

Concepts and Compromise in First Amendment Religious Doctrine

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The first amendment's religion clauses have perplexed commentators and Supreme Court Justices for some time.¹ The difficult body of doctrine derived from these clauses seems to consist of contradictory principles, vaguely defined tests, and eccentric distinctions. Present legal doctrines cannot even claim the support of history with much plausibility. Despite the customary invocation of James Madison and Thomas Jefferson, whose views on this subject were complex and in any event not necessarily shared by the other Framers, scholars know that the present doctrinal approach stems from post-World War II Supreme Court decisions.² In an important sense, contemporary doc-

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My colleagues Michael Smith and Jesse Choper encouraged my interest in this subject in the course of many stimulating conversations, and my student assistant Mark Ryland also provided valuable critical input.

1. "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Leimon v. Kurtzman*, 403 U.S. 602, 612 (1971). See also *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971).

2. For a recent treatment of the historical background of the religion clauses, see R. CORD, *SEPARATION OF CHURCH AND STATE* (1982), which disputes the "strict separationist" interpretation previously advanced in L. PFEFFER, *GOD, CAESAR AND THE CONSTITUTION* (rev. ed. 1967).

Professor Mark De Wolfe Howe wrote that in the religion cases, "[T]he Court has too often pretended that the dictates of the nation's history, rather than the mandates of its own will, compelled a particular decision. By superficial and purposive interpretations of the past, the Court has dishonored the acts of the historian and degraded the talents of the lawyer." M. HOWE, *THE GARDEN AND THE WILDERNESS* 4 (1965). The historical evidence is debated in the majority and dissenting opinions in *Marsh v. Chambers*, 103 S. Ct. 3330 (1983) and *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

The practices of the early Presidents are cited by people on both sides of the religion debate. For example, proponents of the "wall of separation" theory emphasize that Presidents Jefferson and Jackson refused to issue proclamations of National Days of Thanksgiving, whereas adherents of the "benevolent neutrality" theory note that Presidents Washington, Adams, and Madison (as well as more recent presidents) issued numerous such proclamations, expressing the nation's gratitude to God and imploring Him for His blessing. See *Lynch*, 104 S. Ct. at 1360. James Madison, the principal drafter of the establishment clause, was a member of the committee that selected a chaplain to open the sessions of the First Congress with prayer, and he voted for the bill authorizing payment of the chaplain. See *Marsh*, 103 S. Ct. at 3333 n.8. On the other hand, his "Detached Memoranda," written after his retirement from politics many years later, disapproved the practice. *Id.* at 3343-44. Even President Jefferson negotiated a treaty with the Kaskaskia Indians, one condition of which was a pledge by the United States to support a Catholic priest in his priestly duties, and Jefferson repeatedly supported federal land grant trust laws that subsidized

trine has reversed the original understanding and literal meaning of the first amendment. What was intended to keep the federal government (Congress) out of church-state relations has become a mandate allowing the federal government (i.e. the federal courts) to regulate those relations in every detail.³

That in some sense the federal government and the states ought to be "neutral" in religious matters is undisputed, but there is significant disagreement over how benevolent that neutrality should be and how rigorously it ought to be enforced. Practically everyone agrees that government ought not to take sides between Catholic, Protestant, and Jew. It is not equally clear, however, that government can or should be neutral as between atheism and theism,⁴ nor is it clear whether neutrality implies strictly excluding sectarian symbols from public ceremonies or displays.⁵ The Supreme Court seems at times to treat any government assistance to religious activities as a forbidden establishment, yet at other times, it requires governments to take extraordinary

missionaries to spread their religion to the Indians. See R. CORD, *supra*, at 17-47. As rector of the University of Virginia, Jefferson supported on-campus religious instruction by sectarian divinity schools. See *McCullum v. Board of Educ.*, 333 U.S. 203, 245 n.11 (1948) (Reed, J., dissenting).

Whatever one might conclude from the conflicting statements and actions of the early Presidents, the judiciary did not interpret the establishment clause to require strict separation of government and religion until *Everson v. Board of Educ.*, 330 U.S. 1 (1947). "Before that time, the Supreme Court readily upheld government actions concerning religion that seem highly problematic by present standards." Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 86.

3.

The application of the religion clauses to the states through the due process clause of the fourteenth amendment, the movement from a government of closely limited powers to the affirmative state, and the gradual expansion of our understanding of the nature of religion, have combined to work a fundamental transformation in the question of how religious groups and interests should be treated. In this context, the religion clauses, which for the framers represented relatively clear statements of highly compatible goals, have taken on new and varied meanings that frequently appear to conflict.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 812 (1978).

4. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (opinion of Douglas, J.). Cf. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1381 (1984) (Brennan, J., dissenting) (footnote and citation omitted):

While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood . . . as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

The phrase "under God" in the Pledge of Allegiance is, however, a recent addition.

Professor Howe argued that the constitutional separation of church and state reflected more the evangelical faith of Roger Williams than the skeptical rationalism of Thomas Jefferson, and that this separation, understood from an evangelical perspective, "endorsed a host of favoring tributes to faith—tributes so substantial that they have produced in the aggregate what may fairly be described as a *de facto* establishment of religion." M. HOWE, *supra* note 2, at 11.

5. See *Lynch v. Donnelly*, 104 S. Ct. 1355, 1360-61 (1984).

measures to accommodate unusual religious practices.⁶ Despite the most determined efforts of the Justices and the scholars, no single logical framework seems capable of explaining the law.

Many areas of constitutional law are unsettled, of course, but in most areas the uncertainty concerns how far the Constitution requires us to go in a particular direction. In the religion clause area, even the general direction is often difficult to ascertain. For example, if a state decided to experiment with school vouchers as an alternative to the public schools, it could not know whether it would be constitutionally obligated to allow those vouchers to be used at religious as well as secular private schools, or whether it would be constitutionally forbidden to do so; whether it would have the discretion to decide the matter either way without constitutional violation; whether it would be required to give religious schools less money than secular schools to avoid subsidizing the explicitly religious aspects of the curriculum; or whether it would be forbidden to use the voucher alternative altogether because whatever it did with respect to religious schools would be unconstitutional.⁷ The Supreme Court's recent decision in *Widmar v. Vincent*⁸ illustrates the conceptual chaos that pervades this area of the law. A Christian student group at the University of Missouri had been using a room on campus for worship meetings. University officials stopped the practice, citing a state constitutional provision that the state courts had held to require a stricter "separation" of church and state than that mandated by the establishment clause of the federal constitution.⁹ The students, on the contrary, claimed that it was a violation of *their* rights under the free exercise clause to refuse to allow student religious groups to use campus facilities on the same basis as secular student organizations. They also argued that this singling out of religious activities for special adverse treatment violated their rights to equal protection of the laws and freedom of speech, because it distinguished among student meetings on the basis of the content of their speech.

The federal district court agreed with the university administration that providing a room was an impermissible establishment of religion.¹⁰ The court of appeals disagreed, siding with the students.¹¹

6. Compare, e.g., *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) with, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

7. See *Mueller v. Allen*, 103 S. Ct. 3062 (1983) (upholding state tax deduction for limited educational expenses at private and public schools); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that to deny student religious group use of facilities generally open to other student groups violates first amendment); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (disapproving tuition grants for low-income parents who send children to nonpublic schools).

8. 454 U.S. 263 (1981).

9. *Id.* at 275-76.

10. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *remanded*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

11. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

Both decisions are equally rational in terms of conventional constitutional law. Providing facilities such as meeting rooms certainly aids the religious activity, much as if the state were to make a direct cash grant to pay the rent on a church building.¹² Yet, one can hardly describe as "neutral" a state policy that provides meeting rooms to Republicans, communists, musicians, and stamp collectors, but denies similar facilities to religious groups.¹³ Such discrimination seems to imply that religion is a peculiarly disfavored activity.

The Supreme Court eventually decided the case on free speech grounds, ruling that worship is a form of communication and invoking the familiar principle that a state may not ordinarily favor one speaker over another on the basis of the content of their speech.¹⁴ The decision thus held the state constitution's ban on aid to sectarian activities unconstitutional as applied.

Justice White, in dissent, was gravely troubled by the Court's willingness to categorize worship as speech for constitutional purposes.¹⁵ He pointed out that the Supreme Court itself has gone to great lengths to exclude this particular type of speech from the public school classroom.¹⁶ When the Supreme Court decides that a school teacher may not lead her class in reciting the Lord's Prayer but may lead it in reciting the Pledge of Allegiance,¹⁷ or when the Court decides that a state may not require the posting of the Ten Commandments on classroom walls although it certainly could require the posting of the ten amendments of the Bill of Rights,¹⁸ it is certainly making distinctions based on the religious content of the speech or writing. The majority's decision in *Widmar* thus called into question an entire body of doctrine.

First amendment religion doctrine is radically indeterminate in three ways. First, there are what I would call the *characterization* issues, illustrated by *Widmar*.¹⁹ A particular disputed issue can often be characterized in two or more different ways: for example, as an establishment clause problem, a free exercise problem, or a free speech prob-

12. See *Tilton v. Richardson*, 403 U.S. 672 (1971) (establishment clause forbids use of federally subsidized university facilities for religious purposes).

13. "The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups." *Chess*, 635 F.2d at 1317 (footnote omitted).

14. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

15. *Id.* at 284-86 (White, J., dissenting).

16. *Id.*

17. Compare *Engel v. Vitale*, 370 U.S. 421 (1962) with *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Although religious dissenters may have a right to refuse to salute the flag or recite the Pledge of Allegiance, such patriotic ceremonies are not banned from classrooms.

18. See *Stone v. Graham*, 449 U.S. 39 (1980).

19. *Widmar v. Vincent*, 454 U.S. 263 (1981).

lem. The constitutional outcome depends largely, though not entirely, on the characterization option that one selects; and, as *Widmar* and other cases show, no neutral principles govern this determination.

After the characterization decision has been made, a second source of indeterminacy arises when the Court applies a subjective test to determine whether the practice is forbidden, permitted, or required. For example, in free exercise cases, the Court "balances" the individual's or group's interest in the religious practice against the government's interest in regulating the behavior. Similarly, if the issue is characterized as one involving establishment of religion, the Court then considers whether the challenged practice involves a forbidden religious purpose, has a primary effect of advancing or inhibiting religion, or threatens to foster an excessive government "entanglement" with religion. But as with the characterization issue itself, these subjective-test concepts are not really helpful in explaining where to draw the line between what government may and may not do in support of religious institutions or practices.

Third and finally, there is no accepted definition of "religion" for constitutional purposes, and no satisfactory definition is likely to be conceived. The significance of this definitional gap has generally been overlooked because most Supreme Court cases have dealt with Christian groups and practices that are concededly "religious." But first amendment law is based upon an assumption that there is something important about "religious" practices that differentiates them from "secular" practices and entitles (or subjects) them to special constitutional treatment. To the extent that we are unable to identify any factor which distinguishes the religious from the secular, we call into question whether that special treatment is necessary or even rational.

The first three Parts of this Article develop further this theme of indeterminacy, explaining and illustrating the three areas of uncertainty just summarized. Part IV then explores the ideological considerations that might motivate the Justices to exercise their opportunities to manipulate doctrine in one direction rather than another.

I

THE CHARACTERIZATION ISSUE

Judges and commentators have often observed that the free exercise and the establishment clauses look in opposite directions, so that a direct conflict may arise if one is allowed to intrude into territory properly belonging to the other.²⁰ What is less frequently noted is that many significant problems can be categorized so as to fall under the

20. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970); L. TRIBE, *supra* note 3, at 815;

rule of *either* the establishment clause or the free exercise clause, depending upon which we would prefer to have govern the situation.

A. *Aid to Religious Private Schools*

A good example of this characterization problem is the perennially controversial question of whether it is a forbidden "establishment of religion" for a state legislature to provide some assistance to religious schools, or the students in them, as part of a general program of assistance to private education. If we view the transfer of funds to religious schools (with or without the parents or students as a conduit²¹) in isolation, the program seems to be providing a special benefit to religious activity, and thus it is at a minimum constitutionally suspect. That is precisely how the federal district court viewed the use of facilities for student worship in *Widmar*.²² On the other hand, we could equally logically focus on the state educational program as a whole and view the tuition grants or whatever as a rough attempt to "equalize" the treatment of those parents and students who desire a religious education with those who prefer a secular education. In that case we would understand the state's action not as an attempt to benefit religion, but as an attempt to avoid disadvantaging or discriminating against it.

Relatedly, it has long been assumed that parents have a right under the free exercise clause to send their children to religious schools if they can do so at their own expense.²³ It is not obvious that the religious liberty of the children is always furthered by allowing their parents to choose a sectarian education,²⁴ or that a "compelling interest" could not be found to justify a law requiring all children to go through the socializing experience of public education.²⁵ Nonetheless, the parental right is well established and not controversial.

Granted that premise, it is difficult to understand how it can be impermissible for a state to make the same option available to everyone

Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 690-92 (1980).

21. For establishment clause purposes, Supreme Court holdings indicate that it makes some difference if the state channels the aid to religious schools through individual parents. See *Mueller v. Allen*, 103 S. Ct. 3062, 3069 (1983).

22. "[T]his Court finds that a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion." *Chess v. Widmar*, 480 F. Supp. 907, 915-16 (W.D. Mo. 1979), *remanded*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

The issue, of course, is whether one characterizes the policy as a policy permitting religious services or as a policy permitting student activities generally.

23. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding Oregon statute requiring children between the ages of eight and sixteen to attend public schools unconstitutional).

24. See *Yoder*, 406 U.S. at 241-46 (Douglas, J., dissenting).

25. See *id.* at 237-41 (White, J., concurring).

by tuition tax credits, grants, or other forms of aid to private schools. Looked at that way, the question should *not* be whether it is a permissible activity for the state to provide aid to religious schools, but whether the Constitution permits a state (or even conceivably requires it) to give the poor the kind of opportunities for educational choice that the rich and middle class currently enjoy.

The issue in the assistance-to-schools cases is analogous to that involved in *Widmar*, except that much more is at stake. The problem is that government is simultaneously forbidden from giving substantial assistance to religious activities and from discriminating against religious activities. When the question is whether religious organizations should be allowed to receive funding or use facilities on the same basis as secular organizations, the principles of "no assistance" and "no discrimination" come into conflict.²⁶

One can deny the existence of the conflict by denying that "religious" and "secular" educations are the appropriate things to be compared. A person taking this view would probably prefer to label the public schools of the United States as "neutral" rather than "secular." Our public schools do not endorse any particular religious position—Christianity, Judaism, Islam, or whatever—nor do they preach atheism, as the schools in the Soviet Union are said to do. The schools avoid controversial religious questions not because the school authorities have concluded that those questions are not important, but rather because they think religious instruction is best carried on in homes or churches free of governmental involvement. From this viewpoint, the only way to be neutral about religion is to ignore the subject altogether.²⁷

Whether schools that avoid the topic of religion altogether are thereby "neutral" towards religion is debatable. For one thing, the schools have to teach subjects—biology in particular—which touch directly upon matters of religious controversy. A textbook that teaches that the human species evolved gradually over millions of years from simple life forms is anything but neutral from the viewpoint of Biblical literalists. Courses in social living, "values clarification," and sex education also produce religious controversy, because opinions about sexual morality and other ethical issues are so closely related to religious beliefs.²⁸

26. The conflict between the "no assistance" and "no discrimination" principles was apparent even in the first Supreme Court decision on aid to parochial schools. See *Everson v. Board of Educ.*, 330 U.S. 1, 16-18 (1947).

27. See *infra* note 115 and accompanying text.

28. See Eger, *The Conflict in Moral Education: An Informal Case Study*, PUB. INTEREST, Spring 1981, at 62.

For example, is heterosexual, life-long marriage the ideal sexual relationship to which all others are unfavorably compared, although others may be legally tolerated, or should various "living together" arrangements, including homosexual liaisons, be regarded as equally acceptable alternatives? Should pregnant teenagers be encouraged to consider abortion as a morally respectable alternative to raising the child or offering it for adoption? No matter how hard the schools try to straddle that sort of question, they are drawn irresistibly towards either reinforcing the traditional religion-based sexual morality without explaining its theological foundation, or towards emphasizing informed personal choice as the ultimate criterion.²⁹

The point here is not that the public schools are doing something wrong in teaching evolutionary biology, or stressing the practical problems of teenage sex (i.e., contraception and disease prevention) rather than its ultimate morality. The schools ought to teach their students what they need to know, whether or not the teaching touches on controversial subjects. But what do the students need to know, and what do they need to be warned against? One's religious commitments necessarily affect how one answers those questions. To put the point another way, what matters is not so much what the schools do or do not explicitly teach their students about religion, but what assumptions about the nature of humanity and the purpose of life guide the school authorities in planning the curriculum and administering the life of the school.³⁰ Although it is possible to be more or less fair minded about such matters, there is no such thing as a dead-center neutrality in comparison to which all other positions are partisan.

B. Unemployment Compensation

Characterization problems also arise in other contexts. For example, the Supreme Court held in *Sherbert v. Verner*³¹ that the free exercise clause requires states to pay unemployment compensation to Seventh-Day Adventists who refuse to accept employment that requires Saturday work. By contrast, critics such as Dean Choper have argued that not only was this result not required by the free exercise

29. See Kasun, *Turning Children into Sex Experts*, PUB. INTEREST, Spring 1979, at 3. For a further exchange on the sex education controversy, see Crosbie, *Sex Education: Another Look*, PUB. INTEREST, Winter 1980, at 120; Kasun, *More on the New Sex Education*, PUB. INTEREST, Winter 1980, at 129.

30. For example, in a relatively permissive society, public schools are also likely to be permissive. Religious schools attract many students (or parents) by offering a more structured and disciplined learning environment. A school does not have to be religious in order to be strict, of course, but many religious schools do stress discipline. Perhaps a firm commitment to a set of beliefs—whether or not labeled as religious—predisposes school authorities to be firm with their students.

31. 374 U.S. 398 (1963).

clause, but it actually violates the establishment clause by giving to Saturday worshipers a privilege that would be denied to persons who refuse to accept Saturday employment for nonreligious reasons.³²

The difference in characterization depends upon what is compared with what. Dean Choper compared the position of strict Saturday worshipers with that of persons who prefer not to work on Saturday for nonreligious reasons.³³ From his perspective, the former group received a benefit that the latter group did not. The Supreme Court majority, on the other hand, thought it more appropriate to compare the situation of Saturday worshipers with that of Sunday worshipers, whose freedom to refuse work on Sunday was solidly protected by law.³⁴ Because it would involve little added expense or inconvenience to the state to make an adjustment for Saturday worshipers, the Court saw doing so as a fair-minded attempt to equalize the treatment of persons adhering to different creeds.

As in the aid-to-schools cases, one could resist this logic by describing Sunday as the "neutral" day of rest recognized by the state for secular purposes, rather than as a day set apart because of its significance to orthodox Christians. On that basis, the Supreme Court has held that states may forbid businesses to operate on Sunday,³⁵ and to the extent that businesses are closed on Sunday, the question of willingness to work on that day will not arise. Where Sunday work is permitted, on the other hand, a policy of strict neutrality requires that both religious and nonreligious persons who refuse to work on Sundays be treated alike for unemployment compensation purposes, and that persons who refuse to work on other days for religious reasons be given no special dispensation. By granting no religious exemptions at all, the state can avoid having to answer thorny hypothetical questions such as how it should treat an eccentric group that requires its members to refuse to work on Wednesdays. In practice, Saturday worshipers and not Sunday worshipers would probably have to accept employment on their day of worship, due to Sunday closing laws and related customs, but at least the law would be formally neutral if not equal in effect, and the state could avoid the quagmire of individualized exceptions for religious claims.

II

THE SUBJECTIVE TESTS

Although it is an important first step, the characterization decision

32. Choper, *supra* note 20, at 690-92.

33. *Id.* at 691.

34. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *see also* Choper, *supra* note 20, at 692-95.

35. *McGowan v. Maryland*, 366 U.S. 420 (1961).

does not necessarily control the outcome of a religion case. If we find that a state regulation or command burdens someone's free exercise of religion, then that burden must be justified by a "compelling state interest" that cannot be satisfied in some other, less intrusive manner. If we decide instead that we are dealing with a possibly forbidden establishment of religion, then the benefit is nonetheless constitutional if the questioned act can pass a three-part test formulated by the Supreme Court in *Lemon v. Kurtzman*:³⁶ it must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster "an excessive government entanglement with religion."³⁷

At times, however, the Court disregards the *Lemon* test in establishment clause cases if its application would lead to inconvenient outcomes. A leading example is *Marsh v. Chambers*,³⁸ where a six-to-three majority allowed the Nebraska Legislature to continue its long-standing practice of paying a Protestant clergyman to open each day of the legislative session with a nondenominational prayer "in the Judeo-Christian tradition."³⁹ Legislative prayer seems like a clearcut endorsement of theistic religious belief, despite the effort to avoid sectarian controversy, but the Supreme Court found constitutional support for the practice in a tradition dating back to the Continental Congress and the founding of the nation.⁴⁰ Perhaps the holding can best be explained by adding a fourth element or exception to the *Lemon* test: ceremonial governmental religious pronouncements are not unconstitutional if they are sufficiently "traditional," and if they are not made in the public schools.

The *Lemon* test has been ridiculed because of the seemingly absurd lines that the Supreme Court has drawn in its name, especially in the area of public aid to religious schools. One example is particularly notorious: the Supreme Court has permitted states to provide free secular textbooks to parochial school students, but has forbidden as an establishment of religion the furnishing of "instructional materials," such as maps.⁴¹ There is nothing about the *Lemon* test itself, however,

36. 403 U.S. 602 (1971).

37. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The *Lemon* test is also sometimes discussed in free exercise cases, when the issue is whether a religiously motivated individual or group should have an exemption from some broadly applicable regulation. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972). If granting that exemption would run afoul of the test used to determine when assistance to religion violates the establishment clause, then we would have a perfect standoff between the two clauses. The free exercise might conceivably require what the establishment clause forbids.

38. 103 S. Ct. 3330 (1983).

39. *Id.* at 3336 (footnote omitted).

40. *Id.* at 3333-36.

41. *See generally Wolman v. Walter*, 433 U.S. 229 (1977).

that required the Supreme Court to draw the line where it did rather than somewhere else. The problem with the *Lemon* test is not that it requires drawing lines, but rather that its three concepts—religious purpose, religious effect, and entanglement—do not help us to decide where the lines should be drawn. At the same time, they create further characterization problems. Finally, it is not clear why these concepts are even relevant.

A. Religious Purpose or Effect

Consider, for example, the difficulty of making sense out of the crucial distinction between *religious* purpose or effect and *secular* purpose or effect. Governments usually act out of secular motives, even when they are directly aiding a particular religious sect. An atheistic ruler might well create an established church because he thinks it a useful way of raising money, or of ensuring that the clergy do not preach seditious doctrines.⁴² In democratic societies, elected officials have an excellent secular reason to accommodate (or at least to avoid offending) groups and individuals who are religious, as well as groups and individuals who are not. They wish to be re-elected, and they do not want important groups to feel that the community does not honor their values.

Moreover, it is generally acknowledged that religious belief influences behavior, whether for better or for worse. A government might have excellent secular reasons for opposing sects that forbid their members to perform military service or that require racial segregation. For similar reasons, the state might want to support sects that teach their adherents to obey the laws or respect the equality of all races. If establishing a religion had no secular purpose, secular rulers would rarely be attracted to the idea.

Clearly, then, it is difficult to tell religious and secular purpose apart, or to say which effect is primary and which secondary. But beyond that, it is difficult to understand why it is necessarily unconstitutional for legislation to have the purpose or effect of assisting religious practice generally, when the Constitution itself gives a special status to religion. The free exercise clause itself can be said to have the purpose and effect of allowing the citizenry to practice their religion freely. Can it be unconstitutional for government to assist the citizens to exercise

42. King Henry VIII disestablished the Church of Rome and established the Church of England because he wanted to divorce his wife and seize the property of the monasteries. Presumably, equally secular motives or effects would not justify an American Congress in establishing a national church. Perhaps establishing a church has an inherently religious *purpose* even when the *motive* is secular, but then the definition of religious purpose seems to be circular: an act has a religious purpose if it aids religion in an unconstitutional manner.

their constitutional rights under the free exercise clause? But such assistance seems to have the purpose and effect of aiding religion!

The perennial problem of public financial assistance to religious schools can once again be used to illustrate the point. Suppose that a state legislature appropriates money which is to be transferred directly to religious schools to subsidize their operations, complete with a preamble announcing that the statutory purpose is to assist parents to exercise their constitutional rights under the free exercise clause, specifically to ensure that their own children receive a religious education.⁴³ Whether that purpose is termed "religious" or "secular" is entirely a matter of semantic choice. The legislation purposely assists religious activity, but it also purposely assists people to exercise a right guaranteed by that secular document, the Constitution. One effect of this assistance might be that more youngsters will have religious beliefs than would otherwise be the case. But that is also a likely effect of the free exercise clause itself. Perhaps there are excellent reasons for limiting the permissible forms of state aid to religious educational institutions. The point here is that discussing "religious purpose" and "religious effect" is not a useful way of identifying those reasons or deciding what the limitations ought to be.

The notion that it is wrong for legislation to have the purpose or effect of assisting religion only makes sense in terms of an assumed "neutral" starting point that defines what advantages or disadvantages religion ought to have. When the federal government supplies chaplains for the armed services, it clearly means to assist the military personnel to practice their various religions. Even Justices who take a strict "wall of separation" approach to most establishment issues find the military chaplain program acceptable, because they see it as compensation for the difficulties the government creates by removing military personnel from their former environments.⁴⁴ Provision of routine public services like sewers and fire protection to church-related structures is also rarely questioned, and nobody proposes to deny the use of subsidized public transportation to people who are going to church.⁴⁵ Even very substantial aid in the form of tax exemptions for churches and other religious institutions like hospitals and schools is acceptable to most of the Justices, because it can be viewed as treating them like

43. A state would be much more likely to justify such a subsidy on the ground that it compensated the schools for the purely secular societal benefit of education in secular academic subjects. Dean Choper, among others, has argued that subsidies to religious schools are justified if they do not exceed the secular benefits of the education to the community. *See Choper, supra* note 20, at 675, 679-80. The hypothetical in the text is meant to state a more difficult example.

44. *See Marsh v. Chambers*, 103 S. Ct. 3330, 3346 (1983) (Brennan, J., dissenting).

45. *See Mueller v. Allen*, 103 S. Ct. 3062, 3073 (1983) (Marshall, J., dissenting).

other similar charitable and educational institutions.⁴⁶

Measures that have the effect of aiding religious practices or institutions—as all the stated examples do—become controversial only when people perceive them as going beyond a conventionally accepted norm. Until we know where that norm is located, the test of religious purpose or effect is meaningless. Once we have set that norm, *it* measures the appropriate level and forms of public aid for religion, and we can dispense with the *Lemon* criteria altogether. The constitutionality of subsidies to religious schools or employment of either legislative or military chaplains must turn on the nature of the subsidized activity rather than the subjective purpose of the legislators who voted for the appropriation. Clearly, then, the tests that look to religious purpose or effect do not explain the distinctions that the Court has drawn.

B. Entanglement

There are equally difficult problems with “entanglement,” the third branch of the *Lemon* test. Entanglement in this context seems to have at least two distinct connotations. In the more literal sense, it means simply “excessive involvement.” It is undesirable for the state to become deeply involved in the government or regulation of religious institutions, because such involvement itself may curtail religious freedom or involve the state in controversies with which it is not competent to deal.⁴⁷ For this reason, the Supreme Court has insisted that states permit religious organizations a greater degree of self-government than would be required in the case of secular organizations such as corporations, labor unions, or charities.⁴⁸

A second and more important meaning of entanglement seems to be “divisiveness.” Religious issues are considered to be particularly likely to arouse strong passions and enmities, especially when one faction or another sees the possibility of enlisting the state to further its cause.⁴⁹ To avoid bitter controversies over what the state’s role should be, the state should avoid matters touching on religion to the greatest extent possible.⁵⁰ It is in this sense of divisiveness that entanglement is

46. The issue of tax exemptions for church property used solely for religious worship should have been an extremely difficult one for the Supreme Court, because houses of worship do not provide the kind of “secular benefit” that religious schools and hospitals do. Nonetheless, only Justice Douglas dissented from the decision upholding those benefits in *Walz v. Tax Comm’n*, 397 U.S. 664, 700 (1970). Possibly the Court was influenced by the fact that many more religious denominations were threatened by the prospect of denial of tax exemptions than were affected by the denial of subsidies for religious schools.

47. See generally Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

48. *Id.*

49. *Id.* at 1393-94; see also L. TRIBE, *supra* note 3, at 866-67.

50. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971).

most often used in the cases.

Justification of an active judicial role overseeing state involvement with religion on the basis of a policy of avoiding divisive entanglements rests upon two problematic factual assumptions. One is that religious disputes and religious people are particularly contentious, so that state involvement in religious matters is more likely to breed bitter conflicts than state involvement in such matters as the distribution of wealth or civil rights. Undoubtedly, religious conflicts have led to wars and persecutions, as have conflicts over secular ideologies like fascism and communism. What is problematic is whether, in conditions of contemporary American society, matters such as school prayers, legislative chaplains, and Christmas displays are more hotly disputed than many secular matters with which state legislatures deal routinely.⁵¹

The second problematic assumption is that courts alleviate divisiveness when they take an issue away from the voters and legislators and decide it on the basis of a constitutional principle. This is a most implausible idea, and such evidence as exists seems to be against it. Many of us find it easier to accept being outvoted by a majority of our fellow citizens or their representatives than by a handful of judges. Legislative battles over the issue of legalized abortion seem to have become *more* bitter and divisive since the Supreme Court attempted to preempt the issue in *Roe v. Wade*.⁵² The very act of deciding a dispute on the basis of some abstract legal principle rather than on the give-and-take of legislative compromise tends to identify more clearly one side as the winner and the other side as the loser, with the result of increasing the bitterness of the loser.

One sure way to encourage conflict on any subject is to encourage people to think that what seem to be minor irritations are in reality violations of some sacred principle for which they have a duty to fight. The Supreme Court's decision in *Lynch v. Donnelly*,⁵³ involving the constitutionality of a community's tradition of including a crèche or nativity scene in its otherwise secular Christmas display, illustrates the tendency of expansive judicial remedies to generate conflict that might not otherwise occur. The crèche had been part of the annual display for at least forty years. The district court found that no controversy existed over it, until local members of the American Civil Liberties Union brought a lawsuit to enjoin its display.⁵⁴ Nonetheless, the dis-

51. See Smith, *supra* note 2, at 97.

52. 410 U.S. 113 (1973).

53. 104 S. Ct. 1355 (1984).

54. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1180 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1355 (1984).

strict court,⁵⁵ and the dissenting opinion in the Supreme Court by Justice Brennan,⁵⁶ found the divisiveness engendered by the lawsuit itself to be evidence that the Christmas display posed a danger of divisive entanglement, noting that the calm that had prevailed prior to the lawsuit might merely have reflected a feeling on the part of dissatisfied individuals that it would be futile to oppose the majority.⁵⁷

No doubt a sense of futility is a possible explanation for the absence of recorded complaint, but that fact also demonstrates that, by encouraging persons who are easily offended by religious symbolism to believe that the courts stand open to remedy their complaints, the courts foster divisive conflicts over religion. Similarly, by encouraging citizens and legislators to believe that aid to religious schools is a matter to be decided on the basis of abstract constitutional principles rather than by compromise and accommodation, the Supreme Court may well have made such disputes more bitter than they otherwise would be. That consideration does not necessarily mean that the Court has acted wrongly because justice, not domestic peace, is the primary aim of constitutional adjudication.⁵⁸ American society might be more peaceful if the Supreme Court stopped enforcing constitutional rights altogether.

III

THE DEFINITIONAL PROBLEM: WHAT IS "RELIGION"?

First amendment religion law proceeds on the assumption that "religious" activity can and should be treated differently from otherwise similar activities, sometimes to religion's benefit and sometimes to its detriment. For example, religious statements and practices are sometimes exempted from government regulations that apply to other forms of speech or conduct, but as a rule religion is excluded from public institutions such as the schools. Accordingly, an organization may gain or lose privileges depending upon whether it is classified as reli-

55. *Id.*

56. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1374 (1984) (Brennan, J., dissenting).

57. *Id.*

58. The discussion of entanglement in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is particularly perplexing. The majority opinion by Chief Justice Burger praises the enormous contribution that private religious schools have made to our national life, and observes that taxpayers have saved "vast sums" due to their existence. *Id.* at 625. Nonetheless, public aid to these schools has such "divisive political potential" that allowing such aid would tend to polarize state politics, and thus "to confuse and obscure other issues of great urgency." *Id.* at 622-23.

But if religious schools enormously benefit our national life and save taxpayers vast sums of money, why do proposals to assist them arouse such passionate opposition? Is it likely that the opponents of subsidies take so benign a view of religious education? When has public controversy over aid to religious schools actually caused this destructive polarization, and what other issues has it confused or obscured? Above all, who is to blame for this unfortunate state of affairs—the supporters of the subsidies or the opponents?

gious or secular. The practice of Scientology became the Church of Scientology in part to protect the organization's E-meters and other therapeutic devices and practices from regulation by the Food and Drug Administration.⁵⁹ The cult of Transcendental Meditation, though clearly derived from Hindu religion, sought classification as a therapeutic science in part because it wanted to promote its meditation techniques in the public schools.⁶⁰ On what principle are we to assign groups to one category or the other?

The fact is that no definition of religion for constitutional purposes exists, and no satisfactory definition is likely to be conceived. According to an important article by Dean Choper,⁶¹ "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all."⁶² Professor Greenawalt's article in this Symposium carries a similar message: no factor or set of factors has been found that satisfactorily distinguishes "religion" from philosophy or ideology.⁶³

Most Americans probably imagine that religion inherently has something to do with the concept of a creator God. But some faiths commonly called religions—Buddhism, for example—have no such doctrine.⁶⁴ In addition, a number of famous Christian theologians have attempted to "demythologize" their religion by removing all the explicitly supernatural elements that may be uncongenial to the world view of twentieth century rationalists.⁶⁵ Many persons who think of themselves as Christians conceive of God more as an abstract ideal of goodness or "ground of all being" than as a personal being who makes pronouncements to humanity. By contrast, persons who believe that the universe is in some sense rationally ordered, and that there is an objective standard of right and wrong independent of human opinion, may think of themselves as agnostics or atheists because they find the idea of God as an "old man in the sky" to be incredible. The differences among these groups may be more a matter of preferred vocabulary than substance. It would be odd indeed if the Constitution were

59. *See* *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). The E-meter is a skin galvanometer used in some Scientology rituals to measure a person's emotional responses to questions. It is believed that through proper interpretation of the E-meter readings, one can determine the mental and spiritual condition of a subject. *Id.* at 1153.

60. *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979).

61. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579.

62. *Id.*

63. Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

64. *See* *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *see also* Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 288 n.106 (1984).

65. This point is well developed in L. TRIBE, *supra* note 3, at 826-27.

read to treat persons very differently on the basis of whether they used or avoided the word "God" in expressing their understanding of the fundamental order or disorder of the universe.

A. *The Seeger Dilemma*

It is therefore not surprising that the Supreme Court, on the rare occasions when it has been asked to say anything about the definition of "religion" or "religious belief," has indicated that the category must be open ended. In *United States v. Seeger*,⁶⁶ the Court held that draft exemptions granted to persons who oppose participation in all war "by reason of their religious training and belief" must be extended to pacifists who hold any sincere and meaningful belief that "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."⁶⁷ In another decision, the Court observed that the religion clauses prohibit government support of "those religions based on a belief in the existence of God as against those religions founded on different beliefs," noting that "[a]mong 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."⁶⁸

Such formulations make the category of "religion" seem so all-inclusive that it is doubtful whether any system of beliefs that people treat as important can be excluded. Perhaps this is as it should be, because it may be inherently arbitrary to distinguish among beliefs about what is fundamentally real and important on the basis of whether they are conventionally designated as "religious" or not. Consider, for example, Professor Greenawalt's suggestion that, if nonreligion is not religion, government endorsement of atheism might not violate the establishment clause.⁶⁹ This possibility is consistent with the ordinary language usage of the term religion. It does seem peculiar, however, that a constitutional clause supposedly dedicated to religious neutrality could be read to permit the government to endorse one side of a religious issue but not the other, particularly when the clause literally forbids not just an "establishment of religion" but rather "a law respecting an establishment of religion."

Thinking this way leads one to a paradox. If the first amendment

66. 380 U.S. 163 (1965); see also *Welsh v. United States*, 398 U.S. 333 (1970).

67. *Seeger*, 380 U.S. at 165-66, 176, 184. The *Seeger* opinion purports to be interpreting the Selective Service Act, but the interpretation is so strained that commentators have assumed that the Court had constitutional considerations in mind.

68. *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961).

69. Greenawalt, *supra* note 63, at 793-94. Greenawalt concludes that whatever the relevant constitutional clause, government sponsorship of either religion or antireligion ought to be disfavored. *Id.* at 794.

is supposed to prevent government from favoring one religion over another, or from favoring religion over nonreligion or vice-versa, then how do we explain the special constitutional status for religion that the first amendment itself mandates? Does the first amendment violate itself, by giving "religion" special immunities and disabilities? Or, if we avoid this problem by construing "religion" so broadly that the term includes all deeply felt beliefs, do we create an impossibly long list of things that government must not "establish" and whose free exercise government must not hinder?

To some people the most important thing is God; to others it may be the categorical imperative, the pleasure or pain that humans (and animals?) feel, human rights, national glory, the U.S. Constitution, the free market, the class struggle, the battle of the sexes, the liberation of an oppressed racial or ethnic group, the love of power or fame, the life of the mind, artistic or athletic excellence, the bottle, or the needle. If the appropriate set is beliefs about ultimate reality, as the Supreme Court majority seems to have thought in *Seeger*,⁷⁰ then those opinions about that reality that we conventionally label as "religious" seem to constitute an arbitrarily defined subset.

B. Two Definitions or One?

Some scholars have suggested that the term "religion" ought to be defined differently for different purposes. Professor Tribe did not even attempt an overall definition in his treatise, but contented himself with the suggestion that nontheistic creeds or philosophies that are both arguably religious and arguably nonreligious should be protected by the free exercise clause, but should be free of the restrictions of the establishment clause.⁷¹ An individual who refused to comply with a law because of a strong moral belief that would not be religious under a narrow definition would be entitled to have his defense considered under the free exercise clause, but a school board could provide for the teaching of that same belief in the public schools without running afoul of the establishment clause. Although the first amendment uses the word "religion" only once, Tribe thought this dual definition necessary if the establishment clause was not to become "an awful engine of destruction" that would invalidate legislation whose purpose or effect was to advance such arguably religious values as "human dignity, equality, national destiny, freedom, enlightenment, and morality" . . . especially if the legislation was the result of pressure by church or religious

70. See *United States v. Seeger*, 380 U.S. 163, 176, 184, 186 (1965).

71. L. TRIBE, *supra* note 3, at 828-33.

groups."⁷²

Even if one is willing to allow a term that is used only once in the Constitution to have two definitions, Professor Tribe's approach has the objectionable effect of permitting those groups and persons whose beliefs are both arguably religious and arguably not religious to claim the benefits of the free exercise clause without incurring the burdens of the establishment clause.⁷³ In other words, they could have it both ways, which happens to be the classic definition of unfair preference. Members of traditional, "indisputably religious" churches could hardly be expected to see the dual definition as anything but legalistic flim-flam in the service of nontheistic religious ideology. Indeed, if the Supreme Court were to endorse Tribe's reasoning, it would lend support to the claim of some religious fundamentalists that the public schools and other governmental agencies are currently establishing a form of secular religion.

C. *Getting Along Without a Definition*

Dean Choper grasped the other horn of the dilemma in his own attempt to define religion for constitutional purposes. He defined "religious belief" as necessarily involving "extratemporal consequences," so that a conscientious objector's claim would only be defined as religious if the objector believed that he would be punished in the afterlife for participating in war.⁷⁴ This definition has practically nothing to do with how the word religion has been used either in ordinary language or in Supreme Court opinions; Choper chose it solely because he felt that an individual should not be able to claim an exemption from a legal obligation (such as military service or compulsory school attendance) on free exercise grounds, unless he feared punishment in the afterlife if he complied.⁷⁵

The important thing is not the definition itself, however, but the limited use Choper makes of it. The definition has practical effect *only* in free exercise clause cases, where in fact Choper contemplates that relief from generally applicable laws would rarely be granted.⁷⁶ For establishment clause issues, the definition of religion is unimportant to

72. *Id.* at 831 (quoting Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 266).

73. Greenawalt, *supra* note 63, at 814.

74. Choper, *supra* note 61, at 597-601.

75.

[A]lthough there is no sure method of proving it scientifically as an empirical matter, intuition and experience affirm that the degree of internal trauma on earth for those who have put their souls in jeopardy for eternity can be expected to be markedly greater than for those who have only violated a moral scruple.

Id. at 598.

76. See Choper, *supra* note 20, at 696-700.

Choper, because he concludes that government has a general constitutional obligation, independent of the establishment clause, to be ideologically neutral with respect to religious and secular creeds alike.⁷⁷ Without such a general obligation of governmental neutrality, Choper's definition would have the disturbing consequence of permitting the government to "establish" any doctrine, whether or not conventionally labeled as religious, provided the doctrine did not relate to extratemporal consequences.⁷⁸ In effect, Choper is attempting not so much to define religion as to find a way of getting along without a definition.

Given the difficulty of framing a satisfactory definition of religion, there is much to be said for trying to treat the "establishment" problem under some more general doctrine. If there really is no clear-cut difference between religious doctrines and nonreligious doctrines, then why not require government to be neutral about *all* doctrines? As Choper puts it, the public schools may offer courses about "Dewey or Hegel—or Keynes or Friedman, or Luther or Christ—" but for government to attempt to convince its citizens of the ultimate truth of the teaching of *any* of these thinkers would be "ideological partisanship" that ought to be unconstitutional wholly apart from the establishment clause.⁷⁹ But could the schools—or other agencies of government—even try to convince people that it is wrong to cheat and steal, or to practice racial discrimination? What is needed, Choper concludes, is a coherent first amendment doctrine capable of distinguishing "'narrow partisan ideologies' (which government may not subsidize or promote) from . . . 'widely shared and basically noncontroversial public values'—such as the inherent dignity of the individual and the essential equality of all human beings—(which the state may aid or sponsor)."⁸⁰ Abandoning the futile attempt to distinguish "religion" from ideology or philosophy leads us back to Professor Tribe's fear that the establishment clause might become an "awful engine of destruction" directed at government efforts to promote values that are themselves thought to have a constitutional basis.⁸¹ As constitutional law expands to include a growing list of "fundamental values," should *it* be described as an established national civil religion or philosophy? Among the fundamental doctrines of our judicially defined constitutional philosophy are racial equality

77. See Choper, *supra* note 61, at 610-11.

78. "For example, the public schools might have voluntary programs of prayers to God seeking only worldly assistance, or state funds might be granted to a modern Protestant sect whose beliefs excluded salvation." *Id.* at 610.

79. *Id.* at 612.

80. *Id.*

81. See *supra* text accompanying note 72.

and integration (including intermarriage),⁸² a right to privacy (encompassing contraception and abortion),⁸³ and an incompletely defined principle of sexual equality (despite the failure of the Equal Rights Amendment).⁸⁴ These doctrines are not narrowly partisan, but they are not basically noncontroversial either.

Judicial decisions do not compel anyone to believe in anything, of course, but they certainly express an emphatic official endorsement of the moral or philosophical premises on which they rest. May the government expend public resources—in the schools or elsewhere—to encourage people to respect values which the courts have endorsed as fundamental to the American “concept of ordered liberty”?⁸⁵ Unless we can justify distinguishing religion from philosophy or whatever, then the U.S. Commission on Civil Rights, to name a single example, is engaged in establishing something indistinguishable from a religion.

D. Case-by-Case Adjudication

Concluding that none of the attempts to formulate a constitutional definition of religion has been satisfactory, Professor Greenawalt writes in this Symposium that the attempt to settle upon any one definition is misconceived.⁸⁶ He argues that religion is such a complex subject that no single definition is likely to be satisfactory, and we must therefore proceed by the familiar common law method of case-by-case analogical reasoning.⁸⁷ If we start with institutions or beliefs that are indisputably religious and compare doubtful cases of religion to the conceded ones, we can set each doubtful case on one side of the line or the other and gradually create a body of case law that can substitute for a true definition.⁸⁸

Deciding each case by analogy is certainly a viable option, one which the courts have used often enough. But everything depends upon what we choose as the point of comparison from which to analogize. If we compare each doubtful case to the Episcopal Church, few philosophies will qualify as religions because they will lack the ceremonial superstructure. Yet if we compare the doubtful cases to the sort of

82. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983).

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

84. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). This case, which held the exclusion of qualified males from the School of Nursing of a state-supported university unconstitutional, was decided July 1, 1982, the day after the ratification period for the Equal Rights Amendment expired.

85. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by* *Duncan v. Louisiana*, 391 U.S. 145 (1968).

86. Greenawalt, *supra* note 63, at 763.

87. *Id.*

88. *Id.* at 769 n.60.

philosophy of life that the Supreme Court found to be religious in *Seeger*,⁸⁹ everything that anyone believes in strongly will be a religion. Curiously, it is possible that some conventional churches would *not* be "religious" under the *Seeger* test, at least for their members who belong for cultural or social reasons and for whom the church is not a matter of "ultimate concern."

If we retain a creative tension between the points of comparison, each case will be an opportunity for creative reformulation. How we resolve the doubtful cases is not terribly important anyway, according to Greenawalt, because the subjective tests used to decide establishment and free exercise claims are sufficiently flexible that we can avoid "inapt" conclusions.⁹⁰ The Rastafarians may be a religion, for example, but we do not have to let them smoke marijuana;⁹¹ neither do we need to allow a mendicant cult to keep its members' children out of school so that they can beg on the streets.⁹² Even if racial equality and feminism are in some sense religious doctrines, government can easily find a secular reason for promoting them.

My intention is not to denigrate the work of Tribe, Choper, or Greenawalt. Each did his best to work out a solution to an intractable problem, and each advanced our understanding of just how intractable the problem is. Government must endorse *some* values, and does so every day. This is particularly true in public schools, which are as important as they are largely because we believe or hope that they can motivate children to improve upon the values of their parents. Most people want our schools to teach children that it is wrong to cheat on tests, that it is wrong to treat people as intrinsically inferior because of their skin color or ethnic background, that it is wrong to limit arbitrarily the options available to people because of their sex, and that it is right to develop one's own capacity so that one can make a contribution to the community instead of becoming a burden upon it. A public school that tried to be neutral about all such matters would be making the case for private education.

All-pervasive public neutrality cannot be the answer, nor can the answer be one that distinguishes between "clearly" and "arguably" religious philosophies to the advantage of one as opposed to the

89. *See* *United States v. Seeger*, 380 U.S. 163 (1965).

90. Greenawalt, *supra* note 63, at 770; *see also id.* at 762.

91. *See* *Whyte v. United States*, 471 A.2d 1018 (D.C. 1984).

92. In *Wisconsin v. Yoder*, 406 U.S. 205, 222-26 (1972), the Court held that the Amish could withdraw their children from school after the eighth grade. The key element in the case was that the Amish continued to educate their children "vocationally" in a manner likely to prepare them to function in ordinary society should they eventually leave the Amish community. The Court did not endorse the general notion that parents can remove their children from school by a simple invocation of some "religious" belief.

other—unless some further justification can be advanced for the preference. Absent a better solution, we may well have no alternative but to decide cases by analogy as they arise, comforting ourselves with the thought that by defining something as “religion” we are not really committing ourselves to anything, because the subjective tests we employ from that point on give us more than enough maneuvering room to avoid any outcomes that we happen not to like.

A body of constitutional law certainly *can* be built upon that basis. The question is whether it ought to be. If first amendment law is based upon an arbitrary distinction between religion and every other form of belief, why should the Supreme Court continue to employ the first amendment religion clauses to strike down legislation? The inability to define religion is not simply a problem that sometimes arises in particular cases; rather, it reflects a fundamental gap in first amendment theory. How can we say anything about religion if we do not know what it is?

IV

IDEOLOGY AND COMPROMISE

The preceding sections of this Article have attempted to establish the point that Supreme Court decisions in the religion area cannot be justified on the basis of the abstract legal concepts discussed in the opinions, because too much freedom exists in characterizing the issues and applying the subjective tests. Moreover, the doctrinal objectives are inherently contradictory, providing at once both a special legal position for religion and a principle that the law is not supposed to favor or disfavor religious belief. Finally, we have no principled definition of religion, and hence no way to justify treating religious beliefs differently from other beliefs. Doctrinally, first amendment religion law is a mess.

Still, the fact that the constitutional doctrine is at times muddled and internally inconsistent does not necessarily mean that it is intolerable. On the contrary, the very fact that the holdings do not fit any abstract pattern may indicate that the Court is steering a careful path between undue preference for religion (conventionally defined) and undue hostility to it. One major objective of the first amendment is to keep the public peace on religious issues, and one way of doing this is for every religious and antireligious group to feel that the government is neither squarely on its side nor squarely on the other side. It is not good for *anyone* if a major ideological or social group becomes persuaded that the government consistently rejects its values or symbols. A body of decisions that is meant to keep the peace between strong contending factions may seem incoherent to those who wrongly sup-

pose that the Court's purpose is to put into effect some abstract doctrinal principles.

If we judge our constitutional law regarding religion on the basis of its acceptability to persons of widely differing religious opinions rather than its conceptual coherency, it looks a great deal better. For example, parents who desire a religious education for their children have a constitutional right to select this alternative.⁹³ The state may not provide direct cash subsidies or tuition grants for such schools, but it may, if it chooses, provide free secular textbooks, bus transportation, and a certain measure of tax relief for educational expenses.⁹⁴ Church and church-school property may be exempt from property taxes,⁹⁵ and donations to religious institutions are exempt from income tax,⁹⁶ which makes it relatively painless for well-to-do patrons to provide scholarship money for low-income students. Private schools tend to be less expensive to operate per student than public schools, in part because they do not have to support elaborate administrative structures and in part because they may not need to pay teachers as much.⁹⁷ All these circumstances contribute to reducing the financial burden on parents who choose a religious education. Greater and more direct public subsidies would reduce the financial burden still more, but possibly at the cost of inviting more intrusive regulation of the schools' curriculum and administration.⁹⁸ Persons favoring religious education have as much reason to fear basic change in the present legal compromise as to welcome it.

At the same time, establishment clause doctrine has given substantial support to the values of those who want a secular education and who do not want to be taxed to pay for religious alternatives. The religious intrusions that people seem to find most offensive—teacher-led prayers and Bible readings in the classroom—have been banned,⁹⁹ and

93. See *id.* at 213-14; *supra* note 23 and accompanying text.

94. See *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

95. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

96. See *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983).

97. See M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* 154-60 (1980).

98. It is frequently argued that religious schools must be protected from government subsidies in their own interest because their independence would be threatened by the regulation that tends to accompany the subsidies. After the decision in *Bob Jones University*, it appears that the existence of tax deductions can also be an invitation to government regulation. If tax deductions can be taken away from schools that practice racial discrimination, then why can they not be taken away from schools that practice religious or sexual discrimination as well? Even in the absence of "tax subsidies," states can and do regulate private schools, including religious schools. We should, therefore, be careful not to overestimate the degree to which the independence of religious schools is protected by any constitutional doctrines. Nevertheless, it is likely that regular appropriations bills for direct subsidies would inspire legislators to think about regulating religious schools more frequently than they do now.

99. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

the majority of voters who favor allowing some prayer have been unable to overturn the ban.¹⁰⁰ Some public assistance does go to private schools, many of which are religious, but the fact that the aid is limited and indirect seems to reduce the degree to which it is offensive to persons who would prefer no aid at all. Apparently, it is not so much the dollar amount of the aid that generates resentment as whether the aid is provided in a way that seems to associate the state with a particular religious practice.¹⁰¹

Public endorsement of controversial religious symbols outside the classroom has also been strictly limited. The exceptions are sufficiently limited that they prove the rule. The significant thing about the holding of *Lynch v. Donnelly*¹⁰² from this viewpoint is not that the Court allowed the city to continue including a nativity scene in its Christmas display, but that the vote was so close and the decision justified on such narrow grounds.¹⁰³ Militant secularists do not win all the battles, but they too have reason to view the overall situation with at least partial satisfaction.

The free exercise cases are also easier to understand as exercises in political compromise rather than as a working out of abstract constitutional concepts. Regulations of general applicability that are quite reasonable as applied to most people may require some unusual individuals or groups to violate their most deeply held beliefs. Where an exemption can be given without substantially impairing the state or federal government's interests, the Court can invoke the free exercise

100. There is evidence that approximately 80% of the public favors allowing some form of school prayer. See Smith, Book Review, 72 CALIF. L. REV. 908, 913-14 (1984) (reviewing H. McClosky & A. Brill, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983)). In the 1984 Term, the Supreme Court will consider the constitutionality of legislation providing for silent prayer in public schools.

101.

Because of the symbolic role of elementary and secondary education—because of the special place that such education has in our society—the Court has been particularly careful to avoid government programs that would provide economic aid directly and conspicuously to elementary and secondary parochial schools. . . . [Every] dollar spent on police or fire protection for church-affiliated schools and colleges is a dollar released from their budgets, and hence a dollar they are free to spend on religious activity. But the provision of such secular services is not offensive because no one perceives police or fire protection as part of the educational enterprise. Such aid goes to institutions not as schools but as parts of the general public. Similarly, aid for secular programs in all colleges, including those with church affiliation, is generally perceived as assistance to non-religious activities. But the moment aid is sent to a parochial school as such, it is widely seen as aid to religion. The number of dollars released for religious purposes may be identical; the symbolism, and hence the constitutional result, is not.

L. TRIBE, *supra* note 3, at 843-44.

102. 104 S. Ct. 1355 (1984).

103. "[G]iven the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent such secular symbols as Santa Claus' house, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard." *Id.* at 1370 n.1 (Brennan, J., dissenting).

clause to require the exemption. Avoiding unnecessary confrontations over issues of basic principle is an important part of the art of democratic government.

Cases like *Sherbert v. Verner*¹⁰⁴ and *Wisconsin v. Yoder*¹⁰⁵ tend to trouble the legal mind because they involve a mild form of discrimination on religious grounds, and because they involve subjective judgments about how sincere a particular group is, how important various beliefs or practices are to it, and how adversely the public interest will be affected by a special exemption. In *Yoder*, the Court's opinion left no doubt that the decision turned largely on the respect the Justices had for the Old Order Amish and their long historical struggle to preserve their distinctive way of life. The opinion warned that other groups with different characteristics should not necessarily expect similar treatment.¹⁰⁶ It is not easy to achieve this kind of outcome by a neutral application of legal concepts; rather, what the Court did looks more like an act of prosecutorial discretion or executive clemency. Legal scholars struggle to justify what the Court does on neutral principles; but perhaps it would be more honest simply to acknowledge that the Court occasionally gives a deserving party a break.

Behind the compromising and interest balancing that characterizes the constitutional law of religion lies a major ideological issue. Are the prevailing religious beliefs beneficial on the whole to a pluralistic democratic society, or are they something that we tolerate and endure despite their social costs? Would it be desirable if fewer people held theistic beliefs, or at least held them less passionately? In some quarters, religious belief (at least in the traditional sense) is associated with persecution, obscurantism, and social strife, and the religious groups most prone to these evils are thought to be the ones most likely to seek government support.¹⁰⁷ On the other hand, there are many others who consider Judeo-Christian religious belief to be an important positive force in building the values of a democratic citizenry, and who associate *loss* of religious faith with a permissiveness that tends to undermine private and civic virtue. The social value of religion in general is an extremely complex topic, of course, but people do tend to have attitudes about it. Consciously or unconsciously, those attitudes affect how we apply subjective tests, or how we choose to characterize constitutional questions.¹⁰⁸ The state ought to maintain a "wall of separa-

104. 374 U.S. 398 (1963).

105. 406 U.S. 205 (1972).

106. *Id.* at 235-36.

107. Smith, *supra* note 100, at 915-16.

108. For an illuminating discussion of the personal views of various Supreme Court Justices about religion, and the extent to which those views influenced their attitudes towards the religion clauses, see Smith, *supra* note 2, at 105-23. Smith draws a useful distinction between corporate

tion" between itself and creeds which are prone to encourage intolerance and ignorance. "Benevolent neutrality" is a more appropriate paradigm for dealing with creeds that promote virtues that help to maintain the health of the republic, or are at least harmless.

Of course the category "religion" incorporates creeds with a variety of vices and virtues, and we may well feel differently about the category as a whole, depending upon which examples we have in mind. Some legal issues characteristically involve specific kinds of religion. For example, the Supreme Court first invoked the "wall of separation" metaphor against aid to religious schools in a context where the only schools receiving the aid were Roman Catholic,¹⁰⁹ and at a time when many Americans regarded the Catholic church as a semitotalitarian menace to their liberties. Paul Blanshard's influential book *American Freedom and Catholic Power*,¹¹⁰ characterized the Catholic church as an antidemocratic "state within a state,"¹¹¹ which aimed to impose its own law upon Catholics and non-Catholics alike.¹¹² Blanshard saw the Catholic schools as substantially inferior to the public schools academically, with teaching assigned to undereducated and overdisciplined nuns who were primarily concerned with indoctrinating the children to be obedient to the Church and its priests.¹¹³ Because the Church required Catholic parents to send their children to parochial schools or suffer denial of absolution for their sins, attendance at those schools was not truly a matter of personal or family choice.¹¹⁴ All other American religious groups were satisfied with the public schools and their education, according to Blanshard,¹¹⁵ only the Catholic hierarchy de-

religion and individual religion. Many Justices sympathetic to individual religion were or are intensely suspicious of "corporate religion," particularly the Roman Catholic Church. Not surprisingly, those Justices who tend to regard corporate religion as greedy, totalitarian and intellectually backward have tended to be activist in interpreting the first amendment to forbid government assistance to religion. *Id.* at 105-13.

109. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

110. P. BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949). To illustrate the work's influence, more than 100,000 copies of the book were sold in the first nine months following publication. *Id.* at copyright page.

111. See *id.* at 4.

112. *Id.* at 3-4.

113. "[Teaching nuns] are never allowed to forget that they are primarily religious missionaries whose chief mission is the inculcation of the Catholic faith." *Id.* at 69.

114. *Id.* at 65.

115.

The attitude of most non-Catholic Americans toward public support for Catholic schools might be summed up in this fashion: The Catholic people have been offered the same free, democratic schools that have been offered to everybody else. If they do not wish to join the rest of the American community, that is their affair. Methodists, Baptists, Jews, and nearly everybody else except Catholics belong to the great fraternity of American public education. The Catholic people have not been blackballed; they have been elected to full membership, but their priests have persuaded them to stay away from the meeting. They should not pretend that they are being discriminated against. Method-

manded something different—and “un-American.”¹¹⁶

The point here is not to examine the extent to which Blanshard's polemic was a caricature of the Catholic church in 1949. However fair or unfair, *American Freedom and Catholic Power* stated a view of the Catholic hierarchy that was widespread among Americans at the time of the cases that set establishment clause doctrine on its present course—a time when the possible election of a Catholic president aroused the deepest fears. To the extent that they accepted Blanshard's account as substantially true, judges would understandably be attracted to a constitutional theory that disfavored public subsidies for nonpublic schools. Granted Blanshard's premises, or even somewhat less extreme ones, it was simply a matter of self-preservation for non-Catholics to interpret the Constitution in a manner likely to hamper, rather than encourage, the anticonstitutional plans of the Catholic hierarchy.

Attitudes toward both the Catholic church and its schools have changed a great deal since the 1940's, reflecting such developments as the reforms of the Second Vatican Council and the election of a Catholic President. Today, the Catholic schools are staffed primarily with lay teachers rather than nuns, and a high percentage of the pupils in some cities are non-Catholics whose parents were presumably attracted by the quality of the education rather than by any program of religious indoctrination.¹¹⁷ Some studies have compared the performance of the Catholic schools very favorably to that of the public schools in educating low-income minority pupils in inner-city areas.¹¹⁸ If these studies are reliable, the Catholic schools are performing a service of enormous value to the society as a whole.

Attitudes toward the public schools have also changed. Most non-Catholic Americans may have been satisfied with the public schools in 1949, but clearly they are satisfied no longer. Widely publicized problems of violence, drug use, and low academic achievement have motivated many parents to search for alternatives, whether secular or religious. In many places, enrollment at Protestant Christian schools has increased enormously, and there is serious discussion of “voucher” plans which would permit students to attend private schools at public

ists, Baptists and Jews cannot collect public funds for their schools. Neither can Catholics. We must treat everybody alike.

Id. at 88.

116. Blanshard urged “continuous and scientific inspection of all parochial schools to see that the standard requirements of the state are maintained, that classes are taught in the English language, and that textbooks do not distort history, science and sociology in an un-American manner for the benefit of the hierarchy.” *Id.* at 304-05. He described Catholic schooling as based on “a whole philosophy of education that is alien to the American outlook.” *Id.* at 65.

117. For statistics and references on this point, see Laycock, *supra* note 47, at 1387 n.119.

118. See *id.* at 1387 n.118.

expense.¹¹⁹ These developments are controversial. Many persons are no more enthusiastic about Protestant Fundamentalism than Paul Blanshard was about the Catholic church, and to some degree the enthusiasm for private education may be related to court-ordered racial integration.¹²⁰ The point here is not to decide whether public assistance for private education is ultimately a good or a bad idea, but merely to note that the context in which the constitutional issues arise has changed enormously since the 1940's. To the extent that programs of aid to private education are seen as meeting a widespread desire for alternatives to publicly administered education, permitting religious schools to participate may seem more like avoiding discrimination against religion, rather than creating a religious establishment.¹²¹

CONCLUSION

It is no contradiction to say that the constitutional law of religion reflects both ideological bias, and an attempt at "neutral" compromise among conflicting ideological viewpoints about religion. Fortunately, one widely shared ideological premise in American society is that all-out religious conflict must be avoided, which implies that we should make strenuous efforts to avoid identifying government squarely with any religious position, including antireligion. Government must seem to be evenhanded about religious disputes. What it does may coincide with the wishes of some groups and thwart the plans of others, but this coincidence must seem to be the outcome of neutral principles or fair-minded interest balancing, rather than conscious partisanship on the part of judges. The emphasis upon neutrality is not necessarily deceptive. Most judges want to be fairminded and to arrive at a solution that seems reasonable from as many points of view as possible. To say that they are influenced by ideology is not to say that they are ideologues.

There is never only one possible compromise, and neutrality can be more or less benevolent, depending upon what we think we are being neutral about. We may have to be "neutral" with respect to anach-

119. See J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE* (1978); M. FRIEDMAN & R. FRIEDMAN, *supra* note 97, at 150-75.

120. For illuminating discussions of the racial aspects of the growth in Christian schools, see Rabkin, *Behind the Tax-Exempt Schools Debate*, PUB. INTEREST, Summer 1982, at 21; Skerry, *Christian Schools versus the I.R.S.*, PUB. INTEREST, Fall 1980, at 18.

121. Groups whose real interest is to protect the public schools from competition can be expected to continue to invoke the establishment clause as a useful weapon for protecting their economic interests. In *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981), the California Supreme Court ruled that the state constitution's ban on aid to sectarian schools prohibited a state program providing free textbooks for private schools. *Cf. Wolman v. Walter*, 433 U.S. 229 (1977). Although most of the schools that received the textbooks had some religious affiliation, I am confident that the teachers' union that brought the lawsuit was primarily interested in protecting the jobs of its members from private sector competition.

ronistic superstitions that serve the interests of fanatics and unscrupulous power seekers, but we can seek the definition of neutrality that least facilitates their advancement. We may have to avoid "establishing" groups that promote moral truths and serve the cause of liberty rightly understood, but we do not have to erect unnecessary obstacles for their beneficial activities. Inherited legal doctrine and social convention restrict the choices that a lawyer is likely to consider legitimate; ideological preference governs the exercise of choice among alternatives perceived as legitimate.¹²²

We ought not to be shocked at the frank acknowledgment that our attitudes about religious truth and the social value of prevailing religious practices influence how we choose to interpret the Constitution's mysterious phrases. Ideology organizes reality for use, and we cannot decide what to do about law or anything else without relying on some picture of reality, incomplete and distorted though it may inevitably be. One vital component of our ideology is the extent to which it permits us to consider that radically differing groups may each be glimpsing a part of reality through their own distorting lenses. Ideological bias is not itself inconsistent with fair adjudication; on the contrary, it provides an indispensable starting point for the inquiry into what fairness means in a particular context. What we need to fear is not ideology but ideological blindness, including the blindness that takes the form of imagining that one's own views are derived logically from premises acknowledged by all reasonable persons.

122. When Professor Mansfield refers to a "constitutional philosophy," he may mean the same thing that I call "ideological preference." Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 *passim* (1984). I am uncertain about this because Mansfield does not explain how the constitutional philosophy is generated or whether it is something distinct from the philosophies of particular Justices who participate in writing opinions. Using his language, I would say that each Supreme Court Justice has a philosophical perspective which he or she employs when deciding cases. A constitutional philosophy arises because a number of Justices happen to agree on certain principles over a period of time, and implicitly rely upon those principles in writing opinions. The constitutional philosophy is likely to change as new members are appointed to the Court, or as continuing Justices change their ways of thinking. Perhaps it would be more accurate to speak of a "Supreme Court philosophy," because the constitutional philosophy is not derived in any direct way from the document whose authority it invokes.