

A Defining Faith: "True" Religion and the Establishment Clause

Introduction

This essay examines two trends in modern church-state law. Parts I and II review the history of the Supreme Court's Establishment Clause cases. It is a history that can best be understood as a series of jurisprudential maneuvers by which the Court has sought to make room for religion in civic life. The accommodations made by the Court to religious belief and conduct have, in effect, allowed for discrimination against non-religion, and have edged the court toward a nonpreferentialist perspective on disestablishment. But the Court's accommodating attitude amounts to more than a preference for the many varieties of religious experience. That preference is itself premised on the privileged position of what might be called normative religion. By adopting a majoritarian approach to church-state controversies, the Court has put the power, prestige, and financial support of the government behind a traditional religious consensus--behind, in other words, the conventional theism that dominates our cultural heritage. Surprisingly, this religious "settlement" may be threatened not by separationist sentiment, but by the Court's own reluctance to define religion in narrow terms. In Part III of this essay, I consider the expansive approach the Court has taken to the problem of defining religion. Taken together, these two trends pose a significant problem for the Court's accommodationist strategy: by expanding the constitutional definition of religion

to include minority faiths, the Court risks undermining the normative religious consensus it has sought to encourage. In Part IV, I explore this threat to the Court's increasingly nonpreferentialist perspective. The courts have struggled with the "most delicate question"¹ of defining religion in a bewildering variety of Establishment Clause cases. The significance of the definitional question, however, goes beyond the specifics of any one case. As the Supreme Court continues to retreat from a position of separationism, the pressure to define what is religion--that is, what faith is "in" (and entitled to government support) and what faith is "out"--will inevitably increase. A broad definition of religion will mean a wide variety of claimants for government support, including some whose beliefs will not be tolerable to mainstream believers. When witches and Satanists are entitled to the same privileges that Christians receive from the government, the political premises of nonpreferentialism would seem to be poorly served. And, in a strange twist of constitutional history, the very principles by which nonpreferentialists have sought to support religious practice may prompt a reconsideration of the virtue of high and impregnable walls.

I

The history of the Supreme Court's Establishment Clause cases is a record of considerable ingenuity. The Court has tried out "a number of unique, and often sharply juxtaposed approaches"² in its effort to reconcile the claims of church and state. On one side of the jurisprudential spectrum the strict separationists insist that "the effect of the [Establishment Clause] was to take every form of propagation of religion out of the realm

¹ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

² JOHN WITTE, Jr., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 152 (2000).

of things which could directly or indirectly be made public business."³ The other end of the spectrum is occupied by those who claim that the Constitution, far from prohibiting government support of religion, "affirmatively mandates" it.⁴ As befits a spectrum, this one has a range of theoretical options designed to bring some measure of sense (or, at least, peace) to warring constitutional camps.

The conflict in disestablishment law has resulted in a number of familiar "tests" (with assorted variations, and variations on the variations) to determine when some governmental activity has violated the Establishment Clause. The imprecision of these tests has drawn "heavy criticism since their creation."⁵ But the record is not as inconsistent or improvisational as it might appear. In fact, there is a method to the "massive jumble of . . . doctrines and rules"⁶ that forms the law of disestablishment: the method of a somewhat disorderly retreat from the Constitution's foundational principle of church-state separation.

The fortunes of great ideas often rest on a fragile base of metaphor. Jefferson's wall of separation was the symbolic foundation for Justice Black's ringing assertion in *Everson v. Board of Education* that "[n]o 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. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall

³ *Everson v. Board of Education*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

⁴ *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984).

⁵ David L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 163 (1987). The literature critical of the Court's Establishment Clause jurisprudence is voluminous. See, e.g., Mark Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1008 (1986) ("The jurisprudence of the religion clauses is a mess.").

⁶ *Id.* at 182.

of separation between Church and State."⁷ The wall has been crumbling for some time.⁸ In *Lemon v. Kurtzman*, Chief Justice Burger reduced Jefferson's libertarian edifice to something less than wall-like: "[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."⁹ The demise of this particular exercise in judicial imagery came to a rather ignominious end in *Lynch v. Donnelly*, where Chief Justice Burger observed that the concept of a wall is merely "a useful figure of speech."¹⁰ "The metaphor itself," the Chief Justice cautioned, "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."¹¹

For the *Lynch* majority, the practical aspects of that relationship meant "the reality" that total separation of church and state was not possible.¹² This was not just a matter of practicality, however; it was a constitutional mandate: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."¹³ It appears that we should be in the business of building bridges, not walls.¹⁴

⁷ 330 U.S. 1, 15-16 (1947). In Supreme Court jurisprudence, the wall metaphor made its first appearance in *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁸ See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall--A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 781 (1984) ("The wall of separation between church and state has been breached by a clear governmental, politicized, symbiotic embrace of one faith's preferred holy day.").

⁹ 403 U.S. 602, 615 (1971).

¹⁰ 465 U.S. 668, 673 (1984).

¹¹ *Id.*

¹² *Id.* at 672.

¹³ *Id.* at 673.

¹⁴ See Van Alstyne, *supra*, note 8, at 771. Or, perhaps, we are traversing a jurisprudential "tight rope," as Chief Justice Burger suggested in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 672 (1970). In *Walz* the Chief Justice also observed that "[t]he course of constitutional neutrality in this area cannot be an absolutely straight line." *Id.* at 669. One might be forgiven for thinking that there is some metaphorical confusion here. Or that Establishment Clause jurisprudence has become an especially challenging circus act of constitutional interpretation.

The quick collapse of Jefferson's wall should not have been unexpected. Like other famous walls, it was never quite as "high and impregnable"¹⁵ as it appeared to be. In 1947, it seemed that a strict separation of church and state was constitutionally required. The *Everson* Court can certainly lay claim to having established the highwater mark of separationist rhetoric. But, though the *Everson* majority promised not to approve even "the slightest breach" in Jefferson's wall,¹⁶ the separationist rhetoric of that decision receded before a tide of practicality. Black's words delivered less than they promised, and, of course, the Court held that New Jersey's reimbursement scheme did not violate the Establishment Clause.¹⁷ Under certain circumstances, it seems that government could "pass laws which aid . . . all religions."¹⁸

Those circumstances deserve some attention: they would become the tools by which the Court would dismantle Jefferson's metaphor as a constitutional principle.

First, the Establishment Clause, Black asserted, "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."¹⁹ Though New Jersey could not "consistently with the 'establishment of religion clause' of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church," it could not consistent with the Free Exercise clause exclude individual believers "because of their faith . . . from receiving the benefits of public welfare legislation."²⁰ Used this way, "neutrality" means equal access--equal access, that is, to government support--for

¹⁵ 403 U.S. at 18.

¹⁶ *Id.*

¹⁷ *See id.* at 17-18.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 16.

religious and non-religious groups. In *Walz v. Tax Commission of City of New York*, Justice Harlan elaborated on this "equal protection" model of neutrality:

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.²¹

Neutrality, in this sense, is inclusive: it asks whether government has inappropriately excluded religion, not whether government has inappropriately advanced religion. It is in this sense that the Court considers neutrality to be benevolent.²²

Second, though Black acknowledged the benefit that parochial schools would derive from the reimbursement program, this conformity with an outcome favorable to religion was merely a secondary effect, one that was incidental to or overlapped with the primary purpose of the state action. This incidental or overlapping effect could be a considerable one. Black conceded that not only was it "undoubtedly true that children are helped to get to church schools" by the state's transportation program, but "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."²³ Nonetheless, Black was prepared to accept the principle that the advancement of religion may be an acceptable byproduct of government action.²⁴

²¹ *Id.*

²² *Id.* at 669. There are many flavors of neutrality, some more benevolent than others. *See infra* note 41.

²³ 330 U.S. at 17.

²⁴ *See* 330 U.S. at 17-18. For a defense of this "incidental byproduct" doctrine, see Beschel, *supra*, note 5, at 190: "The legitimate role of government is to promote the temporal welfare of the community. To the extent that government pursues this end, the fact that its acts are consistent with any religious doctrine is of no concern."

Third, any Establishment Clause objections to the bus fare program were diminished by the fact that the reimbursement scheme channeled state assistance to individual parents: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."²⁵ Black pointed out that the Court "has said that parents may . . . send their children to a religious rather than a public school";²⁶ the New Jersey bus fare program merely offered parents a way to carry out the individual choices sanctioned by the Court.

In short order, Black stated the major conceptual underpinnings of the Court's retreat from separationism. In cases involving aid to parochial education,²⁷ religious inclusion in public subsidy schemes,²⁸ equal access,²⁹ religious ritual and symbolism,³⁰ the themes of inclusive or benevolent neutrality, incidental or overlapping effect, and individual choice would form a major part of the analytical foundation for the Court's increasingly accommodationist sentiment.

The possibility that *Everson* breached the wall it purported to erect did not go unremarked. For Justice Jackson, "the undertones of the opinion, advocating complete and uncompromising separation of Church and State seem[ed] utterly discordant with its

²⁵ *Id.* at 18.

²⁶ *Id.* (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

²⁷ *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 6099 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983).

²⁸ *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

²⁹ *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

³⁰ *See, e.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 669 (1984); *McGowan v. Maryland*, 366 U.S. 420 (1961).

conclusion yielding support to their commingling in educational matters."³¹ Jackson considered the "absolute terms"³² of the Establishment Clause ("[I]ts strength is its rigidity."³³) to be necessitated by the unique volatility of religious controversy: the Establishment Clause "was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."³⁴ By its very nature, religion cannot be made part of the public business:

The effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation.³⁵

That difference, according to Justice Rutledge, requires the Court "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."³⁶ Like Justice Jackson, Justice Rutledge advocated a "root and branch"³⁷ approach to disestablishment. Relying on Madison, Rutledge argued that religion, as a matter of private conscience, is "wholly beyond the scope of civil power either to restrain or to support."³⁸ Where Jackson focused on the public order, Rutledge stressed how religious

³¹ *Everson v. Board of Education*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

³² *Id.* at 26.

³³ *Id.*

³⁴ *Id.* at 26-27.

³⁵ *Id.* at 26.

³⁶ *Id.* at 32 (Rutledge, J. dissenting).

³⁷ *Id.* at 40.

³⁸ *Id.* at 39-40.

conflict could suppress private religious exercise. State aid, according to Rutledge, would be as destructive of religious freedom as state interference.³⁹

Justice Rutledge worried that one breach could lead to others: "This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction."⁴⁰ It is against the language of the *Everson* dissenters that we must chart the course of the Court's modern Establishment Clause jurisprudence. They brought more than stylistic flourish to the Court. Underlying their contention that the Establishment Clause mandated a radical separationism was neutrality of a different sort: the prohibition of any government activity that aided religion.⁴¹

In *Everson*, Justice Jackson noted, with a good deal of understatement, that "[t]his policy of our Federal Constitution has never been wholly pleasing to most religious groups."⁴² This policy has never been wholly pleasing to a majority of the Supreme Court, either.

II

At times, the Court's accommodationist sentiment has taken the form of a direct assault on the idea that the Constitution requires the separation of church and state. Most notably, Chief Justice Rehnquist's dissent in *Wallace v. Jaffree* sought to refute the notion

³⁹ *Id.* at 40.

⁴⁰ *Id.* at 57.

⁴¹ This is the principle of formal neutrality proposed in Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). For neutrality "in the substantive sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice," see Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 WM. and MARY L. REV. 875, 922 (1987). On the Court's "recent devotion to a rigid formalism of false neutrality in construing the Religion Clauses," see Aviam Soifer, *Secular Sectarianism, Perilous Neutrality*, 38 TULSA L. REV. 755 (2003).

⁴² 330 U.S. 1 at 27 (Jackson, J., dissenting).

that Madison understood the Establishment clause as "requiring neutrality on the part of government between religion and irreligion."⁴³ Rehnquist's analysis of the historical record was clear and certain: "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*." To Rehnquist, it seems indisputable that Madison saw the Establishment Clause as designed only "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects."⁴⁴ (Justice Rehnquist's begrudging "perhaps" suggests that his nonpreferentialism may be a tactical position. Perhaps the First Amendment does not prevent governmental discrimination among the sects. Or, perhaps, the question turns on how we define a sect. If certain sects are defined as non-religious, the Establishment Clause would not prohibit discriminatory government toward them.⁴⁵)

For the most part, however, the constitutional privileging of religion has taken a less direct form. One of the most effective means by which the Court has elevated religion to a position of special status has been a refusal to acknowledge religious behavior as religious. In other words, certain forms of religious behavior are seen as so normative that they cease to be visible. They certainly cease to be objectionable. Thus,

⁴³ 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

⁴⁴ *Id.* In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 854-58 (1995) (Thomas, J., concurring), Justice Thomas argued that "the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others." Like so many other readers of the Establishment Clause before him, Thomas found support for his interpretation in Madison's Memorial and Remonstrance Against Religious Assessments. For Thomas, Madison was concerned that the state tax levy provided support for teachers of the Christian religion, and thus "Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs." The proposed assessment was flawed, Thomas reasoned, because the funding "was to be extended only to Christian sects, and the Remonstrance seized on this defect: 'Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects.'"

⁴⁵ For an early attempt to distinguish a religion from a sect, see *Davis v. Beason*, 133 U.S. 333, 343 (1890). See Part III, *infra*, at 25-27 (discussing the definition of religion in *Davis*.)

we have a long string of cases that, while adhering to the principle that the Establishment Clause "requires the state to be neutral in its relations with groups of believers and non-believers alike," contends that such neutrality does not prohibit government support of certain religious practices.

Some of these are the practices that have come to be referred to as ceremonial deism.⁴⁶ The designation of "In God We Trust" as our national motto, the phrase "Under God" in the Pledge of Allegiance--these types of religious expression are thought to be protected from Establishment Clause scrutiny. Writing in dissent in *Lynch v. Donnelly*, Justice William Brennan suggested that this protection derived from the fact that through "rote repetition" these practices have lost "any significant religious content."⁴⁷ It is curious that the more pervasive a practice the less constitutional significance it has, and curiously⁴⁸ that Brennan would go on to say that "these references are uniquely suited to such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious practices."⁴⁹ One might think that the unique serviceability of these references owed something to their continuing religious vitality. The fact that God's name is used as a form of rote repetition--that is, the fact that the majority could not imagine that the use of God's name could be offensive

⁴⁶ See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

⁴⁷ 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

⁴⁸ "'Curiouser and curiouser!' cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English)." LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 14 (Donald J. Gray ed., Norton 1971) (1865). The Alice-in-Wonderland reasoning of the Court's Establishment Clause cases has been often noted. See, e.g., Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 & n.11 (1987).

⁴⁹ *Id.* at 716 (Brennan, J., dissenting).

to anyone--only testifies to how firmly established theistic religion has become (and how effectively ceremonial deism erases minority religious sentiments).⁵⁰

Writing for the Court in *Lynch*, Chief Justice Burger did not share Justice Brennan's uncertainty about the constitutionality of this type of ceremonial practice, and he did not share Justice Brennan's belief that such practices had "an essentially secular meaning."⁵¹ The Chief Justice detailed "a history replete" with "official" practices embracing religion.⁵² Citing Justice Douglas's observation in *Zorach v. Claiborn* that "[w]e are a religious people whose institutions presuppose a Supreme Being,"⁵³ Chief Justice Burger embraced the continuing religious vitality of such "official references to the value and invocation of Divine guidance."⁵⁴ It is that vitality that accounts for their continuation. Noting that "President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago,"⁵⁵ Burger hastened to add that the Thanksgiving holiday "has not lost its theme of expressing thanks for Divine aid any more than Christmas has lost its religious significance."⁵⁶

There is a candor here absent from Brennan's contrived notion that the omnipresence of religious practices somehow causes them to become non-religious. "[I]t is clear that Government has long recognized--indeed it has subsidized--holidays with religious significance."⁵⁷ For Chief Justice Burger (as, in later decisions, for Justices

⁵⁰ To be fair, Brennan did note that he "remain[ed] uncertain about these questions." *Id.* at 716.

⁵¹ *Id.* at 717.

⁵² *Id.* at 675.

⁵³ 343 U.S. 306, 313 (1952).

⁵⁴ *Id.* at 676.

⁵⁵ *Id.* at 675.

⁵⁶ *Id.* at 675.

⁵⁷ *Id.* at 676.

Kennedy and Scalia⁵⁸), tradition has a way of validating itself. In the case of public ceremonies featuring religious conduct, history also reveals "the contemporaneous understanding"⁵⁹ of the guarantees offered by the Establishment Clause. History, it is argued, can teach us the common sense of a complicated matter.⁶⁰

Thus, as Justice Kennedy wrote, "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."⁶¹ Here, Kennedy acknowledges an Establishment Clause test that has not gained the attention of its more familiar analytical cousins. We can test the constitutionality of government action, it appears, by analogy to forms of conduct that we somehow know pass muster. Burger used this "It's no worse than" test in *Lynch* to find that though a nativity scene "is identified with one religious faith,"⁶² it is "no more so than the examples we have set out from our prior cases in which we found no conflict with the Establishment Clause."⁶³ This test has the advantage of saving the Court from the considerable task of considering whether previous cases were wisely decided. "If the presence of the crèche in this display violates the Establishment Clause," Burger observed in *Lynch* without a hint of irony, "a host of other forms of

⁵⁸ For Kennedy, see, for example, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656-679 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); for Scalia, see, for example, *Lee v. Weisman*, 505 U.S. 577, 631-46 (1992) (Scalia, J., dissenting).

⁵⁹ *Id.* at 673.

⁶⁰ Of course, historical practices may prevail as a result of "domination, not consensus." See Noah Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 863 (1996).

⁶¹ *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁶² 465 U.S. at 685. See also Van Alstyne, *supra*, note 8 at 783 (describing this approach as "an 'any more than' test").

⁶³ *Id.* at 685-86.

taking official note of Christmas, and our religious heritage, are equally offensive to the Constitution."⁶⁴ That, self-evidently, could not be the case.

Or, if it were the case, it may be too late to do anything about it. A longstanding practice, like the practice of opening legislative sessions with prayer, may over time "become a part of the fabric of our society."⁶⁵ Thus, the real threat to society, in a case like *Marsh v. Chambers*, would be the disruption caused by an Establishment Clause challenge. The threat posed by Nebraska's tradition of legislative prayer, on the other hand, would be a mere shadow⁶⁶: "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."⁶⁷

The challenge to ceremonial deism has come (at least, in large part) from nonbelievers.⁶⁸ For the nonpreferentialist camp, "nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion."⁶⁹ So, from this perspective, the nonbeliever is not constitutionally offended when, for instance, the government amends the Pledge of Allegiance to include the phrase "under God." But nonpreferentialism stands for the proposition (Rehnquist's "perhaps" notwithstanding) that the government may not discriminate among sects. Given that, could a believer who

⁶⁴ *Id.* at 686.

⁶⁵ *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

⁶⁶ "The 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. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District of Abington v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

⁶⁷ 463 U.S. at 792. For a defense of the Court's historical approach, see Ashley M. Bell, "*God Save This Honorable Court*": *How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. Rev. 1273 (2001).

⁶⁸ See, e.g., *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

⁶⁹ *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting.)

does not believe in God be constitutionally offended by the Pledge? If so, then the Pledge would fail even by nonpreferentialist standards. Thus, it is critical for the nonpreferentialist to maintain the Brennan-type fiction that certain religion references have lost their religious vitality or the Burger type posture that the government can support religious norms.⁷⁰

But times, and cultural norms, change, and there may come a time (there *will* come a time) when ceremonies like the Pledge are challenged by followers of non-theistic faiths. That time will come, in part, because the Court has determined that non-theistic systems of belief are, for constitutional purpose, valid religions.

What, then, is a nonpreferentialist to do?

III

Faced with conduct that cannot be dismissed as ceremonial, the Court has sought some mechanism (beyond resorting to history) to make religion a part of the public business. In this regard, the Court has tried out several different tests--most notably for purposes of this essay, the *Lemon*⁷¹ and endorsement⁷² tests.

Both tests read the Establishment Clause in less than absolute terms. Where Justice Jackson considered the rigidity of the Establishment Clause as the source of its strength, these tests muddy the constitutional waters. They begin by assuming that the

⁷⁰ Justice Souter raised this concern in *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) ("[A] nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for theistic over nontheistic religion is constitutional.").

⁷¹ See *Lemon v. Kurtzman*, 403 U.S. 606, 612-613 (1971) (citations omitted). "First, the statutes must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'"

⁷² See *Lynch*, 465 U.S. at 687-94.

language of the Establishment Clause is " at best opaque,"⁷³ and they proceed by formulating a set of analytical tools that encourage--indeed, require--highly subjective (and, at times, intensely personal) judicial judgments. Intentionally or not, the effect of these tests has been to allow greater governmental accommodation for religion.

The *Lemon* test reflects, in part, the separationist sentiment of the *Everson* dissenters. By allowing the courts to consider purpose and entanglement as well as effect, the test provides a way to invalidate government activities that might otherwise pass constitutional muster. Indeed, during the 1970s and early 1980s, the *Lemon* test was used to strike down several government programs.⁷⁴

But the *Lemon* court hedges its bets a bit too much. It objects to governmental action with a *principal or primary effect* of advancing or inhibiting religion; it objects to *excessive* governmental entanglement with religion. These qualifiers would lead (probably inevitably) to inconsistent results. The purpose prong, too, is an invitation to speculation, if not outright guessing, about legislative motive.⁷⁵ More subjective than its multi-part analytical structure might suggest, the *Lemon* test could be a useful device to support religion in accommodationist hands. The *Lemon* test was employed, to cite one instance, in *Lynch*, where the Court upheld a city-sponsored nativity scene.⁷⁶ (The district and appellate courts had used the same test to come to the opposite conclusion.⁷⁷)

⁷³ *Lemon*, 403 U.S. at 612. Cf. *Walz*, 397 U.S. at 668: "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution."

⁷⁴ See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985). (In 1997, the Court used a modified *Lemon* test to overrule *Aguilar*. See *Agostini v. Felton*, 521 U.S. 203 (1997)).

⁷⁵ On the ambiguity of the *Lemon* test, see Michael Stoke Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993) ("[T]he ambiguity of the test left the Court leeway to interpret each prong in varying ways, producing a bewildering patchwork of decisions.").

⁷⁶ 465 U.S. at 678-87.

⁷⁷ See *Donnelly v. Lynch*, 525 F. Supp. 1150 (D.R.I. 1981); *Donnelly v. Lynch*, 691 F.2d 1029 (1982).

If the *Lemon* test allows for greater governmental accommodation of religion, the endorsement test insists upon it. The endorsement standard is a model of heavy-handed wordplay: rather than ask whether the government has a secular purpose, "[t]he proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion"⁷⁸; rather than ask whether the government action has a primary effect that advances or inhibits religion, we ask whether a government action has "the effect of communicating a message of endorsement or disapproval of religion."⁷⁹ So, government action can have a non-secular purpose and can have a primary effect that advances religion without running afoul of the Establishment Clause, provided that there is no communication of endorsement. The focus of our attention, thus, is no longer the state's conduct--the medium is now truly the message. To focus on the government's communicative intent is to render establishment law little more than a form of judicial intuition.⁸⁰ Government may not have spoken clearly. Perhaps it did not mean what it said. The listener, relying (naively, one supposes) "on the words themselves,"⁸¹ may receive a message not actually intended. To focus on communicative effect is to make establishment law a muddle of impressions and perceptions. Endorsement is in the eye or, more accurately, in the (hurt) feelings of the observer.⁸²

The endorsement test was embraced by the Court in *Allegheny* because it "provide[d] a sound analytical framework for evaluating governmental use of religious

⁷⁸ 465 U.S. at 691 (O'Connor, J., concurring).

⁷⁹ *Id.*

⁸⁰ See Paulsen, *supra*, note 75, at 815 ("The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions.").

⁸¹ 465 U.S. at 690.

⁸² See Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1220 (1994) ("The ambiguity of the endorsement concept makes it susceptible to observer bias.").

symbols."⁸³ It might be of some value, therefore, to see how the test's originator, Justice O'Connor, used that framework in *Lynch*. Having announced that the proper inquiry under the purpose prong of *Lemon* is whether government intends to convey a message of endorsement of religion, O'Connor applies her formulation to the facts of this case:

I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.⁸⁴

The sound analytical framework here amounts to judicial fiat: the purpose of the including the crèche is "evident"--and it is not endorsement. Not just fiat about the purpose of the display, but about its perception. The crèche does not convey a message of endorsement because "[t]he display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion."⁸⁵

Beyond a statement of what she considers to be self-evident, O'Connor's analytical framework offers little more than the indiscriminate use of strategies designed to support government advancement of religion. Her version of the *Lemon* effect prong is a grab bag of such interpretative maneuvers. Consider one passage striking for its analytical versatility and compactness. Reviewing the effect of the nativity scene, O'Connor fires off a volley of anti-separationist arguments: 1) "It's no worse than" ("These features combine to make the government's display of the crèche in this

⁸³ 492 U.S. at 595.

⁸⁴ 465 U.S. at 691.

⁸⁵ *Id.* at 692. O'Connor notes, at 693, the significance of the fact that the display "caused no political divisiveness prior to the filing of the lawsuit." *But see* Feldman, *supra*, note 60, at 863 ("[The] Court overlooked the possibility [that] Christian cultural imperialism had produced the silence of religious outgroup members.").

particular physical setting no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 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."); 2) ceremonial deism ("Those 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."); and 3) history and tradition ("For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose--celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion.")⁸⁶

The endorsement test turns *Lemon* on its head: government action that is designed to advance religion--even action that has the effect of advancing religion--may be permissible. "Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice because it in fact causes, even as a primary effect, advancement or inhibition of religion." Beyond validating the accommodationist results of prior decisions ("The laws upheld in [*Walz*, *McGowan*, and *Zorach*] had such effects, but they did not violate the Establishment Clause."⁸⁷), the endorsement test extended an invitation to the Court to uphold government conduct that advances religion

⁸⁶ *Id.* at 692-93 (citation omitted).

⁸⁷ *Id.* at 691-92.

based on some belief about the way that conduct is perceived by some undefined group. In *Lynch*, O'Connor avoided the problem of defining whose perception she was talking about by using the passive voice with a vengeance: "These practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche . . . cannot fairly be understood to convey a message of government endorsement of religion." In *Wallace*, O'Connor clarified this aspect of the endorsement test by suggesting the relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the state action, would perceive it as an endorsement of religion.⁸⁸ The objective reader might be forgiven for wondering who besides a member of the judiciary would be so qualified,⁸⁹ or for considering the fact that "judges will always be broadly representative of the general population, and will be susceptible to all the distortions of interpretation that membership in the majority entails."⁹⁰

It is no exaggeration to say that O'Connor's invitation was readily accepted.⁹¹ The endorsement test has had a major impact on the Court's Establishment Clause jurisprudence, both directly (in cases like *Allegheny*, where the majority adopted it as its

⁸⁸ 472 U.S. at 76 (O'Connor, J., concurring).

⁸⁹ See Paulsen, *supra*, note 75, at 816: "Justice O'Connor has awkwardly attempted to remedy this obvious problem by postulating a neutral 'objective observer.' Moreover, this observer must be one 'familiar with this Court's precedents.' It is doubtful whether any of the justices have met such a person--if one exists--leaving the unmistakable impression that O'Connor is talking about herself. The standard has a distinct feeling of academic unreality. A reasonable person familiar with the Court's wildly erratic precedents in this area would have a most difficult time using them as the baseline for measuring 'endorsement.' The 'objective observer' canard is merely a cloaking device, obscuring intuitive judgments made from the individual judge's own personal perspective." See also Smith, *supra*, note 49, at 294 ("[T]he observer will perceive endorsement in all those instances, and only in those instances, in which the judge believes an intent to endorse exists.").

⁹⁰ Mark V. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 733 (1986). *But see* Wallace, *supra*, note 82, at 1221 n.188 ("In many instances, however, judges may more closely represent society's secularized intellectual elite than the general population. If that is true, they would more likely assume the view of the nonreligious or antireligious outsider rather than the view of one who belongs to a religious minority.").

⁹¹ See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

mode of analysis) and indirectly (in cases like *Agostini*, where endorsement principles resulted in new criteria used to evaluate whether government aid has the effect of advancing religion⁹²).

By substituting a vague, judicially-defined majoritarianism for the neutrality of the *Lemon* test, the O'Connor test erases the perceptions of anyone who does perceive endorsement. Their perception, O'Connor would have to say, is wrong. It would be more honest to say that their perception does not matter. Thus, the endorsement test allows for a form of indirect governmental coercion. Justice Black, writing for the Court in *Engel v. Vitale*, recognized that government support of religious conduct can "operate indirectly to coerce nonobserving individuals."⁹³ "When the power, prestige and financial support of the 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."⁹⁴ The Court has relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."⁹⁵ Government support of religion is no less so because the majority fails to perceive that conduct as an endorsement of religion--that fact serves only to intensify the offense.⁹⁶

⁹² See 521 U.S. at 222-230.

⁹³ 370 U.S. 421, 431 (1962).

⁹⁴ *Id.*

⁹⁵ *Lee v. Weisman*, 505 U.S. 577, 587 (1992). For defense of a non-coercion Establishment Clause standard, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1987). *But see* Ronald C. Kahn, *God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. L. REV. 983 (1993).

⁹⁶ This was the conclusion of the Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) (striking down the school district's policy of student-led, student-initiated prayer at high-school football games): "[A] majoritarian policy 'does not lessen the offense or isolation to believers. At best it narrows their numbers, at worst increases their sense of isolation and affront'" (citing *Lee*, 505 U.S. at 594).

In this respect, in its implicit concession to majority sentiment, the endorsement test is of a piece with other means by which the Court secures constitutional accommodation with religion. Ceremonial deism is most obviously a concession to the religious norm. The ubiquity of a religious practice ought to testify to its power and continuing vitality (a power and vitality seen when such a practice is challenged). Instead, by some distortion of common sense, the pervasiveness of a practice becomes evidence of its innocuousness. No reasonable person could object to what so many people say or do as a matter of course. Focusing on history and tradition likewise means transforming what is normative into what is unobjectionable. More indirectly, the endorsement test confirms the normativeness of the perceptions of the religious majority. Taken together, these accommodationist strategies, by permitting the distribution of government recognition and benefits to religious groups, have enabled the Court to adopt a de facto preferentialism in the name of neutrality and choice.⁹⁷

It is misleading to speak of the religious majority as an abstract entity. In our society, the religion of the majority is Christianity. The "God" of ceremonial deism the God of our national religious traditions, the God who benefits most from government recognition is the God worshipped by Christians. To the extent that the Court has chosen a majoritarian approach to disestablishment law, it has promoted "Christian ethnocentrism."⁹⁸ To the extent that other religions worship God (the same or some variant of the Christian God), we might say that the religion of the majority is theistic.

⁹⁷ See Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 34 B.C. L. REV. 1035, 1053 (2002) ("Public resources inevitably will flow to those programs that are popularly affirmed by a majority of the nation to the exclusion of minority faiths. . . . The result will be substantial funding of programs that attract participation by 'acceptable' religions with minority groups left out, an inherently discriminatory situation.").

⁹⁸ See Van Alstyne, *supra*, note 8, at 787.

Both Jews and Christians can pledge their allegiance to one nation under God. (The erasure of other religious beliefs is nowhere better seen than when the Court denominates prayer to God as nonsectarian.) Thus, the success of the accommodationist argument is really a success for Christianity and, more broadly, for a hegemonic theism. It is here, however, that the trend in a related area of the law--the judicial definition of religion--may threaten the effort to make religion a foundational feature of our public life. Some of the varieties of religious experience may not be able to be accommodated, at least not without calling into question the judicial arguments and political premises upon which government support for mainstream religion is based.

III

On December 6, 2002, Cyndi Simpson filed suit in federal district court against the Chesterfield County, Virginia, Board of Supervisors.⁹⁹ Simpson had volunteered to lead prayer at one of the board's meetings. The board declined her offer.

It was not that the Board of Supervisors was averse to beginning a public meeting with a religious message. In fact, every meeting of the board begins with such an invocation. "Local ministers, priests and the occasional rabbi, each of whom has volunteered to be on a list, offer words of inspiration before the meeting shifts to zoning laws, budget cuts and public hearings. It's been that way for years."¹⁰⁰

The problem is that Simpson is a witch.

⁹⁹ See Michael D. Shear, *Dispute Over Leading Prayer; Va. County Biased Against Wiccan*, *ACLU Suit Says*, *The Washington Post*, December 7, 2002, at B1; Tom Campbell, *Wiccan Priestess Sues County; Says Chesterfield Illegally Bars Her From Prayer Role*, *The Richmond Times-Dispatch*, December 7, 2002, at B1.

¹⁰⁰ Shear, *supra*, note 94, at B1.

Cyndi Simpson is a Wiccan priestess. "According to Simpson . . . , Wicca is a peaceful, life-affirming and nature-based religion that focuses on the seasons and what they bring to people's lives. It has many variations among its followers--some traditions are practiced only by women--but one core belief is recognition of divinity in feminine forms."¹⁰¹ In Chesterfield County, however, Wicca is not a religion at all. The chairman of the board determined that Wicca "is basically a non-religion."¹⁰² Or, at least, it is not a religion of the kind that deserves constitutional protection. The attorney for the county argued that the board's "nonsectarian invocations are traditionally made to a divinity that is consistent with the Judeo Christian tradition. . . . Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities."¹⁰³

No one is preventing Simpson from freely exercising her religious rights; the action of the board does not implicate the Free Exercise Clause of the First Amendment. Nor is the practice of legislative prayer itself a constitutional violation. But the board may well be in violation of the Establishment Clause--if, in fact, Wicca is a religion. Thus, the question central to this dispute is a definitional one: what is a religion for Establishment Clause purposes?

The case of Cyndi Simpson is suggestive of what may lie ahead. In *Marsh v. Chambers*, the Supreme Court held that legislative prayer "ha[d] become a part of the fabric of our society."¹⁰⁴ The practice of legislative prayer, which the *Marsh* Court found "a tolerable acknowledgement of beliefs widely held among the people of this

¹⁰¹ Campbell, *supra*, note 94, at B1.

¹⁰² Shear, *supra*, note 94, at B1.

¹⁰³ Campbell, *supra*, note 94, at B1.

¹⁰⁴ 463 U.S. at 792.

country,"¹⁰⁵ was not seen as threatening the principles embedded in the Establishment Clause. However, as the religious beliefs held by the people of this country become more diverse, legislatures will be challenged by more suits of the kind facing the Chesterfield County Board of Supervisors. While legislative prayer may be constitutionally valid, it is not clear how the Court could permit a legislature to favor one religion over another. Such a position should be offensive even to the nonpreferentialists on the Court.¹⁰⁶ So, if Wicca is a religion, the Court will have to allow witches their chance to lead the Board of Supervisors in an opening prayer, one that invokes a divinity, it is safe to say, foreign to most of the residents of Chesterfield County. The prospect of an accommodationist slippery slope is not hard to imagine. If the followers of God get to have their deity's name on our nation's currency, will the followers of Satan be long in demanding a similar benefit?

Of course, the Court could place Wiccans and Satanists outside the sphere of religion--that is, religion as defined by the Constitution. The case law is a repository of definitional options that the Court may consider as it treads its way through such murky territory.

The Court's traditional definition of religion "was closely tied to a belief in God."¹⁰⁷ In 1890, in *Davis v. Beason*, the Court considered whether the advocacy of

¹⁰⁵ *Id.*

¹⁰⁶ Apparently, the board could choose one person to deliver the invocation year after year, thus preempting witches (and others) from getting a chance to invoke divine guidance for the county supervisors. In *Marsh*, the Court was not bothered by the fact "that a clergyman of only one denomination--Presbyterian--had been selected for 16 years." 463 U.S. at 793. The Court could not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that [the clergyman] was reappointed because his performance and personal qualities were acceptable to the body appointing him." *Id.* at 793.

¹⁰⁷ *Malnak v. Yogi*, 592 F.2d 197, 202 (3d Cir. 1979) (Adams, J., concurring)

bigamy and polygamy was "a tenet of religion."¹⁰⁸ Following Madison's assertion that religion is "the duty which we owe to our creator, and the manner of discharging it,"¹⁰⁹ the Court grounded its definition of religion on the existence of a divine creator: "[T]he term 'religion' has reference to one's views of his relations to this Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."¹¹⁰

The emphasis on duty in the Court's language is also noteworthy. The idea that religion involves obligation to a creator points in two directions: 1) a content-oriented definition of religion, and 2) a functional way of defining religion. In *Davis*, the content is "divine creator"; the functional element focuses on the subjective experience of the believer, his sense of duty to that divine creator. Religion imposes a duty higher than that to civil authority; the Religion Clauses of the First Amendment protect that duty--they protect freedom of conscience. "The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience."¹¹¹

But not every sense of duty is religious. The *Davis* Court observed that religion "is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter."¹¹² It is not immediately clear what distinguishes the cult

¹⁰⁸ 133 U.S. 333, 342 (1890).

¹⁰⁹ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in THE COMPLETE MADISON 300 (Saul K. Padover ed., Harper 1953).

¹¹⁰ 133 U.S. at 342.

¹¹¹ 133 U.S. at 342.

¹¹² *Id.* at 343.

practices that the *Davis* Court says are "proper matters for prohibitory legislation"¹¹³ from appropriate matters of conscience, but the Court seems to rest its distinction on "the general consent of the Christian world in modern times."¹¹⁴ The distinction should not be dismissed as a product of an ancient time. The Court is, in effect, defining religion by analogy, and that approach is by no means an antiquated one. *Davis* says that a religion should look like a religion. In 1890, that meant one thing; in 2003, it may mean something else--but the appeal to some idea of what is normative is not unfamiliar to modern courts. Polygamy is not a constitutionally-protected religion for the same reason that forced stomach-pumping is not a constitutionally-protected form of law enforcement: both shock the conscience. "To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind."¹¹⁵

Though its language may be quaint, *Davis* anticipates the main lines by which the courts have sought to define religion: content, function, and analogy.¹¹⁶ The substantive legacy of *Davis*--its focus on duty to a higher power--would also guide the Court as it struggled to decide what is and is not religion. In 1931, Chief Justice Hughes, dissenting in *United States v. Macintosh*, would write that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any other human

¹¹³ *See id.* ("There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects.")

¹¹⁴ *Id.* at 343

¹¹⁵ *Id.* at 342.

¹¹⁶ Of course, these are not mutually exclusive categories. One may look to see whether a belief or practice is analogous to traditional religion in terms of either content or function, or both. On the problem of defining religion for constitutional purposes, see George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1534-49 (1983); Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 U. ILL. L. REV. 579, 587-606 (1982).

relation."¹¹⁷ In *Macintosh*, the Court upheld the denial of a petition for naturalization on the ground that the "petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified."¹¹⁸ But Hughes' formulation would deeply influence the thinking of the Court when it was confronted with moral objections to the Vietnam War; and, though the Court would move beyond the theistic orientation of *Davis*, in a very real sense it would stay true to its spirit.

The narrow confines of *Davis* were broadened by the Court in *Torcaso v. Watkins*.¹¹⁹ In striking down a requirement that holders of public office declare their belief in the existence of God, the Court held that "neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."¹²⁰ In other words, the Court acknowledged that religion does not mean theism.¹²¹ After *Torcaso*, "a belief in the existence of God" would no longer be relevant to the protections of the Establishment Clause.

The most generous definition of religion given by the Supreme Court occurred in a series of decisions interpreting the Universal Military Training and Service Act.¹²² The statute adopted the theme of obligation (borrowing from Hughes's formulation in

¹¹⁷ 283 U.S. 605, 633-34 (1921) (Hughes, J., dissenting).

¹¹⁸ *Id.* at 614.

¹¹⁹ 367 U.S. 488 (1961).

¹²⁰ *Id.* at 495.

¹²¹ Thus, as the Court noted, Buddhism and Taosim, among other systems of belief, qualify as religions for constitutional purposes. *Id.* at 495, n. 11.

¹²² *United States v. Seeger*, 380 U.S. 163 (1965), *Welsh v. United States*, 398 U.S. 333 (1970). On the relevance of these cases for constitutional law, see *Malnak v. Yogi*, 592 F.2d 197, 202 (3d Cir. 1979) (Adams, J., concurring) ("As a matter of logic and language, if the Court is willing to read 'religious belief' so as to comprehend beliefs based upon pantheistic and ethical views, it might be presumed to favor a similarly inclusive definition of 'religion' as that term appears on the first amendment.").

Macintosh) in granting conscientious objector status to persons who were opposed to war on the basis of "religious training and belief,"¹²³ which was defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."¹²⁴ In *Seeger v. United States*, the Court defined the question before it as one involving that theme: "Our question, therefore, is the narrow one: Does the term 'Supreme Being' as used in [the statute] mean the orthodox God or the broader concept of a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent?"¹²⁵ For the *Seeger* court, the fact that Congress used the expression "Supreme Being" rather than the designation "God" indicated that "religious training and belief" was meant "to embrace all religions"¹²⁶:

We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not.¹²⁷

This "parallel position" definition of religion does not include views that are essentially political, sociological, or philosophical; and it is not synonymous with "a merely personal moral code."¹²⁸ The difference is a matter of conscience. "Within the phrase [religious training and belief] come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately

¹²³ 50 U.S.C. App. 456(j) (1958).

¹²⁴ *Id.*

¹²⁵ 380 U.S. at 174.

¹²⁶ *Id.* at 165.

¹²⁷ *Id.* at 165-66.

¹²⁸ *Id.* at 173.

dependent." ¹²⁹ In the context of conscientious objection, the Court found that there is a "duty to a moral power higher than the state"¹³⁰ where a given belief, like a traditional religious belief, involves "duties superior to those arising from any other human relation."

The *Seeger* decision is commonly cited for its expansive definition of religion, and, in relying on the work of such modern theologians as Paul Tillich, it did expand the definition of God; in fact, the Court noted, almost as an afterthought, that "Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not intend that to be the test."¹³¹ For the traditional idea of God, the Court substituted Tillich's "God above God,"¹³² the source of some affirmation of ultimate concern.

But as its reliance on Hughes' opinion in *Mackintosh* suggests,¹³³ the *Seeger* decision was quite orthodox when it proposed that what an objector believes is only relevant if that belief creates a crisis of conscience--that is, only if the belief involves a duty higher than that owed to the state. *Seeger* is, in this sense, a split decision: split between a broad, even radical, definition of religion from a content orientation, and a narrow, quite conservative definition from a functional perspective. While a belief or practice need not be analogous to traditional religion, its place in the heart of the believer must be. In the case of Seeger himself, the Court found that "the beliefs which prompted

¹²⁹ *Id.* at 176.

¹³⁰ *Id.* at 171 (citing *United States v. Mackintosh*, 283 U.S. 605, 633 (1931) (Hughes, J., dissenting)).

¹³¹ *Id.* at 187

¹³² *Id.* at 180.

¹³³ *See id.* at 175.

his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers."¹³⁴

It is the subjective nature of the Court's functional equivalent test that makes *Seeger* so strikingly generous. Critics of the decision ask on what basis a court would undertake a psychological or biographical inquiry of a claimant for religious status.¹³⁵ It is a reasonable question, but perhaps not one we need bother to ponder. For, following Tillich, the Court implies that everyone has an ultimate concern. In deciding that Seeger's belief was functionally equivalent to that of the Quakers, the Court relies on Tillich's exuberant formulation of the test: "And if that word [God] has not meaning for you translate it, speak of the depths of your life, of your ultimate concern, *of what you take seriously without reservation.*"¹³⁶ This is not an "ultimate concern" test; it is a "your ultimate concern test."

Tillich's formulation of the ultimate concern is fundamentally at odds with the notion that religion derives its special constitutional standing from the fact that it imposes on its adherents a higher duty than those arising from human relations; and, thus, *Seeger* is a decision fundamentally at odds with itself. It proposes to distinguish religion from philosophy because the former is based on matters that really matter, but it left us with a radically subjective definition of what really matters. This oddness is reflected in two later Supreme Court cases. In 1970, the *Welsh* Court took another generous step, bringing "intensely personal convictions" within the sphere of religion if "they are held with the strength of traditional religious convictions."¹³⁷ But, in 1972, in *Wisconsin v.*

¹³⁴ *Id.* at 187

¹³⁵ *See, e.g.,* Choper, *supra*, note 113, at 597.

¹³⁶ *Id.*

¹³⁷ 398 U.S. at 339-40.

Yoder, the Court stated that philosophical and personal beliefs, no matter how deeply felt, do "not rise to the demands of the Religion Clauses."¹³⁸ In the case of Henry David Thoreau, the Court's generosity had run out.¹³⁹

Because the Supreme Court seems to be of two minds about what constitutes a tenet of religion, the lower courts, not surprisingly, are also split on what approach to take. Some have adopted a Tillich-like "inward mentor" standard that focuses on the individual's relationship with what he considers to be divine.¹⁴⁰ Others have chosen a more systematic approach. In *Malnak v. Yogi*, the Third Circuit determined that the teaching of Transcendental Meditation in the public schools was violative of the Establishment Clause.¹⁴¹ In his concurring opinion, Judge Adams employed "three useful indicia" that would indicate whether a particular group or cluster of ideas was a religion.¹⁴² Working by analogy, Adams looked 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 as accepted 'religions.'"¹⁴³ The first and most important indicator is "the nature of the ideas in

¹³⁸ 406 U.S. 205, 216 (1972).

¹³⁹ 406 U.S. at 216. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if 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 claims 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."

¹⁴⁰ See, e.g., *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) ("[U]nder the Religion Clauses, everyone is entitled to entertain such view respecting his relations to what he considers the divine and the duties such relationship imposes as may be approved by that person's conscience.").

¹⁴¹ *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979).

¹⁴² *Id.* at 208 (Adams, J., concurring).

¹⁴³ *Id.* at 207.

question."¹⁴⁴ Like the *Seeger* Court, Adams relied on the connection made by Tillich between religion and ultimate concerns, concepts (in Adams' words) "that are of the greatest depth and utmost importance."¹⁴⁵ However, "certain isolated answers to 'ultimate' questions . . . are not necessarily 'religious' answers, because they lack the element of comprehensiveness, the second of the three indicia."¹⁴⁶ Adams writes that religion "is not generally confined to one question or one moral teaching; it has a broader scope."¹⁴⁷ The third of Adams' indicia was "any formal, external, or surface signs that may be analogized to accepted religions"¹⁴⁸ These signs, Adams observes, "can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life."¹⁴⁹

Similarly, the district court in *United States v. Meyers*,¹⁵⁰ considering the defendant's claim that drug use was a central tenet of his religion ("The Church of Marijuana"), sought to avoid judicial subjectivity by listing several "minimal

¹⁴⁴ *Id.* at 208.

¹⁴⁵ *Id.* ("One's views, be they orthodox or novel, on the deeper and more imponderable questions on the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong are those likely to be the most 'intensely personal' and important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference, and never converted into official government doctrine. The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. New and different ways of meeting those concerns are entitled to the same sort of treatment as the traditional forms government doctrine. The first amendment demonstrates a specific solicitude for religion because religious ideas are in many ways more important than other ideas. New and different ways of meeting those concerns are entitled to the same sort of treatment as the traditional forms.")

¹⁴⁶ *Id.* at 208-209.

¹⁴⁷ *Id.* at 209. ("Thus the so-called 'Big Bang' theory, an astronomical interpretation of the creation of the universe, may be said to answer an 'ultimate' question, but it is not, by itself, a 'religious' idea. Likewise, moral or patriotic views are not by themselves 'religious,' but if they are pressed as divine law or a part of a comprehensive belief-system that presents them as 'truth,' they might well rise to the religious level.")

¹⁴⁸ *Id.* ("Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition.")

¹⁴⁹ *Id.*

¹⁵⁰ 906 F. Supp. 1494 (D.Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 583 (1997).

threshold"¹⁵¹ factors that would warrant a court in deciding that a belief is religious (though the absence of these factors would not mean that a belief was not religious).¹⁵²

Under this "low-threshold 'inclusion test,'"¹⁵³ the court presumed "that the following sets of beliefs are 'religious'":

Judaism, Christianity, Islam, Hinduism, Buddhism, Shintoism, Confucianism, and Taoism. Undoubtedly, the test also would lead to the conclusion that the beliefs of the following groups are "religious": Hare Krishnas, Bantus, Mormons, Seventh Day Adventists, Christian Scientists, Scientologists, Branch Davidians, Unification Church Members, and Native American Church Members (whether Shamanists or Ghost Dancers). More likely than not, the test also includes obscure beliefs such as Paganism, Zoroastrianism, Pantheism, Animism, Wicca, Druidism, Satanism, and Santeria. And, casting a backward glance over history, the test assuredly would have included what we now call "mythology": Greek religion, Norse religion, and Roman religion.¹⁵⁴

With a sense of humor (one hopes) the court asked the "obvious question: Is anything excluded?"¹⁵⁵ The not-so-obvious answer: "Purely personal, political, ideological, or secular beliefs probably would not satisfy enough criteria for inclusion.). Examples of such beliefs are: nihilism, anarchism, pacifism, utopianism, socialism, libertarianism, Marxism, vegetism, and humanism."¹⁵⁶ And, lest it be forgotten, "The Church of Marijuana."¹⁵⁷

Where does that leave Cyndi Simpson, the Wiccan who wants to lead the board of supervisors in prayer? In *Dettmer v. Landon*, the Fourth Circuit held that "the Church of

¹⁵¹ *Id.* at 1502.

¹⁵² *Id.* at 1502-1503. These factors were: ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of beliefs.

¹⁵³ *Id.* at 1503.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1504.

¹⁵⁶ *Id.* Cf. *Africa v. Commonwealth of Pennsylvania*, 662 F.2d. 1025, 1036 (3d Cir. 1981) (holding that the naturalist MOVE organization "is not a religion for purposes of the religion clauses").

¹⁵⁷ *Id.* at 1508-1509.

Wicca is a religion."¹⁵⁸ The decision employed both the subjective measure of religion (*Seeger's* functional equivalent test) and the more objective criteria of such cases as *Malnak* and *Myers*. The court found that "the district court properly considered whether the Church occupies a place in the lives of its members 'parallel to that filled by the orthodox belief in God' in religions more widely accepted in the United States."¹⁵⁹ The district court also properly considered the fact that that members of the Church of Wicca adhere to doctrines that concern ultimate questions of human life, doctrines that "parallel those of more conventional religions."¹⁶⁰ It should be noted that the district court paid scant attention to the idea of duty. There was no mention of "a power or being . . . to which all else is subordinate or upon which all else is ultimately dependent." The parallel position doctrine of *Seeger* was completely divorced from the sense of moral struggle that justified special treatment of religious belief and conduct.

The *Dettmer* court relied on objective measures as well, holding that the district court appropriately took into consideration that "the Church's doctrines teach ceremonies parallel to those of recognized religions"; that Church members "seek guidance from Wiccan leaders and study "the doctrines of the Church of Wicca as expressed by these leaders in books, pamphlets, and a correspondence course of study"; that witchcraft has its own history; and that there are between 10,000 and 100,000 adherents in America.¹⁶¹

Regardless of analytical approach, the lower courts no longer make the *Davis* "higher duty" rationale the primary focus of their concern. Rather, cases like *Dettmer* reflect a tendency to protect freedom of conscience by assuring equal treatment for

¹⁵⁸ 799 F.2d 929, 931 (4th Cir. 1986). *Accord* Jackson v. Lewis, 163 F.3d 606 (9th Cir. 1998).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 932.

minority religious groups. The liberal spirit of the lower courts does not mean that every claimant for religious status will qualify (The Church of Marijuana is "out"), but the list is long and growing (Wicca is "in")--and that trend may pose some unusual difficulties for a Supreme Court bent on accommodating religion.

IV

Cyndi Simpson is a believer. She wants government support for Wicca because, she argues, it is a religion constitutionally entitled to equal treatment with other religions. If the Court continues to define religion expansively, it will overturn the board's refusal to let her speak as violating the core Establishment Clause principle of nondiscrimination among sects. But if the Court does so, it threatens to undermine the accommodationist foundation of the Court's modern church-state jurisprudence.

For instance, the arguments that justify ceremonial deism rely on a notion of innocuousness incompatible with a broad definition of religion. In effect, ceremonial deism rests on the notion that the word "God" and other similar ritualistic expressions and practices have lost religious significance. But the significance of such conduct cannot be measured only by its continuing vitality for majority religious groups. That conduct may have a different significance for minority religions; for some of these groups the continued use of theistic ritual may be highly offensive.¹⁶² Moreover, if religious practice can lose its significance through rote repetition, it stands to reason that it could, under the right circumstances, regain spiritual vitality. The judicial recognition of minority religious groups that appear to threaten longstanding cultural traditions might

¹⁶² See Arnold H. Loewy, *Rethinking Government Neutrality toward Religion under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1069 (1986) (calling for a rigorous application of the endorsement test as a means of protecting the rights of religious minorities).

well awaken dormant sensitivities. To take the most striking example, the *Myers* court, as noted above, recognized that Satanism was "more likely than not" a religion. If I may assume that Satanists worship the arch-enemy of God,¹⁶³ it is difficult to see how, from their perspective, government-sponsored use of God's name is not an endorsement of a particular religion.¹⁶⁴ It is equally difficult to see how the followers of God, faced with real religious opposition, would continue to invoke their deity's name with rote repetition.

Minority religious groups will also be unimpressed by arguments that rely on some form of cultural consensus, historical or contemporary. The Supreme Court has repeatedly noted the increasingly pluralistic nature our society: that, too, is part of our history; the preservation of minority rights is also part of our tradition. The Court will have to consider how the fabric of our society has changed--and the role that the courts have played in changing it. In light of case law acknowledging religious pluralism as part of the cultural landscape, what was once "a tolerable acknowledgment of beliefs widely held among the people of this country" now may amount to the impermissible favoring of one religion over another.¹⁶⁵

¹⁶³ See John Milton, *PARADISE LOST* 215 (Merritt Y. Hughes ed., Odyssey Press 1957) (1667):

To do ought good never will be our task,
But ever to do ill our sole delight,
As being contrary to his high will
Whom we resist. If then his providence
Out of our evil seek to bring forth good,
Our labor must be to pervert that end,
And out of good still to find means of evil.

¹⁶⁴ In *Marsh v. Chambers*, Justice Stevens noted that one of the prayers given by Nebraska's chaplain celebrated Christ's death as "the hour when he triumphed over Satan's pride." 463 U.S. 783, 823 n.2 (1983) (Stevens, J., dissenting).

¹⁶⁵ The Court has long recognized that the pluralistic nature of the religious community must be taken into consideration. See, e.g., *School District of Abington v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) ("[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. In the face of such

Perhaps more disconcerting to the accommodationists on the Court is that an expansive definition of religion undermines the political premises of nonpreferentialism. The goal of accommodationist jurisprudential strategies is to provide "a meaningful opportunity"¹⁶⁶ for religious conduct. But that goal presupposes a great deal about religious conduct. It envisions conduct that serves the public good. That premise is made clear when Rehnquist quotes Thomas Cooley to the effect that "the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order."¹⁶⁷ There is a devious circularity here. If religion is meant to conserve public morals, it must first embody those values; thus, it is really public morality that defines "true" religion. Minority religious groups may be perceived as subversive of the public order, but what basis would a nonpreferentialist Court have for excluding them from the public business when it has so forcefully advocated accommodation on a nondiscriminatory basis?¹⁶⁸

profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.) (footnote and citation omitted). For the argument that religious pluralism makes some form of accommodation necessary, see Beschel, *supra*, note 5, at 173.

¹⁶⁶ *Wallace v. Jaffree*, 472 U.S. 38, 89 (1985) (Burger, J., dissenting) (state statute permitting public school prayer "endorses only the view that the religious observances of others should be tolerated and, where possible, accommodated").

¹⁶⁷ *Id.* at 106 (Rehnquist, J., dissenting). *But cf.* Madison, *supra*, note 107, at 303 ("If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people.").

¹⁶⁸ For a reading of the religion clauses advocating an originalist perspective, see Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002) (contending that the original meaning of religion as a monotheistic belief system should govern Free Exercise and Establishment Clause cases).

Even in an era of relative religious uniformity, the founders were sensitive to the danger of establishment by government-sponsored social consensus.¹⁶⁹ For Madison, the Establishment Clause is a form of protection against majoritarian cultural tendencies.¹⁷⁰ The normal social and political processes do not apply here. We may expect a degree of obedience to social norms. We may require a degree of commitment to political compromises. But the constitutional status of the Establishment Clause is uniquely libertarian.¹⁷¹ The special status of religion derives from the sense of duty it imposes, a duty higher (in Madison's words, "precedent both in order of time and degree"¹⁷²) to "the authority of the Society at large."¹⁷³ If the rights of the minority are to be free from trespass, Madison says, religion must be wholly exempt from the cognizance of civil society. But when the Court fashions majoritarian doctrine that allows for government support of religion, it threatens "to overleap the great Barrier which defends the rights of the people."¹⁷⁴ And when the Court expands the pool of constitutionally-sanctioned religions (in part by leaving behind Madison's duty rationale), it ensures that such support runs afoul of the constitutional principle, conceded by the most ardent nonpreferentialist, that government may not endorse religion "where the endorsement is sectarian."¹⁷⁵

¹⁶⁹ What looks like uniformity today did not seem so at the end of the eighteenth century. See James Madison, *Variety of Sects Secures Freedom for All*, reprinted in THE COMPLETE MADISON 306 (Saul K. Padover ed., Harper 1953) (asserting that freedom of religion in the United States arises from a multiplicity of sects).

¹⁷⁰ See Madison, *supra*, note 107, at 300 (warning against trespass of minority religious rights).

¹⁷¹ On the constitutional "asymmetry between politics and religion," see Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 210 (1992). See also 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, 176 (1990) (suggesting that religion is incompatible with "constitutional rationalism").

¹⁷² See Madison, *supra*, note 107, at 300.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

In a pluralistic society, nonpreferentialism contains the seeds of its own undoing. Unless the courts are willing to say someone's faith is not a true religion, the government must dole out its largesse with an even hand. But by providing public support to diverse religious groups, the government ensures that the ugly and divisive drama of religious disagreement will be played out in the public square and at the public trough.¹⁷⁶ It may well be that the "struggle to separate political from ecclesiastical affairs"¹⁷⁷ is bound to continue, but the courts can and should contain that struggle within proper constitutional limits. The place to start is with the resurrection of a metaphor meant to suggest that the sacred and the secular can best be served when kept to their separate spheres. The place to start is with the recognition that Jefferson's wall stands in need of a little repair.

¹⁷⁶ See, e.g., Davis, *supra*, note 95, at 1056 (describing the hostility of audience members attending a meeting of the Dallas, Texas, city council at which a Wiccan priest was allowed to deliver the opening prayer).

¹⁷⁷ *Everson v. Board of Education*, 330 U.S. 1, 28 (1947) (Jackson, J., dissenting).