringement involving the construction of such a road. [176]

In establishment cases like Schempp, [177] Engel v. Vitale, [178] Santa Fe Independent School District v. Doe, [179] and Lee v. Weisman, [180] where prayer in public schools has been at issue, the Court has attempted to preclude religion from the classroom, thereby sheltering some students from psychological harm or at least from feeling public pressure to participate in an exercise in which they do not believe. The Court's goal has been one of fostering religious neutrality. As Graham Walker penetratingly observes, the justices have been "strangely oblivious" to the fact that the rest of the students are equally impressionable and are "deeply susceptible to the politically sanctioned absence of God [and] to the state-sponsored refusal to recognize, in public or common life, God's relevance and His claims." [181] Thoughtful people might therefore wonder whether an "impressionless" and religiously neutral atmosphere is possible and should be a goal in public education at all, or whether it does not perhaps belong ineluctably to the nature of humanity to live in communities with some set of acknowledged meanings and values. Examining in depth the place of religion in human life might shed light upon the question of whether religion can, much less should, be purged from public life and what kind of distinction, if any, is to be made between the "religious" and the "secular." [182] The Court has had the opportunity to engage in this kind of ***111** probing investigation, but has repeatedly declined to do so.

B. Evaluating Chief Judge Hand's Approach

Chief Judge Hand has, by contrast, frontally tackled the problem of defining religion for judicial purposes. To that end, he has written a generally careful, thoughtful, and closely reasoned opinion in Smith v. Board of School Commissioners. Although it was not his intent to limit his investigation to "traditional religions," the four factors that he isolated by which to identify a religion [183] are characteristic of some religions, but not of others. Confucianism and Taoism, for instance, hardly reach a doctrine of deity. While one might argue that they speak of a higher, "transcendent reality," such a description is much too vague to be used in a legal context. Furthermore, virtually every philosophy of life, from Plato's realism through Bertrand Russell's essays in praise of atheism, indiscriminate sexual activity, and world government, advance views regarding the nature of humanity, the ultimate purpose of human existence, and the nature of the universe. [184] One wonders whether Judge Hand would designate all such philosophies as religions and, if so, what distinction, if any, he would make between "philosophy" and "religion." His lengthy opinion leaves one, in the final analysis, with more questions than answers and perhaps serves to suggest some of the reasons why the Supreme Court has not attempted to navigate in these waters.

C. Tillich's Functional Definition

To the extent that the Court has addressed the meaning of religion, the treatment given has been modest. The functional test adopted in Seeger [185] appeared driven more by a desire to salvage the constitutionality of a narrowly worded Congressional statute than to understand the essence of religion. Certainly, if there had been establishment issues in Seeger, the Court would have thought twice before adopting a functional definition and relying so heavily upon Tillich's notion of "ultimate concern." When religion is conceptualized as "ultimate concern," being "nonreligious" is not an option. That each person possesses some concern that rises to the level of ultimacy in his or her life comprises an implied admission that any attempt to purge religion from public life is an exercise in futility. For Tillich, a political community, just like the human self, is centered around an ultimate concern. [186] The subject-object split is transcended by the act of ultimate ***112** concern, such that it constitutes the faith by which one believes (fides qua creditur) as well as the content of faith which is believed (fides quae creditur). [187] Every person and community, therefore, has a choice about how to be, but not whether to be, religious. [188] In light of such considerations, one must doubt whether the sweeping manner in which the Court construed Section 6(J) of the Universal Military Training and Service Act had anything substantive to do with spelling out a concrete definition of religion. The goal was to re-write a particular section of a Congressional statute so as to accommodate Seeger and those like him as conscientious objectors to military service. That objective, but little else, was accomplished.

Functional definitions of religion, by locating the religious impulse in a universal human capacity, superlatively protect free exercise, but they have drawn criticism because they tend to constrict the meaning and scope of establishment concerns. Such definitions tend as well to render the "secular" nothing more than one religious orientation beside others. Separationism and neutrality lose their meaning. But lest one be tempted to subscribe to Professor Tribe's "dual-meaning" suggestion, [189] which even he has recanted, [190] one might keep in mind Justice Rutledge's clarion reminder.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other. [191]

The point is that the same entity or phenomenon is regulated by both religion clauses of the Constitution. The founders intended only one meaning for the term "religion," not two.

D. The 'End' of Religion?

Rutledge's words also serve as a warning to us to be vigilant about trying to dispense with the term "religion." Because the founders used it in connection with the guarantee of fundamental freedoms, following the advice of those like Professor Smith would create a problem for constitutional interpretation. [192] In ***113** addition, the replacement of the word "religion" with those like "faith" and "cumulative tradition," which are in every respect as troubling, would do nothing except beget fresh intellectual bramble bushes. For better or worse, "religion" is the term the founders bequeathed to us, and it is incumbent upon us to interpret it. To capture in its proper perspective their univocal rendering of religion, one must understand that their society was a largely homogeneous one composed almost entirely of Protestants and those directly influenced by that tradition. What was easily understood by the founders is far more difficult for us and constitutes an immense challenge.

E. Criticism of Content-Based Definitions

Designating for our time any precise content for the term "religion" is a risky undertaking. Certainly, identifying religion only with a belief in the supernatural is not only misguided, but also flies in the face of fact. John Dewey, one of the most influential American naturalists of the twentieth century, possessed what he regarded as a religious vision of reality that he sometimes called "a common faith." [193] From Friedrich Schleiermacher, as the father of modern Protestant theology, through Christian thinkers like Albrecht Ritschl and Adolf Harnack, to twentieth century ones like Tillich, Reinhold Niebuhr, Rudolf Bultmann, Karl Rahner, and John Cobb, the overwhelming tendency has been a departure from the supernatural. Do the legal commentators who tout the supernatural as the sine qua non of religion wish to preclude from its compass the most intellectually rigorous Christian thinkers of the last two centuries? It is hardly a serious and meritorious response to the question for one to state that those beliefs which are not grounded in the supernatural are not religious. Circular reasoning solves nothing.

It may not be correct to make too close a correlation between religion and belief in good and evil. While it is tempting to do that, especially in a society like the United States, profoundly influenced by Puritanism, it is problematic to argue that "the moral" is an essential condition of religion. William P. Alston has noted that there are societies in which there is a disconnection between their ritual system, with its network of beliefs, and their moral code. [194]

The same observation may be made about Professor Choper's emphasis upon ***114** "extratemporal consequences." [195] There is little doubt that many religious people believe not only in the supernatural, but also in post-terrestrial rewards and punishments. A fervent belief in either or both might provide grounds for exempting such individuals from shouldering responsibilities discordant with their beliefs. Violating one's conscience, such that he or she is convinced that eternal damnation or, in the alternative, God's angry displeasure will be visited upon them may be a reason to support interpreting religion as Choper recommends. But the fact remains that not all religions recognize belief in a life after this one. Buddhism and Confucianism have no such doctrine; neither does reformed Judaism. Must we therefore conclude that adherents to these and other such religions should not be heirs to the religious freedoms in the First Amendment? One wonders if it would make a difference for Choper that those religious persons, who for example structure their thought in Whiteheadian [196] or Hartshornian [197] terms, might profess a belief in immortality apart from personal consciousness. If religion were defined a là Choper, a discerning jurist might indeed ponder whether such a view of immortality poses a personal threat to the one requesting classification as a conscientious objector.

The majority opinion in Yoder nods in the direction of content when taking notice that the Old Order Amish are generally productive and law-abiding citizens and comprise "an organized group" of deep conviction related to daily living. [198] But these are not universal indicia of religion. Many who are productive, law-abiding, and members of an organized group are not ipso facto religious; indeed, many service organizations, not to say communes, regard themselves as distinctively nonreligious. When Jesus of Nazareth was baptized by John or Siddhattha Gautama was enlightened under the Bo Tree, both without an organized following, were they "religious" ?

Content-based definitions of religion, especially in a pluralistic society, usually fail because of their exclusivity. As the history of religions teaches, virtually every tangible object and experience, including but not limited to food, drink, sexual acts, child-rearing, apparel, physical movement and space, along with every variety of belief, have been given sacral significance. [199] Defining religion by content alone is sure to yield arbitrary and culturally biased results.

F. Analogies to the "Indisputably Religious"

Judge Adams and many like him suggest that we begin, as Kent Greenawalt would have it, with the "indisputably religious" [200] and then analogize to a conclusion about whether that which is before us is truly a "religion." [201] At first blush the method seems safe. It reminds one of Kant's transcendental method, ***115** which reasons from the reality of mathematics, natural science, morality, and beauty to the conditions that make them possible. [202] The point of departure is, or at least appears to be, indubitable and imparts to the inquirer a substantial measure of confidence. But the venture fails for the same reason that Kant's transcendental method failed; there was geometry after Euclid and physics after Newton. The geometry and physics of the eighteenth century are now but an infinitesimal portion of the canvas in those disciplines. There was, in fact, no immutably certain starting point for Kant's transcendental inquiry. One must approach any subject with doubt and wariness when commencing the inquiry with what is billed as "indisputable." Such a method always elevates the ephemeral present to a point of supremacy. If one begins with the Christian religion, any belief system closely paralleling it will be entitled to the label "religion." Belief systems like the one of MOVE will invariably fall short. [203] An inherent bias will work against any religious orientation that is new and different from the "indisputably religious." The so-called "indicia" of religion, utilized by Judge Barrett, [204] are largely similarities between traditional, well known religions, little more.

G. Invoking Wittgenstein

Peñalver's efforts to resolve the definitional problem by relying upon insights from Wittgenstein's philosophy of language highlights the fact that words evolve over time and are not merely static category-concepts. Peñalver's method, like Judge Adams' and Greenawalt's, would begin with paradigm cases, although unlike theirs the baseline for comparison would not be narrow, but broad. [205] Expanding the baseline and mitigating the problem that bedevils the analogical method does not cure it. One still begins the inquiry with the familiar and traditional, then reasons to a conclusion. [206] However much Peñalver might desire to rid his approach of bias, it is built into his method. One must ask how, since for Wittgenstein "word meaning [ ] consist[s] in our way of using words," [207] it follows that new uses must necessarily be analogized to old, familiar ones. Is Peñalver's method not shackled with precisely the idea that Wittgenstein criticizes, that of ***116** attempting to derive new meanings from old static-concepts?

H. Summary Observation

Functional, content-based, and analogically derived definitions of religion all present problems, perhaps even insurmountable ones, for First Amendment jurisprudence. It would be an encouragement of sorts to think that the Supreme Court has declined to define the term because it is cognizant of the insuperable difficulties which are inherent in the endeavor. Being aware of the various intellectual and jurisprudential land mines that are concealed in the undertaking is almost as praiseworthy as attempting to navigate one's way through them. The Court's jurisprudence of religion, sadly enough, does not reflect any especially profound awareness. Its use of terms like "religiously neutral" and "secular," and its references to the "high and impregnable wall" [208] of separation demonstrate an unsettling lack of critical insight and clarity. This impression is magnified by its application of the transparent, superficial tests set forth in Smith and in Lemon for free exercise and establishment respectively.

Searching for a precisely and explicitly expressed constitutional definition of religion in Supreme Court cases always appears to dead-end with a case-specific intimation, as in Seeger, Welsh, or Yoder, of what religion is. If the past is a measure of the future, such "definitions" will continue to engender a welter of conjecture and wholesale recommendation from legal commentators, with far more being read into the Court's pronouncements than is actually there.

The stubborn fact remains that the Court has not seriously sought to define religion. Attempting to comprehend what the Justices mean when they use the term requires the utilization of another methodological approach. Instead of asking about "definition," one may benefit from recasting the inquiry in terms of "meaning." Examining the manner in which political theory conditions the meaning of religion will elucidate the concrete ways in which the term "religion" has been and is being understood in the context of the First Amendment.

IV. Political Theory and the Meaning of Religion

A. Introducing the Impact of Political Theory on "Religion"

I have suggested that, when Supreme Court justices use the word "religion," they have something in mind, although they are usually disinclined to share it in an explicit manner in their opinions. Justice Stevens, for example, in Wolman v. Walter, [209] an establishment case concerning an Ohio statute which provided various kinds of aid to church-related primary and secondary schools, took a stance strongly in favor of the strict separation between church and state. He quoted approvingly of Clarence Darrow's statement in Scopes v. State [210] (the Scopes trial): ***117** "The realm of religion . . . is where knowledge leaves off, and where faith begins . . . ." [211] The Justice, interestingly enough, did not choose to draw from the work of any theologian or from one of virtually myriads of other believers for that proposition, but from a militant agnostic, who claimed, "Fantastic and

foolish and impossible consequences are freely claimed for the belief in religion. All the civilization of any period is put down as a result of religion . . . . The truth is that the origin of what we call civilization is not due to religion but to skepticism." [212]

Darrow's stance toward religion was unquestionably hostile, raising an interesting question concerning why the Justice was drawn to it. While it would of course be neither prudent nor fair to attribute Darrow's point of view in its totality to Stevens, it remains worth noting that the latter does in fact accept the proposition, far from incontestable, that the religious is a realm devoid of "knowledge." [213] The point is not to agree or disagree with Stevens' (theological) assessment, but to underscore that it is one which is immensely significant in determining what he thinks religion is. Of further note is the fact that the Justice resorts to Darrow's statement when making a case for the "high and impregnable wall between church and state." [214] The method that I am advocating proceeds indirectly. It asks, "Given this body of opinions by this particular justice, what does he or she understand the meaning of religion to be?"

B. Typology of the Religion Clauses

When attempting to comprehend the jurisprudence of religion, several possibilities immediately present themselves. In connection with establishment theory, an individual may take one of two fundamental theoretical positions; accommodation or separation. With respect to free exercise theory, one may favor a broad or narrow view of free exercise. The possible combinations therefore break down in the following manner:

	ESTABLISHMENT	
FREE EXERCISE	Accomodation	Seperation
Narrow	De Facto Establishmentarianism	Classical Liberalism
Broad	Revised Liberalism	Communitarianism

***118** The separationist tries to hold fast to the notion that religion and the state function in two disparate spheres, while the accommodationist contends that a cooperative and supportive relationship exists between them. Those favoring a narrow right of free exercise believe that it is only one priority among others in government or that it belongs to some and not to others. Those approving a broad right of free exercise argue that it belongs to all and should be invaded only by the most compelling government concern.

C. Classical Liberalism

Classical liberalism [215] divides the public, where government supposedly operates in a secular and neutral manner, from the private, which is a factious combat zone of conflicting ideologies and concerns. [216] The individual citizen is free to choose [217] and to pursue goals that enhance his or her own self-interest, while the government refuses to play ideological favorites and occupies a place above the fray, beyond good and evil.

Religion is relegated to a person's private life. Moses Mendelssohn's statement, "Be a man in the streets and a Jew at home" [218] captures the spirit of classical liberalism. When one advocates in support of a particular political policy or position, he or she must take care to do so in a secular way, utilizing evidence and reasoning that is available to all. [219] To give voice to private religious reasons ***119** for one's political positions runs afoul of the classically liberal understanding of government. [220]

D. The Classical Liberalism of Justice Frankfurter

Justice Frankfurter's judicial opinions capture the spirit of classical liberalism by minimizing the role of religion in public policy. Frankfurter argued in Gobitis that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve a citizen from the discharge of political responsibilities." [221] The issue for the Justice was simple and straightforward: either a Jehovah's Witness child salutes the United States flag at the risk of what he believes will result in his eternal damnation or he is expelled from public school without, as it may turn out, financial means to enroll in a private one. In Board of Education v. Barnette, overturning Gobitis, Frankfurter filed a passionate dissent in which, in the name of judicial restraint, he opined that "sectarian scruples" should be subservient to the general civil authority. [222]

The Justice likewise joined the majority in Braunfeld v. Brown, in which orthodox Jews from Philadelphia complained of Sunday closing laws that allowed them to compete for business only five, instead of six, days a week. The merchants ***120** were in the unenviable position of having to decide between their jobs and their religious faith. Frankfurter voted with the majority against the complainants and, in a concurring opinion, argued that Sunday as a day of rest is, the closer one gets to modernity, a secular notion. He maintained that any disadvantage to orthodox Jews might be offset by their hard-working creativity. It should not escape attention that, in classically liberal fashion, the Justice wrote:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. [223]

He even spoke of a "balancing test" to be applied when there is a conflict between government and religion, such that a regulation cannot be sustained either when it is "demonstrably outweighed" by the religious impediment at issue or when the object of such regulation could be achieved in another manner with less religiously burdensome effects. [224] Such statements were disingenuous and might lead one to assume incorrectly that the Justice supported a broad right of free exercise. Without surprise, he opted for the government's interest over that of orthodox Jewish observance.

Of equal importance, the Justice cast a dissenting vote in Murdock v. Pennsylvania [225] against the right of a Jehovah's Witness to distribute literature and to solicit door to door without being taxed for exercising that right. Frankfurter excoriated the majority for holding that "the Constitution requires not that the dissemination of ideas in the interest of religion shall be free but that it shall be subsidized." [226]

Frankfurter's minimalist position is exhibited full flower in his establishment ***121** jurisprudence. In Ilinois ex rel. McCollum v. Board of Education of School District Number 71, [227] where the issue was whether the sectarian education of children on public school property in connection with a "time-release" program is a violation of the Establishment Clause, the Justice agreed with the majority's invalidation of the program. [228] In a concurring opinion, he emphasized that public education is to promote "cohesion" and so cannot become entangled in sectarian factionalism. [229] Government occupies an exalted position above such strife and should not support it. [230] To underscore the point, Frankfurter asserted, "Separation means separation, not something less." [231]

In Zorach v. Clauson [232] a time-release program was again at issue, but it was not one that involved either the use of public school classrooms or the expenditure of public funds. Religious instruction was given off campus; the program was entirely voluntary; and truancy was assessed by sectarian, not public school, teachers. [233] Notwithstanding these crucial facts, Frankfurter dissented from the majority's approval of the program on the ground that political and social cohesion was

compromised in order to further private, sectarian interests.[234] Those students who did not participate in the program, he insisted, were injured by virtue of being made to stay in school while others were not.[235]

One does not trade upon hyperbole to observe that Justice Frankfurter's classical liberalism relegated religion to a position of political and social irrelevancy. Religion, for the Justice, had nothing to contribute to public debate or to public decision-making. It belonged to an entirely private sphere which, while influencing human conduct, is always trumped by concerns in the public and political arena. Any belief, act, or practice that was, for Frankfurter, at least putatively religious was understood as a potentially divisive force working to undermine political consensus and should always be viewed warily and subordinated to civil authority.

E. Communitarianism

The guiding principles of classical liberalism are self-interest, personal desire, and the autonomous self that seeks realization of the same. Only procedural values are enshrined in this political system. With respect to substantive moral values the system is to be a paragon of neutrality, beyond any comprehensive conception of the good. Competing theories of virtue and morality belong to the private sphere[236] ***122** and literally talk past one another, with no hope of adjudicating their disagreements. Moral chaos, the critics of liberalism charge, inevitably results under such a regime. Factions against which the classical liberal system is specifically designed to protect become the reality that threatens its survival. In response to this view of classical liberalism emerge communitarians. They stress community values, the "common good," and a rich tradition from which to draw for moral guidance. As Michael J. Sandel, admiring the polis in Aristotle's Politics, puts the matter in his protest against classical liberalism,

Unlike the ancient conception, liberal political theory does not see political life as concerned with the highest human ends or with the moral excellence of its citizens. Rather than promote a particular conception of the good life, liberal political theory insists on toleration, fair procedures, and respect for individual rights--values that respect people's freedom to choose their own values. But this raises a difficult question. If liberal ideals cannot be defended in the name of the highest human good, then in what does their moral basis consist?[237]

Sandel notes that some consider these liberal principles to be justified by an appeal to moral relativism. He correctly argues that the question "Who is to judge?" serves, in the end analysis, only to undercut the values on which liberalism itself is based.[238]

Communitarians are interested in religious groups, like the church, being a light unto society. The idea of the Good precedes the concern for individual rights. Yet communitarians believe strongly in separationism so that they may not be obstructed in the broad and vital exercise of their religion in society.

F. An Exemplary Case

One Supreme Court case that demonstrates the spirit of communitarianism is Yoder. Chief Justice Burger's majority opinion applauded and celebrated the Old Order Amish as those who comprise a tightly-knit religious community, with deeply rich historical roots in the Anabaptist tradition.[239] The Chief Justice emphasized that the values of the community, exemplified by hard work, self sufficiency, productivity, and law-abidingness, pervade and determine the lifestyle of its members.[240] Because secondary schooling accents priorities inimical to those honored by the Amish community and poses a threat to its existence, the Court ***123** exempted Amish children from schooling beyond the eighth grade.[241] The opinion conveys the unmistakable

message that religion is about an organized community, insulated from the rest of society, that draws strength from its refusal to conform to others' beliefs and values. Both separationism and a broad right of free exercise are honored by the opinion.

G. The Communitarianism of Justice Brennan

The opinions of no single Supreme Court justice have embodied the ideals of communitarianism more than those of William Brennan. In Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, [242] a class brought suit against the Mormon Church alleging that it discriminated against its employees on the basis of religion in violation of the Civil Rights Act of 1964. Brennan held for the church in a concurring opinion that gave clear voice to a communitarian philosophy. [243] He wrote,

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to the mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well. [244]

Brennan's dual emphasis of strict separationism and expansive free exercise proceeded with remarkable consistency throughout his career. His separationism was gauged to protect what he regarded as the sanctity of religious symbol, belief, and practice. Lynch v. Donnelly [245] involved the constitutionality of a crèche displayed on public property in Pawtucket, Rhode Island during the Christmas season. The display was set in a commercial context, which included a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, hundreds of lights, and a large banner that shouted "Season's Greetings." [246] The Justice found that the display not only violated establishment principles, but also denigrated the religious symbol itself. [247] He argued that, when the crèche is regarded as a depiction of merely a "traditional ***124** event long recognized as a National Holiday," [248] the display is "not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of 'history' nor an unavoidable element of our national 'heritage.'" [249]

Brennan also voted against the majority in Marsh v. Chambers, [250] where the Court upheld the employment of a legislative chaplain in Nebraska against an establishment challenge. [251] The Justice's admitted jurisprudential objective was to "prevent the trivialization and degradation of religion by too close an attachment to the organs of government." [252] He contended against the majority that "Prayer is serious [theological] business." [253]

Brennan's readiness to interdict the slightest religious establishment translated into his conviction that religious persons should be provided an unhampered right to exercise their faith. Brennan voted with the Warren majority, in Sherbert v. Verner, [254] to uphold the right of a Seventh-Day Adventist not to work on Saturdays. Later he would march to the beat of a nonmajoritarian drummer when he supported the religiously inspired use of peyote by Native Americans, [255] an injunction prohibiting the federal government from building a roadway through Native Americans' sacred land areas, [256] and the right of an orthodox Jewish psychologist in the United States Air Force to wear a yarmulke while on duty. [257]

H. Revised Liberalism

The communitarian critique of classical liberalism has resulted in a refurbished and reconstructed liberal philosophy. This new liberalism provides not ***125** only for the public accommodation of religion, but also for its broad free exercise. The goal is to foster liberty, equality, and diversity while, at the same time, promoting principles of virtue in support of the public interest. So the philosophy may be understood as a synthesis of insights from classical liberalism and communitarian theory. Religion, accordingly, is not a private affair, but is given its place in the public square. The religious qua religious have a full participatory right of citizenship. The hope is that, through vigorous debate, issues of public morality like war, poverty, racial and gender-based discrimination, and child welfare will be cooperatively clarified and addressed. The underlying assumption is that the 'factions' of classical liberalism (also known as the 'communities' of communitarianism) can and do reason from premises that often intersect, enabling the joint resolution of problems. [258]

I. Cases Exemplifying the New Liberalism

There have been Court decisions and opinions which forcefully exemplify this public philosophy. In Widmar v. Vincent [259] for example, the University of Missouri in Kansas City made its facilities available for use by various student organizations, but excluded a group who engaged in religious worship and teaching. The question before the Court was whether a university regulation that bars a religious group from equal access to university facilities violates that group's right to free speech, free exercise, and equal protection. [260] The Court struck down the regulation, maintaining that the university had effectively created an open public forum which invited all forms of discourse and so could not enforce a content-based exclusion of religious speech. [261] Religious speech was regarded as no less violable than any other form of speech and, hence, deserving of protection. [262]

The Court applied its Widmar reasoning to a high school, which permitted various student groups to meet after school on its premises while seeking to exclude from that privilege a Christian club devoted to Bible-reading, discussion, and prayer. [263] In Board of Education v. Mergens, [264] the Court pointed out that a "limited public forum" was established when at least one noncurriculum group was allowed to meet on school premises and that, under the Equal Access Act, a ***126** Christian group who desired to meet could not be prohibited from doing so. [265]

The Court was faced with the same fundamental issue where a New York law authorized school districts to open schools to the public for general civic purposes when the facilities were not otherwise in use. [266] A church wanted to screen a film series concerning the family, but was denied from doing so because the series was religious. [267] The Court ruled in Lamb's Chapel v. Center Moriches School District [268] that a religious viewpoint could be expressed on public property pursuant to an open access policy. [269]

In the same vein, a public university paid for a variety of student publications out of a mandatory student activities fee, but withheld payment for the publication of a student paper with a distinctively religious perspective. [270] In Rosenberger v. University of Virginia, [271] the Court held that the university had targeted and discriminated against a viewpoint only because it was religious and stressed that government cannot impose financial burdens on speakers because of the content of their speech. [272]

The guiding principles of these decisions support the public accommodation as well as the open, free exercise of religion. While none of the foregoing cases involved a minority religion, [273] one can assume, at least from a theoretical standpoint that the outcomes would remain the same notwithstanding that fact.

J. The De Facto Establishment of Majority Religion

A final option remains; it is de facto establishmentarianism. Proponents of this option may argue that classical liberalism and communitarianism are each, for reasons of their own, wounded by the same arrow. The former understands virtue as no more than an individual's freedom to pursue his or her own interest in an atmosphere of factional warfare, with little or no hope for the discovery of commensurate premises. The latter provides an insular moral and religious perspective, leading to few, if any, structural points of intersection with the rest of society. Each in its own manner creates a Tower of Babel, around which dialogue, reciprocity, and cooperation are thwarted. The response offered by the new ***127** liberalism might be viewed as little more than a well-intended, but quixotic aspiration. Multiple religions with radically diverse worldviews and contents will, so the argument goes, succeed only in fostering social and political divisiveness, if not anarchy. [274] Proponents of the theory would maintain that United States culture is predominately Christian. Principles of virtue that are brought to bear upon the political process should come from the country's concrete, identifiable heritage. A reference to "religion" is to that tradition to which the majority of citizens adhere. That tradition is to be accommodated and allowed free exercise, while minority religious points of view are placed on a tighter leash.

K. Chief Justice Rehnquist and Justice Scalia

Rehnquist and Scalia have written numerous opinions which support the fourth option. Rehnquist sided with the majority in Lynch, supporting the public display of a creche at municipal expense. [275] He authored, and Scalia joined, the majority opinion in Witters v. Department of Services for the Blind, [276] which found no establishment violation when the State provided financial assistance to a student pursuing a degree in theology or related areas. [277] They both dissented in Edwards v. Aguillard, [278] where a Louisiana statute allowing for the teaching of creationism was invalidated. [279] They both voted with the majority in Zobrest v. Catalina Foothills School District, [280] which held that a deaf student who attended a Roman Catholic school could be provided an interpreter at public expense. [281] They also in Aguilar v. Felton [282] favored a New York program that sent public school teachers into parochial schools to provide remedial education to disadvantaged students. [283] In each of the foregoing cases, the two Justices supported the public accommodation of the Christian faith.

They have just as staunchly supported the curtailment of the free exercise of minority religious perspectives. Rehnquist dissented in Thomas v. Review Board, [284] where the Court upheld the right of a Jehovah's Witness to receive unemployment compensation when, for religious reasons, he had quit his job fabricating turrets for military tanks. [285] In his dissent, Rehnquist expressed support for the majority opinion in Braunfeld and the dissent in Sherbert, [286] cases where the Court ruled ***128** against orthodox Jews who complained that they could not compete under the burden of a Sunday-closing law and then in favor of a Seventh-Day Adventist who complained that she was forced to work on Saturdays. [287] Also in Goldman, [288] Rehnquist opined that an orthodox Jewish psychologist in military service had no right to wear a yarmulke while on duty. [289] The Chief Justice joined in the much criticized majority opinion of Department of Human Resources v. Smith authored by Scalia. [290] In the same way in Lyng, [291] they took the side of the federal government against Native Americans fighting against a roadway through their sacred lands. [292]

*129 V. Analysis

A. A Caveat about the Function of Typology

Critics may wish to contend that the typology which I have set forth is only of limited value, since the opinions of Supreme Court justices invariably transcend it. Brennan and Rehnquist, for example, voted with the majority in Widmar [293] and Mergens, [294] two opinions which I have maintained reflect the spirit of the new liberalism. Rehnquist furthermore wrote for the majority in Locke v. Davey, [295] which held that a State's prohibition against the public funding of scholarships for students pursuing degrees in devotional theology does not violate the Free Exercise Clause. [296] Additionally, Rehnquist and Scalia dissented in Board of Education v. Grumet, [297] where they approved of the New York legislature's carving out a separate school district to serve Hasidic Jews. [298] Since their dissent was intended to support the religious toleration of a minority religion, one may reasonably inquire how they can be viewed as de facto establishmentarians of the Christian religion. [299]

The primary purpose of a typology, it should be emphasized, is to bring into stark relief comparisons and contrasts between countervailing positions. A typology should be judged only by the extent to which it is able to explain and ultimately to clarify various points of view. The purpose of a typology is not to suggest that persons or phenomena who are generally categorized in a particular way cannot act at times in a manner inconsistent with the categorization. When a social scientist labels an economy as 'socialistic,' it does not follow that the label is inapposite and without value because the economy includes free market features. In the same vein, the wave theory of light should not be dismissed out of hand because it is not universally applicable to all the data. The typology presented herein should be judged in accordance with its capacity to elucidate similarities and *130 differences between public philosophies, as well as those justices' opinions which tend to reflect the philosophies, rather than as an attempt, certainly doomed from the outset, to foster a perfect fit between theory and practice. The predominant objective of this typology is to serve as a tool by which to clarify the meaning of religion in public life, nothing more nor less.

B. Classical Liberalism: Beyond Good and Evil?

Classical liberalism establishes a most uneasy truce with religion. Mark Tushnet, a Georgetown law professor, insightfully observes that religion "poses a threat to the intellectual world of the liberal tradition because it is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between individuals and the state." [300]

There is tension, even hostility, between the two, such that religion is purged from government and relegated to the sphere of private interests. While it is true that, in a liberal state, no one can be punished for professing religious beliefs, it is also true that no policy can pass public muster solely on the ground of religious warrant. The root cause of the liberal antipathy to religion concerns the supreme values that each professes. Liberal governance rests upon the values of neutrality, equality, and tolerance, whereas religious governance postulates a supreme metaphysical reality which more often than not molds believers' sense of duty toward one another and the rest of society. [301] The problem is that there is a contest between ultimate values. Despite the assertions of neutrality and tolerance by liberals, the fact is that liberalism rejects as false any religious position that denies its values. As Larry Alexander sagaciously points out, "Liberalism can rest on agnosticism regarding some truths, but not regarding its own truth." [302] Furthermore, it

cannot claim as a ground for excluding religion from public policy questions a superior or even a different epistemology from that of religion. In other words, the truth of liberalism (and falsity of illiberal religions) cannot rest on an epistemology that is a different and, for public policy issues, better epistemology--because it is fairer, more reasonable, more respectful of autonomy, more consistent with our being free and equal, etc.--than the epistemology employed to support religious claims, *131 including the claims of illiberal religions. [303]

To make the point bluntly, classical liberalism comprises nothing more than a specifically sectarian approach to political issues and, by elevating its own values to preeminence, is not only "illiberal" but also a kind of disguised tyranny. Classical liberalism ignores the fact that, in order for one to adjudicate the contest between the respective values of liberalism and religion, nothing less than a moral and religious discussion is required. By engaging in that discussion, classical liberals make their case and, by so doing, demonstrate that they are anything but neutral regarding comprehensive conceptions of the good. [304] They advocate for their position like others advocate for theirs; there is no distinguishing characteristic between the various advocates other than that liberals are perhaps less likely to admit what they are really doing than others are.

The premiere liberal, John Stuart Mill, predicates political and social liberty on the premise of uncertainty:

> We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still. First, the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth; but they are not infallible. They have no authority to decide the question for all mankind and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false is to assume that their certainty is the same thing as absolute certainty. [305]

Liberals genuflect to neutrality and tolerance because they are 'absolutely certain' that they cannot be absolutely certain. The logical incoherence of their position is overwhelming. All that they succeed finally in demonstrating is their own insincerity regarding the philosophical underpinnings of their position.

C. Critique of Communitarianism

Just as liberalism discounts religious points of view other than its own, communitarianism structurally disconnects religion from the political process. [306] ***132** Ironically enough, each philosophy serves in its own way to privatize religion and to divorce it from the body politic. The classical liberal desires to separate religion from government to protect government, while the communitarian desires the same separation to protect the community. The former is in the secular tradition of Jefferson who desired 'a wall of separation between church and state,' [307] while the latter is in the tradition of Roger Williams who supported a wall to protect the righteous garden from the weeds of the spiritual wilderness.

The Amish are communitarians. They are separationists who live more in the spirit of Williams than of Jefferson. They are industrious, productive, law-abiding, and heirs to a rich historical tradition. Yet they enter the political arena only when they feel the heel of government on their backs. Their commitment is only to their community, and their sole request of government is be left alone. As Ronald F. Thiemann asserts of communitarians in general,

> By urging local communities to withdraw from liberal society, they fail to provide a genuine program of reform, thereby abandoning democratic polity to its own worst tendencies. The danger inherent in the sectarian critique is that its advocates will deconstruct and dismantle the liberal tradition without offering anything enduring in its place. That strategy could create a sense of alienation from liberal political structures that might precipitate the very moral nihilism that the communitarians so vigorously warn us against. It would be ironic indeed if the communitarian critique served to foster the cultural and moral despair that its advocates argue is inherent in classical liberalism. [308]

How could it not foster such despair when those outside the communitarian's own immediate sect are treated as strangers, thereby diminishing the opportunity for dialogue and for the expression of mutually cooperative social and political ***133** goals? Communitarians see and understand that classical liberal values are at war with their own, yet they accept the engagement of war by a strategic retreat and withdrawal to safe haven. Theirs is a religion turned inward with limited relevance for attacking and solving problems of the body politic by building consensus.

D. The Doubtful "Synthesis" of the New Liberalism

Reconstructed liberalism is not a separationist position. It assumes a relationship of accommodation between religion and the state. The state allows all religious traditions and perspectives to have their voice in the public square. The hope is that, in this manner, moral values will directly shape political decision-making and that consensus will be generated. This approach, according to Michael McConnell, relieves the kind of citizenship ambiguity to which Moses Mendelssohn referred when he asserted, "Be a man in the streets and a Jew at home . . . and entitles religious citizens to their language, their advocacy, and their worldview." [309] Religion, according to this theory, becomes a vibrant public force in democratic life, no longer restricted to one's private life or to a local community living in isolation from civil society.

One is compelled to question what the effect of government upon religion will be in view of the partnership posited between them. What will happen to the funding of religious initiatives when a church's, mosque's, or synagogue's point of view differs radically from that of Caesar? There is a concern to be raised that he will control the religious agenda, pouring the various sectarian traditions into a common mold such that their individual truth claims will, far from being distinct, approximate rough equivalencies to one another. The question regarding religion becomes not "So what?" as in classical liberalism, but "What's the difference?" . [310] Stephen L. Carter writes,

A religion . . . is not simply a means for understanding one's self, or even of contemplating the nature of the universe, or existence, or of anything else. A religion is, at its heart, a way of denying the authority of the rest of the world; it is a way of saying to fellow human beings and to the state those fellow humans have erected, 'No, I will not accede to your will.' [311]

The issue for any accommodationist position is whether, in partnership with the state, a religion will be able to retain its own distinctive, individual identity and, whenever necessary, to speak a resounding "No" not only to the state, but also to the rest of the world. The odds of its doing so decrease in direct proportion to the intimacy of its partnership with the state.

***134** In the alternative, there is a concern that, if the various religious communities retain their identity by resisting Caesar's heavy hand, forces of intense alienation, chaos and even anarchy will be unleashed. This horn of the dilemma may not be as probable as the other, but poses a dire prospect for democratic life nonetheless.

One fact appears beyond dispute. The state can and will impose penalties on religious groups who fail to abide by its agenda. The lesson was borne out in Bob Jones University v. United States, [312] where the issue was whether the tax exemption of a religious entity can be revoked when it acts against public policy. [313] Bob Jones University did not tolerate interracial marriage or dating, or the promotion or encouragement of the same; it denied admission to anyone who engaged in these activities. The Court upheld the revocation of the tax exemption on the ground that the government has a "fundamental, overriding interest in eradicating racial discrimination in education," [314] and, in passing, communicated the insight that "not all burdens on religion are unconstitutional." [315] Winnifred Fallers Sullivan, noting that the university changed its admission policies since the case, went on to observe, "[f]ederal law can be a powerful incentive to changes in revelation. The Mormon Church, in the time prior

to the admission of Utah to statehood, partly in response to pressure from the Federal government, changed its revelation with respect to polygamy." [316]

She could have added that the decisions in the Reynolds and Davis cases embodied the white-hot anti-Mormon fervor of the late nineteenth century. Mormons were loathed as blasphemers; they were ridiculed, ostracized, and otherwise persecuted by the state. One historian, writing of their having taken refuge in Utah, makes the major point as follows: "The West was no sanctuary so long as Mormons persisted in their peculiarity." [317] Any religion riding in tandem with the state runs the risk of losing its "peculiarity." A degree of conformity will be expected. The danger is that, when religions are in partnership with the state, they will speak with a spiritually anemic voice and become nothing but a nonvital appendage of the towering monolith of government, which Hobbes aptly termed "Leviathan." The point is that a close relationship between the two, while opening the door to danger, is not necessarily to be decried as an evil. Vulnerability does not always spell disaster.

E. A Narrow "Answer" for an Expansive Problem

The de facto establishment of a single religious tradition may, however, spell precisely that. To be sure, prayer, the Ten Commandments, displays of Christian symbols, and even instruction on Christian moral and religious themes would find their way into public school classrooms as well as into other civic institutions. The union between Christianity and the state would, for some, herald the moment of the ***135** country's return to its spiritual heritage. Yet profound religious confusion might follow, in which prophetic voices would be weak, hollow, and unsure whether to address the church, the state, or both. A true prophet and his or her followers would discover that they have no home in either the church or the state, resulting in a rebellion against both.

Establishmentarianism answers the "So what?" of classical liberalism and the "What's the difference?" of new liberalism, but it does so by alienating large portions of the citizenry who follow nonestablished faiths. The favored public position of Christianity would certainly result in resentment by Jews, Muslims, Native Americans, Buddhists, Hindus, and others toward the political system and in their estrangement from the pursuit of the art of citizenship.

F. Summary

So what is the meaning of "religion" ? That depends upon the political theory according to which the subject is elaborated. For the classical liberal, religion is a realm of opinion that is irrelevant in the public arena and constitutes even a danger to the state. For the communitarian, religion is about values exemplified in the life of a community, which the government should leave alone. For the new liberal, religion is about the pluralistic expression of values in the public square and about government accommodation of such expression in order that principles of virtue and morality may be brought to bear upon the instrumentalities of state. For the de facto establishmentarian, religion boils down to any traditional expression of Christianity, which is accommodated and supported in numerous ways minority religious points of view are not.

Conclusions

A. Redefining the Search

Critics may wish to reflect that the foregoing analysis of the constitutional meanings of religion yields to pessimism. The result, after all, seems to suggest there is no satisfactory way to resolve the issue of what religion is or should be in a democracy founded in part on the guarantees of the First Amendment. Such critics are correct if the search is for a single definition of religion to satisfy, in a conclusive fashion, the multifarious demands and legal contingencies that a religiously pluralistic society

presents. Any treatment of the subject will render what is finally a tenuous outcome when one is searching for the definitive understanding of religion. It is simply not available. As this analysis has demonstrated, although each proposed view of religion has some advantage or benefit to commend its use, it is also replete with difficulties. Rather than entertaining any realistic hope of accomplishing what is at best problematic, perhaps it is time not to abandon the search, but to jettison the false premise upon which it is based; i.e. that a single definition of religion which is beyond criticism can be found to meet the needs of the pluralistic society the United States has become.

***136 B. A Reflection on Judicial Thinking**

When examining constitutional meanings of religion, it is important to recall Chief Justice John Marshall's immortal words, "we must never forget that it is a constitution we are expounding." [318] His point was that constitutional law is organic and is endowed with marvelous plasticity. [319] Meanings are not chiseled once and for all in granite, but they evolve and can change over the course of time. They expand and contract. Barnette, for example, overruled Gobitis, after which Smith, if it did not reinstate Gobitis at least breathed new life into it. [320] This flexibility of the judicial process, for a logician or idealist philosopher, may indicate the presence of contradiction and the impoverishment of reasoning. That assessment may, on one level, be true. But it overlooks the fact that judicial reasoning has always been pragmatic and instrumental. A judicial opinion is a dramatic adventure in the application of ideas, nothing more nor less. The role of precedent guided by the rule of stare decisis is but a single factor in the judicial equation and certainly not the most crucial one.

Judicial decision-making is not, nor has it ever been, an automatonic process that proceeds with logical precision from ironclad premises. It is safe to say that history has proven William Blackstone mistaken about that. Judicial decision-making is a far more tentative and human endeavor than Blackstone envisioned. It is even fair to suggest that judges reason as much from desired outcomes as they do from facts. [321] Who they are is indelibly stamped upon their judicial opinions and pronouncements.

It is equally instructive to remember, as we have seen, that some definitional approaches to religion seem to suit particular factual circumstances better than other approaches. The same is true of the theoretical positions which have been staked out in connection with the religion clauses of the First Amendment framework. Free exercise and establishment should each be viewed as containing polarities, with numerous degrees between them. Although some justices are closer to one theoretical position than to the others, the fact remains that each comprises a legitimate constitutional meaning of religion, with countless shades of meaning between them. This multiplicity of plausible constitutional meanings serves as a sobering reminder that there is not simply one way to define and to treat religion in public life under First Amendment principles.

C. A Reasonable Expectation

Democracy is fraught with peril. Plato considered it only a single step removed from tyranny. The foregoing analysis of religion in the democratic state underscores the delicate and fragile balance between the two. The judicial ***137** challenge may not be so much a matter of adopting the correct definition of religion or the proper jurisprudential theory by which to elaborate its meaning as to steer clear of the perils inherent within each. Doing so is an exercise in judicial wisdom and flexibility. To that end, a justice's most arduous responsibility is to be mindful of the pitfalls within the position he or she is advancing and not to be caught off guard within their grasp. When difficulties arise, as they will, perhaps the justice's reasoning should seek to demonstrate that they are difficulties which are, considering the particular factual circumstances at hand, preferable to others.

D. Exploration of the Art of Citizenship and of the Religious Spirit

The citizenry of a democratic state must also strive for enlightenment. This goal necessitates an exploration of the religious spirit itself. Without being expected to compromise the fervor of one's own religious outlook, a citizen must still be able to transcend it and to understand that others structure reality in their own ways. The humble awareness that all religious faith includes an ontic element of doubt about its content and fails to render propositions that may be statistically and empirically "proved," in the way, for example, that the boiling point of water can be tested and verified, leads away from triumphalism and condescending tolerance to mutual listening, understanding, and respect. As Reinhold Niebuhr once wrote with characteristically discerning insight,

Religious humility is in perfect accord with the presuppositions of a democratic society. Profound religion must recognize the difference between the unconditioned character of the divine and the conditioned character of all human enterprise . . . . Religious toleration through religiously inspired humility and charity is always a difficult achievement. It requires that religious convictions be sincerely and devoutly held while yet the sinful and finite corruptions of these convictions be humbly acknowledged; and the actual fruits of other faiths be generously estimated. [322]

The most virulent enemies of democracy are not the passionately religious, but the so-called "true believers" caught in the web of their own hubris. Circumventing the land mines of religion, the dangers of which the pages of history are replete, will not ultimately depend upon the constitutional definition and theory of "religion" that is adopted in any given case, but upon the extent to which an enlightened populace understands the benefits and dangers religion presents and brings the virtues of their differing religious and moral positions to bear upon the affairs of state. Whether that is done from a position of accommodation or separation and of narrow or expansive free exercise is an important, but penultimate, consideration.

*138 Postscript

The Court will eventually be faced squarely with the question, "How should 'religion' be defined in the context of the First Amendment?" Issues involving both definition and jurisprudential theory will require attention, because one is ultimately inseparable from the other. The objective will be not only to formulate a definition, but also to do so within the parameters of the First Amendment. The history of religion clause jurisprudence teaches that, while no definition of the term will ever be conclusive, some definitions may be more useful than others. The following suggestions are offered in the hope that they will prove useful.

A. William James' Metaphor

In William James' superlative essay, "The Will to Believe," he utilized the metaphor of our standing "on a mountain pass in the midst of whirling snow and blinding mist, though we may get glimpses now and then of paths which may be deceptive." [323] We know not whether to move to the right or to the left; if we stand still in the belief that rescuers will find us we may freeze to death. All options before us are filled with risk and danger, but we must choose. [324]

James' brilliant metaphor describes the existential situation of humanity. The meaning of life presents itself as a living, momentous, and unavoidable issue. By force of will, one must invest trust in a course that promises "redemption" and "salvation" from the "whirling snow and blinding mist." The choice that one makes invariably involves uncertainty and risk. The choice is never scientifically or mathematically quantifiable. The way in which one structures his or her life reflects "the path" he or she has chosen from the perilous "mountain pass."

Religion involves transcendent trust; that is, trust as a way of response to the most profound, objectively unanswerable mysteries of life. Why is there something instead of nothing? What is the meaning of life and death? When is the living of life most

worthwhile? These are examples of questions which force choices. Those who propose functional definitions of religion properly understand it to be endemic to human life, at least inasmuch as the problems to which it responds are inescapable. A human being is homo religiosus. For that reason, religion pervades culture. The "religious-secular" divide should be recognized for what it is; i.e., a precarious artifice that topples with the slightest nudge.

***139 B. A Definition**

But to discontinue the analysis at this point would be premature. More than a functional definition of religion is needed for First Amendment purposes. As religion clause cases demonstrate, religion must be distinguished, for example, from philosophy. Philosophers have been mindful of the "human situation" and have vigorously addressed the spectrum of choices confronting the human species. Philosophy and religion spring from a common root, but they differ in part according to the language that each uses. Philosophy is weighted in concepts, while religion is expressed in symbol and myth. Martin Heidegger was concerned with providing a penetrating and exacting analysis of Being itself. Karl Barth, by contrast, gave himself to the interpretation of the myths and symbols of Christianity. So religion, as distinguished from philosophy, is transcendent trust in a path of life, embraced as one's hope of redemption or salvation [325] and expressed through symbols and myths, [326] either literally or figuratively understood, which assume historic, communal, and cosmic significance.

A departure from the chosen path, which guides one's way, may result in an inner conflict or a "claim of conscience." Claims of conscience should, in general, be honored by the state. Any religion ought to be provided an expansive right of free exercise provided that the religion does not pose the threat of injury or death to ***140** either its adherents or to others and does not militate against a compelling governmental interest. "Religion," as Whitehead succinctly put it, "is by no means necessarily good. . . . [it] is the last refuge of human savagery." [327] That religion can be dangerous and destructive is beyond question.

C. Establishment and Free Exercise

An "establishment of religion" is a burden upon its free exercise. [328] To that extent, the primary indicator of establishment should be actual physical coercion. [329] If an act or practice is not physically coerced, it should not be regarded as an establishment. [330] There are publicly supported religious activities or practices with historical roots, such as a national day of prayer, a national day of thanksgiving, and the pledging of allegiance to the national flag. The government may regard the ***141** support of these and similar activities as being in the interest of social and political cohesion. [331] So long as the citizen is not forced to participate in them as was the case in Gobitis and Barnette, the activities should not be regarded as constitutionally invidious.

Yet any policy advancing the thoroughgoing government subsidization of one or more religions is problematic. The best way in which a religious point of view can sustain its vitality, authenticity, distinctiveness, and prophetic voice is by living in a healthy tension with the state. The specific degree of subsidization should be determined by Congress and State legislatures. To this limited degree, the communitarian philosophy, as opposed to that of reconstructed liberalism, is helpful.

D. The Parameters of Religious Freedom

A robust freedom of religion should be allowed to pervade the public square and should be interdicted if and only if it (1) harms its adherents or other human beings, (2) militates against or threatens a compelling government interest, or (3) compromises human freedom by being physically coercive. Principles of virtue can be integrated into the art of citizenship and brought to

bear upon the instrumentalities of the state, such that no artificial, structural wedge can or will be driven between morality and government as in both classical liberalism and communitarianism.

E. Applications

Under the proposed definition of religion, Seeger and Welsh were wrongly decided; each applicant for conscientious objector status was motivated by a politico-philosophical purpose rather than by a religious one. But some political and philosophical movements, it should be noted, might be regarded as religions under the foregoing definition. In Nazism and Communism, for example, there is an investment of trust in a path of life which promises social and political redemption or salvation and is expressed in communal myths and symbols. "Aryan superiority" in Nazism and "classless society" in Communism are myths which correspond roughly to biblical ones like "the chosen ones" and the "kingdom of God" respectively. Viewing these movements as religions still means that, for them to receive protection under the First Amendment, they must satisfy the above-stated requirements.

A constitutional definition of religion must necessarily be informed by jurisprudential theory. Engel and Schempp were incorrectly decided since there was no evidence that a single student was coerced to participate in any devotional activity. The Court found, in Weisman, that impermissible pressure was exerted ***142** upon one or more attendees at a public high school graduation where a nonsectarian prayer was offered; however, it bears highlighting that no one was coerced to participate in any activity as they were in Gobitis and Barnette. [332] In Weisman, there was neither sanction nor threat of sanction for failure to participate. [333]

Bob Jones University, on the other hand, was rightly decided, since there was a compelling countervailing state interest involved; i.e. to rid society of racial discrimination and to prevent harm to other human beings. [334] The Court, it should be stressed, did not outlaw the religious beliefs or practices which were promoted by the University, but maintained that the state's interest against racial discrimination was sufficiently compelling to outweigh whatever burden the denial of tax benefits placed on the University's exercise of its religious beliefs. [335] The University was free to continue to oppose the state's interest, but was not free to do so with state support. [336]

F. Circumventing Pitfalls

While no claim of finality is made for the proposed definition, it is in general accord with what historians of religion tell us about religious phenomena and is univocally applicable to both religion clauses of the First Amendment.

The proposed jurisprudential position steers a course between the various philosophical theories explicated above. It avoids the debilitating "public-private" dichotomy of classical liberalism by nurturing a creative tension and mutuality between religion and state. It sidesteps the strict separationism of communitarianism by favoring some accommodation, but escapes the smothering effect of governmental power, recognized as a danger under new liberalism, by supporting only limited state subsidization of religion. The position likewise avoids the suppression of minority religions by reinstating the compelling government interest requirement of Sherbert v. Verner. [337] Finally, so long as there is no coercion, the position is compatible with establishmentarian theory expressed in activities such as legislative prayers and recitation of the Pledge of Allegiance and in observances such as a national day of thanksgiving and a national day of prayer. These are traditions not only with historical roots, but which they also promote social and political cohesion. They represent the kind of establishment which Justice Brennan referred to as "ceremonial deism." [338]

Footnotes

a1 B.A., University of Texas at Austin; M.. Div., Austin Presbyterian Theological Seminary; Ph. D. in philosophy of religion, Columbia University (New York); J.D., Texas Tech University. I wish to express my gratitude to the Center for Religion, the Professions, and the Public. I was honored to be a Senior Fellow in Law there from January through May, 2004, and to research and to write this article. My thanks specifically go to Professor Jill Raitt and to all other fellows at the Center for being helpful, caring, and trusted colleagues, and to Professors Illhyung Lee and William B. Fisch at the University of Missouri School of Law for thoughtful, critical comments concerning my work. I wish likewise to thank Tim Hill and Trish Love, who provided me with every conceivable administrative convenience and favor during the tenure of my fellowship. Last but not least, an immeasurable debt of gratitude goes to my friend, Robert Williams, in Corpus Christi, Texas, who discussed over coffee with me my initial ideas regarding this project and encouraged me to pursue it.

1 See Barry A. Kosmin & Egon Mayer, American Religious Identification Survey, at http://www.gc.cuny.edu/studies/aris_index.htm. (last visited Jan. 18, 2005) (listing the exhibits including an exhibit on the "Self-Described Religious Identification of U.S. Adult Population"); See also Adherents.com, Largest Religious Groups in the United States of America, available at http// www.adherents.com/rel_USA.html (last visited Nov. 5, 2004) (providing a summary of the sociological research of Kosmin et al. including that, from 1990 to 2000, the number of Hindus in the United States has increased 237%, Muslims 109%, Sikhs 338%, and Buddhists 170%). The religiously diverse landscape has riveted the attention of professionals concerning the manner in which they deliver their services. See Margaret M. Andrews & Joyceen S. Boyle, Transcultural Concepts in Nursing Care 446 (Lippincott Williams & Wilkins, 4th ed. 2003) (describing the various trends in minorities in the United States and Canada). The authors point out, During the past two decades, there has been an unusually large group of immigrants from Asia and Latin America. The changing composition of the Asian population has resulted in fewer Christians (63% in 1990 compared with 43% in 2001), and those professing Asian religions (e.g. Buddhism, Hinduism, Islam) has risen from 15% to 43%. These immigration patterns have resulted in significant shifts. For example, there are three times as many Hindus in the United States today as there were in 1990.
Id.

2 See generally Anne Fadiman, The Spirit Catches You and You Fall Down (Farrar, Straus & Giroux 1997) (telling the tragic story of a first-generation Hmong family's struggles caring for their epileptic daughter in an American society with religious, cultural, and familial values radically different from their own).

3 Newdow v. United States Congress, 328 F.3d 466 (9th Cir. 2002), cert. granted, 540 U.S. 945 (2003), in which Newdow complained that his daughter had to 'watch and listen as her state-employed teacher in her state-run school leads her in a ritual proclaiming that there is a God, and that our's (sic) is "one nation under God."' Id. at 483. The fundamental question of religion in the case concerned the privileged status of monotheism in the Pledge; in other words, why not "one nation 'under Jesus,' 'under Vishnu,' 'under Zeus,' or 'under no god"'? Id. Having found that the phrase in question is not only religious, but that it also violates the Establishment Clause by failing the coercion test of Lee v. Weisman, 505 U.S. 577 (1992), the court was disinclined to consider whether the phrase failed the endorsement test of County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573 (1989) and the test of Lemon v. Kurtzman, 403 U.S. 602 (1971). Id. at 487. Upon hearing the case, the Supreme Court dodged a decision on the merits by finding that Newdow lacked the requisite standing to bring a federal court action challenging the constitutionality of the school district's policy requiring teacher-led recitation of the Pledge of Allegiance. Elk Grove Unified School Dist. v. Newdow, 124 S.Ct. 2301, 2304 (2004). There is of course nothing to prevent a case with identical facts, except without an issue of standing, from again arising in the Ninth Circuit. See Newdow v. U.S. Congress (Jan., 2005), at http:www.restorethepledge.com/litigation/pledge/docs/2005-01-03% 20complaint.pdf (last visited March 22, 2005) (providing the re-filed, corrected complaint of Mr. Newdow).

4 See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the guarantees of the First Amendment into the Due Process Clause of the Fourteenth and, hence, making it applicable to the States). The Court had not been inclined to accept any notion of incorporation in The Slaughter House Cases, 83 U.S. 36 (1873). See Michael J. Perry, Under God?: Religious Faith and Liberal Democracy 5 (Cambridge University Press 2003) (maintaining it to be the 'constitutional bedrock in the United States' that the nonestablishment norm of the First Amendment is not only applicable to Congress and to State legislatures, but also to all branches of both national and State government).

5 See Thomas v. Review Board of Indiana, 450 U.S. 707, 721 (1980) (Rehnquist, J., dissenting) (offering his reasons, some of which are similar to mine, for increased litigation under the religion clauses of the First Amendment).

6 See United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) (stating that the Supreme Court "appears to have avoided the problem with studied frequency in recent years"). Nothing has changed since then. I do not regard such a state of affairs to advance religious freedom. Neither religion nor law is edified or enhanced by ambiguity. Cf. Derek Davis, The Courts and the Constitutional Meaning of 'Religion': A History and Critique, in The Role of Government in Monitoring and Regulating Religion in Public Life 89, 91 (James E. Wood, Jr. & Derek Davis, eds., 1993) (stating that "'the American courts' unwillingness to adhere to any fixed definition of religion prevents, in statutory and nonstatutory contexts alike, an otherwise inevitable erosion of religious liberty and diminution of our free society"). While defining "religion" for First Amendment purposes is admittedly fraught with difficulties, the task of doing so is inescapable if any measure of clarity and predictability is desired in the interpretation of the Religion Clauses.

7 U.S. Const. amend. I.

8 U.S. Const. art. VI outlaws a "religious test ... as a qualification to any office or public trust under the United States. (italics added).

9 98 U.S. 145 (1898).

10 James Madison, A Memorial and Remonstrance Against Religious Assessments, in 8 The Papers of James Madison 298-304 (William T. Hutchinson et al. eds. 1962), reprinted in Robert T. Miller & Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court app. B at 586 (3d ed. Markham Press Fund of Baylor University Press 1987).

11 Reynolds, 98 U.S. at 163.

12 Id.

13 Id. at 164.

14 Id.

15 Id. at 166.

16 133 U.S. 333 (1890).

17 Id. at 341.

18 Id.

19 Id. at 342.

20 Id.

21 Id. at 342-43.

22 133 U.S. at 343.

23 283 U.S. 605 (1931), overruled by Girouard v. United States, 328 U.S. 61 (1946). See also United States v. Schwimmer, 279 U.S. 644, 649 (1929), overruled by Girouard v. United States, 328 U.S. 61 (1946) (stating that uncompromising pacifism disqualified one from naturalized American citizenship). In Girouard, the Court, speaking through Justice Douglas, overruled Schwimmer and Macintosh and quoted with approval Chief Justice Hughes' dissent in Macintosh. 328 U.S. at 65.

24 Macintosh, 283 U.S. at 613.

25 Id. at 619.

26 Id. at 630.

27 Id. at 633 (Hughes, C.J., dissenting).

28 Id. at 633-34.

29 Id.

30 310 U.S. 586 (1940), overruled by West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

31 Id. at 591.

32 Id. at 591-92.

33 Id.

34 Id. at 593.

35 Id. See also McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring) (suggesting that religion is "man's belief or disbelief in the verity of some transcendental ideal and man's expression in action of that belief or disbelief").

36 Gobitis, 310 U.S. at 594-95.

37 Id.

38 319 U.S. at 624.

39 Id. at 642.

40 Id. at 654 (Frankfurter, J., dissenting).

41 Id. at 658.

42 Id. at 662.

43 322 U.S. 78 (1944).

44 Id.

45 Id. at 79.

46 Id. at 81-82.

47 Id. at 83.

48 Id. at 86 (quoting Watson v. Jones, 80 U.S. 679, 728 (1871)). See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 245 (Basic Books 1983), (keeping the Ballard decision in mind, when writing the following: "Consumers cannot be protected from fraud, for the First Amendment bars the state from recognizing fraud (nor is fraud easy to recognize in the sphere of grace where, as it is said, the most unlikely people may well be doing God's work)"). I interpret Walzer to mean that the objective certainty of religious beliefs is never to be at issue under the First Amendment, but only the subjective certainty with which such beliefs are held.

49 In 1981 the Court re-visited the cognitive requirements of religious belief. See Thomas v. Review Board, 450 U.S. 707 (1981) (upholding the employment claim of a Jehovah's Witness who, as a steel fabricator, had quit working at his plant after he discovered that he was building turrets for military tanks). Thomas was conscientiously opposed to fabricating war weaponry, although the religious organization in which he was a member had taken no official position on the issue. Id. The Court's majority made it clear that a religious belief "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Id. at 714.

50 Torcaso v. Watkins, 367 U.S. 488 (1961).

51 Id.

52 Id. at 495.

53 380 U.S. 163 (1965).

54 50 U.S.C. App. § 456(j) (1958).

55 Id.

56 Id.

57 Seeger, 380 U.S. at 166.

58 Id.

59 Id. at 166-67.

60 Seeger, 380 U.S. at 176.

61 Dr. Paul Tillich, a Protestant theologian, "identifi[ed] God not as a projection 'out there' or beyond the skies but as the ground of our very being." Id. at 180.

62 Id. at 180, 187. The Court of Appeals for the Second Circuit was the first American court to set forth a functional interpretation of religion. In U.S. v. Kauten, 133 F. 2d 703 (2d Cir. 1943), a conscientious objector case, the Court, delivering its opinion through Justice Augustus Hand, stated in part the following:
Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe--a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.
Id. at 708.

63 398 U.S. 333 (1970).

64 Id. at 336-37.

65 Id. at 342-43.

66 406 U.S. 205 (1972).

67 Id. at 219.

68 Id. at 215.

69 Id. at 219.

70 Id. at 212-13. It should be noted, however, that in United States v. Lee, 455 U.S. 252 (1982), the inseparableness and interdependence of religious faith and mode of life, combined with the law-abidingness and self-sufficiency demonstrated in the Old Order Amish community, were not enough to exempt this group from the social security system. Chief Justice Burger emphasized that religious belief must not be allowed to dictate the tax system; but does it follow that it must be allowed to dictate education statutes? Justice Stevens, in an opinion concurring in the judgment, pointed out that not paying Amish benefits would more than compensate for their opting out and paying nothing into the system. Id. at 262. Michael McConnell's statement is relevant here: "It is conceded by most observers, whatever their substantive perspective, that the present state of Supreme Court doctrine is a muddle." Michael W.

McConnell, The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?, in 1990 First Amendment Law Handbook 269 (James L. Swanson & Christian L. Castle eds., 1990).

71 See id. at 216 (explaining that if their claim were like Thoreau's, it would not "rise to the demands of the Religion Clauses").

72 Id.

73 494 U.S. 872 (1990). It would be inaccurate to describe the test for free exercise that is set forth in the case as "new." As the Court points out, the test represents the thinking in Reynolds, 98 U.S. at 145, Gobitis, 310 U.S. at 586, Braunfeld v. Brown, 366 U.S. 599 (1961), and in Bowen v. Roy, 476 U.S. 693 (1986), the question in Bowen was whether having to use a social security number as the condition of receiving welfare benefits is an infringement upon the free exercise rights of a Native American convinced that a social security card would rob his child of her spirit. It would probably be closer to the mark to describe Smith as standing for the Court's picking up and dusting off an old idea.

74 Smith, 494 U.S. at 879.

75 Id. In direct response to Smith, the Congress enacted the Religious Freedom Restoration Act (hereinafter RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (1993), which provided, in part, that the free exercise of religion could not be infringed except in furtherance of a compelling government interest and, then, only by the least restrictive means of furthering that interest. But in Boerne v. Flores, 521 U.S. 507 (1997), the Court struck down the Act on the ground that it exceeded the enforcement power of Congress under § 5 of the Fourteenth Amendment.

76 330 U.S. 1 (1947).

77 Id. at 15-16. Jefferson's phrase was a reflection of his deism. See Ralph Ketcham, Thomas Jefferson, in 4 The Encyclopedia of Philosophy 259-60 (Paul Edwards ed., 1967) (describing Jefferson's history, his philosophical views and his role as a social philosopher). For an excellent treatment of this natural religion of the Enlightenment, see Ernst Cassirer, The Philosophy of the Enlightenment 160-82 (Fritz C. A. Koelln & James P. Pettegrove trans., Princeton, 1968) (1932). Thomas Paine, who was also a deist, condemned the "adulterous connection" between church and state. Philip Hamburger, Separation of Church and State, 61 (Harvard University Press 2002).

78 In Reynolds, 98 U.S. at 164, the Court first invoked Jefferson's celebrated metaphor of "a wall of separation between church and state," which he had used in a letter to the Baptist Association in Danbury, Connecticut. Reynolds was a Free Exercise Clause case. Everson stands for the constitutionalization of the metaphor in Establishment Clause jurisprudence. The story of separationist ideology is told exceedingly well in Hamburger, supra note 77. He points out that the active espousal of the doctrine of separation of church from state was rare prior to the beginning of the nineteenth century and that, in fact, Jefferson's separationist view was so shocking to even the Baptists, who stood for disestablishment but not for separation, that Jefferson's letter lay virtually buried for half a century before being published. Id. at 21, 164-65. Between 1830 and 1850, the doctrine of separationism began to grow in prominence in connection with the escalation of Protestant fears regarding Roman Catholics who were immigrating to the United States primarily from Ireland and Germany. Id. at 202. The doctrine was then taken up by liberal educators, like Henry P. Tappan, and liberal clergymen, like Octavius Brooks Frothingham, who wanted education liberated from sectarian influence. Id. at 253-55. By the last part of the nineteenth century, "anti-Christian secularists" campaigned to divorce government from all religion. Id. at 287. Fringe groups, like the Ku Klux Klan who loathed Roman Catholics and people of color, supported separation as well. Id. at 408. Hugo Black, who authored the majority opinion in Everson, had been a member of the KKK before taking his seat on the Court. Id. at 422-34. The fact was discovered after his nomination had been confirmed by the Senate. Id. at 429-30. He referred to the outcome of the Everson case as a "Pyrrhic victory" for Roman Catholics. Id. at 462. Cf. Walzer, supra note 48, at 248 (1983) (understanding "the wall between church and state" as one of "radical separation" that serves to limit the use of force as a means to personal salvation). But see Ronald F. Thiemann, Public Religion: Bane or Blessing for Democracy, in Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralistic Democracies 73-89 (Nancy L. Rosenblum ed., 2000) [hereinafter Obligations], (recommending that "the phrase 'wall of separation between church and state' should be jettisoned from the Court's lexicon"). Yet, Thiemann incorrectly states that Everson marks the first time when "the wall of separation between church and state... entered the court's lexicon...." Id. at 80. Thiemann also states with inaccuracy that Roger Williams was the first to use the metaphor of a wall. Id. In fact, the English theologian, Richard Hooker, spoke of "walls of separation" half a century before Roger Williams

made use of the metaphor. Hamburger, supra note 77, at 36-38. Thiemann chalks up Justice Black's use of the metaphor to the probability that "an enterprising law clerk, seeking a memorable phrase for Justice Black's decision, discovered the Jefferson letter and suggested its use in Everson, thereby altering Religious Clause interpretation forever." Obligations, supra note 78, at 80. Any such "happenstance" explanation for the Justice's use of the phrase is historically and politically naive.

79 374 U.S. 203 (1963).

80 Id. at 225 (citation omitted).

81 Id. (emphasis added).

82 392 U.S. 236 (1968).

83 Id. at 243.

84 See id. at 254-68 (Douglas, J. dissenting) (illustrating the difficulty in classifying events, subjects, and objects as secular or religious).

85 Id. at 257.

86 Id. at 262 (quoting Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. Number 71, 333 U.S. 203, 237-38 (1948)).

87 Id. at 260.

88 Allen, 392 U.S. at 260-61 (Douglas, J. dissenting).

89 Id. at 260 (citations omitted).

90 Id. at 261.

91 Id. (citations omitted).

92 Id. at 260-62.

93 393 U.S. 97 (1968).

94 Id. at 109.

95 Id. at 113 (Black, J., concurring).

96 See id. (ruminating whether removal of anti-religious doctrine given the absence of religious doctrine truly leaves states in a neutral position).

97 See id. at 114 (stating that the authority to teach evolution is questionable unless one writes off the idea that evolution is anti-religious).

98 Id.

99 397 U.S. 664 (1970).

100 Id. at 666-67.

101 Id. at 667.

102 Id. at 672-73.

103 Id. at 674.

104 See id. at 669 (stating that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

105 Walz, 397 U.S. at 674.

106 403 U.S. 602 (1971).

107 Id. at 606-13.

108 See Marsh v. Chambers, 463 U.S. 783, 786 (1983) (employing "the three part test of Lemon v. Kurtzman ...."); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (concluding that the posting of the Ten Commandments "violates the first part of the Lemon v. Kurtzman test ....").

109 Kurtzman, 403 U.S. at 612.

110 Id. The Lemon Court speaks of parochial school teachers not being able to remain "religiously neutral." Id. at 618. A serious question that the Court never considers is, "How is religious neutrality possible?" The Court appears to assume what it incorrectly regards as self-evident.

111 Id. at 613.

112 Id. at 635 (citing Rev. Joseph H. Fichter, S.J., Parochial School: A Sociological Study 86 (1958) (Douglas, J., concurring).

113 Id. at 640 (Douglas, J., concurring).

114 See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) (stating that facial challenges to Establishment Clause cases are analyzed under the three-factor Lemon test); Agostini v. Felton, 521 U.S. 203 (1997) (applying exclusively the Lemon analysis to a school aid program); Edwards v. Aguillard, 482 U.S. 578, 597 (1978) (Powell, J., concurring) (stating that "[t]his court consistently has applied the three-pronged test of Lemon ....").

115 See, e.g., Lambs Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (citing periodical articles criticizing the Lemon test); County of Allegheny v. ACLU Greater Pittsburgh, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part) (citing criticism of current and previous Supreme Court justices).

116 In Lee v. Weisman, 505 U.S. 577 (1992) (Scalia, J., dissenting), the Court in response to a rabbi's nonsectarian prayer at a high school graduation upheld an establishment challenge on the ground that those who did not agree with the content of the prayer would feel like outsiders or would be pressured to participate in the ritual. Id. at 595-99. Justice Scalia maintained that the majority had applied a "psychological coercion" test in the case and further stressed that history should be a factor in establishment jurisprudence. Id. at 646. Likewise, in County of Allegheny, where the majority adopted Justice O'Connor's endorsement test and, in part, outlawed the placement of a créche on public premises, Justice Kennedy argued for a test with two prongs: first, no coercion either to participate in or to support a religion and, second, no direct financial benefits paid by government in order to establish a religion. 492 U.S. at 658-59 (Kennedy, J., concurring in part and dissenting in part). He contended that Justice O'Connor's test which looks for an "endorsement" of religion as viewed by an "objective observer" is wrong-headed. Id. at 668-74. In Santa Fe Sch. Dist., 530 U.S. at 290, the Court struck down the practice of a student "chaplain" offering a public prayer before home football games and did so on the ground that it found the practice to violate the endorsement test, the coercion test, and the Lemon test. A plurality of justices, comprised of Rehnquist, Scalia, Kennedy, and Thomas, appeared to be attempting to interpret the Establishment Clause in much the same way as the Free Exercise Clause, by resorting to the concept of 'neutrality' and making no enquiry into the effects of a law. According to such a view, when financial aid is allocated by the government on the basis of neutral, secular criteria that neither favor nor disfavor religion and is made available to both religious and secular beneficiaries on a nondiscriminatory basis, the Establishment Clause is not offended. Mitchell v. Helms, 530 U.S. 793 (2000).

117 592 F.2d 197 (3d Cir. 1979).

118 Id. at 198.

119 Id.

120 Id. at 197-98.

121 Id. at 199.

122 Id. at 207-10 (Adams, J., concurring).

123 Malnak, 592 F.2d at 208 (Adams, J., concurring).

124 Id. at 209.

125 Id.

126 Id. at 210.

127 662 F.2d 1025 (3d Cir. 1981).

128 Id. at 1026.

129 Id. at 1026-27.

130 Id. at 1027.

131 Id. at 1027-28.

132 Id. at 1036.

133 Africa, 662 F.2d at 1033.

134 Id. at 1035.

135 Id. at 1036.

136 Malnak, 592 F.2d at 198-99; Africa, 662 F.2d at 1029-30.

137 Laurence H. Tribe, American Constitutional Law 828 (Foundation Press ed., 1978). Tribe specifically proposed that when an activity or belief is "arguably religious," it should be protected by the Free Exercise Clause, whereas one that is "arguably non-religious" should not conflict with the Establishment Clause. Id. In the second edition of his book, he retracts the proposal as "a dubious solution to a problem ...." American Constitutional Law 1186 (Foundation Press ed., 2d. ed. 1988). A student at Harvard, where Tribe teaches, took the professor's initial suggestion in Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978). Carl H. Esbeck, interestingly enough, offers his own version of this "Two-Definitions-Of-Religion Puzzle." Carl H. Esbeck, Religion and the First Amendment: Some Causes of Recent Confusion, 42 Wm. & Mary L. Rev. 883, 897 (2001). He maintains with apodictic certainty, apparently to resolve confusion on the issue once and for all, that the Free Exercise Clause pertains to individual rights, while the Establishment Clause is a limiting condition on the power of government; ergo, it follows (at least for him) that the Supreme Court not only should, but also does, adjudicate religion controversies with two distinct definitions of religion. Id. at 900-01. Esbeck does not of course disclose what the specific content of each of these definitions of religion is. Nor for that matter does he offer any historical justification for two definitions instead of one. In case these considerations fail to convince one that Esbeck's pronouncements are thoroughly suspect, he seems oblivious to the fact that the narrow definition which supposedly safeguards the nonestablishment norm is susceptible to allowing religious beliefs which are not easily recognizable to fall through the cracks and to become established, while the broad definition protecting free exercise is equally susceptible to being utilized to protect nonreligious claims of conscience. Esbeck's analysis of this issue, far from dispelling confusion, does little more than to re-create it. Id. at 897-901.

138 94 F.3d 1223 (9th Cir. 1996).

139 Id. at 1225.

140 Id. at 1229.

141 95 F.3d 1475 (10th Cir. 1996), cert. denied, 522 U.S. 1006 (1997).

142 Id. at 1479.

143 RFRA, supra note 75.

144 Meyers, 95 F.3d at 1482-84.

145 Id. at 1483-84.

146 655 F. Supp. 939 (S.D. Ala. 1987); rev'd on other grounds, 827 F.2d 684 (11th Cir. 1987).

147 Id. at 978.

148 Id. at 979.

149 Id. at 980-81.

150 Jesse Choper, Defining 'Religion' in the First Amendment, 1982 U. Ill. L. Rev. 579.

151 Id. at 579.

152 Id. at 580.

153 Id.

154 Id. at 579-80.

155 Id. at 597-601. Choper refers to "belief in the phenomenon of 'extratemporal consequences."' (italics added). This is a puzzling turn of phrase, since if extratemporal consequences were indeed a 'phenomenon,' there would hardly be reason only to believe in them. The so-called phenomenology of the extratemporal has not yet made it into science, or so far as I am aware even current philosophic or religious texts.

156 Choper, supra note 150, at 599.

157 Id.

158 Id. at 601.

159 Jeffrey L. Oldham, Constitutional 'Religion' A Survey of First Amendment Definitions of Religion, 6 Tex. F. on C.L. & C.R. 117 (2001). Also, for a definition of religion in terms of the supernatural, see Anand Agneshwar, Rediscovering God in the Constitution, 67 N.Y.U. L. Rev. 295, 319 (1992).

160 Oldham, supra note 159, at 170.

161 Id.

162 Id. at 170-71.

163 Id. at 171.

164 Eduardo Peñalver, The Concept of Religion, 107 Yale L.J. 791 (1997).

165 Id. at 808-10.

166 Id. at 809.

167 Id. at 816-17.

168 Id. at 818.

169 Id. at 817.

170 George C. Freeman, III, The Misguided Search for the Constitutional Definition of 'Religion,' 71 Geo. L.J. 1519, 1548 (1983).

171 Anita Bowser, Delimiting Religion in the Constitution: A Classification Problem, 11 Val. U. L. Rev. 163 (1977).

172 Wilfred Cantwell Smith, The Meaning and End of Religion: A New Approach to the Religious Traditions of Mankind 74 (Mentor Books 1962).

173 494 U.S. at 872 (holding that claimants' being denied unemployment compensation for work-related misconduct for their ceremonial ingestion of peyote was not a violation of the Free Exercise Clause).

174 See Mircea Eliade, The Sacred and the Profane: The Nature of Religion 11-12 (William R. Trask trans., Harcourt Brace and Company 1959) (writing that "[b]y manifesting the sacred, any object becomes something else, yet it continues to remain itself, for it continues to participate in its surrounding cosmic milieu"). "Hierophanies," those acts whereby the sacred is manifested, may occur through any object. Id. at 11.

175 485 U. S. 439 (1988).

176 Id. at 452-54.

177 374 U.S. 203, 223 (1963) (outlawing in public schools, as contrary to the Establishment Clause, voluntary Bible-reading and recitation of the Lord's Prayer).

178 370 U.S. 421, 433 (1962) (holding that a voluntary, nonsectarian twenty-two word New York Board of Regents' prayer offended the Establishment Clause).

179 530 U.S. 290, 316 (2000) (holding that a publicly funded school district cannot, in accordance with the Establishment Clause, provide for formal prayer at a school function, even when the same is 'voluntary,' because the prayer is not private speech in an open forum and so is by its nature coercive of the minority).

180 505 U.S. 577, 598 (1992) (holding that a nonsectarian prayer by a rabbi at a public school graduation ceremony was a violation of the Establishment Clause).

181 Graham Walker, Illusory Pluralism, Inexorable Establishment, in Obligations, supra note 78, at 112.

182 The word "secular" is derived from the Latin saeculum, which means century or world-age. It is a word that emphasizes the temporal. The Court has frequently used the term "secular" as an antonym for "religious." But that relationship between the two is not a necessary one. "Secular" might just as well be understood as the adjustment of religious faith to the exigencies of a particular age, connoting more the process of modernization than the purgation of religion. A distinction might also be made between "secularism" and "secularization." The former is an anthropocentric philosophy with a militant anti-God agenda, while the latter often indicates a point of view that addresses real world concerns and not necessarily without a notion of the transcendent. These are possible distinctions which claim factual support. Exploring such distinctions might serve to illuminate religion jurisprudence. See Wilfred M. McClay, Two Concepts of Secularism, Wilson Quarterly, Summer 2000, at 54, 67 (distinguishing between "negative secularism" (or the secularism of non-establishment) and "positive secularism" (or the secularism of established unbelief)).

183 These four factors are: "1) the existence of supernatural and/or transcendent reality; 2) the nature of man; 3) the ultimate end, or goal or purpose of man's existence, both individually and collectively; 4) the purpose and nature of the universe." Smith, 655 F. Supp. at 979.

184 Plato's Theory of Knowledge (The Theaetetus and the Sophist of Plato) (Francis M. Cornford trans., Bobbs-Merrill, 1957); Bertrand Russell, Why I am Not a Christian and Other Essays on Religion and Related Subjects (Simon and Schuster, 1957); Commonsense and Nuclear Warfare 65-72 (1962).

185 380 U.S. at 167.

186 Paul Tillich, Dynamics of Faith 26 (Ruth Nanda Anshen ed., Harper & Brothers 1958). For an excellent critique of Tillich's concept of 'ultimate concern' from a legal standpoint, see Kent Greenawalt, Five Questions About Religion Judges are Afraid to Ask, in Obligations, supra note 78, at 213-14. See also Timothy L. Hall, The Sacred and the Profane: A First Amendment Definition of Religion, 61 Tex. L. Rev. 139, 156 (1982) (commenting critically on the suitability of Tillich's concept of "ultimate concern" for First Amendment purposes).

187 Tillich, supra note 186, at 10.

188 Id. at 27.

189 Tribe, supra note 137, § 14-6, at 1186.

190 Id.

191 Everson, 330 U.S. at 32.

192 Smith, supra note 172, at 74.

193 See generally John Dewey, A Common Faith (Yale University Press 1934).

194 William P. Alston, Religion, in 7 The Encyclopedia of Philosophy 140 (Paul Edwards ed., 1967). See also Yeager Hudson, The Philosophy of Religion 238-39 (1991) (discussing the relationship between morality and religion). Hudson states that,

> So firm was the assumption of the dependence of morality on religion that early explorers and even some anthropologists tended not to notice that in fact religion has little to do with morality among contemporary primitives. Instead, religion functions primarily to placate the gods and the spirit forces through rites and sacrifices. The purpose of these religious practices is twofold: to ward off disasters thought to come from the wrath of the gods and to make provisions for the safety of the human spirit or shade after death. The favor of the gods is not thought to be won by living a life of moral goodness or righteousness. The gods are quite indifferent to the human practice of morality and, indeed, are not themselves beings of high moral character. What the gods want is worship, reverence, and sacrifices. Morality is a matter to be settled among humans.

Id. at 238.

195 Choper, supra note 150, at 597.

196 See infra note 327.

197 Charles Hartshorne, The Logic of Perfection and Other Essays in Neoclassical Metaphysics 245-262 (1962).

198 Yoder, 406 U.S. at 216.

199 Eliade, supra note 174, at 11-12.

200 Greenawalt, Five Questions About Religion, in Obligations, supra note 78, at 218.

201 Id.

202 Greenawalt specifically denies that his analogical method is a search for "essential conditions." Id. at 217. He maintains that his method takes no position on whether definition by necessary and sufficient conditions is theoretically possible. He does, however, state the following: "A final decision to consider something religious depends on how closely the combination of characteristics resembles those of the paradigm instances, judged in light of the particular reason for the inquiry." Kent Greenawalt, Religion as a

Concept in Constitutional Law, 72 Cal. L. Rev. 753, 768 (1984). The problem is that, when the decision is made that "X is religious," the criteria used from the paradigm instances in making the determination are, in effect, deemed "sufficient and necessary." The issue cannot be dodged, but the way Greenawalt treats it points up another problem; that is, if the criteria used are not sufficient and necessary, as he states, then how reliable are they when applied to the phenomenon in question?

203 Africa, 662 F.2d at 1036.

204 Meyers, 95 F.3d at 1484.

205 Peñalver, supra note 164, at 816-17.

206 See id. at 816-18 (describing Wittgenstein's methods for choosing a baseline from which to judge).

207 Id. at 809.

208 Wolman v. Walter, 433 U.S. 229, 266 (1977) (Stevens, J., concurring in part and dissenting in part) (quoting Everson, 330 U.S. at 18).

209 433 U.S. 229, 264 (1977) (Stevens, J., concurring in part and dissenting in part).

210 289 S.W. 363 (1927).

211 Wolman, 433 U.S. at 264 (quoting Tr. Of Oral Argument 7, Scopes, 289 S.W. at 363).

212 Clarence Darrow, Why I Am An Agnostic and Other Essays 18-19 (Prometheus Books 1995).

213 Cf. David Klinghoffer, God is Not a Pluralist, in The Role of Religion in Politics and Society 79-85 (Harold Heie, et al. eds. 1998) (arguing that religion concerns truth-claims about God).

214 Wolman, 433 U.S. at 266 (quoting Everson, 330 U.S. at 18).

215 Classical liberalism "describes a tradition of thought that emphasizes toleration and respect for individual rights and... runs from John Locke, Immanuel Kant, and John Stuart Mill to John Rawls. The public philosophy of contemporary American politics is a version of this liberal tradition of thought ...." See Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 4-5 (Harvard University Press 1996) (describing prevailing political philosophy as a version of liberal political theory).

216 See Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 Va. L. Rev. 671, 679 (1992) (explaining the liberal distinction between "public" and "private" and of the place of religion in classical liberalism). He writes of the liberal state, "Keeping religion and religious belief confined to private life enables the liberal state to marginalize religion without eliminating it." Id.

217 Mill emphasized the individual's freedom of choice: "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it." John Stuart Mill, On Liberty 11 (R.B. McCallum ed., Basil Blackwell Oxford 1946) (1859). Yet, expounding liberalism from a utilitarian point of view, he wrote,

> It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

Id. at 9. Kant, by contrast, did not condition individual choice on utility, arguing that there is no necessary connection between virtue and happiness. Immanuel Kant, Critique of Practical Reason 34, 118 (Lewis White Beck, trans., Bobs-Merrill, 1956) (1788). The pure, unencumbered free will is, for Kant, the foundation of choice; otherwise, the individual is not autonomously, but heteronymously, directed. The paramount point, however, is that no one may determine the individual's choice except the individual.

218 Poet Yehud Leib Gordon, paraphrasing the philosophy of Moses Mendelssohn, quoted in Michael W. McConnell, Believers as Equal Citizens, in Obligations, supra note 78, at 90.

219 Joseph Raz terms this principle "epistemic abstinence." See Facing Diversity: The Case of Epistemic Abstinence, 19 Phil. & Pub. Aff. 3, 4-5 (1990) (using the phrase to mean that, just because a person believes her views are true, it does not follow such belief justifies

the public expression of them). Bruce A. Ackerman states, "We should put the moral ideals that divide us off the conversational agenda of the liberal state." Ackerman, Why Dialogue, 86 J. Phil. 5, 16 (1989); see also Sanford Levinson, Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?, in Religion and Contemporary Liberalism 76-92 (Paul J. Weithman ed., 1997) (considering the question inter alia whether it is permissible to reject a judge for office when he or she is unwilling to promise such abstinence). Levinson opposes the position taken by Stephen L. Carter that a judge's reliance in the judicial decision-making process on personal religious convictions is proper. Id. at 85.

220 In his confirmation hearings, James Watt, who was nominated by President Ronald Reagan to be Secretary of the Interior, took the position that the United States had invested excessively in public lands and that they should be made available for private investment. When asked whether his position would deprive future Americans of the use of these lands, Watt answered that he was persuaded, based upon prophecy in Revelation, that the end of the world was imminent anyway. Ted G. Jelen, In Defense of Religious Minimalism, in Mary C. Segers and Ted G. Jelen, A Wall of Separation? Debating the Public Role of Religion 18 (Rowman & Littlefield 1998). See Kent Greenawalt, Private Consciences and Public Reasons 153-56 (Oxford University Press 1995) (taking a carefully balanced and nuanced view of the connection between the religious beliefs and the public decision-making of elected officials).

221 310 U.S. 586, 594-95 (1940).

222 319 U.S. 624, 653 (1943). See Sandel, supra note 215, at 53-54 (arguing that Gobitis "upheld the law as a legitimate way of cultivating the communal identity of its citizens" and has contrasted Justice Frankfurter's theory with the one which drove the Court's decision in Barnette). By contrast in the latter case, Justice Jackson's majority opinion was, says Sandel, "an eloquent statement of the liberal political theory that the U.S. Constitution had come to embody;" specifically, that the Bill of Rights places particular liberties beyond the control of majoritarian rule and that the Constitution itself is "neutral among ends, that government may not impose a particular conception of the good life...." Id. at 54. The distinction that Sandel makes is, to use his own language, between "the republican tradition" in which fellow citizens deliberate about the common good on the one hand and 'the procedural republic' in which the concern for individual rights always precedes any doctrine of the good on the other. Id. at 6, 54. Yet, I do not think it even arguable that Frankfurter minimized, in a classically liberal manner, the public expression of religious conviction. To understand him as a communitarian with respect to the Religion Clauses misses the essence of what communitarianism is.

223 Opinion filed in McGowan v. Maryland, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., concurring).

224 Id. at 462-63.

225 319 U.S. 105 (1943).

226 Id. at 140 (Frankfurter, J., dissenting). It should also be noted that Justice Frankfurter joined the majority in Jones v. Opelika, 316 U.S. 584 (1942), which decided that a nondiscriminatory license fee might be imposed upon Jehovah's Witnesses in the exercise of their religious solicitations, and that he joined Justice Jackson's dissent in Prince v. Massachusetts, 321 U.S. 158 (1944), which Jackson admitted was rightly decided albeit on the wrong grounds. He distinguished between religious activities which concern "only members of the faith" and those which involve a secular component, which "are intended to obtain means from unbelievers to sustain the worshippers and their leaders." Id. at 177. Jackson declared the following in a manner that sounded like Frankfurter,

All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.

Id. at 178. The gist of the argument is that any religiously inspired behavior that is not kept private is subject to government regulation.

227 333 U.S. 203 (1948).

228 Id. at 212 (Frankfurter, J., concurring).

229 Id. at 216.

230 Id. at 216-17.

231 Id. at 231.

232 343 U.S. 306 (1952).

233 Id.

234 Id. at 321.

235 Id. at 321.

236 See Harold Berman, The Interaction of Law and Religion, 31 Mercer L. Rev. 405, 410 (1980) (lamenting the separation of legal and religious values). He states, "[T]he radical separation of law and religion in the last two generations creates a serious danger, namely, that religion will be viewed as a wholly private, personal, psychological matter without any social, historical, or legal dimension." Id. at 410. He then adds, "Jefferson's [liberal] experiment may be in the process of failing, for though religion is flourishing in America, it is increasingly a 'privatized' religion, with little in it that can overcome the forces of strife and disorder in society." Id.

237 Sandel, supra note 215, at 7-8.

238 Id. at 8. For a critique of moral relativism in its application to law, see L. Scott Smith, Truth and Justice on the Scaffold: A Critique of 'Hired-Gun' Advocacy, 62 Tex.B.J. 1096 (1999).

239 Yoder, 406 U.S. at 216, 235.

240 Id. at 240.

241 Id. at 207.

242 483 U.S. 327 (1987).

243 Id. at 342 (Brennan, J., concurring).

244 Id.

245 465 U.S. 668 (1984).

246 Id. at 671.

247 Id. at 697 (Brennan, J., dissenting).

248 Id. at 680.

249 Id. at 711-12 (Brennan, J., dissenting).

250 463 U.S. 783 (1983).

251 Id.

252 Id. at 804 (Brennan, J., dissenting).

253 Id. at 819 (Brennan, J., dissenting).

254 374 U.S. 398 (1963).

255 Smith, 494 U.S. at 872.

256 Lyng, 485 U.S. at 439.

257 Goldman v. Weinberger, 475 U.S. 503 (1986). Many other cases support the description of Justice Brennan as a communitarian. See Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 91 (1977) (Marshall, J., dissenting) (joining in a dissent construing the Civil Rights Act of 1964 to require an employer to accommodate its employee's sabbatarian faith beyond holding "several meetings with [respondent]... [and] authoriz[ing] the union steward to search for someone who would swap shifts"); McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (maintaining that it violates free exercise for government to "fence out from political participation those, such as ministers, whom it regards as overinvolved in religion"); Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (Brennan, J., dissenting in part) (stating that a Sunday-closing law prejudiced orthodox Jewish merchants' right of free exercise); Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., dissenting) (opposing a Minnesota statute allowing taxpayers to deduct certain expenses incurred in providing for the education of their children when statute helped primarily parents of parochial school students); Comm. for Pub. Educ. and Religious Freedom v. Regan, 444 U.S. 646, 670-71 (1980) (Blackmun, J., dissenting) (opposing New York statute that appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State); Aguilar v. Felton, 473 U.S. 402 (1985) (declaring unconstitutional a program providing for the use of federal funds to pay the salaries of public employees who taught in parochial schools).

258 See Michael W. McConnell, Believers as Equal Citizens, in Obligations, supra note 78, at 90-110 (commenting that the "pluralist approach" to "equal citizenship" encourages "communities of conscience to preserve the institutions necessary to perpetuate their distinctive ways of life and to pass here on to future generations"); Ronald F. Thiemann, Religion in Public Life: A Dilemma for Democracy 95-120 (Georgetown Univ. Press 1996) (noting that the multiplicity of "private or individual interests [ ] obscure[s] the intentions of such groups to serve the public welfare and common good"); and Mary C. Segers, In Defense of Religious Freedom, in Mary C. Segers and Ted G. Jelen, supra note 220, at 53-109 (describing a "moderate accommodationist view of religion in American public life" based on a "very permeable wall of separation between religion and politics").

259 454 U.S. 263 (1981).

260 Id. at 264.

261 Id. at 277.

262 Id.

263 Board of Education v. Mergens, 496 U.S. 226, 233 (1990).

264 496 U.S. 226 (1990).

265 Id. at 245-47.

266 Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384, 386 (1996).

267 Id. at 387-89.

268 508 U.S. 384 (1993).

269 Id.

270 Rosenberger v. Univ. of Va., 515 U.S. 819, 822 (1995).

271 515 U.S. 819 (1995).

272 Id. at 845-46.

273 See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995) (discussing the issue of whether a Latin cross could be displayed next to the Ohio statehouse when that area was available for use by the public for "free discussion" and "activities of a broad public purpose"). The Court's opinion, delivered by Justice Scalia, made little of the fact that the Ku Klux Klan was behind the complaint; that was a political consideration that was kept separate from the religious implications of the case. The Court held that the display of the cross, as a religious symbol, on government property was not a violation of the Establishment Clause since it

was displayed pursuant to neutral policies that incidentally benefited religion. Id. at 769-70. Religion, in other words, was given a place in the public square. But it should not be overlooked that the decision still inured to the benefit of majoritarian religion even though the KKK came away with a victory.

274 See Graham Walker, Illusory Pluralism, Inexorable Establishment, Five Questions About Religion, in Obligations, supra note 78, at 115-19 (disfavoring a de facto establishment but a limited constitutional establishment of religion, although much of his reasoning would also support those who, either wittingly or unwittingly, advocate for a de facto establishment).

275 Lynch, 465 U.S. at 668.

276 474 U.S. 481 (1986).

277 Id. at 489.

278 482 U.S. 578 (1987).

279 Id. at 596-97.

280 509 U.S. 1 (1993).

281 Id. at 13-14.

282 473 U.S. 402 (1997).

283 Id. at 414.

284 450 U.S. 707 (1981).

285 Id. at 719.

286 Id. at 722 (Rehnquist, J., dissenting) (citing Braunfeld, 366 U.S. 599 (1961) and Sherbert, 374 U.S. 398 (1963)).

287 Braunfeld, 366 U.S. at 609; Sherbert, 374 U.S. at 412-13.

288 475 U.S. 503 (1986).

289 Id. at 509-10.

290 494 U.S. at 872.

291 See Michael J. Sandel, Liberalism and the Limits of Justice xii-xiii (Cambridge University Press 2d ed. 1998) (regarding the Goldman and Smith decisions as exemplative of classical liberalism or, specifically, of its placement of "religious convictions on a par with the various interests and ends an independent self may choose"). A close look at the opinions of Rehnquist and Scalia demonstrates that Sandel's view of these decisions is incorrect. The two justices are not classical liberals. The confusion is that their stance regarding the free exercise of religion is similar to that in classical liberalism.

292 See McConnell, supra note 70, at 269-83 (exploring the causes and remedies to resolving the confusion about the religion clauses). McConnell observes, in part, that Chief Justice Rehnquist "tends to defer to invocations of governmental interests and to reject challenges to governmental action, whether based on free exercise or on establishment." Id. at 278. This assessment is generally true and is another way of making the point that, by deferring to majoritarian decision-making, the Chief Justice's decisions serve to establish majority religion while restricting minority ones. Rehnquist has voted to accommodate traditional expressions of Christianity on numerous occasions, while frequently restricting the free exercise of minority religious points of view. See Texas Monthly v. Bullock, 489 U.S. 1 (1989) (dissenting from the majority who held that a Texas statute which exempted religious periodicals from its sales tax was a violation of the Establishment Clause); Bowen v. Roy, 476 U.S. 693 (1986) (joining the majority in holding that the necessity of having and using a social security number in order to receive welfare benefits did not infringe upon the free exercise rights of a Native American); Grand Rapids v. Ball, 473 U.S. 373 (1985) (dissenting from the majority who struck down as an establishment

violation two programs in which classes for nonpublic school students were financed by the public school system, taught by public school teachers, and conducted in classrooms in nonpublic schools); Aguilar v. Felton, 473 U.S. 402 (1985) (dissenting from the majority who declared unconstitutional on establishment grounds a New York City program that used federal funds to pay the salaries of public employees who taught in parochial schools); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (joining the majority in upholding a rule of the Minnesota Agricultural Society that restricted the selling, distribution, and exhibition of materials communicating the views of the Krishna religion); Trans World Airlines v. Hardison International, 432 U.S. 63 (1977) (joining the majority in denying a sabbatarian's claim of religious discrimination under the Civil Rights Act of 1964). The fact is that instances abound where Rehnquist has declined to support establishment claims against what may be broadly termed "traditional Christianity" but has supported tight restrictions on minority religious points of view. To the extent that minorities may have the same goals as the majority, the former receive the Chief Justice's support by being bootstrapped along with the latter.

293 454 U.S. at 277.

294 496 U.S. at 253.

295 Locke, Governor of Washington, et al. v. Davey, No. 02-1315 (9th Cir. Feb. 25, 2004) available at http://laws.findlaw.com/us/000/02-1315.html.

296 See id. (pointing out that what is permitted under the Establishment Clause is not necessarily required under the Free Exercise Clause). The opinion may represent a moderation by the Chief Justice of his usual de facto establishmentarian position. Justice Scalia, in character, dissented. Cf. Hernandez v. Commissioner, 490 U.S. 680 (1989) (deciding the issue of whether petitioners' payments made to the branch churches of the Church of Scientology for auditing and training services were tax-deductible charitable contributions). The Court's majority, joined by Chief Justice Rehnquist, decided against the petitioners, finding that the IRS's disallowance of the deductions (1) did not violate the Lemon test and was pursuant to a section of the IRS Code that was neutral in design and purpose and likewise (2) did not violate petitioners' free exercise rights since even a substantial burden on religious practice, which the majority believed the disallowance doubtfully was, is justified by the public interest in maintaining a sound tax system. Id. at 696-99. Justice Scalia joined in Justice O'Connor's dissent, which was based on the premise that the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings. Id. at 704.

297 512 U.S. 687 (1994).

298 Id. at 752.

299 It is probably fair to say that Rehnquist's and Scalia's most pronounced tendency, while not invariable and rooted in concrete, is to interpret the Establishment Clause so as to afford maximal deference to democratic majorities, which in turn tend to favor the Christian religion.

300 Mark V. Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law 248 (Harvard Univ. Press 1988).

301 See Sidney Hook, Religion in a Free Society 36-37 (Univ. of Neb. Press 1967) (speaking from a classical liberal perspective, the celebrated Sidney Hook pointed out that, when moral and ethical issues are approached from conflicting theological positions, the resolution is impossible in a religiously pluralistic society). What he advocated was an ethical consensus-building apart from religion. The problem with his argument is that expecting religious people in this country to separate their religious convictions from their morality is expecting them to be untrue to themselves.

302 Larry Alexander, Liberalism, Religion, and the Unity of Epistemology, 30 San Diego L. Rev. 763, 766-67 (1993).

303 Id. at 765.

304 See Bruce A. Ackerman, Social Justice in the Liberal State 10-12 (Yale Univ. Press 1980) (arguing that "[w]hile everybody has an opinion about the good life, none can be known to be superior to any other"). Id. at 11. Whether one happens to agree with this statement is not the issue. The issue is whether the liberalism for which Ackerman is advocating with such fervor is morally neutral about moral neutrality. Of course it is not; the professor is hoisted on his own pitard. Classical liberalism is one point of view among others and lays claim to no special epistemological method which elevates it to a privileged philosophical position.

305 John Stuart Mill, On Liberty 16-17 (Elizabeth Rapaport ed., Hackett Publishing Company, 1978) (1859).

306 It does an immense disservice to communitarianism, however, to leave the impression that it is a philosophy whose adherents have made no impact upon political decision-making. It was a communitarian who wrote, "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion .... [The Establishment Clause] may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)). In a similar vein, another commentator points out,
Effective political witness flows, ultimately, from vital churches. To the extent that political activism undermines that vitality, it saps its own future. This dilemma was articulated by that keen observer, Alexis de Tocqueville. Religion in America, he argued, is most powerful in its indirect, cultural influence, educating people in their obligations to the community and directing their attention away from the self-interest, materialism, and hedonism inherent in a society that celebrates individual freedom. Churches make liberal democracy possible, he claimed, because without the inner mores they teach, the centrifugal forces of individualism would plunge society into moral anarchy, selfishness, and indulgence ....
Allen D. Hertzke, An Assessment of the Mainline Churches Since 1945, in The Role of Religion in The Making of Public Policy 43, 73 (James E. Wood, Jr. & Derek Davis, eds., 1991).

307 Letter of January 1, 1802, in 16 The Writings of Thomas Jefferson 281-82 (Albert E. Bergh, ed. 1907).

308 Thiemann, supra note 258, at 104.

309 Michael W. McConnell, Believers as Equal Citizens, in Obligations, supra note 78, at 103-04.

310 See Alan Wolfe, Civil Religion Revisited: Quiet Faith in Middle-Class America, in Obligations, supra note 78, at 32 (claiming to have discovered, based upon his interviews of 200 middle-class Americans in big city suburbs, that Americans have added an eleventh commandment to the Decalogue; it is "Thou shalt not judge"). Id. at 44. One wonders whether this commandment is not predicated upon the question, "What's the difference?" .

311 Stephen L. Carter, The Culture of Disbelief 41 (Harper Collins Publishers 1993) (1954).

312 461 U.S. 574 (1983).

313 Id. at 603-05.

314 Id. at 604.

315 Id. at 603 (quoting Lee, 455 U.S. at 257).

316 Winnifred Fallers Sullivan, Paying the Words Extra: Religious Discourse in the Supreme Court of the United States 127-28 (Harvard University Press 1994).

317 Cushing Strout, The New Heavens and New Earth 135 (Harper & Row 1974).

318 McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

319 Id. at 407.

320 319 U.S. at 642.

321 See L. Scott Smith, Law, Morality, and Judicial Decision-Making, 65 Tex. B.J. 400-08 (2002) (discussing the way in which a judge's view of morality bears upon his or her jurisprudence. See also L. Scott Smith, A Brief Reply to Mr. Miller, 65 Tex. B.J. 923 (2002) (remarking that judges most often rule from something within themselves as opposed to legal principles).

322 Reinhold Niebuhr, The Children of Light and the Children of Darkness 134, 137 (Charles Scribner's Sons 1944).

323 William James, The Will to Believe and Other Essays in Popular Philosophy 31 (Dover, 1956) (1896).

324 See Stephen Carter, Evolutionism, Creationism, and Treating Religion as a Hobby, 1987 Duke L.J. 977, 978 (arguing that to regard religion as the product of "choice" is "to treat religion as a hobby"); see also Michael W. McConnell, Religious Freedom at a Crossroads, in The Bill of Rights in the Modern State 115, 125 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein eds. 1992) (emphasizing that "the dictates of religious conscience [should not be reduced] to the status of mere choice"). Carter and McConnell appear to overlook the fact that the kind of choice which James describes is in a category all its own; it is forced by the nature of human existence and involves doubt, risk and transcendent trust. It would be both incorrect and unfortunate to think of such choice in terms of a "hobby" or "mere choice."

325 See James M. Donovan, God Is As God Does: Law, Anthropology, and the Definition of 'Religion,' 6 Seton Hall Const. L.J. 25, 95 (1995) (offering what the author calls a "generative functional" definition of religion, where the "focus of such... is upon existential concerns"). He defines religion as "any belief system which serves the psychological function of alleviating death anxiety." Id. Donovan's definition brings to mind the Pulitzer Prize-winning work of Ernest Becker, who wrote,

Best of all... religion solves the problem of death, which no living individuals can solve, no matter how they would support us. Religion, then, gives the possibility of heroic victory in freedom and solves the problem of human dignity at its highest level.... Finally, religion alone gives hope, because it holds open the dimension of the unknown and the unknowable, the fantastic mystery of creation that the human mind cannot even begin to approach, the possibility of a multidimensionality of spheres of existence, of heavens and possible embodiments that make a mockery of earthly logic--and in doing so, it relieves the absurdity of earthly life, all the impossible limitations and frustrations of living matter.

Ernest Becker, The Denial of Death 203-04 (The Free Press 1973). The anxiety of death is the existential situation addressed by the hope of redemption or salvation. That anxiety, while pervading human life, is distinct, but not separate, from the anxiety of guilt and the anxiety of despair and meaninglessness. See Paul Tillich, The Courage to Be 51 (Nisbet & Co., Ltd. 1952) (stating that "[t]he three types of anxiety are interwoven in such a way that one of them gives the predominant colour but all of them participate in the colouring of the state of anxiety").

326 See Tillich, supra note 186, at 44, 49 (arguing that "[t]he language of faith is the symbol"). Tillich further explained that myths are stories which combine symbols. Id. I am not unmindful that there are symbols and myths which, in everyday parlance, are not regarded as "religious." Nietzsche's "Ubermensch" and Isaac Newton's mechanistic view of the universe underscore the point. Moreover, both were, at least for a time, imbued by their adherents with salvific importance. Such facts illustrate that the "religious" cannot be neatly compartmentalized although--and here is the problem--that seems to be what the First Amendment requires. Notwithstanding the troublesomeness of this observation, the definition is, I think, far more helpful than others in understanding what religion is and, owing to the jurisprudential theory I propose, not severely challenged by the fact that unwittingly religious points of view can make their way into public institutions. The point is that any religious perspective, conscious or unwitting, is allowed public expression so long as it satisfies the three broad mandates proposed.

327 Alfred North Whitehead, Religion in the Making 17, 36 (Meridian Books, 1969) (1926).

328 See Thomas J. Curry, The First Freedoms: Church and State in America to the Passing of the First Amendment 216-17 (Oxford Press 1986) (pointing out that the passage of the First Amendment was a symbolic act that was an assurance of religious liberty). Curry writes,

To examine the two clauses of the amendment as a carefully worded analysis of Church-State relations would be to overburden them. Similarly, to see the two clauses as separate, balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there....The two clauses represented a double declaration of what Americans wanted to assert about Church and State.

Id. The point is that the founders desired to guarantee the same thing with both clauses, i.e., religious liberty. Since that is the case, coercion should be regarded as the primary enemy of both. See Kathleen M. Sullivan, Religion and Democracy, in The Bill of Rights in the Modern State 195, 205 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein, eds., 1992) (asserting that, when the Establishment Clause is interpreted only "to bar coercion of non-believers," it becomes "mere surplusage" of the Free Exercise Clause and reduces the Establishment Clause to "a redundancy"). Her hypertrophic view of nonestablishment would serve to refashion American culture in a thoroughgoing secular manner by "banish[ing] public sponsorship of religious symbols from the public square" and doing so in the absence of any religious coercion; i.e., when no issue of freedom is involved. Id. at 207. Yet, as Curry's words suggest, religious freedom, as opposed to hostility toward religion, is what the founders had in mind.

329 I do not deny that psychological coercion can be of such intensity and magnitude as to rise to the level of physical coercion.

330 Enjoining coercion is half of Justice Douglas' test for establishment. See supra note 113. Prohibiting the direct funding of religion by government, the second half of his test, is unnecessary and imprudent. Government may choose, in the interest of furthering one or more of its goals, to aid religion. Consider Tilton v. Richardson, 403 U.S. 672 (1971) (validating the Higher Education Facilities Act of 1963, which provided funding to sectarian colleges and universities for the construction of buildings for science, music, and libraries). One may argue, of course, that the case does not involve the "direct" funding of religion, but that contention would be disingenuous. The reality is that, when government funds the "secular" portion of an institution's budget, the institution has additional monies with which to implement its sectarian goals. This point was emphatically made by Justice Douglas in his dissent. The accommodation of religion is nothing new in the history of this country as demonstrated by tax exemptions and multiple forms of assistance like that allowed in Tilton. Not the fact, but the extent and degree, of accommodation is really the issue. The thoroughgoing subsidization by government of one or more religions can diminish to zero the creative tension between the state and such religions. Without this tension, the religious spirit eventually dies. So the accent in any establishment test should be upon the encouragement of such tension by the discouragement of coercion and, with it, a smothering accommodation.

331 See Nancy L. Rosenblum, Introduction, in Obligations, supra note 78, at 3-31 (pointing out that "integralists" (i.e., those who want to see their faith mirrored in their public actions as a citizen), among whose number I in some ways count myself, "willingly trespass across two separationist boundaries...[o]ne is the denial of public support to religious activities aimed principally at advancing the faith. The other is granting public funds for programs that are under the control of religious authorities"). Id. at 17.

332 505 U.S. at 599.

333 Id. at 583.

334 461 U.S. at 604.

335 Id.

336 Id. at 595.

337 374 U.S. 398 (1963).

338 Lynch, 465 U.S. at 716. Justice Brennan's tone is dismissive of civil religion, although sociologist of religion, Robert N. Bellah, writes, "But we know enough about the function of ceremonial (sic.) and ritual in various societies to make us suspicious of dismissing something as unimportant because it is 'only a ritual.'" Robert N. Bellah, America's Civil Religion, in Beyond Belief: Essays on Religion in a Post-Traditionalist World 170 (California Paperback, 1970).

fore modify the grant of summary judgment for the City of Chicago on this claim to a dismissal for lack of jurisdiction for all but the City's vicarious liability for Officer Rodriguez's conduct, which we affirm as a ruling on summary judgment.

III. Conclusion

For the foregoing reasons, we AFFIRM the grant of summary judgment in favor of Defendant Officer Rodriguez on all claims but that for malicious prosecution, which we MODIFY to a dismissal for lack of jurisdiction. We also MODIFY the grant of summary judgment in favor of the unknown and unnamed Defendant on all counts to a dismissal of that party from this lawsuit. With respect to the City of Chicago, we MODIFY the grant of summary judgment in its favor on both state law claims to a dismissal for lack of jurisdiction, with the exception of the district court's grant of summary judgment for the City for its vicarious liability for Officer Rodriguez under 745 ILL. COMP. STAT. 10/4–105, which we AFFIRM. As so modified, this judgment is affirmed.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et al., Appellees,

v.

PRISON FELLOWSHIP MINISTRIES, INC., et al., Appellants.

No. 06–2741.

United States Court of Appeals, Eighth Circuit.

Submitted: Feb. 13, 2007.

Filed: Dec. 3, 2007.

Background: Separation of church and state advocacy group, affected state prison inmates, and others, sued State of Iowa and Christian provider of rehabilitation services, claiming that funding of contract with organization providing pre-release rehabilitation services to inmates violated Establishment Clause. The United States District Court for the Southern District of Iowa, Robert W. Pratt, Chief Judge, 432 F.Supp.2d 862, granted declaratory and equitable relief in favor of advocacy group and inmates. Provider and state corrections officials appealed.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

(1) prison inmates, advocacy group, and individual taxpayer possessed standing;

(2) claims were not moot;

(3) provider was a state actor;

(4) funding constituted an endorsement or religion; but

(5) District Court abused discretion in awarding recoupment.

Affirmed in part and reversed in part.

1. Federal Courts ⚿776

After a bench trial, Court of Appeals reviews de novo legal conclusions and mixed questions of law and fact.

2. Federal Courts ⚿850.1

After a bench trial, Court of Appeals reviews factual findings for clear error.

3. Federal Courts ⚿850.1

Reviewing court oversteps the bounds of its duty on appeal if it undertakes to duplicate the role of the lower court.

4. Federal Courts ⚿776, 850.1

In applying the clearly erroneous standard to the findings of a district court

sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.

5. Prisons ⚿4(14)

In separation of church and state advocacy group's Establishment Clause action against Christian provider of rehabilitation services in state prison, law professor's testimony describing "Evangelical Christianity" was not relevant to inquiry into whether provider was pervasively sectarian. U.S.C.A. Const.Amend. 1; Fed.Rules Evid.Rule 402, 28 U.S.C.A.

6. Federal Courts ⚿900

In separation of church and state advocacy group's Establishment Clause action against Christian provider of rehabilitation services in state prison, error committed by district court in admitting testimony of law professor to describe "Evangelical Christianity," in inquiring into whether provider was pervasively sectarian, was harmless, in light of provider's sincere statements of its beliefs. U.S.C.A. Const.Amend. 1; Fed.Rules Evid.Rule 402, 28 U.S.C.A.

7. Constitutional Law ⚿1290, 1328

An inquiry into an organization's religious views to determine if it is pervasively sectarian under Establishment Clause is not only unnecessary but also offensive, and courts should refrain from trolling through a person's or institution's religious beliefs. U.S.C.A. Const.Amend. 1.

8. Federal Civil Procedure ⚿103.2
Federal Courts ⚿12.1

Article III of the Constitution limits the judicial power of the United States to the resolution of Cases and Controversies, and Article III standing enforces the Constitution's case-or-controversy requirement. U.S.C.A. Const. Art. 3, § 1 et seq.

9. Federal Civil Procedure ⚿103.3

Requisite elements of Article III require that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Constitutional Law ⚿831

State prison inmates, who alleged that they altered their behavior and had direct, offensive, and alienating contact with Christian provider of rehabilitation services in state prison, had standing to challenge and request injunction against state funding of provider's contract under Establishment Clause, as requested injunction could remedy inmates' alleged injury. U.S.C.A. Const.Amend. 1.

11. Associations ⚿20(1)

An association has standing to bring suit on behalf of its members if its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

12. Constitutional Law ⚿683

Generally, the interest of a taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable personal injury required for Article III standing. U.S.C.A. Const. Art. 3, § 1 et seq.

13. Constitutional Law ⚿683, 2453

Because the interests of the taxpayer are, in essence, the interests of the public-at-large, deciding a constitutional claim based solely on taxpayer standing would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly

courts do not possess. U.S.C.A. Const. Art. 3, § 1 et seq.

14. Constitutional Law ⚿825, 848

There is a narrow exception to the general constitutional prohibition against taxpayer standing, which provides that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of the Establishment Clause. U.S.C.A. Const. Art. 3, § 1 et seq; U.S.C.A. Const.Amend. 1.

15. Constitutional Law ⚿825

Exception to general constitutional prohibition against taxpayer standing on Establishment Clause claims also applies to state taxpayer challenges of state expenditures contrary to the Establishment Clause. U.S.C.A. Const. Art. 3, § 1 et seq; U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⚿831

Separation of church and state advocacy group and individual taxpayer possessed taxpayer standing, under narrow exception to general constitutional prohibition against taxpayer standing, to challenge and request injunction against state funding of prison rehabilitation services by Christian provider as violative of the Establishment Clause; state legislature had made specific appropriations from public funds for a values-based treatment program at state prison when Christian provider solely provided the program. U.S.C.A. Const. Art. 3, § 1 et seq; U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⚿831

Payments made by non-inmate fee-payers to an Inmate Telephone Fund were voluntary fees, not taxes, and thus payers lacked taxpayer standing, under narrow Establishment Clause exception to general constitutional prohibition against taxpayer standing, to challenge and request injunction against, as violative of the Establishment Clause, the funding of prison rehabilitation services by Christian provider partially through the Telephone Fund; payment to the fund was a charge correlated to a particular benefit exacted in exchange for a benefit of which the non-inmates had voluntarily availed themselves based on the cost of providing a benefit to the inmate. U.S.C.A. Const. Art. 3, § 1 et seq; U.S.C.A. Const.Amend. 1.

18. Federal Courts ⚿12.1

Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S.C.A. Const. Art. 3, § 2, cl. 1.

19. Federal Courts ⚿12.1

Under Article III cases and controversies requirement, controversy must exist throughout the litigation; otherwise, the case is moot. U.S.C.A. Const. Art. 3, § 2, cl. 1.

20. Federal Courts ⚿12.1

Federal courts lack power to decide the merits of a moot case. U.S.C.A. Const. Art. 3, § 2, cl. 1.

21. Constitutional Law ⚿977

Voluntary cessation of challenged practice of utilizing state funding for Christian provider of prison rehabilitation services to inmates did not render Establishment Cause action against the practice moot, even though state legislature, and not the defendant provider or Department of Corrections, had ended the funding, where provider and Department acted by agreeing to the contract extension that deleted the funding from the state. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1.

22. Federal Courts ⇐12.1

A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. U.S.C.A. Const. Art. 3, § 2, cl. 1.

23. Federal Courts ⇐12.1

Defendant faces a heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again. U.S.C.A. Const. Art. 3, § 2, cl. 1.

24. Federal Courts ⇐13

Cessation of government funding of Christian provider's inmate rehabilitation program did not render moot the live controversy about recoupment of previous payments made by state to the provider. U.S.C.A. Const. Art. 3, § 2, cl. 1.

25. Civil Rights ⇐1325

Under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful. 42 U.S.C.A. § 1983.

26. Civil Rights ⇐1326(4)

In certain circumstances government may become so entangled in private conduct that deed of an ostensibly private organization or individual is to be treated as if a state had caused it to be performed, under § 1983. 42 U.S.C.A. § 1983.

27. Civil Rights ⇐1326(4)

In determining whether a private actor is acting under color of state law, for purposes of a § 1983 action, issue is whether the alleged infringement of federal rights is fairly attributable to the state. 42 U.S.C.A. § 1983.

28. Civil Rights ⇐1325

Under § 1983 color-of-state-law requirement, state action may be found if, though only if, there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as that of the state itself. 42 U.S.C.A. § 1983.

29. Civil Rights ⇐1325

Two-part approach determines whether there is state action under § 1983; first, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and second, the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. 42 U.S.C.A. § 1983.

30. Civil Rights ⇐1326(8)

Establishment Clause deprivation arising from privilege given to Christian providers of inmate rehabilitation services, which possessed access to state prison facilities, control of prisoners, and substantial aid to effectuate programs, was created by the state in its contracts with the providers, as an element of establishing that providers met § 1983 state action requirement. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

31. Civil Rights ⇐1326(5)

One way a private party can appropriately be characterized as a state actor under § 1983 is when it is a willful participant in joint activity with the state or its agents. 42 U.S.C.A. § 1983.

32. Civil Rights ⇐1326(4)

State's mere acquiescence in a private party's actions is not sufficient to meet state actor requirement under § 1983. 42 U.S.C.A. § 1983.

33. Civil Rights ⚿1326(8)

Christian providers of inmate rehabilitation services acted jointly with state Department of Corrections, and as such, they could be classified as state actors, as an element of establishing that providers met § 1983 state action requirement; state effectively gave providers 24–hour power to incarcerate, treat, and discipline inmates, providers' teachers and counselors were authorized to issue inmate disciplinary reports, and progressive discipline was effectuated in concert with the Department of Corrections. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

34. Constitutional Law ⚿1328

Establishment Clause erects a barrier between government and religious entities depending on all the circumstances of a particular relationship. U.S.C.A. Const. Amend. 1.

35. Constitutional Law ⚿1295

In an Establishment Clause case, the inquiry calls for line drawing; no fixed, per se rule can be framed. U.S.C.A. Const. Amend. 1.

36. Constitutional Law ⚿1295

In analyzing an Establishment Clause case, a court should scrutinize challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. U.S.C.A. Const.Amend. 1.

37. Constitutional Law ⚿1334

In determining whether direct aid to an organization violates the Establishment Clause, court must ask whether the government acted with the purpose of advancing or inhibiting religion, and whether the aid has the effect of advancing or inhibiting religion. U.S.C.A. Const.Amend. 1.

38. Constitutional Law ⚿1426
Prisons ⚿4(14)

State Department of Correction's purpose in contracting with and funding Christian provider of inmate rehabilitation services was secular and thus permissible under the Establishment Clause, where Department offered the program for the purpose of reducing recidivism in a tight budgetary environment, and considered the long term nature of the program, its supportive communal environment, and its extensive post-release care program, as the best indicators that the program could reduce recidivism. U.S.C.A. Const. Amend. 1.

39. Constitutional Law ⚿1301

To analyze whether aid has the effect of advancing or endorsing religion in violation of the Establishment Clause, the three criteria that are decisive are whether government aid (1) results in governmental indoctrination, (2) defines recipients by reference to religion, or (3) creates excessive entanglement. U.S.C.A. Const. Amend. 1.

40. Constitutional Law ⚿1298

Government inculcation of religious beliefs has the impermissible effect of advancing religion in violation of the Establishment Clause. U.S.C.A. Const.Amend. 1.

41. Constitutional Law ⚿1301

Whether funding results in governmental indoctrination of religion, resulting in government endorsement of religion violative of the Establishment Clause, is ultimately a question whether any religious indoctrination that occurs could reasonably be attributed to governmental action. U.S.C.A. Const.Amend. 1.

42. Constitutional Law ⚿1334

In showing that government aid to a religious organization results in govern-

mental indoctrination, and thereby advances or endorses religion in violation of the Establishment Clause, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes. U.S.C.A. Const.Amend. 1.

43. Constitutional Law ⚿1301

Court does not presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination, thereby resulting in government endorsement of religion. U.S.C.A. Const. Amend. 1.

44. Constitutional Law ⚿1426
Prisons ⚿4(14)

State's funding, by means of direct aid, of Christian provider of inmate rehabilitation services in state prison resulted in religious indoctrination, thereby constituting government endorsement of religion violative of the Establishment Clause, where program resulted in inmate enrollment in a program dominated by Bible study, Christian classes, religious revivals, and church services, and state Department of Corrections provided housing and living quarters to program participants which afforded participants greater privacy, more visits from family members, and greater access to computers. U.S.C.A. Const. Amend. 1.

45. Constitutional Law ⚿1301

Under the Establishment Clause, a government may not, in administering aid, define recipients by reference to religion; instead, the aid must be allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. U.S.C.A. Const.Amend. 1.

46. Constitutional Law ⚿1426
Prisons ⚿4(14)

State funding, by means of direct aid, for inmate rehabilitation program administered by Christian provider was not allocated on neutral criteria and was not available on a nondiscriminatory basis, thus resulting in government endorsement of religion under the Establishment Clause, where aid to the program was only appropriate to inmates willing to productively participate in a program that was Christian-based. U.S.C.A. Const.Amend. 1.

47. Constitutional Law ⚿1426
Prisons ⚿4(14)

State funding, by means of direct aid, for inmate rehabilitation program administered by Christian provider did not result in excessive entanglement, so as to constitute government endorsement of religion under the Establishment Clause, notwithstanding any administrative cooperation between program and state Department of Corrections, where there was no pervasive monitoring of the program by the Department. U.S.C.A. Const.Amend. 1.

48. Constitutional Law ⚿1301

In order to comply with the Establishment Clause, indirect aid programs must be neutral with respect to religion, and provide assistance directly to a broad class of citizens who, in turn, direct government aid to religious organizations wholly as a result of their own genuine and independent private choice. U.S.C.A. Const. Amend. 1.

49. Constitutional Law ⚿1301

In analyzing an indirect aid program for compliance with the Establishment Clause, the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role

ends with the disbursement of benefits. U.S.C.A. Const.Amend. 1.

50. Constitutional Law ⚿1426
Prisons ⚿4(14)

State's indirect funding of Christian provider of inmate rehabilitation program, by means of a per diem payment of $3.47 for each inmate participating in the program, left inmates with no independent private choice with regard to such funds, thereby violating the Establishment Clause; legislative appropriation could not be directed to a secular program or to general prison programs, thus leaving the inmate with only one choice. U.S.C.A. Const.Amend. 1.

51. Constitutional Law ⚿1194

Generally, a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. U.S.C.A. Const.Amend. 1.

52. Prisons ⚿4(1)

General standard that prison regulations are valid if reasonably related to legitimate penological interests applies only to rights that are inconsistent with proper incarceration, and that need necessarily be compromised for the sake of proper prison administration.

53. Federal Courts ⚿813

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.

54. Federal Courts ⚿813

District court's equitable relief must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials, and those with whom they deal, are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.

55. Civil Rights ⚿1462

District court abused its discretion in granting recoupment of state funds provided to Christian provider of inmate rehabilitation services before its order declaring the program violative of Establishment Clause; even though provider had the ability to repay the funds, district court gave no weight to the fact that specific statutes, presumptively valid, authorized the funding, made no finding of bad faith by the state legislature and governor, and did not consider the testimony of state prison officials credited elsewhere in the order that the program was beneficial and that the state received much more value than it paid for. U.S.C.A. Const.Amend. 1.

56. Prisons ⚿4(2.1)

In shaping equitable relief, a court should consider the views of prison administrators.

57. Civil Rights ⚿1462

Once the district court declared the state funding of Christian provider of inmate rehabilitation violative of the Establishment Clause, provider and Department of Corrections could no longer rely on the legality of the program, and thus could not retain any funds for services rendered after the district court's order. U.S.C.A. Const.Amend. 1.

Alexander J. Luchenitser, argued, Ayesha N. Khan, Richard B. Katskee, Heather L. Weaver, Americans United for Separation of Church and State, Washington, DC; Dean A. Stowers, Rosenberg Stowers & Morse, Des Moines, IA, for appellees Americans United for Separation of Church and State, et al.

Gordon E. Allen, argued, H. Loraine Wallace, Iowa Dept. of Justice, Des Moines, IA, for appellants Terry Mapes, et al.

Anthony R. Picarello, Jr., argued, Kevin J. Hasson, Eric C. Rassbach, Derek L. Gaubatz, Lori E. Halstead, the Becket Fund for Religious Liberty, Washington, DC; Anthony F. Troy, Ashley L. Taylor, Robert A. Angle, Megan C. Rahman, Michael E. Lacy, Troutman Sanders LLP, Richmond, VA, for appellants Prison Fellowship Ministries, et al.

Before O'CONNOR, Associate Justice (Ret.),[1] WOLLMAN, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Prison Fellowship Ministries, Inc., InnerChange Freedom Initiatives, Inc., and employees of the Iowa Department of Corrections in their official capacities (DOC), appeal the declaratory judgment and equitable relief entered in favor of Americans United for Separation of Church and State, individual inmates, contributors to the inmates' telephone accounts, and an Iowa taxpayer. *Ams. United for Separation of Church and State v. Prison Fellowship Ministries,* 432 F.Supp.2d 862 (S.D.Iowa 2006). Having jurisdiction under 28 U.S.C. § 1291, this court affirms in part, reverses in part, and remands.

I.

[1–4] After a bench trial, this court reviews *de novo* legal conclusions and mixed questions of law and fact. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.,* 48 F.3d 365, 369 (8th Cir.1995). Factual findings are reviewed for clear error. *Robinson v. GEICO Gen. Ins. Co.,* 447 F.3d 1096, 1101 (8th Cir. 2006). Further, a

> reviewing court oversteps the bounds of its duty under [Federal Rule of Civil Procedure] 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*"

Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

A.

InnerChange offers a residential inmate program within the Newton, Iowa, medium-security facility. InnerChange, and its affiliate Prison Fellowship, are nonprofit 501(c)(3) corporations. From September 1, 1999 to June 30, 2007, the InnerChange program was funded in part by Iowa.

[5–7] The purposes of InnerChange are: "Reduce the rate of re-offense and the resulting societal costs" and "Provide a positive influence in prison." InnerChange's "ultimate goal" is "to see ex-prisoners become contributing members of society, by becoming responsible leaders in their family, church and community." InnerChange, a Christian program, describes itself as "an intensive, voluntary, faith-based program of work and study within a loving community that promotes transformation from the inside out through the miraculous power of God's love. [InnerChange] is committed to Christ and the Bible. We try to base everything we do

1. The Honorable Sandra Day O'Connor, Associate Justice, Supreme Court of the United States (Ret.), sitting by designation.

on biblical truth." Further, "Biblical principles are integrated into the entire course curriculum of [InnerChange], rather than compartmentalized in specific classes. In other words, the application of Biblical principles is not an agenda item—it is the agenda." The DOC has no control over the selection or teaching of the InnerChange curriculum or personnel.[2]

The program is quartered in Newton's Unit E. This Unit, due to construction budget constraints, has wooden cell doors to which inmates have keys, and community bathrooms with privacy dividers (thus, "dry" cells). Before InnerChange's use, Unit E housed honor inmates. Building M at Newton also is used only by InnerChange. Building M has offices, classrooms, a computer room, a library, and a multi-purpose room, but no security cameras.

Inmates are not required to join InnerChange. No one from the DOC or InnerChange threatens punishment, reduction in privileges, or otherwise pressures inmates to participate. If inmates join, no one from the DOC or InnerChange promises a reduced sentence or earlier parole. When joining, an inmate confirms in writing that participation is voluntary and will not affect eligibility for parole. The mandatory statement adds that the program is based on Christian values and contains religious content, but an inmate need not be a Christian to participate. Also, discontinuation may be voluntary or involuntary, and the inmate will not be penalized for voluntary withdrawal.

Iowa inmates are introduced to the program through presentations by InnerChange personnel at the various DOC institutions. The Introduction Workbook uses the Christian Bible to illustrate civic values. For example, the workbook includes Saul's conversion on the road to Damascus, Jesus' choosing of the apostles, and the parable of the Good Samaritan. It also contains Bible studies, such as *Do You Know Jesus Personally?; Salvation;* and *Answered Prayer.* An inmate may be eligible for InnerChange after completion of the introductory program. There is a substantial inmate waiting list eligible to join InnerChange (146 inmates as of October 2003).

InnerChange begins with a four-week orientation, followed by Phases I through IV. According to the orientation materials, InnerChange "is a Christian program, with a heavy emphasis on Christ and the Bible. All the components of the program are based on a biblical worldview. You will be expected to attend all [InnerChange] programming, including religious services." Further:

> We believe that the root of our transformation is a spiritual change. [InnerChange] is designed intentionally to help produce and nurture spiritual change in you. We focus on relationship with God and how that spreads to other relationships. We study the Bible a lot. The Bible is God's revealed truth to us. Je-

2. Prison Fellowship and InnerChange assert the district court erred in admitting testimony from a law professor/Ph.D./author to describe "Evangelical Christianity." 432 F.Supp.2d at 872–74. An inquiry into an organization's religious views to determine if it is pervasively sectarian "is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion); *see also Employment Div. v. Smith,* 494 U.S. 872, 887, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The district court abused its discretion, as the professor's testimony is not relevant. *See* Fed.R.Evid. 402. However, in light of Prison Fellowship and InnerChange's sincere statements of their beliefs, this error is harmless.

> sus said, "If you hold to my teachings, you are my disciples. Then you will know the truth, and the truth will set *you free!*" (John 8:31–32) That is the kind of transformation we are talking about.

Orientation materials contain introductory Bible studies and state that each InnerChange class is led by a biblical counselor who coaches the inmate in biblical living.

After orientation, to continue to Phase I, an inmate must sign the InnerChange Accountability Covenant, which states:

> I understand that the principles in Matthew 18:12–35 will be applied to my life within the [InnerChange] community.
>
> Those principles are
>
> 1. Error leads us to danger (vs.12)
> 2. The heart of correction is to restore (vs.13, 14)
> 3. It is the responsibility for those involved to reconcile on an interpersonal level (vs.15)
> 4. Peer mediation is to be utilized if necessary (vs.16)
> 5. Removal from the community is a last resort (vs.17)
> 6. Conflict resolution builds a stronger community (vs.18–20)
> 7. Interpersonal forgiveness of others is a condition of personal forgiveness from God. (vs.21–35)
>
> I have read, understand, and will adhere to the above principles as a condition of my participation in the [InnerChange] program.

Each day in Phase I, which lasts 12 months, opens with a 30–minute devotional where inmates pray and read aloud from Christian scripture. Required classes fill the day, with homework, including memorization of Bible verses. Classes are followed by an afternoon community meeting. There, inmates pray, make prayer requests, sing religious songs, read from the Bible, and hear a daily devotional message (by an InnerChange inmate). Evening classes begin after dinner. Friday evenings, a revival service is held; all inmate participants are required to attend and take their InnerChange-provided Bibles. Sunday mornings, InnerChange holds church services, which all program inmates must attend.

During the typical day in Phase I, an inmate has five or six periods of free time, each lasting between 30 minutes and an hour. The DOC admits that during free time, InnerChange inmates are allowed to use computers, but other Newton inmates are not.

After completing Phase I, the inmate may enter Phase II, which lasts six months. The inmate signs a Continued Stay Agreement, to continue participation in the same basic schedule of morning devotionals, community meetings, afternoon and evening classes, Friday evening revivals, and Sunday morning services. By signing this agreement, the inmate understands that "if I fail to maintain these expectations I will be subject to disciplinary actions." In Phase II, the inmate also is assigned an InnerChange volunteer mentor, who assists the inmate in "living the Christian life."

InnerChange's curriculum in Phases I and II include several mandatory religious classes, such as Experiencing God, Old and New Testament Survey, and Spiritual Freedom. InnerChange also has treatment classes, such as Substance Abuse, Anger Management, Victim Impact, Criminal Thinking, Financial Management, Family Series,[3] and Marriage/Family/Par-

3. The district court found that during the three months of this course, an InnerChange inmate receives "more visits than he otherwise would be allowed," allowing "greater

enting. InnerChange's treatment classes have religious content. For example, InnerChange affirms that its (licensed) substance abuse curriculum contains a high level of religious content, based on the premise that "only Jesus Christ is the cure for addiction." Anger Management goals include learning how biblical power works and how to apply it. The Criminal Thinking course has four goals, each comparing and contrasting secular concepts to superior biblical truth and Christian ethics. The only thoroughly secular course is Computer Training, which meets two hours each week.

To measure progress in Phases I and II, InnerChange used a "Fruit of the Spirit" evaluation. (In 2005, this form was changed to a Quarterly Goals Review based upon civic virtues.) This evaluation rated the inmate's progress based on characteristics in Galatians 5:13–26. An inmate's failure to meet expectations, or low Fruit of the Spirit score, could result in dismissal from InnerChange. For example, in dismissing one inmate, the entire treatment team met and discussed his progress, concluding:

> your conduct has been excellent according to security standards, and you are a hard worker. With you as a member you have always completed your work and assignments, however, you are not displaying the growth needed to remain in the program. Your Focus is not on God and His Son to Change you.

(No discipline was imposed on this inmate upon dismissal from InnerChange.) Most dismissals, however, were the result of minor infractions and attitudinal deficiencies.

Additionally, InnerChange staff, without DOC personnel, supervise inmates in classes, activities, and recreation. The DOC has authorized InnerChange staff to write and issue a disciplinary "behavior report" on a participating inmate. After seven reports, the inmate receives, from a DOC officer, a "major report," indicating a serious rule violation. The inmates who testified at trial stated that InnerChange staff possess many of the same duties as corrections personnel.

After Phase II, if the DOC places a participating inmate in a work release center, he may enter Phase III. Phase IV begins if an InnerChange inmate is released from confinement. During these Phases, the inmate is required to stay employed and attend church each Sunday and at mid-week (at the church agreed to by InnerChange, for the first three months after release).

B.

The contractual and monetary relationship between Prison Fellowship, InnerChange, and the DOC developed over a number of years. In 1997, the new Newton facility faced budgetary restraints, overcrowding, and lack of appropriate programs. Prison administrators rank effective programs a close second to overcrowding in addressing prisoner security and safety concerns. Corrections officials searched for innovative ways to meet programing needs. An InnerChange program in Texas was examined to determine if it would work at Newton. A search also was conducted for other organizations with similar services. Although there were several providers of values-based programing, InnerChange was the only organization officials found that offered a long-term, values-based, residential program with excellent post-release services.

Officials were concerned with the constitutionality of InnerChange's religious model but concluded, due to budgetary

exposure to loved ones than he would otherwise have without the programming."

constraints, that it was the only way to provide necessary programing. If the budget allowed, corrections officials gladly would offer a broader spectrum of values-based programing. InnerChange's volunteers and donors enable it to provide in-prison and post-release programing at a greatly reduced cost to the state.

In 1998, Iowa's General Services Department publicly issued a request for proposals to establish a non-compensated, values-based, pre-release program at Newton. Prison Fellowship and InnerChange, jointly, submitted the only proposal. Their submission, however, sought partial state funding. The DOC accepted the proposal.

In March 1999, Prison Fellowship, InnerChange and the DOC contracted for program services, with reimbursement for non-religious costs and expenses. Under an extension clause, the contract covered September 1999 to June 2002. In the first year of the contract, the DOC paid InnerChange $229,950, with all the money coming from the Inmate Telephone Rebate Fund. (In 2003, the law was amended to delete the term "Rebate.") By statute and regulation, expenditures from this fund are at the discretion of the DOC for the benefit of inmates. Iowa Code § 904.508A; Iowa Admin. Code r. 201–20.20(1)–(5). In the contract's second year, the DOC paid InnerChange $191,625 from the same fund. InnerChange's operating costs at Newton were $506,181 the second year. In the third year, InnerChange was paid $191,625 from the fund toward its operating cost of $578,995.

Nearing the expiration of the contract in 2002, the General Services Department issued a request for proposals to the general public to continue a values-based, pre-release program at Newton. InnerChange submitted the only proposal, again accepted by the DOC (with Prison Fellowship no longer a party to the contract).

A contract was entered, renewable for one-year terms from July 2002 to June 2005. It provided state funding for the non-religious parts of the program. In the contract's first year, 2002 to 2003, InnerChange's operating expense was $603,063. The DOC paid InnerChange $191,625 from the Telephone Rebate Fund. This was the last year that rebate funds were paid to InnerChange. Additionally that year, the Iowa legislature appropriated $172,591 to the DOC "for a values-based treatment program at the Newton correctional facility." This appropriation was used to expand the InnerChange program to the Release Center at Newton (a minimum-security facility one mile from the main facility). The appropriation came from the Healthy Iowans Tobacco Trust (proceeds from the master tobacco settlement between the state and tobacco manufacturers). During the contract's second year, 2003 to 2004, the legislature appropriated $310,000 from the Tobacco Trust. Actual payment from the Trust to the DOC for InnerChange was $276,909. The program's operating cost was $670,382. In the third year, 2004 to 2005, the contract was changed to a per diem payment of $3.47 for each inmate participating in the program. The legislature again appropriated $310,000, with actual payment to InnerChange of $236,532.55. InnerChange's operating costs were $687,655.

In April 2005, the DOC issued the last request for proposals to continue the values-based, pre-release program at Newton. Two organizations responded, InnerChange and Emerald Correctional Management—a non-religious service provider. InnerChange's proposal of $310,000 for a full array of services, including a licensed substance abuse program, was lower than Emerald's bid of $562,000. The DOC accepted InnerChange's proposal. In the

contract's first and second years, July 2005 to June 2007, the legislature appropriated $310,000 each year. In June 2007, the legislature refused to make a further appropriation. In accordance with the contract extension for 2007–2008, the InnerChange program is operating without state funds.

C.

Until July 2007, the DOC's funding accounted for 30 to 40 percent of InnerChange's operating costs. The contracts at issue mandated that government funds cover only "the non-religious aspects," or "the non-sectarian portion." The district court found that no clear understanding or definition of non-religious costs was developed. From the first billing (September 1999 to April 2000), the DOC expressed concern about InnerChange's designation of religious and non-religious costs, but paid the billed amount. After reviewing the contract, the DOC Director for Offender Services concluded that "the contract doesn't get very specific about what kinds of expenses are billable." In 2001, the DOC services director called for a clear definition of religious versus non-religious expenses. (At trial, the director testified that the definition was not ever resolved.) The services director informed DOC officials and InnerChange that billing was generalized and did not detail why expenses were characterized as non-religious. Despite this ambiguity, the Newton warden testified that InnerChange gave Iowa far more value in non-religious programs than it paid for.

Salaries and benefits for InnerChange's personnel were paid by the DOC on a percentage basis. The state paid 82% of the Local Director's salary; 9% for the Program Manager; 93% for the Aftercare Manager; 77% for the Office Administrator; and 16% for each of four Biblical Counselors (also called Case Workers). InnerChange staff did not actually divide their work time into religious or nonreligious activities or make any allocation for payroll purposes. The percentages billed by InnerChange were identical for every period (until payment changed to per diem).

As for other expenses, the InnerChange Office Administrator recorded items as religious or non-religious. Items designated as non-religious were billed to and paid for by the DOC. For example, InnerChange's volunteer-recruitment brochure, *A Prison Like No Other,* was printed completely at state expense. The brochure describes InnerChange as a "24–hour–a–day, Christ-centered, biblically based, program that promotes personal transformation of prisoners through the power of the Gospel." It represents the program as immersing "prisoner-participants in round-the-clock, Christ-centered programming" and advancing the state's objectives of rehabilitation and recidivism reduction "with everything grounded in the Word of God." The brochure states:

> The InnerChange Freedom Initiative is our chance to demonstrate, in a way secular people will never be able to doubt, that Christ changes lives, and that changing prisoners from the inside out is the *only* crime-prevention program that really works.

At various times, the DOC paid for small religious gifts—key rings and bookmarks—to volunteers and graduating inmates; a subscription to a monthly Christian devotional booklet; and a "Church Copyright License" to use religious music in worship. Additionally, all land and cell phone costs were billed to the DOC. InnerChange's postal meter and thermal tape were billed to the state without detailed accounting. The DOC paid for InnerChange's computer hardware, software,

repair, and internet account. The DOC also paid for InnerChange's letterhead, envelopes, printer and copier toner, paper, blank videotapes, and standard office supplies. Each month, every photocopy up to 40,000 was charged to the DOC. Copies over 40,000 were designated as religious (although the record does not reflect how many total copies were made each month).

Building M—a modular building housing InnerChange's offices and classrooms—was constructed in 2000. By the lease-purchase contract, the Telephone Fund paid $294,017 for Building M, with ownership in the DOC since 2002.

When the DOC reimbursed InnerChange for costs or paid the per diem amount, the money was deposited in InnerChange's bank account. From that account, InnerChange periodically transferred funds to Prison Fellowship's general accounts, to cover program operating expenses. These general accounts also contain funds from private sources.

II.

A.

[8, 9] Issues of standing arise throughout this case. There are two strands in standing jurisprudence: "Article III standing, which enforces the Constitution's case-or-controversy requirement; and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11–12, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (internal citations and quotation marks omitted). "Article III of the Constitution limits the judicial power of the United States to the resolution of Cases and Controversies, and Article III standing ... enforces the Constitution's case-or-controversy requirement." *Hein v. Freedom from Religion Found., Inc.,* —— U.S. ——, 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007), *quoting DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 126 S.Ct. 1854, 1861, 164 L.Ed.2d 589 (2006) (internal quotation marks omitted). "The requisite elements of Article III standing are well established: 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id., quoting Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

[10] In the present case, there are four categories of plaintiffs: inmates, Americans United, an Iowa taxpayer, and contributors to inmates' telephone accounts (who are also former cigarette smokers). First, the inmates allege they altered their behavior and had direct, offensive, and alienating contact with the InnerChange program. *See ACLU Neb. Found. v. City of Plattsmouth,* 358 F.3d 1020, 1030 (8th Cir.2004), *adopted by court en banc, ACLU Neb. Found. v. City of Plattsmouth,* 419 F.3d 772, 775 n. 4 (8th Cir.2005). An injunction can remedy this injury. The inmates have standing.

[11] Next, Americans United has standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The second and third factors are not disputed.

[12–15] Regarding the first factor, Americans United bases its members' standing on Iowa taxpayer status, as does the individual taxpayer plaintiff. Generally, the interest of a "taxpayer in seeing that Treasury funds are spent in accor-

dance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein,* —— U.S. at ——, 127 S.Ct. at 2563.

> Because the interests of the taxpayer are, in essence, the interests of the public-at-large, deciding a constitutional claim based solely on taxpayer standing "would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."

Id.,quoting Frothingham v. Mellon, 262 U.S. 447, 489, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (alteration in original). There is, however, "a narrow exception to the general constitutional prohibition against taxpayer standing." *Id.* at 2564, *citing Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The exception provides that " 'a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of' the Establishment Clause." *DaimlerChrysler Corp.,* 547 U.S. at 347, 126 S.Ct. at 1864, *quoting Flast,* 392 U.S. at 105–06, 88 S.Ct. 1942. This exception also applies to state taxpayer challenges of state expenditures contrary to the Establishment Clause. *See Doremus v. Bd. of Educ.,* 342 U.S. 429, 434, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *Minn. Fed'n of Teachers v. Randall,* 891 F.2d 1354, 1356–58 (8th Cir.1989).

[16] In this case, the Iowa legislature made specific appropriations from public funds "for a values-based treatment program at the Newton correctional facility" when InnerChange solely provided the program. *See Hein,* —— U.S. at ——, 127 S.Ct. at 2565 (in *Flast,* the acts and expenditures warranting taxpayer standing were by express legislative mandate and appropriation). Therefore, Americans United and the individual taxpayer satisfy the narrow exception for taxpayer standing.

[17] Finally, as for the non-inmate contributors to inmates' telephone accounts, each paid money to a telephone account to permit an inmate to make calls. The profit or commission generated from the telephone vendor was deposited in the Inmate Telephone Fund, specifically authorized by Iowa statute. The non-inmates' payment was a charge "correlated to a particular benefit ... exacted in exchange for a benefit of which the payor has voluntarily availed itself ... based on the cost of providing a benefit to the recipient." *Coal. for Fair & Equitable Regulations v. F.E.R.C.,* 297 F.3d 771, 778–79 (8th Cir. 2002). The non-inmates' payments to the Telephone Fund were thus voluntary fees, not taxes. *Id.* The payments were not a pass-through tax, or a "mandatory" fee, as involved in the cases cited by the plaintiffs. *See Freedom from Religion Found., Inc. v. Bugher,* 249 F.3d 606, 610 (7th Cir.2001). *See also United States v. United Foods, Inc.,* 533 U.S. 405, 408, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Bd. of Regents v. Southworth,* 529 U.S. 217, 221, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Keller v. State Bar,* 496 U.S. 1, 4, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Lemon v. Kurtzman,* 403 U.S. 602, 611, 616, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Therefore, the non-inmate fee-payers to the Telephone Fund do not have taxpayer standing. Prison Fellowship, InnerChange, and the DOC's motion for partial dismissal, as to standing, is denied, except as to the non-inmate contributors to the Telephone Fund.

B.

[18–20] Closely related to standing is mootness. Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. *Haden v.*

Pelofsky, 212 F.3d 466, 469 (8th Cir.2000). The controversy must exist throughout the litigation; otherwise, the case is moot. *Id.* Federal courts lack power to decide the merits of a moot case. *Missouri ex rel. Nixon v. Craig,* 163 F.3d 482, 484 (8th Cir.1998).

Prison Fellowship, InnerChange, and the DOC contend that any challenge to the fully performed contracts is moot. They cite several cases holding that if a litigant seeks an injunction against performance of a contract—and before the injunction is entered, the contract is fully performed—the request for injunctive relief is moot, as the court cannot enjoin completed performance. *See, e.g., Agrigenetics, Inc. v. Rose,* 62 F.3d 268, 270–71 (8th Cir.1995); *Curtis Indus., Inc. v. Livingston,* 30 F.3d 96, 97 (8th Cir.1994); *Fauconniere Mfg. Corp. v. Sec'y of Def.,* 794 F.2d 350, 351 (8th Cir.1986). This reasoning does not apply here. The district court did not enjoin already concluded contracts. Instead, it only addressed *further* operation of InnerChange's program at Newton. Additionally, the dispute as to restitution, premised on the unconstitutionality of the performed contracts, is a live controversy.

[21, 22] Prison Fellowship, InnerChange, and the DOC next move to dismiss all Establishment challenges to the per diem payment structure, arguing such challenges are moot because the program has not been funded since July 1, 2007. To the contrary, the voluntary cessation exception to mootness applies. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). Prison Fellowship, InnerChange, and the DOC object, asserting that the relevant de-funding action was by the Iowa legislature, not the defendants, and the funding expired by its own terms. However, InnerChange and the DOC did act by agreeing to the contract extension that deleted funding from Iowa.

[23] Prison Fellowship, InnerChange, and the DOC contend that Americans United has not successfully demonstrated potential recurrence of the unlawful action. This argument misplaces the burden of showing the likelihood of recurrence. "The defendant faces a heavy burden of showing that 'the challenged conduct cannot reasonably be expected to start up again.' " *Lankford v. Sherman,* 451 F.3d 496, 503 (8th Cir.2006), *quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Prison Fellowship, InnerChange, and the DOC have not met this burden. They effectively ask this court to vacate the injunction without any assurance that they will not resume the prohibited conduct. Therefore, under the voluntary cessation exception, the district court's injunctive relief is not moot.

[24] Finally, the cessation of government funding does not render moot the live controversy about recoupment of previous payments (discussed below in Section II.G). Prison Fellowship, InnerChange, and the DOC's motion for partial dismissal, as it concerns mootness, is denied.

C.

[25, 26] Prison Fellowship and InnerChange assert they are not actors under color of state law for purposes of 42 U.S.C. § 1983. "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999), *quoting Blum v. Yaretsky,* 457 U.S. 991,

1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). However, "[i]n certain circumstances the government may become so entangled in private conduct that 'the deed of an ostensibly private organization or individual is to be treated . . . as if a State had caused it to be performed.' " *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir.2007), *quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

[27–29] The issue is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.' " *Rendell–Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), *quoting Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). *See also West v. Atkins*, 487 U.S. 42, 53–54, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (contract physician's medical care of a state inmate is conduct "fairly attributable to the State"). Thus, "state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad.*, 531 U.S. at 295, 121 S.Ct. 924 (internal citation and quotation marks omitted). A two-part approach determines whether there is state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937, 102 S.Ct. 2744.

[30] Regarding the first part, the alleged deprivation is a violation of the Establishment Clause. This violation is possible because of privileges created by the DOC in its contracts with Prison Fellowship and InnerChange. The DOC gave Prison Fellowship and InnerChange access to facilities, control of prisoners, and substantial aid to effectuate the program. Thus, the privilege to Prison Fellowship and InnerChange was created by the state. *Id.; but cf. Montano v. Hedgepeth*, 120 F.3d 844, 848–51 (8th Cir.1997) (in free-exercise challenge, prison chaplain's religious acts were beyond governmental authority and could not fairly be attributed to the state).

[31, 32] The second, critical inquiry is whether Prison Fellowship and InnerChange can properly be classified as state actors. The Supreme Court has recognized a number of circumstances under which this requirement can be met, but "[t]he one unyielding requirement is that there be a 'close nexus' not merely between the state and the private party, but between the state and the alleged deprivation itself." *Wickersham*, 481 F.3d at 597, *citing Brentwood Acad.*, 531 U.S. at 295, 121 S.Ct. 924. One way a private party can appropriately be characterized as a state actor is when it is "a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (internal quotation marks omitted). However, the state's mere acquiescence in a private party's actions is not sufficient. *Wickersham*, 481 F.3d at 597, *citing Blum*, 457 U.S. at 1004–05, 102 S.Ct. 2777.

[33] In this case, the state effectively gave InnerChange its 24–hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC. Prison Fellowship and InnerChange acted jointly with the DOC and can be classified as state actors under § 1983. *SeeCorr. Servs. Corp. v. Malesko,* 534 U.S. 61, 71–72 n. 5, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) ("the private facility in question housed *state* prisoners—prisoners who already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983"); *Smith v. Cochran,* 339 F.3d 1205, 1215–16 (10th Cir.2003) ("persons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment" in a § 1983 action); *Street v. Corr. Corp. of Am.,* 102 F.3d 810, 814 (6th Cir.1996) (a private prisoner operator acted under color of state law).

In this case, Prison Fellowship and InnerChange are appropriate parties under 42 U.S.C. § 1983.

D.

[34–36] On the merits, the plaintiffs invoke the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 301, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). Also involved is the establishment clause of the Iowa Constitution, which is analyzed simultaneously. *See Kliebenstein v. Iowa Conference of the United Methodist Church,* 663 N.W.2d 404, 406–07 (Iowa 2003). The Establishment Clause erects a barrier between government and religious entities " 'depending on all the circumstances of a particular relationship.' " *Lynch v. Donnelly,* 465 U.S. 668, 678–79, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), *quoting Lemon v. Kurtzman,* 403 U.S. 602, 614, 91 S.Ct. 2125, 29 L.Ed.2d 745 (1971); *see McCreary County v. Am. Civ. Liberties Union,* 545 U.S. 844, 867, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) ("under the Establishment Clause detail is key"). For those "who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n,* 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Lynch,* 465 U.S. at 678, 104 S.Ct. 1355. "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the [Supreme] Court." *Id.* Instead, a court should scrutinize "challenged legislation or official conduct to determine whether, *in reality, it establishes a religion or religious faith, or tends to do so.*" *Id.* (emphasis added).

1.

[37] For the contract years 2000 to 2004, Iowa made payments directly to InnerChange. In determining whether this direct aid violates the Establishment Clause, this court must "ask whether the government acted with the purpose of advancing or inhibiting religion, and ... whether the aid has the effect of advancing or inhibiting religion." *Agostini v. Felton,* 521 U.S. 203, 222–23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (internal citations and quotation marks omitted).

[38] In the present case, the district court concluded that the DOC's purpose in

contracting with and funding InnerChange was secular: offering comprehensive programing to inmates and reducing recidivism. This conclusion is well-supported. The DOC officials were "confronted with the secular, pragmatic needs of running a state prison facility with sufficient programming in a tight budgetary environment." The DOC officials "considered the long term nature of the InnerChange program, its supportive communal environment, and its extensive post-release care program, as the best indicators that the InnerChange program could reduce recidivism . . . ." In this case, the government did not act with the purpose of advancing or inhibiting religion.

[39] To analyze whether aid has the effect of advancing or endorsing religion, three criteria are decisive: whether government aid (1) results in governmental indoctrination; (2) defines recipients by reference to religion; or (3) creates excessive entanglement. *Id.* at 234–35, 117 S.Ct. 1997.[4]

[40–43] First, "government inculcation of religious beliefs has the impermissible effect of advancing religion." *Agostini*, 521 U.S. at 223, 117 S.Ct. 1997. Whether funding "results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs . . . could reasonably be attributed to governmental action." *Mitchell v. Helms*, 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion), *citing Agostini*, 521 U.S. at 226, 230, 117 S.Ct. 1997. Further, "plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Id.* at 857, 120 S.Ct. 2530 (O'Connor, J., concurring in judgment). This court does not "presume inculcation of religion; rather, plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination." *Id.* at 858, 120 S.Ct. 2530; *see Agostini*, 521 U.S. at 223–24, 226–27, 117 S.Ct. 1997 (in the absence of evidence showing use of aid to inculcate religion, there is a presumption of compliance with secular restrictions).

[44] In the present case, plaintiffs demonstrated (and defendants do not seriously contest) that the InnerChange program resulted in inmate enrollment in a program dominated by Bible study, Christian classes, religious revivals, and church services. The DOC also provided less tangible aid to the InnerChange program. Participants were housed in living quarters that had, in previous years, been used as an "honor unit," and which afforded residents greater privacy than the typical cell. Among other benefits, participants were allowed more visits from family members and had greater access to computers.

The DOC officials stress their belief that Iowa received far more in nonreligious programs than it paid for. But plaintiffs meet their burden by citing the DOC's statement:

> The DOC's "monitoring" of the InnerChange Program is limited to receiving and reviewing periodic service invoices from IFI [InnerChange]. The DOC does not, to be sure, involve itself in monitoring the InnerChange Program, IFI's billing procedures, or IFI's use of the money received from the DOC.

The presumption of compliance with secular restrictions does not apply in this case. For contract years 2000 to 2004, religious

4. The district court correctly stated this test. 432 F.Supp.2d at 914–15. It then, however, focused on a "pervasively sectarian" analysis in order to determine whether government aid had the effect of advancing religion. *Id.* at 917–25. This court will apply the clear framework in *Agostini*.

indoctrination can reasonably be attributed to Iowa's funding.

[45] Second, in administering aid, a government may not define recipients by reference to religion. The aid must be " 'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis' " *Id.* at 813, 120 S.Ct. 2530, *quoting Agostini,* 521 U.S. at 231, 117 S.Ct. 1997; *id.* at 845, 120 S.Ct. 2530 (O'Connor, J., concurring in judgment).

[46] In this case, to use the aid appropriated, inmates must have been "willing to productively participate in a program that is Christian-based." The district court found that inmates' religious beliefs (or lack thereof) precluded their participation. For contract years 2000 to 2004, the InnerChange program was not allocated on neutral criteria and was not available on a nondiscriminatory basis.

[47] Third, as for excessive entanglement, there was no pervasive monitoring by the DOC, though there was some administrative cooperation. *See Agostini,* 521 U.S. at 233–34, 117 S.Ct. 1997. For the contract years 2000 to 2004, there was not excessive entanglement between Prison Fellowship, InnerChange, and the DOC.

Because the indoctrination and definition criteria indicate that InnerChange had the effect of advancing or endorsing religion during the contract years 2000 to 2004, the direct aid to InnerChange violated the Establishment clauses of the United States and Iowa Constitutions.

2.

[48, 49] In the 2005, 2006, and 2007 contract years, funding from the DOC to InnerChange changed *from* cost reimbursement *to* per diem payment—an attempt to make InnerChange an indirect aid program. In order to comply with the Establishment Clause, indirect aid programs must be "neutral with respect to religion," and provide "assistance directly to a broad class of citizens who, in turn, direct government aid to religious" organizations "wholly as a result of their own genuine and independent private choice." *Zelman v. Simmons–Harris,* 536 U.S. 639, 652, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.See also Mueller v. Allen,* 463 U.S. 388, 399, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983).

[50] In this case, there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange. The legislative appropriation could not be directed to a secular program, or to general prison programs. *See Mitchell,* 530 U.S. at 816, 120 S.Ct. 2530 (government support for religion is permissible where aid passes through the hands (literally or figuratively) of private citizens who are free to direct the aid elsewhere). For the inmate to have a genuine choice, funding must be "available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" and the inmates must "have full opportunity to expend . . . aid on wholly secular" programs. *Witters v. Wash. Dept. of Servs. for the Blind,* 474 U.S. 481, 488, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (internal citations and quotation marks omitted). *See also Agostini,* 521 U.S. at 226–28, 117 S.Ct. 1997 (no violation where the aid was provided to students at whatever school they chose to attend); *Freedom from Religion Found., Inc. v.*

McCallum, 324 F.3d 880, 881–82 (7th Cir. 2003) (no Establishment Clause violation where parole violator could choose to enroll in "one of several halfway houses," only one of which had a significant Christian element).

Prison Fellowship and InnerChange emphasize that from their viewpoint, they received funds only if the inmate chose them. *Zelman* makes clear that the relevant viewpoint is the chooser's (there, the parents'), not the provider's (there, the private schools'). *See Zelman*, 536 U.S. at 655–56, 122 S.Ct. 2460. Here, the inmate had no genuine and independent private choice because he had only one option. *See id.* at 652–53, 655, 122 S.Ct. 2460, *approving Mitchell*, 530 U.S. at 842–43, 120 S.Ct. 2530 (O'Connor, J., concurring in judgment) (a reasonable observer would perceive per-recipient direct aid to religious organizations differently than aid that recipients choose to use at religious or secular organizations).

The district court did not err in concluding that the per diem structure, as administered, violated the Establishment clauses of the United States and Iowa Constitutions.

E.

Prison Fellowship, InnerChange, and the DOC contend that any constitutional violation is subject to the standard in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987): "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." The DOC stresses that the InnerChange program is reasonably related to legitimate penological interests, and that "*Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights," quoting *Washington v. Harper*, 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

[51, 52] Generally, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). The *Turner* standard applies "*only* to rights that are 'inconsistent with proper incarceration,' " and "that need necessarily be compromised for the sake of proper prison administration." *Johnson v. California*, 543 U.S. 499, 510, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), *quoting Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (emphasis in original).

This court has consistently analyzed Establishment claims without mentioning the *Turner* standard, even when applying that standard to Free Exercise claims in the same case. *See Munson v. Norris*, 435 F.3d 877, 880–81 (8th Cir.2006) (per curiam); *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 982–85 (8th Cir.2004). In this case, there is no Free Exercise or accommodation claim, and taxpayers also assert the Establishment claims. The *Turner* standard thus cannot be used to validate funding violations of the Establishment Clause by the laws authorizing the InnerChange program at the Newton prison.

F.

[53, 54] The district court ordered Prison Fellowship and InnerChange to repay the state funds received under all the contracts (but stayed this equitable relief pending appeal). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) (plurality opinion) (*Lemon II*). The district court's equi-

table relief "must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Id.* at 208–09, 93 S.Ct. 1463.

[55] In ordering recoupment, the district court gave no weight to the fact that specific statutes, presumptively valid, authorized the InnerChange funding. The district court made no finding of bad faith by the Iowa legislature and governor (although the court criticizes the bid process and "state officials, in all branches of state government" for permitting the InnerChange program). However, the actual finding of fact regarding the Iowa state officials is:

> [T]hough evidence shows InnerChange received a warm welcome at the Dept. of Corrections Board, state Legislature, and Governor's Office, no evidence shows that the promotion of religion was the primary concern of those state officials in passing legislation authorizing funding.

432 F.Supp.2d at 917. Further indicating good faith is that the legislature stopped the funding after the district court enjoined it. *See New York v. Cathedral Acad.,* 434 U.S. 125, 130, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977) (reimbursement for pre-injunction expenses disallowed where "[t]he state legislature . . . took action inconsistent with the court's order"). The district court believed that Prison Fellowship, InnerChange, and the DOC had clear notice the program was plainly unlawful. The case the district court cites is distinguishable factually. *See Williams v. Lara,* 52 S.W.3d 171 (Tex.2000) (a religious county-jail program held unconstitutional due to the direct participation of the sheriff in setting the program's curriculum according to his own personal religious beliefs). The district court also cites a legal memorandum by the California DOC, which has no more weight than that of any other attorney. Even if there were some risk associated with the program, it cannot be said that resolution of this case was clearly foreshadowed. *See Lemon II,* 411 U.S. at 206, 93 S.Ct. 1463.

[56] In ordering recoupment, the district court did not consider the testimony of the state prison officials—credited elsewhere in the order—that the program was beneficial and the state received much more value than it paid for. In the prison context, courts defer to the judgment of prison administrators. *See, e.g., Cutter v. Wilkinson,* 544 U.S. 709, 723, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (applied statute by giving " 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources' "); *Washington v. Harper,* 494 U.S. 210, 223–24, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) ("prison authorities are best equipped to make difficult decisions regarding prison administration"); *Murphy v. Mo. Dept. of Corr.,* 372 F.3d 979, 983 (8th Cir.2004), *quoting Goff v. Graves,* 362 F.3d 543, 549 (8th Cir.2004) ("We accord great deference to the judgment and expertise of prison officials, 'particularly with respect to decisions that implicate institutional security' "); *Iron Eyes v. Henry,* 907 F.2d 810, 812 (8th Cir.1990), *quoting Pitts v. Thornburgh,* 866 F.2d 1450, 1453 (D.C.Cir.1989) (" 'issues of prison management are, both by reason of separation of powers and highly practical considerations of judicial competence, peculiarly ill-suited to judicial resolution, and . . . accordingly, courts should be loath to substitute their judgment for that of pris-

on officials and administrators' "). This deference does not insulate prison administrators' decisions from judicial review. However, in shaping equitable relief, a court should consider the views of prison administrators, which oppose recoupment in this case.

The district court additionally cited Prison Fellowship's ability to repay the contract funds. Standing alone, this is not sufficient as it depends solely on the defendant's wealth and deters financially sound organizations from contracting with the government. *See Lemon II,* 411 U.S. at 207, 93 S.Ct. 1463 ("Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall").

Critically, the plaintiffs did not seek interim injunctive relief to prevent payment by the DOC during litigation, strengthening Prison Fellowship and InnerChange's reliance on those payments. *See id.* at 204, 93 S.Ct. 1463 (reliance interest was reinforced because the "tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State"). In the absence of interim injunctive relief, expenses continued to be incurred, and payments spent, for the 24–hour care of inmates. *See Roemer v. Bd. of Pub. Works,* 426 U.S. 736, 767 n. 23, 96 S.Ct. 2337, 49 L.Ed.2d 179 (reliance was stronger where the money had "been paid out to, and spent by, the colleges").

[57] By the same logic, once the district court declared the funded InnerChange program unconstitutional on June 2, 2006, the defendants cannot rely on the legality of the program and cannot retain any funds for services rendered *after* the district court's order. *See id.; Lemon II,* 411 U.S. at 194, 93 S.Ct. 1463.

Given the totality of the circumstances, the district court abused its discretion in granting recoupment for services rendered before its order.

G.

Prison Fellowship, InnerChange, and the DOC object that the injunction is overbroad, claiming it bars InnerChange from ever contracting with the DOC. They cite the district court's ultimate statement: "[T]he InnerChange treatment program is hereby permanently enjoined from further operation at the Newton Facility, or any other institution within the Iowa Dept. of Corrections, so long as it is supported by government funding."

To the contrary, the injunction, in context, applies only to programs like those operating before the district court's order and funded by the unconstitutional structures for those years. The court's ultimate declaratory relief is:

> [T]he contractual relationship between the state of Iowa, *as managed and directed* by the named state Defendants, and InnerChange and Prison Fellowship violates the Plaintiffs' Establishment clause rights as contained in the Federal and Iowa Constitutions by *impermissibly funding* the InnerChange treatment program at the Newton Facility.

(emphasis added). The district court did not forever ban Prison Fellowship and InnerChange from operating in Iowa.

III.

The judgment of the district court is affirmed in part, reversed in part, and the case remanded.

530 U.S. 640, 147 L.Ed.2d 554

[640]**BOY SCOUTS OF AMERICA and Monmouth Council, et al., Petitioners,**

v.

James DALE.

No. 99–699.

Argued April 26, 2000.

Decided June 28, 2000.

Assistant scoutmaster who was expelled after he publicly declared he was homosexual brought action under New Jersey's Law Against Discrimination (LAD) against Boy Scouts of America (BSA), seeking reinstatement and damages. The Superior Court, Law Division, Monmouth County, granted summary judgment for BSA. Assistant scoutmaster appealed. The Superior Court, Appellate Division, 308 N.J.Super. 516, 706 A.2d 270, affirmed in part and reversed in part. On appeal, the New Jersey Supreme Court, 160 N.J. 562, 734 A.2d 1196, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that applying New Jersey's public accommodations law to require Boy Scouts to admit plaintiff violated Boy Scouts' First Amendment right of expressive association.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justices Souter, Ginsburg and Breyer joined.

Justice Souter filed dissenting opinion in which Justices Ginsburg and Breyer joined.

1. Constitutional Law ⚿91

Forced inclusion of unwanted person in group infringes group's freedom of expressive association if presence of that person affects in significant way group's ability to advocate public or private viewpoints. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⚿91

For group to be protected by First Amendment's expressive associational right, it must engage in "expressive association." U.S.C.A. Const.Amend. 1.

3. Federal Courts ⚿512

In First Amendment case where ultimate conclusions of law are virtually inseparable from findings of fact, Supreme Court must independently review factual record to ensure that state court's judgment does not unlawfully intrude on free expression. U.S.C.A. Const.Amend. 1.

4. Clubs ⚿1

Constitutional Law ⚿91

Boy Scouts engaged in "expressive association," protected by First Amendment, when scoutmasters and assistant scoutmasters inculcated youth members with Boy Scouts' values, both expressly and by example. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Clubs ⚿8

Constitutional Law ⚿91

Boy Scouts' assertion that homosexual conduct was inconsistent with values embodied in Scout Oath and Law was entitled to deference, for purposes of Boy Scouts' claim that forced inclusion of homosexual assistant scoutmaster would violate their right of expressive association. U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⚿91

As Supreme Court gives deference to association's assertions regarding nature of its expression, for First Amendment purposes, Court must also give deference to association's view of what would impair its expression. U.S.C.A. Const.Amend. 1.

7. Civil Rights ⚿119.1

Constitutional Law ⚿91

Applying New Jersey's public accommodations law to require Boy Scouts to admit avowed homosexual and gay rights activist as assistant scoutmaster violated

Boy Scouts' First Amendment right of expressive association; scoutmaster's presence would significantly burden Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior," and state interests embodied in New Jersey's law did not justify such a severe intrusion. U.S.C.A. Const.Amend. 1; N.J.S.A. 10:5-4, 10:5-5.

8. Constitutional Law ⚿91

Association does not have to associate for "purpose" of disseminating certain message in order to be entitled to protections of First Amendment; association must merely engage in expressive activity that could be impaired in order to be entitled to protection. U.S.C.A. Const. Amend. 1.

9. Constitutional Law ⚿91

First Amendment does not require that every member of group agree on every issue in order for group's policy to be "expressive association." U.S.C.A. Const. Amend. 1.

10. Constitutional Law ⚿90(1)

First Amendment protects expression, be it of the popular variety or not. U.S.C.A. Const.Amend. 1.

Syllabus *

Petitioners are the Boy Scouts of America and its Monmouth Council (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. It asserts that homosexual conduct is inconsistent with those values. Respondent Dale is an adult whose position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. He filed suit in the New Jersey Superior Court, alleging, *inter alia*, that the Boy Scouts had violated the state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. That court's Chancery Division granted summary judgment for the Boy Scouts, but its Appellate Division reversed in pertinent part and remanded. The State Supreme Court affirmed, holding, *inter alia*, that the Boy Scouts violated the State's public accommodations law by revoking Dale's membership based on his avowed homosexuality. Among other rulings, the court held that application of that law did not violate the Boy Scouts' First Amendment right of expressive association because Dale's inclusion would not significantly affect members' ability to carry out their purposes; determined that New Jersey has a compelling interest in eliminating the destructive consequences of discrimination from society, and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose; and distinguished *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, on the ground that Dale's reinstatement did not compel the Boy Scouts to express any message.

Held: Applying New Jersey's public accommodations law to require the Boy Scouts to readmit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire. *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462. Such forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 101 L.Ed.2d 1. However, the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

freedom of expressive association is not absolute; it can be overridden by regulations adopted to serve compelling [641] state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts,* 468 U.S., at 623, 104 S.Ct. 3244. To determine whether a group is protected, this Court must determine whether the group engages in "expressive association." The record clearly reveals that the Boy Scouts does so when its adult leaders inculcate its youth members with its value system. See *id.,* at 636, 104 S.Ct. 3244. Thus, the Court must determine whether the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. The Court first must inquire, to a limited extent, into the nature of the Boy Scouts' viewpoints. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression, see *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 123–124, 101 S.Ct. 1010, 67 L.Ed.2d 82. The Court then inquires whether Dale's presence as an assistant scoutmaster would significantly burden the expression of those viewpoints. Dale, by his own admission, is one of a group of gay Scouts who have become community leaders and are open and honest about their sexual orientation. His presence as an assistant scoutmaster would interfere with the Scouts' choice not to propound a point of view contrary to its beliefs. See *Hurley,* 515 U.S., at 576–577, 115 S.Ct. 2338. This Court disagrees with the New Jersey Supreme Court's determination that the Boy Scouts' ability to disseminate its message would not be significantly affected by the forced inclusion of Dale. First, contrary to the state court's view, an association need not associate for the purpose of disseminating a certain message in order to be protected, but must merely engage in expressive activity that could be impaired. Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues, its method of expression is protected. Third, the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." Given that the Boy Scouts' expression would be burdened, the Court must inquire whether the application of New Jersey's public accommodations law here runs afoul of the Scouts' freedom of expressive association, and concludes that it does. Such a law is within a State's power to enact when the legislature has reason to believe that a given group is the target of discrimination and the law does not violate the First Amendment. See, *e.g., id.,* at 572, 115 S.Ct. 2338. The Court rejects Dale's contention that the intermediate standard of review enunciated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, should be applied here to evaluate the [642] competing interests of the Boy Scouts and the State. Rather, the Court applies an analysis similar to the traditional First Amendment analysis it applied in *Hurley.* A state requirement that the Boy Scouts retain Dale would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the freedom of expressive association. In so ruling, the Court is not guided by its view of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of an organization's expression does not justify the State's effort to compel the organization to accept members in derogation of the organization's expressive message. While the law may promote all sorts of conduct in place of harmful behavior, it may not interfere with speech for no bet-

ter reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem. *Hurley, supra,* at 579, 115 S.Ct. 2338. Pp. 2451–2458.

160 N.J. 562, 734 A.2d 1196, reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 2459. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 2478.

George A. Davidson, New York City, for petitioners.

Evan Wolfson, New York City, for respondents.

For U.S. Supreme Court briefs, see:

2000 WL 228616 (Pet.Brief)

2000 WL 340276 (Resp.Brief)

2000 WL 432367 (Reply.Brief)

643 Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, 644 Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

I

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and 645 others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals." App. 137.

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute pro-

hibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. N.J. Stat. Ann. §§ 10:5–4 and 10:5–5 (West Supp.2000); see Appendix, *infra,* at 2458–2459.

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts. The court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law. The court rejected Dale's common-law claim, holding that New Jersey's policy is embodied in the public accommodations law. The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear |646 and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common-law claim, but otherwise reversed and remanded for further proceedings. 308 N.J.Super. 516, 706 A.2d 270 (1998). It held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. It held that the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality. After considering the state-law issues, the court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights " 'to enter into and maintain ... intimate or private relationships ... [and] to associate for the purpose of engaging in protected speech.' " 160 N.J. 562, 605, 734 A.2d 1196, 1219 (1999) (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 544, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987)). With respect to the right to intimate association, the court concluded that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 160 N.J., at 608–609, 734 A.2d, at 1221 (quoting *Duarte, supra,* at 546, 107 S.Ct. 1940). With respect to the right of expressive association, the court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development |647 of its members." 160 N.J., at 613, 734 A.2d, at 1223. But the court concluded that it was "not persuaded ... that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Ibid.,* 734 A.2d, at 1223–1224 (internal quotation marks omitted). Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.' " *Id.,* at 615, 734 A.2d, at 1225 (quoting *Duarte, supra,* at 548, 107 S.Ct. 1940). The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society," and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. 160 N.J., at 619–620, 734 A.2d, at 1227–1228. Finally, the court addressed the Boy Scouts' reliance on *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), in support of its claimed First

Amendment right to exclude Dale. The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel Boy Scouts to express any message." 160 N.J., at 624, 734 A.2d, at 1229.

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment. 528 U.S. 1109, 120 S.Ct. 865, 145 L.Ed.2d 725 (2000).

II

In *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would [648] rather express other, perhaps unpopular, ideas. See *ibid.* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Id.*, at 623, 104 S.Ct. 3244. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Ibid.*

[1] The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts, supra*, at 623, 104 S.Ct. 3244.

[2] To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

[3] Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the [649] factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley, supra*, at 567–568, 115 S.Ct. 2338. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

> "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> "The values we strive to instill are based on those found in the Scout Oath and Law:
>
> "Scout Oath
>
> "On my honor I will do my best
> "To do my duty to God and my country
> "and to obey the Scout Law;
> "To help other people at all times;
> "To keep myself physically strong,

"mentally awake, and morally straight.

"Scout Law

[4] "A Scout is:

"Trustworthy	Obedient
"Loyal	Cheerful
"Helpful	Thrifty
"Friendly	Brave
"Courteous	Clean
"Kind	Reverent." App. 184.

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid.* The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy 650 Scouts' values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra,* at 636, 104 S.Ct. 3244 (O'CONNOR, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law.App. 184. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.' " Brief for Petitioners 3. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See *supra,* at 2451 and this page. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy 651 Scouts' commitment to a diverse and 'representative' membership ... [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.' " 160 N.J., at 618, 734 A.2d, at 1226. The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." *Ibid.* But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or compre-

hensible to others in order to merit First Amendment protection").

[5] The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," Brief for Petitioners 39, and that it does "not want to promote homosexual conduct as a legitimate form of behavior," Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> [652]"A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership." App. 453–454.

Thus, at least as of 1978—the year James Dale entered Scouting—the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view:

> "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.,* at 457.

This position statement was redrafted numerous times but its core message remained consistent. For example, a 1993 position statement, the most recent in the record, reads, in part:

> "The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.,* at 461.

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today. See *Curran v. Mount Diablo Council of Boy*[653] *Scouts of America,* No. C–365529 (Cal.Super.Ct., July 25, 1991); 29 Cal.Rptr.2d 580 (1994); 17 Cal.4th 670, 72 Cal.Rptr.2d 410, 952 P.2d 218 (1998). We cannot doubt that the Boy Scouts sincerely holds this view.

[6, 7] We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. See, *e.g., La Follette, supra,* at 123–124, 101 S.Ct. 1010 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party"). That is not to say that an expressive association can

erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." App. 11. Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish–American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed:

> [654]"[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals .... The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." 515 U.S., at 574–575, 115 S.Ct. 2338.

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

> "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views [655]in respect of homosexuality." 160 N.J., at 612, 734 A.2d, at 1223.

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

[8] First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating

views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

[9] Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant.[1] The presence of an avowed homosexual and gay 656 rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. See, *e.g.*, *Hurley, supra*, at 571–572, 115 S.Ct. 2338 (explaining the history of Massachusetts' public accommodations law); *Romer v. Evans*, 517 U.S. 620, 627–629, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places.[2] New Jersey's statutory 657 definition of "'[a] place of public accommodation'" is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N.J. Stat. Ann. § 10:5–5(*l*) (West Supp.2000); see Appendix, *infra*, at 2458–2459. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gar-

1. The record evidence sheds doubt on Dale s assertion. For example, the National Director of the Boy Scouts certified that *any* persons who advocate to Scouting youth that homosexual conduct is consistent with Scouting values will not be registered as adult leaders. App. 746 (emphasis added). And the Monmouth Council Scout Executive testified that the advocacy of the morality of homosexuality to youth members by any adult member is grounds for revocation of the adult s membership. *Id.*, at 761.

2. Public accommodations laws have also broadened in scope to cover more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under our cases. See *Romer*, 517 U.S., at 629, 116 S.Ct. 1620. Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. See 1 Boston, Mass., Ordinance No. § 12 9.7 (1999) (ex-offender, prior psychiatric treatment, and military status); D.C.Code Ann. § 1 2519 (1999) (personal appearance, source of income, place of residence); Seattle, Wash., Municipal Code § 14.08.090 (1999) (political ideology).

dens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location.[3] As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts,* we said "[i]ndeed, the Jaycees has failed to demonstrate . . . [658]any serious burdens on the male members' freedom of expressive association." 468 U.S., at 626, 104 S.Ct. 3244. In *Duarte,* we said:

> "[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U.S., at 548, 107 S.Ct. 1940 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley,* we said that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." 515 U.S., at 572, 115 S.Ct. 2338. But we went on to note that in that case "the Massachusetts [public accommodations] law has been applied in a peculiar way" because "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.,* at 572–573, 115 S.Ct. 2338. And in the associational freedom cases such as *Roberts, Duarte,* and *New York State Club Assn.,* after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has [659]been set on one side of the scale, and the State's interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech—in that case the symbol-

3. Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. *Welsh v. Boy Scouts of America,* 993 F.2d 1267 (C.A.7), cert. denied, 510 U.S. 1012, 114 S.Ct. 602, 126 L.Ed.2d 567 (1993); *Curran v. Mount Diablo Council of Boy Scouts of America,* 17 Cal.4th 670, 72 Cal.Rptr.2d 410, 952 P.2d 218 (1998); *Seabourn v. Coronado Area Council, Boy Scouts of America,* 257 Kan. 178, 891 P.2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm n on Human Rights & Opportunities,* 204 Conn. 287, 528 A.2d 352 (1987); *Schwenk v. Boy Scouts of America,* 275 Or. 327, 551 P.2d 465 (1976). No federal appellate court or state supreme court except the New Jersey Supreme Court in this case has reached a contrary result.

ic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

In *Hurley,* we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.[4]

[10] 660 Justice STEVENS' dissent makes much of its observation that the public perception of homosexuality in this country has changed. See *post,* at 2477–2478. Indeed, it appears that homosexuality has gained greater societal acceptance. See *ibid.* But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. See, *e.g., Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)* (holding that a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform violates the First Amendment). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

Justice STEVENS' extolling of Justice Brandeis' comments in *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (dissenting opinion); see *post,* at 2459, 2478, confuses two entirely different principles. In *New State Ice,* the Court struck down an Oklahoma regulation prohibiting the manufacture, sale, and distribution of ice without a license. Justice Brandeis, a champion of state experimentation in the economic realm, dissented. But Justice Brandeis was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed that freedom 661 to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (concurring opinion). He continued:

4. We anticipated this result in *Hurley* when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization. 515 U.S., at 580, 115 S.Ct. 2338. We stated: Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club s existing members. *Id.,* at 580 581, 115 S.Ct. 2338.

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.,* at 375–376, 47 S.Ct. 641.

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S., at 579, 115 S.Ct. 2338.

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

N.J. Stat. Ann. § 10:5–4 (West Supp. 2000). "Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation,[662] publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

APPENDIX TO OPINION OF THE COURT—Continued

N.J. Stat. Ann. § 10:5–5 (West Supp.2000). "Definitions

"As used in this act, unless a different meaning clearly appears from the context:

. . . . .

"*l.* 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. [663]Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall any-

APPENDIX TO OPINION OF THE COURT—Continued

thing herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students."

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 80, 389 A.2d 465, 478 (1978). Since 1945, it has had a law against discrimination. The law broadly protects the opportunity of all persons to obtain the advantages and privileges "of any place of public accommodation." N.J. Stat. Ann. § 10:5–4 (West Supp.2000). The New Jersey Supreme Court's construction of the statutory definition of a "place of public accommodation" has given its statute a more expansive coverage than most similar state statutes. And as amended in 1991, the law prohibits discrimination on the basis of nine different traits including an individual's "sexual orientation." [1] The question in this case is whether that expansive$_{664}$ construction trenches on the federal constitutional rights of the Boy Scouts of America (BSA).

Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with "things social" is directly applicable to this case.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (dissenting opinion).

In its "exercise of this high power" today, the Court does not accord this "courageous State" the respect that is its due.

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law

1. In 1992, the statute was again amended to add familial status as a tenth protected class. It now provides:

> 10:5 4 Obtaining employment, accommodations and privileges without discrimination; civil right
>
> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

[665] does not "impos[e] any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," *Roberts v. United States Jaycees,* 468 U.S. 609, 622, 626–627, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of BSA.

I

James Dale joined BSA as a Cub Scout in 1978, when he was eight years old. Three years later he became a Boy Scout, and he remained a member until his 18th birthday. Along the way, he earned 25 merit badges, was admitted into the prestigious Order of the Arrow, and was awarded the rank of Eagle Scout—an honor given to only three percent of all Scouts. In 1989, BSA approved his application to be an Assistant Scoutmaster.

On July 19, 1990, after more than 12 years of active and honored participation, the BSA sent Dale a letter advising him of the revocation of his membership. The letter stated that membership in BSA "is a privilege" that may be denied "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." App. 135. Expressing surprise at his sudden expulsion, Dale sent a letter requesting an explanation of the decision. *Id.,* at 136. In response, BSA sent him a second letter stating that the grounds for the decision "are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." *Id.,* at 137. At that time, no such standard had been publicly expressed by BSA.

In this case, BSA contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

[666] BSA's mission statement reads as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.,* at 184. Its federal charter declares its purpose is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U.S.C. § 23; see also App. 315–316. BSA describes itself as having a "representative membership," which it defines as "boy membership [that] reflects proportionately the characteristics of the boy population of its service area." *Id.,* at 65. In particular, the group emphasizes that "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.... To meet these responsibilities we have made a commitment that our membership shall be representative of *all* the population in every community, district, and council." *Id.,* at 66–67 (emphasis in original).

To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets. For example, the Scout Law requires a member to promise, among other things, that he will be "obedient." Accompanying definitions for the terms found in the Oath and Law are provided in the Boy Scout Handbook and the Scoutmaster Handbook. For instance, the Boy Scout Handbook defines "obedient" as follows:

> "A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to

have them changed in an orderly manner rather than disobey them." *Id.*, at 188 (emphasis deleted).

667To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase "morally straight," which appears in the Oath ("On my honor I will do my best ... To keep myself ... morally straight"); the second term is the word "clean," which appears in a list of 12 characteristics together constituting the Scout Law.

The Boy Scout Handbook defines "morally straight," as such:

"To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant." *Id.*, at 218 (emphasis deleted).

The Scoutmaster Handbook emphasizes these points about being "morally straight":

"In any consideration of moral fitness, a key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster." *Id.*, at 239–240.

As for the term "clean," the Boy Scout Handbook offers the following:

"A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.*

"You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting668 dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

"There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

"Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults." Id., at 225–226 (emphasis in original); see also *id.*, at 189.[2]

It is plain as the light of day that neither one of these principles—"morally straight" and "clean"—says the slightest thing about homosexuality. Indeed, neither term in the Boy669 Scouts' Law and Oath express-

2. Scoutmasters are instructed to teach what it means to be clean using the following lesson:

(Hold up two cooking pots, one shiny bright on the inside but sooty outside, the other shiny outside but dirty inside.) Scouts, which of these pots would you rather have your food cooked in? Did I hear somebody say, Neither one?

That s not a bad answer. We wouldn t have much confidence in a patrol cook who didn t have his pots shiny both inside and out.

But if we had to make a choice, we would tell the cook to use the pot that s clean inside. The same idea applies to people.

Most people keep themselves clean outside. But how about the inside? Do we try to keep our minds and our language clean? I think that s even more important than keeping the outside clean.

A Scout, of course, should be clean inside and out. Water, soap, and a toothbrush tak[e] care of the outside. Only your determination will keep the inside clean. You can do it by following the Scout Law and the example of people you respect your parents, your teachers, your clergyman, or a good buddy who is trying to do the same thing. App. 289 290.

es any position whatsoever on sexual matters.

BSA's published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." Boy Scout Handbook (1992) (reprinted in App. 211). To be sure, Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature, but Scoutmasters are, literally, the last person Scouts are encouraged to ask: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." *Ibid.* Moreover, Scoutmasters are specifically directed to steer curious adolescents to other sources of information:

> "If Scouts ask for information regarding . . . sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional." Scoutmaster Handbook (1990) (reprinted in App. 264).

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

> "You may have boys asking you for information or advice about sexual matters. . . .
>
> "How should you handle such matters?
>
> "Rule number 1: *You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area,* and that you are probably not well qualified to do this.
>
> "Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence.[670] A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.
>
> "Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck." Scoutmaster Handbook (1972) (reprinted in App. 546–547) (emphasis added).

In light of BSA's self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are concerned, BSA's bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training." *Id.*, at 362. "The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders." *Id.*, at 76. In fact, many diverse religious organizations sponsor local Boy Scout troops. Brief for Petitioners 3. Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals,[3]

3. See, *e.g.*, Brief for Deans of Divinity Schools and Rabbinical Institutions as *Amicus Curiae* 8 (The diverse religi[ous] traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation s major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy); Brief for General Board of Church and Society of the United Methodist Church et al. as *Amicus Curiae* 3 (describing views of the United Methodist Church, the Episcopal Church, the Religious Action Center of Reform Judaism, the United Church Board for Homeland Ministries, and the Unitarian Universalist Association, all of

it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation. This is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders (and Scoutmasters are told to refer Scouts to them);[4] BSA surely is aware that some religions do not teach that homosexuality is wrong.

II

The Court seeks to fill the void by pointing to a statement of "policies and procedures relating to homosexuality and Scouting," App. 453, signed by BSA's President and Chief Scout Executive in 1978 and addressed to the members of the Executive Committee of the national organization. *Ante,* at 2453. The letter says that the BSA does "not believe that homosexuality and leadership in Scouting are appropriate." App. 454. But when the *entire* 1978 letter is read, BSA's position is far more equivocal:

> "4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?
>
> "A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.
>
> "5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?
>
> "A. Yes, *in the absence of any law to the contrary.* At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. *In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above.* It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate." *Id.,* at 454–455 (emphasis added).

Four aspects of the 1978 policy statement are relevant to the proper disposition of this case. First, at most this letter simply adopts an exclusionary membership policy. But simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim. See *infra,* at 2466–2470.

Second, the 1978 policy was never publicly expressed—unlike, for example, the Scout's duty to be "obedient." It was an internal memorandum, never circulated beyond the few members of BSA's Executive Committee. It remained, in effect, a secret Boy Scouts policy. Far from claiming any intent to express an idea that would be burdened by the presence of homosexuals, BSA's *public* posture—to the world and to the Scouts themselves—remained what it had always been: one of tolerance, welcoming all classes of boys and young men. In this respect, BSA's claim is even weaker than those we have rejected in the past. See *ibid.*

Third, it is apparent that the draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be

whom reject discrimination on the basis of sexual orientation).

4. See *supra,* at 2461 (Be ... faithful in your religious beliefs); *id.,* at 2461, n. 2 (by following ... the example of ... your clergyman); *id.,* at 2462 (If you have questions about ... sex, ... [t]alk with your ... religious leade[r]); *ibid.* (If Scouts ask for information regarding ... sexual activity ... refer him to his ... religious leader); *ibid.* (You should refer boys with sexual problems to [their] spiritual leader).

"obedient" and "obe[y] the laws," even if "he thinks [the laws] are unfair," would prevail in such a 673 contingency. See *supra*, at 2460. In 1978, however, BSA apparently did not consider it to be a serious possibility that a State might one day characterize the Scouts as a "place of public accommodation" with a duty to open its membership to all qualified individuals. The portions of the statement dealing with membership simply assume that membership in the Scouts is a "privilege" that BSA is free to grant or to withhold. The statement does not address the question whether the publicly proclaimed duty to obey the law should prevail over the private discriminatory policy if, and when, a conflict between the two should arise—as it now has in New Jersey. At the very least, then, the statement reflects no unequivocal view on homosexuality. Indeed, the statement suggests that an appropriate way for BSA to preserve its unpublished exclusionary policy would include an open and forthright attempt to seek an amendment of New Jersey's statute. ("If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.")

Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts. Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not "appropriate" appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA. That idea does not appear to be among any of the principles actually taught to Scouts. Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives that the organization wishes to exclude gays—and that wish has nothing to do with any expression BSA actually engages in.

The majority also relies on four other policy statements that were issued between 1991 and 1993.[5] All of them were 674 written and issued *after* BSA revoked Dale's membership. Accordingly, they have little, if any, relevance to the legal question before this Court.[6] In any event, they do not bolster BSA's claim.

In 1991, BSA issued two statements both stating: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." App. 457–458. A third statement issued in 1992 was substantially the same. *Id.*, at 459. By 1993, however, the policy had changed:

> "BSA Position
>
> "The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> "We do not believe that homosexuals provide a role model consistent with these expectations.

5. The authorship and distribution of these statements remain obscure. Unlike the 1978 policy which clearly identifies the authors as the President and the Chief Scout Executive of BSA these later policies are unsigned. Two of them are initialed (one is labeled JCK ; the other says js), but BSA never tells us to whom these initials belong. Nor do we know how widely these statements were distributed. From the record evidence we have, it appears that they were not as readily available as the Boy Scout and Scoutmaster Handbooks; indeed, they appear to be quite difficult to get a hold of. See App. 662, 668 669.

6. Dale s complaint requested three forms of relief: (1) a declaration that his rights under the New Jersey statute had been violated when his membership was revoked; (2) an order reinstating his membership; and (3) compensatory and punitive damages. *Id.,* at 27. Nothing that BSA could have done after the revocation of his membership could affect Dale s first request for relief, though perhaps some possible postrevocation action could have influenced the other two requests for relief.

"Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.*, at 461.

Aside from the fact that these statements were all issued after Dale's membership was revoked, there are four important points relevant to them. First, while the 1991 and 1992 [675] statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort. Rather, BSA's 1993 homosexual exclusion policy was based on its view that including gays would be contrary to "the expectations that Scouting families have had for the organization." *Ibid.* Instead of linking its policy to its central tenets or shared goals—to teach certain definitions of what it means to be "morally straight" and "clean"—BSA chose instead to justify its policy on the "expectatio[n]" that its members preferred to exclude homosexuals. The 1993 policy statement, in other words, was *not* based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past. See *infra*, at 2466–2470.

Second, even during the brief period in 1991 and 1992, when BSA tried to connect its exclusion of homosexuals to its definition of terms found in the Oath and Law, there is no evidence that Scouts were actually taught anything about homosexuality's alleged inconsistency with those principles. Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being "morally straight" and "clean." Neither BSA's mission statement nor its official membership policy was altered; no Boy Scout or Scoutmaster Handbook was amended to reflect the policy statement; no lessons were imparted to Scouts; no change was made to BSA's policy on limiting discussion of sexual matters; and no effort was made to restrict acceptable religious affiliations to those that condemn homosexuality. In short, there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality.[7]

[676] Third, BSA never took any clear and unequivocal position on homosexuality. Though the 1991 and 1992 policies state one interpretation of "morally straight" and "clean," the group's published definitions appearing in the Boy Scout and Scoutmaster Handbooks take quite another view. And BSA's broad religious tolerance combined with its declaration that sexual matters are not its "proper area" render its views on the issue equivocal at best and incoherent at worst. We have never held, however, that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views. At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.

Fourth, at most the 1991 and 1992 statements declare only that BSA believed "homosexual *conduct* is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed." App. 457 (emphasis added). But New Jersey's law prohibits discrimination on the basis of sexual *orientation*. And when Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct.[8]

7. Indeed, the record evidence is to the contrary. See, *e.g.*, App. 666 669 (affidavit of former Boy Scout whose young children were Scouts, and was himself an Assistant Scoutmaster and Merit Badge Counselor) (I never heard and am not aware of any discussion about homosexuality that occurred during any Scouting meeting or function.... Prior to September 1991, I never heard any mention whatsoever of homosexuality during any Scouting function).

8. At oral argument, BSA s counsel was asked: [W]hat if someone is homosexual in the sense of having a sexual orientation in that

It is clear, then, that nothing in these policy statements supports BSA's claim. The only policy written before the revocation of Dale's membership was an equivocal, undisclosed statement that evidences no connection between the group's discriminatory intentions and its expressive interests. The later policies demonstrate a brief—though ultimately abandoned—attempt to tie BSA's exclusion to its expression, but other than a single sentence, BSA fails to show that it ever taught Scouts that homosexuality is not "morally straight" or "clean," or that such a view was part of the group's collective efforts to foster a belief. Furthermore, BSA's policy statements fail to establish any clear, consistent, and unequivocal position on homosexuality. Nor did BSA have any reason to think Dale's sexual *conduct,* as opposed to his orientation, was contrary to the group's values.

BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities is highly significant. By the time Dale was expelled from the Boy Scouts in 1990, BSA had already been engaged in several suits under a variety of state antidiscrimination public accommodation laws challenging various aspects of its membership policy.[9] Indeed, BSA had filed *amicus* briefs before this Court in two earlier right to associate cases (*Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987)) pointing to these very cases; it was clearly on notice by 1990 that it might well be subjected to state public accommodation antidiscrimination laws, and that a court might one day reject its claimed right to associate. Yet it took no steps prior to Dale's expulsion to clarify how its exclusivity was connected to its expression. It speaks volumes about the credibility of BSA's claim to a shared goal that homosexuality is incompatible with Scouting that since at least 1984 it had been aware of this issue—indeed, concerned enough to twice file *amicus* briefs before this Court—yet it did nothing in the intervening six years (or even in the years after Dale's explusion) to explain clearly and openly why the presence of homosexuals would affect its expressive activities, or to make the view of "morally straight" and "clean" taken in its 1991 and 1992 policies a part of the values actually instilled in Scouts through the Handbook, lessons, or otherwise.

III

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts,* 468 U.S., at 618, 104 S.Ct. 3244. And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association ... may be implicated." *Ibid.* But "[t]he right to associate for expressive purposes is not ... absolute"; rather, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which ... the constitutionally protected liberty is at stake in a given

direction but does not engage in any homosexual conduct? Counsel answered: [I]f that person also were to take the view that the reason they didn t engage in that conduct [was because] it would be morally wrong ... that person would not be excluded. Tr. of Oral Arg. 8.

9. See, *e.g., Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Opportunities,* 204 Conn. 287, 528 A.2d 352 (1987) (challenge to BSA s exclusion of girls); *Curran v. Mount Diablo Council of the Boy Scouts of America,* 147 Cal.App.3d 712, 195 Cal.Rptr. 325 (1983) (challenge to BSA s denial of membership to homosexuals; rejecting BSA s claimed right of association), overruled on other grounds, 17 Cal.4th 670, 72 Cal. Rptr.2d 410, 952 P.2d 218 (1998).

case." *Id.*, at 623, 618, 104 S.Ct. 3244. Indeed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools,[10] law |679firms,[11] and labor organizations.[12] In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), we addressed just such a conflict. The Jaycees was a nonprofit membership organization " 'designed to inculcate in the individual membership ... a spirit of genuine Americanism and civic interest, and ... to provide ... an avenue for intelligent participation by young men in the affairs of their community.' " *Id.*, at 612–613, 104 S.Ct. 3244. The organization was divided into local chapters, described as " 'young men's organization[s],' " in which regular membership was restricted to males between the ages of 18 and 35. *Id.*, at 613, 104 S.Ct. 3244. But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to " 'deny any person the full and equal |680enjoyment of ... a place of public accommodation because of ... sex.' " *Id.*, at 615, 104 S.Ct. 3244. The Jaycees, however, claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy.

We rejected that claim. Cautioning that the right to associate is not "absolute," we held that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*, at 623, 104 S.Ct. 3244. We found the State's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas. *Id.*, at 623–626, 104 S.Ct. 3244. We also held that Minnesota's law is the least restrictive means of achieving that interest. The

10. *Runyon v. McCrary*, 427 U.S. 160, 175–176, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) ([T]he Court has recognized a First Amendment right to engage in association for the advancement of beliefs and ideas.... From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle (citation omitted)).

11. *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) ([R]espondent argues that application of Title VII in this case would infringe constitutional rights of ... association. Although we have recognized that the activities of lawyers may make a distinctive contribution ... to the ideas and beliefs of our society, respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context, [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections (citations omitted)).

12. *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93–94, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945) (Appellant first contends that [the law prohibiting racial discrimination by labor organizations] interfere[s] with its right of selection to membership.... We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race).

Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.*, at 626, 104 S.Ct. 3244. Though the Jaycees had "taken public positions on a number of diverse issues, [and] ... regularly engage in a variety of ... activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.*, at 626–627, 104 S.Ct. 3244. "The Act," we held, "requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*, at 627, 104 S.Ct. 3244.

We took a similar approach in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). Rotary International, a nonprofit corporation, was founded as "'an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill[681] and peace in the world.'" *Id.*, at 539, 107 S.Ct. 1940. It admitted a cross section of worthy business and community leaders, *id.*, at 540, 107 S.Ct. 1940, but refused membership to women. "[T]he exclusion of women," explained the group's General Secretary, "results in an 'aspect of fellowship ... that is enjoyed by the present male membership.'" *Id.*, at 541, 107 S.Ct. 1940. That policy also allowed the organization "to operate effectively in foreign countries with varied cultures and social mores." *Ibid.* Though California's Civil Rights Act, which applied to Rotary International, prohibited discrimination on the basis of sex, *id.*, at 541–542, n. 2, 107 S.Ct. 1940, the organization claimed a right to associate, including the right to select its members.

As in *Jaycees*, we rejected the claim, holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U.S., at 548, 107 S.Ct. 1940. "To be sure," we continued, "Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But [California's Civil Rights Act] does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community." *Ibid.* Finally, even if California's law worked a "slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.*, at 549, 107 S.Ct. 1940.[13]

[682]Several principles are made perfectly clear by *Jaycees* and *Rotary Club*. First, to prevail on a claim of expressive associa-

13. BSA urged on brief that under the New Jersey Supreme Court s reading of the State s antidiscrimination law, Boy Scout Troops would be forced to admit girls as members and Girl Scout Troops would be forced to admit boys. Brief for Petitioners 37. The New Jersey Supreme Court had no occasion to address that question, and no such issue is tendered for our decision. I note, however, the State of New Jersey s observation that BSA ignores the exemption contained in New Jersey s law for any place of public accommodation which is in its nature reasonably restricted exclusively to one sex, including, but not limited to, any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex. See Brief for State of New Jersey as *Amicus Curiae* 12 13, n. 2 (citing N.J. Stat. Ann. § 10:5 12(f) (West 1993)).

tion in the face of a State's antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity. Both the Jaycees and the Rotary Club engaged in expressive activity protected by the First Amendment,[14] yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the Jaycees and the Rotary Club did that as well.[15] Third, it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy. The Rotary Club, for example, justified its male-only membership policy by pointing to the " 'aspect of fellowship ... that is enjoyed by the [exclusively] male membership' " and by claiming that only with an exclusively male membership]683could it "operate effectively" in foreign countries. *Rotary Club,* 481 U.S., at 541, 107 S.Ct. 1940.

Rather, in *Jaycees,* we asked whether Minnesota's Human Rights Law requiring the admission of women "impose[d] any *serious burdens* " on the group's "collective effort on behalf of [its] *shared goals.*" 468 U.S., at 622, 626–627, 104 S.Ct. 3244 (emphases added). Notwithstanding the group's obvious publicly stated exclusionary policy, we did not view the inclusion of women as a "serious burden" on the Jaycees' ability to engage in the protected speech of its choice. Similarly, in *Rotary Club,* we asked whether California's law would "affect in any *significant way* the existing members' ability" to engage in their protected speech, or whether the law would require the clubs "to abandon their *basic goals.*" 481 U.S., at 548, 107 S.Ct. 1940 (emphases added); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 581, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("[A] private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Assn.,* 487 U.S., at 13, 108 S.Ct. 2225 (to prevail on a right to associate claim, the group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion"); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462–463, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (asking whether law "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association" and whether law is "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs"). The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are]684BSA's shared goals and the degree to which its expressive activities would be

14. See *Roberts v. United States Jaycees,* 468 U.S. 609, 626 627, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ([T]he organization [has] taken public positions on a number of diverse issues ... worthy of constitutional protection under the First Amendment (citations omitted)); *Board of Directors of Rotary Int l v. Rotary Club of Duarte,* 481 U.S. 537, 548, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment).

15. The Jaycees openly stated that it was an organization designed to serve the interests of young men ; its local chapters were described as young men s organization[s] ; and its membership policy contained an express provision reserving regular membership to young men. *Jaycees,* 468 U.S., at 612 613, 104 S.Ct. 3244. Likewise, Rotary International expressed its preference for male-only membership: It proclaimed that it was an organization of business and professional *men* and its membership policy expressly excluded women. *Rotary Club,* 481 U.S., at 539, 541, 107 S.Ct. 1940 (emphasis added).

burdened, affected, or restrained by including homosexuals.

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law—and accompanying definitions—are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality. Moreover, there is simply no evidence that BSA otherwise teaches anything in this area, or that it instructs Scouts on matters involving homosexuality in ways not conveyed in the Boy Scout or Scoutmaster Handbooks. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all—let alone one that is significantly burdened by admitting homosexuals.

As in *Jaycees,* there is "no basis in the record for concluding that admission of [homosexuals] will impede the [Boy Scouts'] ability to engage in [its] protected activities or to disseminate its preferred views" and New Jersey's law "requires no change in [BSA's] creed." 468 U.S., at 626–627, 104 S.Ct. 3244. And like *Rotary Club,* New Jersey's law "does not require [BSA] to abandon or alter any of" its activities. 481 U.S., at 548, 107 S.Ct. 1940. The evidence relied on by the Court is not to the contrary. The undisclosed 1978 policy certainly adds nothing to the actual views disseminated to the Scouts. It simply says that homosexuality is not "appropriate." There is no reason to give that policy statement more weight than Rotary International's assertion that all-male membership |685 fosters the group's "fellowship" and was the only way it could "operate effectively." As for BSA's postrevocation statements, at most they simply adopt a policy of discrimination, which is no more dispositive than the openly discriminatory policies held insufficient in *Jaycees* and *Rotary Club;* there is no evidence here that BSA's policy was necessary to—or even a part of—BSA's expressive activities or was ever taught to Scouts.

Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being "morally straight" and "clean" is a far cry from the clear, unequivocal statement necessary to prevail on its claim. Despite the solitary sentences in the 1991 and 1992 policies, the group continued to disclaim any single religious or moral position as a general matter and actively eschewed teaching any lesson on sexuality. It also continued to define "morally straight" and "clean" in the Boy Scout and Scoutmaster Handbooks without any reference to homosexuality. As noted earlier, nothing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State's antidiscrimination law does not impose a "serious burden" or a "substantial restraint" upon the group's "shared goals" if the group itself is unable to identify its own stance with any clarity.

IV

The majority pretermits this entire analysis. It finds that BSA in fact " 'teach[es] that homosexual conduct is not morally straight.' " *Ante,* at 2453. This conclusion, remarkably, rests entirely on statements in BSA's briefs. See *ibid.* (citing Brief for Petitioners 39; Reply Brief for Petitioners 5). Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of

what would impair its expression." *Ante,* at 2453. So long as the record "contains written evidence" to support a group's bare assertion, "[w]e need not inquire further." *Ante,* at 2453. Once the organization "asserts" that it engages in particular expression, *ibid.,* "[w]e cannot doubt" the truth of that assertion, *ante,* at 2453.

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." *Ante,* at 2451. It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited," *ante,* at 2452, because "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent," *ante,* at 2452. See also Brief for Petitioners 25 ("[T]he Constitution protects [BSA's] ability to control its own message").

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court's prescription of total deference will not do. In this respect, Justice Frankfurter's words seem particularly apt:

> "Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanc-

tion than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." *Railway* [688] *Mail Assn. v. Corsi,* 326 U.S. 88, 98, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945) (concurring opinion).

There is, of course, a valid concern that a court's independent review may run the risk of paying too little heed to an organization's sincerely held views. But unless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws, an independent inquiry is a necessity. Though the group must show that its expressive activities will be substantially burdened by the State's law, if that law truly has a significant effect on a group's speech, even the subtle speaker will be able to identify that impact.

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey's law.

V

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." See *supra,* at 2462. Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

In *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), we recognized that the government may not "requir[e] affirmation of a belief and an attitude of mind," nor [689] "force an American citizen publicly to profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." *Id.,* at 633–634, 63 S.Ct. 1178. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.' " *Hurley,* 515 U.S., at 573, 115 S.Ct. 2338. Though the majority mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim. See *id.,* at 564–565, 580–581, 115 S.Ct. 2338 (noting distinction between free speech and right to associate claims). As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send. *Id.,* at 567, 115 S.Ct. 2338.

In its briefs, BSA implies, even if it does not directly argue, that Dale would use his Scoutmaster position as a "bully pulpit" to convey immoral messages to his troop, and therefore his inclusion in the group would compel BSA to include a message it does not want to impart. Brief for Petitioners 21–22. Even though the majority does not endorse that argument, I think it is important to explain why it lacks merit, before considering the argument the majority does accept.

BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked. Accordingly, BSA's revocation could only have been based on an assumption that he would do so in the future. But the only information BSA had at the time it revoked Dale's membership was a newspaper article describing a seminar at Rutgers

University on the topic of homosexual teenagers that Dale attended. The relevant passage reads:

> "James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.
>
> 690 "He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> " 'I was looking for a role model, someone who was gay and accepting of me,' Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends." App. 517.

Nothing in that article, however, even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs Dale, like all Scoutmasters, that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. Indeed, from all accounts Dale was a model Boy Scout and Assistant Scoutmaster up until the day his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA because of anything he said in the newspaper article.

To be sure, the article did say that Dale was co-president of the Lesbian/Gay Alliance at Rutgers University, and that group presumably engages in advocacy regarding homosexual issues. But surely many members of BSA engage in expressive activities outside of their troop, and surely BSA does not want all of that expression to be carried on inside the troop. For example, a Scoutmaster may be a member of a religious group that encourages its followers to convert others to its faith. Or a Scoutmaster may belong to a political party that encourages its members to advance its views among family and friends.[16] Yet BSA does not think it is appropriate for Scoutmasters to proselytize a particular faith to unwilling Scouts or to attempt to convert them from one 691 religion to another.[17] Nor does BSA think it appropriate for Scouts or Scoutmasters to bring politics into the troop.[18] From all accounts, then, BSA does not discourage or forbid outside expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization. Of course, a disobedient member who flouts BSA's policy may be expelled. But there is no basis for BSA to presume that a homosexual will be unable to comply with BSA's policy not to discuss sexual matters any more than it would presume that politically or religiously active members could not resist the urge to proselytize or politicize during troop meetings.[19]

16. Scoutmaster Handbook (1990) (reprinted in App. 273) (Scouts and Scouters are encouraged to take active part in political matters *as individuals* (emphasis added)).

17. Bylaws of the Boy Scouts of America, Art. IX, § 1, cl. 3 (reprinted in App. 363) (In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church).

18. Rules and Regulations of the Boy Scouts of America, Art. IX, § 2, cl. 6 (reprinted in App. 407) (The Boy Scouts of America shall not, through its governing body or through any of its officers, its chartered councils, or members, involve the Scouting movement in any question of a political character).

19. Consider, in this regard, that a heterosexual, as well as a homosexual, could advocate to the Scouts the view that homosexuality is not immoral. BSA acknowledges as much by stating that a heterosexual who advocates that view to Scouts would be expelled as well. *Id.,* at 746 (*[A]ny* persons who advocate to Scouting youth that homosexual conduct is morally straight under the Scout Oath, or clean under the Scout Law will not be registered as adult leaders (emphasis added)) (certification of BSA s National Director of Program). But BSA does not expel hetero-

As BSA itself puts it, its rights are "not implicated *unless* a prospective leader *presents himself* as a role model inconsistent[692] with Boy Scouting's understanding of the Scout Oath and Law." Brief for Petitioners 6 (emphases added).[20]

The majority, though, does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so. The majority holds that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinc[t] ... message," and, accordingly, BSA is entitled to exclude that message. *Ante*, at 2455. In particular, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[693] *Ante*, at 2454; see also Brief for Petitioners 24 ("By donning the uniform of an adult leader in Scouting, he would 'celebrate [his] identity' as an openly gay Scout leader").

The majority's argument relies exclusively on *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). In that case, petitioners John Hurley and the South Boston Allied War Veterans Council ran a privately operated St. Patrick's Day parade. Respondent, an organization known as "GLIB," represented a contingent of gays, lesbians, and bisexuals who sought to march in the petitioners' parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.*, at 561, 115 S.Ct. 2338. When the parade organizers refused GLIB's admission, GLIB brought suit under Massachusetts' antidiscrimination law. That statute, like New Jersey's law, prohibited discrimination on account of sexual orientation in any place of public accommodation, which the state courts interpreted to include the parade. Petitioners argued that forcing them to include GLIB in their parade would violate their free speech rights.

We agreed. We first pointed out that the St. Patrick's Day parade—like most every parade—is an inherently expressive undertaking. *Id.*, at 568–570, 115 S.Ct.

sexual members who take that view *outside* of their participation in Scouting, as long as they do not advocate that position to the Scouts. Tr. of Oral Arg. 6. And if there is no reason to presume that such a heterosexual will openly violate BSA s desire to express no view on the subject, what reason other than blatant stereotyping could justify a contrary presumption for homosexuals?

20. BSA cites three media interviews and Dale s affidavit to argue that he will openly advance a pro-gay agenda while being a Scoutmaster. None of those statements even remotely supports that conclusion. And *all* of them were made *after* Dale s membership was revoked and *after* this litigation commenced; therefore, they could not have affected BSA s revocation decision.

In a New York Times interview, Dale said I owe it *to the organization* to point out *to them* how bad and wrong this policy is. App. 513 (emphases added). This statement merely demonstrates that Dale wants to use *this litigation* not his Assistant Scoutmaster position to make a point, and that he wants to make the point to the BSA organization, not to the boys in his troop. At oral argument, BSA conceded that would not be grounds for membership revocation. Tr. of Oral Arg. 13. In a Seattle Times interview, Dale said Scouting is about giving adolescent boys a role model. App. 549. He did not say it was about giving them a role model who advocated a position on homosexuality. In a television interview, Dale also said I am gay, and I m very proud of who I am .... I stand up for what I believe in .... I m not hiding anything. *Id.*, at 470. Nothing in that statement says anything about an intention to stand up for homosexual rights in any context other than in this litigation. Lastly, Dale said in his affidavit that he is open and honest about [his] sexual orientation. *Id.*, at 133. Once again, like someone who is open and honest about his political affiliation, there is no evidence in that statement that Dale will not comply with BSA s policy when acting as a Scoutmaster.

2338. Next, we reaffirmed that the government may not compel anyone to proclaim a belief with which he or she disagrees. *Id.,* at 573–574, 115 S.Ct. 2338. We then found that GLIB's marching in the parade would be an expressive act suggesting the view "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.,* at 574, 115 S.Ct. 2338. Finally, we held that GLIB's participation in the parade "would likely be perceived" as the parade organizers' own speech—or at least as a view which they approved—because of a parade organizer's customary control over who marches in the parade. *Id.,* at 575, 115 S.Ct. 2338. Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.

[694] First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade—otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the "inherent expressiveness of marching [in a parade] to make a point," *id.,* at 568, 115 S.Ct. 2338, and in particular that GLIB was formed for the purpose of making a particular point about gay pride, *id.,* at 561, 570, 115 S.Ct. 2338. More specifically, GLIB "distributed a fact sheet describing the members' intentions" and, in a previous parade, had "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.' " *Id.* at 570. "[A] contingent marching behind the organization's banner," we said, would clearly convey a message. *Id.,* at 574, 115 S.Ct. 2338. Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so. *Id.,* at 572–573, 115 S.Ct. 2338.

Second, we found it relevant that GLIB's message "would likely be perceived" as the parade organizers' own speech. *Id.,* at 575, 115 S.Ct. 2338. That was so because "[p]arades and demonstrations ... are not understood to be so neutrally presented or selectively viewed" as, say, a broadcast by a cable operator, who is usually considered to be "merely 'a conduit' for the speech" produced by others. *Id.,* at 575–576, 115 S.Ct. 2338. Rather, parade organizers are usually understood to make the "customary determination about a unit admitted to the parade." *Id.,* at 575, 115 S.Ct. 2338.

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley.* His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not [695] carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.[21]

It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as "speech" under the First

21. The majority might have argued (but it did not) that Dale had become so publicly and pervasively identified with a position advocating the moral legitimacy of homosexuality (as opposed to just being an individual who openly stated he is gay) that his leadership position in BSA would necessarily amount to using the organization as a conduit for publicizing his position. But as already noted, when BSA expelled Dale, it had nothing to go on beyond the one newspaper article quoted above, and one newspaper article does not convert Dale into a public symbol for a message. BSA simply has not provided a record that establishes the factual premise for this argument.

Amendment. See *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). At the same time, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. See *Dallas v. Stanglin,* 490 U.S. 19, 24–25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989).[22] Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.

696 The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.[23] As counsel for BSA remarked, Dale "put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself." See Tr. of Oral Arg. 25.

Another difference between this case and *Hurley* lies in the fact that *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern BSA's claim of a right of expressive association. Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission 697 of some person as a member or at odds with the appointment of a person to a leadership position in the group.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA members. 160 N.J. 562, 571, 734 A.2d 1196, 1200 (1999). The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families,

22. This is not to say that Scouts do not engage in expressive activity. It is only to say that the simple act of joining the Scouts unlike joining a parade is not inherently expressive.

23. See Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. L.Rev. 1753, 1781 1783 (1996).

were even aware of his sexual orientation, either before or after his public statements at Rutgers University.[24] It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message—for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral—but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African–Americans, religious[698] minorities, or any other discrete group.[25] Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.

The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as schoolteachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. Dozens of Scout units throughout the State are sponsored by public agencies, such as schools and fire departments, that employ such role models. BSA's affiliation with numerous public agencies that comply with New Jersey's law against discrimination cannot be understood to convey any particular message endorsing or condoning the activities of all these people.[26]

[699]VI

Unfavorable opinions about homosexuals "have ancient roots." *Bowers v. Hardwick*, 478 U.S. 186, 192, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. *Id.*, at 196–197, 106 S.Ct. 2841 (Burger, C. J., concurring); *Loving v. Vir-*

24. For John Doe to make a public statement of his sexual orientation to the newspapers may, of course, be a matter of great importance to John Doe. Richard Roe, however, may be much more interested in the weekend weather forecast. Before Dale made his statement at Rutgers, the Scoutmaster of his troop did not know that he was gay. App. 465.

25. The majority simply announces, without analysis, that Dale s participation alone would force the organization to send a message. *Ante*, at 2454. But ... these are merely conclusory words, barren of analysis.... For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually asserting as true the message. *Wooley v. Maynard*, 430 U.S. 705, 721, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (REHNQUIST, J., dissenting).

26. BSA also argues that New Jersey s law violates its right to intimate association. Brief for Petitioners 39 47. Our cases recognize a substantive due process right to enter into and carry on certain intimate or private relationships. *Rotary Club*, 481 U.S., at 545, 107 S.Ct. 1940. As with the First Amendment right to associate, the State may not interfere with the selection of individuals in such relationships. *Jaycees*, 468 U.S., at 618, 104 S.Ct. 3244. Though the precise scope of the right to intimate association is unclear, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship to determine whether a group is sufficiently personal to warrant this type of constitutional protection. *Rotary Club*, 481 U.S., at 546, 107 S.Ct. 1940. Considering BSA s size, see *supra*, at 2476, its broad purposes, and its nonselectivity, see *supra*, at 2460, it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives. *Rotary Club*, 481 U.S., at 545, 107 S.Ct. 1940.

ginia, 388 U.S. 1, 3, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).[27] See also *Mathews v. Lucas*, 427 U.S. 495, 520, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976) (STEVENS, J., dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders;[28] a move toward greater understanding within some religious communities;[29] Justice Blackmun's classic opinion in *Bowers*;[30] [700]Georgia's invalidation of the statute upheld in *Bowers*;[31] and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.[32]

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

I join Justice STEVENS's dissent but add this further word on the significance of Part VI of his opinion. There, Justice STEVENS describes the changing atti-

27. In *Loving*, the trial judge gave this explanation of the rationale for Virginia s antimiscegenation statute: Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix. 388 U.S., at 3, 87 S.Ct. 1817.

28. Brief for American Psychological Association as *Amicus Curiae* 8.

29. See n. 3, *supra*.

30. The significance of that opinion is magnified by comparing it with Justice Blackmun s vote 10 years earlier in *Doe v. Commonwealth s Attorney for City of Richmond*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). In that case, six Justices including Justice Blackmun voted to summarily affirm the District Court s rejection of the same due process argument that was later rejected in *Bowers*. Two years later, furthermore, Justice Blackmun joined in a dissent in *University of Missouri v. Gay Lib*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978). In that case, the university had denied recognition to a student gay rights organization. The student group argued that in doing so, the university had violated its free speech and free association rights. The Court of Appeals agreed with that argument. A dissent from denial of certiorari, citing the university s argument, suggested that the proper analysis might well be as follows:

> [T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. *Id.*, at 1084, 98 S.Ct. 1276 (REHNQUIST, J., dissenting).

31. *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998).

32. See, *e.g.*, Bradsher, Big Carmakers Extend Benefits to Gay Couples, New York Times, June 9, 2000, p. C1; Marquis, Gay Pride Day is Observed by About 60 C.I.A. Workers, New York Times, June 9, 2000, p. A26; Zernike, Gay Couples are Accepted as Role Models at Exeter, New York Times, June 12, 2000, p. A18.

tudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender. The legitimacy of New [701] Jersey's interest in forbidding discrimination on all these bases by those furnishing public accommodations is, as Justice STEVENS indicates, acknowledged by many to be beyond question. The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.

Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. See *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). BSA has disclaimed any argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA. See Tr. of Oral Arg. 12–13.

The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message. As Justice STEVENS explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive [702] association into an easy trump of any antidiscrimination law.*

If, on the other hand, an expressive association claim has met the conditions Justice STEVENS describes as necessary, there may well be circumstances in which the antidiscrimination law must yield, as he says. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.

* An expressive association claim is in this respect unlike a basic free speech claim, as Justice STEVENS points out; the latter claim, *i.e.* the right to convey an individual s or group s position, if bona fide, may be taken at face value in applying the First Amendment. This case is thus unlike *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

proceeding, and did not deprive Tully of a meaningful sentence reduction hearing within the meaning of *Tully I.*

IV.

The order of the district court will be reversed.

GILFILLAN, Susan Jane B., Rev. Forehand, Mary Anne

and

Rev. Weider, Walter, Rev. Kopke, Bryan, Smith, Bertha R., Herrman, Herbert S., Bye, Gerard H., Montanaro, Antoinette, Calter, Elizabeth M., Miln, Martha Walker, Fox, Paul H., Schulte, Janice, Intervenors in District Court,

v.

CITY OF PHILADELPHIA, Mayor Rizzo, Frank L., Managing Director Levinson, Hillel S., City Representative La Sala, Joseph A., Commissioner of Public Property Silver, Robert, City of Philadelphia, Appellants.

No. 79-2786.

United States Court of Appeals, Third Circuit.

Argued Sept. 15, 1980.

Decided Dec. 30, 1980.

Taxpayer sued city of Philadelphia and others complaining that certain city expenditures in connection with Pope John Paul II's two-day visit to city violated the establishment clause. The United States District Court for the Eastern District of Pennsylvania, Raymond J. Broderick, J., 480 F.Supp. 1161, held the expenditures unconstitutional and ordered reimbursement, as previously agreed to by the Archdiocese, and city appealed. The Court of Appeals, Rosenn, Circuit Judge, held that: (1) city of Philadelphia's expenditure of more than $200,000 to construct a special platform used to celebrate a Mass and for the Pope to bring his message to Philadelphia and provide other extraordinary assistance, including rental of 20,000 chairs for seating of guests who obtained tickets from Archdiocese, renting of sound system, planting of shrubbery and flowers and building of smaller choir platform, violated the establishment clause of the First Amendment, and (2) finding that city's aid displayed an impermissible purpose, effect or entanglement did not constitute a denial to members of the Archdiocese of the right of free exercise of their religion.

Affirmed.

1. Constitutional Law ⇐42.3(2)

Taxpayers had standing to challenge city's expenditures to construct special platform and provide other extraordinary assistance for papal ceremonies as allegedly made in violation of the establishment clause. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐84

That a government action has a religious purpose does not mean that it cannot also have a secular purpose sufficient to satisfy the secular legislative purpose requirement of three-part test applied under the establishment clause. U.S.C.A.Const. Amend. 1.

3. Federal Courts ⇐870

Although city of Philadelphia, which had expended more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies, asserted two secular purposes, namely protection of the Pope and the crowd and possibility of a public relations bonanza, finding of district court, in action challenging expenditures as violative of establishment clause, that platform was not designed, constructed or used for civil purpose but for celebration of Holy Mass by the Pope assisted by Bishops of the Catholic Church was not plainly erroneous. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐84

Even if certain expenditures by city of Philadelphia in connection with two-day papal visit were for secular purposes, city's claim of protecting the Pope was not a sufficient secular purpose to justify expenditures in connection with construction of 36-foot high cross, expenditure of approximately $50,000 in flowers and shrubbery encircling platform from which Pope celebrated Mass, the $50,000 for a sound system and a stand for a 360-voice choir. U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐84

City of Philadelphia's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle did not constitute a secular purpose, for establishment clause purposes, as having a public relations purpose by putting the City in a "good light." U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐84

State approval of a particular religion is one of specific evils which the establishment clause was designed to prevent; an auspicious aspect of our pluralistic society is its rich religious diversity and the essential purpose of the establishment clause reflects such pluralism. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐84

City of Philadelphia's expenditures in constructing special platform and providing other extraordinary assistance for papal ceremonies at Logan Circle could not be justified as having a secular purpose, for establishment clause purposes, on ground that the Pope was accorded only what was due him as a head of state and that purpose behind the expenditures was to honor a head of state as the Pope never asserted any diplomatic role during his visit and all his activities indicated clearly his religious purpose and type of aid provided, including construction of platform on which to hold religious ceremonies, was plainly of a type to advance religion, not diplomacy. U.S.C.A. Const. Amend. 1.

8. Constitutional Law ⇐84

City of Philadelphia's expenditures of more than $200,000 to construct special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle had primarily a religious effect for establishment clause purposes, notwithstanding contention that there was little risk that expenditures had effect of placing city's imprimatur on approval of Catholic religion, as city officials went out of their way to align themselves and collaborate with the Archdiocese, which had sole responsibility for distributing tickets for area in vicinity of platform, and challenged activities were independent of planning for police and fire functions, emergencies and crowd control. U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐84

Even assuming that cost of constructing a cross on platform erected by city of Philadelphia for use during papal visit was recovered, such was not determinative of whether city's aid had primarily a religious effect for establishment clause purposes as city's design of platform to include the cross and advance of funds for construction were relevant both to the purpose and effect of the city's overall action. U.S.C.A.Const. Amend. 1.

10. Constitutional Law ⇐84

Fact that special platform constructed by City of Philadelphia for use during papal visit was used only once by the Pope and was removed within two weeks did not mean that no religious institution was aided for purpose of the establishment clause, as aid need not be continuing to have an impermissible religious effect and service was viewed directly by more than a million persons and, in effect, city created a temporary shrine by ordering the platform left standing for more than a week to enable Philadelphians to visit it. U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⇐84

Religious effect of city of Philadelphia's expenditures of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal

ceremonies at Logan Circle was not too remote to constitute a violation of the establishment clause. U.S.C.A.Const. Amend. 1.

12. Constitutional Law ⇐84

City of Philadelphia's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle did not pass muster under establishment clause on ground that any religious effect was result of the Mass and not the city's providing the platform for the Mass and related support; if accepted, such claimed distinction between sources of effects would emasculate the establishment clause. U.S.C.A.Const. Amend. 1.

13. Constitutional Law ⇐84

City of Philadelphia's expenditures of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle created an impermissible establishment of religion as the Pope was admittedly on a pastoral mission and was, with aid of magnificent setting provided by the city, able to celebrate a Mass and deliver a sermon and in doing so he brought a religious message with help of city from the Roman Catholic Church to millions of persons, an effect that could only be considered as advancing religion. U.S.C.A.Const. Amend. 1.

14. Constitutional Law ⇐84

There was sufficient entanglement between city of Philadelphia and Archdiocese to violate establishment clause as regards city's expenditure of over $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle where although the city designed the platform, the design was approved by the Archdiocese, which alone had access to the 20,000 reserved seats nearest the platform, and for each aspect of preparations the Philadelphia official in charge had a counterpart in the Archdiocese. U.S.C.A.Const. Amend. 1.

15. Constitutional Law ⇐84

Although papal visit to Philadelphia lasted only two days, city's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle sufficiently tended to prompt divisiveness among and between religious groups as to cause entanglement in violation of establishment clause in that at least three separate groups brought suit to enjoin the assistance. U.S.C.A.Const. Amend. 1.

16. Constitutional Law ⇐84

Finding that city of Philadelphia's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance for papal ceremonies at Logan Circle displayed an impermissible purpose, effect or entanglement in violation of establishment clause would not constitute a denial to members of the Archdiocese of the free exercise of their religion; case law that a public facility cannot prohibit a recognized group from using public facilities to hold religious services might have had some weight had the city sought to deny the Pope use of Logan Circle, but the city had no duty to support the Archdiocese by providing extraordinary assistance to Pope's religious activities. U.S.C.A. Const. Amend. 1.

17. Constitutional Law ⇐84

City of Philadelphia's expenditure of more than $200,000 to construct a special platform and provide other extraordinary assistance, including rental of 20,000 chairs for seating of guests who obtained tickets from Archdiocese, renting of sound system, planting of shrubbery and flowers and building of smaller choir platform, violated the establishment clause of the First Amendment, with the platform used to celebrate a Mass and for the Pope to bring his message to Philadelphia. U.S.C.A.Const. Amend. 1.

Alan J. Davis, City Sol., T. Michael Mather (argued), Chairman, Litigation Dept., Philadelphia, Pa., for appellant City of Philadelphia.

Henry W. Sawyer, III (argued), Edward M. Posner, Drinker, Biddle & Reath, Phila-

delphia, Pa., for appellees Susan Jane B. Gilfillan and American Civil Liberties Union, Greater Philadelphia Branch.

Earl W. Trent, Jr., Valley Forge, Pa., for appellees Rev. Mary Anne Forehand and National Ministries, American Baptist Churches in the U.S.A.

John T. Acton, Willow Grove, Pa., Lee Boothby (argued), Berrien Springs, Mich., for intervenors.

Before ALDISERT, ROSENN and GARTH, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

On October 3, 1979, more than a million people came together at Philadelphia, Pennsylvania to hear Pope John Paul II offer Mass and deliver a sermon at the City's Logan Circle. The liturgical service, the largest event during the Pope's two-day visit to Philadelphia, generated an unprecedented outpouring of warmth and good will felt throughout the City for months following. No one disputes that the historic visit of the Pope had a lasting and beneficial effect on the people of Philadelphia. It also favorably enhanced the image of the City. This case, however, requires us to decide a narrow question of the constitutionality of the expenditure by the City of Philadelphia of more than $200,000 to construct a special platform and to provide other extraordinary assistance for the papal ceremonies at Logan Circle. Without reflecting in any way on the brilliant success of the Pope's visit to Philadelphia, what we must examine in this case is whether certain governmental actions by the City were permissible under the Establishment Clause of the first amendment of the Constitution.

I.

In September of 1979, Pope John Paul II, the temporal leader of the Roman Catholic Church, announced that he would undertake a "pastoral mission" to the United States and that his trip would include a stop in Philadelphia. City officials then began a series of meetings with the leaders of the Archdiocese of Philadelphia in preparation for the Pope's visit. Out of these meetings grew plans for a Mass at Logan Circle. In accordance with those plans, and with the approval of the Archdiocese, the City designed and built, over Swann Fountain in Logan Circle, a large platform to be used as the dais from which the Pope would celebrate Mass and distribute Holy Eucharist, a sacrament of the Roman Catholic Church, and bring his message to Philadelphia.

[1] This challenge came shortly after the City announced its construction plans. Plaintiffs Susan Jane B. Gilfillan and Reverend Mary Anne Forehand, taxpayers of the City of Philadelphia, brought suit to enjoin the City from expending funds to build the platform for the Pope, alleging a violation of the first amendment's Establishment Clause.[1] With the approval of the district court, the parties stipulated to an order under which construction was allowed to proceed, but the Archdiocese agreed to reimburse the City for the cost of the platform and related construction should there be a final judgment that the City could not constitutionally pay for the items.

The finished platform was an impressive creation that significantly helped beautify the Mass offered by the Pope. Paid for entirely by the City, the platform was cylindrical in shape, 28½ feet high and 144 feet in diameter. Fifty-seven steps, 60 feet wide, extended 110 feet from the platform to the street. On the platform was a 16-step, four-sided pyramid, 45 feet on a side and 14 feet high. On this pyramid was another small, 5-step pyramid upon which was placed a throne used by the Pope. The platform was painted white; the top of the large pyramid and portions of the steps

1. As taxpayers, plaintiffs have standing to challenge the expenditures allegedly made in violation of the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Plaintiffs were joined in their actions, respectively, by the American Civil Liberties Union and the National Ministries, American Baptist Churches. The district court also permitted the intervention of several individuals under Fed.R.Civ.P. 24(b).

were carpeted in red. In one corner of the large pyramid stood a white, 36-foot high cross. *See* photograph reproduced at 480 F.Supp. 1161, 1170 (E.D.Pa.1979). The City encircled the platform with nearly $50,000 worth of shrubbery and yellow chrysanthemums. The City also rented 20,000 chairs for seating of selected guests; it supplied a sound system, part rented and part purchased at a cost of more than $50,000; and it constructed a nearby, separate platform for a 360-voice choir.

On the afternoon of October 3, 1979, Pope John Paul II led a procession from the Cathedral of Saints Peter and Paul to the Logan Circle platform. There he began a service that lasted more than two hours, during which he delivered a homily and personally distributed Communion to 150 worshipers. With him on the platform were a large number of clergy, but no city officials. The 20,000 seats nearest the platform, the chairs rented by the City, were available only to ticket holders, and tickets could be obtained only through the Archdiocese. The platform, illuminated for six days prior to the service, was left in place over Swann Fountain for more than one week after the service, but it was used for no other purpose.

After the Pope's visit had ended, the City and those contesting the City's expenditures presented their arguments before Judge Raymond Broderick of the United States District Court for the Eastern District of Pennsylvania. The plaintiffs opposed only a few items. Not challenged was the City's construction of a platform at the airport, a platform used by city as well as religious officials in welcoming the Pope to Philadelphia. Not challenged was the City's deployment of police along the parade route and at all events attended by the Pope. Not challenged was the Pope's use of public areas such as Logan Circle for his religious activities. Rather, plaintiffs contested only the City's payment for the construction of the platform in Logan Circle, a platform used exclusively for a religious service, and a few other extraordinary expenditures, all a kind never offered to other organizations, religious or non-religious. Specifically, these additional expenditures were for renting of the chairs and a sound system, the planting of shrubbery and flowers, and the building of the smaller platform for the choir. The plaintiffs argued that such assistance cannot be offered without violating the Establishment Clause of the first amendment of the Constitution.

On November 9, 1979, Judge Broderick, in a scholarly and well reasoned opinion, held that the expenditures were unconstitutional and ordered the reimbursement. 480 F.Supp. 1161 (E.D.Pa.1979). The amount to be reimbursed totalled $204,569 and included the cost of materials and labor, less the value of reusable items. *See id.* at 1170–71.[2] The City appealed.[3] We affirm.

II.

The first amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The amendment was made binding on the states by the fourteenth amendment. *Everson v. Board of Education*, 330 U.S. 1, 8, 67 S.Ct. 504, 507, 91 L.Ed. 711 (1947). The two religion clauses have stirred deep feelings and their meaning has been much litigated. Although members of the Supreme Court have disagreed on the proper application of the Establishment Clause, *see Com-*

2. The trial court found that the City improperly expended the total sum of $310,741 for the Pope's service. The court, however, readily accepted the City's contention that *all* of the $28,894 spent on lumber, $2,618 spent on bunting, $48,860 spent on shrubbery and flowers, and $5,800 spent on carpeting was recoverd by the City because those items were reusable, apparently without diminution of value. Another $20,000 was subtracted from the total of expenditures as the value of reusable sound equipment purchased by the City. 480 F.Supp. at 1170–71.

3. The Rev. Mary Anne Forehand and the Board of National Ministries, American Baptist Churches in the U.S.A., also appealed, No. 79–1785 (Notice of Appeal filed November 27, 1979), but that appeal was dismissed pursuant to the stipulation of the parties on March 19, 1980.

mittee for Public Education v. Regan, 444 U.S. 646, 648, 662, 671, 100 S.Ct. 840, 844, 855, 63 L.Ed.2d 94 (1980); *Everson, supra*, 330 U.S. at 3, 18, 28, 67 S.Ct. at 505, 512, 517, a fairly simple statement of the test has evolved: "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education v. Regan*, 444 U.S. 646, 653, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980), *citing Roemer v. Maryland Public Works Board*, 426 U.S. 736, 748, 96 S.Ct. 2337, 2345, 49 L.Ed.2d 179 (1976); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772–73, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). This circuit is familiar with the application of this three-part test. *See Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd.*, 442 U.S. 907, 99 S.Ct. 2818, 61 L.Ed.2d 273 (1979).

In its analysis of the constitutionality of the City's funding of the construction of the platform and the other extraordinary support for the Logan Circle ceremony, the district court employed the three-part test. 480 F.Supp. at 1166. The City does not contend that some other test should be applied in an examination of the City's actions, but does argue that the district court erroneously applied the test.

Applying the test, the district court found that the challenged expenditures failed to satisfy any of the three requirements of the Establishment Clause. The court concluded that the City's action (1) had primarily a religious purpose and only incidentally a secular purpose; (2) had a primary effect that advanced religion; and (3) created two types of impermissible entanglement: (i) the joint participation in the planning of and preparation for a religious function, and (ii) the promotion of divisiveness among and between religious groups. 480 F.Supp. at 1168–69. We shall now review that application of the law.

A. *Secular Purpose*

[2] The district court found that the construction of the platform had only an incidental secular purpose, and that the primary purpose of the City's action was religious. 480 F.Supp. at 1167. That a government action has a religious purpose does not mean that it cannot also have a secular purpose sufficient to satisfy this element of the test. For instance, Sunday closing laws have been found to have had a secular purpose in the goal of a uniform day of rest. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961). But not all state actions have passed the test. In *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), the Court found no non-religious justification for a statute prohibiting the teaching of evolution.

[3] The City of Philadelphia asserts two secular purposes: the first, the protection of the Pope and the crowd, and the second, the possibility of a "public relations bonanza," a purpose first raised on appeal and not apparently considered by the district court. The asserted purpose of protecting the Pope is, at best, suspect. At all other events attended by the Pope, he was protected by, at most, police and barricades. At Logan Circle, the platform was surrounded by barricades and police officers and these, much more than the platform, protected the Pope. Approaching and leaving the ceremony, the Pope passed through the crowd, and at one point during the service he went into the crowd. The City argues that by providing the platform to make the Pope widely visible it prevented a rush of persons attempting to see the Pope. This claim of protection is only partially true because the Pope's position on the platform made him a clear target in any direction. In any event, the district court found that the platform was not designed, constructed or used for a civil purpose but for the celebration of Holy Mass by the Pope, assisted by the bishops of the Catholic Church. 480 F.Supp. at 1167. This finding is not plainly erroneous.

[4] Nor can we accept the City's claim of protecting the Pope as a purpose sufficient to justify several of the other contested preparations: the 36-foot high cross; approximately $50,000 in flowers and shrubbery; the $55,950 sound system; and the stand for the choir. Unless some other rational secular purpose is advanced for these expenditures, they, like the statute in *Epperson, supra,* must be found unconstitutional. At least some minimal secular purpose must be advanced.

[5–7] On appeal, the City asserts a public relations purpose, claiming that by funding these extraordinary items, it helped put Philadelphia in a good light. By so arguing, the City places itself in a difficult position. Viewers of the ceremony that do not know of the city-sponsorship are likely to believe only that the Archdiocese, not the City, made a special effort. The Archdiocese, not the City, will receive the public relations "bonanza." But if the city-sponsorship is known, that aid connotes the state approval of a particular religion, one of the specific evils the Establishment Clause was designed to prevent. An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the Establishment Clause reflects this pluralism. Finally, if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed, for it is hard to imagine a city expenditure that will not look good in someone's eyes.[4]

We recognize that it is difficult for a court to ascertain the true purpose behind a governmental action, particularly when the challenged activity is not legislation. *See Allen v. Morton,* 495 F.2d 65, 68 (D.C.Cir. 1973). However, we believe that if we are to retain any meaningful purpose test, we must conclude that the district court did not err in finding that the challenged actions of the City were undertaken with a religious purpose. Because the City failed to satisfy the first part of the constitutional test, the district court properly held that the City expenditures violated the Establishment Clause of the first amendment.

B. *Religious Effect*

In *Abington School District v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844 (1963), the Supreme Court stated that government aid should have "a primary effect that neither advances nor inhibits religion." Similarly, in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 783–85 n.39, 93 S.Ct. 2955, 2970, 2971 n.39, 37 L.Ed.2d 948 (1973), the Court iterated that aid is impermissible if it has "the direct and immediate effect of advancing religion."[5] The state must maintain an attitude of absolute neutrality, neither "advancing" nor "inhibiting" religion. *Id.* at 788, 93 S.Ct. at 2973. The district court found that the City's action had a primary religious effect under both of the above tests. 480 F.Supp. at 1167–68.

[8, 9] The City presents several imaginative arguments against this finding. First, it asserts that the "unique" nature of the Pope's visit somehow makes the effect not primarily religious, because "there is little risk that the expenditures will have the effect of placing the City's imprimatur of approval on the Catholic religion." We see no merit to that disclaimer. City officials went out of their way to align themselves and collaborate with the Archdiocese. For weeks, representatives of the City and the Archdiocese repeatedly met to discuss the

4. The City also argues that the Pope was accorded only what was due him as a head of state, and that the purpose behind the expenditures was to honor a head of state. This argument is, on its face, transparent. The Pope never asserted any diplomatic role during his visit to Philadelphia. Rather, all his activities indicate clearly his religious purpose. Also, the type of aid provided by the City was plainly of a type intended to advance religion, not diplomacy.

5. Professor Tribe believes the effects test was thus transformed into *"a requirement that non-secular effect be remote, indirect and incidental."* L. Tribe, American Constitutional Law § 14–9, at 840 (1978) (emphasis in original).

numerous problems involved in designing and constructing the platform, including the cross, and planning for the Mass.[6] These meetings were separate and independent of the planning for police and fire functions, emergencies and crowd control. In addition, the district court found that the City had in effect "ceded control of the Logan Circle area to the Archdiocese," 480 F.Supp. at 1167, as evidenced by the Archdiocese's sole responsibility for the distribution of tickets for admission to the area in the vicinity of the platform. Further, regardless of imprimatur, the City's assistance had effectively enabled the Pope to reach large numbers of persons and to perform a religious service. A religious effect of such magnitude may itself be unique.

[10] The City maintains that the "transitory nature" of the aid—the Pope used the platform once and it was removed within two weeks—means that no religious institution was aided. But the aid need not be continuing to have an impermissible religious effect. The service was viewed directly by more than a million persons. It cannot be argued that its effect was not great. The platform itself was, on the City's orders, left standing for more than a week to enable Philadelphians to visit it. The City thus created a temporary shrine. Such activity is not compatible with the Constitution.

[11] Nor can it be argued that any religious effect was too remote. In *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the Court sustained most of the federal Higher Education Facilities Act of 1963 providing aid to all colleges for construction of buildings. The Act permitted the Government to recover the aid if the federally financed facility were used for sectarian instruction or as a place of worship. However, under the Act, recovery was possible only if the breach occurred within 20 years after completion of construction. The Court found the possibility that a federally financed building might be used for some religious activity more than 20 years later was a sufficient religious effect to render that aspect of the Act, the 20-year limitation, invalid. *Id.* at 683–84, 91 S.Ct. at 2098. The religious effect there was more attenuated than what we have here.

[12] The City also reasons that any religious effect was the result of the Mass and not the City's providing the platform and related support. If this were true, then the clause struck down in *Tilton, supra*, would have been valid because, by the same argument, the religious instruction and not the building is the root of the religious effect. This claimed distinction between sources of effects would, if accepted, emasculate the Establishment Clause.

[13] The religious effect was both plain and primary. The Pope, admittedly on a pastoral mission to this country, was, with the aid of a magnificent setting provided by the City, able to celebrate a Mass and deliver a sermon. In so doing, he brought a religious message, with the help of the City, from the Roman Catholic Church to millions of persons. This is an effect that can only be considered as advancing religion. We therefore affirm the district court's holding that the City's action created an impermissible establishment of religion.

C. *Entanglement*

The district court found the relationship between the City and the Archdiocese constituted entanglement in violation of the third part of the Establishment Clause test. 480 F.Supp. at 1168–69. The problem the district court found was not the necessity of constant government monitoring of sectarian activities fatal in other cases, but rather

6. In note 9, the dissent urges that the City's expenditure on the cross is irrelevant. We disagree. First, only in appellant's brief on appeal was the claim made that the cost was recovered. As an appellate court, we decline to find such a fact when no evidence on the point was offered to the trial court. Second, even assuming that the cost of that particular component was recovered, the City's design of the platform to include the cross and the advance of the funds for its construction are relevant both to the purpose and effect of the City's overall action.

was the (1) joint planning with the Archdiocese of the Logan Circle ceremony and (2) the potential for community divisiveness along religious lines that joint planning created. The City disputes each conclusion on the basis that any state-church relationship was not a continuing one.

In *Allen v. Morton*, 495 F.2d 65 (D.C.Cir. 1973), the District of Columbia Court of Appeals found excessive entanglement between the federal Government and the committee running the Christmas pageant. The City attempts to distinguish this case on two grounds: first, the Government in *Allen* had an active role in management of the pageant, with officials holding two of the five positions on the executive committee; and second, the Government "co-sponsored" the pageant, providing labor assistance.

[14] On review, the facts in *Allen, supra*, seem quite similar to those involving the relationship between the City here and the Archdiocese. Despite the City's claim, the only contact between the two was not "to discuss provision of normal government services." Philadelphia Commissioner LaSala, in his deposition, indicated that for each aspect of the preparations, the Philadelphia official in charge had a counterpart in the Archdiocese. Admittedly, the City alone designed the platform, but the design was approved by the Archdiocese before it was built. Finally, the Archdiocese alone handled the access to the 20,000 reserved seats. Admission was by ticket only, tickets available only through the Archdiocese. At the service, Archdiocese "marshals" turned away non-ticket holders from the several square block area where the 20,000 seats were located. Thus, in preparation, joint efforts were the norm, and at the event the religious organization apparently took over some government functions. We therefore affirm the district court's finding of entanglement based on the facts of the preparation.

[15] An alternative basis for the district court's conclusion that the City's activity caused entanglement was a finding that the assistance tended to promote divisiveness among and between religious groups. This basis was recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 622–24, 91 S.Ct. 2105, 2115, 2116, 29 L.Ed.2d 745 (1971). Again, the City argues that the ephemeral nature of the Pope's visit makes this finding incorrect, reasoning that any divisiveness will be evanescent. True, in *Lemon,* statutes providing long-term aid to parochial schools were challenged, but there is no reason to believe that short-term aid of the type rendered here is not as divisive. Judge Broderick's finding of divisiveness was based on the number of plaintiffs. At least three separate groups brought suit to enjoin the City's assistance. We believe the district court could find entanglement from the divisiveness evidenced by the number of legal actions.

Thus, the City's assistance and the extensive cooperation during the preparations for the Pope's visit, also fail the entanglement test, because of the potential for divisiveness.

III.

Throughout this appeal, the City has argued that to find that the City's aid displays an impermissible purpose, effect, or entanglement, would constitute a denial to members of the Archdiocese of their right to free exercise of religion as protected by the first amendment. For instance, after arguing that any religious effects stem from the Mass, not the City's aid, the City contends that the plaintiffs are really trying to limit the Pope's religious activities, and therefore are attempting to deny his free exercise of religion. Such an argument has only superficial appeal. The free exercise cases, by their nature, arise when the state has denied the right. For example, in *Sherbert v. Verner*, 374 U.S. 398, 10 L.Ed.2d 965 (1963), the Court found South Carolina abridged a woman's right to the free exercise of her religion when the state would not give her unemployment compensation because she refused to work on Saturday, her Sabbath.

The issue in this case is city spending on the platform, shrubberies and related assist-

ance, such as rental of chairs and a sound system, *not* whether the Pope could use city land at Logan Circle for religious purposes or have police protection. The question then is whether the Archdiocese would have a colorable claim against the City for reimbursement if the City had declined the challenged assistance. Such a claim would obviously be without merit. To have the City reimbursed for such expenditures then cannot be a denial of the right of free exercise of religion.

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979), which the City cites repeatedly as supporting their free exercise argument, does not in any way suggest a different conclusion. That case also involved Pope John Paul II's visit to the United States. The Pope held a service on the National Mall at Washington, D. C. The challenge there was primarily directed to this use of the property, a use the court sustained. The City provided police, fences and barriers, and utilities, but these had been regularly provided to every major demonstration raising first amendment values, such as the inhabitants of "Resurrection City," the anti-war protestors at the Moratorium, and recently the farmers who brought their tractors and protests to Washington. The court noted specifically that the Washington Archdiocese would expend in excess of $400,000 for construction of the platform and the alter, other physical and electrical facilities, sound equipment, chairs and clean-up, the very items the City of Philadelphia paid for. In this case, the plaintiffs agree the Pope had a right to use the city property. Their objection is to the extraordinary city expenses, an issue not raised in *O'Hair*.

[16] Nor does *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), help the City. The Eighth Circuit, in deciding that a public university cannot prohibit a recognized student group from using any university facilities to hold religious services was certainly not holding that the university had a duty to erect a special facility for that group. *Chess v. Widmar* would be relevant had the City sought to deny the Pope the use of Logan Circle. *Chess* and the other free exercise cases require only neutrality. They in no way substantiate the City's argument that it had a *duty* to support the Archdiocese by providing extraordinary assistance to the Pope's religious activities.

We conclude therefore that the district court correctly rejected the City's free exercise argument.

IV.

The development of the religion clauses of the first amendment began before the First Congress in the struggles in the various states over religious freedom. *See generally Everson v. Board of Education*, 330 U.S. 1, 8–14, 67 S.Ct. 504, 507–510, 91 L.Ed. 711 (Black, J.), 31–49, 67 S.Ct. 519–527 (Rutledge, J., dissenting) (1947). In Virginia in 1785, James Madison wrote and circulated his famous "Memorial and Remonstrance" to the General Assembly of the Commonwealth of Virginia. *See id.* at 63, 67 S.Ct. at 534. Although Madison's views may not have been shared by a majority of the drafters of the Constitution, *Public Funds for Public Schools v. Byrne*, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd*, 442 U.S. 907, 99 S.Ct. 2818, 61 L.Ed.2d 273 (1979), his statements remain instructive when Establishment and Free Exercise Clause issues are raised. Urging the Virginia assembly to defeat a bill that would provide financial support from tax revenues to the clergy of a certain sect, Madison observed that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." Madison, Memorial and Remonstrance ¶ 3, *quoted at Everson, supra*, 330 U.S. at 65–66, 67 S.Ct. at 535–536. By requiring that the Archdiocese, pursuant to the order to which it stipulated in September 1979, reimburse the City for the impermissible expenditures, we in no way penalize the Archdiocese. Rather, we are adhering to the venerable principle of neutrality. For if the City can spend in excess of $200,000 directly in support of the Pope's Mass, it can devote half

its budget to some other group next year. As Madison did not accept the "arrogant pretension" that "the Civil Magistrate is a competent Judge of Religious truth," *id.* at ¶ 5, 330 U.S. at 67, 67 S.Ct. at 536, we cannot accept the City's decision to support a particular sect. Finally, because we believe, as Madison argued, that such support "will destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects," *id.* at ¶ 11, 330 U.S. at 69, 67 S.Ct. at 537, we must affirm the district court and order the Archdiocese to reimburse the City of Philadelphia for those expenditures made by the City in violation of the Establishment Clause of the first amendment of the Constitution.

[17] For the foregoing reasons, we hold that the challenged City expenditures violate the Establishment Clause of the first amendment of the Constitution. The Archdiocese of Philadelphia is required, in accordance with the stipulation and order of the district court, to reimburse the City $204,569 that the City unconstitutionally spent in support of Pope John Paul II's Mass at Logan Circle.

The judgment of the district court will be affirmed.

ALDISERT, Circuit Judge, dissenting.

Susan B. Gilfillan and the American Civil Liberties Union request a judicial declaration that the expenditure of a *certain portion* of City of Philadelphia funds relating to a two-day visit by Pope John Paul II in October, 1979, was improper under the establishment clause of the first amendment.[1] The City spent approximately $1,200,000 during the papal visit. This lawsuit is a challenge only to those funds expended by the City to erect a platform and buy public address equipment in connection with the celebration of a mass at Logan Circle. The district court agreed with the plaintiffs that the City's expenditure of $204,569 of the total expenditure violated the Constitution. The majority have affirmed. I would reverse and remand these proceedings to the district court with a direction to enter judgment in favor of Philadelphia. In my view, there was a secular purpose for the challenged expenditures, the primary effect was secular, and the narrow relief requested by the appellees and granted by the district court requires the City of Philadelphia impermissibly to entangle itself in religion. This entanglement violates the establishment clause of the first amendment.

I.

This controversy arose from the visit to Philadelphia of Pope John Paul II, head of the Vatican State and spiritual leader of the world's Roman Catholics, as part of a six-city visit to the United States. Pennsylvania's governor, Philadelphia's mayor, and other civil and religious dignitaries greeted him at the airport and the usual welcoming ceremony followed. A motorcade then proceeded through the City to the Catholic basilica at Logan Circle, a public park. Thereafter, the Pope emerged from the basilica leading a religious procession to the public park, mounted a platform, and celebrated a nationally-televised pontifical mass.

The plaintiffs' position before the district court was clear and precise. They contested neither the celebration of mass on public property nor the normal expenditure of public funds for security and crowd control. They assert the same position before this court. Although the City expended approximately $1,200,000 for the papal visit, they challenge only the $204,569 expended for the platform and its appurtenances.[2] Thus,

1. The parties have not raised the issue of mootness. I have assumed that this is a live controversy. I also do not address this court's authority to order performance by the Archdiocese of Philadelphia, not a party to these proceedings.

2. Counsel for plaintiff-appellees stated at oral argument:

> [W]e have conceded that the visit in its entirety has primarily at least a secular character. That is the arrival at the airport, the platform at the airport where the Pope was greeted by secular officials, bands played, the procession up through Broad Street, all the

the question presented by this appeal is whether the United States Constitution precludes a municipality from paying these particular expenses incident to the visit of Pope John Paul II.

II.

Had the platform been constructed for a priest, bishop or cardinal visiting the City and celebrating mass I would have no difficulty agreeing that the expenditure violated the establishment clause. But Pope John Paul II is no ordinary bishop; he is the head of a secular state, albeit a theocratic one. The Holy See is an independent papal state, located in Vatican City, emerging from the Lateran Pacts entered into by Pope Pius XI and the Kingdom of Italy in 1929. These pacts provided that, in return for recognition of the secular Italian government by the Holy See, the Pope would be provided with a small, independent political enclave, a large sum of money as compensation, and recognition of the Roman Catholic faith as the state religion of Italy. These pacts have remained essentially unaltered since their ratification.

Sovereignty in this independent papal state is exercised by the Pope upon his election as the head of the Catholic Church. He has absolute executive, legislative, and judicial powers within the city. Administrative powers are delegated to a governor who is also permitted to compile legislation. The governor is in turn assisted by a central council. The principle sources of objective law in the Holy See are the *Codex juris canonici* and the apostolic constitutions, although the penal code of Italy applies within its boundaries.

The Holy See has civil courts in addition to its religious courts, although most civil offenses are tried in Italy. There is a diplomatic corps of approximately sixty persons who serve as legates (ambassadors). In addition, apostolic delegates serve in nations without formal diplomatic relations with the Vatican, including one to the United States.

The papal state has its own telephone and telegraph system, post office, railroad station, radio station, banking system, stamps, currency, pharmacy, jail, and flag. Vatican "papers" are given to citizens, who consist primarily of permanent Vatican employees. The state is in all ways independent of Italy, although the Italian government does provide certain services, including police to aid in security and crowd control.[3]

As a theocratic state, the Holy See is not unique. Israel, for example, is its Jewish counterpart. The religious nature of the State of Israel is disclosed by the circumstances surrounding its establishment on May 14, 1948. Its creation fulfilled the historic dream of the Jewish people that stemmed from their belief in God's promise that the land of Israel would one day be theirs. Excerpts from the "Declaration of the Establishment of the State of Israel" emphasize the religious significance of the date:

> Eretz-Israel was the birthplace of the Jewish people. Here their spiritual, religious, and political identity was shaped. Here they first attained to statehood . . . and gave to the world the eternal Book of Books.
>
> . . . . .
>
> In [1897] . . . the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country.

way up to the point at which the Pope at the head of a religious procession with the forty bishops who helped him go celebrate the mass approached the platform, which was, of course, used for no . . . purpose other than the mass and the sermon. Indeed, no secular foot ever touched that platform except the special eight communicants who came upon it to receive the Holy Eucharist. And the religious character . . . of the visit, however, is one which is perhaps arguable, but which we don't at all challenge. And indeed, the largest expenditures were for those of crowd control and the like.... [They were] the largest expenditures, . . . over a million dollars.

Transcript of oral argument at 24–25.

3. *See generally* A. Blaustein & G. Flanz, eds., Constitutions of Dependencies and Special Sovereignties, *Vatican City State* (1976).

> The right was . . . re-affirmed in the Mandate of the League of Nations which . . . gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.
>
> . . . . .
>
> Accordingly, we . . . representatives of the Jewish community of Eretz-Israel and of the Zionist movement . . . hereby declare the establishment of . . . the State of Israel.
>
> . . . . .
>
> We appeal to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel . . . and to stand by them in the great struggle for the realization of the age-old dream—the redemption of Israel.[4]

The Law of Return, for example, announces the right of every Jew to settle in Israel. The World Zionist Organization—Jewish Agency (Status) Law regulates the relationship of the World Zionist Organization in Israel to the state. Other laws relating to religion govern such matters as *kosher* food for soldiers, religious service budgets, and the Chief Rabbinate Council. Whenever new legislation is needed, the relevant principles of Jewish law are examined first. If they are found to be suitable, they are incorporated into the law.[5]

So close is the relationship between members of the Jewish faith and Israel that Israeli Prime Minister Menachem Begin, arguing that criticism of Israel by the French government provoked acts of anti-semitism in France, recently stated: "The incitement against the Jewish state is, objectively speaking, incitement against the Jewish people." [6]

Another theocratic state is the newly-created Islamic Republic of Iran. Principle 4 of its constitution states:

> All civil, penal, financial, economic, administrative, cultural, military, political, etc., laws and regulations should be based on Islamic rules and standards. This principle will absolutely or in general be dominant over all of the principles of the constitution, and other laws and regulations as well, and any determination in this connection will be made by the religious jurists of the Council of Guardians.

Principle 5 states that the "religious leader and Imam" of Iran is a substitute for the missing Shiite guide, the twelfth Imam who disappeared eleven centuries ago and is expected to return.[7]

These examples illustrate the difficulties inherent in the majority's implicit distinction between heads of secular states and heads of religious states. Under the majority's analysis, the extension of diplomatic courtesies and security to Pope John Paul II must be carefully segmented into numerous contexts. More important, however, is the failure of the majority to recognize that although the Pope's following is largely, but not totally, a result of his religious status, the size of that following raises security and safety concerns for the City of Philadelphia that cannot be neatly characterized as "religious."

III.

This case is unique because it requires examination of a one-time expenditure of municipal funds incident to the visit of a foreign dignitary who also heads a religion. The plaintiff-appellees rely on a novel and elusive distinction between municipal expenditures for a reception platform at the Philadelphia airport, from which Pope John Paul II extended a blessing to all observers, and expenditures for a platform at Logan Circle, from which he conducted mass and distributed the Holy Eucharist. Although there is no controlling precedent for these

4. A. Blaustein & G. Flanz, eds., 6 Constitutions of the Countries of the World: Series of Updated Texts, *Israel*, vol I, pp. 3–5 (1973).

5. 9 Encyclopedia Judaica *Israel* 651 (1971).

6. The New York Times, October 14, 1980, § A at 9, col. 1.

7. English translation of Iranian Constitution provided by the Iran Working Group, United States Department of State.

unique facts, some direction is forthcoming in the standards developed by the Supreme Court for analysis of expenditures in aid of religious schools. The Court announced these standards in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971):

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz* [*v. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)].

My difference with the majority is in the emphasis I place on the City's concern with safety and security and with its reputation in the eyes of the world. Although the majority are correct that the expenditures at issue aided the Catholic Church,

> [t]he prohibition of enactments respecting the establishment of religion [does] not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment—free speech, free press—are absolutes.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 255–56, 68 S.Ct. 461, 486–487, 92 L.Ed. 649 (1948) (Reed, J., dissenting). In my view, these two secular concerns, the safety and security of its citizenry and enhancement of its reputation as an attractive city, justified Philadelphia's expenditures.

A.

Both the district court and the majority have concluded that the primary purpose behind the expenditures was nonsecular and therefore forbidden under the establishment clause. Neither opinion, however, cites evidence of the City's intent in undertaking the expenditures. They rely instead on the rather simplistic assertion that because the platform was used for celebration of Mass and the Holy Eucharist, the City's *primary* motivation must have been sectarian. *See* Maj. op. at 929–930; 480 F.Supp. at 1166. This reasoning merely assumes that the justifications offered by the City are pretextual; it fails to explain why the benefit to the Catholic Church was not an incident to the predominant purpose of public safety.

Viewed against the recent historical setting available to the City immediately prior to the Pope's visit, the City could have reasonably reached three purely secular conclusions. First, Pope John Paul II's position as head of the Catholic Church, as well as his much publicized personal charisma, would draw a huge crowd of Catholics and non-Catholics to his outdoor appearance at Logan Circle. Second, the safety of the expected crowd, for which the City remained primarily responsible, would be endangered if the Pope were not visible to a large percentage of the persons in attendance. The City argues that its officials wished to avoid "the shoving and pushing" like that which later led to the May 4, 1980, tragedy in Zaire when nine people were trampled to death during the papal visit there.[8] Finally, City officials could have concluded that an essential means of controlling the expectant crowd would be assurance that the Pope would be visible to and heard by the crowd. This conclusion led quite rationally to the purely secular decision to build the platform and purchase sound amplification equipment.

The other challenged expenses include money spent on shrubbery and flowers.[9]

8. Transcript of oral argument at 52.

9. The majority's repeated reference to the wooden cross erected at City expense is now irrelevant. The City sold the cross after the papal visit at no financial loss, and it is not included within the district court's order. Appellant's brief at 18.

Although the secular purpose for these expenditures is not as compelling as the desire to safeguard the lives of those in attendance, the City of Philadelphia could have anticipated wide media coverage and desired to make the most of the papal visit's public relations benefit to the City. Because the shrubbery and flowers played no part in the ceremony, the majority's attempt to include them within a class of forbidden expenditures is unpersuasive. In addition, the district court found that these items were totally reusable, and the taxpayer-appellees have suffered no cognizable loss by these particular expenditures.

Finally, the appellees emphasize that the Church, not the City, was primarily responsible for distributing tickets for seats close to the platform. This observation carries little weight because the persons most subject to physical peril by crowd disorders were not the persons nearest to the platform, but persons farthest from it. Persons at the rear of the crowd would be least able to see or hear without the platform and amplification equipment, and would be most likely to surge forward, endangering lives at the edge of the crowd. If the City's sole concern were for the safety of the Pope, or even for the dignitaries on or in proximity to the platform, police barricades would have been sufficient. In my view, however, the more difficult security problem was the outlying crowd, and I cannot fault City officials for resolving it as they did.

In sum, therefore, I part with the majority's secular purpose analysis in my emphasis on the safety of the crowd, not of the papal visitor. Pope John Paul II's ability to draw excited throngs may or may not be attributable to his religious position, but Philadelphia's recognition of that ability, and preparation for it, is certainly secular. Plaintiff-appellees "have conceded that the visit in its entirety has primarily at least a secular character." Note 2, *supra*. The religious intent of the City was at most incidental to its primary concern with the safety of its citizens. I do not disagree that the platform was used for a religious ceremony, but the lingering question is what would have occurred in the absence of a platform. Perhaps the Archdiocese would have built a platform; but perhaps, as in Zaire, it would have depended on traditional modes of assuring safety. In Justice Frankfurter's phrase, "[i]n light of these considerations, can it reasonably be said that no substantial non-ecclesiastical purpose relevant to a well-ordered social life exists . . .?" *McGowan v. Maryland*, 366 U.S. 420, 504–05, 81 S.Ct. 1177, 1178, 6 L.Ed.2d 393 (1961) (Opinion of Frankfurter, J.). I must answer this question negatively.

B.

The second part of the test for establishment clause violations is whether the primary effect of the expenditures neither advances nor inhibits religion. In applying this criterion, however, we as jurists should recognize that our guidance comes not from the text of the Constitution, "but [from] our own prepossessions." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 238, 68 S.Ct. at 478 (Jackson, J., concurring). Application of this criterion is not greatly aided by prior Supreme Court decisions, which "lack . . . a principled and logical thread." *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 521 (3d Cir.) (Weis, J., concurring), *aff'd without opinion*, 442 U.S. 907, 99 S.Ct. 2818, 61 L.Ed.2d 273 (1979).

In examining governmental action under the primary effect criterion, we do well to remember that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344, 49 L.Ed.2d 179 (1976) (Blackmun, J., joined by Burger, C. J., and Powell, J., announcing the judgment of the Court). Total separation between church and state is neither possible nor constitutionally mandated. *See Lemon v. Kurtzman*, 403 U.S. at 614, 91 S.Ct. at 2112, *Zorach v. Clauson*, 343 U.S. 306, 312, 72

S.Ct. 679, 683, 96 L.Ed. 954 (1952). The proper analysis must determine whether the primary *and substantial* effect of the expenditure was in aid of religion.

Philadelphia's concern with the safety of the throng present for Pope John Paul II's ceremony, discussed *supra*, was manifested in the expenditures incurred. The absence of disturbances in the unprecedented crowd should not be overlooked. The considerations outlined above that motivated the City to provide the platform and public address equipment support the conclusion that the primary effect of these expenditures was crowd control. The mass would have occurred regardless of the expenditures, but may have been accompanied by tragedy.

Like the *Walz* Court's determination of "minimal and remote involvement" in granting tax exemptions to properties used for religious worship, I believe the same characterization applies to a *one-time* use of a wooden platform in conjunction with a papal visit to Philadelphia. Although a portion of the Catholic liturgy was performed on the platform, that ceremony consumed only a short period on a single day. It was not repeated like the daily reading of a prayer in a schoolroom. The Court has noted that "[t]he problem, like many problems in constitutional law, is one of degree." *Zorach*, 343 U.S. at 314, 72 S.Ct. at 684. As Justice Jackson wrote, "[m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 236, 68 S.Ct. at 477 (Jackson, J. concurring). Similarly, a secular welcome by Philadelphia to the head of the Holy See, without the pomp and splendor of a papal mass, would also be "eccentric and incomplete."

To permit the celebration of a mass in a public place, as the appellees concede we should, but to abjure an elevated platform from which the Pope would be made visible to a million people, or an amplifying system which would carry his voice to them, and to deny the City the right to decorate Logan Circle with flowers, a world-wide symbol of hospitality, is, in my view, sheer sophistry. No constitutional scholar, on or off the bench, has previously defended such a diaphanous distinction. Appellees in this case predicate their challenge to Pope John Paul II's visit on grounds that require the court to examine the fine line closely. They challenge only one-sixth of the City's total expenditures for the two-day visit. They do not challenge the use of public property for the situs of the mass. They question only the labor and materials for the erection of the platform, the planting of shrubs and flowers, and the rental of sound equipment and chairs. I presume that had Pope John Paul II conducted mass at ground level with no chairs or amplification system, there would have been no lawsuit. *See O'Hair v. Andrus*, 613 F.2d 931 (D.C.Cir. 1979).

More than a million people attended the gathering at Logan Circle. The papal mass was not solely for the Catholics in attendance and was not the primary purpose of the visit to the city. The commemorative supplement produced by The Philadelphia Inquirer and KYW–TV [10] referred to "the mood of the throngs of Catholics, Protestants, blacks and whites who awaited the Pope" at the mass. This two-or-three hour event deserves the same treatment as other practices previously determined not to have a principal or primary effect of advancing religion, such as the singing of Christmas carols and the commemoration in public schools of Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. *See Florey v. Sioux Falls School District*, 619 F.2d 1311, 1319–20 (8th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 409, 66 L.Ed.2d 251 (1980).[11] Relative to the im-

10. "Pope John Paul II in Philadelphia," distributed to the court at oral argument by appellees.

11. Other analogous examples of state action not deemed offensive to the establishment clause include providing non-public school students with textbooks, standardized testing and

pressive security concerns, the religious effect produced by Philadelphia's expenditures in this case is neither primary nor substantial.

C.

I turn now to the issue of excessive government entanglement with religion. The appellees' entanglement analysis hinges on two arguments. First, they emphasize the close contact between the City and Archdiocese in planning for the papal visit, and the exclusive distribution of tickets by the Archdiocese. In light of the safety concerns surrounding the Pope's visit, it is not surprising that the City and Archdiocese worked closely together. What this analysis fails to establish is that any substantial increase in contact arose from the construction of the platform over what would have occurred had the City expended no money other than for police escorts and direct protection. Similarly, the distribution of tickets would seem the normal province of the Archdiocese. In addition, as previously noted, the recipients of tickets were not the people evoking the most concern because they would be able to hear and see without aid, and therefore were not expected to become unruly.

The second part of the appellees' entanglement analysis emphasizes the potential for political divisiveness generated by the expenditures. The risk of divisiveness is diminished, however, because of the one-time nature of the expenditures. *See Roemer*, 426 U.S. at 765–66, 96 S.Ct. at 2353, 2354 (Blackmun, J., joined by Burger, C. J., and Powell, J., announcing the judgment of the Court). The number of plaintiffs has never been an accurate index of political divisiveness, and should not be. Courts are available for dispute resolution; the mere filing of a lawsuit does not connote the extreme political and religious divisiveness with which the drafters of the first amendment were familiar.

In my view, the very theory advanced by appellees requires the City to violate the establishment clause. They concede that the platform constructed by the City at the airport did not violate the establishment clause, even though the Pope pronounced a blessing from it.[12] The distinction urged by appellees between the Logan Circle platform and the airport platform would require the City to evaluate "the religious context of a religious organization [and] is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman*, 403 U.S. at 620, 91 S.Ct. at 2114. It would require a court to engage "in a searching and therefore impermissible inquiry into church polity." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723, 96 S.Ct. 2372, 2387, 49 L.Ed.2d 151 (1976). The plaintiff-appellees suggest that the City, or a civil court, assume the role of a liturgical expert, separating out expenditures in support of blessings pronounced by Pope John Paul II and expenses for crowd control during celebration of a mass. The executor of this theory, however, would be required to disallow funds for construction of a platform for the same mass.

Judge Leventhal's statement for the United States Court of Appeals for the District of Columbia Circuit in *O'Hair v. Andrus* is also appropriate here:

> Appellants conceded at trial and at oral argument that the Pope could be issued a permit to deliver a sermon, arguing that

scoring services, and diagnostic, therapeutic, and remedial services, *see Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), non-categorical grants to private colleges, including religious institutions, *see Roemer v. Board of Public Works*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), secular textbooks on an equal basis to children attending public and religious schools, *see Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975); *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), publicly financed transportation for parochial school children, *see Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), and financial aid to church related colleges for construction of buildings, *see Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973). *See also Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d at 522 (Weis, J., concurring).

12. *See* transcript of oral argument at 26.

it is the unique religious nature of the Mass that sets it apart. This contention runs counter to the principles of the First Amendment by hopelessly entangling the government with religion. Such a distinction would involve the government in the task of defining what was religious and what was non-religious speech or activity—an impossible task in an age where many and various beliefs meet the constitutional definition of religion. The administration of such a test would impermissibly entangle government and religion.

613 F.2d at 936 (footnote omitted). The argument advanced by appellees and accepted by the majority would require a governmental entity to examine each activity of the Pope, categorizing each as religious or secular. As this case demonstrates, these distinctions are not clear, and the determinations cannot be made without substantial intrusion by the state in matters primarily religious.

IV.

The court's holding today may have little precedential value in the event of future visits to Philadelphia by the head of the Holy See. It is doubtful that he will return during the lives of those who welcomed him. Nevertheless, I have an abiding fear that this ruling will have a direct effect on government relations with other religious states, some of which receive direct financial aid from the United States. The lesson of the district court, affirmed by this court today, is that governmental finances expended for or on behalf of such nations must always be carefully, if not meticulously, examined to determine the precise portion of the funds that may be devoted to arguably religious purposes. I believe that this examination will excessively entangle the government in religious affairs in the future.

Because of the dangers of this excessive entanglement in the case at bar and because the primary purpose and effect of the City's expenditures for the platform were secular, I would order judgment in favor of the City of Philadelphia. Accordingly, I dissent.

UNITED STATES of America

v.

Vince GIOVENGO, Samuel Paladino.

Appeal of Samuel PALADINO.

No. 80-1793.

United States Court of Appeals, Third Circuit.

Argued Nov. 6, 1980.

Decided Dec. 31, 1980.

Rehearing and Rehearing In Banc Denied Jan. 26, 1981.

Defendant was convicted in the United States District Court for the Western District of Pennsylvania, Gustave Diamond, J., of violating federal wire fraud statute, and conspiring to commit wire fraud, and he appealed. The Court of Appeals, Adams, Circuit Judge, held that fraudulent scheme of defendant and another airline ticket agent in which they made use of communications network linking airline computer in Kansas City to terminals in Pittsburgh in order to defraud airline out of price of one-way tickets sold for cash fell within federal wire fraud statute.

Affirmed.

1. Telecommunications ⇐362

Application of federal wire fraud statute is not limited to interstate wire communications regulated by Federal Communications Commission. 18 U.S.C.A. § 1343.

2. Telecommunications ⇐362

Fraudulent scheme of defendant and another airline ticket agent in which they made use of communications network linking airline computer in Kansas City to terminals in Pittsburgh in order to defraud airline out of price of one-way tickets sold for cash fell within federal wire fraud statute. 18 U.S.C.A. § 1343.

Frank AFRICA, Appellant,

v.

The COMMONWEALTH OF PENNSYLVANIA Leroy S. Zimmerman (Attorney General) Bureau of Corrections Ronald Marks (Commissioner of B.O.C.).

No. 81-2325.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Sept. 22, 1981.

Decided Oct. 30, 1981.

Rehearing Denied Nov. 24, 1981.

As Amended Jan. 6, 1982.

Prisoner sought injunction requiring state prison authority to provide him allegedly special religious diet or requiring that he be maintained in county institution where his dietary requisites could continue to be satisfied. The United States District Court for the Eastern District of Pennsylvania, John B. Hannum, J., 520 F.Supp. 967, denied application for injunctive relief, and appeal was taken. The Court of Appeals, Adams, Circuit Judge, held that: MOVE, which was described by prisoner as a "revolutionary" organization "absolutely opposed to all that is wrong" was not a religion within purview and definition of First Amendment, in that organization did not address fundamental and ultimate questions, it was not comprehensive in nature and did not have the defining structural characteristics of a traditional religion.

Affirmed.

1. Constitutional Law ⇐84

In order for particular beliefs, alleged to be religious in nature, to be accorded First Amendment protection, court must decide whether beliefs avowed are sincerely held and religious, in claimant's scheme of things. U.S.C.A.Const.Amend. 1.

2. Constitutional Law ⇐84
Prisons ⇐4(14)

For purposes of suit in which state prisoner sought order requiring state prison authority to provide him an allegedly special religious diet, MOVE, described by prisoner as a "revolutionary" organization "absolutely opposed to all that is wrong," was not a religion within purview and definition of First Amendment, in that organization did not address fundamental and ultimate questions, it was not comprehensive in nature and did not have defining structural characteristics of a traditional religion. U.S.C.A.Const.Amend. 1.

Albert John Snite, Jr., Asst. Defender, Defender Association of Philadelphia, Philadelphia, Pa., for appellant.

Frank Africa, pro se.

Leroy S. Zimmerman, Atty. Gen., Harrisburg, Pa., by Mark N. Cohen, Deputy Atty. Gen., Philadelphia, Pa., for appellees.

Before SEITZ, Chief Judge, and VAN DUSEN and ADAMS, Circuit Judges.

OPINION OF THE COURT

ADAMS, Circuit Judge.

Frank Africa, who claims to be a "Naturalist Minister" for the MOVE organization and who is a prisoner of the Commonwealth of Pennsylvania, appeals from a district court judgment holding that the state government is not required, under the religion clauses of the first amendment, to provide him with a special diet consisting entirely of raw foods. He maintains that to eat anything other than raw foods would be a violation of his "religion." After a careful consideration of the record in this case, we affirm.

I.

On July 15, 1981, Frank Africa was convicted of various state offenses by a Pennsylvania court and was sentenced to serve a term of up to seven years at the State Correctional Institution at Graterford, Pennsylvania. Prior to his sentence, Africa

had been incarcerated in Holmesburg Prison, a facility under the jurisdiction of Philadelphia County. While at Holmesburg, Africa requested and received a special diet of uncooked vegetables and fruits.

Africa filed a motion for a temporary restraining order in federal district court on July 16, 1981, seeking an order either that he remain in Holmesburg for the duration of his sentence or that Graterford, upon his transfer there, be required to provide him with his dietary needs. In his pleading for relief, Africa averred that, as a Naturalist Minister for MOVE, "I eat an all raw food diet in accordance with my Religious principle. To eat anything else . . . would be a direct violation of my Religion and I will not violate my Religion for anyone."[1] Africa's motion was assigned to Judge Hannum, who classified the matter as a civil rights action under 42 U.S.C. § 1983.

State authorities transferred Africa from Holmesburg to Graterford on July 17, 1981. Later that same day, at Judge Hannum's request, the Common Pleas Court of Philadelphia entered an order directing that Africa be returned to Holmesburg pending resolution of his request for injunctive relief. Pursuant to that order, Africa was sent back to Holmesburg on July 20 and his special diet was restored.

On July 27, 1981, the district court conducted a hearing on Africa's motion, which was treated as an application for a permanent injunction, and received testimony from Africa himself, Ramona Johnson, a "supporter" of MOVE, and Julius T. Cuyler, the superintendent of Graterford. At the hearing, Africa acted pro se and was questioned directly by the court. Judge Hannum sought to determine, among other things, whether Africa's diet was mandated by his "religion," and, if so, whether the Commonwealth could demonstrate a compelling interest sufficient to infringe upon Africa's dietary practices. Because our disposition of Africa's appeal depends so heavily upon the particular facts of this case, it will be necessary to set forth in some detail the evidence introduced in the proceeding below.

Based on Africa's testimony and on materials he provided the district court, MOVE is a "revolutionary" organization "absolutely opposed to all that is wrong." MOVE was founded, although the record does not reveal when, by John Africa, who serves as the group's revered "coordinator" and whose teachings Frank Africa and his fellow "family" members follow. MOVE has no governing body or official hierarchy; instead, because "everything is level" and "there are no ups or downs," all MOVE members, including John Africa, occupy an equivalent position within the organization. In fact, MOVE really has only "one member, one family, one body" since, according to Frank Africa, to talk to an individual MOVE "disciple" is to "talk to everybody."

Africa also summarized what he believed to be the tenets that defined the MOVE organization. MOVE's goals, he asserted, are "to bring about absolute peace, . . . to stop violence altogether, to put a stop to all that is corrupt." Toward this end, Africa and other MOVE adherents are committed to a "natural," "moving," "active," and "generating" way of life. By contrast, what they alternatively refer to as "this system" or "civilization" is "degenerating": its air and water are "perverted"; its food, education, and governments are "artificial"; its words are "gibberish." Members of MOVE shun matters "systematic" and "hazardous"; they believe in "using things [but] not misusing things." Thus, according to Africa:

> the air is first, but pollution is second. Water is first, but poison is second. The food is first, but the chemicals that hurt the food are second.... We believe in the first education, the first government, the first law.... This is the perception that *John Africa* has given us. The water's existence is to be drunk and *not* poisoned, the air's presence is to be breathed and *not* polluted, the food's purpose is to be eaten and *not* distorted.

1. To assist the reader, we have corrected mistakes of spelling and punctuation present in various materials submitted by Mr. Africa to the district court and quoted herein.

> The abuse that life suffers MOVE suffers the *same*.

MOVE endorses no existing regime or lifestyle; it yields to none in its uncompromising condemnation of a society that it views as "impure," "unoriginal," and "blemished."

According to Africa, MOVE is a religion. In fact, he insists that "just as there is no comparison between the sun's perfection and the lightbulb's failure, there is no comparison between the absolute necessity of our belief and this system's interpretation of religion." Africa testified that MOVE members participate in no distinct "ceremonies" or "rituals"; instead, every act of life itself is invested with religious meaning and significance. In his words:

> We are practicing our religious beliefs all the time: when I run, when I put information out like I am doing now, when I eat, when I breathe. All of these things are in accordance to our religious belief.... We don't take a date out of the week to practice our religion and leave the other days and say that we are not going to practice our religion ... It is not a one-day thing or a once-a-week thing or a monthly thing. It doesn't have anything to do with time. Our religion is constant. It is as constant as breathing.... Every time a MOVE person opens their mouth, according to the way we believe, according to the way we do things, we are holding church.

Similarly, Africa contends that, since no one day is any more special than another, for MOVE members every day of the year can be considered a religious "holiday."

Africa did not provide the district court with any purportedly official guidelines setting forth MOVE's religious credo. He did submit, however, a document, which he apparently authored, entitled *Brief to Define the Importance of MOVE's Religious Diet.* That document, which Africa asserts is wholly consonant with the teachings of John Africa, sets forth an elaborate explanation of the MOVE philosophical framework and consequently constitutes extremely pertinent evidence for purposes of assessing the nature of the organization. In the *Brief*, Africa contends that "while religion is seen as a way of life, our religion is simply *the* way of life, as our religion in fact *is* life." Individuals who subscribe to the MOVE ideology must live in harmony with what is natural, or untainted:

> Water is *raw*, which makes it *pure*, which means it is *innocent, trustworthy*, and *safe*, which is the same as *God*.... Our religion is raw, our belief is pure as original, reliable as chemical *free* water, ... nourishing as the earth's soil that connects us to food, satisfying as the air that gives breath to all life.

By rejecting the "polluted" and the "fraudulent," and by concentrating instead on the "healthy" and the "original," men and women are put "in touch with life's vibration." Africa asserts that, "when flowing, moving along with the activity of life, ... the less you resist the power that commands this flow the more you become forceful *as* the flow."

Central to this conception of an unadulterated existence is what Africa refers to as MOVE's "religious diet." That diet is comprised largely of raw vegetables and fruits;[2] MOVE members who fully adhere to the diet[3] decline to eat any foods that

2. *The MOVE Organization's Religious Diet*, a document made available to the district court, explains that the diet desired by MOVE members consists of:

> [r]aw, uncut-unpeeled, unprocessed chemical free sweet potatoes, yams, white potatoes, turnip roots, *all roots* of organic eatable nature, wild rice organic, wild organic garlic, onions, peppers, tomatoes, corn, spinach, raw unopened unprocessed nuts, berries, melons, oranges, peaches, pears, grapes, bananas, apples, organic eggs, raw organic water meats, and some land meats....

Appendix at A–117.

3. Africa does not assert that every member of MOVE follows the dietary regimen he describes. In fact, any such assertion would be inconsistent with other evidence contained in the record. Judge Hannum found, after conducting an in-person inspection of the prison at Graterford, that "all MOVE members presently incarcerated are not practicing an alleged MOVE preferred diet." And in *The MOVE Organization's Religious Diet*, it is explained that "there will be members requesting food

have been processed or cooked. "There is nothing unusual or special about our diet," Africa declares in his *Brief*; rather, "our religious diet is common and uncomplicated because our diet is provided by *God* and already *done*." Failure to follow the diet constitutes deviation from the "direct, straight, and true" and results in "confusion and disease." In part, Africa's total commitment to specific provisions appears prudently based, since he asserts that it is "impossible" for an individual's body to adjust to more traditional fare after it has become accustomed to natural foods. But Africa also insists that he is obligated to follow his diet:

> To take away our diet is to leave me to eat nothing, for I have *no* choice, because when given a choice between eating poison and eating nothing, I have no choice but to eat nothing, for I *can't* eat other than raw. This would be *suicidal* and suicide is against life's ministry.

Africa contends that the diet, in conjunction with "our founder's wisdom," transformed him from a weak, timid, and ailing being to a strong, confident, and healthy individual. "Our religious diet is work, hard work, simple consistent unmechanized unscientific self-dependent work," he concludes; "our religious diet is family, unity, consistency, [and] uncompromising togetherness."

Dietary considerations excepted, Africa shed little light upon what, if any, ethical commandments are part and parcel of the MOVE philosophy. In response to specific questioning by the district court, Africa testified that MOVE members would be unable to serve in the armed forces, since "it is impossible for us to defend this system." At the same time, though, he stressed that, from his point of view, there was nothing inconsistent in seeking judicial intervention to prevent his transfer to Graterford:

> We are taught to use anything, anything that is necessary to bring about our purpose.... I have to do whatever is necessary to get my point across, to teach people.... I am using this system as a bridge to get my purpose to people [and to get] the poor people on my side.

"When you are right, you are deserving of protection," Africa declared, "and everything that is in our interest is right."

Africa's discussion of the MOVE organization and its dietary precepts was corroborated by the testimony of Ramona Johnson, a self-labeled "MOVE supporter." Johnson testified that her "brother" was "ordained" as a naturalist minister of MOVE by John Africa, and that he is an ardent follower of his religion and its mandates. Johnson confirmed, but added little to Africa's description of the concerns that lie at the heart of the MOVE ideology. She contended that the MOVE "religion is total; it encompasses every aspect of MOVE members' lives; there is nothing that is left out." And she stressed that Africa's raw food diet is both a necessary "part of" and a sincere "reflection of" his religious commitment. In support of this last observation, Johnson testified that Africa in fact had gone without food for the four day period in July when he was imprisoned at Graterford.

The final witness at the hearing in the district court was Julius T. Cuyler, the superintendent of Graterford. Cuyler testified that his institution was unwilling to meet the dietary needs of Frank Africa. He expressed concern about the possibility of "a proliferation of other groups surfacing in our prison requesting special diets" and warned that, were a court to grant Africa's desired relief, MOVE would attract new "sympathizers." Cuyler contended that the prison's cafeteria already made available to inmates a number of raw foods, such as bananas, apples, and oranges. There were practical reasons, he explained, why Graterford could not be any more accommodating in this regard: it would be "quite a major problem to buy the items that are listed on this diet in the retail market"; the prison's accounting system would be unable to handle such a "major

that is not listed in MOVE's religious diet, which is understandable and expected, as everybody in MOVE understands [that] people coming to MOVE with customs other than MOVE's must run clear of these customs at their own pace." *See* note 5 *infra*.

deviation" in the procurement process; some of the foods asked for by Africa, particularly the potatoes, rice, corn, and berries, if "not kept under strict security, . . . would probably be stolen and used for other purposes," such as to "make homemade booze"; accumulation of raw food might lead to a "rodent problem"; and furnishing special diets might delay the prison's feeding process, with the result that "our entire population will be deprived of just that much of recreation [time]." In short, according to Cuyler, providing Africa with a raw food diet "could be the straw that could break the camel's back."

On August 21, 1981, the district court denied Africa's application for injunctive relief. *Africa v. State of Pennsylvania*, 520 F.Supp. 967 (E.D.Pa.1981). In an opinion accompanying his order, Judge Hannum concluded that, because Africa's sentence was for a period of at least five years, it was not possible, under Pennsylvania law, to grant his request to serve the remainder of his term at Holmesburg.[4] Moreover, Africa had failed to establish that MOVE is "a religion within the purview and definition of the first amendment." On the contrary, according to the district court, "MOVE is merely a quasi-back-to-nature social movement of limited proportion and with an admittedly revolutionary design." As an organization, it is concerned solely with "concepts of health and a return to simplistic living." This the district court found to be more akin to a "social philosophy" than to a religion:

> While MOVE members may respect and respond to religious concepts, these concepts are not subsumed by the MOVE ideology. Rather MOVE exists, as do virtually all other organizations in our society, independent of religion and with separate and distinct purposes while still respecting and abiding by external religious principles.

Consequently, the district court concluded that both Frank Africa and MOVE itself "are not entitled to the first amendment protections and rights respecting the exercise of religion."[5] *Id.* at 970.

Africa immediately appealed the district court's decision to this Court. On August 28, 1981, we ordered that Africa's transfer to Graterford be stayed pending determination of his appeal, which we expedited. In addition, we directed that Albert John Snite, Jr. of the Defender Association of Philadelphia be appointed counsel for Africa for this appeal.

II.

[1] The relevant case law in the free exercise area suggests that two threshold

4. Africa does not question this determination, which was clearly correct, *see* 42 Pa.Const. Stat.Ann. § 9762 (Purdon) (1981).

5. After reaching this determination, the district court proceeded to consider two additional matters. First, relying primarily on Chief Justice Burger's concurring opinion in *Cruz v. Beto*, 405 U.S. 319, 323, 92 S.Ct. 1079, 1082, 31 L.Ed.2d 263 (1972), the court held that even if MOVE were declared a religion, state prison authorities would be under no affirmative duty to provide Africa with his dietary requisites. Although Africa enjoyed the freedom to believe as he wished, he could not assert an absolute right to practice his beliefs while in prison. Second, the court noted that other MOVE members apparently did not follow what Africa claimed was MOVE's religiously mandated diet. *See* note 3 *supra*. From this fact the court concluded that "the MOVE proposed or preferred diet is merely a choice of personal preference" and, as such, did not qualify for special treatment under the first amendment. *Africa v. State of Pennsylvania*, 520 F.Supp. 967, 970–71 (E.D.Pa.1981).

In light of our ultimate resolution of this appeal, it is unnecessary for us to address either of these two "in-the-alternative" determinations. We note, however, that the district court's second conclusion may not be compatible with the Supreme Court's recent observation that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd., Ind. Employment Sec. Div.*, 450 U.S. 707, 715, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1981). And with respect to the district court's first contention, it is observed that the Chief Justice's concern in *Cruz* had to do with the distribution of literature within a prison, and not with the receipt of food by prisoners. A number of courts have been willing to uphold prisoners' religiously based dietary claims. *See e. g., Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975); *see generally*, Note, *Free Exercise of Religion in Prisons—The Right to Observe Dietary Laws*, 45 Fordham L.Rev. 92 (1976).

requirements must be met before particular beliefs, alleged to be religious in nature, are accorded first amendment protection. A court's task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965); *Callahan v. Woods*, 658 F.2d 679 (9th Cir. Oct. 5, 1981). If either of these two requirements is not satisfied, the court need not reach the question, often quite difficult in the penological setting,[6] whether a legitimate and reasonably exercised state interest outweighs the proffered first amendment claim.

A.

It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy.[7] *See United States v. Ballard*, 322 U.S. 78, 85–88, 64 S.Ct. 882, 885–87, 88 L.Ed. 1148 (1944). The Supreme Court has emphasized, however, that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.'" *Seeger, supra*, 380 U.S. at 185, 85 S.Ct. at 863.[8] Without some sort of required showing of sincerity on the part of the individual or organization seeking judicial protection of its beliefs, the first amendment would become "a limitless excuse for avoiding all unwanted legal obligations."[9]

The requirement of sincerity poses no obstacle to Africa in this case. Although the district court made no specific findings in this regard, the Commonwealth never intimated, either at the hearing below or on this appeal, that Africa's convictions, however they might be denominated, were other than deeply held and sincerely advanced. Moreover, we are persuaded from our review of the record that Africa's opinions,

6. *Compare St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980) *with St. Claire v. Cuyler*, 643 F.2d 103 (3d Cir. 1980) (Adams, J., dissenting from denial of petition for rehearing); *see generally* Comment, *The Religious Rights of the Incarcerated*, 125 U.Pa.L.Rev. 812 (1977). *See also Alim v. Byrne*, 521 F.Supp. 1039, 1045 (D.N.J.1980) (holding that limitations placed upon the religious activities of two prison groups found to be religious organizations were "reasonable under the circumstances").

7. "I cannot give up my guidance to the magistrate; because he knows no more of the way to heaven than I do & is less concerned to direct me right than I am to go right." Jefferson, *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in I The Papers of Thomas Jefferson 525, 547 (J. Boyd ed. 1950).

8. *Seeger* was a case of statutory interpretation, involving § 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j) (1958 ed.) (requiring belief in "a Supreme Being" in order to qualify for conscientious objector status). We have found no case in which the Supreme Court has explicitly concluded that an inquiry into a claimant's sincerity also is necessary in a constitutional context. Such a requirement, however, plausibly can be inferred from *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), and a number of lower federal courts have so held. *See Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981); *Theriault v. Carlson*, 495 F.2d 390, 394–95 (5th Cir.), *cert. denied*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974); *Maguire v. Wilkinson*, 405 F.Supp. 637, 640 (D.Conn.1975). In addition, in two recent decisions, the Supreme Court observed, without commenting upon the significance of its observation, that the religious claim with which it dealt was sincerely held. *Thomas v. Review Bd., Ind. Employment Sec. Div.*, — U.S. —, —, 101 S.Ct. 1425, 1434, 67 L.Ed.2d 624 (1981) ("petitioner terminated his work because of an honest conviction that such work was forbidden by his religion"); *Wisconsin v. Yoder*, 406 U.S. 205, 235, 92 S.Ct. 1526, 1543, 32 L.Ed.2d 15 (1972) ("the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs").

9. L. Tribe, American Constitutional Law 859 (1978). *See Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir.), *cert. denied*, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974) (first amendment does not protect "so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 Harv.L.Rev. 1381, 1417–18 (1967); Comment, *The Religious Rights of the Incarcerated, supra* note 6, at 861 n.306 (sincerity inquiry is "especially important in prison free exercise cases because the bleakness of institutional life may create an incentive falsely to allege religious motivation for acts" otherwise forbidden by prison authorities).

especially those having to do with his diet, are "truly held" within the meaning of *Ballard* and *Seeger*.[10] We turn, therefore, to the second issue: whether Africa's beliefs, however sincerely possessed, are religious in nature.

B.

Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment. Judges are ill-equipped to examine the breadth and content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. "Religions now accepted were persecuted, unpopular and condemned at their inception." *United States v. Kuch*, 288 F.Supp. 439, 443 (D.D.C.1968). Nonetheless, when an individual invokes the first amendment to shield himself or herself from otherwise legitimate state regulation, we are required to make such uneasy differentiations. In considering this appeal, then, we acknowledge that a determination whether MOVE's beliefs are religious and entitled to constitutional protection "present[s] a most delicate question"; at the same time, we recognize that "the very concept of ordered liberty precludes allowing" Africa, or any other person, a blanket privilege "to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215–16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972).

The Supreme Court has never announced a comprehensive definition of religion for use in cases such as the present one.[11] There can be no doubt, however, that the Court has moved considerably beyond the wholly theistic interpretation of that term expressed in cases such as *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890) (" 'religion' has reference to one's views of his relations to his Creator"). In *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965), the Court recognized as religious for purposes of the Universal Military Service and Training Act an individual's "sincere religious beliefs," even though not theistic in nature, if "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." 380 U.S. at 176, 85 S.Ct. at 859. A similar "parallel"-belief approach was employed in *Welsh v. United States*, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), where conscientious objector status was extended to a military conscript even though he declined to profess belief in a Supreme Being. The four Justices in *Welsh* who considered the constitutional question, in addition to the statutory issue, either expressly or implicitly defined religion to include non-theistic ideologies. *Id.* 398 U.S. at 356, 90 S.Ct. at 1804 (Harlan, J., concurring); *id.* 398 U.S. at 367–74, 90 S.Ct. at 1810–14 (White, J., dissenting, joined by Burger, C. J., and Stewart, J.); *see Malnak v. Yogi*, 592 F.2d 197, 205 (3d Cir. 1979) (Adams, J., concurring). And in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), the Court struck down as a violation of the establishment clause a Maryland statute requiring public officials to declare their belief in God before taking office. Justice Black, writing for a unanimous Court, concluded that a state could not favor "those religions based on a belief in the existence of God as against those religions founded on different beliefs"; in a

10. There is nothing in the record to indicate that Africa has merely "adopt[ed] religious nomenclature and cynically use[d] it as a shield to protect [himself] when participating in antisocial conduct that otherwise stands condemned," *United States v. Kuch*, 288 F.Supp. 439, 443 (D.D.C.1968), or that MOVE is "a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as 'religious.' " *Theriault v. Silber*, 453 F.Supp. 254, 260 (W.D.Tex. 1978).

11. *See Malnak v. Yogi*, 592 F.2d 197, 200–07 (3d Cir. 1979) (Adams, J., concurring); Note, *Toward a Constitutional Definition of Religion*, 91 Harv.L.Rev. 1056, 1057–66 (1978).

footnote, he observed that a number of religious groups within the United States do not hold to theistic doctrines. *Id.* 367 U.S. at 495 & n.11, 81 S.Ct. 1684 & n.11.

Drawing upon these Supreme Court cases, a number of lower federal courts have adopted a broad, non-theistic approach to the definition-of-religion question.[12] In considering a first amendment claim arising from a non-traditional "religious" belief or practice, the courts have "look[ed] to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'" *Malnak, supra*, 592 F.2d at 207 (concurring opinion). In essence, the modern analysis consists of a "definition by analogy" approach. It is at once a refinement and an extension of the "parallel"-belief course first charged by the Supreme Court in *Seeger*.

[2] In conducting its inquiry in the case at bar, the district court employed what it referred to as the "inherently vague definitional approach" enunciated in the concurring opinion in *Malnak, supra*. *Africa v. State of Pennsylvania*, 520 F.Supp. 967, 970 (E.D.Pa.1981). In the *Malnak* opinion, which explicitly adopted the "definition by analogy" process, three "useful indicia" to determine the existence of a religion were identified and discussed. First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[13] Applying these three factors, the concurring opinion in *Malnak* concluded that the Science of Creative Intelligence-Transcendental Meditation constituted a religion under the first amendment despite the contentions of its leaders to the contrary. After considering Africa's testimony in light of these guideposts, we reach the obverse result: in spite of his protestations, we conclude that MOVE, at least as described by Africa, is not a "religion," in the sense that that term is used in the first amendment.[14]

12. *See Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) ("beliefs holding the same important position for members of one of the new religions as the traditional faith holds for more orthodox believers are entitled to the same treatment as the traditional beliefs"); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir.1969); *Alim v. Byrne*, 521 F.Supp. 1039 (D.N.J.1980); *Womens Services, P. C. v. Thone*, 483 F.Supp. 1022, 1034 (D.Neb.1979); *Remmers v. Brewer*, 361 F.Supp. 537, 540 (S.D.Iowa 1973). A number of commentators also have recommended a non-theistic definition of religion. *See* L. Tribe, American Constitutional Law § 14–6 (1978) (proposing "arguably religious" test for use in free exercise clause cases); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U.Pa.L.Rev. 479 (1968); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 Duke.L.J. 1217, 1245; Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U.Chi.L.Rev. 805, 831 (1978) ("the meaning of 'religion' [may be] minimally objectified by testing a claimant's characterization of his beliefs against a traditionally accepted notion of religion as involving duties and obligations to conform to the standards of a unified belief system that cuts across and directs more than a single aspect of an individual's life"); Comment, *Toward a Constitutional Definition of Religion, supra* note 11, at 1072–83; Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U.Chi.L.Rev. 533, 550–51 (1965).

13. *Malnak, supra*, 592 F.2d at 207–10 (concurring opinion). The concurring opinion did not purport to have isolated the only possible factors that could be used to "test" for the presence of a religion. It recognized that "[f]lexibility and careful consideration of each belief system are needed." Still, the opinion stressed that "it is important to have some objective guidelines in order to avoid *ad hoc* justice." *Id.* at 210.

14. In *Malnak*, representatives of the Science of Creative Intelligence-Transcendental Meditation organization opposed designation as a religion in order to continue to teach SCI/TM in certain New Jersey public schools and in order to continue to receive federal funds for that purpose. It is not controlling for our analysis that Africa advances his religious claim under the free exercise clause, whereas *Malnak* involved an establishment clause inquiry. The same standards appear to govern the definition-of-religion determination in both contexts. *Malnak, supra*, 592 F.2d at 210–13 (concurring opinion).

Fundamental and ultimate questions. Traditional religions consider and attempt to come to terms with what could best be described as "ultimate" questions—questions having to do with, among other things, life and death, right and wrong, and good and evil. Not every tenet of an established theology need focus upon such elemental matters, of course; still, it is difficult to conceive of a religion that does not address these larger concerns. For, above all else, religions are characterized by their adherence to and promotion of certain "underlying theories of man's nature or his place in the Universe." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C.Cir.1969).

We conclude that the MOVE organization, as described by Africa at the hearing below, does not satisfy the "ultimate" ideas criterion. Save for its preoccupation with living in accord with the dictates of nature, MOVE makes no mention of, much less places any emphasis upon, what might be classified as a fundamental concern. MOVE does not claim to be theistic: indeed it recognizes no Supreme Being and refers to no transcendental or all-controlling force. Moreover, unlike other recognized religions, with which it is to be compared for first amendment purposes, MOVE does not appear to take a position with respect to matters of personal morality, human mortality, or the meaning and purpose of life. The organization, for example, has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim *Koran*, Hinduism's *Veda*, or Transcendental Meditation's Science of Creative Intelligence. Africa insists that he has discovered a desirable way to conduct his life; he does not contend, however, that his regimen is somehow morally necessary or required. Given this lack of commitment to overarching principles, the MOVE philosophy is not sufficiently analogous to more "traditional" theologies.

Despite having concluded that MOVE does not deal with "ultimate ideas," we concede that the matter is not wholly free from doubt. Appointed counsel for Africa argues that MOVE members do share a fundamental concern, namely, an all-consuming belief in a "natural" or "generating" way of life—a way of life that ultimately cannot be reconciled with "civilization" itself. According to counsel, Africa's insistence on keeping "in touch with life's vibration" amounts to a form of pantheism, wherein

> the entity of God is the world itself, and God is "swallowed up in that unity which may be designated 'nature' "... . [MOVE's] return to nature is not simply a "preferred" state. It is the *only* state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism.

Brief for Appellant at 9–11.

We decline to accept such a characterization of Africa's views, however. We recognize that, under certain circumstances, a pantheistic-based philosophy might qualify for protection under the free exercise clause.[15] From the record in this case, though, we are not persuaded that Africa is an adherent of pantheism, as that word is commonly defined.[16] His mindset seems to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (*e. g.*, he contends

15. It is arguable that the Supreme Court implied as much in *Peter v. United States*, a companion case to *United States v. Seeger*, 380 U.S. 163, 169, 187–88, 85 S.Ct. 850, 855, 864–65, 13 L.Ed.2d 733 (1965). *See Malnak v. Yogi*, 592 F.2d 197, 204 & n.19 (3d Cir. 1979) (Adams, J., concurring).

16. Pantheism is "[t]he religious belief or philosophical theory that God and the universe are identical (implying a denial of the personality and transcendence of God); the doctrine that God is everything and everything is God." 2 Compact Edition of the Oxford English Dictionary 2067 (1971). *See* MacIntyre, *Pantheism*, in 6 Encyclopedia of Philosophy 31, 31, 34 (1967) ("Pantheism is a doctrine that usually occurs in a religious and philosophical context in which there are already tolerably clear conceptions of God and of the universe and the question has arisen of how these two conceptions are related.... Pantheism essentially involves two assertions: that everything that exists constitutes a unity and that this all-inclusive unity is divine").

that a raw food diet is "healthy" and that pollution and other such products are "hazardous") and social (*e. g.*, he claims that MOVE is a "revolutionary" organization, "absolutely opposed to all that is wrong" and unable to accept existing regimes), rather than spiritual or other-worldly. Indeed, if Africa's statements are deemed sufficient to describe a religion under the Constitution, it might well be necessary to extend first amendment protection to a host of individuals and organizations who espouse personal and secular ideologies, however much those ideologies appear dissimilar to traditional religious dogmas.

The Supreme Court would appear to have foreclosed such an expansive interpretation of the free exercise clause. *In Wisconsin v. Yoder*, the Court concluded that Wisconsin could not require members of the Amish sect to send their children to school beyond the eighth grade, where there was uncontested evidence that such a course was inconsistent with the Amish religion. The Court arrived at this result only after conducting a searching inquiry into the history and customs of the Amish people and into the nature of their religious teachings and practices. In the course of his opinion for the Court, Chief Justice Burger stressed that the objections of the Amish to compulsory secondary education derived from "deep religious conviction[s]" rather than from a "personal" or "secular" philosophy. According to the Chief Justice:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

406 U.S at 216, 92 S.Ct. at 1533.[17] Precisely the same distinction had been drawn by the Court in the *Seeger* and *Welsh* cases: while an individual could qualify for conscientious objector status on the basis of a genuine "religious belief," reliance upon a "merely personal moral code" was insufficient.

For purposes of the case at hand, then, it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however "ultimate" their ends or all-consuming their means. An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope. As the Supreme Court declared in *Yoder*, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely *secular* considerations; to have the protection of the Religion Clauses, the claims must be rooted in *religious* belief." 406 U.S. at 215, 92 S.Ct. at 1533 (emphasis added).[18] While

17. It is possible, of course, to take issue with the Supreme Court's classification of Thoreau-like beliefs as non-religious. *See Wisconsin v. Yoder*, 406 U.S. 205, 247–49, 92 S.Ct. 1526, 1549–50, 32 L.Ed.2d 15 (1972) (Douglas, J., dissenting in part). It is also possible to dismiss the Court's observations about Thoreau as being unnecessary to dispose of the *Yoder* case. *See* Note, *Toward a Constitutional Definition of Religion*, *supra* note 11, at 1066 n.63. Nonetheless, in light of Justice Douglas' explicit criticism of the majority opinion on precisely this point, it is difficult to conclude other than that the Amish-Thoreau spectrum represented—and from all indications, still represents—the considered position of a majority of the Court. We therefore follow the framework set forth in *Yoder* in deciding the present appeal.

18. The task of drawing distinctions between religiously-based and secularly-derived claims in no way entitles or forces a court to assess the truth of the contentions under review. As was observed earlier, the judicial branch is neither authorized nor equipped to pronounce upon the veracity of a religious precept. Unless, however, every individual's subjective definition of a religion is to be controlling in first amendment litigation, "a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion." *Malnak*, *supra*, 592 F.2d at 208 (concurring opinion).

we do not necessarily agree with the district court's description of MOVE as "merely a quasi-back-to-nature social movement of limited proportion," *Africa, supra*, 520 F.Supp. at 970, we conclude that the concerns addressed by MOVE, even assuming they are "ultimate" in nature, are more akin to Thoreau's rejection of "the contemporary secular values accepted by the majority" than to the "deep religious conviction[s]" of the Amish.

Comprehensiveness. The concurring opinion in *Malnak* stressed that a religion must consist of something more than a number of isolated, unconnected ideas. "A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth.'" 592 F.2d at 209. The Science of Creative Intelligence qualified as a religion, therefore, in part because of its comprehensive nature: its teachings consciously aimed at providing *the* answers to "questions concerning the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness." *Id.* at 213.

In contrast, we cannot conclude, at least on the basis of Africa's testimony, that MOVE members share a comparable "world view." MOVE appears to consist of a single governing idea, perhaps best described as philosophical naturalism. Apart from this desire to live in a "pure" and "natural" environment, however—a desire which we already have deemed insufficiently religious to qualify for first amendment protection—little more of substance can be identified about the MOVE ideology. It would not be possible, we believe, on the basis of the record in this case, to place Africa's dietary concerns within the framework of a "comprehensive belief system." Expressed somewhat differently, were we to conclude that Africa's views, taken as a whole, satisfied the comprehensiveness criterion, it would be difficult to explain why other single-faceted ideologies—such as economic determinism, Social Darwinism, or even vegetarianism—would not qualify as religions under the first amendment.

Again, we acknowledge that our conclusion in this regard is not unassailable. It could be argued that Africa's views are in a sense comprehensive, since, according to his testimony, his every effort and thought is attributable to and explained by his "religious" convictions. MOVE members, according to Africa, "are practicing our religious beliefs all the time," even when running, eating, and breathing.[19] The notion that all of life's activities can be cloaked with religious significance is, of course, neither unique to MOVE nor foreign to more established religions.[20] Such a notion by itself, however, cannot transform an otherwise secular, one-dimensional philosophy into a comprehensive theological system. It is one thing to believe that, because of one's religion, day-to-day living takes on added meaning and importance. It is altogether different, however, to contend that certain ideas should be declared religious and therefore accorded first amendment protection from state interference merely because an individual alleges that his life is wholly governed by those ideas. We decline to adopt such a self-defining approach to the definition-of-religion problem.

Structural characteristics. A third indicium of a religion is the presence of

> any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.

19. *See* Brief for Appellant at 11 ("MOVE's beliefs are totally consuming, totally directing, and totally uncompromising.... MOVE compels a way of life that cannot be altered by *anything* that a person could subjectively evaluate and decide to follow as a matter of personal preference").

20. *See e.g.*, I Corinthians 10:31 ("Whether therefore ye eat, or drink, or whatsoever ye do, do all to the glory of God").

Malnak, supra, at 209 (concurring opinion).[21] MOVE lacks almost all of the formal identifying characteristics common to most recognized religions. For example, Africa testified that his organization did not conduct any special services and did not recognize any official customs. Similarly, the group apparently exists without an organizational structure, since MOVE consists of only "one member" and since "everything is level." In this connection, although Africa claimed to be an ordained "Naturalist Minister," he did not make clear what responsibilities and benefits, if any, this title conferred on him in contradistinction to other MOVE members. Moreover, MOVE apparently celebrates no holidays, since it takes the position that every day of the year is equally important. Finally, although Africa referred to a series of guidelines that supposedly were written by John Africa and that allegedly set forth MOVE's principal tenets, no such documents were made available to the district court; thus, the record contains nothing that arguably might pass for a MOVE scripture book or catechism. Given what we know about the group from the record, we are of the view that MOVE is not structurally analogous to those "traditional" organizations that have been recognized as religions under the first amendment.

21. Since "a religion may exist without any of these signs, . . . they [may not be] determinative, at least by their absence, in resolving a question of definition." *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring). *See Stevens v. Berger*, 428 F.Supp. 896, 900 (E.D.N.Y.1977) ("Neither the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious.")

22. We emphasize that our holding is narrow in scope. We do not hold that MOVE forever must be classified as a purely secular organization. We do not preclude other members of MOVE from establishing, on the basis of other evidence at another time, that they are entitled to the protections afforded by the free exercise clause. Rather, we have focused solely on the description of MOVE made available to the district court by Frank Africa, and have determined only that the set of ideas for which, according to him, that organization stands, does not rise to the level of a religion within the purview of the first amendment.

III.

We conclude first, that to the extent MOVE deals with "ultimate" ideas, a proposition in itself subject to serious doubt, it is concerned with secular matters and not with religious principles; second, that MOVE cannot lay claim to be a comprehensive, multi-faceted theology; and third, that MOVE lacks the defining structural characteristics of a traditional religion. The "new set of ideas or beliefs" presented by Africa does not appear to us to "confron[t] the same concerns, or serv[e] the same purposes, as unquestioned and accepted 'religions,'" *Malnak, supra*, 592 F.2d at 207 (concurring opinion). We hold, therefore, that MOVE, at least as described by Africa, is not a religion for purposes of the religion clauses. We do not conclude that Africa's sincerely-held beliefs are false, misguided, or unacceptable, but only that those beliefs, as described in the record before us, are not "religious," as the law has defined that term.[22]

As the result of our holding in this case, the Commonwealth of Pennsylvania is not required under the first amendment to supply Frank Africa with a special raw-food diet.[23] Such a consequence, however troubling, follows directly from our declaration

23. Our decision in this appeal does not foreclose Africa from challenging, at a later time, the denial of his dietary regimen on other constitutional grounds, particularly the eighth amendment's prohibition against cruel and unusual punishment. While the Commonwealth does not run afoul of the eighth amendment by refusing to provide Africa with what he *wants*, it may do so by refusing to provide him with what he *needs*. According to the testimony below, Africa has followed his special diet for years. It is quite possible, therefore, that any non-raw food provided to him might not be tolerated by his system. In his brief filed with this Court, Africa explains:

> To deprive us of our diet is to starve us of our nourishment that is our God-given right, and starvation is cruel, sadistic, and torturous. . . .
>
> This example can be seen clearly in our sister Gail Africa, who has been insensitively denied her diet, and though she still eats cooked food, . . . her body has become sensitive and demanding of our diet, and because of this starvation she is *now* suffering. Her

that MOVE is not a religion. We do not mean to suggest, however, that the requirements of the first amendment also define the proper scope of prudent state penological policy. Especially in light of the apparent willingness of Graterford officials to accede to the dietary requirements of other prisoners, both for religious and for medical reasons,[24] it is not clear from the record why special accommodations cannot be made in this instance for a prisoner who obviously cares deeply about what food he eats. Nonetheless, as a matter of constitutional law, the Commonwealth prevails. Accordingly, the judgment of the district court will be affirmed.

Michael Everett STREET, Appellant,

v.

P. G. County Police Detective CHERBA; P. G. County Police Detective Robert Derfler, Sex Squad, Appellees.

No. 80-6611.

United States Court of Appeals, Fourth Circuit.

Argued June 4, 1981.

Decided Oct. 1, 1981.

Civil rights action was filed against two Maryland police detectives who arrested plaintiff in a federal enclave in the District of Columbia, and who subsequently transported the plaintiff to Maryland without authorization by the District of Columbia Superior Court. The United States District Court for the District of Maryland, Magistrate Daniel E. Klein, Jr., entered judgment for defendants, and appeal was taken. The Court of Appeals, Haynsworth, Senior Circuit Judge, held that two Maryland police detectives reasonably believed that they were acting lawfully, and thus they could successfully assert their good-faith defense in plaintiff's civil rights suit against them.

Affirmed.

1. Civil Rights ⇐13.10

Police officers in civil rights action were not limited to asserting defenses analogous to those available at common law, but defense of good faith could be raised to a claim of unlawful arrest or illegal extradition. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.8(4)

A police officer is entitled to qualified immunity from an assessment of damages against him in civil rights action if he acted with a reasonable and good-faith belief that he had acted lawfully. 42 U.S.C.A. § 1983.

3. Arrest ⇐66

Generally, an arrest warrant issued in one state may not be lawfully executed in another.

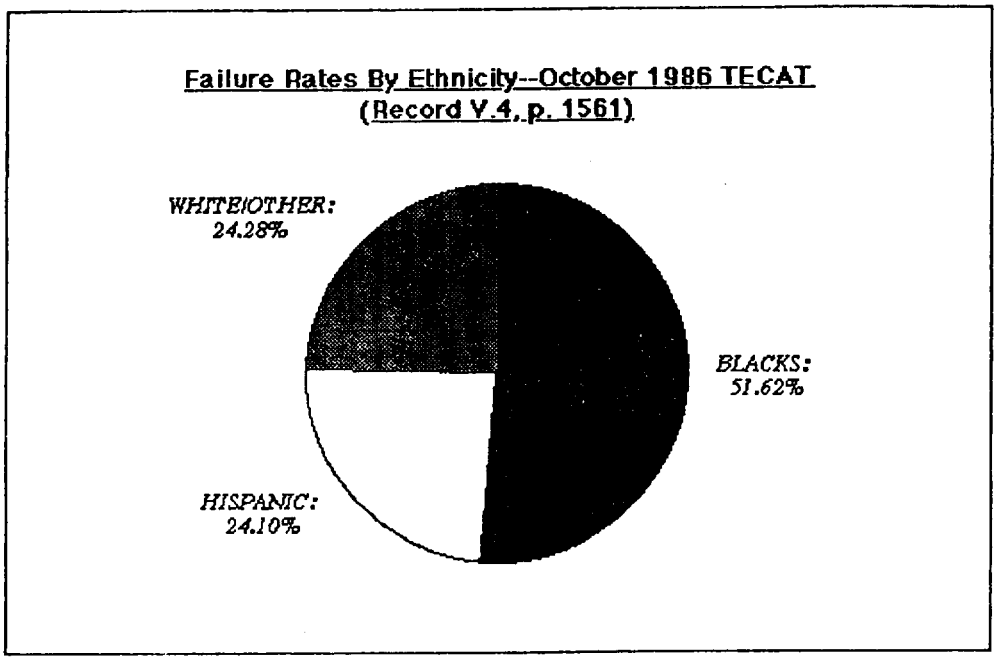
energy is low, her hair that was full is now dry and brittle, her skin that was clear when we last saw our sister is now broken with rash, her teeth have become dulled, and she suffers dizzy spells.... Those of us who eat only raw food *can't* eat anything *but* raw food, for to do otherwise would cause extreme sickness as harmful as *fatal.*

Should Graterford decide not to supply Africa with raw food, and should he become ill as a result, Africa might well be entitled to examination and treatment by a doctor. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) ("deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" [citation omitted]).

24. *See* testimony of Julius T. Cuyler, Appendix at A-91 (altered feeding procedures at Graterford for inmates who participate in annual Ramadan service); Appendix at A-96, A-99 (Graterford provides any special diets ordered by physicians). We also note that the Commonwealth apparently is willing to provide a special raw food diet to female MOVE members incarcerated in the State Correctional Institution at Muncy, Pennsylvania. *See* Clancy, *6 female MOVE prisoners on hunger strike for 33 days*, Philadelphia Inquirer, Oct. 14, 1981, at 1-B, col. 2.

APPENDIX—Continued

V. FAILURE RATE BY ETHNICITY--October 1986 TECAT



WEST KEY NUMBER SYSTEM

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; Benjamin Baum; Phyllis Ball; Walter Bergman; John Charles Bearden; Gilbert R. Davis; and James T. Weaver, Plaintiffs–Appellees,

v.

CITY OF GRAND RAPIDS, Defendant–Appellant (91–1448),

Chabad House of Western Michigan, Inc., Intervenor–Appellant (90–2337/91–1391).

Nos. 90–2337, 91–1391 and 91–1448.

United States Court of Appeals, Sixth Circuit.

Reargued Aug. 12, 1992.

Decided Nov. 16, 1992.

Private organization and individuals challenged grant of permit to religious organization to place a private menorah display in traditional public forum during Chanukah. The United States District Court for the Western District of Michigan, Richard A. Enslen, J., granted preliminary injunction against issuance of permit. Religious organization filed emergency notice of appeal after hearing on its motion to intervene was scheduled in manner which would prevent motion from being heard before Chanukah. The Court of Appeals granted organization's motion to intervene and stayed injunction, 922 F.2d 303. On remand, the District Court issued permanent injunction. Religious organization and city appealed, and appeals were consolidated. The Court of Appeals affirmed. Rehearing en banc was granted. The Court of Appeals, sitting en banc, Boggs, Circuit Judge, held that privately funded menorah display erected during Chanukah in traditional public forum did not violate establishment clause of First Amendment where it could not be seen as endorsement of religion by reasonable observer.

Reversed.

Martin, Circuit Judge, filed dissenting opinion.

Lively, Circuit Judge, filed dissenting opinion in which Martin, Keith, Kennedy, Jones, and Milburn, Circuit Judges, joined.

1. Constitutional Law ⇐84.5(11)

Religious organization that wished to erect menorah on public square which had been treated as traditional public forum was entitled to full protection of public forum doctrine, which extended to nonverbal forms of communication. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐84.5(11)

Fact that religious organization wished to engage in religious speech on public square which had been treated as traditional public forum did not inherently limit its freedom. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐84.5(11)

Only city granting religious organization permit to construct menorah in public square, and not religious organization itself, could thereby violate establishment clause, since religious organization was not government, it could not establish religion in violation of Constitution. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇐84(1)

"Reasonable observer," whose perspective is to be adopted in determining whether governmental action violates establishment clause, is one having knowledge of all facts relevant to case, who does not evince hostility towards religion, and who will consider carefully amount of weight to be given each fact. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐84.5(11)

Privately funded menorah display, erected during Chanukah in traditional public forum, did not violate establishment clause; truly private religious expression in truly public forum could not be seen as endorsement of religion by reasonable observer; signs with display indicated that it had been erected by private organization, and that its presence was not endorsement by city of organization or display. U.S.C.A. Const.Amend. 1.

Albert Dilley, Grand Rapids, Mich. (argued and briefed), for plaintiffs-appellees.

G. Douglas Walton, Deputy City Atty., Grand Rapids, Mich. (argued and briefed), for defendant-appellant.

Richard G. Leonard, Douglas P. Vanden Berge, Rhoades, McKee, Boer, Goodrich & Titta, Grand Rapids, Mich., David G. Webbert, Bradford M. Berry, Nathan Lewin (argued and briefed), David I. Gelfand, Niki Kuckes, Miller, Cassidy, Larroca & Lewin, Washington, D.C., for intervenor-appellant.

Before: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, Circuit Judges; and LIVELY, Senior Circuit Judge.

BOGGS, Circuit Judge.

In this case, we sit *en banc* to determine whether a privately-funded menorah display, erected during Chanukah in a traditional public forum in Grand Rapids, Michigan, violates the Establishment Clause of the first amendment, as applied to state and local governments by the fourteenth amendment. We hold that it does not.

I

Each year since 1984, Grand Rapids has granted Chabad House of Western Michigan, Inc. a permit to display a 20–foot high steel menorah in Calder Plaza during the eight days of the Jewish holiday of Chanukah. The menorah was purchased entirely with private funds and is owned by Chabad House, a private organization. Grand Rapids has no role in the planning, erection, removal, maintenance, or storage of the menorah. All display costs have been paid with private funds, except for the small cost of providing electricity for the display; however, even this cost is probably offset

by a $2.50 permit fee charged by Grand Rapids.

Calder Plaza is located in the center of downtown Grand Rapids, and is the principal public plaza in the area, being four and one-half acres in size. The Plaza features a large sculpture by Alexander Calder, a drawing of which appears on the city's signs, vehicles, and stationery. The Kent County Building and Grand Rapids City Hall are also located on the Plaza, as are three flagpoles flying the flags of the United States, Kent County, and the City of Grand Rapids. Monroe Avenue runs along the west side of the Plaza. The Hall of Justice, which houses the district and circuit courts for Kent County and Grand Rapids, and the police station stand across Monroe Avenue from the Plaza. The Federal Building is on the Plaza's north side. Ottawa Avenue runs along the Plaza's east side, and across Ottawa Avenue stand the State of Michigan Office Building, the Probate Court Building, the Frey Building, and the National Bank of Detroit Building. The Old Kent Building and the Calder Plaza Building border the Plaza to the south and southwest. The Frey, National Bank of Detroit, Old Kent, and Calder Plaza Buildings are all private office buildings.

The menorah stands at the east side of the Plaza, 162 feet from the nearest governmental building, the Kent County Administration Building, and 256 feet from Grand Rapids City Hall. The menorah is adjacent to the three flagpoles, and 150 feet from the Calder sculpture. Grand Rapids requires that the menorah be accompanied by two signs, measuring two feet by three feet, which are illuminated at night. The signs read as follows:

> Happy Chanukah to All
>
> This Menorah display has been erected by Chabad House, a private organization. Its presence does not constitute an endorsement by the City of Grand Rapids of the organization or the display.

From 1984 to 1988, one such sign was displayed. Since 1989, Grand Rapids has required Chabad House to display two illuminated signs. The signs are visible from the front and the back of the menorah. Chabad House conducts a candlelighting ceremony at the menorah for up to one hour on each of the eight nights of Chanukah. Other than these ceremonies, no Chabad House representative regularly attends the menorah. In previous years, there have been no displays of Christmas decorations on the Plaza contemporaneously with the menorah. Such displays have not been discouraged; Grand Rapids has simply chosen not to erect a Christmas display in the Plaza, and has received no applications for permits to display Christmas decorations.

Grand Rapids has made the Plaza available to the public for all forms of speech and assemblage; all parties agree that the city has treated the Plaza as a traditional public forum. Since 1969, a City Commission policy has provided guidelines for the Plaza's use. The guidelines provide:

> [T]he City of Grand Rapids may, on behalf of itself and the County of Kent, authorize any person, organization, association, club, society or other group of any type to use and occupy any portion of the so-called Plaza area of the City–County Complex for the purpose of making or presenting any program, public address, exhibit or display, or for any other organized or semi-organized purpose whatever.

Between 1986 and 1990, Grand Rapids allowed numerous groups to use Calder Plaza for expressive activities of many types. For example, permits have been granted for a Right to Life rally, a Hunger Walk by the Grand Rapids Center for Ecumenism, and an Italian Festival (including a Catholic Mass on Sunday). Several of the previous events have involved the use of temporary structures comparable in size to the menorah. An Arts Festival involved a three-day erection of booths and exhibit areas, the Italian Festival involved a two-day erection of similar structures, and a Tennis Exhibition involved laying down a large canvas with court markings for two days. Furthermore, at oral argument, counsel for Grand Rapids stated that several shanties were recently erected in Calder Plaza to symbolize the plight of the homeless, and

that these shanties stood for "quite some time."

In 1990, Chabad House once again applied for a permit to display its menorah in the Plaza from December 11 to 20, 1990, and Grand Rapids was prepared to grant that request. However, Americans United for Separation of Church and State, along with Benjamin Baum, Phyllis Ball, Walter Bergman, John Charles Bearden, Gilbert R. Davis, and James T. Weaver, brought suit in federal district court to enjoin Grand Rapids from allowing the proposed display.[1] On November 13, 1990, the plaintiffs moved for a preliminary injunction. The district court heard argument on the motion on December 5. Because Chanukah was imminent, the district court issued an oral opinion from the bench that granted the preliminary injunction. On December 21, the district court issued a full written opinion explaining its decision.

When Chabad House learned that Grand Rapids might not appeal this decision, it sought to intervene. On December 7, the district court scheduled a hearing on the motion to intervene for December 18. Because this schedule would prevent Chabad House from being heard before Chanukah, Chabad House filed an emergency notice of appeal with this court on December 10. The next day, this court granted Chabad House's motion to intervene and stayed the injunction entered by the district court. A full opinion was issued two days later. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir.1990).

On February 25, 1991, the parties filed a stipulation of facts with the district court, as summarized above. These facts were not substantially different from those that faced the district court when it initially ruled on this case. On March 21, 1991, the district court granted the plaintiffs' request for a permanent injunction preventing Grand Rapids from allowing Chabad House to erect its menorah. In doing so, the district court relied largely on its opinion of December 21, 1990. Both Chabad House and Grand Rapids appealed to this court, and all appeals were consolidated. A panel of this court affirmed the district court. *Americans United for Separation of Church and State v. City of Grand Rapids*, Nos. 90-2337; 91-1391/1448, 1992 WL 77643, 1992 U.S.App. LEXIS 7513 (6th Cir. Apr. 21, 1992). However, on June 25, 1992, the full court vacated the panel's decision and granted a rehearing *en banc*.

II

All parties to this case agree that since Calder Plaza was opened in 1969, Grand Rapids has treated it as a traditional public forum, allowing all forms of speech and assembly. No group has ever been denied permission to use the plaza. The city's decision to treat Calder Plaza as a traditional public forum grants Chabad House significant constitutional protection. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Supreme Court recognized that "these quintessential public forums" " 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " 460 U.S. at 45, 103 S.Ct. at 954–55 (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939)). The Court held that no government may exclude speech from a traditional public forum unless "its regulation is necessary to serve a compelling state interest and ... is narrowly drawn to achieve that end." 460 U.S. at 46, 103 S.Ct. at 955; *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, — U.S. —, —, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992) ("regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny"). In this case, the plaintiffs ask the courts, rather than the local gov-

1. The complaint originally sought to prevent the placement of the menorah on any public property. At oral argument, plaintiffs conceded that placement in a park away from government buildings would be constitutional.

ernment, to regulate speech; nevertheless, the same principles apply.

[1] Although it wishes to erect a menorah, rather than sponsor a speech, Chabad House merits the full protection of the traditional public forum doctrine. The Supreme Court has long recognized that the protection of free speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989). The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974). The Supreme Court has extended constitutional protection to many non-verbal forms of communication. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (first amendment precludes prosecution for burning an American flag); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969) (students' wearing of black armbands to protest American military involvement in Vietnam constituted protected speech).

[2] Furthermore, Chabad House's decision to engage in *religious* speech does not inherently limit its freedom; religious speech and association receive the full protection of the first amendment. *See Widmar v. Vincent*, 454 U.S. 263, 268–69, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).[2] Justice Brennan explained this principle quite eloquently:

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here.... It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

McDaniel v. Paty, 435 U.S. 618, 641, 98 S.Ct. 1322, 1336, 55 L.Ed.2d 593 (1978) (Brennan, J., concurring) (footnote omitted).

Thus, we must recognize Chabad House's rights within the public forum, whether or not their speech offends others. Over forty years ago, the Supreme Court recognized that while free speech breeds controversy, it must be protected:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949). Furthermore, we must be particularly cautious about abridging Chabad House's right to freedom of speech in this case because of the religious content of its message. "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, — U.S. ——, ——, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) (citations omitted). The district court's decision can be affirmed, therefore, only if we are certain that the alleged constitutional violation caused by Chabad House's menorah justifies limiting its right of free speech.

III

[3] The plaintiffs contend that Chabad House's speech must be limited because it

2. In *Widmar*, Justice White argued that religious worship is not protected by the free speech guarantee of the first amendment, but is protected instead only by the religion clauses. *Widmar v. Vincent*, 454 U.S. 263, 284, 102 S.Ct. 269, 281–82, 70 L.Ed.2d 440 (1981) (White, J., dissenting). The Court, however, specifically rejected this argument. 454 U.S. at 269 n. 6, 102 S.Ct. at 274 n. 6.

violates the Establishment Clause. However, since Chabad House is not a government, it cannot "establish" a religion in violation of the Constitution; Grand Rapids is the only party to this case with such power. In order to determine whether Grand Rapids has violated the Establishment Clause, we must turn to the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971):

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

(quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)) (citations omitted). Although this test has been questioned a number of times, it still appears to govern Establishment Clause cases. *See Lee v. Weisman*, — U.S. —, —, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992) ("[W]e do not accept the invitation ... to reconsider our decision in *Lemon v. Kurtzman*....")

No one seriously questions whether the first two aspects of this test have been violated. Grand Rapids's policy of treating religious speech the same as all other speech certainly serves a secular purpose. The establishment of a public forum is a laudable goal, and part of a worthy tradition dating back to the Greek agora and the Roman forum. Furthermore, the policy avoids entangling government with religion, as no government official need decide which groups may use the plaza. Therefore, we need only decide whether the "principal or primary effect" of the public forum policy is one that "advances [or] inhibits religion."

A

In *Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), a majority of the Supreme Court adopted a test first proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 1367, 79 L.Ed.2d 604 (1984) to answer this question.

> Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597, 109 S.Ct. at 3103 (Opinion of Blackmun, J.) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985)). Justice Blackmun, who delivered the judgment of the Court in *Allegheny*, applied this standard to a menorah display. He explained that "[w]hile an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'" 492 U.S. at 620, 109 S.Ct. at 3115 (Opinion of Blackmun, J.) (citations omitted); *see also Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 493, 106 S.Ct. 748, 755, 88 L.Ed.2d 846 (1986) (O'Connor, J., concurring in part and concurring in judgment). This court has also acknowledged the importance of Justice O'Connor's "reasonable observer." *See ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir.1990).

Thus, in order to decide whether or not Grand Rapids has violated the Establishment Clause, we must adopt the perspective of a reasonable observer. We wish to emphasize that the endorsement test creates an objective standard, similar to the "reasonable man" [3] standard of tort law or

3. "The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are

the "reasonable person knowing all the relevant facts" who judges judicial disqualification under 28 U.S.C. § 455. *Roberts v. Bailar*, 625 F.2d 125 (6th Cir.1980). Accordingly, we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think Grand Rapids endorses religion. Instead, we ask whether *the* reasonable observer *would* conclude that Grand Rapids endorses religion by allowing Chabad House's display.

B

[4] In attempting to define the "reasonable observer," we must look to the guidelines established by precedents both from this court and the Supreme Court. Justice O'Connor, who first promulgated the endorsement test, has emphasized that, when adopting the perspective of the reasonable observer, courts must consider *all* of the facts presented in each case. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S.Ct. 1355, 1370, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). She repeated this warning in *Allegheny*, noting that "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice...." 492 U.S. at 629, 109 S.Ct. at 3120 (O'Connor, J., concurring in part and concurring in the judgment).

However, Justice O'Connor has also recognized that when a court analyzes a religious display, some facts should receive greater consideration than others. For example, certain religious practices that might otherwise be unconstitutional are valid if their "history and ubiquity" would convince a reasonable observer that such practices merely represent an "acknowledgment" of religion. Thus, because of their "history and ubiquity," Justice O'Connor approved the constitutionality of legislative prayers such as those in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). She has also stated that the Establishment Clause permits "government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.' " *Lynch*, 465 U.S. at 693, 104 S.Ct. at 1369 (O'Connor, J., concurring). She repeated this reasoning in *Allegheny:*

> It is the combination of the *longstanding existence* of practices such as opening legislative sessions with legislative prayers ..., as well as their *nonsectarian nature*, that lead me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.

492 U.S. at 630–31, 109 S.Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). Justice O'Connor has also indicated that the reasonable observer does not evince hostility toward religion; courts must ask "what viewers may *fairly* understand to be the purpose of the display." *Lynch*, 465 U.S. at 692, 104 S.Ct. at 1369 (emphasis added).

Thus, when applying the endorsement test to this case, we must examine all the relevant facts, consider carefully the amount of weight to give each fact, and be careful to treat religious displays fairly. We must avoid hasty reliance on partial similarities between the facts at hand and those found in other cases. Even if this display appears similar in some respects to others that have been found unconstitutional in the past, other factors, unique to this case, may require us to uphold the City's decision to grant Chabad House a permit.

The plaintiffs identify several aspects of Chabad House's display that tend to support the idea that it endorses a religion. The display sends a religious message; it stands near the heart of local government; and it does not include secular symbols.

to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment." William L. Prosser, The Law of Torts 154 (3d ed. 1964).

Each of these facts tends to support the claim that the display violates the Establishment Clause. However, two crucial facts make this case very different from many holiday display cases: Chabad House's display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access. Although these facts are not automatically determinative, recent precedent indicates that they should carry much more weight than the details of the display emphasized by the plaintiffs.

IV

[5] As noted earlier, Grand Rapids has no direct connection with the Chabad House display. In fact, Grand Rapids does not even go so far as to "acknowledge" religion by permitting the menorah's display; it merely sends a message that religious groups will be treated no worse than others. Anyone familiar with Calder Plaza soon realizes that many groups use it, and that none of these groups receives special treatment from Grand Rapids. Surely a reasonable observer recognizes the distinction between speech the government *supports* and speech that it *allows*.

The courts have long recognized a clear distinction between public and private religious speech. As Justice O'Connor has stated, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990) (O'Connor, J.) (plurality opinion) (emphasis in original). While the Supreme Court has affirmed the rights of private groups to use public facilities to spread a religious message, *see Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951) (overturning conviction for disorderly conduct of a Jehovah's Witness who sought to speak in a public park); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (overturning conviction of a Jehovah's Witness for using a sound amplification device in a public park without permission of the local Chief of Police), it has specifically prohibited public bodies from acting likewise. *See, e.g., School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (banning Bible reading in public schools). These cases demonstrate the critical distinction between private and public speech that must be kept in mind when applying the endorsement test.

Obviously, not all private speech automatically passes the endorsement test. In *Allegheny*, for example, the Supreme Court struck down a crèche display sponsored by a private group. However, the Court certainly considered the private nature of the speech in question. It carefully noted that Allegheny County had granted this group special privileges by allowing it to place its crèche on the Grand Staircase of the county courthouse.

> The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the crèche in that location for over six weeks would then not serve to associate the government with the crèche.... In any event, the county's own press releases made clear to the public that the county associated itself with the crèche.... Moreover, the county created a visual link between itself and the crèche: it placed next to official county signs two small evergreens identical to those in the crèche display.

492 U.S. at 600 n. 50, 109 S.Ct. at 3104 n. 50.

There is no connection between Grand Rapids and Chabad House comparable to the relationship between a government and a religious speaker found in *Allegheny*. Nor does it present the type of financial support for religion condemned in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), in which the Supreme Court struck down a sales tax exemption granted by state law to religious periodicals. In fact, the plaintiffs have presented no evidence of any *sub rosa* attempt by Grand Rapids to encourage the menorah

display, or any steps—other than its traditional public forum policy—relating to religion at all. On these facts, we must acknowledge that the display at issue is purely private, with neither overt nor covert government support, and this fact weighs heavily against a finding of endorsement.

Furthermore, the importance of the menorah's private ownership is increased in this case because of the disclaimer signs required by Grand Rapids. Although they can not be seen for as great a distance as the menorah itself, the signs make the private ownership of the menorah obvious to anyone who cares to investigate the possibility of government endorsement. Such disclaimers are not necessarily required, nor do they automatically eliminate any difficulties with the Establishment Clause. Instead, they are just one of the many factors to be considered in cases of this type. *See, e.g., ACLU of Ky. v. Wilkinson,* 895 F.2d 1098 (6th Cir.1990). In this case, the disclaimer signs are large enough for us to conclude that they were erected as part of a good faith effort to identify the private ownership of the menorah. Accordingly, they must be considered as another factor weighing in favor of our allowing this display.

V

We must also recognize the significance of Grand Rapids's policy of allowing all parties to have equal access to Calder Plaza. Equal access policies provide strong protection for religious speech. One striking example of this protection is *O'Hair v. Andrus,* 613 F.2d 931 (D.C.Cir.1979). In *Andrus,* the District of Columbia Circuit held that an outdoor Mass conducted by Pope John Paul II on the National Mall did not violate the Establishment Clause. In making this decision, the court placed great weight on the government's decision to treat religious and secular speech equally in a public forum.

> Religious and non-religious groups and events are treated alike. No "preference" is present. This undercuts appellants' establishment claim. When the National Mall is, as a matter of established policy, openly available on a nondiscriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of a religion," and there cannot be a meaningful perception of one.

613 F.2d at 934. Although *Andrus* was decided before the Supreme Court adopted the endorsement test, the plaintiffs in that case anticipated the test and argued that allowing the Mass implied government support for Catholicism. The *Andrus* court strongly rejected this argument.

> Appellants say that the government permit for this occurrence on the renowned National Mall sends an implied message—to the nation and to the world—of government approval (and therefore "establishment") of this church service. *It implies no more approval for this church than for any other group using the Mall. The message that it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.*

613 F.2d at 936 (emphasis added). Furthermore, unlike the menorah in this case, which places no net cost upon Grand Rapids, the outdoor mass in *Andrus* forced the government to spend over $100,000 for crowd control and other functions. Even this large expense did not create an Establishment Clause violation. "[I]t is an important function of government to permit such large assemblies.... Provision of police, sanitation and related public services is a legitimate function of government and not an 'establishment' of religion." *Ibid.*

Andrus conclusively demonstrates the importance of a policy of equal access for all in traditional public fora. The leader of one of the world's largest faiths and 500,000 of his followers filled the National Mall, an area in which national and governmental symbols are clearly visible from every line of sight. Furthermore, in connection with the Mass, the Roman Catholic Archdiocese of Washington constructed a platform and altar, and provided "fencing, sound equipment, electrical facilities (in-

cluding supplemental electric current), portable toilets, first aid stations, chairs and other physical facilities." 613 F.2d at 933. Thus, the intrusion of religion upon a public forum was much greater than any that occurs in this case. Yet once the *Andrus* court determined that the Pope celebrated the Mass pursuant to a policy of equal access, it was satisfied that the Establishment Clause had not been violated.

The *Andrus* court did not limit its holding to religious services, and clearly intended its ruling to apply to all religious speech. "The government may not allocate access to a public place available for communication among citizens *on the basis of the religious content of the messages.*" *Andrus*, 613 F.2d at 935 (footnote omitted) (emphasis added). Furthermore, *Andrus* relied heavily upon *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953), which upheld the first amendment right of Jehovah's Witnesses to address religious meetings in a public park.

The *Andrus* decision does not stand alone; two recent Supreme Court rulings also place great reliance on equal access policies in Establishment Clause law. In *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), the Court held that a state university that makes its facilities generally available to student groups cannot close those facilities to student religious groups. The Court explained the distinction between allowing religious speech and endorsing that speech as follows:

> [A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University ... to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

454 U.S. at 274, 102 S.Ct. at 276 (citation and footnote omitted). The *Widmar* Court also emphasized that many non-religious groups were eligible to use school facilities; "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." 454 U.S. at 274, 102 S.Ct. at 277.

The Court expanded this finding in *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). *Mergens* upheld the Equal Access Act, which requires schools to give student religious groups the same access to facilities as other non-curriculum related student groups. Justice O'Connor, writing for the plurality, rejected the claim that the Act's primary effect was to advance religion:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250, 110 S.Ct. at 2372 (citations omitted) (emphasis in original). The *Mergens* plurality also recognized that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248, 110 S.Ct. at 2371.[4]

Several recent cases demonstrate the broad sweep of the equal access doctrine promulgated in *Mergens*. *See, e.g., Gregoire v. Centennial Sch. Dist.*, 907 F.2d

4. Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist, Justice White, and Justice Blackmun. Justice Kennedy, who wrote a concurring opinion in *Mergens* joined by Justice Scalia, would not even have used the endorsement test. Instead, he upheld the Equal Access Act because it neither gave direct benefits to religion in such a manner that it tended to establish a state religion, nor coerced any student to participate in a religious activity. *Mergens*, 496 U.S. at 260, 110 S.Ct. at 2377 (Kennedy, J.) (concurring in part and concurring in the judgment).

1366 (3d Cir.) (affirming an injunction requiring a high school to grant access to religious groups for discussion and worship services), *cert. denied*, — U.S. ——, 111 S.Ct. 253, 112 L.Ed.2d 211 (1990); *Berger by Berger v. Rensselaer Cent. Sch. Corp.*, 766 F.Supp. 696 (N.D.Ind.1991) (court upheld a school's policy of permitting religious organizations to distribute religious literature in fifth-grade classrooms); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F.Supp. 704 (M.D.Ala.1991) (court granted a preliminary injunction to plaintiffs seeking to require a school board to allow a church to rent its high school auditorium to conduct a baccalaureate service for graduating seniors). Thus, an equal access policy weighs very heavily in determining whether an endorsement of religion has occurred. We recognize that the school cases are not directly on point in this case. However, the fact that these cases involve schools rather than public areas demonstrates the *breadth* of their holdings, not the narrowness. Schools are not traditional public fora, and governments have much broader power over student speech than other types of private speech. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 567, 98 L.Ed.2d 592 (1988) (citation omitted). Moreover, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.... Students in such institutions are impressionable and their attendance is involuntary." *Edwards v. Aguillard*, 482 U.S. 578, 583–84, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987). "The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for '[t]he government's activities in this area can have a magnified impact on impressionable young minds....'" *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1072 (6th Cir.1987) (Kennedy, J., concurring) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985)), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988). *See also Lee v. Weisman*, — U.S. ——, ——, 112 S.Ct. 2649, 2658, 120 L.Ed.2d 467 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

Thus, the Supreme Court's decision to uphold an equal access policy for religious speech in schools strongly indicates that we should uphold a city's equal access policy in a traditional public forum for all citizens, including those who wish to send a religious message. A reasonable observer who does not find endorsement in religious groups' use of school facilities would not find it in Chabad House's use of Calder Plaza. Those who worry about religious influence over their fellow citizens would be much less concerned about private religious activity in the Plaza than in the schools, since they know that all sorts of groups speak in the Plaza. In fact, public fora exist solely to provide a platform for speakers of all kinds.

The Supreme Court's recent decision in *Lee v. Weisman*, — U.S. ——, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) does not affect this analysis. In that case, the Court held that a public school could not provide for a "non-sectarian" prayer to be given by a clergyman chosen by the school at graduation ceremonies. However, the Court carefully distinguished that case from *Mergens:*

> We recognize that ... there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. See *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform.

— U.S. at ——, 112 S.Ct. at 2661. Thus, *Weisman* provides little support for the plaintiffs. In fact, the *Weisman* Court recognized that " '[t]he First Amendment does not prohibit practices which by any *realistic measure create none of the dangers which it is designed to prevent* and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have *meaningful and practical impact.*' " — U.S. at ——, 112 S.Ct. at 2661 (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 1616, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring)) (emphasis added). We are confident that the display in this case neither creates a realistic danger of oppressing non-believers, nor has a meaningful and practical detrimental impact on the lives of those who will see the menorah.

We also reject the plaintiffs' argument that the menorah display violates the Establishment Clause because it stands alone. They suggest that while a candle-lighting ceremony in Calder Plaza would be acceptable, an unattended menorah might mislead a reasonable observer into believing that the government was speaking rather than a private group.[5] As noted above, however, *Widmar* and *Mergens* are not strictly limited to their facts. Instead, they represent a broad policy of tolerance for equal access policies in Establishment Clause jurisprudence. The plaintiffs' argument also seems to rest on the assumption that the menorah constitutes only a religious symbol that remains after Chabad House has finished its speech. But this assumption is wrong; Chabad House's menorah display is no mere remnant of religious speech, it *is* religious speech and must receive the same respect as a round-the-clock Bible reading. It would be strange for a reasonable observer to find *more* endorsement in a menorah standing alone than in a menorah accompanied by a Torah reading or by crowds of people celebrating Chanukah with games or feasts. The menorah display constitutes religious speech just as much as a meeting of a school Bible club or a Mass presided over by the Pope. Therefore, this case must be governed by *Andrus*, *Widmar*, and *Mergens*.

Furthermore, the plaintiffs' argument forces Chabad House's freedom of speech to depend on the actions of third parties. The only reason that the menorah stands alone is that the City has received no other requests for permits during the holiday season. The record conclusively demonstrates that neither Chabad House nor Grand Rapids has sought to discourage other displays. It makes no sense to rule that others can veto Chabad House's freedom of speech by abstaining from speech.

Obviously, the fact that the menorah stands unattended for most of eight days may have *some* effect on our conclusion as to whether Grand Rapids has endorsed religion. However, in this case, that fact is simply overwhelmed by Calder Plaza's status as a traditional public forum. To a *reasonable* observer, no display actually stands alone in this public forum. In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the Plaza was opened. The reasonable observer knows that other speakers have used the Plaza before, and will do so again. Instead of concluding that religious zealots have stormed the gates with the city's endorsement, the reasonable observer recognizes this display as yet another example of free speech.

VI

In reaching our decision, we reject the definition of the reasonable observer posited by the plaintiffs and the dissent. The plaintiffs' brief gave no explicit definition of the reasonable observer, relying instead on the general principle that the government's actions must not convey a message

5. Opponents of any display could easily make the contrary argument when necessary. For example, the former mayor of Beverly Hills, opposing "the ceremonial lighting of a 27-foot menorah ... at a city park," objected mightily because "the event was distinctly religious." He described it as "something like a Jewish revival meeting.... It makes it appear that the city was taking part in the religious ceremony...." L.A. Times, Jan. 11, 1987, part 9, at 1.

of endorsement. At oral argument, however, counsel for the plaintiffs fleshed out the parameters of their "reasonable observer," in terms of a person who knows enough to infer government endorsement, but not enough to understand why there is none. The dissent, at page 1558, postulates a slightly different reasonable observer, one who, while his faculties of ratiocination may be intact, is stated to have no knowledge beyond what appears upon seeing the menorah, whereupon the "observer must be left to draw his or her own conclusions from the vista presented *at the time.*" (emphasis in original)

The "reasonable observer" explicated at oral argument by the able and candid counsel for the plaintiffs strikes us as unreasonable. For example, the plaintiffs' observer does not follow local politics or controversies, or read the newspapers where this issue has been discussed. However, the plaintiffs' observer does go downtown where the menorah can be seen. In fact, the plaintiffs' observer must come close enough to recognize that the menorah is placed in Calder Plaza. The menorah can be seen from several blocks away, and from that distance it may not be obvious that the menorah is on public ground. From some perspectives, the menorah would appear little different than if it were actually standing on one of the private plazas that border the Calder Plaza area.

Furthermore, the plaintiffs' observer must come close enough to realize that there are no persons associated with the menorah. Counsel for the plaintiffs, and the majority of the panel that ruled in the plaintiffs' favor, concede that if religious services or ceremonies were going on at the base of the menorah, then no endorsement could reasonably be perceived. This concession implies that the observer comes closer than the maximum sight-line distance of the menorah itself, because the menorah is clearly visible from distances and angles from which any persons accompanying the menorah would not be visible. However, the plaintiffs' observer must not come close enough to the menorah to read the sign. Counsel for the plaintiffs conceded at oral argument that if the observer reads the sign, and acts reasonably, the observer must conclude that no endorsement of religion has occurred.[6] Indeed, counsel for the plaintiffs himself indicated that he and his clients agree that Grand Rapids is not actually endorsing religion, although they do argue that a reasonable observer *would* (not just *could*) think so. We simply cannot agree with the plaintiffs' characterization of the appropriate limitations on the knowledge,[7] location and perspective (both literal and figurative) of a reasonable observer. The plaintiffs appear to be asking what an unreasonable person *could* think of the display, rather than what a reasonable person *would* think.

In reaching our decision, we decline the invitation to follow several cases cited by the plaintiffs. In *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 74, 112 L.Ed.2d 48 (1990), a divided panel of the Fourth Circuit held that a crèche erected by Jaycees on the front lawn of a county

6. There is a slight conflict between the dissent and the plaintiffs in that the plaintiffs concede that a reasonable observer who reads the signs could not believe there is an endorsement, while the dissent states that if the natural effect of the menorah in the plaza "creates an inference of endorsement or support, no words should be found sufficient to counter that impression." (At 1564)

7. The selectivity of the knowledge of the plaintiffs' reasonable observer is further emphasized by the treatment of the significance accorded to the respective structures of the menorah and the Calder stabile. It is considered significant that the stable is a symbol of Grand Rapids, a fact that is surely not known to everyone, while it is assumed that the significance of the menorah is known to everyone, which is surely not the case. Thus, some untutored passersby might think that the stabile was the object with religious significance and not the menorah. And what if a group arose that worshiped Calder and his works? Would that require the removal of the stabile? These thoughts simply emphasize the necessity of adhering to the standard discussed above (At 1543–44), that the reasonable observer used in the resolution of these cases must be an observer in possession of all of the relevant facts. Once it is admitted that the observer is ignorant in some areas, there is no objective means of deciding who gets to make up the components of the observer's knowledge.

office building violated the Establishment Clause. There are significant differences between *Smith* and this case. The *Smith* display was approved by a special vote of the County's Board of Supervisors, rather than being allowed pursuant to a long-established policy like the menorah in this case. Furthermore, unlike Calder Plaza, which regularly features all types of activities, the lawn in *Smith* had been used only "sporadically for occasional activities...." 895 F.2d at 955. In fact, although the *Smith* court treated the lawn as a traditional public forum, it acknowledged that "[t]he front lawn though used for such events as weddings and concerts does not have the traditional indicia of a free speech forum associated with a public park." 895 F.2d at 958 n. 5. Because we must consider all the facts in each case and avoid drawing false parallels, these distinctions are significant. Citizens of Grand Rapids have become accustomed to the free use of Calder Plaza and should know that events taking place there are not necessarily supported by the city. The county lawn in *Smith*, on the other hand, was rarely used for such events, which could have made the county's citizens more likely to draw a connection between those who spoke on the lawn and those who allowed them to speak. Because the endorsement test places great weight on the reasonable observer's perception of the speech in question, this distinction could easily justify different results in *Smith* and this case. However, even if *Smith* were exactly on point with this case, we believe that the *Smith* court simply erred by minimizing the importance of an equal access policy. We choose to avoid that error, rather than repeat it.

The plaintiffs also rely on *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2619, 110 L.Ed.2d 640 (1990), a case given great weight by the district court. In that case, the Second Circuit rejected an unattended, solitary display of a large menorah in City Hall Park. It rejected the public forum argument made here, because it feared that "the public forum doctrine would swallow up the Establishment Clause." *Id.* at 1029. Furthermore, it noted that "[o]ther than the menorah in question, no permits had been issued for the unattended display of any religious symbol in the Park." *Ibid.* It also stated that "[t]he existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Ibid.* Judge Meskill dissented, arguing that the case should be governed by *Widmar v. Vincent*. The Second Circuit later re-affirmed its decision in a case involving the same parties and only slightly different facts. *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir.1991) (Chabad proposed moving the menorah further away from City Hall and placing it near two signs that sent a secular holiday message), *cert. denied*, — U.S. —, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992).

However, this court has criticized *Kaplan* heavily on several occasions. In *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir.1990), this court stated that "Judge Meskill's dissent [in *Kaplan*] strikes us as persuasive...." In an earlier stage of this case, this court specifically endorsed Judge Meskill's reasoning. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309 (6th Cir.1991) ("On our tentative view of the merits, we believe Judge Meskill had it about right....") Finally, in *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 462 (6th Cir. 1991), this court noted that "in the [Grand Rapids] case we stated that we did not believe that [*Kaplan*] was the law in our circuit." Thus, in three separate cases, we have indicated our general disagreement with *Kaplan*. Furthermore, in light of the above discussion of *Widmar* and *Mergens*, it is clear that *Kaplan* simply misconstrues the endorsement test.

Instead of adhering to *Smith* and *Kaplan*, we agree with the Seventh Circuit's analysis in *Doe v. Small*, 964 F.2d 611 (7th Cir.1992) (en banc), a case very similar to this one. In *Small*, the City of Ottawa, Illinois had been enjoined from allowing anyone to display a series of religious paintings in a local public park that had

long served as a traditional public forum. Sitting *en banc*, the Seventh Circuit reversed. It reasoned as follows:

> Since the State of Missouri's desire [in *Widmar*] to achieve greater separation of church and state than provided for under the Establishment Clause was an insufficient interest to justify a content-based exclusion of religious speech in the limited public forum of a state university, we fail to comprehend how the Establishment Clause could constitute a sufficiently compelling state interest to justify a content-based exclusion of private religious speech in a quintessential public forum. Thus, we hold that the district judge erred in finding that the Establishment Clause provided a sufficiently compelling interest to justify a content-based exclusion of speech from Washington Park. *The City of Ottawa may not exclude private persons from Washington Park merely because of the religious content of their speech.*

964 F.2d at 618–19 (emphasis in original).

The plaintiffs attempted to distinguish *Small* on the grounds that the park in question was "well removed from the seat of the City government; City Hall is some three blocks away, and no City buildings border the park." 964 F.2d at 613. However, while these facts strengthen a finding of no endorsement, other facts tend to make *Small* appear a much stronger case for endorsement than this case. While the menorah stands for eight days, the paintings have occupied space in the park for an average of two months per year, and permanent supports have now been erected for them. 964 F.2d at 613 n. 3. Furthermore, the Ottawa City Council passed a resolution in 1986 stating that "this council *endorses* the activities of the Ottawa Jaycees in maintaining, erecting, dismantling and storing [the paintings] and incorporating them in the overall Christmas display that annually graces the downtown area of the City...." 964 F.2d at 616 (emphasis added). Thus, the connection between Ottawa and the Jaycees was much closer than any relationship between Grand Rapids and Chabad House in this case.

Nevertheless, we believe these are distinctions without a difference; the crucial facts in both *Small* and this case are that a private group is erecting a display in a traditional public forum. These facts are not automatically determinative. Tricky questions could arise if there is a claim that the public forum has not been equally open to all, that an ostensibly neutral restricting criterion actually discriminates among viewpoints, or that there is some government collusion in an ostensibly private display. However, no such questions exist in this case. Grand Rapids has made a consistent, even noble, effort to open the Plaza to as wide a range of speakers as possible. For a number of years, the city has followed its policy of equal access rigorously, with an admirable neutrality that insures that no viewpoint has received any advantages over any other.

In its brief and at oral argument, Grand Rapids reiterated its commitment to allowing all points of view to be represented in the Plaza. Despite a rain of hypothetical questions from the bench, counsel for Grand Rapids did not deviate from affirming that Grand Rapids would allow other viewpoints equal access, even if such displays were unpopular (for example, erecting a swastika on Adolf Hitler's birthday) or stood for an extended period of time. A case can be made that such an enlightened attitude might be difficult to maintain if a political controversy arose. *See, e.g., Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (upholding right of Nazis to march in Skokie, Illinois), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). If a case of this type arose, with specific facts that showed favorable treatment of a religious message, then an Establishment Clause challenge might carry more weight. However, on the facts in this case, no such challenge is tenable.

A ban on religious expression in the public forum, even if limited to a ban on expression by signs and symbols, would lead to impossible difficulties. Under established doctrine, the ban could hardly be limited to pro-religious expression; it would have to extend to anti-religious expression as well. "State power is no more

to be used so as to handicap religions, than it is to favor them." *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947). As counsel for plaintiffs correctly asserted at oral argument, under the plaintiffs' principle a banner reading "Cure AIDS, smash the Catholic Church" would be banned, while one reading "Cure AIDS, support research" could not be banned. We do not read the Establishment Clause to place such a heavy burden on freedom of speech.

Thus, we rule in favor of Grand Rapids and Chabad House, because we hold that truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer. This holding does not mean that an equal access policy in a public forum "trumps" the Establishment Clause, or that the Establishment Clause does not apply to such a situation. A government cannot avoid the legal questions in this area of the law simply by designating a particular place as a public forum. Additional facts may belie the label, and thus undermine a government's reliance on our holding. However, if such additional facts are not forthcoming, and the evidence indicates that an area actually is a traditional public forum, then private groups may express a religious message without a reasonable observer inferring public support of the message. Those who oppose such practices are free to express their own beliefs and to take their case to the citizens of the community rather than to the courts.

We must remember, when applying the endorsement test, that the reasonable observer is "objective." *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711, 105 S.Ct. 2914, 2918, 86 L.Ed.2d 557 (1985) (O'Connor, J., concurring). Thus, the reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do. Great defenders of free speech, such as Professor Harry Kalven, have written of the dangers to free speech posed by the "Heckler's Veto," an attempt by those who dislike a speaker to create such a disturbance that the speaker must be silenced.[8] By and large, however, the courts have recognized that we cannot allow the right of free speech to be restricted based on the hostile reaction of those who disagree with it. "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1, 86 S.Ct. 719, 719 n. 1, 15 L.Ed.2d 637 (1966).

This case presents another challenge to the right of free speech from those who do not like the message at issue or the manner in which it is presented. We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. The plaintiffs posit a "reasonable observer" who knows nothing about the nature of the exhibit—he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. We refuse to rest important constitutional doctrines on such unrealistic legal fictions. *See Doe v. Small*, 964 F.2d 611, 630 (7th Cir.1992) (Easterbrook, J., concurring) (refusing to allow "an obtuse observer's veto, parallel to a heckler's veto over unwelcome political speech.")

VII

Finally, we wish to emphasize that our holding, while it gives significant protection to private religious speakers, does not require governments to allow all such speakers to speak in any manner whatsoever in a public forum. Private groups might

8. For an excellent discussion of this concept, *see* Harry Kalven, Jr., The Negro and the First Amendment 140–60 (1965).

be seen as exceeding that protection by seeking to make their displays permanent, by erecting displays so large as to be dangerous, or by otherwise monopolizing the forum. However, governments have ample avenues of protection from such possibilities. "[T]he government may enforce reasonable time, place and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). Thus, Grand Rapids could, if it chose, probably limit the height or length of time of displays or rallies, or even ban all unattended displays, if done evenhandedly. *See Chabad Lubavitch of Ga. v. Harris*, 752 F.Supp. 1063 (N.D.Ga. 1990) (state policy prohibited placement of any object on state capitol grounds by members of the public); *Lubavitch of Iowa, Inc. v. Walters*, 684 F.Supp. 610 (S.D.Iowa 1988), *aff'd*, 873 F.2d 1161 (8th Cir.1989) (requiring plaintiffs to remove menorah at close of services was consistent with state policy that there be a thorough cleanup after event is concluded).

VIII

What the members of Chabad House seek in this court is fully consistent with, and does not violate, our traditional division between church and state. They are neither interfering in city functions, nor trying to bend the city to their will. They seek nothing that this court would not readily compel the city to grant to any secular group in similar circumstances. They merely ask that they not be spurned because they choose to praise God. Instead of forcing them to remain on the sidelines, our Constitution offers them a platform from which to proclaim their message. In the traditional public forum, as at the ballot box, all citizens are insiders as they seek to influence our civic life.

When it granted Chabad House's permit, Grand Rapids stayed firmly on its side of the wall separating church and state. It acted merely as the referee and arbiter of the public space, rather than becoming a participant or combatant in the melee of ideas and expression that characterizes America at its best. As Justice Brennan has stated:

> The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously diverse lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

McDaniel v. Paty, 435 U.S. 618, 642, 98 S.Ct. 1322, 1336, 55 L.Ed.2d 593 (1978) (Brennan, J., concurring). Thus, we hold that Chabad House's exercise of its freedom of speech does not violate the Establishment Clause, and REVERSE the judgment of the district court.

BOYCE F. MARTIN, JR. Circuit Judge, dissenting.

I join Judge Lively's dissent from the opinion of the court. I would go further, however, and delineate once and for all what is acceptable and what is not acceptable when free speech collides with freedom from government endorsement of religion.

The First Amendment does not confer absolute rights of freedom of speech. Reasonable restraints on time, place, and manner of speech in public forums are upheld as long as the restrictions are necessary to achieve a valid state purpose. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068, 82 L.Ed.2d 221 (1984). Government regulation of speech in public forums is permissible if it is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternate channels of communication. *Id.* Freedom from governmental endorsement of any re-

ligion is a valid state purpose, which in this case could be implemented by refusing to allow religious groups to leave religious symbols in Calder Plaza. In my opinion, such a restraint is appropriate. Yet the majority opinion rejects this solution out of hand.

My saddest objection to the majority opinion is that it overrules without explanation our prior decisions in *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986); *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir.1990); *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir.1990); *Grand Rapids I*, 922 F.2d 303 (6th Cir. 1990); and *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991).

The majority opinion opens every downtown public park to any form of religious symbol. In this case, a purely religious symbol was left unattended in a public park. The disclaimers were of little value. The majority upholds the right of private parties to leave religious symbols throughout the park on any occasion as an element of free speech. Because different religions celebrate various events in their religious year at different times, Calder Plaza could be filled with religious items year round. These religious symbols may, and probably will, give the impression that the city of Grand Rapids endorses some religion. As Judge Lively argues so well in his dissenting opinion, such an impression was created by the menorah in this case. The city simply cannot allow anyone to place religious symbols in Calder Plaza if those symbols leave that impression that the city endorses religion. The First Amendment protects Chabad House's right to say anything it wants to say in Calder Plaza, but the First Amendment does not mandate allowing Chabad House to leave a religious symbol, which creates the appearance of government-endorsed religion, on the square.

Judge Lively's quote from Justice Stevens' opinion in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 650–51, 109 S.Ct. 3086, 3131–32, 106 L.Ed.2d 472 (1989) (Stevens, J., concurring in part and dissenting in part), reflects my belief as well as it can be written. Thus, I respectfully dissent.

LIVELY, Senior Circuit Judge, dissenting.

The First Amendment enshrines values and guarantees that lie at the core of individual human liberty. This is true whether the various clauses are considered individually or together. Yet, there is inherent in this grouping of several absolute commands a potential for conflict between two or more of them. This case concerns a conflict between the Establishment Clause and the Free Speech Clause. In my opinion, the court has reached the wrong answer in attempting to resolve this conflict.

There is no dispute that the display of a menorah is symbolic "speech" under the First Amendment. What is in dispute is whether the City of Grand Rapids violated the Establishment Clause by permitting Chabad House to erect the twenty-foot high steel menorah at a conspicuous place on Calder Plaza and leave it unattended for the eight days of the Jewish holiday of Chanukah. The majority opinion finds no violation in this case essentially for three reasons.

In the first place, the majority finds that only a resident of Grand Rapids who knows that Calder Plaza is a public forum open to all speakers and who has lived there long enough to have known and observed the various activities that have occurred there qualifies as "the reasonable observer." I believe this definition of a reasonable observer is far too narrow.

Next, the majority concludes that because Calder Plaza is a public forum, the Free Speech Clause of the First Amendment requires that it permit all speech there, secular and religious alike. In effect, this is an interpretation that requires the Establishment Clause always to yield to the Free Speech Clause when the two are in conflict. To me, this is an erroneous interpretation of First Amendment law.

Finally, the majority opinion appears to find constitutional significance in the fact

that Chabad House is a private organization, not an arm of government. Obviously, the First Amendment only addresses official action. The Supreme Court has made it abundantly clear, however, that a government violates the Establishment Clause by permitting a private party to erect and maintain religious symbols on public property if the effect of such a display is to give the impression that the government, either intentionally or unintentionally, endorses or supports the religious message that the private group seeks to convey.

I disagree with all three major premises of the majority opinion for the reasons that follow, and respectfully dissent.

I.

A.

The question of whether a governmental unit violates the Establishment Clause by permitting a private religious organization to display religious symbols or engage in other religious exercises on public property depends upon the facts and circumstances in each case where the activity is challenged. Chief Justice Burger stated for the Court in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984):

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz* [*v. Tax Comm.*, 397 U.S. 664], 668 [90 S.Ct. 1409, 1411, 25 L.Ed.2d 697] [1970]. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614 [91 S.Ct. at 2112].

Id. 465 U.S. at 678–79, 104 S.Ct. at 1362. Justice O'Connor echoed that same thought in her separate opinion in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989):

> Judicial review of government action under the Establishment Clause is a delicate task. The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion. Instead the courts have made case-specific examinations of the challenged government action and have attempted to do so with the aid of the standards described by Justice Blackmun in Part III–A of the Court's opinion. (describing the *Lemon* test).

Id. at 623, 109 S.Ct. at 3115 (O'Connor, J., concurring). In the most recent Establishment Clause case from the Supreme Court, Justice Kennedy wrote that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one...." *Lee v. Weisman*, — U.S. —, —, 112 S.Ct. 2649, 2661, 120 L.Ed.2d 467 (1992).

B.

The statement of facts in the majority opinion is essentially accurate. There are certain facts, however, that lead me to conclude there was an Establishment Clause violation in this case.

Calder Plaza is much more associated with government than an ordinary city park. In fact, the presence of government is pervasive. The City filed exhibits with its brief consisting of a plat showing the location of the menorah in relation to the various government buildings and several photographs of the menorah in place. The surrounding buildings house the core functions of local and state government units. The photographs, taken from eye level, show the menorah from different angles with different government buildings in the background. In each picture the menorah dominates the view, and the buildings serve as a backdrop. The total effect is overwhelming; for these eight days nothing

else in or upon this government square captures the eye of an observer like this religious symbol. The two City exhibits are filed as an Appendix to this opinion.

The majority opinion appears to concede this much, as indeed it must, but says this strong visual impression is totally neutralized by the two-foot by three-foot sign on each side of the menorah. They call the sign a "disclaimer," but that is not all it is. As the City's photographs show, the sign, at the very top and in much larger letters than the disclaiming language, conveys a greeting related to the religious holiday it celebrates:

> HAPPY CHANUKAH TO ALL
>
> This Menorah display has been erected by Chabad House, a private organization. Its presence does not constitute an endorsement by the City of Grand Rapids of the organization or the display.

Judge Cornelia Kennedy admirably summarized the scene presented by this particular menorah in this particular place, and its appearance to a reasonable observer, in her concurring opinion for the original panel that heard this case:

> We have here a public forum provided by the government in which some speech, the Calder sculpture, is in some fashion endorsed by the government, and other speech, the menorah, is not readily identifiable as not being endorsed or promulgated by that same government. In light of the overwhelming size and permanent appearance of the menorah, and the absence of identifiable responsible parties for twenty-three hours a day, it is not unreasonable for a neutral observer, with no knowledge of the respective religious communities' representations and no knowledge of the permit requirements, to conclude that it may in fact be a government display. In fact, for twenty-three hours a day the only distinction between the Calder sculpture and the menorah in the eyes of a reasonable observer is the disclaimer sign.
>
> In this case, the disclaimer is clearly inadequate to its task. The disclaimer is not at all visible to the majority of the audience of the speech. As noted by the majority opinion, the most visible part of the disclaimer is in fact not a disclaimer at all, but rather more religious speech. The actual dissociative message of the disclaimer is not available to the vast majority of the audience of the symbolic speech, and therefore cannot redeem it. I do not think it necessary to address all the possible relative size and viewing combinations with respect to the symbolic speech's audience and the disclaimer's audience, but I have no trouble concluding that in light of the many factors lending credence to an inference that the menorah is government speech, this disclaimer is inadequate.
>
> A reasonable observer of Calder Plaza, seeing a seemingly permanent and orphan sculpture at one end and a similarly permanent and orphan religious symbol at the other end, could easily infer that Grand Rapids has, for whatever reason, decided to participate in the Chanukah celebration. This appearance of an endorsement, however unintended, violates the establishment clause.

Americans United for Separation of Church and State v. City of Grand Rapids, Nos. 90–2337; 91–1391/1448, slip op. at 33–34, 1992 WL 77643 (6th Cir. Apr. 21, 1992).

II.

A.

The majority opinion argues that the plaintiff's definition of "the reasonable observer" is too broad and that in effect, it permits a "Heckler's Veto" or an "Ignoramus's Veto." [1] I disagree. To the majority, only a resident of Grand Rapids who is familiar with the details of the city's policy for use of Calder Plaza, and in fact, knows that many other organizations have used it as a public forum qualifies as "the reason-

1. The individual plaintiffs, whom the district judge saw and heard, were concerned residents of Grand Rapids. The district court's conclusions rest in part upon an implicit finding that these parties were representative "reasonable observers."

able observer." I find this definition much too narrow.

To me, any reasonably well-informed person who happens to pass Calder Plaza during the time the twenty-foot high unattended menorah occupies the place shown in the photographs qualifies as a reasonable observer. That observer might be a passer-through or a passer-by. The reasonable observer does not have to be familiar with Grand Rapids' religious demographics, the city's regulations regarding use of the plaza, or past uses to which it has been put. This observer must be left to draw his or her conclusions from the vista presented *at the time.*

The majority opinion seeks to strengthen its reasonable observer argument by stating that anyone interested enough to investigate would read the small "disclaimer" sign and know that there was no endorsement by the City of Chabad House's display. Again, I disagree. All the sign can inform an observer is that the City *intends* no endorsement. If the menorah sends a message of endorsement, the intent of the parties is irrelevant.

Counsel for Chabad House argued before the *en banc* court that no reasonable observer would believe that Grand Rapids, a predominantly Christian community, would endorse the faith of a very small group of its non-Christian citizens. Of course, the Establishment Clause is no less a prohibition against governmental endorsement of a minority religion than of the religion of the majority. It prohibits endorsement or support of any religion. It requires absolute neutrality in all matters religious.

B.

The majority opinion seeks to satisfy this constitutional requirement of neutrality by pointing out that the City is neutral as regards all "speakers" who desire to use the plaza, secular and religious alike. If the only issue in the case were free speech, that would be answer enough. By ignoring the constitutional significance of religious speech, however, the majority opinion reaches the unsustainable conclusion that because Calder Plaza is a public forum, no speech can be excluded on the basis of its content. Indeed, despite its statement to the contrary, the majority opinion does have the effect of holding that the public forum concept "trumps" the Establishment Clause in a case such as this.

Justice Kennedy described the relationship between protection of speech and religion under the First Amendment in *Lee v. Weisman:*

> The First Amendment protects speech and religion by quite different mechanisms.
>
> * * * * * *
>
> The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. (citations omitted).

— U.S. at ——-——, 112 S.Ct. at 2657–58. What this relationship requires, of course, is accommodation. The majority would require the Establishment Clause always to yield to, or accommodate the Free Speech Clause as exemplified by the public forum doctrine. I believe the accommodation should be the other way around, because as Justice Kennedy recognized, the Establishment Clause stands apart within the First Amendment as a specific prohibition against certain state activities, and there is no exact counterpart in the speech provisions. Thus, I believe that the public forum concept must accommodate the proscriptions of the Establishment Clause.

Justice Kennedy dealt with conflicts between the free speech guarantee and other constitutional rights in *Burson v. Freeman,* — U.S. ——, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). Concurring in the opinion of the Court, he stated:

> Under what I deem the proper approach, neither a general content-based proscription of speech nor a content-based proscription of speech in a public forum can be justified unless the speech falls within

one of a limited set of well defined categories.

* * * * * *

As I noted in *Simon & Schuster* [*Inc. v. Members of New York State Crime Victims Board*] [— U.S. —, 112 S.Ct. 501, 116 L.Ed.2d 476] (1991), there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. A conflict with the Establishment Clause is one of those "well defined categories"—a "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." (citations omitted).

Id. at ———, 112 S.Ct. at 1858–59.

We are not constituted to decided hypothetical cases or render advisory opinions to governments. On the facts of this case, the large unattended menorah at this location would send a message of endorsement or support to a reasonable observer. Thus, the district court correctly held that the public forum concept must yield to the prohibition of the Establishment Clause.

C.

In addition to its treatment of the "reasonable observer" requirement and its emphasis on the fact that Calder Plaza is a public forum, the majority opinion makes much—too much, I believe—of the fact that the "speech" involved here is that of a private group rather than speech made directly by the City. The opinion appears to argue either that the Establishment Clause applies only when the government itself is the speaker, or that its prohibition is less absolute when a private party or organization speaks under circumstances in which government support may be inferred. That reading of the First Amendment is too narrow under existing precedents. Justice Blackmun wrote for the Court in *Allegheny County:*

> But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, *e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 [109 S.Ct. 890, 103 L.Ed.2d 1] (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

492 U.S. at 600–01, 109 S.Ct. at 3105. It is clear that a government's support and promotion of a private organization's religious communications violate the Establishment Clause.

The majority opinion relies upon the Supreme Court's reference to the "crucial difference" between government and private speech endorsing religion in *Bd. of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990). The Court in *Mergens* did not hold or intimate that government action that supports or endorses private organizations' religious communications can never run afoul of the Establishment Clause. The quotation merely expressed the truism that private religious expressions are not affected by the Establishment Clause *absent* some governmental act of support or promotion.

III.

I believe the majority opinion's reliance upon *Mergens, Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and other decisions not involving religious symbols on publicly owned property is misplaced. Since the Supreme Court's decisions in *Lynch* and *Allegheny County* we have a well-defined body of law dealing with the specific problem presented by this case. Although cases involving different First Amendment disagreements may provide general principles, the Supreme Court has now given us a definitive test to apply to the specific issue that arises from the governmental practice of

permitting displays of religious symbols in settings intimately associated with government. Justice O'Connor stated the test in her separate concurrence in *Lynch*, where she wrote:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

465 U.S. at 692, 104 S.Ct. at 1369. What the government must avoid is sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688, 104 S.Ct. at 1367. A majority of the Supreme Court adopted the endorsement standard in *Allegheny County*. 492 U.S. at 597, 109 S.Ct. at 3103.

A.

The majority opinion's heavy reliance on *Mergens*, a case decided under a statute, to support its view that a requirement of equal access to a public forum has constitutional primacy over the Establishment Clause is typical of its misapplication of precedent to the facts of this case. The issue in *Mergens*, from which the majority draws its open forum argument, was whether, under the federal Equal Access Act, a government agency—a high school—could constitutionally deny a private group use of school facilities after instructional hours to conduct a meeting involving religious expression. When the meeting ended, no religious symbols were left behind. Only after finding that the school board's action in complying with the Equal Access Act did not amount to an endorsement of religion did the Court hold that use of the facilities for that purpose could not be denied because the school was a limited public forum. There was no intimation that if the Court had ruled otherwise on the endorsement question the public forum doctrine would have required permission to use the facilities despite the fact that such use would have violated the Establishment Clause.

Similarly, I believe that reliance upon such decisions as *O'Hair v. Andrus*, 613 F.2d 931 (D.C.Cir.1979) is also misplaced. The facts of *O'Hair* relate in no way to the facts of the present case. It involved a single religious ceremony on the Mall in Washington by the Pope. When the Catholic Mass was over the Pope departed and all vestiges of the event were removed. The *O'Hair* court stated that its holding was controlled by its own previous decision in *A Quaker Action Group v. Morton*, 516 F.2d 717 (1975), and *Allen v. Morton*, 495 F.2d 65 (1973). *O'Hair* was decided long before *Lynch* and *Allegheny County* and does not mention, much less rely upon, the issue of endorsement. Finally, as the decision of another court of appeals that was never reviewed by the Supreme Court, *O'Hair* has no binding effect on this court.

Both *Mergens* and *O'Hair* concerned discrete meetings of short duration conducted by religious groups. If the sponsoring group of the religious discussions in *Mergens* had erected and left unattended for a period of time a large religious sign in front of the school, or in the classroom, I believe *Lynch* and *Allegheny County* would require a different result. These decisions would surely have required a different result if the religious group that sponsored the Pope's appearance had left behind at the place on the Mall where the Mass was celebrated, a lighted twenty-foot high cross or crucifix.

B.

Of other post-*Lynch* and *Allegheny County* cases at the court of appeals level, the majority opinion appears to embrace *Doe v. Small*, 964 F.2d 611 (7th Cir.1992), with the greatest enthusiasm. In fact it describes *Doe v. Small* as "a case very similar to this one." This description overlooks several critical facts that distinguish that case from the present one. First, the *Doe v. Small* opinion states that the religious paintings were displayed by the Jay-

cees in Washington Park, "a quintessential public forum *well removed from the seat of the City government; City Hall is some three blocks away, and no City buildings border the park.*" 964 F.2d at 613 (italics supplied). This language hardly describes a setting "very similar" to Calder Plaza. Second, when the district court in *Doe v. Small* granted an injunction prohibiting the display, the City did not appeal. The issue before the *en banc* court of appeals was whether the injunction against the Jaycees was too broad. In describing the issues on appeal, Judge Coffey stated, "We need not and will not address the issue of whether the City of Ottawa endorsed the Jaycees' religious speech because the City has not appealed." *Id.* at 617. Thus, what is the critical issue in the present case was neither addressed nor decided in *Doe v. Small.* The case is no precedent at all for this court. What the majority opinion does is quote dicta by various members of the *Doe v. Small* court found in four separate opinions, while ignoring those facts which deprived the decision of any true precedential value in our case.

If we are to look to decisions from other circuits for guidance, it seems to me that post-*Lynch* and *Allegheny County* cases from the Second and Fourth Circuits should provide that guidance. In *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir.1989), the court held that permitting a private group to erect a sixteen-foot high menorah in a city park in front of city hall for the period of Chanukah violated the Establishment Clause. Judge Feinberg analyzed *Allegheny County* in depth, and related the holdings of that case to the one before the court. As in the present case, the attorneys for the City and the private group that had erected the symbol argued that because City Hall Park was a traditional public forum, the City could not deny the private group's request to erect the menorah. Judge Feinberg responded for the court: "If this were so, however, the public forum doctrine would swallow up the Establishment Clause." *Id.* at 1029. I agree with this analysis.

I also believe that the court in *Smith v. County of Albemarle, Virginia,* 895 F.2d 953 (4th Cir.1990), decided the issue correctly. In *Smith,* the court found that a nativity scene erected on the front lawn of the County Office Building by a private group violated the Establishment Clause. The lawn was a least a "designated public forum," which required that there be a compelling state interest in order to permit content-based regulation of speech there. The court found that a small disclaimer sign did not serve to render the display permissible. In rejecting *Smith*'s application to this case the majority opinion states that the lawn was "rarely used for such events," making the "county's citizens more likely to draw a connection" between the government and the speakers. Does the majority opinion mean that the result turns on how often the public forum is used as well as by the degree of familiarity the "reasonable observer" has with past uses?

IV.

A.

Several times since the Supreme Court decided *Lynch* and *Allegheny County* this court has dealt with the Establishment Clause issue raised by religious symbols being placed on public property, either by governmental units or private parties.

In *ACLU v. City of Birmingham,* 791 F.2d 1561 (6th Cir.), *cert. denied,* 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), a divided panel held that a city violated the Establishment Clause by displaying a city-owned crèche on the lawn of City Hall during the Christmas season. The nativity scene included the traditional figures used to depict the Biblical story of the birth of Jesus. "Absolutely nothing else [was] included in the display." *Id.* at 1562. Applying the three-pronged *Lemon* test and Justice O'Connor's endorsement standard in *Lynch,* the majority of the panel concluded that the display in a prominent position on the lawn of the official headquarters building of the municipality, without any offsetting secular symbols of the season, had the effect of endorsing Christianity.

The crèche called attention to a single aspect of the Christmas season—its religious origin. Thus, standing alone without any nonreligious symbols, it "sen[t] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 1566 (quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. at 1367 (O'Connor, J., concurring)).

ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir.1990), arose when the Commonwealth of Kentucky erected a 15–foot high stable, containing approximately 20 by 30 feet of floor space on the State Capitol grounds during the 1988 Christmas holiday season. The stable had a manger and some straw inside, but it contained no statues or figurines traditionally used to depict the birth of Jesus and events that followed. The ACLU sought an injunction to require the State to remove the stable. Three times prior to the district court hearing, church groups were permitted to conduct pageants in and around the stable with live persons and animals representing figures in the Biblical story. *Id.* at 1100–01.

The district judge held a hearing and viewed the site. He denied the request for an injunction, provided that the State prominently display a sign advising the public that the area around the stable was a public forum available to responsible civic and religious groups "for holiday ceremonies, pageants or displays;" the State adopt a formal written policy consistent with this notice; private funds defray all expenses in connection with the stable; and the State post a disclaimer in front of the stable "in letters big enough to be read from an automobile passing on the street before it." *Id.* at 1099–1100.

A divided panel of this court affirmed the judgment denying an injunction. The majority opinion distinguished *City of Birmingham* and *Allegheny County* as follows:

> The present case differs from both *City of Birmingham* and *Allegheny County* in that here we have a structure capable of use for non-religious purposes, and the structure is unaccompanied by any display of religious figurines or statues. The nativity scene in *City of Birmingham* was comprised *solely* of "figurines depicting the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs," 791 F.2d at 1562, while the *Allegheny County* crèche included "figures of the infant Jesus, Mary, Joseph, farm animal, shepherds, and wise men, all placed in or before a wooden representation of a manger...." 492 U.S. at 580, 109 S.Ct. at 3094, 106 L.Ed.2d at 486. (emphasis in original).

Id. at 1103. Nevertheless, because there were no secular symbols associated with the season in the immediate area of the stable, the majority concluded that, in the absence of a disclaimer, the unadorned stable might lead a "reasonable observer" to find some religious significance in the display. *Id.* at 1103. The combination of notice that the area was a public forum and the unequivocal disclaimer were found sufficient to dispel any message of endorsement.

Doe v. City of Clawson, 915 F.2d 244 (6th Cir.1990), involved a citizen's challenge to the display of a crèche containing all the traditional figures on the front lawn of the City Hall. Many secular figures and symbols were included in the overall display. Judge Milburn, writing for a unanimous panel, found that the display fell somewhere between the crèche and menorah displays considered by the Supreme Court in *Allegheny County*. This court found that the City of Clawson crèche, as displayed, did not violate the Establishment Clause. The court reached this conclusion after identifying three factors considered by the *Allegheny County* Court in making its "endorsement" determination: context, composition, and location. *Id.* at 247. Analyzing these factors the court found that the crèche was displayed in the context of celebration of Christmas as a national holiday; the composition of the display included secular symbols of the season that had separate "focal points" with different visual stories to tell, that detracted from the

crèche's religious message; and although the location of the display on city hall lawn was troublesome, the "combined display" ... "conveys a message of pluralism" rather than one of endorsement. *Id.* at 248–49.

We also have published opinions in connection with stay orders in this case, *Grand Rapids I*, 922 F.2d 303 (6th Cir. 1990), and in *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991). In *Grand Rapids I* the panel concluded that the Chabad House had demonstrated a sufficient likelihood of success on the merits to warrant this court's staying the district court injunction. That was the only issue before the court, and it prefaced its discussion of the merits by stating: "We strongly emphasize that we are not now deciding the appeal. That must wait until full briefing and the opportunity for oral argument." 922 F.2d at 306.

A divided panel denied a stay of the district court's refusal to enter an injunction in *Congregation Lubavitch v. Cincinnati* upon finding that while Fountain Square is a public forum in Cincinnati, it "does not carry the same suggestion of imprimatur as a location near City Hall." 923 F.2d at 462. Judge Guy dissented and would have granted a stay until the case could be decided on the merits. He expressed the view that the public forum doctrine "does not give members of the public an unfettered right to place tangible objects in a public square and leave them there unattended...." 923 F.2d at 463.

B.

Of course, none of these decisions, and least of all, those that decided preliminary injunction questions without reaching the merits, is binding on this *en banc* court. The only one of these cases with facts even remotely analogous to those in the present case is *Wilkinson*. The *Wilkinson* court found the disclaimer sign dispositive in view of its determination that without a disclaimer, the stable, in its setting, would convey a message of endorsement of Christianity. 895 F.2d at 1103. But all disclaimer signs are not equal.

There was no ambiguity about the disclaimer sign in *Wilkinson*. It made two statements: (1) that the display was not constructed with public funds and did not constitute the Commonwealth's endorsement of any religion or religious doctrine; and (2) that the immediate area of the stable structure was a public forum, available to all responsible citizens and groups, civic and religious, for holiday displays. 895 F.2d at 1101–02 n. 2. By contrast, the "disclaimer" in the present case contained at the sign's very top a religious greeting, in large letters, followed by an identification of Chabad House and a statement that its presence did not constitute an endorsement by the City, all in smaller letters.

The stable in *Wilkinson* was just an ordinary small farm building, "capable of use for non-religious purposes." 895 F.2d at 1103. There were no statues or figurines depicting the characters in the New Testament accounts of the birth of Jesus. When the church groups were acting out that story, "observers" would presumably draw near enough to see and hear the performance. From such location, the disclaimer sign would be clearly legible and its language would effectively negate what could otherwise easily be construed as endorsement of the religious message that clearly was being sent. By contrast, the very size and placement of the menorah, as shown by the photographs, sent its religious message far beyond those locations from which the disclaimer language could be read. From a distance, only the menorah itself and the religious message "HAPPY CHANUKAH TO ALL" could be read. Further, one who observed the stable in *Wilkinson* from afar saw nothing but an unremarkable building with no religious trappings; the Calder Plaza menorah, from a similar distance, sent only a religious message.

I do not believe a city or other governmental unit should be permitted to escape responsibility for permitting the erection and unattended presence of religious symbols on public land intimately associated with government by merely erecting a sign that says "what you see is not what you think you see." If the natural effect of

such a display in a particular location is to create an inference of endorsement or support, no words should be found sufficient to counter that impression. If the court concludes that *Wilkinson* correctly held that a simple disclaimer is sufficient to satisfy the absolute prohibition of the Establishment Clause, however, I believe the disclaimer should at least be as unambiguous and clear as the one approved in *Wilkinson*. The sign erected by Chabad House in the present case (and all such cases must be decided on their own facts) does not satisfy that requirement.

CONCLUSION

The fact that religious expression takes place in a public forum does not in any way lessen the force of the Establishment Clause; that fact does, however, require a stringent examination to determine whether the government's effort to limit speech in a particular setting serves a compelling government interest. Every unit of government in the United States, including the City of Grand Rapids, has a compelling interest in observing the Establishment Clause and preserving the values that Clause guarantees. To accept the majority's construction of the interplay between Establishment Clause principles and the public forum doctrine would turn the Establishment Clause into a paper screen rather than the bulwark of separation between church and state it was intended to be.

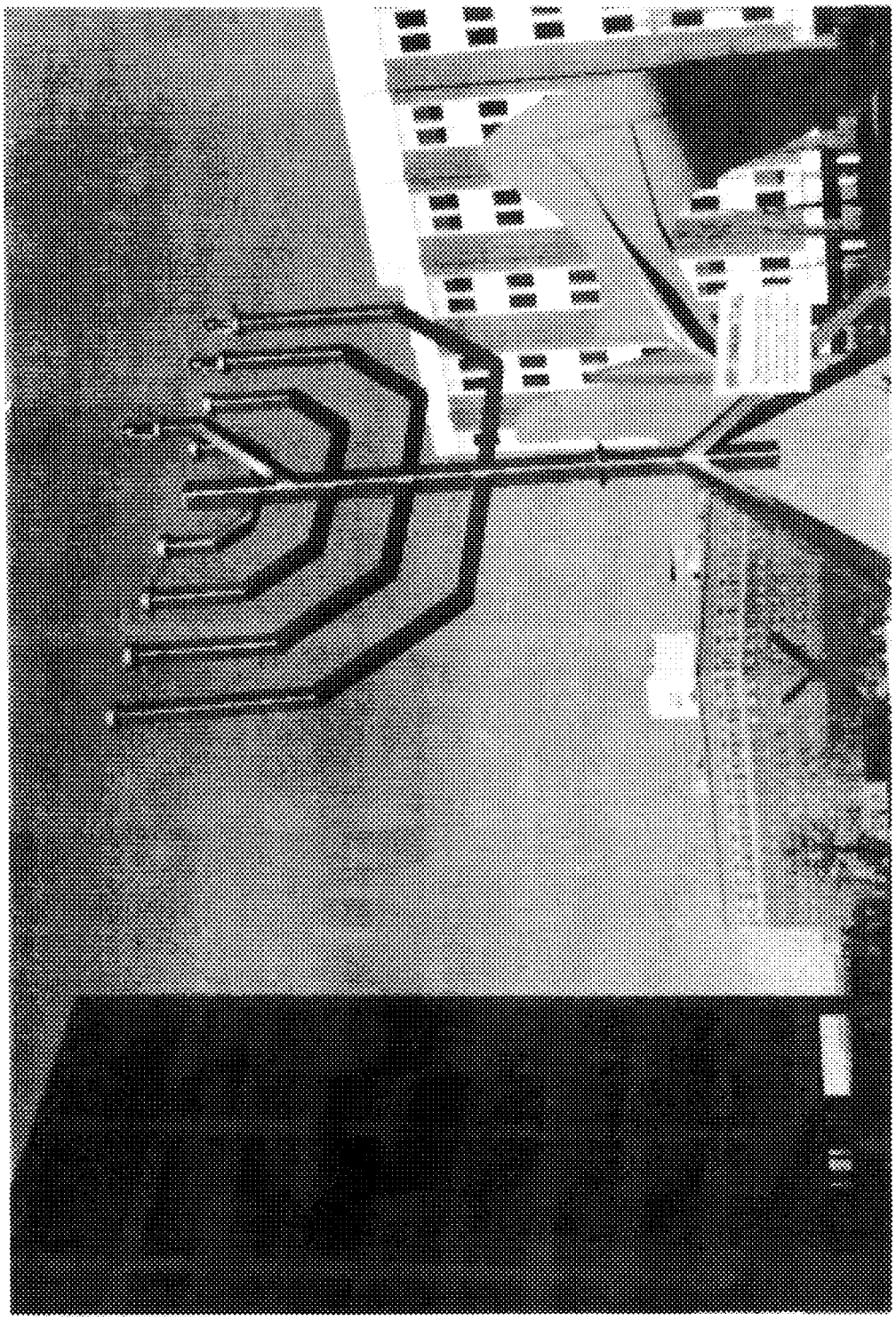
Justice Stevens's statement in *Allegheny County* provides the proper approach to cases of this kind:

> In my opinion the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City–County Building. Even though "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs," displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement.

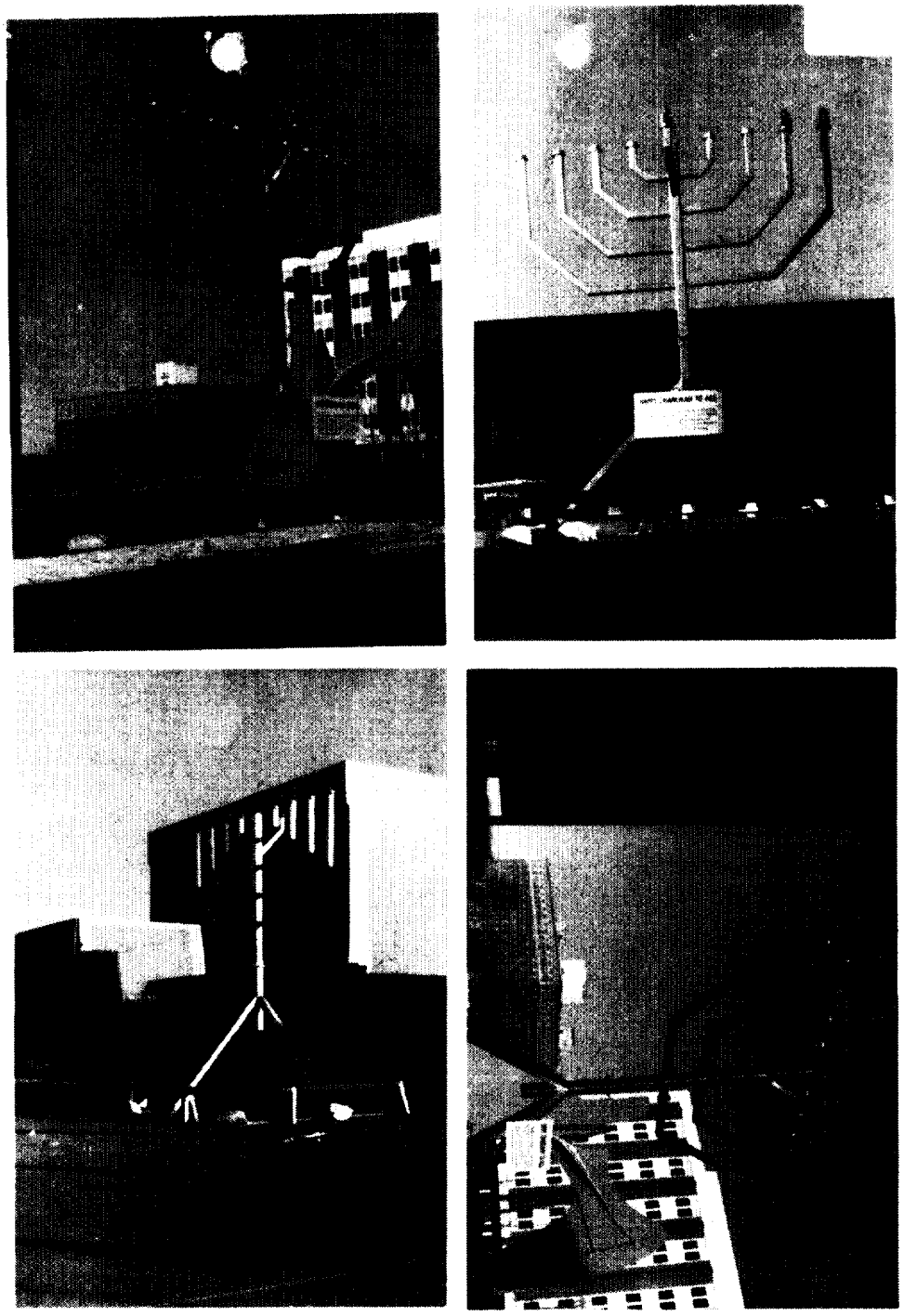
492 U.S. 573, 650–51, 109 S.Ct. 3086, 3131–32, 106 L.Ed.2d 472 (Stevens, J., concurring in part and dissenting in part) (citations and footnotes omitted).

I would affirm the judgment of the district court.

APPENDIX



APPENDIX—Continued



APPENDIX—Continued