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Religious Establishment

During almost fifteen centuries has the legal establishment of religion been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry, and persecution. . . . Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discourd, by proscribing all difference in Religious opinions.

Above all, [men] are to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves freedom to embrace, to profess, and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.

James Madison (1785)[1]

I am shocked and frightened that the Supreme Court has declared unconstitutional a simple and voluntary declaration of belief in God by public school children. The decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised.

Cardinal Spellman (1962)[2]

In some parts of our Country, there remains a strong bias towards the old error, that without some sort of alliance or coalition between Government and Religion neither can be duly supported. Such indeed is the tendency to such a coalition, and such its corrupting influence on both parties, that the danger cannot be too carefully guarded against. Every new and successful example of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion and Government will both exist in greater purity, the less they are mixed together. Religion flourishes in greater purity without than with the aid of Government.

James Madison (1822)[3]

Americans have fought over the relationship between religion and government since before there was a United States. Although it seemed to many at the time of the framing that there was considerable religious diversity in the colonies, viewed from the perspective of the late twentieth century that period looks remarkably homogeneous. Disagreements were largely among Protestant denominations; there were few Catholics and almost no non-Christians.

State support of religion was a commonplace at the time of the Constitutional Convention. Some states required belief in God as a prerequisite for holding public office, and five states (Connecticut, Maryland, Massachusetts, New Hampshire, and South Carolina) had officially established, state-supported churches. New Jersey went so far as to give full civil rights only to Protestants. Since extension of the Bill of Rights to the states through incorporation into the Fourteenth Amendment did not occur until the twentieth century, it would even have been constitutional for a state legislature to outlaw a religious sect had it wanted to do so.

Federalists as well as Anti-federalists feared both that the new national government might endanger religious freedom and that it might encroach on the religious authority of the states. The original Constitution, as we have seen, relied on checks and balances, federalism, and enumerated governmental powers to maintain control of the national government. Many people, especially Anti-federalists worried about preserving state authority, believed that such protections were inadequate and should be augmented by a bill of rights.

The First Amendment begins with the statement that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In addition to being the first right in the Bill of Rights, freedom of religion is the subject of two clauses rather than the customary one. The two clauses are known, respectively, as the establishment clause and the free exercise clause. The free exercise clause was incorporated into the Fourteenth Amendment's guarantee that states not deprive citizens of liberty without due process of law in 1940;[4] the establishment clause was incorporated in the same fashion in 1947.[5]

The free exercise clause expressed an idea already familiar to the framers; its historical roots go back to the debates about religious toleration after the English Civil War. The principle underlying free exercise is respect for the individual right of conscience; it requires that government not coerce people to accept or participate in any particular religion, whether the official state religion or any other. The principle of free exercise of religion can coexist fairly well with an established religion, since its focus is on individuals' right to worship in a manner of their own choosing—a right that England's experience to this day shows need not be infringed by an established church.

The establishment clause has a somewhat different focus, although there is often overlap between them. It grew out of hostility toward a national church. For some the clause represented an effort to protect state religious establishments from national intrusion; for others, like Madison, it also expressed a degree of distrust of religious institutions in general, especially when aligned with government. So a national church is the paradigm of religious establishment, and a law proscribing a particular religion would be the clearest case of a free-exercise violation.

But the relationship between the two is more complicated in practice than these

examples may suggest, for there is often room to argue about which clause applies. Sometimes the same case can be described in terms of either clause. Do Sunday closing laws, for example, "establish" religions that observe a Sunday Sabbath, or do they infringe the "free exercise" rights of people whose religion demands that they close their businesses on Saturday?

Tensions may also exist between the two clauses: pressing one to its logical limit can lead it into conflict with the other. A strict interpretation of the establishment clause, for instance, would lead a court to reject both direct and indirect governmental aid to religious schools, leaving the way open for parents to argue that paying taxes for public schools in addition to their children's parochial school tuition limits their free exercise of religion. Laws that exempt people from military service on religious grounds demonstrate the conflict even more sharply. On one hand, it can be argued that granting conscientious-objector status to religions that teach pacifism is merely a reflection of government's responsibility to respect free exercise. Yet that same law also favors certain religious groups, suggesting a violation of the establishment clause. For government to "make no law respecting the establishment of religion," political and religious institutions must in some sense be kept at arm's length. But the ways they must be kept apart, the degree of separation, and the reasons for disestablishment are all unclear. Among the framers, Madison was especially concerned about the dangers posed by religion; his fear of religious repression and entanglement with government was matched only by his fear that a tyrannical majority might confiscate property or infringe liberty of contract. As part of their general movement to disestablish the Episcopal Church, Madison and Jefferson both championed a provision in the Virginia state constitution that prevented using public funds to pay clergy.

Church–state relations bring the disagreements between Federalists and Antifederalists over the role of government and the rights of minorities into sharp focus. The religion clauses are seen by many to reflect the federalist commitment to individual rights and governmental neutrality, demanding that the state not brand one conception of the good as less valuable than another. It is not clear that such an approach can be maintained, however. First, lines must be drawn between acceptable and unacceptable forms of aid, both inside the classroom and out. These questions are important in constitutional debate about religion, but there are others as well. The religion clauses force courts to consider the role of education and the responsibility of government to protect children from their parents, along with the rights of adults to practice their religion and raise their children free from governmental interference. Religious fundamentalists also raise important arguments that teaching evolution and secular humanism is incompatible with neutrality. Those with more republican leanings, however, maintain that neutrality is neither desirable nor possible, and they have important arguments available to support that view. We will focus first on the establishment issues; then we will turn to free exercise.

Public Aid and School Prayer

The aspiration that government remain neutral in the field of religion has never meant that government must ignore the religious beliefs of people or that it cannot provide aid in any form. Government is free to make accommodations for religious practices

in a multitude of ways; for example, by allowing chaplains in the military and in prisons, by making Christmas a public holiday, and by referring to God on currency. It also aids religion by assigning police to protect church property and the lives of clergy, paving roads leading to churches, and giving hearing aids to poor people who will sometimes use them to listen to sermons. To ask that government stay completely out of religion not only would be impractical but would hinder the free exercise of religion.

The major focus of debate over the establishment clause, not surprisingly, has been over the role of religion in education, for the classroom is the battleground for the hearts and minds of future generations. Most of the cases involve either public aid to religious schools or religious involvement in public ones, primarily in the matter of school prayer. We will consider each in this section.

The first and most important establishment clause case was *Everson* v. *Board of Education*, decided in 1947. There the Court upheld a New Jersey law providing tax money to reimburse parents for transportation of their children to school, including those who chose to send their children to religious schools. *Everson* demonstrates both the hold on the Court of the ideal of neutrality and the difficulties it raises. Justice Black wrote the opinion of the Court:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." . . .
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> New Jersey cannot consistently with the establishment clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it 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. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.
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> Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to

church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. [Similarly], parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions that it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. . . . It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Mr. Justice Rutledge, dissenting.

The Amendment's purpose was [to] create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. [T]he prohibition is absolute. The funds used here [in] fact give aid and encouragement to religious instruction. [The reimbursement program] . . . aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching. [T]here is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. [Commingling] the religious with the secular teaching does not divest the whole of its religious permeation and emphasis. [Indeed], on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular. [T]ransportation where it is needed is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials. [No] rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. [Now], as in Madison's time, not the amount but the principle of assessment is wrong.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus

destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey. . . .

[Public] money devoted to payment of religious costs, education or other, brings request for more. It brings, too, the struggle of sect against sect for the larger share or for any. [That] is precisely the history of societies which have had an established religion and dissident groups. It is the very thing Jefferson and Madison [sought] to guard against, whether in its blunt or in its more screened forms. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.

[No] one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. . . . But if those feeling should prevail, there would be an end to our historic constitutional policy and command. . . . The child attending the religious school has the same right as any other to attend public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids [any state agency] to give or aid him in securing the religious instruction he seeks. [Nor] is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety.* Certainly the fire department must not stand idly by while the church [burns].[6]

*The protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions.

Both Black and Rutledge share the view that the establishment clause requires governmental neutrality between religion and nonreligion as well as among different religions. Aid to all religious schools on an equal basis would therefore still violate the clause. Government cannot, said Justice Black, "aid one religion, aid all religions, or prefer one religion over another." Both the majority and the dissent also sense the potential conflict in the case between preventing establishment of religion and protecting its free exercise: if they strike down the aid program on establishment grounds, they burden parents who wish to send their children to religious schools; if they do not strike it down they are aiding religion in possible violation of the establishment clause. The justices disagree, however, over how this aid program fits within the requirement of neutrality. Black compares it to fire and police protection, whereas Rutledge likens it to governmental provision of textbooks, lunches, and athletic equipment.

All agree that the state can provide police and fire protection, sewage disposal, and roads to religious institutions without breaching the "wall of separation" between church and state. But how can those provisions be distinguished from illicit forms of aid? Justice Black gives little indication, noting simply that government should be neither the adversary nor the advocate of religion. To withhold basic public services, including transportation of children to school, would make the state an adversary of religion, he thinks, whereas providing them does not violate neutrality.

Justice Rutledge argues in dissent that no clear line can be drawn between transportation and other forms of aid that everybody agrees are illicit—purchasing textbooks, for instance. In one sense, this is obviously right. Whether the school is helped

by free transportation or free textbooks, it will then be able to spend the savings elsewhere. Rutledge therefore claims that the real distinction separates governmental functions, such as police and fire protection, which are "matters of common right, part of the general need for safety," from others, such as reimbursement for transportation, which are not matters of common right. Yet, as Justice Black says, it is at least arguable that a public purpose—increased safety—is enhanced by providing children with transportation to school. And in any case Rutledge's suggestion in a footnote that transportation, unlike police and fire protection, does not require special appropriation simply assumes that in the nature of things police and fire protection is provided to everybody and transportation is not.

But why assume that ? Suppose fire protection were purchased from independent companies, as is done in some rural areas. Would that mean, on Rutledge's view, that state payment of the fee for churches would violate the establishment clause? If the key is whether the government provides a service to everyone needing it out of general tax revenues, then New Jersey's law would pass constitutional muster since it provided everybody with the benefit of free transportation to school. The distinction between fire protection and transportation to school seems to depend on prior assumptions and social practices already in place, so that the attempts to decide the case by distinguishing "public" from "private" purpose is circular.

Despite these difficulties, the Court has since used the establishment clause to turn back some governmental programs and accept others, although it is far from clear what principle the Court has used. The Court overturned laws that lent parochial schools instructional materials and that provided them with remedial reading instructors,[7] although it allowed states to reimburse schools for the costs of administering state-mandated tests and meeting record-keeping requirements[8] and to lend secular schoolbooks to all students within the state.[9] It has upheld state tax deductions for expenses incurred by parents who send their children to religious schools[10] but denied state tuition grants for the same purpose.[11] It allowed tax money to pay for construction at religious colleges, though it required that the buildings never be used for worship or other religious purposes.[12]

It's easy to conclude that these lines are arbitrary, and there is little suggestion from *Everson* or elsewhere about why some proposals pass muster and others do not. Perhaps, however, we get off the track by focusing solely on the economic impact of the aid. Some of the programs that the court rejected—tuition grants to parents, for example—would tend to convey an image of official endorsement much more strongly than others, such as reimbursing schools for the costs of keeping records required by the state. If that distinction is important, and it seems that it is, then the establishment clause has both an objective and a subjective component: not only is government limited in the amount of direct financial aid it provides to religious schools but it also cannot appear to place the power of the government behind religion. So the establishment clause asks not just how much help is actually granted but also how the help will be perceived. This symbolic element in the establishment clause was identified by Justice Brennan in a case involving publicly financed programs that sent teachers into parochial schools to teach "enrichment" courses during the regular school hours. In rejecting the program, he wrote that an important element is:

> whether the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and the nonadherents as a disapproval, of their individual religious choices. The symbolism of a union between church and state is most likely to influence children of tender years.[13]

If the establishment clause requires government to remain neutral, neither hindering nor aiding religion, even if only symbolically, then we confront an interesting question: what about a voucher system that parents could then use to send a child to the school of their choice? Given the Court's rejection of tuition grants to parents, it is hard to imagine this proposal's being upheld, but it is nonetheless illustrative of the crosscurrents that courts face. One objection, of course, is that such a plan would threaten public education. But even if true, why would replacing relatively homogeneous public schools with more diverse private ones be a bad thing, and in any case why should the Court make that judgment rather than elected officials? Perhaps the point is the familiar one that public education serves to provide both a basic education and a common culture. But the federalist ideal of neutrality calls into question that whole rationale for public education, asking why government should be permitted to smooth out such differences among groups. Neutrality argues for more, rather than less, protection of the independence of religions, and the homogenizing view of education seems contrary to the spirit of neutrality. Perhaps, then, it is the symbolism that would undo the voucher system, although it is not entirely clear why. Vouchers provided to all parents should arguably not be taken as an endorsement of a particular religion or even of religions in general. Atheists would presumably be free to set up schools that reflect their views, just as religious people could. But even if that is true in theory, the symbolic value may be different, for it depends on how the program is perceived rather than on what it actually does. These are hard questions, and we will see them reappear when we consider government-sponsored displays of Christmas symbols.

None of the school aid cases generated as much controversy—or anger—as the ban on state-supported prayer in public schools. School prayer raises deeper questions than school aid, forcing us to look more closely at the purposes served by the clause. Even those who share a broadly federalist commitment to neutrality often disagree over what it means.

Madison's reasons for opposing established churches were complex. In 1787 he analyzed the weaknesses of the Articles of Confederation in a widely published pamphlet he hoped would help bring about their revision or replacement. After noting that factions based on property and other interests could lead to despotism and anarchy, he wrote:

> Whenever therefore an apparent interest or common passion unites a majority, what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals? Will religion be sufficient restraint? Quite the reverse. The conduct of every popular assembly acting on oath, the strongest of religious ties, proves that individuals join without remorse in acts, against which their consciences would revolt if proposed to them under the sanction, separately in their closets. When indeed Religion is kindled into enthusiasm, its force like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of religion, and while it lasts will hardly be seen with pleasure at the helm of Government.[14]

Rather than serving the ends of government, "religious enthusiasm" endangers them. Years later, in a letter to Edward Livingston, Madison again expressed his distrust of any "alliance or coalition between government and religion." Religion and government, he said, "will exist in greater purity, the less they are mixed together.[15] The federalist writer Elihu went even further, remarking that as religion has faded "the light of philosophy has arisen . . . mankind are no longer to be deluded with fable."[16] So the Federalists' desire to maintain a wall between religion and government rested on two dangers of religious "zeal." It threatens the harmony and even health of the political process and the rights of religious minorities.

Republicans saw the relationship between government and religion in an entirely different light, in part because they believe government should encourage virtuous behavior, including certain visions of how people ought to live. Consistently with that, they hoped that state governments would continue to encourage religious belief among citizens, feeling that religious convictions were essential if republican government were to succeed. Ironically, it was for that reason that they insisted on the First Amendment—not to keep religion and government separate but to provide insurance against federal intrusion into this important local function. So while agreeing with Madison on the importance of protecting religious freedom against the national government, they did so for a different and incompatible reason—namely to protect the close relationship between state government and religion. As we will shortly see, however, these disagreements mask even more fundamental ones about the nature of morality and its connection with religion.

The first school prayer decision, *Engel* v. *Vitale*,[17] was announced the same day in 1962 as *Baker* v. *Carr*,[18] which opened up the legislative redistricting processes to Supreme Court scrutiny. Despite its far-reaching implications for how the American political system works, the redistricting case provoked only mild reaction compared with the school prayer case. Evangelist Billy Graham proclaimed, "God pity our country when we can no longer appeal to God for help," and the Jesuit weekly *America* called the opinion "asinine, stupid, doctrinaire, and unrealistic."[19] Former Presidents Hoover and Eisenhower both expressed shock at the decision. U.S. Representative Andrews complained that "They put negroes in to the schools and now they have driven God out of them." New York Representative Rooney saw the decision as "Communistic."[20]

Engle struck down a New York state law requiring teachers to read a prayer to their classes each morning. The prayer, composed by the New York State Board of Regents, read: "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers, and our country." In his opinion, Justice Black explained why he thought it important to keep political and religious institutions separate.

> The purposes underlying the Establishment Clause rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of the governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect, and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of

> government to spread its faith. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[21]

Justice Black sounds very much like James Madison, stressing the dangers of religious establishment both to the political process and to religious institutions. If government allies itself with one particular religion, the inevitable result is that government will incur the "hatred, disrespect, and even contempt of those who [hold] contrary beliefs." Establishment leads to government persecutions and to political strife, perhaps even to the "destruction of government." Nonestablishment also serves the religious objectives, since religion loses support when government tries to coerce belief.

Modern history provides still another view of the dangers of religious establishment, one that fits nicely with Madison's position and also with the Federalists' oft-expressed faith in separation of powers. The twentieth century is replete with examples of the dangers of unchecked state power, including fascism and Stalinism. But we have also learned that one way to reduce the dangers of statism is to ensure that its power is balanced by other institutions. An independent press is valued for this reason and, as the experience of Poland and Latin America in the 1980s suggests, religious institutions can also serve that function. If religion is to fulfill that function and provide a check on state authority, however, it cannot become entangled with and dependent on government.

The establishment clause relies on the assumptions that by remaining neutral, government reduces popular resentment of both governmental and religious institutions, and that by encouraging strong, independent religious institutions it helps check governmental power. Though he did so in *Everson*, Justice Black did not say in *Engel* that government cannot support religion in general. He claimed in *Engel* only that it cannot interfere in a way that supports "one particular religion." In his concurring opinion, Justice Douglas took that stronger view, although he failed to win the support of a majority of the Court. The First Amendment, Justice Douglas wrote,

> leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the non-believer—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force.[22]

Justice Black's opinion represented a retreat from the stronger, federalist version of neutrality he articulated in *Everson*. It also avoided confronting directly an issue that divided Federalists like Madison from Republicans: can a government or society survive and prosper if its children are not provided religious instruction?

This issue came to a head a year later in *Abingdon School District* v. *Schempp*[23] (1963), when the Court rejected a school board's claim that religious instruction was acceptable in public schools because of the secular, ethical purposes it serves. Pennsylvania law required that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." Unitarian and atheist parents brought suit, arguing that the law violated the establishment clause. Justice Clark delivered the opinion of the Court.

> The wholesome "neutrality" [toward religion] of which this Court's cases speak [stems] from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. . . . What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . . The trial court has found that such an opening exercise is a religious ceremony and was intended by the State to be so [But the states contend] that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. [But] even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid. . . .
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> The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel*. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.

Justice Clark identified two tests an activity must pass to be consistent with the establishment clause: the government must have a secular purpose and the primary effect of the practice must be neither to advance nor to inhibit religion. New York argued that the secular purposes and effects of this policy were to promote moral values, counter materialistic trends, and teach literature. Justice Jackson disagreed. Although he did not deny that these three were part of the reasoning behind the practice, there can be no doubt, he observed, that the Bible is a religious work. The rights of atheists to determine for themselves which way of life to pursue cannot be ignored in the name of promoting moral virtue; and religion, though perhaps useful in moral teaching, is hardly essential.

This is not a new issue, of course. Madison feared deeply the effects of religion, and Elihu even expressed hope that such "fables" would be replaced by philosophy. Strong neutrality—the unwillingness to support any religion, even if done in a neutral way—not merely reflects the rejection of the idea that religion is essential for morality but also demonstrates Madison's fear of the majority, especially when under the influences of religious passion.

The response of republican Anti-federalists is that a decent concern for the well-

being and rights of others and for the value of community depends on governmental support of religious training and belief. Far from being a danger, say many Republicans, religion is vital for self-government and respect for others. That claim is at the heart of the debate over prayer in schools and the requirement of neutrality.

How, then, might it be argued that religious worship is an important or even necessary part of education? The typical republican answer was offered in a letter to Madison from Richard Henry Lee: "All experience," he wrote, "shews religion to be the guardian of morals."[24] Another Republican went further, emphasizing that religion, along with reward and punishment, was the only way of controlling the "turbulent passions of mankind." It is easier, he wrote, "to build an elegant house without tools to work with, than it is to establish a durable government without the public protection of religion."[25] Far from threatening political harmony, religion is essential for people to live together. Without the fear of punishment associated with religion, the state is subject to the passions of the masses—just the opposite of Madison's position.

Still another Republican, Charles Turner, wrote: "Without the prevalence of Christian piety and morals, the best republican Constitution can never save us from slavery and ruin." Religious education, he said, must be "adequate to the divine, patriotick purpose of training up the children and youth at large, in that solid learning, and in those pious and moral principles, which are the support, the life, and *soul* of republican government and liberty."[26] For Turner, then, the issue is less one of motivation than of education: how, he asks, can people be expected to know right from wrong without the help of religious instruction?

We have, then, two arguments: that religion is necessary to provide motivation to be moral and that it provides people with guidance in seeking to learn what is right. The first emphasizes that people need the fear of God's wrath and the hope of eternal life in order to be motivated to do the right thing. People cannot be counted on to eschew self-interest, so religion encourages moral behavior by welding self-interest and morality into a single, coherent requirement. A less harsh, but similar, suggestion is that religious training encourages children to be moral by showing them how to make their lives harmonize with the purposes and intentions of God. So on this view religious people, when doing the right thing, are acting not necessarily from self-interest—out of fear of divine punishment, for example—but out of love of God.

This argument assumes, however, that the only or at least the most important reasons for acting morally are religious ones. Yet people typically have many reasons for doing the right thing, and often religion is not given a thought. Fear of punishment by legal authorities or parents is often important, as are fear of embarrassment at being caught and the simple desire to do the right thing and not hurt others. It is far from clear, in fact, that religion adds much to these. Do you refuse to kill or cheat because you fear religious sanction or because you don't want to get caught, be embarrassed in front of others, or feel guilty afterward? Maybe it's just because you just don't want to hurt another person, or else you think of yourself as an honest person and don't want to change. To say that morality needs religion is at best an exaggeration.

Perhaps, however, we have missed the point. Another claim, more philosophical than psychological, is that without religion there can *be* no morality and no moral foundation on which to rest democratic institutions. Such a view was expressed, sur-

prisingly, by Justice Douglas, though he regretted it later. In *Zorach* v. *Clauson* (1952) the Court was asked to consider a public school policy giving students time off to attend religious services and instruction away from school. In upholding the policy the Court observed:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[27]

Justices Black and Jackson both dissented in *Zorach*, and Justice Douglas obviously changed his mind in the ten years between *Zorach* and his strong concurrence in *Engel*.

Justice Douglas claims that our institutions are premised on the existence of a Supreme Being. Though he does not explain what he means, the most natural interpretation is that prepolitical moral rights are presupposed by our institutions and that God is the ultimate guarantor of the truth of these premises. The natural rights could include both the right of self-government and the various liberties included in the Bill of Rights; Justice Douglas does not say. The key claim, however, is that just as the laws of the United States depend for their existence on acts of Congress, so too the existence of "self-evident" natural rights depends on God's command: take away the lawmaker, and you have taken away the law.

Assuming that this is not simply a restatement of the earlier point that only religious people have reason to care about morality, the answer to this new claim is twofold. First, Western philosophy has been full of attempts to understand the nontheological basis of natural rights. Utilitarians, for instance, hold that a society comprising people who take care to look out for one another's interests and not harm one another is happier as a whole than one in which people take no interest in the welfare of others; indeed, it's not even clear that human society could exist, much less flourish, without protecting rights to speech and religion, as well as to life and property. In Chapter 3 we saw that it was a utilitarian—John Stuart Mill—who provided the classic defense of free expression. Another attempt to provide a nontheological basis for right comes from the eighteenth-century philosopher Immanuel Kant. For him, morality rests on the foundation of consistency and equal respect for the autonomy of others. To condemn robbery by another yet allow it for oneself is inconsistent, he argued, unless there is some relevant difference between the two situations. Still others, such as twentieth-century philosopher John Rawls, imagine justice as a kind of social contract in which people agree among themselves on the sorts of institutions and rules they will accept. Society, on this view, though marked by conflict, is also an association for mutual benefit. The rules that should govern its institutions are ones that people would agree to under fair conditions, meaning that they would not know their race, sex, talents, and other special advantages or disadvantages in choosing their institutions.

Efforts to rest morality on a secular foundation were well known to at least some of the framers, including Madison and Jefferson, who were especially concerned with insulating politics and religion. Famed English philosopher Jeremy Bentham, the founder of utilitarianism, wrote Madison offering to revise U.S. law in order to better promote happiness. Others at the Philadelphia convention were familiar with the writing of David Hume and other Scottish moral philosophers whose views also did not rest on divine commandments.

A second problem with Douglas's defense of school prayer based on the essential role of religion to our institutions is that it is not clear how religion is in any better position than secular philosophy to justify morality. The story of Abraham, who was willing to murder his son because God commanded it, ought to give us pause about assuming we know what God wants us to do. Murderers often feel divinely inspired. Nor is it clear that we really want to say that morality depends entirely on God's will. If true, that would mean God could make even torture and killing right by ordering them. If we say that God would never order such a thing because they are wrong, as many theists have done, then we have rejected the position that morality depends entirely on God's commands, for rightness is in that sense prior to the will of God.

Although Justice Douglas's claim on behalf of religion is questionable, republican Anti-federalists need not hold such a strong position to defend their views. The republican emphasis on the importance of virtue and community self-government can be, and has been, defended in its own right. Even if constitutional government does not depend on religion, the majority of citizens may still be entitled to define for themselves the nature of their community and the types of people they wish to become. And that definition might be religious. Similarly, the fact that Federalists denied—rightly, I have argued—that religion is not essential for political and social life does nothing to justify attacking it or refusing to accommodate it. For Madison, governmental attacks on religion were just as dangerous as governmental support. We will look again at these issues when discussing the Amish school case, in which the issue is free exercise of religion and governmental actions that threatened a religious community.

Before turning to that issue, we note with interest how outside the context of education the Supreme Court has shown a notable willingness to allow governmental activities that support religion. In a 1983 case, *Marsh* v. *Chambers*, for example, it upheld the Nebraska State Legislature's practice of opening each day's proceedings with a prayer, even when the chaplain was paid by the state.[28] The most controversial of these cases, however, involved a publicly supported display on public land of one of the most holy of Christian symbols—a crèche.

The Pawtucket Crèche

For many years the city of Pawtucket, Rhode Island, and its downtown merchants' association sponsored a display under a large banner that read "Seasons Greetings." In the display were a Santa Claus, reindeer pulling a sleigh, a Christmas tree, some carolers, a clown, an assortment of animals, and a crèche with the familiar figures representing the birth of Jesus in the manger. The focus of the lawsuit was the crèche;

the central question was whether it "established" religion in violation of the First Amendment.

Twenty-three years earlier, the Court had upheld Sunday closing laws, reasoning that despite their original purpose—to get people to go to church—they now served the secular function of providing a "uniform day of rest."[29] The mere fact that the historical explanation of such a law may have been religious, said the Court, does not preclude its continuation if it now achieves a secular purpose. In upholding the constitutionality of prayers at the opening of Nebraska's legislative sessions, the Court had observed in *Marsh* that "There can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of society. It is simply a tolerable acknowledgment of beliefs widely held among the people of this country." Justice Brennan, a Roman Catholic whose religion had been an issue when he was appointed to the Court, had dissented in *Marsh*, claiming that legislative prayers violate the "principles of neutrality and separation." Brennan said they force legislators either to participate or to make a public statement by their refusal, indirectly force voters to support an exercise that may be contrary to their own beliefs, have the potential of degrading religion by mixing it with a call to order, and risk injecting religious disagreement over the content of such prayers or the practice itself into the political process. Similar issues confronted the Court in Pawtucket, when Justice Burger argued that public display of the crèche did not violate the establishment clause. Justice Brennan again differed sharply with the majority, claiming that the crèche neither served a secular purpose nor had a secular effect on those who viewed it. The case was *Lynch* v. *Donnelly* (1984).

> The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, see. e.g., [*Everson*]. The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. . . .
>
> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly: "We are a religious people whose institutions presuppose a Supreme Being." [*Zorach*.]
>
> Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. [Thus,] it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," which Congress and the President mandated for our currency, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year. . . .

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. . . .

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . .

[In] this case, the focus of our inquiry must be on the crèche in the context of the Christmas season. In Stone v. Graham, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause. . . .

The narrow question is whether there is a secular purpose for Pawtucket's display of the crèche. The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. . . .

To conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than [expenditure] of public funds for transportation of students to church-sponsored schools. *Everson*. . . .

We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. . . .

[Here,] whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums. . . .

We are satisfied that the City has a secular purpose for including the crèche, that the City has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government. . . . The display engenders a friendly community spirit of good will in keeping with the season. The crèche may well have special meaning to those whose faith includes the celebration of religious masses, but none who sense the origins of the Christmas celebration would

fail to be aware of its religious implications. That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not, as the dissent points out, determine the character of the display. That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation.

Of course the crèche is identified with one religious faith but no more so than the [prior] cases in which we found no conflict with the Establishment Clause.

Justice Brennan, dissenting.

[After] reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a crèche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the crèche's singular religiosity, or that the City's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. . . .

[The] City claims that its purposes were exclusively secular. Pawtucket sought, according to this view, only to participate in the celebration of a national holiday and to attract people to the downtown area in order to promote pre-Christmas retail sales and to help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season.

Despite these assertions . . . "valid secular objectives can be readily accomplished by other means." Plainly, the City's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display. . . . To be found constitutional, Pawtucket's seasonal celebration must at least be non-denominational and not serve to promote religion. The inclusion of a distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene.

The "primary effect" of including a nativity scene in the City's display is [to] place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche. . . . For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche. . . . The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. . . .

[The] City has done nothing to disclaim government approval of the religious significance of the crèche, to suggest that the crèche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalogue of ethnic and religious celebrations, or to disassociate itself from the religious content of the crèche. . . .

Finally, and most importantly, even in the context of Pawtucket's seasonal cele-

bration, the crèche retains a specifically Christian religious meaning. . . . But for those who do not share these beliefs, the symbolic re-enactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith. [To] be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause. . . .

When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities. . . . But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday, and places the prestige, power and financial support of a civil authority in the service of a particular faith. . . .

The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the crèche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage". . . .

Intuition tells us that some official "acknowledgment" is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people. It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs. . . .

[At] least three principles—tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause—may be identified. First the government may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion. [That] principle would justify government's decision to declare December 25th a public holiday.

Second, our cases recognize that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons. [The] mere fact that a governmental practice coincides to some extent with certain religious beliefs does not render it unconstitutional. Thanksgiving Day, in my view, fits easily within this principle, for despite its religious antecedents, the current practice of celebrating Thanksgiving is unquestionably secular and patriotic. . . .

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. While I remain uncertain about these questions, I would suggest that such practices as the designation of "In

> God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, [as] a form a "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. . . . The crèche fits none of these categories. I dissent.[30]

Neutrality and its specific problems were the major focus in cases involving aid to religious schools, and the role of religion in morality dominated debate in school prayer cases. While *Lynch* involves those issues, albeit in less dramatic form, it provides another focus for our discussion: it upholds the federalist claims that religion endangers the political process and that government must show equal respect by remaining neutral among different conceptions of the good.

The Court had three options in *Lynch:* it could approve the crèche, as it did; it could hold the crèche unconstitutional because it goes further than practices upheld in previous cases, as Brennan wanted; or it could extend the establishment clause to rule out not only crèches but also some of the practices Burger described.

Justices Burger and Brennan both apply the test developed in *Lemon* v. *Kurtzman*[31] (1971), which rejected a Pennsylvania law providing salary supplements for religious school teachers. The *Lemon* test has three prongs, two of which are familiar from Justice Jackson's *Schempp* opinion, discussed above: the statute must have a secular *purpose*, and its primary *effect* must be one that neither advances nor inhibits religion. The third prong requires that the law not foster excessive governmental *entanglement* with religion, as close regulation and supervision would do.

Justice Burger argues that the country has always "accommodated" religion, whatever the sect, while being "hostile to none." He acknowledges, nevertheless, that the crèche "advances religion in a sense" but then claims that such support is consistent with history and legal precedent. Justice Burger then compares the crèche with a range of other activities that are part of U.S. history: Thanksgiving Day proclamations by presidents, the national motto "In God We Trust," and a reference to "one nation under God" in the Pledge of Allegiance. He also observes that "we are unable to discern a greater aid to religion deriving from the crèche" than from other practices the Court has recently allowed; for example, Sunday-closing laws and public payment of chaplains' salaries.

The crèche does not violate the "purpose" prong, according to Justice Burger, despite the fact that it is meant to "take note of" and "celebrate" the holiday. This is because the Christmas holiday has become "secular" and, in any event, the city also intends for the crèche to encourage purchases in the downtown section of the city.

Justice Brennan wrote a vigorous dissent, arguing that the crèche had neither a secular purpose nor a secular effect. If the city desired merely to celebrate the "secular" aspect of the holiday, it could have done so without the addition of the distinctly religious symbol. The effect of the crèche is not neutral among religions, much less between religion and nonreligion. It's a Christian symbol that the Court trivializes and drains of meaning. This display is more than mere accommodation of a recognized holiday; officials are participating in and appear to be endorsing the holy day of a particular religion, albeit the dominant one. Justice Brennan concludes by indicating the three ways government can legitimately acknowledge and accommodate religion, suggesting how most of the cases Justice Burger relied on can be distinguished from

that of the crèche. But the key, for Justice Brennan, is what the crèche says to religious minorities: "Your religion is not worthy of public support and recognition."

Justice Burger's opinion generated widespread comment, much of it critical. It is difficult, at best, to see how the Court can believe that the crèche lacks a religious purpose or that its display does not have the effect of endorsing one religion. What Justice Burger does claim, however, is that the crèche passes the "not much worse than" test: although it does, in fact, have a purpose and effect of promoting religion, this is not much worse than some of the other approved practices. Justice Burger says, perhaps correctly, that "If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution."

Justice Burger mentions Thanksgiving Day proclamations as an example of history's acceptance of government officials' invoking religion. Madison and Jefferson, however, both thought the proclamations inappropriate. Jefferson even refused to comply with Congress's request to make one, saying:

> I do not think myself authorized to comply. I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines. I am aware that the practice of my predecessors may be quoted. Be that as it may, every one must act according to the dictates of his own reason, and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.[32]

Not only would Thomas Jefferson have disagreed with Justice Burger about the constitutionality of such practices, he explicitly rejected reliance on history—which Burger invokes—as a substitute for the "dictates of his own reason." The mere fact that a practice has won historical acceptance, Jefferson stressed, does not determine its constitutionality. Jefferson would not accept the "not much worse than" test, for a simple reason. Since all rights can be destroyed by erosion as well as revolution, none could survive Justice Burger's test.

One reason for concern about religious entanglement with government is its effect on the nation's politics. As an illustration, it is useful to consider the history of some of the practices Justice Burger mentions in defending the crèche. The original motto for the United States, adopted in 1782, was "*E pluribus unum*" (Latin for "out of many, one"), and the back of the Great Seal of the United States originally read "*Novus Ordo Seclorum*" (a "New Order of the Ages"). Coins were originally given the inscription "Mind Your Own Business." These were changed, however, during wartime, when political passion ran high and criticism was suppressed. The Civil War brought substitution of "In God We Trust" on coins, and the Cold War era of the 1950s brought the change in the motto, the reference to God in the Pledge of Allegiance, and the requirement that "In God We Trust" be printed or stamped on money.

Madison often stressed the danger of allowing seemingly minor cracks in the wall separating religion and government, emphasizing that they tend to grow with time, threatening the autonomy of both. Religious "enthusiasm," he said, is dangerous for any government that reflects the will of the people, for it often leads people to do

things they might otherwise regret. Religious differences are frequent sources of conflict, both within and between nations. The connection between war making and increased religious fervor is no accident. When leaders wrap their policies in the emotionally charged rhetoric of religion, the possibility of both thoughtful deliberation and tolerance of criticism diminishes. Patriotism is dangerous enough, but when religious fervor is added the results are rarely helpful and often disastrous.

Besides those fears, however, the establishment clause serves another federalist purpose, one that Madison often mentioned, Brennan stressed in his Pawtucket dissent, and Burger ignored. In attacking a proposal to establish an official church in Virginia, Madison wrote:

> The proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country. Instead of holding forth an asylum to the persecuted, the Bill is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form from the Inquisition, it differs from it only in degree. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven.[33]

The United States is a place, says Madison, where diverse people can hope to achieve equality before the law regardless of their conception of the good: a theme that runs deep in federalist thought and that is a wellspring for the federalist commitment to neutrality. Yet the United States is more diverse today than it was even in the eighteenth century; we include among ourselves millions of people who do not believe in the Christian religion.

Justice Burger dismissed these concerns with the observation that "apart from this litigation there is no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration." Yet that is hardly an answer: the fact that a minority has not destroyed the crèche or demonstrated against its presence is no indication that it is not insulted and alienated by it. When government erects the symbols of the majority religion it alienates minorities from political processes and institutions, treating them as outsiders whose values are unworthy of public support. Even if minorities have come to expect no greater sensitivity from the majority, that hardly proves that the majority owes them no more.

One need only imagine what it would be like to be in the minority to see what Pawtucket means. As Justice Brennan observed, "the essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah." To miss that, or ignore its meaning to those who are not members of the dominant religion, requires either insensitivity to the significance of religious symbols in general or inability to step outside one's own world, where such symbols are a natural and agreeable part of life, to appreciate how the world looks to people who are different. If instead of the familiar Protestant symbol there were a Star of David or a crucifix, it's hard to imagine that the religious purpose and effect would be missed.

The establishment clause expresses a generally federalist outlook. It demands that

government maintain a distance from religion. It reflects a degree of skepticism about the importance of religion for ethics, as well as a concern about the influence of religious passion and divisions on the political process.

Republicans, we have seen, would look at the Pawtucket crèche in a different light, partly because they disagree with Federalists about the importance of religion and its dangers to government and partly because they see government not as a neutral entity committed to equal respect but rather as an institution that can facilitate the growth of communities, including ones informed by religion. For them, equality and individual rights take second place to virtue and the rights of communities to realize their conception of the good life. Unlike the national government, the town of Pawtucket is small enough for citizens to work for these ideals of self-government and self-definition.

In Pawtucket, Justice Burger shows some sympathy with this traditional republican vision, though he does so by refusing to take seriously the federalist purposes behind the establishment clause. The free exercise clause, however, is not in essential tension with the republican view. By guaranteeing that a community is free to exercise its religion, it interposes itself on the community's behalf against government. But as we will see, even here the analysis is not quite so simple, for under some circumstances the twin republican commitments to democratic process and communities can conflict. Free exercise also has a federalist cast since it reflects a commitment to individual rights by protecting people against government.

Avoiding religious coercion—the core of free exercise—has been in the background of the establishment clause cases we have considered. In controversial cases, non-Christians were forced to pay taxes to the government for "Christian" activities and, more important, children were forced either to pray in school or to be singled out for special exemption. But now coercion moves to the center—either coercion of individuals, as Federalists would stress, or coercion and perhaps destruction of communities, as Republicans would emphasize.

6

Free Exercise of Religion

> A jury in Federal District Court here today found two white supremacists guilty in the 1984 assassination of the host of a Denver radio talk show. Assistant U.S. Attorney Thomas O'Rourke described the defendants as "true believers in a religion of losers." According to testimony at the trial, the defendants were members of a neo-Nazi religious cult based in Hayden Lake, Idaho. Their religion, known as the Christian Kingdom Identity Movement, holds that people of European descent are the "chosen people" of the Bible, that Jews are offspring of Satan and must be eliminated in order for Aryans to assume their rightful place as rulers of the world, and that all others are "mud people." "They are totally immersed in this religion," Mr. O'Rourke said.
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> *New York Times* (1987)[1]

> [Given] the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of "anointment," we would be derelict in our duty if we did not hold that respondents have combined to commit a public nuisance. Tennessee has the right to guard against unnecessary creation of widows and orphans. Our state and nation have an interest in having a strong, healthy, robust, taxpaying citizenry capable of self-support and of bearing arms and adding to the resources and reserves of manpower. We, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave.
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> *Tennessee Justice Joe Henry (1975)*[2]

Not only does the Constitution promise that government will not establish a religion but it also assures people a right to free exercise of their own religion. Yet despite the importance of protecting religion, nobody thinks people are entitled to do anything they wish in the name of freedom of religion: laws preventing ritual murder, for example, cannot be made to yield to constitutional claims under the free exercise clause. To have real meaning, free exercise demands more than the abstract freedom of belief

and the right to pray; it must include the right to practice one's religion. Often, however, religious freedom conflicts with government's desire to prevent behavior it regards as harmful, immoral, or offensive to the majority. Two such cases are referred to at the start of the chapter. Though obviously the law cannot protect religiously motivated killing, the Tennessee case is more difficult. There the question is whether people should be allowed to test their faith by following a Biblical requirement to "take up serpents." The Court emphasized the need to protect children; it is less clear whether the state may prevent adults from harming themselves should they freely consent to participate in the ritual. Where are the lines to be drawn? And are the conflicts that arise here similar to those we discussed in connection with establishment, or are they of a different sort?

The Amish School Case

One of the earliest free exercise cases involved a challenge to a Congressional statute making polygamy illegal in the U.S. territories. Members of the Church of Jesus Christ of Latter-Day Saints, who practiced polygamy, had long been subjected to both legal and illegal persecution and were eventually forced to flee from the Midwest to what are now Utah and Idaho. The governor of Missouri used the military to drive them from his state, proclaiming that the Mormons (as they are known) "must be treated as enemies, and must be exterminated."[3] In 1882 Congress denied the vote to anybody in a U.S. territory who practiced bigamy or polygamy, and in 1887 it nullified the Mormon church's charter. The Supreme Court upheld the nullification, calling polygamy "contrary to the spirit of Christianity" and "barbarous." It held that the church was not a charitable or religious corporation because the religious justification of polygamy was merely a "pretense" and polygamy was incompatible with the "enlightened sentiments of mankind."[4] Three years later the Mormon church abandoned the advocacy of polygamy, though in some places it continues to be practiced.

Free exercise became the focus of national attention when a Mormon named Samuel Davis was convicted under a national statute requiring people not to advise, counsel, or encourage anyone to commit the crime of polygamy. He appealed to the Supreme Court. Justice Field wrote the opinion of the Court; the case was *Davis* v. *Beason* (1890).

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.
>
> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of

> obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.[5]

This opinion is remarkable, in part, for its narrow interpretation of the free exercise clause. Religions that deserve protection must fall within the Judeo-Christian tradition, expressing "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Furthermore, religious protection is limited to beliefs and worship, not to other practices; and even these must give way whenever the peace, prosperity, or morals of society conflict. In another polygamy case a few years before, the Court observed: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[6] So there are two reasons why the Mormons' practice of polygamy does not receive constitutional protection: it will damage the "purity of the marriage relation," and it is not protected because it is not a matter of belief and opinion but instead is a practice.

The Court does not even suggest in these cases that the laws against polygamy might be justified on more neutral grounds, such as protection of the interests of children or similarity between this and the issues it later confronted in *Coppage* v. *Kansas* (see Chapter 2). *Coppage* involved coercion and laws preventing yellow dog contracts. The objective of the laws overturned in *Coppage* was to strengthen the bargaining position of workers by preventing managers from requiring them to sign contracts promising not to participate in union activities. Antipolygamy laws, it could be argued, serve the same purpose for women as laws preventing yellow dog contracts did for workers: they make illegal marriage contracts in which there is apparent coercion. Whatever the strength of such arguments, however, they were not the ones the Court relied on.

Instead it argued that because polygamy offends the "Christian world" and is not mere "belief," it is not protected by the Constitution. Even the Court's definition of "Christian" is questionable since Mormons both acknowledge the divinity of Christ and think of themselves as Christians.

Whatever the merits of such laws, the Court has never reconsidered the issue of polygamy. Beginning with a series of cases in the 1930s and 1940s, however, the Court began to extend the protections of the free exercise clause. It overturned the conviction of a Jehovah's Witness for soliciting door to door without first getting a police permit,[7] and it extended the notion of a "religious" practice to include playing a record critical of another religious group. Contrary to its distinction in *Davis* between beliefs, which are protected, and practices, which are not, the Court held in another case that religious freedom includes "two concepts—freedom to believe and freedom to act."[8] It also overturned South Carolina's denial of unemployment compensation to a Seventh-Day Adventist who had been fired for refusing to work on Saturday, her Sabbath.[9]

That case was especially important because the Court refused to say that in denying unemployment compensation the state was merely withholding a benefit; instead it found that the state imposed a "burden" on religions that do not observe a Sunday Sabbath. The Court thus rejected the notion that government should be blind to religion in favor of a requirement that government find ways to accommodate religion by seeking alternative regulations that accomplish its purposes without imposing burdens on the exercise of religion.

Given this evolution of free exercise law since *Davis*, it is no longer clear that government interests in the "purity of marriage" would be sufficient to save antipolygamy laws. It is also possible, however, that another polygamy case would be considered in the context of contraception, abortion, and other issues involving personal privacy—matters we will turn to in the next chapter.

In another of its early free exercise cases, *Pierce* v. *Society of Sisters*[10] (1925), the Court overturned a state law requiring all students to attend public school. In doing so, however, the Court focused on the interests not of the child but of the parents, "those who nurture him and direct his destiny" and therefore have the right to "prepare him for additional obligations." In *Prince* v. *Massachusetts*[11] (1944), however, the Supreme Court did consider the child, agreeing that a state's interests in protecting children from burdensome work justified Massachusetts's law preventing parents from making children sell religious literature on the streets.

The Court's strongest statement of the rights of children came in *Meyer* v. *Nebraska*[12] (1923), when it overturned the conviction of a teacher for giving instruction in German. The Nebraska law, passed in a fit of anti-German sentiment during World War I, forbade the teaching of "any language other than English." Noting that children in Plato's *Republic* were to be raised entirely by the state, not even knowing who their parents were, and that in Sparta children were educated in barracks by public officials "in order to submerge the individual and develop ideal citizens," the Court went on to emphasize the important role of the family in protecting the interests of children.

The most interesting—and complex—of the free exercise cases was *Wisconsin* v. *Yoder* (1972). Wisconsin law required all children to be sent to school until the age of 16. The Amish parents of two children, ages 14 and 15, refused to comply, arguing that the compulsory attendance law violated the free exercise clause. Chief Justice Burger wrote the opinion of the Court.

> On complaint of the school district administrator for the public schools, respondents [Mr. and Mrs. Yoder] were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each. Respondents defended on the ground that the application of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. . . . The State stipulated that respondents' religious beliefs were sincere.
>
> In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more

general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. . . .

Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. . . .

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education . . . takes [Amish children] away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. . . . And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. . . .

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. . . .

On the basis of such considerations, [an expert] testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. . . .

In order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. . . .

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

of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world. . . ." . . .

Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical. . . .

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. . . . It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. . . .

Whatever their idiosyncrasies as seen by the majority, . . . the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. . . .

This case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . .

To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole.

Mr. Justice Douglas, dissenting in part.

The Court's analysis assumes that the only interests at stake in the case are those

of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

No analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. . . . And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. . . . Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

These children are "persons" within the meaning of the Bill of Rights. . . . While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. . . .

If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . .

[In the polygamy cases,] action which the Court deemed to be antisocial could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his "choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." That is contrary to what we held in *United States* v. *Seeger*, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said: "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately 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. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

Welsh v. *United States* was in the same vein. . . .

The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words: "I believe that human life is valuable in and of itself; in its living: therefore I will not injure or kill another human being. This belief

> (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: *it is essential to every human relation*. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant."
>
> I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race.[13]

The differences between the majority opinion here and the crèche case are striking. As Justice Burger saw it, the fundamental issue in *Yoder* is the right of parents to guide the religious future and education of children, a right he says is "established beyond debate as an enduring American tradition." Wisconsin responded by stressing the interests of the children that are at stake: their ability to participate in the political process and their need to be prepared to become full-fledged members of society. Burger responds by emphasizing that the education that Amish children receive is sufficient to prepare them for Amish life and that the Amish are a "productive and law-abiding community" that rejects welfare. Justice Douglas's dissent stresses that there are three, not two, sets of interests here. Not only must the parents and the state be heard but also the children, and only one of them testified in the trial, though she said that she was opposed to public education. Nobody doubts that children are persons and that they have (some) constitutional rights. Specifically, Douglas worries that these young people will be "forever barred from entry into the new and amazing world of diversity that we have today."

The triangle of interests in this case of parents, children, and the general society (represented by the state) lie at the heart of the *Yoder* debate.[14] But what, exactly, are those interests? Obviously the society as a whole, represented by Wisconsin, needs to have citizens who are law abiding, self-sufficient, and able to participate in the processes of general self-government. The Amish system of education meets the first two requirements, but the third only partly. An understanding of the outside world, which includes complex national and international issues, is difficult at best without at least a high school education. Yet even illiteracy is not sufficient reason to deny people the right to vote, and Old Order Amish children are not illiterate. Furthermore, although it is difficult to participate in politics without some understanding of complicated national and international issues, the Amish believe they should reject such worldly concerns.

The Amish parents have two interests at stake here. First, they care deeply about their children, and how children are socialized and educated profoundly affects them now and in the future. They do not want their children to attend public secondary school because it threatens to lure children away from them and from traditional Amish life and because they believe it does not offer the best education for their children. Second, like many other people, the Amish wish to perpetuate their community and way of life. The right to raise children as Catholic, Jews, or Old Order Amish is essential if minority religious communities are to be maintained.

Other considerations also suggest allowing control over raising children to remain with parents. One claim is that doing so serves the child's interests better than state control, for two reasons. Parents typically care more for the interests of their children than do strangers, including government employees. Furthermore, children's need for

affection is better satisfied in the context of family life and parental upbringing than in a public institution. A second argument is similar to one considered in an earlier section. There is danger from state power if the government is allowed to take and raise children. The family, like the church, can provide a counterbalance to governmental power.

It has also been suggested that the fact of reproduction gives parents the right to control the upbringing of their children.[15] But this argument seems wrong, for the reason that children, unlike other biological products, are people. Adults can sell or destroy their blood, for example, without raising the same moral or legal questions as sale or murder of children. We also make no distinction, legally or morally, between the rights of biological parents and of those who adopt children, as we presumably would if biological reproduction were an important part of parental authority.

Despite the difficulties with the last argument, we are still left with a range of factors supporting the claim that children are best raised by parents: parents have important interests at stake, including the perpetuation of their communities; parents do a better job of raising them; and there are political advantages to strong, independent families rather than state-controlled nurseries. Not all these arguments seem strong, however: that parents are better at raising children is at best only a generalization with many exceptions, and the political advantages of having independent families could survive modest regulation, including mandatory schooling until age 16. So the key claim is the one stressing the interests of the parents in perpetuating their religious tradition and community. But does that dictate how *Yoder* should be decided? The answer depends on how one thinks about the importance of protecting religious communities, how one views the rights of children, and, most basically, how one sees the purpose of government.

Justice Burger's opinion seems to show sympathy for federalism. Wisconsin cannot, he says, require high school education when doing so would have the effect of undermining the Amish religion. Such mandatory school attendance would violate the ideal of neutrality. Living and studying in the outside world foster religious skepticism and encourage children to pursue the alternative ways of life they encounter in the classroom and among fellow students. It's not that the Amish want to maintain ignorance for its own sake; rather, to survive, the Amish must teach children a sense of identity with the community and a commitment to its values at an early age, away from influences of the outside world.

That federalist reading of the opinion misses two other points Burger stresses, however. Justice Burger paints a picture of Amish life as a simple, happy one. Not just any religion, he says, can expect to have so much weight given to its free exercise claim, for it seems to have mattered to Justice Burger what Amish values are and what the Amish community stands for, as well as the fact that the Amish are law abiding and rarely need welfare. Partly because they represent a way of life that he found appealing, the state should not interfere.

Nor is it clear on a federalist reading why Burger would distinguish genuinely religious beliefs from Thoreau's "subjective evaluation and rejection of the contemporary secular values accepted by the majority," which are based on the "philosophical and personal rather than religious." Why should only views that fit the majority's conception of religion be protected by free exercise, leaving the Amish protected but not

the conception of the good held by philosophers like Thoreau? Again Justice Burger seems to qualify his apparent federalist commitment. And these republican themes in Burger's opinion square, of course, with the fondness for Christianity he manifested in the crèche case.

Justice Burger also never really answers the federalist charge that there may be Amish children who, if given the alternative, would eventually choose a very different life. Burger's observation that the practical training and good work habits would be useful in seeking work elsewhere does not take seriously the coercive aspects of Amish life.

Justice Douglas's dissent also shows the crosscurrents of federalism and republicanism that lie under the surface in *Yoder*. On one hand, he suggests that the children should be consulted and so takes a step toward the federalist ideal of protecting individual rights and autonomy. Federalists will tend to see education as a way to develop critical powers and acquire a broad knowledge of the world and its variety; it's a necessary part of the emphasis on individual freedom and choice. Education can provide the means to learn who we want to be and to express our nature as free and rational persons. From the federalist perspective, Burger's opinion seems to ignore Amish children's right to learn enough about the world for them freely to consent—or not—to remain with the Old Order Amish. Education develops in children the ability to make informed choices among different conceptions of the good life, and so the Amish elders' desire to keep the children out of high school looks like a violation of their liberty. Choices made in ignorance of the alternative are not fully free.

On the other hand, if we shift the focus away from the children to the Amish community, Douglas's view appears more republican. By allowing the state to mandate school attendance, he would permit government to undermine the Amish conception of the good in favor of a more "modern" way of life. So whereas from the perspective of the children Douglas may seem to be in tune with Federalists, like Burger's his opinion also bears the imprint of the opposing view.

Unlike many other cases, *Yoder* does not present a clear line between Federalists and Republicans. Justice Burger shows sympathy with Federalists by protecting the Amish from the state, yet backs away from neutrality by stressing the merits he sees in the Amish way of life. Douglas's opinion also shows the same strains. His federalist emphasis on the autonomy and rights of children is in tension with a republican willingness to violate neutrality and allow mandatory school attendance.

Yoder is interesting in another way, for it poses a challenge to the practicability of federalism's ideal of neutrality. Indeed, *Yoder* suggests that it may not be possible for education ever to be really neutral among different conceptions of the good life and that tolerance may be just a cover for the dominant ideology. In fact, this argument goes, *all* education, including the secular one that Wisconsin proposed, teaches some values over others, forecloses some options and encourages others. The state's education will emphasize competition, acquisition of wealth, secular world views, and intellectuality, whereas the Amish emphasizes cooperation, lack of concern for material goods, a religious world view, and the importance of physical rather than intellectual labor. This argument is critical not only for the *Yoder* case but also for the larger debate between Federalists and Republicans, for it attacks federalism at its heart—the com-

mitment to neutrality—by claiming that neutrality is an impossible goal. We will look at that charge in the next section.

In addition to these deep and familiar disagreements about the purposes and limits of government, *Yoder* also poses the question of how "religion" should be understood. Justice Burger defines the term narrowly, limiting the religion clauses to traditional, organized, and familiar religions. But as Justice Douglas says, the Court has already rejected that path in other areas such as conscientious objection. Christian fundamentalists also raised the question of how to understand the concept of religion used in the two clauses by charging that public education establishes the religion of "secular humanism." From their perspective, teaching evolution and other aspects of modern science not only conflicts with their religious views but also violates the establishment clause.

Both these issues—the definition of religion and the possibility of neutrality—were confronted squarely in a 1987 Alabama case, *Smith* v. *Board of School Commissioners of Mobile County*,[16] which gained national attention when a federal judge agreed with religious fundamentalists that secular humanism is the established religion of the public schools.

Establishment Revisited: Secular Humanism and the Ideal of Neutrality

In *Yoder*, Justice Burger describes the task of deciding which beliefs are to count as "religious" as a "most delicate question." The Old Order Amish sect qualifies, he said, because its members have a deep conviction, it is an organized group, and its beliefs are intimately related to daily living. He also mentions the Amish commitment to the Bible. Justice Douglas, however, emphasized that recent cases have expanded the definition of religion beyond the Judeo-Christian one offered a century ago in the polygamy case, *Davis*, v. *Beason* (1890).

In *Davis* the Court defined religion narrowly, in terms of a person's "relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." But the requirement of belief in a supernatural being has since been rejected by the Court. Justice Black listed examples of religions that do not assert the existence of a God in *Torasco* v. *Watkins* (1961): "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, ethical culture, Secular Humanism, and others."[17]

The Court later explained its definition when it interpreted congressional statutes excusing conscientious objectors from military service. There the court held that as long as a belief occupies a "place in the life of its possessor paralleled to that filled by the orthodox belief in God" the believer qualifies for the exemption.[18] In a later case, *Welsh* v. *United States*[19] (1972), the Court explicitly stated that "beliefs which are purely ethical or moral in source and content" can occupy the same position as theistic ones and thereby entitle a person to conscientious-objector status.

One reason the definition of religion has been broadened is that the United States has become a more diverse nation in the past century. Today there are something like

250 major religions in this country, not including hundreds of other splinter groups.[20] There is great diversity within Christianity, wherein many have rejected the traditional definition of God as an independent, personal creator in favor of more naturalistic conceptions such as the "ground of our being."[21] The Court has largely mirrored these changes, expanding the definition of religion in the religion clauses and elsewhere to fit with people's changing beliefs and practices.

By limiting itself to traditional definitions of religion the Court also risks unfair discrimination. If "religion" is understood narrowly, so that only beliefs closely resembling those of traditional Judaism and Christianity can qualify, then the Constitution would allow government to benefit or penalize one religion on the basis of the content of its teachings. It seems unfair to exclude from protection a person whose system of beliefs occupies the same position as a more traditional religion might for someone else. In other times and other places, Christianity and Judaism have seemed subversive.

The Court has not been willing, however, to allow just anything to count as a religion. During the 1960s, courts refused to exempt from drug laws a newly formed religion that claimed the hallucinogen LSD as part of its ritual, in part, no doubt, because the Court suspected that the motivation of the faithful was less religious than chemical. A California court refused, on the other hand, to allow the state to ban the drug peyote when used by the Native American Church, basing its decision on the history of the church and the sincerity of its members.[22]

Given the central role religious beliefs play in many people's lives, it is neither realistic nor fair to protect some religions but not others. So it seems that the definition of religion should be broad. To prevent people from practicing their religion creates deep conflicts of conscience, alienates them from the Creator, challenges their integrity, and frustrates the mission and purpose of their lives. This importance of religion also explains why the courts have been less concerned about a practice like drug taking when it is evidently not part of a deeply held religious conviction. Although people may fervently want to use drugs, they do not have nearly as much at stake as either followers of traditional religions or conscientious objectors. Such beliefs do not, as the Court itself said, occupy the same place in people's lives. But if the importance of the belief is what lies behind the special accord given to religion, then why treat nonsupernatural beliefs differently?

In an earlier discussion of the establishment clause, I argued that religious motivations are not necessary in morality and that it is possible for ethical beliefs to be held with the same intensity as religious ones. In that case, persons forced to violate their ethical codes could be just as alienated from themselves and filled with guilt and anguish as persons prevented from practicing religion. The expansive definition of religion makes sense, then, both because of increased religious diversity among Americans and out of a concern to avoid bias against unfamiliar or minority views.

Yet if religion is defined broadly enough to cover all the religions Justice Black mentioned, including secular humanism, then it is possible for groups like the Amish to argue not just that free exercise rights were violated but that the state of Wisconsin was teaching a "religion" in its schools. Conservative Christians succeeded in making just that argument in federal court, demanding that public schools not teach the religion of "secular humanism." The principal actor in the drama is a district court judge

in Mobile, Alabama, named Brevard Hand. The case began in 1982 when Judge Hand tried to uphold an Alabama law authorizing a one-minute period of silence in public schools "for meditation or prayer" and suggested in his opinion that if Alabama wished, it could establish a state religion.[23] The court of appeals disagreed sharply with Judge Hand, calling the judge's views on the establishment clause "remarkable." The Supreme Court, predictably, agreed with the reversal of Judge Hand's decision upholding an official moment of silence because, it said, the Alabama legislature enacted the bill "for the sole purpose of expressing the state's endorsement of religion" in violation of the First Amendment's establishment clause.[24] (The Court did not, however, ban prayer from the schools, as is sometimes suggested; it simply said that there can be no *official* prayer, run by the state. Children are and always have been free to pray in private.)

But Judge Hand did not let the issue die. He suggested in his opinion that, should it be overruled (as it was), he would then be willing to consider arguments that the school board had established another religion—secular humanism—in violation of the establishment clause. A group of plaintiffs took the Judge up on his offer and filed suit. After the trial, which included many expert witnesses on both sides, Judge Hand wrote a lengthy opinion contending that secular humanism is a religion and that the Mobile school board "established" it by virtue of its choice of textbooks. The case was *Smith* v. *Board of School Commissioners of Mobile County.*

I. A *First Amendment Definition of Religion*

The Supreme Court has never stated an absolute definition of religion under the first amendment. . . .

The court's focus has shifted over the years from monotheism to a broad and mayhap vague notion of ultimate concerns and equivalent beliefs. . . .

Out of these cases can be discerned several threads. First the requirement of neutrality affirmed in . . . the cases means that the Constitution protects every religious belief without regard to its theological foundations or idiosyncrasies. Second, what is religious is largely dependent on the way people in America currently think of religion, and this is a product of our past as a people. Third, the government cannot hinder or prohibit the growth of new beliefs by its definition of religion, since this growth is a product of the fundamental rights guaranteed by the first amendment. Fourth, the government is still obligated to perform its essential functions, thus reasonable boundaries may circumscribe acts performed in the name of religious freedom. . . .

These ideas revolve around an individualistic and subjective view of religion, as opposed to the objective test of the Mormon cases. Thus, in *Seeger* each claimant was found to have a sincere and meaningful belief that occupied "a place in the life of its possessor parallel to that filled by the orthodox belief in God." . . . In *Welsh* the petitioner held beliefs that were moral and ethical, and would not himself characterize them as religious, yet he was granted the exemption, the Court equating his beliefs with religious ones because they were held with equivalent strength.

The application of these principles to the question of what constitutes a religion under the first amendment indicates that the state may not decide the question by reference to the validity of the beliefs or practices involved. . . . The state must instead look to factors common to all religious movements to decide how to distinguish those ideologies worthy of the protection of the religion clauses from those which must seek refuge under other constitutional provisions.

Any definition of religion must not be limited, therefore, to traditional religions, but must encompass systems of belief that are equivalent to them for the believer. . . . The Supreme Court has focused on such factors as a person's "ultimate concern," organizational and social structure, and on equivalency to belief in a Supreme Deity. All of these are evidence of the type of belief a person holds. But all religious beliefs may be classified by the questions they raise and issues they address. Some of these matters overlap with non-religious governmental concerns. A religion, however, approaches them on the basis of certain fundamental assumptions with which governments are unconcerned. These assumptions may be grouped as about: (1) the existence of supernatural and/or transcendent reality; (2) the nature of man; (3) the ultimate end, or goal or purpose of man's existence, both individually and collectively; (4) the purpose and nature of the universe. . . .

Whenever a belief system deals with fundamental questions of the nature of reality and man's relationship to reality, it deals with essentially religious questions. A religion need not posit a belief *in* a deity, or a belief *in* supernatural existence. A religious person adheres to some position on whether supernatural and/or transcendent reality exists at all, and if so, how, and if not, why. A mere "comprehensive world-view" or "way of life" is not by itself enough to identify a belief system as religious. A world-view may be merely economic, or sociological, and a person might choose to follow a "way of life" that ignores ultimate issues addressed by religions. . . .

There are also a number of characteristics exhibited by most known religious groups to which courts can look when trying to determine if a set of theories or system of ideas is religious in nature. First would be the sincerity of the adherents' claims. . . . Another factor is group organization and hierarchical structure, which evidence the social characteristics of a movement, and show that the adherents sincerely follow a theory of human relationship. Literary manifestations of a movement may also be important, particularly if they take the form of an authoritative text. Ritual and worship also would be significant because they would be evidence of the religion's belief about supernatural or transcendent reality. . . .

II. *Humanism a Religion?*

In the present case, the plaintiffs contend that a particular belief system fits within the first amendment definition of religion. . . . All of the experts, and the class representatives, agreed that this belief system is a religion which: "makes a statement about supernatural existence a central pillar of its logic; defines the nature of man; and sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose." . . .

It purports to establish a closed definition of reality; not closed in that adherents know everything, but in that everything is knowable: can be recognized by the human intellect aided only by the devices of that intellect's own creation or discovery. The most important belief of this religion is its denial of the transcendent and/or supernatural: there is no God, no creator, no divinity. By force of logic the universe is thus self-existing, completely physical and hence, essentially knowable. Man is the product of evolutionary, physical, forces. He is purely biological and has no supernatural or transcendent spiritual component or quality. Man's individual purpose is to seek and obtain personal fulfillment by freely developing every talent and ability, especially his rational intellect, to the highest level. Man's collective purpose is to seek the good life by the increase of every person's freedom and potential for personal development.

In addition, humanism, as a belief system, erects a moral code and identifies the source of morality. This source is claimed to exist in humans and the social relationships of humans. Again, there is no spiritual or supernatural origin for morals: man is

merely physical, and morals, the rules governing his private and social conduct, are founded only on man's actions, situation and environment. In addition to a moral code, certain attitudes and conduct are proscribed since they interfere with personal freedom and fulfillment. In particular any belief in a deity or adherence to a religious system that is theistic in any way is discouraged.

Secular humanism, or humanism in the sense of a religious belief system, (as opposed to humanism as just an interest in the humanities), has organizational characteristics. . . .

These organizations publish magazines, newsletters and other periodicals, including *Free Inquiry, The Humanist* and *Progressive World*. The entire body of thought has three key documents that furnish the text upon which the belief system rests as on a platform: *Humanist Manifesto I, Humanist Manifesto II*, and the *Secular Humanist Declaration*. . . . Secular humanism is religious for first amendment purposes because it makes statements based on faith-assumptions.

To say that science is only concerned with data collected by the five senses as enhanced by technological devices of man's creation is to define *science's* limits. These are the parameters within which scientists function. However, to claim that there is nothing real beyond observable data is to make an assumption based not on science, but on faith, faith that observable data is all that is real. A statement that there is no transcendent or supernatural reality is a *religious* statement. . . .

To demand that there be physical proof of the supernatural, and to claim that an apparent lack of proof means the supernatural cannot be accepted, is to create a religious creed. It is not scientific to say that because there is no physical proof of the supernatural, we must base moral theories on disbelief and skepticism. If there is no evidence, the theory, one way or the other, has nothing to do with science. Religious persons can and do conduct rational and systematic debate on matters of *faith*. The physical sciences do not preclude religion and religious faith. They examine other areas of inquiry, and are unconcerned, yet compatible with, religious inquiry. The Court is holding that the promotion and advancement of a religious system occurs when one faith-theory is taught to the exclusion of others and this is prohibited by the first amendment religion clauses.

For purposes of the first amendment, secular humanism is a religious belief system, entitled to the protections of, and subject to the prohibitions of, the religion clauses. It is not a mere scientific methodology that may be promoted and advanced in the public schools.

III. *Religious Promotion in Textbooks?*

. . .[T]he Supreme Court has declared that teaching religious tenets in such a way as to promote or encourage a religion violates the religion clauses. This prohibition is not implicated by mere coincidence of ideas with religious tenets. Rather, there must be systematic, whether explicit or implicit, promotion of a belief system as a whole. The facts showed that the State of Alabama has on its state textbook list certain volumes that are being used by school systems in this state, which engage in such promotion. . . .

The virtually unanimous conclusion of the numerous witnesses, both expert and lay, party and non-party, was that textbooks in the fields examined were poor from an educational perspective. Mere rotten and inadequate textbooks, however, have not yet been determined to violate any constitutional provision, much less the religion clauses. . . . Their expert opinion was that religion was so deliberately underemphasized and ignored that theistic religions were effectively discriminated against and made to seem irrelevant and unimportant within the context of American history. . . .

The religious influence on the abolitionist, women's suffrage, temperance, modern civil rights and peace movements is ignored or diminished to insignificance. The role of religion in the lives of immigrants and minorities, especially southern blacks, is rarely mentioned. After the Civil War, religion is given almost no play.

Omissions, if sufficient, do affect a person's ability to develop religious beliefs and exercise that religious freedom guaranteed by the Constitution. Do the omissions in these history books cross that threshold? For some of them, yes. In addition to omitting particular historical events with religious significance, these books uniformly ignore the religious aspect of most American culture. The vast majority of Americans, for most of our history, have lived in a society in which religion was a part of daily life. . . . For many people, religion is still this important. One would never know it by reading these books. Religion, where treated at all, is generally represented as a private matter, only influencing American public life at some extraordinary moments. This view of religion is one humanists have been seeking to instill for fifty years. These books assist that effort by perpetuating an inaccurate historical picture. . . .

According to humanistic psychology, as with humanism generally, man is the center of the universe and all existence. Morals are a matter of taste, dependent upon whether the consequences of actions satisfy human "needs." These needs are always defined as purely temporal and nonsupernatural. . . .

The [social studies] books do not state that this is a *theory* of the way humans make choices, they teach the student that things *are* this way. . . . The books teach that the student must determine right and wrong based only on his own experience, feelings and "values." These "values" are described as originating from within. A description of the origin of morals must be based on a faith assumption: a religious dogma. The books are not simply claiming that a moral rule must be internally accepted before it becomes meaningful, because this is true of *all* facts *and* beliefs. . . . The books repeat, over and over, that the decision is "yours alone," or is "purely personal" or that "only you can decide." The emphasis and overall approach implies, and would cause any reasonable, thinking student to infer, that the book is teaching that moral choices are just a matter of preference, because, as the books say, "you are the most important person in your life." . . . This faith assumes that self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action. This belief strikes at the heart of many theistic religions' beliefs that certain actions are in and of themselves immoral, *whatever the consequences*, and that, in addition, actions will have extratemporal consequences. The Court is not holding that high school . . . books must not discuss various theories of human psychology. But it must not present faith based systems to the exclusion of other faith based systems, it must not present one as true and the other as false, and it *must* use a comparative approach to withstand constitutional scrutiny. . . .

With these [history and social studies] books, the State of Alabama has overstepped its mark, and must withdraw to perform its proper nonreligious functions. . . . The Court will enter an order to prohibit further use of the books.[25]

This opinion stresses that government should remain neutral in religious matters. Judge Hand's earlier opinions, however, took a very different view, claiming that government was free to promote religion and even establish an official church. The two views are incompatible, since school prayers would put the state in the position of advocating religious views in opposition to secular humanism, which he has now

claimed is also a religion, the one the state has "established." It is hard not to wonder whether Judge Hand is more interested in seeing fundamentalism protected and advanced than in deciding cases in a principled fashion.

Judge Hand also complains that religion is ignored in public schools, a charge regularly made. One reason for this, however, is that textbook publishers are worried that books discussing religion might offend conservative parents. In that sense, ironically, Judge Hand's decision makes it even more difficult for schools to redress the evils pointed to in his opinion. By bowing to the concerns of parents, Judge Hand makes it harder for textbook writers to address his complaints that texts ignore the sensitive topic of religion.

But however inconsistent or result oriented Judge Hand may be, the *Smith* opinion raises important and difficult issues, including the nature of religion, its connection with scientific theory, and the role of schools in teaching morality. Judge Hand's argument proceeds in three stages. He first describes how the Courts have defined the concept of religion; next he argues that secular humanism is a religion; and, finally, he shows how the school textbooks, discussed at great length in the original opinion, advocate secular humanism.

To the extent that we share the Federalists' desire to see government remain neutral, respecting the rights of all individuals to choose their own conceptions of the good life, we will be troubled by school texts that impose one view at the expense of others. Assuming (which I will do) that Hand's description of the books is accurate, it is hard to avoid the conclusion that they make it more difficult for fundamentalists to practice their religion. At a deeper level, his opinion raises questions about the entire federalist vision of government, suggesting that neutrality is impossible.

As we have seen, the Court has expanded its definition of "religion" to include beliefs that make no claims about the supernatural or a creator. Judge Hand argues, however, that it is still possible to glean a definition from these opinions. Any belief system that takes positions on four issues is, he says, a religion. The four are the existence of a supernatural reality, the nature of man, the purpose of human existence, and the purpose of nature. That is not to say that opinions or theories about economic, social, or psychological issues are religious; these do not make broad assumptions about the purposes of existence and the supernatural and so are not comprehensive in the way that a religious view must be. Judge Hand also mentions that an organizational structure is another factor in defining religion.

Secular humanism, he claims, takes a position on each of the four issues. It assumes that reality is entirely knowable by human experience and reason, thereby denying any supernatural dimension or creator. Humanism's moral theory places man at its center by claiming that obligations have their source in human interests, needs, or happiness rather than divine commandment, and nature is seen as independent of divine purposes. So secular humanism includes views about the supernatural, man, and the purposes of life and nature. What's more, Humanists publish periodicals designed to win new converts and have the organizational structure associated with traditional religions.

Embedded in the opinion are really four different issues, though Judge Hand often confuses them. First, are these particular texts compatible with the ideal of neutrality? That is, do they teach students to believe what is incompatible with their

religion? This is a different question from the second: whether some particular teachings of science, no matter how they are presented, are incompatible with religious neutrality. Third, we need to ask if teaching science in general includes teaching the general ideas Judge Hand describes as secular humanism (whether or not it is a "religion.") And finally, we can ask if secular humanism is a religion. I will discuss each of the four.

Much of Judge Hand's argument is meant to support the claim that these texts are not consistent with fundamentalist Christianity. He gives two reasons in support of that charge. First, he claims, they discriminate against theistic religions, trivializing their role in American history by ignoring important religious events as well as the day-to-day role religion played in the lives of Americans. By minimizing the role of religion in American history, he says, they teach students to belittle their religion and its importance. The second claim is that the books advocate humanistic psychology: the view that man is the center of the universe and that morality, properly understood, involves only fulfilling human needs or desires. Right and wrong, according to the texts, must be determined by the students' own experience and feeling—not, therefore, by God.

So far, however, this is no argument that a religion has been established or even that education cannot be neutral; he has only claimed that these particular books are not neutral. Perhaps all that is required is that they be replaced by better, more balanced ones giving more space to those who think religion played a large role in U.S. history and can be the basis of morality. That leads to the second question—whether the particular teachings of science are religiously neutral.

It is fairly clear, I think, that science cannot be neutral in this sense. Evolutionary theory, for example, seems inconsistent with certain religious beliefs; yet most scientists believe that Darwin's theory better explains the origins of the species than creationism. Fundamentalists who believe the earth was created 4,000 years ago and already included human life and fossils hold opinions that science denies.

This problem was addressed by the Louisiana legislature when it passed what came to be called its "balanced treatment" law, requiring those who teach evolution to give equal time to creationism. In *Edwards* v. *Aquillard* (1987), however, the Court struck it down. Justice Brennan, writing for seven justices, found that the purpose of the Louisiana legislature

> was clearly to advance the religious viewpoint that a supernatural being created humankind. We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. Teaching a variant of scientific theories about the origins of humankind to school children might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.[26]

Defenders of the law, including Justice Scalia in a dissent, argued that the law's purpose was neutral; it was designed to advance academic freedom and "enhance students' freedom from indoctrination." Equal-time laws, he argued, would merely provide students with an alternative view about the origins of life—the very opposite of coercion. The Court has consistently held, he wrote in *Edwards*, that

> the Establishment Clause forbids not only state action motivated by the desire to advance religion, but also that intended to "disapprove," "inhibit," or evince "hostility"

> toward religion, and since we have said that government "neutrality" toward religion is the preeminent goal of the First Amendment, a State which discovers that its employees are inhibiting religion must take steps to prevent them from doing so, even though its purpose would clearly be to advance religion. Second, we have held that intentional governmental advancement of religion is sometimes required by the Free Exercise Clause (*Yoder*).

In one sense, the critics of teaching evolution seem right: teaching evolution is not neutral if judged by its effect. It undermines some religions almost as much as would teaching that Moses never existed or that the Bible is often in error, and it does so regardless of intent or purpose of the legislature.

It seems that at least some of the teachings of science are not neutral. Yet the equal-time law also runs into problems of its own as an attempt at neutrality. First, it is not at all clear that the Louisiana law really is neutral, either; everything depends on what is meant by "neutrality." The law was not meant to protect the rights of teachers to teach science without political interference; people who wanted to teach evolution were not being harassed, nor were biology teachers being discriminated against who pointed out the gaps and other problems with evolutionary theory. The law's legislative history and political context undermine its claim to neutrality, if by "neutrality" one means leaving science free to investigate nature without interference from external factors such as politics and religion. So although the law might promote neutrality in one sense—by mitigating the effects of teaching evolution on religious fundamentalists—it is not neutral in another sense. The state sought to redefine the curriculum for religious reasons, under the guise of balanced treatment.

There are also great practical problems raised if the idea of neutrality is extended to protect religions whose doctrines are incompatible with science. Other religions might also reject aspects of science; and if the real purpose of a law like Louisiana's is to give every theory about the origin of the world equal time, how can any theory be excluded? The alternative would be to allow state legislatures to pick and choose among different religions, selecting those that it feels should be given equal time and rejecting others—hardly a neutral state of affairs. Furthermore, if all possibilities were discussed regardless of scientific merit, then the science classroom would be turned into a study of the history of ideas, and scientific education would suffer.

Perhaps, then, we have another case in which religious teachings are incompatible with the demands of a modern, pluralistic community and so must give way. Just as we cannot allow ritual drug taking and human sacrifice, excluding science from the classroom would also be impractical and socially costly. What this shows, then, is something we already knew from other contexts: that it is impossible to be absolutely neutral. Scientific teachings cannot be made compatible with every religion, and science cannot be eliminated from the schools or even taught as merely one of an indefinite number of answers to questions such as the origins of life.

None of this, however, answers our question of whether teaching science establishes the religion of secular humanism. The most that has been shown is that some sacrifice of neutrality must be made if science is to be taught in schools because some religious beliefs seem to contradict scientific findings.

The third question is an even more troubling one for those committed to neutrality, since it asks whether science per se is compatible with religious faith. For obvious

reasons, Judge Hand does not want to suggest that teaching science in schools is unconstitutional, so he needs to show that although *these* books establish a religion, other approaches to science might not. His argument is that it is only when teachers go beyond science and claim there is nothing real or true except what scientific theories tell us that scientists intrude on religion. As long as science stays within its own boundaries, he thinks, it does not establish a religion. There is nothing about doing science itself that is inconsistent with a belief that there is a creator, that man is a product of God, or that concepts of right and wrong reflect divine will. Science functions, he says, within the "parameters" of observation, though it is not committed to the conclusion that only things that can be observed are real. That assertion, he says, belongs to the domain of faith; no scientist can either prove or disprove the existence of a supernatural being. Physical sciences do not contradict religion—they are simply irrelevant.

But we have already seen one sense in which that is wrong, for the effect of science sometimes *is* to undermine religion. One cannot believe evolution and also believe the Biblical account of creation, and scientific evidence clearly supports evolution. But what about the scientific enterprise itself? Here we have an even stronger suggestion (which was denied by Judge Hand) that the scientific approach is *intrinsically* incompatible with religious views of the world. Much of what goes on in ordinary life, schools, and laboratories is secular rather than supernatural. We normally do not look for supernatural explanations when repairing the television, debating the deficit, or doing an experiment. Is it correct, however, that law, medicine, science, and the arts neither affirm nor deny the existence of a supernatural being? Or is it perhaps more accurate to say that science *presupposes* there is no such being? Judge Hand suggests that only some approaches to science establish secular humanism, though we need to look at it more closely.

He is certainly correct that science does not teach that only the directly observable is real. Scientists believed that Uranus existed before it could be observed, on the basis of the effects of its gravitational field on nearby planets. Indeed, modern physics is full of forces, subatomic particles, and black holes, none of which can be directly observed. It is also no part of science to deny that numbers, for example, are "real." Science does seem to assume, however, that it is rational to hold beliefs that are supported by evidence and that observation is necessary to construct theories about how things work and what is real. Scientific theories are then able to predict future observations and solve practical problems. So there is an important sense in which believing in miracles, for example, seems "unscientific." There is no way to verify them through observation and test, and the hypothesis that a miracle occurred provides no basis for predicting future events.

Furthermore, as science explains more and more of the events in the natural world, religious explanations tend to recede. Where it was once thought gods cause lightning, we now think of electricity; where creation was once thought to explain the origin of the species, we now think of evolution; where life was once thought a miracle, we now imagine chemical elements combining in a warm pond. The overall effect of this retreat from religious explanations in favor of scientific ones can be more than the undermining of particular religious beliefs; it can also cast doubt on the truth of religion in general. Should we conclude, then, that teaching science as a method

of discovery also demands that one accept the first tenet of secular humanism: that it is reasonable to believe only in what can be verified by observation and test and not, therefore, in a god?

We have been led by our discussion to questions in philosophy of science, questions that we cannot resolve here. It is worth noting, however, how controversial these issues are. On one view of science, reasonable people should conclude that the universe is made up of whatever scientists ultimately say it is made of—or perhaps what the correct theory says it is made of. This is because scientific theories are the best-confirmed ones we have available and because observation is the most reliable method of confirmation. To believe anything that either is inconsistent with science or cannot be established by science is irrational.

Others, however, think of science in more instrumental, pragmatic terms. From their perspective a scientific theory is one way of looking at the world—perhaps the best way to make predictions and solve problems, but still only one way. On that view, it's a long way from the premise that scientific theory is better at making predictions to the conclusion that looking at the world as that theory would have us is the only true way. A scientist who takes this instrumental view of her discipline might doubt that the only things that exist are the theoretical entities of scientific theory. We imagine subatomic particles to exist because they allow us to construct theories that are useful in making predictions; whether they are all that exists is another question.

So it seems on this point that Judge Hand may be right: it is possible to view science as consistent with religion. God's existence is not a question that science can answer. The relationship between science and religion is thus an interesting, complicated philosophical problem, as are the connections among belief, rationality, observation, and evidence. They are also questions we will not answer here, except to stress that we do not seem led to the conclusion that employing the methods of science and teaching science to children are incompatible with claims that there are other, nonscientific ways of knowing or that it might be reasonable to believe something exists other than the theoretical entities of scientific theories. We might think of scientific theories as heuristic models—as instruments that allow us to make predictions—and not as the final arbiter in questions of truth and existence. As Judge Hand says, nothing about the teaching of science commits us to the general position he describes as secular humanism.

We come then to Hand's last and most controversial claim: that teaching secular humanism (as he thought those particular tests did) constitutes the establishment of religion. First, it's important to note that the mere fact that some position is incompatible with religious beliefs does not thereby make the position into a religion. In other words, to take a position on an issue that is contrary to religion is not to become religious, any more than religion becomes science by denying evolution. Judge Hand's definition of religion is in that way too broad, for he assumes that because secular humanism holds to those four tenets it qualifies as a religious position. If that were true, then even atheism would be a religion, as would communism, fascism, utilitarianism, and liberalism. Indeed, the whole world of secular, nonreligious philosophies would become religions. In ordinary life, at least, we distinguish religion from these.

What, then, can we say about the meaning of "religion"? As I suggested in discussing the connection between religion and morality, the standard cases of religion

involve belief in a transcendent reality. But that is only the standard case, and rather than trying to give a precise definition, a more useful approach is to begin with what we understand to be the clearest cases. "Religion" as we use the term in this society typically involves most or all of the following: supernatural beliefs, a holy book, houses of worship, a clergy, prescribed prayers, a view of humankind's role, a prescribed moral code, and an institutional structure. No one of those is essential, of course, though by taking away enough we would conclude that a religion had been transformed into a merely philosophical world view, just as a group that included enough of them might come to be thought of as a new religion. The point, in other words, is that religion does not reduce to a single set of ideas or practices; to be called a religion, something must include some, but not necessarily all, of a variety of these beliefs and practices.

Is secular humanism a religion, then? It would seem not, for much of its point is to deny the validity of most of the qualities by virtue of which we call a belief or an institution religious. It lacks supernatural beliefs, a holy book, houses of worship, a clergy, and prayers. It does have a moral code, a view of man, and an institutional structure, but so do political parties and the American Medical Association. Judge Hand also emphasizes that secular humanism is based on faith, but again that does not establish his claim that it is a religion. The faith is not in anything supernatural, and depending on what he means by faith, the Democratic and Communist parties, the nation of the United States, Harvard University, and the American Medical Association would also qualify.

That leaves a final question. As we have seen, the Court has expanded the definition of religion to include belief systems that occupy the same position as religious ones, and so maybe the Court should treat secular humanism as if it were a religion even though it is not. Freedom of religion really has two parts. The free exercise clause focuses on individual liberty and is concerned with protecting religious minorities. The establishment clause, though reflecting a commitment to equal respect of the individual, has a more political purpose: to protect the political process from religious divisiveness and religious institutions from the threat of government. Given their different purposes, a natural suggestion is to define the term *religion* differently when interpreting them.

Establishing an official religion endangers political life in two ways: by encouraging divisions in the political process as one group imposes its view on others and by weakening religious institutions so that they cannot provide a counterweight to state authority. "Religion" should be interpreted for purposes of establishment clause analysis in ways that make sense in light of those purposes, which means in the traditional, narrow sense, including only the beliefs we all agree are religious. This is because the concerns behind the Constitution's rejection of religious establishment are less important in the case of fringe groups: it is unlikely that some religious minority, arguably not even a religion, will capture a legislature and win for itself the status of an official church or even gain special advantages. So the purpose of the establishment clause leads us to focus on large and powerful religious groups that might use political authority to benefit themselves. When it is the "establishment" clause that is being interpreted, as in the crèche case, we can safely stay with a narrow definition of religion; Christianity obviously falls within it.

The primary purpose of the free exercise clause, however, is to protect individual

freedom of conscience. It focuses on those whose right to practice their religion is most at risk: religious minorities who lack the numbers, organization, and power to protect themselves in the political process. For free exercise purposes, therefore, we need a broader definition of religion so that people with unusual and unpopular beliefs can be protected from legislative interference. Large, powerful religious institutions can look out for themselves in the political process. Our concern with them is their tendency to seek establishment, not the infringement of their free exercise rights. But minority religious views, on the fringes of traditional conceptions of religion, need free exercise protection, so here we should use a broader, more inclusive definition of religion.

This solution also squares nicely with the rationale, discussed earlier, for expanding the definition of religion, since it would give members of minority and fringe religions, including those whose beliefs are arguably not religious in the narrow sense at all, the same protection as members of larger, more familiar religious groups.

Using this approach, however, would mean that Judge Hand was mistaken in applying a broad definition of religion to the textbook case since the issue is establishment, not free exercise. Secular humanism is not a religion in the narrow, traditional sense, and so the charge that the state has established it would be rejected.

Those same plaintiffs might have a better case, however, if they argued under the free exercise clause that the textbooks are inconsistent with their religious beliefs and that the school should either use other texts for all its classes or else allow their children to study from ones that are less objectionable. Unlike those making broad challenges to evolution in the classroom, they would not demand any more than toleration. This approach would have a number of advantages, mostly because it would focus the debate on the real issues, not on whether secular humanism is a religion. Are the textbooks teaching history and science, or are they unnecessarily intrusive into students' religious beliefs? And, more important, if it were understood as a free exercise case then the solution might be simply to allow the students the freedom to read another book. If the case is presented as an establishment question, however, then the textbooks must be rejected even if the majority thinks they do a better job than ones that a minority is willing to accept. Again, a broad definition of religion would protect freedom of conscience under the free exercise clause, and a narrow definition for establishment will allow school boards to run schools in the ways they think are most effective without having to tailor their policies to ensure that they do not establish anything that could possibly be construed as a religion.

To the surprise of nobody, an appeals court overturned Judge Hand's ruling and the Supreme Court then refused to review that judgment. The court of appeals argued that even if secular humanism is a religion (it avoided that question), the textbooks do not establish it. Alabama did not have that purpose, nor was it an effect of the books. Rather, said the court, their effect is to

> instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate secular effect.[27]

The Court went on to claim that the mere omission of religion would not convince an objective observer that Alabama was conveying the message of approval of secular

humanism. The state need not, as Judge Hand suggested, provide equal time for religion; it must maintain a separation between itself and religion. Alabama's textbooks, it said, are compatible with the state's responsibility to "pursue a course of complete neutrality toward religion." I hope it is apparent by now, however, that the issues are not quite so simple as the court of appeals suggested.

Absolute neutrality is a goal of Federalists, though it is impossible to achieve in practice. Allowing children to attend private schools or to learn at home can help, but not all parents can afford the time or money, and a system allowing parents to send children to private school at taxpayers' expense could seriously damage public education and create the appearance of governmental advocacy. Other possibilities, such as giving parents the opportunity to have their children opt out of the offending curriculum, might also help, although the Courts have recently rejected such a plan in Tennessee.[28] But some compromise between neutrality and other values is inevitable.