The Religion Clauses of the First Amendment and the Philosophy of the Constitution

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I
INTRODUCTION

In a recent case testing the constitutionality under the religion clauses of a state program that reimbursed private schools, including religiously affiliated private schools, for the cost of performing certain testing and reporting functions required by state law, Justice White, in an opinion for the Supreme Court that found the program valid, made these observations:

> This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibilty, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.[1]

"Flexibility" is perhaps not quite the word to describe the Court's decisions under the establishment clause. That there is a need for a "single, more encompassing construction" of the establishment clause, few readers of the Court's opinions in this area would care to deny. Indeed most will agree that there is a need for a more encompassing and clearer view of both of the religion clauses of the first amendment and also of the relation between the religion clauses and other provisions of the Constitution. It seems unlikely however, that such a wider and clearer view will come simply from "continuing interaction be-

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1. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

tween the courts and the States." The multiplication of decisions in this area, in response to legislative efforts to get around the Court's rulings, has yet to produce a "single, more encompassing construction." New legislative efforts produce more decisions, but without any noticeable increase in coherence and consistency and without giving confidence that the results reached are grounded in some vision of fundamental constitutional truths. For increased clarity and consistency and for a convincing structure of ideas to support the results reached, a different sort of effort will have to be made.

The principal fault with the Court's decisions under the religion clauses is their failure to come to grips with the fundamental philosophical questions that these clauses inescapably present. More often than not the necessity of confronting these questions is obscured by the incantation of verbal formulae devoid of explanatory value. As Professor Kurland has said of the Court's opinions in this area, "words, words, words."[2] That legislation must not have as its "purpose" or "primary effect" the aiding or inhibiting of religion and that it must not "excessively entangle" government with religion, we have learned very well, but by repeating these slogans we come no closer to understanding what is really at stake. The Court stultifies itself by repeated use of these phrases.[3] Furthermore, a tendency on the part of the Court and commentators to see cases as either free exercise clause cases or establishment clause cases has impeded true understanding. It is necessary to see the religion clauses as working together to create a single standard that dictates the proper relation between government and religion.

What follows is an effort to take a somewhat different approach to problems under the religion clauses than the Court has usually taken. This approach, it is hoped, will bring more clearly into view the fundamental questions that must be answered in applying these clauses. The terminology that the Court employs will be avoided out of the conviction that it is not particularly helpful. The ultimate purpose of this article is to demonstrate that for the satisfactory resolution of problems under the religion clauses, it is necessary to explore and expound a philosophy of the Constitution regarding human nature, human destiny and other realities, and that this is so even though the Constitution may in some sense "separate" church from state. What the content of that philosophy may be, I shall not attempt at any length to say. So far from the usual analysis of church-state cases is this conviction of the

2. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 15 (1978-79) (quoting Hamlet).

3. It is a virtue of the Court's recent decision in Marsh v. Chambers, 103 S. Ct. 3330 (1983), holding valid under the establishment clause the saying of certain prayers by a paid chaplain in a state legislature, that it avoids the usual language.

necessity to explore and expound such a philosophy, that it seems task enough for now to emphasize the necessity. Although I start with an assertion of the necessity for a substantive constitutional philosophy, I then seek to lead the reader to that conclusion along the same path that I have travelled, through the cases.

II
THE RELATION BETWEEN THE TWO RELIGION CLAUSES AND BETWEEN THE RELIGION CLAUSES AND OTHER CONSTITUTIONAL PROVISIONS

A. The Relation Between the Two Religion Clauses

The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Speaking generally we may say that the establishment clause provides a certain limit to the support that government may give to religion whereas the free exercise clause requires that government give religion a certain measure of support. If either clause stood alone in the amendment, the legal effect would be different from what it is with both clauses present. Both clauses are present, however, and taken together provide the standard that determines what is permissible or required of government so far as concerns religion.

Consider the parochial school aid cases.[4] In judging the validity of legislative efforts to extend financial aid to private schools, including religiously affiliated schools, it is necessary to consider limitations that may be placed upon such programs by the establishment clause. It is likewise necessary to consider the right that religiously affiliated schools may have to participate in such programs on account of the free exercise clause.

The necessity to consider both clauses is also present in cases like *Sherbert v. Verner*,[5] where the question was whether a Seventh Day Adventist who could not get a job because of her unwillingness to work on Saturday was constitutionally entitled to unemployment compensation, and *Wisconsin v. Yoder*,[6] where the question was whether Amish parents could be criminally convicted for refusing to send their children to school past the eighth grade. The relevance of the free exercise clause to these cases is obvious. The establishment clause is relevant because of the limit it may impose upon the assistance that government

4. *E.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

5. 374 U.S. 398 (1963).

6. 406 U.S. 205 (1972).

may give to religion, in the one case through financial assistance and in the other by refraining from criminal prosecution.

The claims of religion to advantageous treatment by government, or to the avoidance of some burden, may be based upon the free exercise clause or upon the establishment clause. The claims of nonreligion, on the other hand, may be based only upon the establishment clause.[7] This is the source of the protection of nonbelief, of the right not to be religious. If nonbelief could claim equal rights with belief under the free exercise clause, any government program that gave special recognition to religion as against nonreligion would be invalid. This would be contrary to the recognition that the free exercise clause gives to the value of religious belief and action in accordance with religious belief. In fact, if nonreligion had equal claim with religion under the free exercise clause, then as a result of the operation of both of the religion clauses, religion would have a constitutional status inferior to nonreligion, because although the establishment clause limits the assistance that government may give to religion, it does not limit the assistance that it may give to nonreligion.[8]

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7. Does religion ever have a superior status to nonreligion under the establishment clause? In some cases where one religion has been preferred over others, the establishment clause has been relied upon to strike down the preference. Thus in Larson v. Valente, 456 U.S. 228 (1982), a state statute required charitable organizations soliciting funds within the state to register with a state agency, but exempted from this requirement religious organizations that raise more than 50% of their funds from members. The Supreme Court held that the 50% rule violated the establishment clause because it preferred one kind of religion over another without sufficient justification. The decision could be read to mean that when one religion is preferred over another and over nonreligion, under the establishment clause the disadvantaged religion has a stronger claim for equal treatment with the preferred religion than does nonreligion. The contrary view would be that the only source of the claim of religion to a status superior to nonreligion is the free exercise clause. In *Larson*, the Court probably would have reached the same result that it did if it had relied exclusively on the free exercise clause.

8. Support for the proposition that nonreligion has no rights under the free exercise clause may be found in Harris v. McRae, 448 U.S. 297, 320 (1980). In that case the Court held that parties invoking the free exercise clause to challenge a prohibition against the use of government funds for abortions did not have standing to do so because "none alleged, much less proved, that she sought an abortion under compulsion of religious belief" (footnotes omitted). On the other hand, in Torcaso v. Watkins, 367 U.S. 488, 496 (1961), a man who did not claim to be religious could not be barred from public office because he refused to take an oath that he believed in God. The Court said that to impose this condition "unconstitutionally invades the appellant's freedom of belief and religion." See also the statement in Everson v. Board. of Educ., 330 U.S. 1, 16 (1947), that "Consequently [because of the free exercise clause?], it [a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (emphasis in original).

Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978), distinguishes "nonreligion" from "irreligion" and says that although nonreligion is not on an equal footing with religion under the religion clauses, irreligion is. The author sees the free exercise clause as protecting "expression of beliefs in relation to religion," *id.* at 815, and she speaks of "irreligious free exercise," *id.* at 818. But is it

As to what is "religion" for purposes of the first amendment, the answer remains in doubt. In *United States v. Seeger*,[9] the Supreme Court, in interpreting statutory language that exempted religious conscientious objectors from military service, held that a religious belief is one

> based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.[10]

One difficulty with this definition is that it tends to turn everything into religion and so destroys the independent significance of the religion clauses. Every action that a person takes or position that he upholds is based upon some premise or other, which in turn is traceable to an "ultimate" belief, and so would seem to be religious from the *Seeger* point of view. An alternative is to consider as religious only those beliefs that affirm the existence of a spiritual reality. If this definition excludes some philosophies, that, it may be said, is exactly what the Constitution intended. A particular importance was attached to, and a particular problem for government seen in connection with, a certain belief about reality, and these matters were addressed in the opening clauses of the first amendment. Yet another approach to the question of what is religion is to stress the way in which belief is formed and the basis upon which it rests. If reason and ordinary experience predominate, the result, it may be said, is not religion for constitutional purposes. Religion requires "faith," and faith moves beyond the paths of ordinary understanding.[11]

In the final analysis, the meaning to be given "religion" in the first

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possible to maintain the distinction between nonreligion and irreligion? Is not a nonreligiously motivated action irreligious in that it contains an implicit rejection of religion?

In regard to the special value to be placed upon religious belief and action in accordance with religious belief, see Gillette v. United States, 401 U.S. 437, 445 (1971), where the Court speaks of the statutory exemption of religious conscientious objectors from military service as stemming from "a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state." *See also* United States v. Seeger, 380 U.S. 163, 169-70 (1965); United States v. MacIntosh, 283 U.S. 605, 633-35 (1931) (Hughes, C.J., dissenting). In Welsh v. United States, 398 U.S. 333, 370-71 (1970) (White, J., dissenting), Justice White expressed the view that the free exercise clause gives religion a preferred position that is not canceled out by the establishment clause.

9. 380 U.S. 163 (1965).

10. *Id.* at 176. The fact that in Welsh v. United States, 398 U.S. 333 (1970), only a plurality opinion reaffirmed the definition of religion adopted in *Seeger*, with Justice Harlan concurring in the judgment on other grounds, may weaken the authority of the *Seeger* definition.

11. For recent discussions of the meaning of religion in the first amendment, see Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Note, *The Sacred and the*

amendment, illuminated though it may be by the reflections of anthropologists and students of religion, and the attitudes and practices of the people, must be derived from the philosophy of the Constitution. Under that philosophy, what is it that should receive special treatment at the hands of government? The answer to this question will not be pursued in this article. Instead we will assume that we know what is meant by religion in the first amendment, and then inquire what sort of special treatment this religion should receive at the hands of government.

B. The Relation Between the Religion Clauses and Other Constitutional Provisions

When we move from considering the relation between the religion clauses to considering the relation of the religion clauses to other provisions of the Constitution, particularly the free speech clause, analysis becomes more difficult. The free speech clause provides general protection for expression and association.[12] However, this protection is not unlimited. "Fighting words" may be punished.[13] Speech in aid of illegal activity may be regulated.[14] Obscenity, defined as the Supreme Court has defined it, is not protected speech at all.[15] Libel receives a degree of protection that depends upon whether the person libeled is a public official, a "public figure," or just a private citizen.[16] Group libel may under certain circumstances be punished.[17] Commercial speech has some constitutional protection, more than was formerly supposed.[18] Does whether speech is religious or not make any difference

Profane: A First Amendment Definition of Religion, 61 TEX. L. REV. 139, 140 n.7 (1982) (listing other discussions).

12. Even though not expressive, conduct may be in defense of "the right of freedom of thought," and so find protection under "the first amendment." *See* Wooley v. Maynard, 430 U.S. 705 (1977) (upholding an injunction against the prosecution of a Jehovah's Witness for covering up the state motto "Live Free or Die" on his license plate). "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715. *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232-37 (1977), holding that when public employees are required as a condition of employment to pay to a union dues or "service charges," it is a violation of the free speech provision to use these payments for political or ideological purposes unrelated to collective bargaining, when the employees object to such use.

13. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

14. Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

15. Miller v. California, 413 U.S. 15 (1973); *see also* New York v. Ferber, 458 U.S. 747 (1982) (distribution of child pornography punishable even though not legally obscene, at least when it has no educational, medical or artistic justification).

16. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times v. Sullivan, 376 U.S. 254 (1964).

17. Beauharnais v. Illinois, 343 U.S. 250 (1952).

18. *See* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983); Bates v. State Bar, 433

in the degree of protection it receives under the free speech clause, looking to that clause alone?

Assume that the free speech clause gives equal rights to all forms of speech that fall within its boundaries, including religious speech. What then is the effect of the religion clauses? One possibility is that religious speech is more protected than nonreligious speech. If there is no additional protection, what is the point of the free exercise clause, it may be asked. Some have suggested that the effect of taking into account the religion clauses is that religious speech is less protected than nonreligious speech. The establishment clause, it is argued, requires this result.[19] Another possibility is that religious speech is protected to the same extent as nonreligious speech, no more and no less.[20]

Some light may be brought to these questions by keeping clear the difference between two distinctions: the distinction between religion and nonreligion and that between the constitutional philosophy and all other ideologies, whether they be religious or nonreligious. When it is suggested that the effect of taking into account both the free speech clause and the religion clauses is that religious speech is less protected than nonreligious speech, what may be meant is that in certain situations all ideological competitors of the constitutional philosophy must give way before the truths of that philosophy. In a recent dissent, Justice White took the position that religious worship has a lower constitutional status than nonreligious speech.[21] He supported this view[22] by reference to *Stone v. Graham*,[23] a decision which held invalid under the establishment clause a statute that required the posting of the Ten Commandments in public school classrooms. The reason that the statute in *Stone* was unconstitutional, however, was probably not because the Ten Commandments are religious rather than nonreligious, but because they express ideas that are not part of the constitutional philosophy.[24] The posting of the Commandments in classrooms constituted an invasion of a sphere of influence reserved for the constitutional philos-

U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

19. This is a possible reading of Justice White's dissent in Widmar v. Vincent, 454 U.S. 263, 285-87 (1981). *See also infra* text accompanying notes 21-25.

20. In his dissenting opinion in Douglas v. City of Jeannette, 319 U.S. 157, 179 (1943), Justice Jackson expressed the view that "[i]t was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement" in the free exercise clause. In dictum in the Court's opinion in Prince v. Massachusetts, 321 U.S. 158, 164 (1944), it is observed: "[I]t may be doubted that any of the great liberties insured by the First Article can be given higher place than the others."

21. Widmar v. Vincent, 454 U.S. 263, 282 (1981) (White, J., dissenting).

22. *Id.* at 284-85 (White, J., dissenting).

23. 449 U.S. 39 (1980).

24. *But see* the discussion of Marsh v. Chambers, 103 S. Ct. 3330 (1983), *infra* in text accompanying notes 205-10.

ophy alone—the public school classroom. The case would have been no stronger for the posting of the precepts of a nonreligious ideology inconsistent with the constitutional philosophy—for example, the teachings of dialectical materialism—than it was for the posting of the Ten Commandments, at least if we suppose an audience likely to be influenced by such teachings. Although religious speech inconsistent with the constitutional philosophy may have no higher constitutional status than nonreligious speech inconsistent with the constitutional philosophy, it certainly does not have a lower status, and an argument can be made that it does indeed have a higher status, because of the free exercise clause.

There is no holding, so far as I know, clearly answering these questions. In cases in which the right to speak has been upheld, obviously the fact that the speech was religious did not defeat the right. On the other hand, it has not necessarily been the holding of any of these cases that the right to speak prevailed because the speech was religious, nor that had the speech been nonreligious it would have prevailed more easily.[25] In cases in which the right to speak has not prevailed, it is clear that the fact that the speech was religious speech did not save it. However, it has not been held in these cases that the character of the speech as religious speech was a reason for the defeat of the claimed right, nor that the claim was defeated notwithstanding a superior right to protection based on its character as religious speech.[26]

In the recent case of *Widmar v. Vincent*,[27] the Court held that when a state university makes its facilities generally available for student activities, it must also make them available to students who wish to engage in religious worship and teaching. The Court held that the free speech clause required this result, even though the establishment

25. *E.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (enjoining prosecution of Jehovah's Witness for covering state motto on license plate); Follett v. Town of McCormick, 321 U.S. 573 (1944) (voiding license tax for selling books imposed on Jehovah's Witnesses); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (voiding expulsion of Jehovah's Witnesses from school because of refusal to salute the flag); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (voiding license tax for selling merchandise as applied to Jehovah's Witnesses selling religious literature).

It might be argued that *Follett* stands for the proposition that religious speech is more protected than nonreligious speech, because the Court contrasts what the defendant was doing—selling religious literature—with "purely commercial activity." *Follett*, 321 U.S. at 576. However, the "purely commercial activity" to which the Court referred may at that time have been supposed to be entirely outside the first amendment, and by mentioning it the Court did not mean to suggest that there was speech within the first amendment that had an inferior status to religious speech. The dissenters thought that the Court meant to place religious speech and nonreligious speech that was within the first amendment on an equal footing. *See id.* at 581-82 (opinion of Roberts, Frankfurter, & Jackson, JJ.).

26. *E.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (Jehovah's Witness convicted for permitting child to sell religious literature on street).

27. 454 U.S. 263 (1981).

clause is taken into account.[28]

Widmar may be compared with *Heffron v. International Society for Krishna Consciousness, Inc.*[29] In *Heffron*, the Court held that the first amendment was not violated when a public corporation that ran a state fair required those who wished to sell or distribute literature or other materials or to solicit donations at the fairgrounds do so only from rented booths and not at other locations, and that this restriction could be applied to a religious group which claimed that its activities were engaged in pursuant to a religious duty.[30] The Court found that the state interest in crowd control was significant and sufficiently outweighed the liberty interest of the respondents. The state supreme court, in overturning the regulation, had taken the view that no significant disturbance would take place as a result of not restricting respondents' activities to rented booths.[31] The Supreme Court, however, said that the state court had proceeded on an incorrect basis in judging the likelihood of disturbance. Since all groups seeking to communicate political, social or ideological messages would have the same rights as religious groups, it was necessary to consider the likely effect of allowing all these groups to engage in the specified activities.[32] Thus the Court seemed to say that religious speech was no more protected than nonreligious speech. However, from the other opinions in the case, it appears that the respondents, in their arguments before the Court, had relied exclusively upon their rights under the free speech clause and had abandoned any claims that they might have had under the free exercise clause.[33] That the Court itself so understood the case is indicated by language in its opinion[34] and by the absence of citations to precedents under the free exercise clause. Thus *Heffron* appears not to

28. "Respondents' claim also implicates rights of speech and association, and it is on the basis of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation." *Id.* at 273 n.13. The implication could be that consideration of the free exercise clause might produce a stronger claim to access to university facilities than nonreligious speech would have.

29. 452 U.S. 640 (1981).

30. *Id.* at 654.

31. *Id.* at 651-52.

32. *Id.* at 652-54.

33. *See* Justice Brennan's concurring and dissenting opinion, *id.* at 659 n.3, and Justice Blackmun's concurring and dissenting opinion, *id.* at 663 n.1. Justice Brennan seems to think that the free exercise clause gives religions speech no greater rights than speech protected only by the free speech clause and that the distinctive function of the free exercise clause is to give special protection to religious action. *See id.* at 659 n.3.

34. "Nor *for present purposes* do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize." *Id.* at 652-53 (emphasis added).

address the relative constitutional status of religious and nonreligious speech.

If conduct is involved and not just speech—as for example, in a person's decision to have an abortion, to use contraceptives, not to perform military service, or not to pay Social Security taxes—inquiry is also required into the relation between the religion clauses and other provisions in the Constitution, especially the due process clause and the ninth amendment. In this regard it may be boldly asserted that the free exercise clause was intended to give greater protection to religiously motivated action than the Constitution provides for nonreligious action. However, the difference must still be kept in mind between distinguishing religion from nonreligion and distinguishing the constitutional philosophy from all other ideologies. To say that religiously motivated action has a status under the Constitution superior to that of nonreligion is not to say that it will necessarily prevail against the truths of the constitutional philosophy itself, whatever the character of those truths may be, religious or nonreligious.

III

THE CONSTITUTIONAL PHILOSOPHY AND ITS DERIVATIVE PRINCIPLE OF FREEDOM

Thus far I have spoken of the relation between the two religion clauses and of the relation between the religion clauses and other constitutional provisions, particularly the free speech clause. I have asserted that the questions presented by these provisions and their interrelationships cannot be answered without inquiry into the philosophy of the Constitution itself. I wish now to enlarge upon this point and to make clear its importance for the proper interpretation of the religion clauses.

The Constitution embodies a particular view of human nature, human destiny and the meaning of life. It is not neutral in regard to these matters.[35] If "separation of church and state" requires a constitution that is neutral on these questions, then the United States does not have a constitutional regime of "separation of church and state." There is a constitutional philosophy addressed to fundamental matters, which is adequate to answer all the questions that may arise in connec-

35. *But see* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871): "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." In his dissent in the recent case of Marsh v. Chambers, 103 S. Ct. 3330, 3343 (1983), Justice Brennan expresses the belief, doomed to disappointment, that "[w]ith regard to matters that are essentially religious, however, the establishment clause seeks that there should be no political battles, and that no American should . . . feel alienated from his government because that government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion" (footnote omitted).

tion with the proper exercise of governmental power. Furthermore, in embracing certain beliefs about reality, the Constitution necessarily rejects conflicting beliefs. If one needs examples to convince those who insist that the Constitution is agnostic on religious questions and does not reject any religious beliefs, it should be enough to mention the belief that there exists a supreme being who commands government to inflict cruel and unusual punishments or the belief that there is a deity who is opposed to the idea that decision by majority vote is ever an appropriate way to resolve social problems.[36] Of course there are questions of a religious nature that do not necessarily need to be answered in order to decide how government should act. Whichever way these questions are answered, it may be that the government's action should be the same. Although it may matter for the criminal law whether there is a deity, it may not be necessary to decide for that purpose whether he has a particular attribute. However, many fundamental questions do have to be answered in order to provide the basis for government.

Although the truths of the constitutional philosophy are inconsistent with many propositions about human nature, human destiny and ultimate reality, in certain respects no doubt they do have a general character and may be consistent with a number of different views that are themselves inconsistent with each other. The Constitution may permit the majority of the day to promote one or another of these conflicting views. This does not mean, however, that the constitutional philosophy does not have definite content or that it does not repudiate entirely many beliefs.

If the constitutional philosophy is a religious ideology, then ideologies consistent with it will be religious. From a constitutional point of view they will have a double character: as ideologies that the majority may promote, because consistent with the constitutional ideology; if in dissent and not favored by the majority of the day, as ideologies entitled to the status of religious ideologies under the religion clauses of the first amendment.

From the truths of the constitutional philosophy regarding human nature, human destiny and the meaning of existence is derived a principle that determines the permissible or required effect of government action on the positions of the constitutional philosophy and religious and nonreligious ideologies inconsistent with it. On the one hand, this

36. The Unification Church, headed by the Reverend Sun Myung Moon, subscribes to the view that "the republican form of government with separate or coequal powers held by the legislative, judicial and executive branches of government is a Satanic principle." Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n, 55 N.Y.2d 512, 525, 435 N.E.2d 662, 667, 450 N.Y.S.2d 292, 297 (1982).

philosophy requires that its own truths be maintained to a certain extent; on the other hand, a measure of freedom is required for other ideologies to shape the world in accordance with their beliefs. This principle of freedom is not something that conflicts with or cuts across the constitutional philosophy. Instead, when the constitutional philosophy is seen in its entirety, this principle is part and parcel of it: Man is of such a nature and his situation is such that his proper end cannot be achieved without this freedom. To use the power of government to extend the rule of the constitutional philosophy, or of some of its truths, to all of life, were that possible, would defeat the constitutional philosophy itself.

In dealing, then, with cases arising under the religion clauses, one important matter to consider is the effect of challenged government action on the positions of the constitutional philosophy and its religious and nonreligious ideological competitors. On the one hand, the government action under inquiry may impermissibly limit the opportunity of other ideologies to affect the world. On the other hand, it may reduce the influence of the truths of the constitutional philosophy itself below the level that that philosophy will tolerate. As indicated earlier, the freedom guaranteed for religious and nonreligious ideologies is not necessarily the same. Greater freedom may be required for religious than for nonreligious ideologies inconsistent with the constitutional philosophy.

In the following sections I mean to examine certain groups of cases that have arisen under the religion clauses from the perspective that has just been suggested. I will avoid characterizing these cases as free exercise clause cases or establishment clause cases because, as already noted, ordinarily the two clauses should be read as creating a single standard. I will also avoid the language the Court usually employs in its opinions because it is not particularly helpful. My principal purpose is to show that in dealing with cases under the religion clauses, it is inescapably necessary to explore and expound the substantive truths of the constitutional philosophy. Unless this is done, it is impossible to achieve an integrated and convincing jurisprudence in this area.

IV
Disputes Over Church Property

The cases first to be discussed are those involving disputes over church property. These cases are frequently regarded as standing apart from the more familiar religion clause cases, such as those involving aid to parochial schools, religious activities in the public schools, or conscientious objection to military service. For this reason it is particularly challenging to see whether the property cases can be brought

within a general theory of the religion clauses and reconciled with the more familiar cases. My suggestion will be that an acceptable solution to the church property cases can be found only by bringing these cases within a general theory of the religion clauses.

Typically in the property cases, two groups contend for the control of property dedicated to some religious use, each group claiming to be the true object of the donor's intent. For example, it may be disputed which of two groups is the true "Walnut Street Presbyterian Church" within the meaning of a trust created to support a church so named.[37] The contention that one group is, and the other is not, the true church may be based upon the fact that the first group accepts the decisions of a higher ecclesiastical authority or claimed higher ecclesiastical authority in regard to a particular matter, whereas the second group does not. In another example, dispute may focus upon the significance for a trust to support "the Russian Orthodox Church in North America" of a change in the relationship between the Patriarch in Moscow and the Government of the Soviet Union.[38] An increase in control by the Government, it is contended, has destroyed the character of a certain person in Moscow as Patriarch, with the consequence that his appointee as Archbishop in New York should be declared not entitled to control church property there and the property awarded to those loyal to the true notion of the Russian Orthodox Church, one in which the Patriarch is free from excessive political control.

There appear to be three possible ways to deal with these cases. The first is to interpret and apply the trust as one would any charitable trust, and decide, for instance, which of the factions is the true Walnut Street Presbyterian Church, just as one would decide who are the true Odd Fellows in a dispute within that organization, or whether control by the Soviet Government has destroyed the character of a person as Patriarch, taking into account all the circumstances relevant to the intention of those who created the trust. The second way to deal with these cases is to refuse to enforce trusts that present questions of this sort, questions that involve problems of religious meaning, and declare such trusts void. The property, in consequence, will be in the donors or their successors. The third way is to refuse to interpret trust terms having a religious meaning, but instead of declaring the trust void and the property in the donor or his successor, to determine the right to control and enjoy the property by reference to some state policy.[39]

37. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

38. Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

39. A fourth suggested solution is mentioned *infra* in note 68.

Watson v. Jones,[40] *Kedroff v. St. Nicholas Cathedral*[41] and *Serbian Eastern Orthodox Diocese v. Milivojevich*[42] are all cases that can be read as adopting the first approach. In *Watson*, a case applying the general common law[43] rather than the first amendment, but mentioning the right to religious freedom, the Court held for those in the local church who were loyal to the General Assembly of the Presbyterian Church and against those who refused to submit to the Assembly's decrees. The Supreme Court reprimanded the state court for having inquired into whether the General Assembly had exceeded its jurisdiction because, in the Court's view, such inquiry deprived the General Assembly of its right to determine church law.[44] The result in *Watson* can be seen as following simply from a determination that the trust required deference to the decisions of the General Assembly even on the matter of the General Assembly's own jurisdiction.

Likewise, in *Kedroff*, a case that did arise under the first amendment, the Supreme Court's decision to overrule the New York legislature and courts and hold that the right to control the property was in the Patriarch's appointee, can be seen as a determination that those who created the trust intended that political domination of the Patriarch, even by a Communist government, would not destroy his right to make ecclesiastical appointments.

The recent *Milivojevich* case involved the question whether the Bishop of the American-Canadian Diocese had been properly removed from office and deprived of his episcopal rank by the Holy Synod and Holy Assembly in Belgrade, Yugoslavia, with the consequence that he was no longer entitled to control certain properties in Illinois.[45] The Supreme Court's reversal of a decision by the Supreme Court of Illinois[46] that inquired into the legality under church law of actions taken by the authorities in Belgrade could be seen as resting on the ground that such inquiry was precluded by the trusts. Under the trusts, so it might have been found, the authorities in Belgrade had full power to determine church law, including the procedural requirements for the deposition and defrocking of a bishop.

In all three of these cases, if they are seen as cases involving the interpretation of the trusts, the holding is that there is only one correct

40. 80 U.S. (13 Wall.) 679 (1871).

41. 344 U.S. 94 (1952).

42. 426 U.S. 696 (1976).

43. *Watson* was decided prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), under the general common law then applicable to diversity actions in federal courts.

44. *Watson*, 80 U.S. (13 Wall.) at 732-34.

45. The case also involved the right of the authorities in Belgrade to divide the American-Canadian diocese into three dioceses.

46. 60 Ill. 2d 477, 328 N.E.2d 268 (1975).

interpretation of the trust, the interpretation reached by the Supreme Court.[47] The danger of manipulating the interpretation of religious trusts for political or other reasons might have been thought to be so great that the Supreme Court must say what is the one, correct interpretation.

The second way of dealing with these cases—refusing to enforce trusts that contain religious provisions and holding such trusts void—appeared to be a possible consequence of the Supreme Court's decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.[48] In that case two local churches had withdrawn from the general church, and the dispute was whether the general church or the local churches had the right to control the property of the local churches. In its opinion, the Supreme Court announced the principle that the first amendment forbids civil courts to answer religious questions contained in trusts relating to church property.[49] Thus the interpretive approach described above appeared to be constitutionally blocked. The Court suggested that the prohibition which it announced could already be found in *Watson* and *Kedroff*.[50] If interpretation was blocked, then possibly all trusts containing religious questions were void and the property belonged to the donor or his successors. But to hold void religious trusts containing billions of dollars worth of property would be a drastic step indeed, and this fact itself perhaps gave assurance that the Supreme Court did not mean to take such a step. That certiorari was denied[51] when on remand of the *Hull* case the state court found a way to give the property to the local churches, using means other than those originally employed, and did not declare the trusts void,[52] tends to support this view.

The reason for the rule laid down in the *Hull* case, that a court may not answer a religious question in enforcing a trust of church property, is not far to seek. When a court sets about to interpret a provision relating to church doctrine or church polity, such as "so long as they believe in the Trinity," or "so long as they remain part of the Presbyterian Church," or "so long as he is Patriarch," there is more than a small possibility that interpretation will be influenced by ideas

47. Although it is not entirely clear, it appears that the holding in *Kedroff* is that New York was required to give recognition to the Patriarch's appointee's right to control the property, not just that it was required not to support the rival American group's claim. This would seem to be the meaning of the Court's decision that the complaint brought by the American group against the Patriarch's appointee was required to be dismissed.

48. 393 U.S. 440 (1969).

49. *Id.* at 449.

50. *Id.* at 445-49.

51. 396 U.S. 1041 (1970).

52. Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969).

and values other than those held by the donor. This is true even though objective information about the donor and his beliefs may set limits on interpretation. The ideas and values that may influence interpretation could concern a particular religion and what it is or ought to be, religion in general, or the philosophy of the Constitution itself. Through decisions regarding property, courts may consciously or unconsciously place their power and influence behind a particular religious ideal, or perhaps a nonreligious ideal. "If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[53] The *Hull* prohibition was designed to eliminate any opportunity for such influence.[54]

The decision in *Milivojevich* came after the *Hull* decision. As noted above, *Milivojevich* could be read as involving an interpretation of the trust on the basis of all the circumstances relevant to the donors' intent. The Illinois court committed error, the Supreme Court's opinion could be read to say, because the trust gave to the authorities in Belgrade the right finally to determine church law. A more careful reading of the *Milivojevich* case makes it clear, however, that the Court had no intention of repudiating its recently announced *Hull* prohibition against answering religious questions. To the contrary, the *Milivojevich* decision reaffirms the *Hull* rule, in spite of Justice Rehnquist's shrewd observations in dissent about the difficulties to which enforcement of that rule leads.[55] The authorities in Belgrade

53. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

54. With the necessity of determining what the settlor of a trust meant by "Presbyterian" or "Roman Catholic" and whether particular persons or institutions conform to the intended meaning, compare the necessity of determining under adoption laws whether prospective adoptive parents are of the same religion as the natural parents or conform to the "religious wishes" of the natural parents. Dickens v. Ernesto, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346, *appeal dismissed for want of substantial federal question*, 407 U.S. 917 (1972).

If a question posed by a trust is not a religious question, the *Hull* prohibition does not apply. In a recent case involving a marriage contract rather than a trust, the court held that a requirement in the contract (the "Ketubah") that the husband appear before and submit to the jurisdiction of the Beth Din, a Jewish tribunal, did not involve a religious question and could be enforced. Avitzur v. Avitzur, 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 104 S. Ct. 76 (1983). Likewise, in a suit by Roman Catholic nuns against their bishop and parochial school officials alleging that nonrenewal of the nuns' teaching appointments would constitute a breach of contract, it was held permissible for a court to interpret the provisions of the contract so long as this did not involve "doctrinal" judgments. Whether nonrenewal of the teaching appointments was "dismissal" within the terms of the contracts, entitling the plaintiffs to certain procedures guaranteed by the contracts, did not involve a doctrinal question, according to the court, but the sufficiency of reasons given for nonrenewal might involve doctrinal questions or "secular" questions. Reardon v. Lemoyne, 122 N.H. 1042, 454 A.2d 428 (1982).

55. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 734-35 (1976) (Rehnquist, J., dissenting).

win control over the property not as a result of an interpretation of the trust based on all the relevant circumstances, but for some other reason not made clear in the *Milivojevich* case itself, but to be made reasonably clear in the case to follow.

Jones v. Wolf,[56] decided three years after *Milivojevich*, approves what I have listed above as the third way of dealing with disputes over church property: a government policy determines who shall control and enjoy the property.[57]

Jones v. Wolf involved the property of a local Presbyterian Church in Macon, Georgia. There was a dispute within the local church concerning certain policies of the General Assembly, and a majority of the congregation, together with the pastor, voted to withdraw from the general church. A minority of the congregation remained loyal to the general church and was found by a commission appointed by the presbytery of the general church to be "the true congregation of the Vineville Presbyterian Church." The Supreme Court of Georgia held against the general church and the minority loyal to it and in favor of the majority of the congregation.[58] The United States Supreme Court vacated the decision and remanded the case.[59]

It is difficult to state with confidence the holding of the United States Supreme Court in the *Wolf* case. The opinion is not entirely clear on a number of important points. Nevertheless, an arguable reading of the Court's decision is this: If pertinent documents—the constitution of the general church, the charter of the local church, deeds to the property in dispute and so forth—contain language expressly referring to the question of property and with regard to the property speak of a trust in favor of the general church, a state must recognize the right of the general church to control the property. This right of the general church is founded not on the intention of the donors, but on a governmental, indeed a constitutional, policy. If the intention of the donors were consulted—which would require reference to all the evidence pertinent to that intention, not just to particular language in the documents, which evidence might present a religious question—it might be found that the local church should control. If, on the other hand, the pertinent documents do not contain express trust language in favor of the general church, then a state has two options: it may adopt a rule that gives the property to the general church or it may adopt a rule that

56. 443 U.S. 595 (1979).

57. Maryland & Va. Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam), can be read as approving this course, or the case can be seen as one involving full interpretation.

58. 241 Ga. 208, 243 S.E.2d 860 (1978).

59. Jones v. Wolf, 443 U.S. 595 (1979).

gives the property to the local church. In either case, in accord with the *Hull* prohibition, the disposition of the property follows not from an interpretation of the donors' intent expressed in religious language in the documents, but from a rule of law embodying a governmental policy. That policy will favor either large religious organizations or small, local entities.

What has just been set down is a statement of the first part of the Court's opinion in the *Wolf* case.[60] The first part of the opinion is based upon an assumption that the local congregation was unanimous in its opposition to the general church. In fact that was not the case in *Wolf*, for there was a division in the local church, a minority adhering to the general church. Thus the question was presented which part of the local church was entitled to control the property. The Georgia court had held for the majority of the local church without explaining how it reached this result. The Supreme Court remanded the case with instructions as to the constitutional principles that were to govern decision about this matter.

Included in the instructions that the Supreme Court gave the Georgia court on remand is the direction that Georgia could, if it chose, adopt a "presumption" of majority rule. The Supreme Court seemed to suggest that the presumption must be capable of being rebutted or overcome.[61] However, when the Court's opinion is scrutinized for the purpose of determining what manner of rebuttal may or must be allowed, it becomes clear that rebuttal in the usual sense is not contemplated. Those contending that the local church has a form of government other than majority rule may not come forward with all relevant evidence tending to establish this fact, for such evidence might well present a religious question, which under the *Hull* decision a civil court may not answer. Instead they will be able to rebut or overcome the presumption only if they are able to make a showing that satisfies some rule that the state chooses to adopt. Here again we confront the fact that control over the property will be determined not in accordance with the donors' intent, but on the basis of some governmental policy embodied in a "presumption" and a rule regarding how it may be overcome. When the Court speaks of overcoming the presumption of majority rule, it may have in mind rewriting church documents before controversy arises to make clear that the church has a form of government other than majority rule.[62]

60. *Id.* at 595-606 (the portions of the Court's opinion numbered I-III).

61. *Id.* at 607-08.

62. The Court refers to the presumption being "defeasible upon a showing that the identity of the local church is to be determined by some other means" than majority rule and that any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general

At the end of the second part of its opinion, the Court observes that if under Georgia law it is necessary to look to church law, including the law of the general church, to determine which group in the local church is entitled to control the property, then the state must recognize the right of the general church to control the property.[63] This seems at first surprising, since earlier in the Court's opinion we were told that if the pertinent documents do not contain express trust language in favor of the general church—and the absence of such language is assumed in the second part of the Court's opinion—the state is not required to give control of the property to the general church.[64] The answer appears to be, and it is an answer that reconciles the first and second parts of the Court's opinion, that when there is not in the pertinent documents express trust language in favor of the general church, the state may adopt a rule that gives the property to the general church or it may adopt a rule that gives the property to the local church, the rule in either case not answering religious questions and not seeking to implement the donor's intent. If, however, the state does not have such a rule, but the only state law to be found calls for an inquiry into church law, including the answering of religious questions, then the Constitution requires that the general church prevail. This, it could be said, was the situation in *Kedroff* and *Milivojevich*, and the reason why the Court held in those cases that the general church had to win. If New York in *Kedroff* or Illinois in *Milivojevich* had chosen to do so, it could have adopted a rule that gave the property to the dissident American group, rather than to the foreign ecclesiastical authorities. Instead, each of those states insisted upon trying to give the property to the American group through an interpretation of the trust rather than by a rule based on state policy, ignorant no doubt of the state's constitutional options. Thus *Kedroff* and *Milivojevich* are not overruled.

As I indicated earlier, the adoption of the *Hull* rule could have had the momentous consequence of voiding all trusts that present religious questions.[65] Most trusts for the support of religion present such questions. Instead, however, the Court has taken a course with consequences almost as momentous. Although it is perhaps constitutional for a state to declare void trusts that present religious questions, it is not required to do so. Instead the state may appropriate the trust property to some object that accords with a state policy respecting religion. This

church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it.

Id.

63. *Id.* at 609.

64. *Id.* at 599-606.

65. *See supra* text accompanying notes 48-52.

may be done through so-called "neutral principles of law." The state may prefer small organizations and local people or it may prefer large organizations and distant authorities. By a "presumption," it may prefer majority rule. May it prefer other forms of religious organization? The one thing that it must not do is seek on the basis of all the evidence to determine the purpose for which the trust was created when that process would involve answering a religious question. As long as this is avoided, a state may direct that the property be used in accordance with its own policies.

The Court seeks to divert attention from this startling result by pointing out that churches may avoid the consequences of its decision by redrafting church constitutions, charters and other documents before disputes arise so as to eliminate reference to religious matters and make clear in nonreligious terms who is to control the property.[66] Courts may then, without constitutional difficulty, interpret and apply the reconstructed trusts just as they would other charitable trusts. The essence of this suggestion is that state diversion of trust property in accordance with state policy may be avoided by private diversion in accordance with private policy. Although the redrafting of documents to eliminate religious questions may be authorized by some trusts, it surely is not authorized by many.[67]

As for trusts created after the *Hull* and *Wolf* decisions and with an eye to their requirements, the situation will be different. To the extent that such trusts avoid the use of language that presents religious questions, there will not be diversion of property from one religion to another. The trusts will be interpreted and enforced on the basis of all the evidence relevant to the donor's intent. However, as a consequence of being required to avoid religious terms, donors will be limited in the means available to achieve their religious purposes. Suppose, for example, a person is interested in supporting the Roman Catholic Church in the Chicago area. He must be careful in making his gift not to use the words "Roman Catholic." These are words of religious signification and would clearly be intended by him as such. A dispute may well arise as to which of two groups is the Roman Catholics in Chicago. The donor must not give his property to "the Roman Catholic Archbishop of Chicago, a corporation sole." That there is such a corporate entity can be known without addressing religious questions, but deter-

66. Jones v. Wolf, 443 U.S. 595, 606 (1979).

67. The Court states that its decision in *Wolf* "does not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights," because the Georgia Supreme Court announced its intention to follow a neutral-principles approach in its decision on remand in the *Hull* case and in another case decided after *Hull*. *Wolf*, 443 U.S. at 606 n.4. However, the local church in the *Wolf* case was organized in 1904 and the property in dispute was almost certainly acquired before the Georgia court's decision on remand in the *Hull* case.

mination of the identity of the person who embodies that entity and is entitled to control its assets does involve a religious question and is potentially the subject of dispute. *Kedroff* and *Milivojevich* show that disputes about matters of this sort are not imaginary. Nor will it do any good to give money to "the person determined by the Pope to be the Roman Catholic Archbishop of Chicago," for who is the Pope is itself a religious question under the *Hull* rule. There was a time when three persons claimed to be the Pope.

The pious donor, anxious to support the religion in which he believes and not one selected by the state or by private persons authorized by the state, must develop nonreligious criteria that will serve his religious ends. This may be rather difficult. In the case of a donor interested in supporting Roman Catholicism in Chicago, for instance, he might direct that the property shall be controlled by that person who is certified to be the Roman Catholic Archbishop of Chicago by whoever has political sovereignty over Vatican City. The fate of the trust will then depend upon who has power over that territory. What of the donor who wishes to give his property to support a particular religious doctrine, such as Trinitarianism? Although *Watson* would have permitted the enforcement of a trust for such a purpose, *Hull* clearly would not.[68] Is there some nonreligious test that can be devised to make sure that those who enjoy the property believe what the donor had in mind by Trinitarianism? Perhaps control of the property could be made to depend upon periodic recitation of or subscription to a particular text.[69]

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68. In Watson v. Jones, the Court said:

> A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity . . . has a right to expect that the law will preveut that property from being used as a means of support and dissemination of the Unitarian doctrine . . . .

80 U.S. (13 Wall.) 679, 723 (1873). In his concurring opinion in *Hull*, Justice Harlan said that he read the Court's opinion in *Hull* not to prohibit courts from

> enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted. If, for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder . . . or never amend certain specified articles of the Confession of Faith, he is entitled to his money back if the condition is not fulfilled. . . . *Cf.* Watson v. Jones . . . .

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan, J., concurring) (citations omitted). Assuming that Justice Harlan meant to include cases such as "so long as they believe in the doctrine of the Trinity," if it was not clear from the Court's opinion in *Hull* that he was wrong, it was made clear in the Court's subsequent decisions. On the other hand, the examples that Justice Harlan gives—that the church never ordain a woman as a minister or elder or never amend certain specified articles of the Confession of Faith—could be found not to involve religious questions. It all depends on the frame of reference that the donor intended.

69. *See* Sampeu, *Civil Courts, Church Property and Neutral Principles: A Dissenting View*, 1975 U. ILL. L.F. 543, 577.

Reflection on the consequences of the Court's decisions in this area from *Hull* to *Wolf* must give one pause. In order to avoid such diversion of trust funds as might result from the process of interpretation, the Court has authorized a much more drastic diversion to objects approved by the state or by private persons authorized by the state. This is not what is done with "secular" charitable trusts: even though those trusts contain provisions that require interpretation, and interpretation may be influenced by extrinsic considerations, the courts do interpret and apply these provisions as best they can, on the basis of all the circumstances relevant to the donor's intent.

In regard to trusts created after *Hull* and *Wolf* and with an eye to their requirements, it should be asked whether the difficulties imposed upon religiously minded donors are justified under the religion clauses. As was pointed out earlier, an important question under these clauses is whether the effect of government action on the positions of the constitutional philosophy and its religious and nonreligious ideological competitors accords with the truths of the constitutional philosophy. The constitutional philosophy, as we have seen, embraces the view that religious ideologies, even though inconsistent with the constitutional philosophy, must have a certain opportunity to shape the world in accordance with their visions. The prohibition announced in *Hull* imposes a restriction on religion that does not apply to other charities. Although this restriction may from a certain point of view benefit religion, in that it prevents interpretation that could introduce values that were not those of the donor, it also imposes upon religion the disabilities that I have described. Of course the mere fact of different treatment of religion does not necessarily mean that the religion clauses have been violated. If there is a difference in treatment, however, one should inquire whether that difference and the disadvantages that it may entail accord with the basic constitutional standard. In Justice Powell's illuminating dissent in the *Wolf* case, he takes the view that the path of full interpretation, even though questions of religious meaning may need to be addressed, is the approach most consonant with the free exercise clause.[70]

70. Jones v. Wolf, 443 U.S. 595, 610-21 (1979) (Powell, J., dissenting). Justice Powell was joined by the Chief Justice and by Justices Stewart and White.

Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378 (1981), a most valuable article, seems to reach the same conclusion as the dissenters in *Wolf*. The author reviews various alternatives and decides that the least objectionable is what he calls "the contract principle." This approach permits the courts to determine the intention of the parties in cases involving religious trusts and contracts. The author does take the position, however, that in some cases involving great uncertainty as to the intention of the parties, the courts should refuse to act. But, he says, they would not act under these circumstances in cases involving nonreligious trusts either, so that no special rule for religion is being proposed. It is not clear that he is right about this. Some of the examples that he gives of situations in which courts

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FRAUDS, ATTEMPTS AND THE TRUTH OF RELIGIOUS BELIEFS

The problems presented by cases involving fraud, whether criminal prosecutions or civil actions for deceit, are somewhat different from those involved in trust cases. In the first place, in a fraud case there may be less reason to avoid determining what meaning someone intended to be attached to a religious term. Suppose, for example, a defendant is alleged to have said that the food served in a restaurant was "kosher." The person to whom he spoke ate in the restaurant and then discovered that the food was not kosher. Assume that "kosher" has only two possible meanings: that the food was prepared in a particular way or that it bore the seal of a rabbinical association.[71] The question is which of these meanings the defendant intended should be attached to the word. There may also be presented, at least in a civil action, a question as to what was understood by the person to whom the defendant spoke. In answering these questions, the tribunal is as likely to be influenced by its own beliefs as it would be in interpreting the word "kosher" in a trust. Furthermore, its determination can lead to an award of damages or, in a case of criminal fraud, to punishment. Persons in the defendant's position holding to the other meaning of "kosher" than that found by the tribunal will have to be careful, if they are

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should refuse to enforce religious trusts because of excessive uncertainty probably would not pose an insurmountable difficulty in the case of nonreligious charitable trusts. The author suggests, for instance, that in *Kedroff*, the significance of the Patriarch's relations with the Soviet Government might have involved such a degree of uncertainty that the courts should have refused to act. *Id.* at 1420. It may be, therefore, that what the author is proposing really is a special rule for religious cases, a rule that would permit courts to answer more questions than would the *Hull* rule, but not all the questions that could be answered under the rules generally applicable to charitable trusts. "At some point, a court will have so few clues as to the parties' probable intentions that any decision would necessarily [effect] the court's own preferences more than the parties', and in church disputes especially, that is a result to avoid, since it contains the seeds of uncoustitutional intrusion." *Id.* at 1420 n.127.

Professor Ellman does not mention the possibility of declaring trusts presenting religious questions void and the property in the donor or his successors. Instead he suggests the alternative of a court's refusing to act and leaving the parties in the position in which it found them. *Id.* at 1411, 1417, 1420-21. This is the course that he recommends when there is a high degree of uncertainty concerning the parties' intentions. Although this solution may be workable in some situations, for instance in an action on a contract for damages, it would not be satisfactory in most of the cases that we have considered, for it leaves no one with the legal right to deal with the property. In *Kedroff*, for instance, no one would be recognized by government as having the legal right to use or sell the cathedral.

For other discussions of the church property cases, see Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347.

71. The facts are suggested by Cohen v. Eisenberg, 173 Misc. 1089, 19 N.Y.S.2d 678, *aff'd*, 260 A.D. 1014, 24 N.Y.S.2d 1004 (1940), although that was an action for slander.

to avoid liability, to explain the meaning that they attach to the term. Persons in the victim's position holding to the other meaning of "kosher" than that found by the tribunal will have to make inquiry, in order to protect themselves, to determine whether the word is being used in the sense in which they understand it. These consequences, however, may not involve a significant degree of government support for one meaning of "kosher" as against the other. No one is likely to change his religious beliefs or practices as a result. In trust cases, by contrast, a judicial finding that a term has a particular meaning will determine which of the parties will control the property and have it for the promotion of their religious beliefs, and in order to obtain the property, people may well conform their actions and beliefs to what they think will be the judicial determination.[72]

In addition to the question of whether a court may determine the

72. In Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925), a New York statute provided: Any person who "with intent to defraud" sells food "falsely represent[ing] the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements" is punishable. *Id.* at 498. Appellants attacked the statute on the ground that it was "so indefinite and uncertain as to cause . . . [it] to be unconstitutional for want of any ascertainable standard of guilt," and therefore in violation of the fourteenth amendment. *Id.* at 501. The Court rejected this argument on the ground that all that was required by the statute was a good faith belief in the truth of the representations made and that "kosher" "has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." *Id.* at 502. No argument was made under the religion clauses and the Court did not refer to them.

The statute in *Hygrade* could be interpreted to require the tribunal to ascertain what the defendant and those to whom he spoke meant by "kosher." The statute, so interpreted, shares with a general fraud statute the risk of the possible influence of the tribunal's own ideas about religion on its findings. However, the statute punishes the false use of a particular religious term and not others, and there might be a question whether this special treatment is permissible under the religion clauses. If there also exists a general fraud statute, it might be found that the kosher statute is redundant, and that all frauds are in fact treated in the same way. On the other hand, the intention of the legislature that enacted the kosher statute might have been to attach legal consequences to its own idea of "kosher," not to that of private persons—defendants and those with whom they deal. Although it might be reasonably clear what the legislature meant by "kosher"—perhaps it intended to refer to some fairly definite body of religious teachings—the essence of the situation would be that the law attaches legal cousequences to a governmental meaning of "kosher"—that found by the courts to be intended by the legislature—and not to other meanings. Under the first suggested construction of the kosher statute and under a general fraud statute, by contrast, whatever the private persons involved meant by "kosher," it is false speaking in respect to that *private* meaning to which the law attaches consequences.

For the current New York statutes relating to kosher food, see N.Y. AGRIC. & MKTS. LAW §§ 26-a, 201 (McKinney 1972 & Supp. 1983). *See also* N.Y. GEN. BUS. LAW § 349-a (McKinney Supp. 1983), relating to the sale of mezuzahs (pieces of parchment inscribed with certain passages from the Bible, which are designed to be affixed to doorposts in accordance with a scriptural command) and tefillin (small square leather boxes containing parchment slips inscribed with scriptural passages and traditionally worn on the left arm and forehead by Jewish men during morning weekday prayers) that do not comply with "orthodox Hebrew ritual requirements."

See also Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28 (Fla. Dist. Ct. App. 1972), which involved a statute similar to that in the *Hygrade* case. In upholding a conviction under the statute, the court rejected, without any reasoned explanation, claims under the religion clauses.

meaning of what a person said, religious fraud cases present the possibly more troublesome problem: whether a court may determine the truth of what was said. In the kosher food example given above, two meanings of "kosher" were supposed—that the food was prepared in a particular way and that it bore the seal of a rabbinical association. To determine whether either of these conditions existed does not involve answering a religious question. Both the preparation of the food in a particular way and the presence of rabbinical seals are facts of this world. But suppose that a third meaning of "kosher" was intended by the parties—that the food was in a certain condition of spiritual purity. What is a court to do when called on to determine the truth or falsity of a statement that this condition existed? The problem would be the same had the defendant said that someone was "baptized" or "saved," meaning not just that a certain ritual had been performed, but that a state of grace or justification existed.

One approach to questions of this sort would be to attempt to answer the question on the basis of some religious premises. Perhaps an effort could be made to ascertain what premises the parties would have found acceptable and the procedure and methods of proof that would have been satisfactory to them. With this approach, however, there is a danger that the tribunal's own values and beliefs will enter into its determination of the truth, a danger greater, it would seem, than when the question is simply what was intended or understood. Furthermore, if the court finds that a certain spiritual condition did or did not exist, there will be a more powerful appearance of government putting its authority behind particular religious truths than when a finding relates only to the question of intention or meaning. In the one case there is a finding relating to a fact that under the constitutional philosophy can exist—what a person intended or understood; in the other case there is a finding relating to a fact that under the constitutional philosophy cannot exist.

A second approach that could be taken to the question whether a person is "saved" in the sense of being justified or whether food is "kosher" in the sense of being spiritually pure would be to answer the question from the point of view of the constitutional philosophy. From that point of view the answer could be that the person is not "saved" or the food is not "kosher" because no such condition is possible.

The third approach is to refuse entirely to determine the truth of what was asserted.

United States v. Ballard[73] is the Supreme Court's famous effort to confront these problems. *Ballard* was a prosecution for mail fraud.

73. 322 U.S. 78 (1944).

The elements of the crime were use of the mails to make false statements, knowledge of their falsity and the intention to mislead. It may also have been an element of the crime that those to whom the statements were made were in fact misled. The defendants had used the mails to obtain money by making statements about certain spiritual beings and defendants' contacts with them, as well as by statements about more mundane matters.[74] The trial court put to the jury the issue of the defendants' sincerity, but it refused to submit the question of the truth of the statements. On this basis, a verdict of guilty was returned against the defendants. On appeal, the court of appeals reversed, holding that it was error not to have submitted to the jury the question of the truth of the defendants' statements. The Supreme Court in turn reversed the court of appeals, holding that the first amendment prohibited deciding whether defendants' statements were true or false. It remanded the case to the court of appeals without deciding, or so the Court's opinion could be read to say, whether the defendants could constitutionally be punished for insincerity alone.[75]

The *Ballard* case stands for the proposition that in a fraud prosecution the truth of a defendant's religious representations may not be judged from any point of view. They may not be judged from the point of view of the constitutional philosophy. Judged from that point of view they would be found false. From that point of view the spiritual beings with whom the Ballards said they had contact do not exist. The outcome in respect to one element of the offense would be foreordained. The result would be that those who make religious representations would be in a worse position than those who make other sorts of representations. They would not necessarily be convicted, since insincerity would also have to be found, but they would be at a significant disadvantage. The effect of such a disadvantage is difficult to assess. One consequence might be that people would be less likely to seek money on the basis of religious representations and there would be fewer opportunities to obtain what some might see as benefits by giving

74. One of the deficiencies of the opinion in United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982), a recent prosecution of a religious leader for mail fraud, is the failure of the court to distinguish between these different sorts of representations. For a discussion of the importance of the distinction, see Heins, *"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153, 191-95 (1981).

75. On remand the court of appeals affirmed the defendants' convictions. United States v. Ballard, 152 F.2d 941 (9th Cir. 1945). Once again the Supreme Court reversed the court of appeals and ordered the indictment dismissed because of failure to include women on the grand and petit juries. Ballard v. United States, 329 U.S. 187 (1946). The opinions in the Supreme Court on this second review disagree as to whether on the first review the Court decided that the defendants could be convicted for insincerity alone. The Supreme Court's second decision, in any case, does not decide whether the defendants could be convicted for insincerity alone.

money to those who make such representations.[76] The power of religious ideologies to shape the world in accordance with their beliefs would thus be reduced. In *Ballard*, the Court reached the conclusion that this effect of government action on the position of religious ideologies was not permissible.

If the truth or falsity of religious representations were judged from some religious perspective, then, as noted above, there would be a considerable likelihood that the tribunal's decision would be influenced by its own beliefs. The finding of the tribunal as to the truth or falsity of the representations would constitute open and powerful support for a particular religion. In *Ballard*, the Supreme Court determined that such support for a particular religious belief would violate the religion clauses.

This leaves us with the question whether a defendant may be convicted for insincerity alone. As already noted, on its first review of the *Ballard* case the Supreme Court does not seem to have decided this question. If the defendant may be convicted for insincerity alone, his situation will be worse than that of a person who makes representations about facts that under the constitutional philosophy can exist. Such a person may be convicted only if it is established both that he was insincere and that his representations were false. This difference in treatment at the hands of government might adversely affect the position of religion. Although people might be readier to part with money knowing that a person making a representation could be punished for insincerity alone, fewer such representations might be made for the same reason. The constitutional question cannot be answered simply by saying that it is not unfair to punish a person who has obtained money by representations that he believed to be false. The question is whether a difference in treatment of those who make representations within the constitutional philosophy and those who make representations inconsistent with it, to the disadvantage of the latter, accords with the constitutional standard regarding the permissible effect of government action on the positions of the constitutional philosophy and other ideologies. If equal treatment is required, both classes of defendants should be punished for insincerity alone. If the truth of religious representations inconsistent with the constitutional philosophy may not be determined, nor those who make them punished for insincerity alone, these persons may not be punished at all. This was the result favored by Justice Jackson in his dissent in the first *Ballard* case. He particularly emphasized that the sincerity of a person cannot be determined fairly without considering the truth or falsity of the statement he made. If you believe

76. *Cf.* Ellman, *supra* note 70, at 1405.

a statement to be true, he argued, you are more likely to believe that the person who made the statement was sincere.[77] Again we confront the problem of different treatment. If one who makes a religious representation may not be punished at all, even though he is insincere, he has an advantage over those who make representations within the constitutional philosophy. Is this advantage constitutionally permissible?

In not every case, of course, does the Constitution forbid government from acting on the basis of a determination that religious statements or beliefs are false. *Mayock v. Martin*[78] provides an example. There it was held not to offend a person's rights under the religion clauses to detain him in a mental institution on the ground that he entertained false beliefs. Mayock declared himself to be a prophet. He had already taken out one of his eyes and removed one of his hands, the eye in thanksgiving for a revelation, the hand as a covenant with God, and there was a likelihood that he would do himself further harm. The diagnoses of the psychiatrists rested expressly on a finding that Mayock's beliefs were false.

One difference between *Ballard* and *Mayock* lies in the nature of the consequences that flow from belief. In *Ballard* money was at stake, in *Mayock* physical well-being and life. When it comes to physical well-being and life, at least when they may be intentionally destroyed, the constitutional philosophy does not require that leeway be given its ideological competitors.[79] The infliction of the same physical consequences might not be interfered with if it flowed from beliefs judged not to be false, as, for instance, if Mayock had authorized removal of his hand or eye because he believed them to be diseased. The infliction of a less serious physical consequence, for instance fasting for a time, might not be interfered with even though it flowed from the beliefs that Mayock in fact held. Even in this less dangerous situation, however, a question might arise whether Mayock had sufficient mental capacity to decide to subject himself to this consequence, and judgment on this question might be affected by views about the truth or falsity of his beliefs.[80]

Similar to *Mayock* are recent cases involving the "deprogramming" of members of religious "cults." A young person becomes a member of a religious organization allegedly as a result of methods

77. *See* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting). This is the view taken in Heins, *supra* note 74, at 182-89.

78. 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969), discussed in Whelan, *Governmental Attempts to Define Church and Religion*, 446 ANNALS 32, 38-39 (1979).

79. *See* Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942) (upholding convictions for handling snakes during religious ceremony).

80. *But see* Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277, 1300 (1983).

characterized by critics as "coercive persuasion." The parents then, with the aid of professional "deprogrammers," take control of the young person and subject him to experiences designed to counteract the influence of the religious organization and restore him to his former views.[81] Some courts have permitted this action by parents and deprogrammers.[82] Such approval would seem to imply a finding that the teachings of the religious organization are false, at least insofar as they justify "coercive persuasion." Apparently it is the seriousness of the consequences to the young people—a certain way of thinking and feeling, a certain approach to life—that is taken to justify placing the power of the state against the religious organization's beliefs. One court, however, citing *Ballard* and its prohibition against determining the truth or falsity of religious beliefs, refused to authorize deprogramming. The evidence did not show that the young people were in such a condition as to warrant intervention.[83]

Other cases can be cited in which, notwithstanding what is said in *Ballard*, the truth or falsity of religious beliefs is expressly or implicitly determined.[84] In the recent case of *Bob Jones University v. United States*,[85] the Court held that it did not violate the free exercise clause to deny tax exemption to educational institutions that discriminate on grounds of race, even though the discrimination is motivated by religious belief. Evidently beliefs favoring racial discrimination are so in conflict with the truths of the constitutional philosophy, and the consequences of their implementation in educational institutions so serious from the perspective of that philosophy, that it is permissible to penalize the holding of such beliefs by the denial of tax exemption. Such denial necessarily rests upon a judgment that the religion that preaches racial discrimination in education is false in this respect.

The famous hypothetical used in discussions of the criminal law of attempts concerning the voodoo practitioner who shoves pins into an image of his enemy in order to kill him[86] may be the reverse of the

81. For a listing of the cases and secondary authorities discussing them, see *id.*

82. *E.g.*, Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981) (upholding judgment of nonliability of parent and deprogrammers for false imprisonment).

83. Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (prohibition and mandamus against lower court for establishing conservatorship and authorizing deprogramming). In Chatwin v. United States, 326 U.S. 455 (1946), a conviction under the federal kidnapping statute was reversed because the requirement of involuntariness found in the statute was not satisfied by evidence that the victim, a 15-year-old girl with a mental age of seven, had been induced to accompany petitioner and cohabit with him by statements about Mormon fundamentalist teachings regarding "celestial marriage."

84. Some of these cases will be mentioned later in connection with a discussion of cases usually associated with the free exercise clause. *See infra* text accompanying notes 177-98.

85. 103 S. Ct. 2017 (1983).

86. For discussions of this hypothetical, see G. FLETCHER, RETHINKING CRIMINAL LAW 166, 175-77 (1978); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 592-93 (2d ed. 1960); W.

cases we have been considering. In these prior cases the falsity of a person's beliefs is the reason, or part of the reason, why he may be confined, controlled or penalized. In the voodoo case, the falsity of the defendant's beliefs is claimed as a reason why he should be left alone. Essentially, the voodoo practitioner's argument is that although he may have had a culpable intention—to kill by means he believed to be effective—in fact he poses no danger to anyone. He invokes the perspective of the constitutional philosophy to establish the harmlessness of his conduct, although he himself did not believe it to be harmless. Furthermore, he claims that since his belief is religious, he has a constitutional right to freedom from punishment whatever may be done with defendants in other "impossible attempt" cases, for instance the person who puts aspirin into his enemy's coffee believing that this will kill him.

An empirical question, from the point of view of the constitutional philosophy, would seem to be presented. If it is the case that one who has stuck pins into an image of his enemy intending to kill him is no more likely to cause death than one who has not, then the defendant's argument may be sound. His murderous inclinations obtain expression only through means that from the perspective of the constitutional philosophy are ineffective. On the other hand, there may be some basis for believing that one who sticks pins into an image of his enemy intending to kill him, when he finds that this does not work, will turn to conventional means. If there is such a danger, it may warrant punishing the voodoo practitioner for an attempt.[87] Must the dangerousness be greater in the case of the voodoo practitioner than in the case of the person who puts aspirin in his enemy's coffee? The importance of preventing death is no less, but in the case of the voodoo practitioner

LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 445-46 (1972); G. WILLIAMS, CRIMINAL LAW; THE GENERAL PART 652 (2d ed. 1961).

87. G. FLETCHER, *supra* note 86, at 166, says that the consensus of Western legal systems is that there should be no liability in the case of attempted murder by "superstitious means." *See also* Attorney Gen. v. Sillem, 2 H. & C. 431, 525-26, 159 Eng. Rep. 178, 221 (Ex. 1863) (dictum) (attempt to kill by witchcraft not punishable); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 366-67 (3d ed. 1975). The possibility that the voodoo practitioner might be punishable because he may next resort to conventional methods is touched upon in G. FLETCHER, *supra* note 86, at 177 ("We have so little experience with black magic in modern industrial society that it is difficult to know whether this supposition [that the voodoo practitioner is harmless] is correct."), and Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33 (1968) ("When a man makes a harmless attempt to commit a crime, he may well try again, perhaps more effectively. The voodoo witch doctor may use a gun next time."). The Model Penal Code eliminates the defense of impossibility even in the case of the voodoo practitioner, but gives the court power "to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, . . . dismiss the prosecution," if the defendant's conduct was "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section." MODEL PENAL CODE §§ 5.01(1), 5.05(2) (Proposed Official Draft 1962); *see also* MODEL PENAL CODE § 5.05(2), comment at 179-80 (Tent. Draft No. 10, 1960).

the prediction of dangerousness is founded upon an act grounded in religious belief.

Even if liability cannot be based upon a determination that the defendant's act was dangerous or that the defendant is a dangerous person, it might be based upon a determination that his conduct caused or could cause apprehension in others. Believers in voodoo might think that the defendant's activities have caused or could cause death. The purpose of punishment would be to protect such persons from fear and its physical and emotional effects and reduce the likelihood of self-help and disorder. Punishment of the defendant would constitute support of a sort for voodoo beliefs, but it would not be founded upon any acceptance of the truth of those beliefs.[88]

VI

WALZ, WIDMAR AND THE SCHOOL AID CASES

I turn now to two cases that are particularly helpful in making clear what I have already suggested to be a central consideration in cases arising under the religion clauses: the effect of government action on the positions of the constitutional philosophy and other ideologies, religious and nonreligious. These decisions are *Walz v. Tax Commission*[89] and *Widmar v. Vincent*.[90] The *Widmar* case has already been briefly mentioned.[91]

In *Walz*, the Supreme Court sustained against a challenge under the establishment clause the validity of a New York law that granted tax exemption to property used for religious purposes. The Court made it clear that the validity of this exemption did not depend upon the fact that most of the churches that would enjoy the exemption were engaged in social welfare activities.[92] Even though church property might be used exclusively for religious worship, exemption was permissible. It would seem that exemption would be permissible even though all the activity conducted on the church property had no value under the constitutional philosophy, because honoring deities not recognized

88. The idea of protecting believers from apprehension through punishment for an attempt is suggested by G. WILLIAMS, *supra* note 86, at 652:

> The rule [that there should not be liability for attempt if the insufficiency of the means established such ineptitude as to show the defendant to be harmless] perhaps gives a common-sense result for the superstitious type of case provided that it occurs in England at the present day. An attempt to kill by conjuration or sympathetic magic in a backward territory might well be held criminal, for when such beliefs are common the magic may work through the mechanism of the victim's mind.

89. 397 U.S. 664 (1970).

90. 454 U.S. 263 (1981).

91. *See supra* notes 27-28 and accompanying text.

92. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

by it.[93] Under the New York law, property used for religious purposes was exempt from taxes along with property used for "the moral or mental improvement of men and women, or for . . . charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes."[94]

The *Widmar* case is similar to *Walz*. As will be recalled, in *Widmar* the Court held that if a state university makes its facilities available generally for student activities, it may not exclude student organizations that wish to conduct religious worship or teaching. Here again the activity that the state would support by allowing use of its facilities might be wholly devoid of value under the constitutional philosophy. Whereas in *Walz* the benefit to religion took the form of exemption from taxes, in *Widmar* it came from the use of state-owned facilities.

It is clear that an important consideration in both *Walz* and *Widmar* was the breadth of the program under which the benefits were made available.[95] In *Walz*, property used for religious purposes was exempted along with property used for a variety of other activities. In *Widmar*, a wide range of student organizations were allowed to use the university's facilities. If the breadth of either program had been different, the result might have been different. In *Walz*, had the list of exempt activities been shorter, it might have been impermissible to exempt religion, and had the list been longer, it might have been required. In fact, exemption of religion might have been constitutionally required even with the list as it stood. However, since New York had chosen to exempt religion, the only question presented was whether

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> Far from representing an effort to reinforce any perceived "common community conscience," the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. . . . [Exemptions] illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time *are* "at odds" with the position of our Government.

Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2038 & n.3 (1983) (Powell, J., concurring) (emphasis in original) (criticizing the majority's suggestion that tax exemption is granted because nonprofit organizations provide a "public benefit").

94. *Walz*, 397 U.S. at 667 n.1.

95. In Walz v. Tax Comm'n, *see* the Court's opinion, 397 U.S. 664, 671-73, 676 (1970); *id.* at 687-89 (Brennan, J., concurring); *id.* at 696-97 (Harlan, J., concurring). In Widmar v. Vincent, *see* 454 U.S. 263, 274-75 (1981). The Court in *Walz* also gave other reasons for the result it reached: the difference between a tax exemption and a grant, the fact that property used for religious purposes has always been exempt from taxes in this country and the fact that exemption "entangles" government less with religion than would taxation. 397 U.S. at 674-76. For another case in which the Court places heavy emphasis on the fact that a practice has long been engaged in, see the recent decision in Marsh v. Chambers, 103 S. Ct. 3330 (1983), sustaining the validity of prayers by a state-paid chaplain in the legislature.

exemption was permissible. In *Widmar*, since the university had not permitted religious use of its facilities, the question presented was whether religion could be excluded. If the university had limited use of its facilities to a narrower range of activities, it might have been permitted or even required to exclude religion.[96]

In the *Widmar* case, the Court rested its decision upon the free speech clause. The Court also held that the result it reached did not conflict with the establishment clause: allowing religious worship and instruction in university buildings would not under the circumstances give to religion a benefit to which it was not entitled under that clause. The Court did not consider the possible effect of the free exercise clause. As I observed before,[97] *Widmar* tells us nothing about the relative constitutional status of religious and nonreligious speech. All that it tells us is that if government makes benefits as widely available as it did in that case, to activities having value under the constitutional philosophy and possibly to nonreligious activities having no value under that philosophy as well, it must also make them available to religious speech.[98]

The Court's most recent school aid decision, *Mueller v. Allen*,[99] like *Walz* and *Widmar*, emphasizes the importance of the breadth of the program of government assistance.[100] The analytical framework that the Court adopts in *Mueller* is consistent with that employed in *Walz* and *Widmar*, and indeed *Walz* and *Widmar* are cited and relied upon.[101] In *Mueller*, the Court sustained against attack under the establishment clause a state program of aid to education that took the form of a tax deduction allowed to parents of school children for tui-

96. The Court in *Widmar* distinguished Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), which invalidated a program allowing private groups to offer religious instruction for public school students on public school premises. In *McCollum*, the *Widmar* Court said, the statutes permitted the school facilities to be used for instruction by religious groups but not by others. *Widmar*, 454 U.S. at 271-72 n.10. The Court also made an interesting suggestion regarding Tilton v. Richardson, 403 U.S. 672 (1971). In *Tilton*, government funding of certain facilities on college campuses, including the campuses of religiously affiliated colleges, was held permissible on condition that the facilities never be put to sectarian use. It was not sufficient that they not be put to such use for 20 years, as the statute had provided. The Court in *Widmar* suggested that the result in *Tilton* might have been different and the bar to sectarian use unnecessary if the colleges turned the facilities into "forums equally open to religious and other discussions." *Widmar*, 454 U.S. at 272-73 n.12.

97. *See supra* note 28.

98. In *Walz* the Court did not say whether it read the New York law to include nonreligious activities among those exempted from taxation. Justice Harlan concurred on the understanding that the law did include activities of groups that were "antitheological, atheistic, or agnostic," 397 U.S. at 697 (Harlan, J., concurring), but Justice Douglas thought that it did not, *id.* at 708 (Douglas, J., dissenting).

99. 103 S. Ct. 3062 (1983).

100. *Id.* at 3068-69.

101. *Id.*

tion, textbook and transportation expenses, limited to $500 and $700 per pupil depending upon the grade of the pupil. The deduction was allowed regardless of the school attended, public or private, religiously affiliated or otherwise, so long as attendance at the school satisfied the state's compulsory attendance laws and the school was not operated for profit. The Court emphasized this feature of the program and said that it distinguished the program from others of aid to education that were limited to private schools or to students attending private schools.[102] The Court also noted that the deduction for educational expenses was only one among many deductions allowed under the state tax laws. Although the Court mentioned other considerations, for instance that the benefit of the tax deduction went directly to parents and children and only indirectly to schools, clearly an important reason for sustaining the program was the breadth of the class entitled to benefit under it.[103]

Mueller does not necessarily overrule any of the Court's earlier school aid decisions. These decisions invalidated most programs that provided aid to private education and included aid to education in religiously affiliated schools.[104] Nevertheless, *Mueller* poses a severe challenge to the earlier decisions. In truth it can be said that this challenge was present in *Walz* and in *Widmar* and that *Mueller* merely brought it into the context of aid to education. The fact that the statutes in the earlier cases provided assistance only to private schools or to students attending private schools, whereas the statute in *Mueller* gives a tax deduction to the parents of students attending all schools, hardly stands as a convincing distinction. Even though the programs reviewed in the earlier cases were restricted to private schools, massive aid was in fact going to public education under other statutes.

In the school aid cases prior to *Mueller*, for the most part govern-

102. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

103. Justice Marshall, who wrote the dissenting opinion in *Mueller*, gave some recognition in his opinion in Wolman v. Walter, 433 U.S. 229 (1977), to the relevance of the breadth of a program of assistance to its constitutional validity:

> That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance. General welfare programs, in contrast to programs of educational assistance, do not provide "[s]ubstantial aid to the educational function" of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek*.

Id. at 259-60 (Marshall, J., concurring and dissenting) (footnotes omitted) (citing Meek v. Pittenger, 421 U.S. 349 (1975)). In a footnote Justice Marshall observes: "To some extent, of course, any program that improves the general well-being of a student may assist his education. The distinction is between programs that help the school educate a student and welfare programs that may have the effect of making a student more receptive to being educated." *Id.* at 259 n.5.

104. *See* especially the line of cases from Lemon v. Kurtzman, 403 U.S. 602 (1971), to Wolman v. Walter, 433 U.S. 229 (1977).

ment was forbidden to provide assistance to educational activities carried on in religiously affiliated schools even though these activities had value under the constitutional philosophy. Under most of the programs of aid that the Court considered, it was certain that the amount of the aid would not exceed the cost to the schools of educational activities carried on by them having value under the constitutional philosophy. Nevertheless, aid to religiously affiliated private schools has generally been forbidden.

A refinement of analysis is necessary here in regard to whether activities do or do not have value under the constitutional philosophy. Some activities clearly have no value under that philosophy, except of course in the sense that they represent an exercise of freedom defended by it. I have suggested that this may be the case with some of the religious worship and teaching supported by tax exemption in *Walz* or by the use of university facilities in *Widmar*. As to activities that do have value under the constitutional philosophy, they may also have value under other ideologies, including religious ideologies. In fact, it is difficult to think of an activity with value under the constitutional philosophy that is incapable of having value from the point of view of some religion. One has only to recall the "cargo cult" that developed on certain South Pacific islands during World War II, in which islanders worshipped American aircraft and their contents that had fallen from the sky. Everything depends on the point of view from which things are seen. Bible study has literary, esthetic, historical and moral values that certainly have a place within the constitutional philosophy, and yet at the same time, for certain persons, Bible study also has value from the point of view of religious faith. Although in some cases the perspective of faith may be so complete as to obliterate all "secular" significance, often "secular" objectives may be achieved along with the strengthening of faith. Christians who visit an exhibition of medieval art are ordinarily influenced both in respect to the values of the constitutional philosophy and in respect to their Christian faith.[105]

A full description of the effect of a government program on the positions of the constitutional philosophy and other ideologies would have to include consideration of whether those who participate in the program will realize a religious as well as a "secular" value. The legal significance of whether they do or do not realize a religious value will depend upon the constitutional standard determining the permissible effect of government action on the positions of the constitutional philosophy and other ideologies. It is certain, however, that government programs under which a religious value is realized by the participants

105. The example of displaying religious art in governmentally supported museums is mentioned in Lynch v. Donnelly, 104 S. Ct. 1355, 1361, 1364 (1984), the recent Christmas crèche case.

will not always be condemned. For example, it is certainly not constitutionally permissible to exclude believers from an exhibition of medieval art held in a city museum. Likewise it is improbable that Jewish or Christian students may be excluded from a Bible study course in a public school because one of the effects of the course may be to strengthen their religious faith. Part of the explanation lies in the understanding that the exhibition and the Bible course are accessible to persons of all persuasions, and that medieval art is not the only kind of art that the city exhibits, nor the Bible the only book studied in public schools.

Notwithstanding the broad prohibition contained in the school aid cases preceding *Mueller* against aid to religiously affiliated primary and secondary schools or to the students attending them, an exception has been recognized when the activity to be aided not only has value under the constitutional philosophy but also is "separated" and "marked off" in some way from activities that do not, and this separation can be maintained without a great deal of state supervision.[106] In *Wolman v. Walter*,[107] for instance, the Court held it permissible for the state to supply to private school pupils, including those attending religiously affiliated schools, diagnostic speech, hearing and psychological services. The services were provided on private school premises, but by public employees. But "a mere statistical judgment will not suffice as a guarantee that the state funds will not be used to finance religious education."[108] For this reason, in *Committee for Public Education and Religious Liberty v. Nyquist*,[109] the Court struck down grants to private schools for the maintenance and repair of school facilities, even though the amount of the grants was less than the cost to the schools of the "secular" component of their educational programs; and also for this reason the Court struck down tuition reimbursement and tax benefits to parents of private school pupils, even though the benefits provided cov-

106. Making the existence of excessive state supervision, or "excessive administrative entanglement" as it is sometimes referred to, a reason for finding unconstitutionality under the religion clauses has been criticized. *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-83 (1980). Nevertheless the Court has continued to insist on its relevance. *See* NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979). In the *Mueller* case, the Court does not abandon the prohibition against "excessive administrative entanglement," but finds it not violated under the circumstances of that case. The effect of enforcing a prohibition against "excessive administrative entanglement" may be either to give to religion an advantage to which it might not otherwise be entitled, Walz v. Tax Comm'n, 397 U.S. 664 (1970); *see also* NLRB v. Catholic Bishop, 440 U.S. 490 (1979); or to deprive it of an advantage to which it might otherwise be entitled, *see* Lemon v. Kurtzman, 403 U.S. 602 (1971). The "administrative entanglement" referred to seems principally to consist in government officials determining whether an activity is religious or not, although it may include other sorts of questions as well.

107. 433 U.S. 229, 241-44 (1977).

108. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778 (1973); *see also id.* at 779, 783, 787-88.

109. 413 U.S. 756 (1973).

ered only a small portion of the tuition bills that the parents had to pay, an amount that clearly would not exceed the cost to the parents of the "secular" component of their children's education. The grants and benefits were invalid because there was not the required "separation."

The Court's notion in these cases that "separation" within the educational program of the religious school may permit limited public assistance may find its source in *Everson v. Board of Education*.[110] In that case the Court upheld a New Jersey statute under which parents of school children were reimbursed for the cost of bus transportation to and from schools, including religiously affiliated schools. The bus rides were thought of by the Court as "separate" and "indisputably marked off from the religious function" of the schools.[111] Paradoxically, the "separate" and "indisputably marked off" bus rides had no value except insofar as they took children to and enabled them to engage in educational programs in which religious and "secular" elements were mixed together, not separated.[112] The children did not take the buses just for the pleasure and experience of the ride.

The rationale for allowing government assistance when an activity is "separate" and "marked off" cannot be that in this situation there is assurance that the state will not pay more than the cost of an activity with value under the constitutional philosophy. As already pointed out, there has been such assurance in all the aid to education programs that the Court has considered. If the government pays a small percentage of the salary of a chemistry teacher in a parochial high school,[113] it surely does not pay more than the cost of activity by the teacher that has value under the constitutional philosophy. There must be some other explanation, therefore, for the "separation" requirement. Perhaps it is thought that the proximity of government supported "secular" education to religious education, in time or space, suggests approval of the religious education, and that it is just this additional support, from the appearance of approval, over and above the support that religion receives as a result of government money for "secular" education freeing private money for religious education, that produces a violation of the Constitution. Thus, there must be such separation as will avoid the appearance of approval. If a chemistry teacher makes statements about religious doctrine in his chemistry classes, the statements will constitute separate sentences or separate groups of sentences. But clearly this is not enough. Nor is it probably enough

110. 330 U.S. 1 (1947).

111. *Id.* at 18.

112. Justice Rutledge in effect points this out in his dissenting opinion. *Id.* at 29 n.3 (Rutledge, J., dissenting).

113. *See* Earley v. DiCenso, 403 U.S. 602 (1971).

that the teacher makes his doctrinal statements in the last ten minutes of the class hour. To meet the "separation" requirement, the religious statements would probably have to be made in another classroom or in another building or at a significantly different time. But none of this may be enough. In *Earley v. DiCenso*,[114] a case involving a Rhode Island program to supplement the salaries of private school teachers of certain "secular" subjects, the Court said that any teacher receiving government funds would have to avoid religious teaching entirely.[115]

The oddity of the separation requirement can be seen in *Tilton v. Richardson*, a case already mentioned.[116] Under the program involved in that case, the federal government paid half the cost of constructing certain buildings on college campuses, including the campuses of religiously affiliated colleges. The colleges were prohibited from using the buildings for sectarian instruction or religious worship for a period of twenty years. After twenty years they were free to use the buildings in any way they liked. The Court struck down the twenty-year limitation and held that although federal money could be used to construct the buildings, it was required that they be free from sectarian instruction and religious worship forever.[117] Even though Caesar had paid only half of the cost, that to which he had contributed was required to be dedicated to him entirely and forever. It is probable that this aspect of the *Tilton* decision has been undermined by *Roemer v. Board of Public Works*.[118] There the Court sustained a program of grants to private colleges in the amount of fifteen percent of the state's per-pupil appropriation for state colleges with the simple limitation that the money not be used for sectarian purposes.

It is significant that in *Mueller v. Allen* the "separation" requirement was not enforced. Tuition payments up to a certain amount could be deducted by parents of school children even though the payments were not tied in any way to "secular" educational activities that were "separated" and "marked off" from religious activities in the school. A statistical guarantee that the economic benefit that parents received from the tax deduction did not exceed the cost of educational activities having value under the constitutional philosophy evidently was enough in this context, where aid was to parents of all school children.

There is a line of argument in the school aid cases that precede

114. 403 U.S. 602 (1971).

115. *Id.* at 618-19.

116. 403 U.S. 672 (1971); *see supra* note 96.

117. 403 U.S. at 682-84; *see also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779 n.36, 783-84 n.39 (1973).

118. 426 U.S. 736 (1976).

Mueller which to some has seemed hard to justify: because under the state programs that the Court has reviewed such a large percentage of the benefit would in fact go to religiously affiliated schools, these programs are invalid. Because such a large percentage of the benefit would go to religiously affiliated schools, the "primary effect" of the programs, the Court has said, is to aid religion.[119] The relevance of this consideration has been vigorously disputed. In *Nyquist* Chief Justice Burger observed:

> With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. For purposes of constitutional adjudication of that issue, it should make no difference whether 5%, 20%, or 80% of the beneficiaries of an educational program of general application elect to utilize their benefits for religious purposes.[120]

And in *Meek v. Pittenger*, Justice Rehnquist noted that even if the percentage of aid that goes to religiously affiliated schools is relevant, account should be taken not just of the aid received by private schools, but also of the aid that goes to the public schools, even though under different statutes. "If the number of sectarian schools were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion."[121]

The dissenters' point of view triumphed in the *Mueller* case. There, Justice Rehnquist, now writing for the Court, refused to consider as constitutionally significant that most of the benefit of the tax deduction would go to parents of children attending religiously affiliated schools. Most private schools are religiously affiliated, and parents of public school children ordinarily do not have any educational expenses to deduct. With a program of such breadth as that in *Mueller*, it does not matter, the Court said, what the actual pattern of benefits received may be.

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little impor-

119. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 362-66 (1975); *see also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973).

120. *Nyquist*, 413 U.S. at 804-05 (Burger, C.J., concurring and dissenting); *see also Meek*, 421 U.S. at 389 (Rehnquist, J., concurring and dissenting).

121. *Meek*, 421 U.S. at 389 (Rehnquist, J., concurring and dissenting).

tance in determining the constitutionality of the statute permitting such relief.[122]

It may seem difficult at first glance to justify taking into account the percentage of the benefit that goes to religion under a particular program. Does it not suggest a grant of religious liberty that is merely conditional and that will be withdrawn if the exercise of that liberty becomes too successful? However, an argument can be made that may justify taking this factor into account. We have seen that in certain matters the constitutional philosophy will brook no competition. Government power must be used exclusively to support the values of that philosophy. In *Watson v. Jones*[123] the Court said that if the General Assembly of the Presbyterian Church undertook to try one of its members for murder and to punish him by death or imprisonment, its sentence would be of no validity. In *Mayock v. Martin*,[124] civil commitment was upheld because of the risk of serious physical harm or death. No opportunity need be given to put into effect religious beliefs that would justify the infliction of such consequences. The deprogramming cases suggest that social and psychological harm to young persons may justify intervening to prevent the occurrence of such harm even though this implies a judgment that certain religious beliefs are false.[125] Perhaps *Reynolds v. United States*[126] should be cited at this point, and numerous instances from the criminal law could be added.[127] On the other hand, there are situations in which it is probably not required that the truths of the constitutional philosophy prevail at all, so long as the avenues of ideological competition are kept open. Take, for example, the case of a public park. Surely the constitutionality of allowing religious speakers to use the park does not depend upon the percentage of religious speakers using it or the size of the audiences they attract. Even if all of the speakers and all of the listeners are believers, the maintenance of the park by government would not violate the Constitution, at least so long as the facts do not cast doubt upon the motive of the city officials in maintaining the park.[128] The entire population of the city might be converted to a particular religion and employ certain public facilities for the expression of their beliefs without the Constitution being violated.

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122. Mueller v. Allen, 103 S. Ct. 3062, 3070 (1983).

123. 80 U.S. (13 Wall.) 679, 733 (1871).

124. 157 Conn. 56, 245 A.2d 574 (1968), *cert. denied*, 393 U.S. 1111 (1969); *see supra* text accompanying notes 78-80.

125. *See supra* text accompanying notes 81-83.

126. 98 U.S. 145 (1878) (upholding criminal conviction for polygamy against free exercise challenge).

127. *See also* the reference to the *Bob Jones* case, *supra* text accompanying note 68.

128. On the significance of legislative motive, *see infra* text accompanying notes 133-76.

There may be situations, however, that fall in between the categories just described. These are situations in which only a certain portion of the benefit may go to religion. Only if this limitation is observed will the standard regarding the permissible effect of government action on the positions of the constitutional philosophy and its ideological competitors be satisfied. For a certain part of the benefit under the government program, the constitutional philosophy will struggle for adherents along with other ideologies, but beyond this point it must prevail. When this point is reached may be related to the benefit involved and the value placed upon it under the constitutional philosophy. Most of the programs of aid to education considered prior to *Mueller*, the Court seemed to think, fell into this middle category: a certain percentage of the benefit had to support the constitutional philosophy. Whether this judgment is correct cannot be determined without resort to the truths of the constitutional philosophy.

Might some of the programs that we have mentioned which relate to matters other than education also fall into the middle category, permitting limited competition with the constitutional philosophy? Under *Walz*, for instance, would tax exemption of churches be jeopardized if more than a certain percentage of the economic benefit of the program was found to be going to religion? The percentage of the benefit going to religion might rise as the result of a large social movement toward religion and away from "secular" charities. In its opinion in *Widmar*, the Court suggests that in the context presented by that case, the de facto situation may be constitutionally relevant: "At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.' "[129] Does this remark call into question the correctness of our conclusion regarding public parks? If an increase in the percentage of the benefit going to religion under a program might invalidate the program, might a decrease in the benefit going to religion have the same effect?

In the school aid cases that preceded *Mueller*, the Court found additional significance in the percentage of the benefit going to religiously affiliated schools. This significance relates to what has come to be known as "political entanglement." Because of the high percentage of the benefit that would go to religiously affiliated schools, these programs, it was said, would lead to "political division along religious lines," a situation that the Court thought one of the principal evils against which the first amendment was designed to protect.

A broader base of entanglement of yet a different character is

129. Widmar v. Vincent, 454 U.S. 263, 275 (1981).

> presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.[130]

In *Mueller* the political divisiveness argument is found inapplicable to the circumstances of that case, and it is said that the language in *Lemon v. Kurtzman*, quoted above, should be regarded as "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[131] Indeed the whole "political divisiveness" argument is referred to in a slighting way as an "elusive inquiry."[132]

The concern with "political entanglement" is linked with the problem of legislative motive. When a large percentage of the benefit under a program goes to religiously affiliated schools, there is a possibility that a religious motive lay behind the program. The suggestion is that if there was a religious motive, the program should be invalid even though it might be capable of justification on some other basis, and even though the amount of the benefit that would go to religion would not itself invalidate the program. This suggested basis for invalidity—improper religious motive—requires close examination.

Considerable attention has been given in the area of race discrimination to the relevance of legislative motive to constitutionality. In *Palmer v. Thompson*,[133] the Court held that a racially discriminatory motive in closing municipal swimming pools was irrelevant under the equal protection clause when the closing of the pools could be justified on other grounds.[134] This holding was consistent with the decision a few years earlier, in *United States v. O'Brien*,[135] that a conviction for

130. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971); *see also* Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976) (plurality opinion); Meek v. Pittenger, 421 U.S. 349, 365 n.15 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794-98 (1973).

131. Mueller v. Allen, 103 S. Ct. 3062, 3071 n.11 (1983).

132. *Id.* This attitude continues to be manifested in Lynch v. Donnelly, 104 S. Ct. 1355, 1364-65 (1984).

133. 403 U.S. 217 (1971).

134. *Id.* at 224-26.

135. 391 U.S. 367, 382-86 (1968).

burning a draft card was proper even though the statute may have been enacted for the purpose of suppressing speech. The prohibition contained in the statute, the Court found, could be justified by concern for the efficient operation of the Selective Service System.[136] However, in *Washington v. Davis*,[137] the Court changed direction and began to emphasize the importance of legislative motive in cases of racial discrimination. In *Davis* the constitutionality of a test used for police recruitment was sustaincd even though a much higher percentage of blacks than whites failed the test, because "the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowercd to pursue"[138]—the efficiency of the police force—and because there was no showing of racial motive in the adoption of the test.[139]

Of course the necessity of showing racial motivation in order to establish a violation of the equal protection clause does not mean that in all situations legislative motive is essential to a finding of unconstitutionality.[140] In some situations the existence of a certain state of affairs, regardless of why it came about, violates the Constitution. The right to trial by jury is infringed by the absence of a jury, for whatever reason.[141] However, *Washington v. Davis* makes it clear that in some important areas at least, constitutionality depends on legislative or official motive.

The holding of *Washington v. Davis* has met with resistance from two directions. On the one hand, there have been those who have insisted that to establish a violation of the equal protection clause it

136. *Id.* at 385-86. For earlier discussions of legislative motive, see Flemming v. Nestor, 363 U.S. 603, 612, 617 (1960) (due process clause); United States v. Darby, 312 U.S. 100, 115 (1941) (commerce clause).

137. 426 U.S. 229 (1976).

138. *Id.* at 246.

139. *See also* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (preference for veterans in state employment that had effect of disadvantaging women not violative of equal protection clause in absence of showing of intention to disadvantage women); Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 281-87 (1977) (burden on teacher whose contract was not renewed to show that motivating or substantial factor in decision not to renew was his exercise of right of free speech); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (zoning decision with disparate racial impact not violative of equal protection clause because of absence of showing of racial motivation). The constitutional significance of legislative or official motive is discussed in L. TRIBE, CONSTITUTIONAL LAW 229-30, 591-98, 835-39, 1026-32 (1978); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); and in a symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

140. *See* Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1161 (1978).

141. *See* Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

should be enough that the effect of government action weighs more heavily on blacks than on whites.[142] It is the unequal impact of the program, given a history of racial discrimination, that results in a denial of equal protection. On the other hand, there have been those who have suggested, indirectly at least, that *Palmer v. Thompson*[143] was right after all, and that if government action is capable of justification on some proper basis, it should not be found unconstitutional because as a matter of fact the legislature was motivated by considerations of race. Justice Stevens seems to have been moving toward this view.[144]

Rogers v. Lodge[145] was a case involving the governmental structure of a Georgia county. Members of a five-man board of commissioners were elected at large rather than from separate districts. The trial court found that this system, although originally instituted for nonracial reasons, was being maintained in order to keep blacks off the board.[146] The Supreme Court held, in accord with *Washington v. Davis*, that in view of the trial court's finding of racial motivation, the county's system of government violated the equal protection clause, even though the same system would be valid in the absence of such motivation.[147] Justice Stevens, in his dissent, does not absolutely reject inquiry into motivation as constitutionally irrelevant. He does, however, seek to restrict it to what he refers to as "the customary indicia of legislative intent": "[t]he formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents."[148] The reasons he gives for limiting inquiry into legislative motive and restricting its constitutional significance cannot be simply brushed aside. He raises the question, for instance, whether it is clear that there is no constitutional room for bias

142. *See, e.g.*, Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1166 (1978).

143. 403 U.S. 217 (1971); *see supra* text accompanying notes 133-34.

144. Rogers v. Lodge, 458 U.S. 613, 631 (1982) (Stevens, J., dissenting); *see also* the plurality opinion in Michael M. v. Superior Court, 450 U.S. 464, 470-72 & n.7 (1981). There, the Court found that the purpose of statute punishing only males for statutory rape was to reduce number of pregnancies, but "[e]ven if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because '[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Id.* at 472 n.7 (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

145. 458 U.S. 613 (1982).

146. *Id.* at 616.

147. *Id.* at 617.

148. *Id.* at 646 n.28 (Stevens, J., dissenting) (quoting his own earlier dissent in Cousins v. City Council, 466 F.2d 830, 856 (7th Cir. 1972)).

and unsound views in the lawmaking process.[149] He asks what other motives will invalidate legislation if racial motivation will do so. Does a system of at-large elections violate the equal protection clause if legislators maintain it out of a selfish desire to stay in office? If legislators decide to build a memorial for Jews killed during World War II, rather than for Palestinian refugees, is there a constitutional violation?[150] Finally, Justice Stevens asks whether we are ready to accept as the consequence of making legislative motive constitutionally relevant, that governmental structures and other laws will be continuously vulnerable to attack because new motives may arise for maintaining them.[151]

In some discussions it is suggested that decisions of the Court have settled that legislative motive is constitutionally relevant under the religion clauses.[152] Careful scrutiny of the cases cited to support this suggestion, however, indicates that there is no clear holding to this effect and that the question probably should be considered still to be open.

Epperson v. Arkansas[153] is the case most often cited for the proposition that motive will render unconstitutional under the religion clauses legislation that would otherwise be constitutional.[154] *Epperson* involved an attack upon a state statute, adopted by public initiative, which prohibited the teaching in any school supported by state funds of the Darwinian theory of evolution. In the course of holding the statute unconstitutional under the religion clauses, the Court observed: "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."[155] The Court took note of public statements of a sectarian tenor made in the course of the campaign for the adoption of the statute.[156] Nevertheless, it cannot be said that the case necessarily holds that a law which is otherwise valid under the religion clauses will

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> It is nevertheless important to remember that the First Amendment protects an individual's right to entertain unsound and unpopular beliefs—including stereotypical beliefs about classes of persons—and to expound those beliefs publicly. There is a vast difference between rejecting an irrational belief as a justification for discriminatory legislation and concluding that neutral legislation is invalid because it was motivated by an irrational belief. Fresh air and open discussion are better cures for vicious prejudice than are secrecy and dissembling. No matter how firmly I might disagree with a legislator's motivation in casting a biased vote, I not only must respect his right to form his own opinions . . . but also would prefer a candid explanation of those opinions to a litigation-oriented silence.

Id. at 648 n.31.

150. *Id.* at 648.

151. *Id.* at 643-47.

152. *See, e.g.*, Eisenberg, *supra* note 139, at 166-68; Ely, *supra* note 139, at 1318; *see also* Choper, *supra* note 11, at 606-09.

153. 393 U.S. 97 (1968).

154. *See, e.g.*, Ely, *supra* note 139, at 1318.

155. *Epperson*, 393 U.S. at 107-08 (footnote omitted).

156. *Id.* at 108 n.16.

be invalid because of legislative motive. The holding could be simply that the anti-evolution statute was incapable of justification on any ground other than the beliefs of a particular religion. No justification could be found under the constitutional philosophy for prohibiting the teaching of evolution while permitting the teaching of other theories of human origins.[157]

Stone v. Graham,[158] which involved the posting of the Ten Commandments in public school classrooms,[159] can be similarly explained. In that case the Court spoke of the statute as invalid because of its religious "purpose."[160] An adequate explanation of the result reached in that case can be found in the fact that, in view of the contents of the Ten Commandments, the circumstances under which they were to be displayed and those to whom they were to be displayed, the effect of posting them, and therefore the statute's only justification, would be the promotion of a particular religion.[161]

The strongest case for the proposition that improper motive will invalidate legislation under the religion clauses is the recent decision in *Larson v. Valente*.[162] That case involved a Minnesota statute that imposed registration and reporting requirements on charitable organizations engaged in soliciting funds, but exempted from these requirements religious organizations that received more than fifty percent of their contributions from members. In a suit brought by the Unification Church, which apparently was not entitled to exemption under the fifty percent rule, the Court held the rule invalid under the

157. "No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious view of some of its citizens." *Id.* at 107 (footnote omitted). *See also* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1190-91 (N.D. Ohio 1979) (interpreting *Epperson* in this manner), *modified*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part and rev'd in part*, 103 S. Ct. 2481 (1983).

158. 449 U.S. 39 (1980) (per curiam).

159. *See supra* text accompanying notes 23-24.

160. *Stone*, 449 U.S. at 41-42.

161. The Court's decision in McGowan v. Maryland, 366 U.S. 420 (1961), upholding a state law prohibiting certain commercial activities on Sunday, is, in spite of the Court's discussion of the "purpose" of the law, susceptible of explanation on the ground that there were substantial "secular" reasons for the prohibition. The same view can be taken of Lynch v. Donnelly, 104 S. Ct. 1355 (1984), the Christmas crèche decision. The city of Pawtucket, Rhode Island, each year erected a Christmas display in downtown Pawtucket. The display was owned by the city, but it was erected on land owned by a nonprofit organization. The display contained, in addition to the crèche, a Santa Claus house, reindeer pulling a sleigh, cutout figures of a clown, an elephant and a bear, a Christmas tree, candy-striped poles, colored lights and a banner proclaiming "Seasons Greetings." The Court held that the display did not violate the establishment clause. "The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes." *Id.* at 1363 (footnote omitted). "The display engenders a friendly community spirit of good will in keeping with the season." *Id.* at 1365.

162. 456 U.S. 228 (1982). The *Larson* case has already been mentioned in connection with the question of the relation between the two religion clauses. *See supra* note 7.

establishment clause, on the ground that it created an unjustified preference for one sort of religion over another.[163]

Several views of the holding of this case are possible. One is, indeed, that the statute was invalid because of the motive that led to its enactment. Language in the Court's opinion supports this view:

> But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per cent rule . . . effects the *selective* legislative imposition of burdens and advantages upon particular denominations. The "risk of politicizing religion" that inheres in such legislation is obvious, and indeed is confirmed by the provision's legislative history. For the history of . . . [the] fifty per cent rule demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others.[164]

The Court cited various parts of the legislative history which tended to show that legislators favored the adoption of the fifty percent rule because they did not like the Unification Church and certain other religious groups.[165]

Another view of the holding in *Larson* is that the fifty percent rule was invalid because of the effect that it had on different religious groups. The Unification Church would be required to register but not the Episcopalians. Because of this different effect, justification was required by a "compelling state interest" and a "close fit" of the statute to the furtherance of that interest.[166] Although the prevention of fraud may be a "compelling state interest," the reasons advanced for the fifty percent rule did not "closely fit" it to the furtherance of that interest.

A third explanation of *Larson* brings together the factors of legislative motive and "compelling state interest." When there is an improper legislative motive, a statute must be closely fitted to the furtherance of a compelling state interest, and there was no such close fit in the *Larson* case. Under this third explanation, which finds some support in the Court's opinion,[167] a religious legislative motive would not always invalidate a statute.

McDaniel v. Paty[168] is the Court's most tantalizing decision on the relevance of legislative motive under the religion clauses. In *McDaniel*, a Tennessee law which excluded priests and ministers from serving in the legislature was struck down. The state court had upheld the exclusion on the ground that it helped prevent an establishment of religion. A plurality opinion written by Chief Justice Burger held that the exclu-

163. *Larson*, 456 U.S. at 246-51.
164. *Id.* at 253-54 (emphasis in original).
165. *Id.* at 254-55.
166. *Id.* at 255.
167. *Id.* at 246-47, 253-55.
168. 435 U.S. 618 (1978).

sion violated the free exercise clause because it forced a choice between the ministry and public office that was not warranted by the risk that priests and ministers would contribute to the enactment of unconstitutional legislation.[169] Left unanswered by the plurality opinion was the question whether the risk to be considered was that legislation incapable of being justified on any "secular" ground would be enacted, or also that legislation would be religiously motivated. Admission of the clergy to the legislature creates a greater risk of the latter than of the former.

Justice Brennan's concurring opinion in *McDaniel* shows a marked tension on the question of legislative motive under the religion clauses. On the one hand, he insists that religious motivation will invalidate legislation that would otherwise be unobjectionable, citing cases that do not necessarily support that proposition,[170] but on the other hand, he says that

> [t]he mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. . . . Government may not inquire into the religious beliefs and motivation of officeholders—it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction.[171]

Perhaps what Justice Brennan means is that although religious motivation will invalidate legislation under the religion clauses, these same clauses prohibit the use of certain means to enforce the constitutional rule against religious motivation.[172]

What essentially is at stake in this controversy over legislative motive? If in order to be valid under the religion clauses legislation need only be capable of justification under the constitutional philosophy and not actually motivated by it, religious groups which may control the legislature will find it easier to achieve a body of laws consonant with their beliefs than if legislative motivation must also be within the constitutional philosophy. A religiously inspired majority can pick and

169. *Id.* at 626-29.

170. *Id.* at 636 n.9 (Brennan, J., concurring) (citing Epperson v. Arkansas, 393 U.S. 97, 109 (1968); and McGowan v. Maryland, 366 U.S. 420, 431-45, 453 (1961)); *see supra* text accompanying notes 153-57.

171. *McDaniel*, 435 U.S. at 640-41 (Brennan, J., concurring).

172. The Court's opinion in Marsh v. Chambers, 103 S. Ct. 3330, 3336 (1983) (upholding the constitutionality of prayers in the legislature by a state-paid chaplain), says: "Absent proof that the chaplain's reappointment [for sixteen years] stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the establishment clause." Justice Stevens criticizes this statement, *id.* at 3351 n.1 (Stevens, J., dissenting) (citing his opinion in Rogers v. Lodge, 458 U.S. 613 (1982)). *See supra* notes 143-51 and accompanying text.

choose among statutes capable of justification under the constitutional philosophy and enact only those that accord with their religious beliefs. For example, if legislators confine their consideration to the constitutional philosophy, they might not adopt a food stamp program, although it is capable of justification under that philosophy, but if they bring to bear their religious beliefs—a belief that the Sermon on the Mount is Revelation, for instance—they might adopt such a program.

Whether this additional opportunity for particular religious beliefs is required or permitted by the religion clauses depends upon the content of the constitutional philosophy, just as do judgments about the effects of a statute. The beliefs that would benefit from the opportunity would be those of the majority or those that achieve majority support through the ordinary workings of the political process. Possibly certain religious beliefs, but not others, are entitled to this opportunity. Beliefs in racial superiority or segregation, for example, may be so in conflict with the constitutional philosophy that they may not influence government in any way.[173] On the other hand, religious beliefs regarding food stamp programs, abortion funding or nuclear weapons, to give just a few examples, although not part of the constitutional philosophy, perhaps should be allowed to affect law by way of legislative motivation.[174]

Even if one is clear that legislators must be motivated only by considerations within the constitutional philosophy, it may not be quite so clear that this same restriction should apply to the voters when a matter comes before them as an initiative or referendum. Still, when they cast their votes they are exercising governmental power just as much as

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

174.

> I am not convinced, however, that the Constitution affords a right . . . to have every official decision made without the influence of considerations that are in some way "discriminatory." Is the failure of a state legislature to ratify the Equal Rights Amendment invalid if a federal judge concludes that a majority of the legislators harbored stereotypical views of the proper role of women in society? Is the establishment of a memorial for Jews slaughtered in World War II unconstitutional if civic leaders believe that their cause is more meritorious than that of victimized Palestinian refugees? Is the failure to adopt a state holiday for Martin Luther King, Jr. invalid if it is proved that state legislators believed that he does not deserve to be commemorated? Is the refusal to provide Medicaid funding for abortions unconstitutional if officials intend to discriminate against women who would abort a fetus?

Rogers v. Lodge, 458 U.S. 613, 647-48 (1982) (Stevens, J., dissenting) (footnote omitted).

For a discussion of the religious influences that played a part in obtaining the adoption of a restriction on the use of government funds to pay for abortions, see McRae v. Califano, 491 F. Supp. 630, 690-715 (E.D.N.Y. 1980). The restriction was upheld by the Supreme Court against attack under the establishment clause in Harris v. McRae, 448 U.S. 297, 319-20 (1980). For a discussion of whether the use of the firing squad for executions in Utah is unconstitutional because based on Mormon beliefs, see Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U.L.Q. 435.

their representatives.[175] What about the voters when they vote for a candidate for office? Is it unconstitutional for them to be influenced in this action by their religious beliefs? Do we reach here a point sufficiently removed from lawmaking that the Constitution permits or requires complete freedom? When it comes to lobbying, at least, we are sure of the answer. Lobbyists do not exercise governmental power; they only seek to influence its exercise. When the Roman Catholic bishops try to influence the government regarding arms control, they do not violate the Constitution even though they may be motivated by the Gospel. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."[176]

VII
"FREE EXERCISE CASES"

The approach I have taken to the cases discussed thus far, I suggest, is also appropriate to cases usually thought of as free exercise clause cases. In these cases, also, a crucial question is the effect of government action on the positions of the constitutional philosophy and its ideological competitors. Will the proposed action leave to other ideologies that opportunity to shape the world in accordance with their beliefs that the substantive truths of the constitutional philosophy require? Cases ordinarily regarded as presenting free exercise problems often involve the specific effects of government action on identified persons. They will be disadvantaged for acting in accordance with their beliefs. Even so, it is proper to view these cases as implicating both of the religion clauses and as not essentially different from the cases that we have already considered.

In *Sherbert v. Verner*,[177] a Seventh Day Adventist was unable to find suitable employment because of her unwillingness, on religious grounds, to work on Saturday. All the textile mills in Spartanburg, South Carolina, where she lived, had gone to a six-day work week and required Saturday work. Petitioner applied for, but was denied, unem-

175. *See* Brest, *supra* note 139, at 124 n.144; *cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional amendment adopted by voters invalid because it authorized and encouraged private discrimination in housing). *Compare* Hunter v. Erickson, 393 U.S. 385, 392 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."), *with* Rogers v. Lodge, 458 U.S. 613, 647 n.30 (1982) (Stevens, J., dissenting) ("[T]he very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast.").

176. Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

177. 374 U.S. 398 (1963).

ployment compensation under the South Carolina unemployment compensation statute. The statute authorized compensation only for those who were "able to work and available for work" and did not fail "without good cause . . . to accept available suitable work." The South Carolina Supreme Court held that a person who would not work on Saturday for religious reasons came within the disqualifying provisions of the statute. The Supreme Court of the United States reversed, holding that the denial of unemployment compensation to the plaintiff under the circumstances violated the free exercise clause.[178] The Court also held that the result it reached was not in conflict with the establishment clause.[179]

It is clear that the breadth of the class entitled to unemployment compensation under the state statute was important to the Court's decision. The Court treated the case as one in which some "personal" reasons for being unable to work were recognized by the state as justifying compensation.[180] There was insufficient reason to believe, the Court thought, that the state would not recognize any personal reasons. Under these circumstances, Mrs. Sherbert's unwillingness to work because of religious belief constitutionally entitled her to unemployment compensation. The precise holding of the case is difficult to determine because of the uncertainty as to what personal reasons the state would recognize. The holding might be that if *any* personal reasons are recognized as justifying compensation, then religiously motivated unemployment must also be compensated. On the other hand, the holding might be that religiously motivated unemployment is entitled to compensation only if a certain number of personal reasons of a certain kind are recognized as justifying compensation.

The Court seems to suggest that if no personal reasons were recognized by the state as entitling a person to compensation, then it would be permissible also to deny compensation to those who will not work for religious reasons. This cannot be stated as a holding, however, because the Court did not consider itself confronted with such a case. Even if the state recognized no personal reasons as justifying compensation, it did provide compensation for those thrown out of work because of business conditions, and it could be that even with a program thus limited, religious objectors must be included.

If the entitlement of a single personal reason, regardless of its character, would give religiously motivated unemployment a constitutional right to compensation, and *a fortiori* if there is a constitutional right to compensation even though no personal reasons are recognized,

178. *Id.* at 410.
179. *Id.* at 409.
180. *Id.* at 401 n.4.

then we may have a question whether *Sherbert* is consistent with cases like *Widmar* and *Walz*. In *Widmar*, it will be recalled, the constitutional right to use the university facilities for religious teaching and worship appeared to depend upon the fact that the facilities were open not to a few but to a wide range of student activities.[181] In *Walz*, an extended list of charities, along with religion, were exempt from property taxes.[182]

The recent case of *Thomas v. Review Board*[183] is like *Sherbert*. A Jehovah's Witness quit his job because it violated his religious beliefs to be engaged directly in the production of armaments. He was denied compensation under the state unemployment compensation statute because his reason for quitting was found not to satisfy a requirement that the employee have left work for "good cause in connection with the work."[184] The Supreme Court held that the free exercise clause entitled petitioner to compensation. As Justice Rehnquist pointed out in his dissent,[185] *Thomas* could be seen as a case in which the state recognized *no* personal reasons as entitling a person to unemployment compensation, the situation that the Court in *Sherbert* seemed to suggest might not require compensation for religiously motivated unemployment.

In cases like *Sherbert* and *Thomas*, if the religious objector must be compensated, the cost of this compensation must fall upon others.[186] Some of those upon whom it will fall may themselves be believers. If their religions might also give them reason to refuse work under certain circumstances, it could be said that they are at least potential beneficiaries of a principle that religious objectors must be supported out of the unemployment fund. Other persons may have religions that would under no circumstances give them reason to refuse work. They might object to other matters involving government and recognition might or might not be given to their objection, but in respect to the unemployment fund at least, they can only be losers from a principle that recog-

181. *See supra* notes 95-98 and accompanying text.

182. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970). Some language in the Court's opinion in *Sherbert* suggests that it is important to the holding of the case that a provision of state law required that if in a national emergency the Sunday Closing law was suspended and businesses kept open on Sunday, that employees who refused to work on Sundays for reasons of conscience not be penalized. However, in the main, the language of the Court's opinion makes this difference in treatment of Saturday and Sunday observers irrelevant. Sherbert v. Verner, 374 U.S. 398, 406, 410 (1963).

183. 450 U.S. 707 (1981).

184. *Id.* at 709-10 & n.1.

185. *Id.* at 723 n.1 (Rehnquist, J., dissenting).

186. This fact is pointed out and discussed in 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, 1414-16 (1981).

nizes the claims of people like Mrs. Sherbert. In a sense they are disadvantaged because of their religion. Does the way in which the practice of their religion is affected or the seriousness of the disadvantage imposed upon them provide a basis for distinguishing their situation from that of Mrs. Sherbert and a reason why they should be required to support her conscience? The answer cannot be found in a standard relating to the effect of government action on the position of the constitutional philosophy vis-à-vis religious ideologies, for the situation involves a conflict between different religions, all of which are outside the constitutional philosophy. The answer, nevertheless, must be found in the truths of the constitutional philosophy. Nonbelievers, of course, also may object to contributing to support Mrs. Sherbert's conscience, but, as we have seen, their objection will have less constitutional force.

Wisconsin v. Yoder[187] is another case usually thought of as presenting a question under the free exercise clause. In that case Wisconsin required all children except those mentally or physically disabled to attend school up to the age of sixteen. The Amish parents of certain children who had completed the eighth grade but had not reached the age of sixteen refused to send their children for further schooling on the ground that to do so would be against their religion. The worldly concerns that higher schooling involved, they believed, would take the children away from the simple, God-fearing, agricultural life to which the Amish adhere. The Amish provide adolescent children with on-the-farm training in practical skills. The Supreme Court held that the free exercise clause required that the Amish be exempt from the further schooling requirement and that this result did not conflict with the establishment clause.

What is striking about *Yoder* is the modest value that the Court found in the objective that the state sought to promote by the requirement of further schooling. The state's objective is not spelled out in any detail, but essentially seems to have been to produce adults who possess a certain knowledge widely recognized to be true and useful, skills that will enable them to survive and prosper in an urban and technological society, and moral qualities that include a certain degree of individualism and assertiveness. Since the Amish were willing to let their children go to school through the eighth grade, what was in issue was only the additional promotion of those objectives that would be achieved by one or two more years of schooling. Furthermore, since Amish children receive on-the-farm training that has value even from a worldly point of view—training that would increase their chances of

187. 406 U.S. 205 (1972).

success in the outside world if they should later choose to leave the Amish community—the question was the constitutional significance of the gap between the preparation that this training provided and that which would come from one or two more years of formal schooling. Essentially what the Court held was that the objective the state wished to achieve was not important enough, nor sufficiently threatened, to overcome the value to be placed on the Amish desire to live in accordance with their religious beliefs.

In *Walz* and *Widmar* it seemed that the bracketing of religion with activities having value under the constitutional ideology, and possibly with nonreligion as well, was necessary to the result. Likewise in *Sherbert*, if the state had not provided unemployment compensation for any "personal" reasons, it might not have been required to compensate religiously motivated unemployment. In *Yoder*, however, religion seems to stand alone as constitutionally entitled to exemption from the schooling requirement. Indeed, the Court emphasizes that those who seek to avoid sending their children to school for nonreligious reasons will not be entitled to the same protection as the Amish, nor will those who do so for religious reasons but do not provide the practical training and community support that the Amish do, or do not have a historical record that gives assurance of their reliability.[188] Thus *Yoder* seems to involve a constitutional standard that requires government to give rather favorable treatment to religion. The state could compel Thoreau to send his children, if he had any, to school until the age of sixteen, his ideology being classified as nonreligious.[189]

188. *See id.* at 215-16, 235-36.

189. *See id.* at 216. Some language in the Court's opinion in *Yoder* suggests that religious belief was not, standing alone, enough to entitle the Amish to constitutional protection, but that it was also required that the belief on which their objection was based be a "central," "fundamental," "important," or "essential" part of their faith. *Id.* at 210-19. These words are probably intended to express a legal idea. Some policy of the law is served by exempting religious objectors from a generally applicable requirement when the requirement conflicts with an important or essential part of their religious faith, but not otherwise. If a belief is not essential or important, then it may not be wrong to make a person choose between giving it up or suffering a disadvantage for adhering to it. To implement this policy, an examination into the nature and structure of the person's beliefs will be necessary. He may have an idea about the importance or centrality of a particular belief to his faith, but this idea will not necessarily correspond with the legal standard, any more than a person's definition of religion will necessarily correspond with the constitutional definition of that term. The relation between the person's idea and the legal standard will have to be determined. In Widmar v. Vincent, 454 U.S. 263 (1981), the Court refused to adopt a distinction between religious speech and religious worship—it being suggested that the former would be protected by the free speech clause, but not the latter—because, among other reasons, the distinction would require courts "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Id.* at 269 n.6. This observation seems equally applicable to determining whether a particular belief or practice of a religion is central or important.

It will be recalled that the *Hull* case, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), discussed *supra* in Part

United States v. Lee,[190] a recent case in which the free exercise clause was again the principal focus of inquiry, may be difficult to reconcile with *Sherbert* and *Yoder*. Justice Stevens in his concurring opinion in *Lee* calls attention to this difficulty and suggests that no matter what the Court may say—and what it says is that only an "overriding" governmental interest will justify the invasion of religious liberty—it has in fact adopted a laxer standard than was applied in the earlier decisions.[191]

In *Lee*, an Amish employer refused on religious grounds to pay social security taxes. The Amish believe that the Bible requires them to take care of their dependent brethren and that it is sinful to participate in insurance programs. Congress has in fact exempted from the Social Security system self-employed persons who are opposed to participating in the system on religious grounds and who belong to a religious group that makes provision for its dependent members.[192] However, Congress has not provided exemption for those who employ others, which was Lee's case. The Supreme Court held that the religion clauses did not require that Lee be exempted from the obligation to pay Social Security taxes.

Why is the "governmental interest" in *Lee* any more "overriding" than the interests advanced in *Sherbert* and *Yoder*? Can one and the same constitutional standard justify recognition of the interest sought to be promoted in *Lee* and require compromise of the interests sought to be promoted in *Sherbert* and *Yoder*? In *Sherbert* a fund that the state created primarily to deal with the problem of adverse economic conditions was required to be shared with religion. In *Yoder* the state was required to give up, to some degree, its objective of assuring a cer-

IV, prohibits courts from answering religious questions, such as whether a belief or practice is "Presbyterian," in the course of enforcing trusts. "Presbyterian" in this context does not express a policy of the law, but the settlor's idea, which the courts, but for the *Hull* prohibition, might attempt to understand and enforce. The prohibition against answering religious questions was erected to prevent the covert introduction of official ideas and preferences in the course of interpretation. When it comes to determining whether a belief is central or important, in the sense referred to in *Yoder*, the object is precisely to implement a policy of the law, and an effort is made to understand the attitude of the person before the court only as a means to that end. Mistakes may be made in this effort, but concern about this perhaps does not touch upon the rationale of the *Hull* case.

When the Court refers to centrality or importance in *Yoder*, it probably means to focus on the beliefs of the person or persons before the court—in *Yoder*, the defendant parents. Thus when it speaks of a belief as "fundamental to the Amish faith," 406 U.S. at 216, it probably only means to suggest that an attitude generally found in a religious community or expressed by religious authorities may be evidence of the beliefs of the persons before the court. Otherwise, legal consequences would be imposed upon those before the court because of the beliefs of others in a religious organization or community to which they may belong.

190. 455 U.S. 252 (1982).

191. *Id.* at 261.

192. 26 U.S.C. § 1402(g) (1982).

tain kind of education for all young persons. In *Lee*, it is difficult to argue that exempting the Amish would compromise Congress's objective in adopting the Social Security system. If community support of dependents was a sufficient reason for Congress to exempt self-employed Amish, why was it not also a sufficient reason to exempt Amish who employ other Amish? Nevertheless, the Court announced that "[b]ecause the broad public interest in maintaining a sound tax system [apparently including the Social Security system] is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[193]

A possible basis for narrowing the holding of *Lee* may be found in uncertainty as to whether Lee's employees were in fact Amish and if they were whether they, like Lee, were conscientiously opposed to participation in the Social Security system. Some support for this narrow reading may be found in the Court's observation that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[194]

Finally, mention should be made again of the recent *Bob Jones* decision.[195] In that case the Court held that it did not violate the free exercise clause to deny tax exemption to private educational institutions that have a policy of excluding students on grounds of race or a policy against interracial dating or marriage, even though the policies are founded upon religious belief. Because the government had chosen to deny tax exemption, the question did not arise whether it was constitutionally required to do so. Belief in racial segregation is evidently so strongly reprobated by the constitutional philosophy that it need be given very little room in the life of the society. Still, denying tax exemption is not the same as prohibiting racial discrimination in education altogether. Furthermore, even if discrimination in education generally may be made illegal, it is not yet settled that it may be made illegal when based upon religious belief.[196]

A footnote in the *Bob Jones* decision states: "We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education."[197] If churches that practice racial discrimination are entitled to tax exemption although schools are not, would it be because the schools' programs include elements that

193. United States v. Lee, 455 U.S. 252, 260 (1982).

194. *Id.* at 261.

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

196. *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976).

197. Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2035 n.29 (1983) (emphasis in original).

have value under the constitutional philosophy whereas the churches' services do not?[198]

Whether the "free exercise cases" that have been discussed can be reconciled with each other requires careful reflection. One thing that seems clear, however, is that this group of cases does not present problems essentially different from those in the other cases that have been discussed. Although it is not the only question to be asked, a central concern must be the effect of government action on the positions of the constitutional philosophy and its ideological competitors. What finally is at stake is the substantive content of the constitutional ideology. To it ultimately all questions must be referred.

VIII
CONCLUSION

Among scholars of the Constitution there has come increasing awareness that constitutional interpretation, at least of many of the Constitution's most important provisions, involves inquiries of a philosophical nature.[199] This awareness has developed partly in reaction to those who have suggested that the courts in judging the constitutionality of legislation should restrict themselves to enforcing rules of "process" necessary to maintain the characteristic features of "democracy." It has also developed as a result of efforts to penetrate behind the notion that constitutional interpretation involves finding "the intention of the Framers." In the one case it has come to be realized that ideas about proper process are themselves but reflections of deeper "substantive" ideas (just as, to refer back to our discussion of the church property cases, questions of church "polity" are inseparable from questions of doctrine). In the other case it has been seen that an interest in "the intention of the Framers" and a particular notion of that intention are themselves matters that require explanation, an explanation that can only be found on the level of political or moral philosophy.

Valuable as this development is, it has only just begun and meets with strong resistance. It has the appearance of an intolerable boldness. Furthermore, in regard to the religion clauses, with which we are here particularly concerned, there is reason to think that even the proponents of this "substantive" constitutional method may not be fully aware of the significance of its application. They may not be aware

198. The NLRB tried to draw a similar line, exercising jurisdiction over religiously affiliated educational institutions, but not over those that are "completely religious," but the Supreme Court held that the National Labor Relations Act did not warrant exercising jurisdiction over either sort of institution. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

199. *See, e.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

that the religion clauses too, as much as the due process clause, the equal protection clause, and the free speech provision, are expressive of fundamental truths. As a matter of fact, if one is interested in the moral philosophical underpinnings of a constitutional document, one's eye might well be caught first by references in the document to the relation between government and religion.

As stated at the beginning of this article, the religion clauses, along with other parts of the Constitution, embody a philosophy addressed to fundamental questions regarding human nature, human destiny and other such realities. They embody a philosophy adequate to deal with all the questions that may arise regarding the relations between government and religion. They embody that philosophy in the sense that they require the Court to expound it. But there is a special resistance to admitting that this is the case for the religion clauses. This is because, from a certain point of view, the religion clauses are seen to put aside, as not in the proper domain of government, just such questions. When it comes to these clauses, there is a particular need to believe that fundamental questions do not have to be answered. That they should not be answered is what is meant by "separation of church and state." Here enters the fear of serious social conflict, if indeed these questions must be answered. Certain questions of "moral philosophy" may perhaps be recognized to be presented by various provisions in the Constitution, but not questions of "religion." The nearly impenetrable cloud of words and "tests" that the Court has used in its religion clause decisions has been part of a strategy of evading the real task at hand.

Reluctance to see that if interpretation of the Constitution generally requires the expounding of a philosophy this is also true of the religion clauses, has limited recognition of what the character of that philosophy may be, what the content of its ideas about human nature and human destiny may be. It seems to be supposed that the constitutional philosophy is "secular," and that having said that, no more need be said. But is it so clear that the constitutional philosophy is "secular," and even if it is, what does that mean? Does it mean that that philosophy gives no recognition to a spiritual element in man? A standard regarding nonestablishment and free exercise could well flow from a philosophy that gives such recognition. Precisely because of that element, possibly, certain restrictions on government are necessary.

It is interesting, though perhaps not very rewarding in view of the present state of the art of constitutional interpretation, to scrutinize Supreme Court opinions for what light they may directly throw on the content of the constitutional philosophy, particularly concerning the religion clauses. Sometimes the Court will say something that seems

pertinent to the nature of the values that must justify legislation. For instance, in *Harris v. McRae*,[200] the abortion funding decision, in rejecting the contention that the prohibition against the use of federal funds to pay for abortions violated the establishment clause, the Court said that although this restriction might coincide with the beliefs of some religions, its constitutional validity was assured by the fact that it expressed "traditionalist" values. Cases involving the question of what may be taught in the public schools may contain suggestions concerning the content of the constitutional philosophy. Public schools perhaps may be vehicles for expounding the truths of this philosophy. If it is the case that the Ten Commandments may not be posted in public school classrooms,[201] nor verses from the Bible required to be read,[202] still the Bible may be studied for its "literary and historic" qualities.[203] What view of existence makes such study valuable?[204]

The recent case of *Marsh v. Chambers*,[205] upholding the constitutionality of prayers in the legislature, though it could be seen as entitled to little influence beyond its particular facts, may throw some light on the constitutional ideology. The view that the decision is not entitled to any great influence finds support in the fact that the Court relied heavily on the circumstance that the first Congress, just before it adopted the Bill of Rights, authorized the appointment of congressional chaplains.[206] But what led the Court to attach the significance that it did to this fact? Although there is indication in the Court's opinion in *Marsh* that some explicitly Christian prayers that the chaplain had said were constitutionally out of bounds, prayers characterized by the chaplain as "nonsectarian," "Judeo-Christian" and as containing "elements of the American civil religion,"[207] were not disapproved.[208] Now the purpose of these prayers, according to the Court, was to "invoke Divine guidance on a public body entrusted with making the laws."[209] It seems fair to conclude that the justification for the laws that would be made following the prayers might properly be found in the truths that

200. 448 U.S. 297, 319-20 (1980).

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

202. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

203. *Id.* at 225.

204. In Ambach v. Norwick, 441 U.S. 68, 80 (1979), the Court spoke of the public school teacher's function to promote "civic virtues."

205. 103 S. Ct. 3330 (1983).

206. *Id.* at 3333-34.

207. *Id.* at 3336 n.14.

208. *See also* dictum in the Court's opinion in Lynch v. Donnelly, 104 S. Ct. 1355, 1360-61 (1984), suggesting that it is not unconstitutional to have Thanksgiving as a national holiday, nor for the President to issue Thanksgiving Day proclamations, nor for Cougress to authorize references to God in the Pledge of Allegiance and on our money.

209. *Marsh*, 103 S. Ct. at 3336.

the prayers expressed. Approval of these prayers in this context perhaps is more significant for the content of the constitutional ideology than what may be included in the public school curriculum.[210]

I suppose it might be argued that the chaplain's prayers are designed to affect only the subjective motivation of the legislators, or of those legislators who choose to be influenced by them, and that any laws that are enacted must be capable of justification under a "secular" ideology. We do know that religious tests may not be "required as a Qualification to any Office or public Trust under the United States,"[211] and that persons who refuse to declare a belief in the existence of God may not be excluded from public office.[212] However, these restrictions do not necessarily mean that what the chaplain says to the legislators at the beginning of each session is not evidence of what the Constitution authorizes as the ground of legislation. The principle of freedom derived from the truths that the chaplain invokes, which demands a generous opportunity for views in conflict with the constitutional philosophy, may provide a satisfactory explanation for these restrictions.

Some will say that any truths that might be advanced regarding human nature, human destiny and other such matters, as truths embodied in the religion clauses, or in other provisions of the Constitution, will be of such a general nature as to be useless in deciding concrete cases.[213] They will only be window-dressing for other things that either cannot be explained or that perhaps should not be explained. How are statements of such a general and elevated nature going to help decide cases relating to disputes over church property, aid to parochial schools, or exemption from Social Security taxes? All one need do is look back over the pages of this article discussing these problems to appreciate the futility of such an enterprise. However, our legal tradition does contain a large amount of experience and reflection on that experience, that can be of value both in the illumination of general truths and the derivation from them of intermediate principles useful in deciding particular questions. It is not true that we know nothing about ourselves and our situation. That in the case of the religion clauses, because of a particular fearful perspective that has been

210. The prayers said in the presence of the legislators in the *Marsh* case were probably similar in content to the Regent's prayer that in Engel v. Vitale, 370 U.S. 421 (1962), was forbidden to be said in the presence of children in public schools. But the Court in *Marsh* says that legislators are adults "presumably not readily susceptible to 'religious indoctrination' . . . or 'peer pressure.'" 103 S. Ct. at 3335-36. It does not necessarily follow that because a truth may serve as the basis for legislation it may be announced in the presence of all audiences under all circumstances.

211. U.S. CONST. art. VI.

212. Torcaso v. Watkins, 367 U.S. 488 (1961).

213. *See* the views expressed in J. ELY, DEMOCRACY AND DISTRUST 51-52 (1980).

adopted, we have not made the effort that could be made to express this understanding and to develop it further, and to apply it, is no reason to consider the task hopeless. Indeed, if this is not the task in interpreting the religion clauses, what is?