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## Secular Contribution of Religion to the Political Process: The First Amendment and School Aid, The

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# THE SECULAR CONTRIBUTION OF RELIGION TO THE POLITICAL PROCESS: THE FIRST AMENDMENT AND SCHOOL AID

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## I. THE THESIS

### A. *Statement of the Thesis*

Underlying James Madison's political philosophy is a concern with the power of special interest groups.<sup>1</sup> The fear that selfish interests might prevail over the common good remains a contemporary concern.<sup>2</sup> As in Madison's day, majority rule, a republican form of government, and structural checks

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1. See *infra* notes 105-07 and accompanying text.

2. See, e.g., R. DAHL, *DILEMMAS OF A PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 40-53 (1982); G. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 40-46 (1983).

and balances are methods of restraining special interests. An additional way to secure the public good is to ground society's members and leaders in civic values so that they will act accordingly. Some societal institutions long have educated the public in higher values and called for civic conduct in harmony with those values. Schools, churches, and charitable organizations, for example, have consciously worked to further the public good.

In the United States, churches have an historic tradition of concern about ethical standards in civic life.<sup>3</sup> In this Article, I argue that religious forces generally have a positive effect on the American governmental process and that this positive effect justifies an accommodationist judicial policy in matters of church and state. I thus argue that religion makes a secular contribution to society, that is, it contributes to meeting society's secular needs.

Religious forces, that is, religious institutions, groups, and individuals with an explicitly religious background,<sup>4</sup> demand that virtue be an important consideration in political decisionmaking. "Virtue" is a force that encourages decisionmakers to consider values on a high plane. In this context, virtue furthers the moral, altruistic, and similar concerns that are associated with religion.<sup>5</sup> Religious forces may express these concerns in religious or secular

3. See *infra* notes 39-46 and accompanying text.

4. For this Article's purposes, "religion" refers to any system of belief to which courts would find the Constitution's religion clauses applicable. The Supreme Court has hesitated to attempt a precise definition of religion. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Zorach v. Clauson*, 343 U.S. 306, 318 n.4 (1952) (Black, J., dissenting); *United States v. Ballard*, 322 U.S. 78 (1944). Whether certain organizations and beliefs are religious or secular can present close questions. *E.g.*, *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (whether Transcendental Meditation is a religion). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 859-65 (1978). Where to draw the line between the religious and the nonreligious is not a focus of this Article.

5. I choose the word "virtue" to make the association with the classical notion of civic virtue. The classical virtues were wisdom, justice, courage, and temperance. See C. COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 48-52 (1944). St. Augustine believed that true virtue must have a religious foundation, but recognized civic virtue as an authentic shadow of true virtue. See ST. AUGUSTINE, *CITY OF GOD*, V. 18, in 6 *WRITINGS OF ST. AUGUSTINE* 285-86 (G. Walsh & D. Zema trans.), 8 *FATHERS OF THE CHURCH SERIES* (1950); ST. AUGUSTINE, *TO SIMPLICIAN—ON VARIOUS QUESTIONS*, I q. 2:16, in *AUGUSTINE: EARLIER WRITINGS* 397-98 (J. Burleigh trans., 6 *LIBRARY OF CHRISTIAN CLASSICS SERIES* 1953); E. TESSELLE, *AUGUSTINE THE THEOLOGIAN* 274 (1970). For him, the chief motivation for civic virtue is desire for glory, as opposed to love of God, which is the basis of true virtue. He argued that Rome's era of greatness was its reward for civic virtue:

After all, the pagans subordinated their private property to the common welfare, that is, to the republic and the public treasury. They resisted the temptation to avarice. They gave their counsel freely in the councils of the state. They indulged in neither public crime nor private passion. They thought they were on the right road when they strove, by all these means for honors, rule, and glory. Honor has come to them from almost all peoples . . . They have no right to complain of the justice of the true and supreme God. They have received their reward.

terms. The expressly religious concerns may be tied closely to religious doctrine; for example, American Roman Catholic bishops may oppose nuclear war, because it violates the church's just war doctrine.<sup>6</sup> Concerns expressed in secular terms also may have nonreligious sources and have the support of non-religious people. For example, many religious and secular forces may oppose nuclear war on humanitarian grounds.<sup>7</sup> Decisionmakers may choose to give particular weight to the arguments of religious forces, because the arguments are inherently compelling or because these interest groups have sufficient clout to demand serious consideration.

Religious forces thus play a dual role in the political process. First, they urge government leaders to consider virtuous concerns in decisionmaking. Second, they criticize government conduct that appears to be unvirtuous and thus impose a "virtue check" on the political process.<sup>8</sup> Because these roles are salutary, government should accommodate the needs of those making these contributions to the extent that accommodation falls short of violating the doctrine of separation of church and state.<sup>9</sup>

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*City of God, supra*, V, 15, at 277. *See id.*, V, 14-21, at 274-92; Letter from St. Augustine to Marcellinus (Letter 138), in 11 WRITINGS OF ST. AUGUSTINE 36, 42-53 (W. Parsons trans., 20 FATHERS OF THE CHURCH SERIES 1953). The loss of civic virtue led to Rome's decline. *See City of God, supra*, V, 19, at 287-88; Letter from St. Augustine to Marcellinus, *supra*, at 48-49. As for the evils that befell Rome under Christian emperors, he found fault not with the religious teaching, but with the emperors or "those other men without whom emperors cannot get anything done." *Id.* at 48. *See City of God, supra*, V, 24-26, at 296-302.

St. Augustine thus furnishes a precedent for a religious recognition that a successful society depends on the secular virtues of its citizens. He probably would agree with this Article's thesis that those with religious values contribute to the growth of secular virtue, as well as religious virtue. *See E. TESSELLE, supra*, at 277-78.

Americans in the Revolutionary and Federalist eras were well acquainted with the classical notion of civic virtue. For them, civic virtue meant pursuing the common good as opposed to one's selfish interests. *See J. POCOCK, THE MACHIAVELLIAN MOMENT* 506-36 (1975); G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST 185-92* (1981); *infra* note 58.

6. *See* National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response*, reprinted in Nat'l. Cath. Rep., June 17, 1983, at 5, col. 1; *Bishops' Letter on Nuclear Arms is Revised to More Flexible View*, New York Times, April 6, 1983, at A1, col. 5. By a 238 to 9 vote, the bishops called for a halt to nuclear weapons propagation, gave nuclear deterrence a strictly conditioned acceptance as disarmament is pursued, and asserted that first use of nuclear weapons cannot be morally justified in any foreseeable situation.

7. *See, e.g.*, National Conference of Catholic Bishops, *supra* note 6, at B1, col. 1 (acknowledging the obligation "to create a community of conscience in the wider civil community").

8. The notion of a virtue check is analogous to the notion that the first amendment's free speech and free press clauses help check the abuse of power by public officials. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RESEARCH J. 521; *infra* note 24 and accompanying text.

9. The first amendment's religion clauses state "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

The argument presented here accepts separation of church and state as a wise and constitutionally mandated principle. It recognizes, however, that complete separation is not possible or desirable. In any number of situations, the Supreme Court has permitted accommodations that lawmakers have found acceptable.<sup>10</sup> For example, the Court has upheld certain types of direct or indirect financial aid to students at church-related schools and colleges<sup>11</sup> and certain exemptions from government mandates for individuals who object to the mandates as a matter of religious conviction.<sup>12</sup> As the great number of split decisions and plurality opinions demonstrates, cases often present very close questions whether a particular law violates the doctrine of separation of church and state.<sup>13</sup>

This Article's analysis offers an additional policy consideration to help tip the closely balanced scales. In close cases in which traditional constitutional analysis fails to furnish a broad judicial consensus, the side favoring accommodation should succeed when accommodation will strengthen the religious forces that contribute to virtuous decisionmaking and check abuses in the political process.

In this Article, I first develop the thesis and evaluate objections to it. I also relate it to the thinking of the Constitution's Framers. Modern Supreme

10. The Supreme Court has never adopted a strict separationist position. See *L. TRIBE*, *supra* note 4, § 14-4, at 819 (1978). Chief Justice Burger has described the wall between church and state as "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The metaphor of the wall of separation originated with Thomas Jefferson. See Letter of Thomas Jefferson to the Danbury Baptist Assn. (Jan. 1, 1802), *reprinted in* 16 WRITINGS OF THOMAS JEFFERSON 281 (A. Lipscomb ed. 1903).

11. *E.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983); *Committee for Pub. Educ. & Relig. Liberty v. Regan*, 444 U.S. 646 (1980); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976). See generally *infra* Part III of this Article.

12. *E.g.*, *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (statute cannot condition unemployment compensation on conduct prohibited by religious belief); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state cannot require Amish parents to send children to school after eighth grade, contrary to religious conviction); *Sherbert v. Verner*, 374 U.S. 398 (1963) (state cannot deny unemployment compensation to Sabbatarian for refusing to work on Saturday).

13. The split decisions in the school aid cases illustrate the point. *E.g.*, *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (6-3 decision); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985) (invalidating one type of aid by a 5-4 vote and another type by a 7-2 vote); *Mueller v. Allen*, 463 U.S. 388 (1983) (5-4 decision); *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980) (5-4 decision); *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding four and invalidating two types of aid; the votes were 8-1, 7-2, 6-3, 6-3, 6-3, and 5-4); *Meek v. Pittenger*, 421 U.S. 349 (1975) (upholding one and invalidating two types of aid; the votes were all 6-3, with different majorities); *Wheeler v. Barrera*, 417 U.S. 402 (1974) (8-1 decision); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (6-3 decision); *Hunt v. McNair*, 413 U.S. 734 (1973) (6-3 decision); *Levitt v. Committee for Pub. Educ.* 413 U.S. 472 (1973) (8-1 decision); *Lemon v. Kurtzman (Lemon II)*, 413 U.S. 192 (1973) (5-3 decision); *Tilton v. Richardson*, 403 U.S. 672 (1971) (5-3 decision); *Lemon v. Kurtzman (Lemon I)*, 403 U.S. 602 (1971) (8-0 and 8-1 decisions).

Court cases on church and state then are reviewed in search of acknowledgment of the positive dimensions of church-state relations. I conclude by applying the thesis to cases dealing with government aid to church-related schools and their students.

### B. *The Religious Contribution to the Political System*

My argument presents a helpful approach for those who favor greater interaction of religious values with legal and political values.<sup>14</sup> These advocates face the objection that greater interaction requires imposing particular religious beliefs on society. The alternative, they are told, lacks efficacy: in order to avoid impinging on religious freedom in a diverse society, the religious contribution would consist of vague, inoffensive generalizations.<sup>15</sup> My analysis offers another viewpoint. It recognizes that religious forces champion religious values by being effective interest groups in the political system. The competition of other interest groups and the constitutional doctrine of antiestablishmentarianism prevent one sect from gaining coercive religious power over nonbelievers. Religious forces, moreover, do more than promote the invocation of vague generalizations; they seek to influence concrete political decisions. My analysis favors fostering this interaction of religion and society by fostering the vitality of religious forces, that is by reading the Constitution's religion clauses from an accommodationist perspective.<sup>16</sup>

Traditional judicial analysis of the religion clauses barely acknowledges the notion that religion has a positive effect on society and government.<sup>17</sup> Discussions of the free exercise clause identify the believer's freedom of conscience as the clause's justification.<sup>18</sup> Cases concerning free speech and free press also emphasize the protection of individual integrity, but they further recognize the contribution of free expression to an informed, open political process.<sup>19</sup> When the Court focuses on free exercise, it usually fails to note that religious expression offers benefits to others in addition to the beleaguered be-

14. The modern seminal work on the subject is H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

15. For a summary of this debate, see *Symposium: The Secularization of the Law*, 31 *MERCER L. REV.* 401 (1980) (major contributions by Harold Berman, Edward M. Gaffney, Lois Forer, Charles Donahue, Jr.).

16. My analysis speaks only to one part of the discussion on the interaction of law and religion. The full discussion focuses primarily on broad concerns, including law and religion as dimensions of culture that share the elements of ritual, tradition, and authority; the influence of religion on basic legal concepts and institutions; religion's concern for social order and social justice; and the consequences of radical separation of religious values and legal and political values. The advisability of separating religious institutions from legal and political institutions is an unchallenged presupposition to the discussion. See H. BERMAN, *supra* note 14; *Symposium, supra* note 15.

17. See *infra* Part II of this Article.

18. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

19. See *infra* notes 137-48 and accompanying text.

liever, for example, the leafletting Jehovah's Witness<sup>20</sup> or the Sabbatarian who risks unemployment benefits by refusing to work on Saturdays.<sup>21</sup> As a result, these forms of religious exercise are inconveniences to be tolerated in order to preserve the guaranty of autonomy, which in turn, protects more traditional styles of religious exercise.<sup>22</sup>

As for the establishment clause, the traditional analysis focuses on the negative aspects of church-state interrelationships. Judicial emphasis on the word "entanglement" reflects the fear of government interference with church autonomy and the threat of political divisiveness along religious lines.<sup>23</sup> Traditional constitutional analysis thus fails to recognize the positive dimension to church-state relationships.

Despite the neglect of religion's beneficial role in the political process, the religion clauses permit a contribution analogous to the contribution that the free speech and press clauses permit.<sup>24</sup> Like the religion clauses, the speech and press clauses protect individual autonomy against the state by permitting citizens to form and communicate their beliefs. Free expression also promotes diversity of opinion. Our system assumes that the marketplace of ideas is the forum in which to determine truth and enhance understanding of the government process and the subject matter with which it deals. Free speech and free press also furnish a dual check on the political process. First, the freedom to scrutinize and expose places a check on the misconduct of public officials. Second, the clauses also offer a general safeguard against malfunction in the political process by promoting the informed participation of a vigilant citizenry. Free speech and free press thus check abuses and promote political participation in our self-governing society.

Because the religion clauses guarantee free exercise and prohibit preferential treatment, they, too, emphasize individual and group autonomy<sup>25</sup> and toleration of diversity.<sup>26</sup> They thus encourage formation and communication of

20. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943).

21. See *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

22. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

23. See *infra* notes 197-98 and accompanying text.

24. This analysis of the free expression clause's contribution to the political process draws upon A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); and Blasi, *supra* note 8. Meiklejohn developed the theory that the first amendment protects free expression, because it is part of a process of self-government that assumes a high degree of democratic participation. Blasi argues that free expression also checks the misconduct of public officials; he recognizes the role of countervailing powers and views the press as the primary institution to exercise the check. For a general discussion of rationales for giving special protection to free expression, see Wellington, *On Freedom of Expression*, 88 *YALE L.J.* 1105, 1110-26 (1979).

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

26. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

belief and presume the merit of a marketplace of ideas. To the extent that religious belief and expression speak to political concerns, the religion clauses imply a particular value to views bottomed on religious conviction. According to my argument, religiously based views deserve attention, because they stem from moral, altruistic, and other similar values. They therefore make a special contribution to the political process.<sup>27</sup>

Religion makes both a general and concrete contribution to the political process. It makes a general contribution by adding to the process a general concern for higher principles. It makes a concrete contribution when religious forces take positions on specific issues. The latter contribution may come in any of three ways.

First, a significant religious bloc may form a broad consensus on a particular issue, such as world hunger or nuclear disarmament.<sup>28</sup> Whatever the merits of the bloc's position, its efforts add a virtuous orientation to the political debate.<sup>29</sup> By affecting the orientation, it may reduce the persuasiveness of those with ignoble arguments.

Second, certain religious interests may press for a specific piece of legislation or other government action, perhaps on an issue like world hunger, or perhaps on a highly controversial issue like abortion, school prayer, sex education, or the teaching of evolution. Other religious and nonreligious interests may take contrary positions. Just like advocates of any other interest, religious advocates must work for their goal. Their special contribution lies in directing attention to an issue that might otherwise lack prominence and in compelling at least some of the debate to take place on a higher plane.<sup>30</sup> For example, they may remind decisionmakers that a routine determination on agricultural policy may affect the availability of food in the world. The contributions may not always arise;<sup>31</sup> motivations may be venal or the debate simply may degenerate into unreflective sloganeering. The assumption is that religious participation generally will result in a positive contribution to the political process.

Third, religious groups or individuals with ties to a religious tradition may serve as prophetic voices.<sup>32</sup> They may find themselves in extreme disagreement

27. Other commentators have touched on this argument. See Marty, *Epilogue: The Natures and Consequences of Social Conflict for Religious Groups*, in RELIGION AND SOCIAL CONFLICT 174 (R. Lee & M. Marty ed. 1964); Van Patten, *In the End is the Beginning: An Inquiry into the Meaning of the Religion Clauses*, 27 ST. LOUIS U.L.J. 1, 81-83 (1983); Weber, *Building on Sand: Supreme Court Construction and Educational Tax Credits*, 12 CREIGHTON L. REV. 531, 550-55 (1978).

28. See, e.g., *supra* note 6.

29. For an illustration of the call for religious involvement in the political process during the Johnson administration, see W. STRINGFELLOW, *DISSENTER IN A GREAT SOCIETY* (1966).

30. See G. WINTER, *ELEMENTS FOR A SOCIAL ETHIC* 277-78 (1966) (a policymaker may have to make practical compromises, but still needs to make decisions informed by ethical criticism).

31. See *infra* text accompanying notes 39-49.

32. I use "prophetic" in the Biblical sense. A prophet is "one who challenges



with societal decisions and oppose them with words, actions, and even civil disobedience. Contemporary examples would include peace activists who engage in civil disobedience,<sup>33</sup> churches in the pre-civil rights South,<sup>34</sup> and groups like the Catholic Worker<sup>35</sup> and Sojourners.<sup>36</sup> Their participation may be dramatic, but their effectiveness is not always predictable. Prophets are not necessarily heeded in their own times.<sup>37</sup> Most often, their extreme positions fail to win out, but they influence the public debate and final decision.<sup>38</sup>

Religious forces, then, can achieve a desirable secular effect on the political process.

### C. *Objections to the Thesis*

Three major objections challenge my argument that beneficial secular contributions of religion justify a liberal accommodationist policy. First, it may be said, an advocate's religious affiliation offers no guarantee of virtue.

the current social order, and in particular the state and its instrumentalities, in the name of higher truth." McLennan, *Response to Lois Forer*, 31 MERCER L. REV. 456 (1980).

33. See, e.g., D. Berrigan, *Trial of the Catonsville Nine*, reprinted in THE BEST PLAYS OF 1970-71 (O. Guernsey ed. 1971); Turner, *Tax Refusal Completes Prelate's Moral Journey*, N.Y. Times, April 19, 1982, at A16, col. 2.

34. See, e.g., McCoy, *The Churches and Protest Movements for Racial Justice*, in RELIGION AND SOCIAL CONFLICT 37, 43-50 (R. Lee & M. Marty ed. 1964); R. KLUGER, SIMPLE JUSTICE 13-31, 571-607, 953-54, 956 (1975); J. WALLIS, BROTHER TO A DRAGONFLY 107-250 (1979).

35. Founded by Dorothy Day and Peter Maurin, the Catholic Worker Movement is the mother of the American Catholic left. With a uniquely anarchist-pacifist perspective, its members run houses of hospitality for the poor, publish a newspaper, Catholic Worker, participate in social causes, and frequently employ civil disobedience. See, e.g., D. DAY, THE LONG LONELINESS (1981); W. MILLER, DOROTHY DAY (1981); M. PIEHL, BREAKING BREAD: THE CATHOLIC WORKER AND THE ORIGIN OF CATHOLIC RADICALISM IN AMERICA (1982); Wills, *The Dragooned Saint*, SOJOURNERS, September 1982, at 35; Whitman, *Dorothy Day, Catholic Activist*, 83, Dies, N.Y. Times, November 30, 1980, § 1 at 45.

36. Sojourners is a small community in inner-city Washington, D.C. It is the evangelical Christian counterpart to the Catholic Worker (see *supra* note 35) and has broad ecumenical appeal. In addition to working with the poor and participating in social causes, it publishes the magazine SOJOURNERS.

37. See Luke 4:24.

38. For example, the Catholic Worker has strongly influenced clergy and laity who themselves have played a prophetic role or a more mainstream role in society. Their numbers include intellectuals John Cogley and Michael Harrington, Trappist author Thomas Merton, peace activists Daniel and Philip Berrigan, educator Ivan Illich, and union organizer Cesar Chavez. See Whitman, *supra* note 35.

SOJOURNERS magazine's list of contributing editors includes Sen. Mark Hatfield as well as others well known in religious and social justice circles.

Church based leaders of the civil rights movement served partly as prophets and partly as more conventional advocates. For an account of their lobbying efforts during the Kennedy administration, see A. SCHLESINGER, JR., A THOUSAND DAYS 924-77 (1965).

Second, contributions to political virtue may come from nonreligious sources to which my argument for religious accommodation gives no assistance. Third, religious accommodation, like support of religion, impairs religious autonomy, corrupts religious virtue, and thus weakens or precludes any contribution to the political system. These objections are not entirely without merit. Nonetheless, persuasive responses are available.

As for the first objection, all assertions issuing from a religious institution or individual obviously do not emanate from a higher source. Some religious positions may derive from venal motives, such as self-aggrandizement of a church or minister. Sincere religious advocates may disagree on which position is, in fact, virtuous. My argument is that, in spite of these difficulties, religion in the United States adds a moral, virtuous dimension to a political debate dominated by special interests. This argument does not lend itself to empirical proof. Nonetheless, one easily could find support for the proposition in American history. Religious leaders have played major roles in many significant movements,<sup>39</sup> including the abolition of slavery,<sup>40</sup> civil rights,<sup>41</sup> prison reform,<sup>42</sup> public education,<sup>43</sup> labor organizing,<sup>44</sup> social welfare,<sup>45</sup> and peace

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39. For example, evangelical Christians rooted in the Great Awakening provided a rationale and stimulus for the American Revolution. They believed they could forward the progress of history and thus give momentum to the coming of the millennium by helping develop a Christian commonwealth. See A. HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* (1966).

40. See S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 648-69 (1972). Churches originally did not join in the antislavery cause but by the mid-nineteenth century, their moral concern over the issue motivated them to take the lead in the movement. See *id.* at 657. As opposition to slavery solidified in the North, southern churches began to mute their opposition in conformity with the romantic ideal of the "new Southern nationalism." See *id.* at 653-55; see also Davis, *The Emergence of Immediatism in British and American Antislavery Thought*, in *RELIGION IN AMERICAN HISTORY: INTERPRETIVE ESSAYS* 236 (J. Mulder & J. Wilson ed. 1978).

41. See S. AHLSTROM, *supra* note 40, at 1072-78; R. HANDY, *A HISTORY OF CHURCHES IN THE UNITED STATES AND CANADA* 414-15 (1977). For an account of participation by religious leadership in the efforts to enact the 1964 Civil Rights Act, see J. ADAMS, *THE GROWING CHURCH LOBBY IN WASHINGTON* 1-43 (1970).

42. In the post-Revolutionary era, Quakers in Philadelphia joined with members of other religions and formed the Philadelphia Society for Assisting Distressed Persons. See J. MOYHAHAN & E. STEWART, *THE AMERICAN JAIL: ITS DEVELOPMENT AND GROWTH* 34-35 (1980). During the mid-nineteenth century, religious influences dominated the prison reform movement under the leadership of the Rev. Louis Dwight and the Boston Disciplinary Society. See S. AHLSTROM, *supra* note 40, at 644; B. MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915* 38-39 (1936); see also R. HANDY, *supra* note 41, at 183.

43. From the early nineteenth century, Protestant leaders such as Horace Mann and William Ellery Channing worked for comprehensive public school systems. Their notion of public education included the inculcation of "common Christianity," a non-sectarian "National Protestantism." See E. NORMAN, *THE CONSCIENCE OF THE STATE IN NORTH AMERICA* 138-40 (1968).

44. Roman Catholics were a strong force in the movement toward unionism, since Catholics were the largest discrete element among America's distressed workers.

movements.<sup>46</sup>

Critics may disagree whether the contributions were for good or ill and may note that religious leaders have endorsed both sides of any major issue.<sup>47</sup> A partial reply is possible. On some prominent issues, religious forces have formed a consensus on one side, though certainly some religious support has arisen on the opposite side. The civil rights movement offers an example.<sup>48</sup> Many Americans might agree that the side with the consensus of religious support usually was the better side, though they might disagree with specific proposals issued by that side. Others might disagree that religious forces chose the better side.<sup>49</sup> They, however, might agree that the religious presence on an issue has contributed a valuable dimension to the discussion, whether it ultimately has favored one side or both sides of the issue. In any case, the assumption is that most Americans would agree that religion is a force for virtue.

The second objection to my argument would emphasize the contributions to political virtue that come from nonreligious institutions and individuals. Critics might ask why those entities and individuals should not receive the same accommodation as their religious counterparts. The short response would cite the text of the first amendment and note the express recognition it gives to religious expression. The more elaborate response might look to the sparse history we have concerning the amendment's drafting. Prior versions of the amendment also banned infringement on "rights of conscience."<sup>50</sup> The histori-

See S. AHLSTROM, *supra* note 40, at 1003; Abell, *The Catholic Factor in the Social Justice Movement*, in ROMAN CATHOLICISM AND THE AMERICAN WAY OF LIFE 70-98 (T. McAvoy ed. 1960).

45. See Pickrell & Horwich, "Religion as an Engine of Social Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field, 44 LAW AND CONTEMP. PROBS. 111, 112-15 (1981); Van Patten, *supra* note 27, at 83 & nn.364-65.

46. For a brief history of war resistance in the United States, see DiSalvo, *Saying "No" to War in the Technological Age—Conscientious Objection and the World Peace Tax Fund Act*, 31 DEPAUL L. REV. 497, 498-507 (1982). For an account of religious peace activism in the 1960's, see J. ADAMS, *supra* note 41, at 204-30. On current efforts, see *supra* note 6; J. CASTELLI, *THE BISHOPS AND THE BOMB* (1984).

47. Examples of issues on which I feel that most authorities in my particular religion (Roman Catholic) largely have taken the wrong side include opposition to child labor laws in the 1920's; see Abell, *supra* note 44, at 79; opposition to gay rights; see Nugent, *Homosexuality and the Vatican*, *Christian Century*, May 9, 1984, at 487; resistance to feminism; see Kalven, *Women's Voices Began to Challenge . . . After Negative Vatican Council Events*, *Nat'l Cath. Rep.*, April 13, 1984, at 10, col. 1; and an affection for single issue politics; see, e.g., Ryan, *Theology a la Cuomo, O'Connor*, *Nat'l Cath. Rep.*, Aug. 17, 1984, at 8, col. 1.

48. As recently as 1983, the Supreme Court had to deal with litigation precipitated by a fundamentalist Christian university's racial discrimination, which was based on religious conviction. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

49. See, e.g., *supra* note 47.

50. "Congress shall make no law establishing religion or to prevent the free exercise thereof, or to infringe the rights of conscience." THE FIRST CONGRESS, MARCH

cal record furnishes no reason why the first Congress rejected the phrase. One interpretation might find a conscious decision to give special protection to only religiously based rights. A reading of the limited recorded debate suggests that the drafters were concerned only with religious freedom and equated conscience with religious conscience, at least for purposes of the amendment.<sup>51</sup> Their rationale may have resulted from a special respect for religion, perhaps because of its express link with the transcendent. It also may have resulted from a special concern for religious freedom, based on the recent experience of some colonies with the established church of England and of some New Englanders with established Congregational churches.<sup>52</sup> It also may have resulted from fear that protection for all forms of sincere expression would unleash an unmanageable flood of claims that some Congressional action had infringed on some individual's right of conscience.<sup>53</sup>

Whatever the reason, my argument does not disparage the rights or contributions of the nonreligious conscience. Perhaps those rights must seek protection from the free speech and free press clauses and from sensitive govern-

4, 1789-MARCH 3, 1791 431 (R. Williams ed. 1970).

51. See *id.* at 373-77.

52. In the pre-Revolutionary era, religious establishments in the American colonies were tolerant. Prior to the 1760's, controversies over establishment were only episodic. In the 1760's and 1770's, two major episodes triggered a general concern with establishment and related antiestablishment mood with Revolutionary thought.

In 1759, the Virginia Assembly devalued the salaries of the Anglican clergy and launched a heated controversy with the Bishop of London as well as the local clergy of the established Anglican church. The king in council disallowed the act and thus joined government oppression with ecclesiastical oppression in the minds of the colonists.

In 1759, in Massachusetts, the Anglican church founded a branch of its missionary society under the contentious leadership of East Apthorp. Massachusetts colonists enjoyed a tolerant type of Congregationalist establishment and interpreted the move as the beginning of an effort to establish in America an Anglican episcopate hostile to New England nonconformism. The Americans recognized that Parliament would be the vehicle for Anglican establishment efforts. At the same time, Americans were beginning to challenge Parliament's authority over the colonies in other matters.

During the same era, radical dissenters began attacks against churches established in the colonies. In Massachusetts, for example, dissenters objected to paying taxes to support the Congregational church and argued that the taxes were as illegitimate as those that Parliament was imposing on the colonies. The struggle for religious liberty thus merged with the struggle for civil liberty. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 247-72 (1967).

53. Speculative theory might tie the disappearance of the word "conscience" from the first amendment to eighteenth century deism. Deism proclaimed natural religion, rationality, and the rejection of divine revelation. See G. KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* (1933). Anti-deists may have feared that including "conscience" in the first amendment's text would connote acceptance of deism's repudiation of external authority in moral and ethical matters. In addition, most deists belonged to the upper classes and many feared the spread of militant deism to members of other social strata. They viewed it as potentially dangerous enough to destroy not only organized religion, but also the social order. See H. MORAIS, *DEISM IN EIGHTEENTH CENTURY AMERICA* 14-15 (1960). Deists thus also may have favored the change in the proposed amendment's language.

ment bodies. Courts, moreover, have been generous in treating arguably secular claims of conscience as religious claims.<sup>54</sup> In any case, an analysis that recognizes the religious contribution to the political process and argues for liberal religious accommodation is discrete from a consideration of the nonreligious conscience.

The third objection might recognize the positive influence of religion, but argue that religion's strength derives from its autonomy. Because accommodation violates that autonomy, it risks corrupting religious virtue<sup>55</sup> and emasculating its contribution to the political process. In the abstract, the argument has obvious merit; however, it has less merit given the reality of American society.

Our Constitution and traditions accept as a major premise the separation of church and state.<sup>56</sup> Without this premise, unlimited state involvement in religious enterprises easily could corrupt them. But the liberal accommodation that I advocate is really a limited accommodation in a society that subscribes to separation. This accommodation runs little risk of corrupting religious forces. My specific argument, moreover, focuses on accommodation only in those cases in which reasonable people disagree whether the accommodation runs afoul of the American brand of separation. Unlimited state involvement is not at issue here.

In any case, our law and traditions accept accommodation as permissible and salutary;<sup>57</sup> the question is one of degree. The objection that warns of religious corruption has some validity, but it poses no serious obstacle to my argument.

The nature of the above objections points to the underlying issue. My argument rests on assumptions about religion's positive contribution to society and about acceptable types of church-state interplay. Though these assumptions are not entirely capable of empirical proof, my arguments suggest that my thesis is in harmony with the mainstream of American thought.

#### D. *The Thesis in Historical Context*

The Constitution's Framers recognized that civic virtue and morality are essential to a desirable society and government.<sup>58</sup> They also recognized that

54. See L. TRIBE, *supra* note 4, § 14-6, at 826-33, § 14-11, at 859-65.

55. The fear that state assistance to churches would corrupt them is in the tradition of Roger Williams. It was a strongly influential notion at the time of the Constitution's framing. See M. HOWE, *THE GARDEN AND THE WILDERNESS* 5-31 (1965).

56. See generally Part I.D. of this Article.

57. See generally Part II.A. of this Article.

58. Virtue in the classical humanist tradition, played a major role in the thinking of American Revolutionaries. They viewed English government and society as a source of corruption that threatened their virtue. See B. BAILYN, *supra* note 52, at 79-143; J. POCOCK, *supra* note 5, at 507-13; G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* 32-36 (1969). By the time of the Constitution's framing, however, the Federalists felt that their experience under the Articles of Confederation had

religion contributes to advancing these qualities.<sup>59</sup> Some Framers, however, might have disagreed whether organized religion makes a contribution and whether any such contribution outweighs the sectarian divisiveness it fomented.<sup>60</sup> As in the traditional debate over the degree of separation that the Framers envisioned, the evidence lies in their statements and in the practices of the time, all in light of the prevailing social, political, and economic conditions of the era.<sup>61</sup>

Certain practices disclose a recognition of the religious contribution. For example, the Continental Congress always opened with a prayer;<sup>62</sup> the armed forces and all congresses retained chaplains;<sup>63</sup> a religious service was part of George Washington's inauguration ceremony;<sup>64</sup> with the exception of Jefferson, all presidents followed the Continental Congress's example in declaring days of thanksgiving and prayer;<sup>65</sup> numerous states continued to have an es-

proven the failure of classical political theory in this country. They argued that a natural, virtuous aristocracy had not arisen and that the states had generated undisciplined, parochial legislatures instead of enlightened republics. See J. POCOCK, *supra*, at 516-21; G. WOOD, *supra*, at 391-425. In advocating the Constitution, the Federalists pressed for a new form of government that relied heavily on separation of powers, checks and balances, and an innovative federalism presiding over a geographically extensive republic. They relied on these innovations to secure the public good. See THE FEDERALIST NO. 10 & 51 129-36, 355-59 (J. Madison) (B. Wright ed. 1961); Morris, Book Review, 82 COLUM. L. REV. 406 (1982); *infra* notes 108-11 and accompanying text. Among historians, controversy exists over the extent that the Federalists viewed virtuous leaders as a necessary element in the working of the proposed political system. See, e.g., Shklar, Book Review, 90 YALE L.J. 942, 948-50 (1981) (critically reviewing G. WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981)). Even if the Framers had abandoned classical political theory, however, virtue continued to be a part of their language and thought. See J. POCOCK, *supra*, at 524-45; Myers, Book Review, N.Y. Times, Mar. 1, 1981, § 7 (Book Reviews), at 11, 25. Madison and others hoped that the proposed system would raise virtuous people to leadership positions. See, e.g., FEDERALIST NO. 10, *supra*, at 134; G. WOOD, *supra*, at 505.

59. See, e.g., *Editorial Note on Memorial and Remonstrance against Religious Assessments*, in 8 PAPERS OF JAMES MADISON 295 (R. Rutland & W. Rachal ed. 1973); A. HEIMERT, *supra* note 39, at 519-21, 528-32, 545-48 (1966); G. WOOD, *supra* note 58, at 427-28 (1969); Whitson, *American Pluralism*, THOUGHT 525, 526 (Winter 1962).

60. See *infra* notes 90-92 & 98 and accompanying text.

61. The purpose of an historical search is to inform constitutional interpretation with an appreciation of the purposes and values underlying the amendment's language. Changes in assumptions about government and society make ascertainment of the precise intent elusive and not of great relevance. See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383-84 (1967); Wofford, *The Blinding Light: The Uses of History in Constitutional Adjudication*, 31 U. CHI. L. REV. 502 (1964).

62. L. PFEFFER, CHURCH, STATE, AND FREEDOM 120 (rev. ed. 1967).

63. *Id.*

64. A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 87 (1964).

65. L. PFEFFER, *supra* note 62, at 266. President Andrew Jackson later followed Jefferson's example and refused to issue thanksgiving proclamations. *Id.* For an ac-

tablished church well into the nineteenth century.<sup>66</sup> Members of the constitutional generation often articulated the importance of religion in public life. For example, the Declaration of Independence includes numerous references to God;<sup>67</sup> the Northwest Ordinance expressly recognizes that religion and morality, along with knowledge, are necessary to good government;<sup>68</sup> the Continental Congress<sup>69</sup> and leaders in state government<sup>70</sup> frequently made reference to their commitment to advancing religion.

James Madison and Thomas Jefferson perhaps represent the extreme position favoring separation of church and state. Their prominent writings recognize the positive contributions of religion—but not organized religion—to government.<sup>71</sup> Their words and actions, however, have long furnished ammunition

count of the desire of the First Congress for a presidential Thanksgiving Day proclamation, see *Wallace v. Jaffree*, 105 S. Ct. 2479, 2513-14 (1985) (Rehnquist, J., dissenting).

66. See generally S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 510-17 (1902). In 1833, Massachusetts became the last state to disestablish its state church. *Id.* at 515.

67. In the Declaration of Independence, the Continental Congress stated that it sometimes becomes necessary for a people to become the independent political entity to which the "laws of nature and of nature's God entitle them," that the Creator endows all people with certain unalienable rights, and that the declarants appeal to the "Supreme Judge of the world" for the rectitude of their intentions.

68. Northwest Ordinance (U.S. 1787).

69. See L. PFEFFER, *supra* note 62, at 119.

70. See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM ESTABLISHMENT* 159-88 (1964). Many of the acts and words cited in the text here and in the text *infra* at notes 72-83 are open to divergent interpretations. Opposing advocates long have squabbled over them.

One example of scholarly squabbling will suffice. In 1822 Jefferson, as rector of the University of Virginia, agreed—with considerable reluctance it would appear—to allow "some pious individuals . . . to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University." Anyone who has attended many discussions or debates between church-state activists knows as soon as this quotation is mentioned that he is in for an extended exchange on the early 19th-century meaning of the word "confines." The reverend gentleman from Fordham will contend that Jefferson meant "on the grounds of the University." The learned gentleman from Yale will counter that Jefferson clearly meant "off, but adjacent to, the campus." The urbane gentleman from Harvard will suggest that Jefferson was being deliberately ambiguous, and conclude that the reference cannot be scored for either side.

R. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA* 70 (2d ed. 1980) (footnote omitted). I have chosen not to replay these controversies, but to note them and view them in the context of the general thinking of the Framers.

71. See *infra* notes 84-100 and accompanying text. Though the Founding Fathers emphasized their antiestablishmentarian principles, they recognized that religion, as a source of morality, contributes to a desirable government and society. As Jefferson wrote to John Adams,

But if the moral precepts innate in man, and made a part of his physical constitution, as necessary for a social being, if the sublime doctrines of philanthropism and deism taught us by Jesus of Nazareth, in which all agree, con-

for advocates arguing the extent to which they would have required separation.

A strict separationist, for example, might cite Madison's successful opposition to the 1785 Virginia bill for a general assessment to aid Christian teachers in the state;<sup>72</sup> his presidential veto of a bill to incorporate the Protestant Episcopal Church in Alexandria, District of Columbia;<sup>73</sup> his reluctance to issue executive proclamations of fasts and festivals;<sup>74</sup> Jefferson's refusal to issue a presidential proclamation of a day for thanksgiving and prayer;<sup>75</sup> and his insistence that theological schools be independent of the University of Virginia.<sup>76</sup> An accommodationist might note that Madison introduced into the Virginia legislature a bill to punish Sabbath breakers;<sup>77</sup> Madison and Jefferson apparently failed to attack Virginia's tax exemption statute of 1777;<sup>78</sup> Madison proclaimed a national day of fast, humiliation, and prayer during the War of 1812;<sup>79</sup> Jefferson, as Virginia's governor, proclaimed a day of thanksgiving and prayer in 1779;<sup>80</sup> as president, in a treaty with the Kaskasi Indians, he provided financial assistance for supporting a priest and erecting a

stitute true religion, then, without it, this would be, as you again say, "something not fit to be named even, indeed, a hell."

Letter from Thomas Jefferson to John Adams (May 5, 1817), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 108, 109 (A. Lipscomb ed 1904). This relation between religion and society was the generally accepted thought of the era. See Whitson, *supra* note 59 at 508-09.

72. See L. PFEFFER, *supra* note 62, at 109-13. The bill was introduced in 1784, but not acted upon until 1785. Madison's opposition prompted him to write his *Memorial and Remonstrance against Religious Assessments*, reprinted in Walz v. Tax Comm'n, 397 U.S. 664, 719 (Appendix II to Justice Douglas's dissent). At the time, however, he kept his authorship secret. See Editorial Note, *supra* note 59, at 297.

73. See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 70, at 176-78. At the time, what is now Alexandria, Virginia, was part of the District of Columbia.

74. See L. PFEFFER, *supra* note 62, at 266-67. In drafting proclamations, Madison was always careful to make them "absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms." Letter from James Madison to Edward Livingston (July 20, 1822), reprinted in THE MIND OF THE FOUNDER 428, 432 (M. Meyers ed. 1973) (emphasis in original).

75. See R. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 130-34 (1962); L. PFEFFER, *supra* note 62, at 266.

76. See R. HEALEY, *supra* note 75, at 213-16; see also *supra* note 70. But see Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), reprinted in WRITINGS OF THOMAS JEFFERSON 403, 405 (A. Lipscomb ed. 1904) (suggesting that theology students be permitted to attend university lectures, use its library and enjoy "every other accommodation we can give them").

77. Reprinted in 2 PAPERS OF THOMAS JEFFERSON 555 (J. Boyd ed. 1950). Jefferson authored the bill. See Editorial Note on the Revisal of the Laws 1776-1786 in *id.* at 305, 320.

78. See E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 250 (1972). The statute exempted religious societies and educational institutions from taxes.

79. See C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 70, at 183.

80. See *id.* at 82.



church;<sup>81</sup> at the University of Virginia, he provided for the appointment of an ethics professor who would deal with religious matters in a sympathetic way<sup>82</sup> and also expected students to attend the religious services of their respective denominations.<sup>83</sup>

Any inconsistencies between the articulated belief and actual practices of these individuals may stem from a political compromise, a change of mind, or a misreading of their beliefs. A brief overview of their philosophies might prove helpful.

Jefferson believed that virtually all people possess an innate moral sense.<sup>84</sup> Those who lack this faculty can gain it through education and practice.<sup>85</sup> For

81. See *id.* at 167, 201. In his proposal to reorganize the College of William and Mary, Jefferson proposed a mission to the Indian tribes, as opposed to an Indian school as part of the college. See *A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support*, reprinted in 2 PAPERS OF THOMAS JEFFERSON 535, 543 (J. Boyd ed. 1950). The description of the missionary's duties focuses exclusively on anthropological investigations. See *id.* at 540.

82. See *infra* note 96 and accompanying text.

83. See *Report of Bd. of Visitors* (Oct. 7, 1822), reprinted in N. CABELL, *EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA* 471, 475 (1856).

84. E.g., Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), reprinted in 12 PAPERS OF THOMAS JEFFERSON 14, 15 (J. Boyd ed. 1955); Letter from Thomas Jefferson to Thomas Law (June 13, 1814) reprinted in 14 WRITINGS OF THOMAS JEFFERSON 138, 141-42 (A. Lipscomb ed. 1904). See R. HEALEY, *supra* note 75, at 45-47; Appleby, *What is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. 287 (1982).

85. E.g., *Report of the Commissioners for the University of Virginia*, reprinted in THE PORTABLE THOMAS JEFFERSON 332, 336 (M. Peterson ed. 1975) [hereinafter cited as *Rockfish Gap Report*] (education "improves what in [a person's] nature was vicious and perverse into qualities of virtue and social worth"); Letter from Thomas Jefferson to Peter Carr, *supra* note 84, at 15 (moral sense "may be strengthened by exercise, as may any particular limb of the body;" reading good books encourages and directs moral feelings); Letter from Thomas Jefferson to Thomas Law, *supra* note 84, at 142-43 (lack of moral sense can be remedied by education, appeals to reason, and calculated appeals to self interest). See R. HEALEY, *supra* note 75, at 143-45. For the formal teaching of ethics, Jefferson looked primarily to the classical Greek and Roman authors. See Letter from Thomas Jefferson to Peter Carr (Aug. 19, 1785), reprinted in 5 WRITINGS OF THOMAS JEFFERSON 82, 85 (A. Lipscomb ed. 1904); Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), reprinted in 12 PAPERS OF THOMAS JEFFERSON 14, 18 (J. Boyd ed. 1955). According to Jefferson, sophisticated learning does not necessarily improve on common sense. "State a moral case to a ploughman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules." *Id.* at 15. Jefferson viewed liberal education as a way to select and prepare individuals of genius and virtue for positions of public leadership. See *A Bill for the More General Diffusion of Knowledge*, reprinted in 2 PAPERS OF THOMAS JEFFERSON 527, 534 (J. Boyd ed. 1950). But he also argued for education of the common people, "convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 12 PAPERS OF THOMAS JEFFERSON 438, 442 (J. Boyd ed. 1955). Ultimately, however, Jefferson saw the continuation of an agricultural society as essential to a virtuous society, since the

Jefferson, only that aspect of religion that deals with morality is true religion.<sup>86</sup> Theological speculation could wreck the mind<sup>87</sup> and even make people immoral by encouraging them to rely on nonrational doctrines instead of reason.<sup>88</sup> Consequently, he had no use for sectarianism, which arose from doctrinal dispute.<sup>89</sup> Jefferson, moreover, had antipathy toward organized religion, because he thought it promotes nonrational doctrines,<sup>90</sup> creates divisiveness,<sup>91</sup> and corrupts society whenever it joins forces with secular government.<sup>92</sup> Nonetheless, he believed that all religions share a common morality.<sup>93</sup> Jefferson thus would have acted to promote religious freedom for the individual. He authored not only a Bill for Establishing Religious Freedom,<sup>94</sup> but also a Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers, the latter perhaps as a recognition of government responsibility to protect freedom of worship.<sup>95</sup> Though he advocated that Virginia's proposed university have no professor of divinity—lest sectarianism raise its head—he wished other profes-

occupation does not beget subservience and venality. *Id.*; *Notes on Virginia*, reprinted in 2 WRITINGS OF THOMAS JEFFERSON 228, 229 (A. Lipscomb ed. 1903).

86. Letter from Thomas Jefferson to John Adams (May 15, 1817), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 108, 109 (A. Lipscomb ed. 1904). See R. HEALEY, *supra* note 75, at 159-61.

87. Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 408, 409 (A. Lipscomb ed. 1904).

88. Letter from Thomas Jefferson to John Adams (June 15, 1813), reprinted in 9 WRITINGS OF THOMAS JEFFERSON 386 (P. Ford ed. 1892-99); see Letter from Thomas Jefferson to Samuel Kercheval (Jan. 19, 1810), reprinted in 12 WRITINGS OF THOMAS JEFFERSON 345 (A. Lipscomb ed. 1904); Letter from Thomas Jefferson to Mathew Carey (Nov. 11, 1816), reprinted in 10 WRITINGS OF THOMAS JEFFERSON 67, 68 (P. Ford ed. 1892-99); R. Healey, *supra* note 75, at 162.

89. See Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 408 (A. Lipscomb ed. 1904).

90. See Letter from Thomas Jefferson to J.P.P. Derieux (July 25, 1788), reprinted in 13 PAPERS OF THOMAS JEFFERSON 418 (J. Boyd ed. 1956).

91. Jefferson also saw division along class lines. In Virginia, he viewed establishment of religion as financial support for the affluent: "for the establishment was truly of the religion of the rich, the dissenting sects being entirely composed of the less affluent. . . ." *Autobiography of Thomas Jefferson*, reprinted in 1 WRITINGS OF THOMAS JEFFERSON 69 (P. Ford ed. 1892).

92. *E.g.*, *Rockfish Gap Report*, *supra* note 85, at 337. See D. MALONE, *JEFFERSON THE VIRGINIAN* 278 (1 JEFFERSON AND HIS TIME series 1948).

93. *E.g.*, Letter from Thomas Jefferson to Thomas Leiper (Jan. 21, 1809), reprinted in 12 WRITINGS OF THOMAS JEFFERSON 236, 237 (A. Lipscomb ed. 1904). See R. HEALEY, *supra* note 75, at 159-61, 208-09; *cf.* Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), reprinted in 15 WRITINGS OF THOMAS JEFFERSON 408, 410 (A. Lipscomb ed. 1904) (both Trinitarianism and Unitarianism "make honest men"). Jefferson believed Jesus's system of morality to be superior. See Letter from Thomas Jefferson to Samuel Kercheval (Jan. 19, 1810), reprinted in 12 WRITINGS OF THOMAS JEFFERSON 345 (A. Lipscomb ed. 1904); see D. MALONE, *JEFFERSON THE PRESIDENT* 203 (4 JEFFERSON AND HIS TIME series 1970).

94. Reprinted in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950).

95. Reprinted in 2 PAPERS OF THOMAS JEFFERSON 555 (J. Boyd ed. 1950). See R. HEALEY, *supra* note 75, at 140.

sors to teach morality, proofs of the existence of God, and Hebrew, Greek, and Latin (tools for researching scripture), that is, matters common to all sects.<sup>96</sup>

Madison's philosophy of religion is not as well developed in the historical record. Yet, he believed strongly that religious freedom is an individual right and that an established church is an evil. His concern about persecution of Baptists in Virginia may well have been the issue that lured him into political life.<sup>97</sup> As for establishmentarianism, he observed that "union of religious sentiments begets a surprizing confidence and ecclesiastical establishments tend to great ignorance and corruption all of which facilitate the execution of mischievous projects."<sup>98</sup> Whatever the basis of Madison's philosophy, he and Jefferson apparently concurred on how they would resolve specific issues and frequently worked in concert.<sup>99</sup> The only exception of which I am aware is Madison's opposition to Jefferson's proposal to exclude clergy from elective office—an issue on which Jefferson changed his mind more than once.<sup>100</sup>

In summary, both Jefferson and Madison apparently recognized the importance of religion to the pursuit of the common good. Analysis of their words and conduct, however, has led to differing conclusions on the degree of church-state separation that they envisioned. Their philosophies and experiences with sectarianism and establishmentarianism led to their emphasis on safeguarding religious liberty against the state. Their emphasis lay on the negative consequences for free exercise when one particular church enjoys close identification with the government. They played the primary role in drafting the establishment clause,<sup>101</sup> which prevents establishment of a national

96. *Rockfish Gap Report*, *supra* note 85, at 337-43. Jefferson also favored accommodating the various sects by encouraging them to establish their own respective professorships on the confines of the university. *See supra* note 70. As a member of the Board of Visitors, he also agreed that "their students may attend lectures [at the university], and have free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other." Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), *reprinted in* 15 WRITINGS OF THOMAS JEFFERSON 403, 405 (1903). He also hoped that "by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality." *Id.* at 406.

97. *See* Letter from James Madison to William Bradford (Jan. 24, 1774), *reprinted in* 1 PAPERS OF JAMES MADISON 104, 107 n.9 (W. Hutchinson & W. Rachal ed. 1962).

98. *Id.* at 105.

99. *See* A. KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 23-32, 40-41 (1950). *See generally* H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910); E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 27-44 (1972).

100. *See* R. HEALEY, *supra* note 75, at 136-38.

101. The first amendment's language resulted from the efforts of many Congressional members. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 70, at 123-42. With Jefferson in France, Madison took the lead in Congress in pressing for the Bill of Rights. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983-84, 1006-09 (B. Schwartz ed. 1971). Jefferson and Madison have received the credit for the religion

church.<sup>102</sup> They thus did not forbid states to establish religions, apparently in the belief that federal intrusion was more serious a matter than were the evils associated with established churches.<sup>103</sup> The result of this balance of concerns at least suggests a recognition of church and state was tolerable in important units of government. Antiestablishmentarianism, then, was not so strong a force that it negated any thought of church-state accommodation; the establishment clause tolerated a type of accommodation that today would be unthinkable.

Jefferson and Madison, then, strongly advocated religious autonomy for groups and individuals and saw a connection between religion and a virtuous society. Yet, the distaste for organized religion and sectarianism discouraged an accommodating interplay between church and state. Their public actions, however, create ambiguity about the extent of accommodation they would permit. Moreover, because these men acted out of philosophical principle as well as legal mandate, it is impossible definitively to determine which accommodations they considered merely inadvisable and which unconstitutional.<sup>104</sup>

Perhaps a more profitable way to relate my thesis to the thinking of the constitutional era is to view religion in the context of Madisonian political theory.<sup>105</sup> A primary concern of Madison was the injurious effect of factions. Madison defined a faction as "a number of citizens amounting to a majority or minority of the whole, who are united and actuated by some common impulse

clauses because of the precedent set by their efforts in Virginia to enact the Statute of Religious Liberty. *See, e.g.,* *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947). Justice Rehnquist has argued that Madison sponsored the Bill of Rights "as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Wallace v. Jaffree*, 105 S. Ct. 2479, 2512 (1985) (Rehnquist, J., dissenting)

Other schools of thought also influenced the Framers, most notably Roger Williams' argument that separation would protect the church against corruption by the state. *See* M. HOWE, *supra* note 55, at 1-31.

102. The clause also has been viewed as not prohibiting federal courts from respecting state-level action supporting religion. *See* M. HOWE, *supra* note 55, at 11-23.

103. *See id.*, at 29-31. In contrast, concern for federalism did not stand in the way of insistence on the right to trial by jury in state courts. *See, e.g.,* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed. 1955).

104. *See, e.g.,* R. HEALEY, *supra* note 75, at 15, 132-40, 215-16.

105. The following account primarily relies on Madison's writings in *THE FEDERALIST*, particularly Numbers 10 and 51. The following descriptive paragraphs are an attempt at a faithful paraphrase. Madison believed that *THE FEDERALIST* mirrored the sentiments of the Framers:

"The Federalist" may fairly enough be regarded as the most authentic exposition of the text of the federal Constitution, as understood by the body which prepared and the Authority which accepted it. Yet it did not foresee all the misconstructions which have occurred, nor prevent some that it did foresee . . . . [N]either of the great rival parties have acquiesced in all its comments.

Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), *reprinted in* 9 WRITINGS OF JAMES MADISON 218, 219 (G. Hunt ed. 1910).

of passion, or of interest, adverse to the rights of other citizens or the permanent and aggregate interests of the community."<sup>106</sup> According to Madison, the causes of factions are not removable, and moral and religious motives are inadequate to control them.<sup>107</sup> These clashing interests, moreover, are not necessarily susceptible to an adjustment that will render them subservient to the public good. Enlightened leaders capable of making such adjustments will not always be at the helm, and, in many cases, such an adjustment is not possible. The goal, then, is control of factions.

Majority rule, according to Madison, ultimately controls minority factions. As for majority factions, a republic based on a scheme of representation offers a twofold cure. First, the delegation of government to a small number of elected officials helps to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."<sup>108</sup> Second, an extensive republic, as opposed to a small one, furnishes a wider choice of proper guardians of the public weal. Its size and diversity of interests also works to favor the election of virtuous leaders, in part because a majority will be less likely to share a common deleterious motive, and those sharing such a motive will find it harder to discover their strength and act in unison. The underlying assumption is that the American people have a virtuous spirit that prevails when the electorate acts within the structure of an extensive republican government.<sup>109</sup> Though factions and unvirtuous leaders may have their triumphs, "the process of elections . . . will most certainly extract from the mass of the society the purest and noblest characters which it contains . . ."<sup>110</sup> Madison also favored further checks on leaders, including separation of powers, checks and balances, and federalism.<sup>111</sup>

Throughout the past century, Madison's political theory has been the subject of extensive critiques.<sup>112</sup> Described broadly, however, it presents a perspective relevant to contemporary politics. Madison recognized a pluralistic society of competing interests. He acknowledged that selfish interests and individuals sometimes win out. Nonetheless, he believed that, over the long run,

106. THE FEDERALIST No. 10, *supra* note 58, at 130.

107. *Id.* at 130-31.

108. *Id.* at 134.

109. See, e.g., THE FEDERALIST No. 55, at 374, 377, 379 (J. Madison) (B. Wright ed. 1961); G. WILLS, *supra* note 5, at 179-92; Shklar, *supra* note 58, at 950-51.

110. *Vices of the Political System of the United States*, reprinted in 9 PAPERS OF JAMES MADISON 345, 357 (R. Rutland & W. Rachal ed. 1975).

111. See THE FEDERALIST No. 51, *supra* note 58.

112. See, e.g., D. ADAIR, FAME AND THE FOUNDING FATHERS 93-106 (1974); C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 156-58 (1913); J. BURNS, THE DEADLOCK OF DEMOCRACY 18-23, 218 (1963); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); G. WILLS, *supra* note 5. Prior to Beard's work, THE FEDERALIST No. 10 failed to receive particular attention from commentators. For an historiography on the Tenth Federalist, see D. ADAIR at 75-92; G. WILLS at xiv-xxii.

the virtue of the electorate would prevail and public minded leaders usually would have charge of government. Despite, then, Madison's dark view of a society ridden with selfish interests, he ultimately offered a bright view of a society that is rooted in the spirit of the American people and the structures of American government.

As for religion, Madison believed that religious sentiments and morality constitute too weak a force to dissipate factions: "They are not found to be adequate controls . . . on the injustice and violence of individuals, and lose their efficacy in proportion as their efficacy becomes needful."<sup>113</sup> Yet he relied on the political system to produce virtuous leaders for whom religious sentiments and morality presumably would be qualities of character.<sup>114</sup> Madison failed to articulate a positive role for organized religion in the political system. In the *Federalist*, he offered religious sects as an illustration of factions that the political system would keep under control.<sup>115</sup> In Madison's thinking, then, organized religion can play a deleterious role, and religion needs no formal support from the political system to assure that it will be a beneficial force on the electorate and the elected.<sup>116</sup>

My view differs from Madison's. I do not believe one can expect religious sentiments to have the strength to influence society without the existence of strong, organized religion. To be sure, religious individuals always play an important role in keeping honest both society and religious sects. Religious individuals alone, however, are not enough. Nor can one rely on the individual's innate religious and moral sentiments. Even Jefferson recognized the need to develop these qualities through education. I also disagree with Madison, because I believe that organized religion can be a beneficial force in developing the religious and moral sentiments that Madison assumed would be at work in society.<sup>117</sup>

113. THE FEDERALIST No. 10, *supra* note 58, at 133. He stated this belief in stronger words in a precursor to THE FEDERALIST No. 10—*Vices of the Political System of the United States*, reprinted in 9 PAPERS OF JAMES MADISON 345, 356-57 (R. Rutland & W. Rachal ed. 1975).

114. See *supra* text accompanying note 110.

115. THE FEDERALIST No. 10 *supra* note 58, at 132 and THE FEDERALIST No. 51, *supra* note 58, at 358-59; see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 12 PAPERS OF THOMAS JEFFERSON 270, 278 (J. Boyd ed. 1955).

116. See, e.g., Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting) ("for it is known that [Christianity] both existed and flourished, not only without the support of human laws, but in spite of every opposition from them"); Letter from James Madison to Rev. Adams (1832), reprinted in 9 WRITINGS OF JAMES MADISON 484 (G. Hunt ed. 1900-10) (religion is at its best and purest without the support of government).

117. My position finds support in the notion of mediating structures. Mediating structures, such as the neighborhood, the family, the voluntary association, and the church, are those institutions standing between the individual in his or her private life and the large institutions of public life. See P. BERGER & R. NEUHAUS, TO EMPOWER

As for the fear that religious forces cause factionalism, Madison noted that pluralism keeps the various sects under control.<sup>118</sup> My analysis recognizes that pluralism may work too well. The specific political position of a given religion may not succeed regardless of the authenticity of its claim to virtue. That interest must still compete with the wants of other religions and still other interests. The analysis, however, still shares Madison's optimism that virtue prevails in the long run.

My thesis, then, parts from Madison's political theory by taking a bleaker view of the power of virtue to hold its own in a pluralistic society. Though it recognizes the soundness of the principles of church-state separation, it does not assume that religious interests always enjoy the innate strength to exist as pluralistic influences. It therefore insists on liberal church-state accommodation. In this way, it seeks to insure that interests formally contributing a virtuous dimension to political decisionmaking enjoy sufficient clout not just to survive, but to make a significant contribution.

## II. SUPREME COURT ACKNOWLEDGMENT OF RELIGION'S SECULAR CONTRIBUTIONS

The Supreme Court only fleetingly has acknowledged religion's secular contribution to the political process. The Court, however, has raised themes that are hospitable to this acknowledgment. Three themes recognize the positive role of religion in American life: the religious dimension of the nation's history and culture; the common contribution of free exercise and free expression to the political process; and the role of religious institutions in meeting society's secular needs. A brief examination of these themes demonstrates that my argument is hardly a radical departure from traditional thinking about the religion clauses.

### A. Religion's Historical and Cultural Roles

The Court has used historical and cultural arguments in three ways to further accommodationist positions. First, the Court frequently has emphasized that historically and culturally, American society has a religious character, and it has used this assertion to set out a principle of liberal accommodation.<sup>119</sup> The strongest, most quoted declaration of this assertion appears in

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PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 2 (1977). As the value generating and value maintaining agencies in society, they play an essential role in a vital democratic society. *See id.* at 6. Within the family and between the family and society, the church is the primary agent for bearing and transmitting society's operative values. *See id.* at 30.

118. *See supra* note 115; *see also* Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615, 618-20 (1981).

119. *See, e.g.*, Lynch v. Donnelly, 104 S. Ct. 1355, 1360-61 (1984); Marsh v. Chambers, 103 S. Ct. 3330, 3336 (1983); McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970);

Justice Douglas's majority opinion in *Zorach v. Clauson*,<sup>120</sup> which upheld a released time program permitting public school children to receive off-premises religious instruction:

We are a religious people, whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary . . . . [A permissible accommodationist law] respects the religious nature of our people and accommodates the public service to their spiritual needs.<sup>121</sup>

The Court regularly has noted this underlying premise to the general principle of accommodation, even when it has invalidated an arguably permissible accommodationist law in the case at bar.<sup>122</sup>

Second, the Court has invoked the long historical acceptance of a particular practice as evidence that the practice does not run afoul of the religion clauses.<sup>123</sup> The evidence is particularly persuasive to the Court when the practice enjoyed acceptance in the Framers' era and, therefore, presumably did not violate the separationist principle in their eyes. These circumstances were present in *Walz v. Tax Commission*,<sup>124</sup> upholding tax exemptions for religious organizations, and *Marsh v. Chambers*,<sup>125</sup> validating the opening of legislative sessions with a prayer by a paid chaplain. *Lynch v. Donnelly* assumed that the celebration of Christmas had enjoyed governmental acceptance from the country's beginning, and it permitted a municipality to include a creche in its Christmas display.<sup>126</sup>

School Dist. v. Schempp, 374 U.S. 203, 212-14 (1963); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

120. 343 U.S. 306 (1952).

121. *Id.* at 313-14; see also Justice Douglas's dissent in *McGowan v. Md.*, 366 U.S. 420, 562-63 (1961), recognizing that society's institutions are founded on the belief that there is an authority higher than the state's authority. He limited the practical consequences of the assertion by stating that "if a religious haven is to be worked into the affairs of our people, it is to be done by the individuals and groups, not by the Government." *Id.* at 563.

122. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 792 (1973); *School Dist. v. Schempp*, 374 U.S. 203, 212-14 (1963); *Engel v. Vitale*, 370 U.S. 421, 441-43 (1962) (Douglas, J., concurring).

123. See *Lynch v. Donnelly*, 104 S. Ct. 1355, 1360-61, 1365 (1984); *Marsh v. Chambers*, 103 S. Ct. 3330, 3332-36 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 676-78 (1970).

124. 397 U.S. 664, 676-78 (1970).

125. 103 S. Ct. 3330, 3332-36 (1983).

126. The majority's language is careful. It describes the creche as a "symbol of a particular historic religious event, [that is included] as a part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries . . . ." 104 S. Ct. 1355, 1365 (1984). The Court thus did not state that the American people and government have approved or acknowledged creche displays for two centuries, but only that they have acknowledged Christmas. The Court failed to explain exactly what governmental actions comprise the acknowledgment. As Justice Brennan's dissent notes, the



Third, in some free exercise cases, the Court has pointed out that such practices as pamphleteering are historic tools in the fight for religious freedom and are also in the best tradition of free expression.<sup>127</sup> These discussions recognize that free exercise joins free expression as essentials in the political system.<sup>128</sup>

In the first two instances, the Court has discussed history to dispel fears that a particular law or practice contributes to a creeping establishmentarianism. For example, the Court has stated that the long practice of a paid chaplain offering a legislative prayer has not advanced the state toward religious establishment; therefore, history gives abundant assurance that legislative chaplains pose no threat to the separationist principle.<sup>129</sup> The Court, however, also has used history as evidence of a tradition of benevolent neutrality. The necessity of protecting religious autonomy serves as one justification for this neutrality.<sup>130</sup> The Court also has found in history an acknowledgment that religion makes a positive contribution to society. Uncontroverted is the recognition that many legal, political, and moral values derive from religious teachings.<sup>131</sup> Cases note religious references in public rituals like Thanksgiving Day and Christmas proclamations;<sup>132</sup> they also mention divine guidance and its

widespread celebration of Christmas in its present form did not emerge until well into the nineteenth century. Previously, hostility to the holiday by many denominations made the celebration a controversial subject. *Id.* at 1383-86. Longstanding tradition, then, still evidences the harmony of public, religiously oriented Christmas displays with the establishment clause, but the historical argument is less strong than in *Marsh* and *Walz*, in which specific government practices existed during the Framers' era.

127. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 509 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring); *Jones v. Opelika*, 316 U.S. 584, 619 (1942) (Murphy, J., dissenting).

128. See Part II, § B, *infra*.

129. *Marsh v. Chambers*, 103 S. Ct. 3330, 3337 (1983).

130. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 672, 676-78 (1970); *Zorach v. Clauson*, 343 U.S. 306, 314 (1951); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

131. See *School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

132. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1360-61 (1984); *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1951). Justice Brennan has suggested that such practices as designating "In God We Trust" as the national motto and referring to God in the Pledge of Allegiance could be viewed as forms of "ceremonial deism," in which rote repetition has deprived them of any significant religious content. *Lynch* at 1381 (Brennan, J., dissenting). Yet he also admitted that these references "are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases." *Id.* This unique quality, however, suggests a nonsecular dimension, even though the practices are "so conventional and uncontroversial as to be constitutional." Sutherland, *Book Review*, 40 *IND. L.J.* 83, 86 (1964).

Justice Brennan might have considered the historian's and sociologist's concept of American civil religion. It is the set of beliefs, symbols, and rituals that express the public religious dimension, which, in turn, reflects the common elements of religious

value in the deliberations and pronouncements of past and present public officials.<sup>133</sup>

These acknowledgments admittedly are thin strands in the judicial analyses, but my argument is a fair one. Our nation enjoys a lengthy history of public religious practices and accommodations. The cases mention this history in a positive light and recognize the wholesome contribution of religious values to the national character. The Court has not invoked culture and history to require a mere tolerance of religion. Instead, it has emphasized that a stark neutrality would create a perception of hostility to religion that contradicts American history and culture.<sup>134</sup> The Court therefore has set forth benevolent neutrality as the guiding principle.<sup>135</sup> This accommodationist approach implicitly recognizes that the American religious tradition is salutary, rather than unfortunate, and should be permitted to flourish. The Court, then, has invoked history and culture to celebrate the contribution of the nation's religious character to society and government.<sup>136</sup>

### B. *The Free Exercise-Free Expression Contribution*

The kindred roles of religious free exercise and free press in the political

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orientation that a great majority of Americans share. See R. BELLAH, *Civil Religion in America*, in BEYOND BELIEF 168, 171 (1970), reprinted from 96 DAEDALUS 1 (1967). See generally AMERICAN CIVIL RELIGION (R. Richey & D. Jones ed. 1974); R. BELLAH, *THE BROKEN COVENANT* (1975); M. NOVAK, *CHOOSING OUR KING* 105-59 (1974); Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123; A.A.L.S. *Law and Religion Panel: Law as Our Civil Religion*, 31 MERCER L. REV. 477 (1980). "[C]ivil religion at its best is a genuine apprehension of universal and transcendent religious reality as seen in . . . the experience of the American people." R. BELLAH, *supra* at 179. From this perspective the national motto, oaths of office, and the like are more than hollow rituals. American civil religion is nondenominational; therefore including the creche within its ambit presents difficulty unless one broadens the civil religion concept to include a benevolent accommodation of mainstream sectarian religious themes. One also might identify a latitudinarian Christianity as a major subcategory of American civil religion and recognize public religious Christmas displays as one of its symbols.

133. See *Lynch v. Donnelly*, 104 S. Ct. 1355, 1360 (1984).

134. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 314 (1951); *McCullum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948).

135. The phrase "benevolent neutrality" first appears in *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 676 (1970).

136. To be sure, historical and cultural arguments do not always persuade the Court or individual justices. A judicial opinion may reject the accuracy of the historical argument. E.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1382-86 (1984) (Brennan, J., dissenting). An opinion also may invoke history to justify a policy of church-state separation and find that the policy invalidates a traditional law or practice. E.g., *School Dist. v. Schempp*, 374 U.S. 203, 213-14 (1963). It also may find that despite a law's historical roots, it nonetheless fails to survive an ahistoric analytical test for constitutionality. E.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (Burger, C.J., plurality opinion). The sometime vulnerability of historical and cultural arguments does not refute my point, but merely demonstrates that other arguments can be more persuasive.

process find recognition in the Jehovah's Witnesses cases concerning religious pamphleteering and evangelizing in public places.<sup>137</sup> In the 1940's and early 1950's, the Court used these cases to develop ways in which to apply the free expression—free speech and free press—and free exercise clauses to state and local licensing laws that restricted door-to-door canvassing and public speaking. The Court struck down the laws in most of these cases by employing an analysis that invoked free expression and free exercise arguments without clearly distinguishing between the two.<sup>138</sup> In addition to recognizing the value of the constitutional guarantees in protecting individual autonomy against the state's power,<sup>139</sup> the decisions also recognized the value of both free expression and free exercise in contributing to the working of a democracy. The recurring, albeit sketchily developed theme is that both contribute to knowledge, discussion, and hence to opinion and right conduct.<sup>140</sup>

The cases rely on both the religious and free expression guarantees, though the Court could have decided the cases solely on the latter ground.<sup>141</sup> Prior to *Cantwell v. Connecticut*,<sup>142</sup> the Court had decided two cases for the

137. *E.g.* *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Kunz v. New York*, 340 U.S. 290 (1951); *Marsh v. Alabama*, 326 U.S. 501 (1945); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

138. *See, e.g.*, cases cited *supra* note 137.

139. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). Individual autonomy is the prime concern in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943) (invalidating requirement that school children salute the flag).

140. *See, e.g.*, *Kunz v. New York*, 340 U.S. 290, 293 (1951) (streets and parks "have immemorably . . . been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,") (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)); *Marsh v. Alabama*, 326 U.S. 501, 509 (1945) (exercise of liberties of free press and religion "lies at the foundation of free government by free men," quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)); *Jones v. Opelika*, 319 U.S. 584, 594-95 (1942) ("To proscribe the dissemination of doctrines or arguments . . . is to destroy the principal bases of democracy—knowledge and discussion.") (holding against the Witnesses); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (religious and political liberties are "essential to enlightened opinion and right conduct on the part of the citizens of a democracy").

141. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), for example, the Court invalidated an anti-solicitation ordinance solely on free speech and free press grounds, but three members of the five member majority also rested their decisions on the free exercise clause. *Id.* at 149 (Murphy, J., concurring with Douglas, J., and Rutledge, J.). In these sorts of cases, the protection offered by the free exercise and free speech guarantees appears to be coextensive. *See, e.g.*, *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981); *id.* at 659 n.3 (Brennan, J., concurring and dissenting). Opposition to making free exercise protection more extensive surfaces in some cases. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 164-65 (1944); *Douglas v. City of Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring); R. MORGAN, *THE SUPREME COURT AND RELIGION* 66-68 (1972).

142. 310 U.S. 296 (1940) (employing the due process clause of the fourteenth amendment to apply the free exercise clause to the states).

Witnesses by invoking only the free speech and free press clauses.<sup>143</sup> Though *Cantwell* recognized the applicability of the free exercise clause to the states, it also relied on free expression arguments to justify its decision.<sup>144</sup>

Perhaps *Cantwell's* invocation of the free exercise clause was inevitable, since the offending statute authorized a public official to decide whether a solicitation was for a religious purpose and therefore permissible.<sup>145</sup> Yet, subsequent cases with similar fact patterns concerned laws that were religiously neutral on their face.<sup>146</sup> The Court nonetheless included the free exercise clause in its arguments, though the inclusion was apparently unnecessary.

The inclusion may well have arisen out of a belief that the free exercise claim made the opinions more persuasive.<sup>147</sup> Perhaps the use of both the free exercise and free expression arguments as part of an undifferentiated analysis worked to strengthen both doctrines at this stage of their development, with each bolstering the other. By applying the free exercise argument to an issue for which the free expression doctrine appeared controlling, the Court increased the number of situations in which free exercise arguments could be invoked. Perhaps the free exercise argument aided in justifying the application of the free expression doctrine to conduct, as opposed to merely pure speech.<sup>148</sup> With *Cantwell*, the Court recognized limits on regulating religious activity as well as the prohibition on regulating religious belief. Though the Court already had begun extending the free expression doctrine to conduct, the analogous development under the free exercise doctrine must have given persuasive support to the extension.<sup>149</sup> In any case, the use of a common argument led the Court to hold that free exercise, as well as free expression, is essential to promoting the communication of ideas and diversity of opinion, which play a critical role in the political process.

### C. *The Contribution of Religious Institutions*

Supreme Court cases also have recognized that religious institutions contribute to furthering society's secular goals. The recognition arises in establishment clause cases<sup>150</sup> in which the Court must determine whether a secular, as opposed to religious purpose underlies legislation that arguably benefits reli-

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143. *Schneider v. Town of Irvington*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

144. 310 U.S. at 303-10.

145. *See id.* at 301-02.

146. *See, e.g., Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

147. *See R. MORGAN, supra* note 141, at 73-74.

148. *See id.* at 73.

149. *See, e.g., cases cited supra* note 143.

150. Free exercise cases that focus on the conduct of religious individuals also could be interpreted as acknowledging the contributions of the religious groups to which the individuals belong. *See Sec. II.B supra*.

gion.<sup>151</sup> The Court regularly has deferred to legislative statements of secular purpose, except in cases in which the nonsecular purpose was obvious—for example, a statute that forbids teaching evolution in public schools<sup>152</sup> or that requires posting the Ten Commandments in public classrooms (as a reminder of the religious roots of the Western legal code).<sup>153</sup> In an area populated by controversial cases, the ability of legislative bodies routinely to propose statements of purpose that the judiciary finds uncontroversial is noteworthy. The Court rarely has felt the need to closely analyze these statements.<sup>154</sup> In some instances, the Court has fleshed out<sup>155</sup> or even inferred<sup>156</sup> a legislative purpose that was sketchy or nonexistent. The near invulnerability of these statements to judicial attack suggests a strong societal consensus favoring the purposes they set forth.

Judicially acknowledged contributions of religious institutions fall into two categories: the general benefits of religion to society, and the specific benefits conferred by religions that sponsor educational institutions. In *Walz v. Tax Commission*, the Court upheld a property tax exemption for religious institutions as well as other social service and nonprofit organizations.<sup>157</sup> It inferred a secular legislative purpose of not inhibiting the activities of certain institutions that exist harmoniously with the community and foster its moral and mental improvement. *Walz* perhaps offers the most direct acknowledgment of the general secular contributions of religious institutions. There, the Court refused to limit the notion of valid public purpose to assisting religions only insofar as they furnish social welfare services or perform other good works.<sup>158</sup> The fear of potential administrative entanglement was the Court's articulated reason for rejecting the provision of these services as a criterion for determining which particular religious institutions qualify for a tax exemption.<sup>159</sup> Implicit, then, is a recognition that religion makes a secular contribution in addition to its social services contribution. The Court has found that the contribution to "mental or

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151. The requirement that legislation have a secular purpose is the first prong of the Supreme Court's current test for determining the constitutionality of legislation that arguably benefits one religion over another or religion over nonreligion. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For further discussion, see *infra* notes 187-99 and accompanying text.

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

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

154. The most extensive discussions of secular purpose appear in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1362-63 (1984), and *Walz v. Tax Comm'n* 397 U.S. 664, 671-74 (1970).

155. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 236 & n.5 (1977); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 740-41, 754 (1976).

156. See, e.g., *Mueller v. Allen*, 463 U.S. 388, 395 n.4 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-74 (1970); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

157. 397 U.S. 664 (1970).

158. *Id.* at 674.

159. *Id.* at 674-76.

moral improvement"<sup>160</sup> alone is sufficient to justify a tax exemption for religious institutions. Permitting the exemptions suggests an acknowledgment that the contributions are significant. They justify denying government a potential source of income. They also justify protecting churches in areas with high property values. In some instances, protection from the tax burden permits less affluent churches to survive and to continue to make the contribution that stems from religious exercise.

Acknowledgment of concrete contributions of religious institutions arises in cases concerned with state aid to religiously-affiliated schools.<sup>161</sup> In recognizing a valid secular purpose in aiding them and their students, the Court has expressly ratified three values that the aid promotes: financial relief for the state, educational diversity, and excellence in public education.

The privately-funded schools make available alternatives to the state's educational programs. In the absence of the alternatives, the state would have to carry a heavier financial burden in order to meet the increased educational demands posed by students it previously had not served. Religious schools, then, lighten the financial obligations of the state and its taxpayers.<sup>162</sup> As an educational alternative, the schools also furnish diversity in educational programs and help insure the vitality of a pluralistic society.<sup>163</sup> They also provide a yardstick against which to measure public education and serve as a competitive spur.<sup>164</sup>

In some instances, a religious institution may further a secular goal by invoking religious concerns to urge conduct that a legislature has determined to be a desirable goal for entirely secular reasons. Sunday closing laws offer an example. A religious group may encourage citizens to set aside Sunday for worship and reflection, and the state may wish to set it aside as a day of rest and relaxation.<sup>165</sup> Of course, such harmony between religious institutions and the state is not desirable in all instances. Disagreement acts as a desirable check on government when religious institutions believe government is acting

160. *Id.* at 672, quoting N.Y. REAL PROP. TAX LAW § 420(1), amended by N.Y. REAL PROP. TAX LAW § 420-a (McKinney 1984).

161. *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3230 (1985); Mueller v. Allen, 463 U.S. 388, 395 (1983); Tilton v. Richardson, 403 U.S. 672, 678 (1971). I use the word "schools" to include colleges and universities as well as primary schools and high schools.

162. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 395 (1983); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 764-65 (1973).

163. *See, e.g.*, cases cited *supra* note 162.

164. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 395 (1983).

165. *See* McGowan v. Maryland, 366 U.S. 420, 430 (1961); *see also, e.g.*, Harris v. McRae, 448 U.S. 297, 318-19 (1980) (upholding ban on use of Medicaid funds for abortions where ban was in agreement with doctrines of some religious groups, but also had the independent secular purpose of encouraging childbirth). The Court's reluctance to attribute unconstitutional motivation to government action reduces the risk of its finding an improper religious motivation. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

improperly. In some instances, however, a religious institution will support government conduct that is unconstitutional or inappropriate. My thesis, however, accords with the apparent judicial consensus that religious institutions generally are a salutary force.

#### D. *Some Reflections*

The Supreme Court thus has recognized religion's general contribution to society and the political process. According to the Court, religious institutions and religion as an historic and cultural influence have helped shape desirable secular values and the national character. The free exercise clause has joined with the free speech and free press clauses in promoting communication of ideas and diversity of opinion and thus has benefited the political process. In addition to making these general contributions, some religious institutions also have made a concrete contribution by providing schools as an alternative to public education. If the opportunity presented itself, presumably the Court also would recognize the positive contribution of religious institutions in offering social welfare services.<sup>166</sup>

None of these acknowledgments is particularly controversial, except perhaps to those with strong anti-religious feelings. The Court has not found it necessary to defend its acknowledgments or those embodied in legislative statements of purpose. The lack of controversy suggests that these contributions are taken for granted. This observation invites two inquiries: why has the Court not allocated a weightier role to the accepted notion of religion's secular contribution, and would such an allocation make a difference in the outcome of close cases.

I venture a brief response. In some free exercise and establishment clause cases, other religiously oriented policy concerns have proven sufficiently strong to make unnecessary the consideration of an additional policy concern. In free exercise cases concerning constitutional exemptions from state regulations, religion's secular contribution simply has failed to receive attention. In establishment clause cases dealing with government benefits to religion or particular religions, the Court's understanding of the clause's origins has encouraged a preoccupation with the dangers of church-state relationships. The judicial test that the Court applies in these cases contains a bias reflecting this preoccupation.

In cases that treat free exercise and free expression as concurrent concerns—for example, the Jehovah's Witness cases—the force of the free expres-

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166. In *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970), the Court upheld property tax exemptions for religious institutions and refused to justify the exemption on the social welfare services that churches provide. It feared that reliance on this criterion would result in administrative entanglement of church and state. The Court, however, recognized that churches furnish services that the state also frequently sponsors. Hence it implicitly recognized that churches furnishing these services perform a public function.

sion argument generally has proven sufficient to guard the religious interest.<sup>167</sup> The cases do not appear to make the protection offered by one guaranty more extensive than that offered by the other.<sup>168</sup> In these cases, the free expression concerns that predominate in the analyses<sup>169</sup> are so overwhelming that added attention to religion's secular contribution probably would not affect the judicial decisions.

In other free exercise cases, concern for religious autonomy has served as the prime value. It has proven strikingly powerful in cases dealing with inquiries into the verity of religious beliefs<sup>170</sup> and in cases concerning internal ecclesiastical disputes.<sup>171</sup> The Court consistently has refused to pass judgment on the former or intrude into the latter. In these cases, any other religiously oriented concern doubtlessly would be viewed as surplusage.

The concern for religious autonomy also has been central in challenges to state regulations that arguably have a coercive effect on the free exercise of religious minorities—the *Sherbert v. Verner*<sup>172</sup> line of cases. In only four cases have these challenges resulted in judicially mandated religious exemptions.<sup>173</sup>

167. Though the Court decided these cases on both free exercise and free expression grounds, from today's perspective the arguments appear based on the principles associated with guarantees of free speech and free press. See *supra* note 141 and text accompanying notes 141-49.

168. See *supra* note 141.

169. See *supra* note 141 and text accompanying notes 141-49.

170. See *United States v. Ballard*, 322 U.S. 78 (1944).

171. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese for the United States v. Milivojevich*, 426 U.S. 696 (1976). For an analysis of this line of cases, see Sirico, *The Constitutional Dimensions of Church Property Disputes*, 59 WASH. U.L.Q. 1 (1981).

172. 374 U.S. 398 (1963). In a related line of cases, individuals have argued that government action infringed on their free exercise rights, even though no government mandate compelled them to act in violation of their religious beliefs. See, e.g., *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (rejecting claim that government operation of dam and lack of control over tourists unconstitutionally interfered with Navajo religious practices at sacred area); *Sequoyah v. T.V.A.*, 620 F.2d 1159 (6th Cir. 1980) (rejecting Cherokee constitutional claim that completion of dam would flood sacred homeland and destroy important religious sites); *N.W. Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983) (rejecting claim that construction of road in a region that Native Americans hold sacred and use for rites would violate free exercise rights); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (rejecting claim that government construction of road and lack of control over tourists unconstitutionally disturbed Native American sacred area and interfered with religious rites); *Hopi Indian Tribe v. Block*, 8 I.L.R. 3073 (D.D.C. June 15, 1981) (rejecting claim that further development of recreational area would unconstitutionally disturb deities inhabiting the area). For a discussion, see Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175 (1983).

173. *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961). *McDaniel v. Paty*, 435 U.S. 618 (1978), arguably might be added to this list. The Court unanimously invalidated a state law disqualifying ministers from serv-



The small number of victories of those seeking exemptions suggests that they consider ways to bolster their arguments. In line with my thesis, they might argue that courts should give weight to the contribution made by those whose religions demand nonconformity with government mandates. These minorities play a prophetic role<sup>174</sup> in challenging societal norms on matters ranging from the necessity of military service to the necessity of mandatory education.

In establishment clause cases, the Court's interpretation of the clause's origins also creates a bias favoring strict separation of church and state. Beginning with *Everson v. Board of Education*,<sup>175</sup> the Court developed a history that portrayed the Framers as exclusively Jeffersonian in their fears that relations between church and state would lead to religious persecution and civil strife.<sup>176</sup> Though the Court since has softened this interpretation and described

ing as legislators. A plurality decided the case on free exercise grounds. Justice Stewart invoked *Torcaso* to find the law unconstitutional. *Id.* at 642-43 (Stewart, J., concurring).

The Court has not found a constitutional requirement to exempt religious conscientious objectors from military service. *See Gillette v. United States*, 401 U.S. 437 (1971). It has broadly interpreted statutory exemptions for religious objectors. *See Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion); *United States v. Seeger*, 380 U.S. 163 (1965).

In other situations, state courts have found a constitutional mandate to grant exemptions from government imposed rules. *See, e.g., Frank v. State*, 604 P.2d 1068 (Alaska 1979) (reversing Native American's conviction for shooting and transporting moose out of season for religious funeral ceremony); *Rankin v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907 (finding reasonable duty to accommodate teacher who required several absences a year for religious observances), *appeal dismissed*, 444 U.S. 986 (1979); *McMillan v. State*, 258 Md. 147, 265 A.2d 453 (1970) (exempting criminal defendant from trial court order to remove religious headgear); *Dotter v. Maine Employment Sec. Comm'n*, 435 A.2d 1368 (1981) (granting unemployment benefits to employee who lost job for attending religious festival and thus being absent from work); *In re Adoption of "E"*, 59 N.J. 36, 279 A.2d 785 (1971) (rejecting state requirement that prospective adoptive parents believe in a Supreme Being); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (permitting children to attend religious schools without state accreditation); *West Hill Baptist Church v. Abbate*, 24 Ohio Misc. 66, 261 N.E.2d 196 (1969) (finding state action and rejecting covenant that would exclude churches from residential area); *Whitehorn v. Oklahoma*, 561 P.2d 539 (Okla. Crim. App. 1977), (following *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964)) (both cases permitting Native American Church members to use peyote in religious ceremonies); *State v. Everly*, 150 W. Va. 423, 146 S.E.2d 705 (1966) (granting exemption from jury duty because of personal religious beliefs).

174. *See supra* text accompanying notes 32-39. *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1971) offers a nod in this general direction:

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong."

175. 330 U.S. 1, 8-16 (1947); *id.* at 33-43 (Rutledge, J., dissenting).

176. *See id.*; *see also Engel v. Vitale*, 370 U.S. 421, 427-31 (1962); *Torcaso v.*

the wall between church and state as less than impenetrable,<sup>177</sup> the Jeffersonian metaphor for strict separation remains a frequent starting point in judicial discussions of the establishment clause.<sup>178</sup>

The formal judicial tests in establishment clause cases have not taken the form of expressly balancing competing concerns, such as religion's secular contribution. Discussions of such matters as benevolent neutrality<sup>179</sup> and historic and cultural traditions<sup>180</sup> arise in the cases and presumably influence the decisions, but the Court leaves very unclear their degree of actual influence and the method for weighing their significance.<sup>181</sup>

Watkins, 367 U.S. 488, 490-92 (1961); *McCullum v. Board of Educ.*, 333 U.S. 203, 213-17 (1948); *L. TRIBE*, *supra* note 4, § 14-4 at 818 & n.17 (1978) (later Courts have accepted the separatist perspective as historical truth, though its accuracy has been disputed vigorously). For a critical assessment of this historical analysis, see *Wallace v. Jaffree*, 105 S. Ct. 2479, 2508-14 (1985) (Rehnquist, J., dissenting).

Though *Everson* upheld a form of indirect aid to parents of parochial school children, the Court's separatist perspective provoked criticism from contemporary accommodationists. See *R. MORGAN*, *supra* note 141, at 93-93. Justice Black, a primary author of the Court's history, harbored hostility toward the Roman Catholic church. His library contained a marked, personally indexed copy of Paul Blanshard's *AMERICAN FREEDOM AND CATHOLIC POWER* (1949), a popular anti-Catholic polemic. See *G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION* 268 (1977). Justice Black's son has written:

The Ku Klux Klan and Daddy, so far as I could tell, had one thing in common. He suspected the Catholic Church. He used to read all of Paul Blanshard's books exposing the power abuse in the Catholic Church. He thought the Pope and bishops had too much power and property. He resented the fact that rental property owned by the Church was not taxed; he felt they got most of their revenue from the poor and did not return enough of it.

H. BLACK, JR., *MY FATHER: A REMEMBRANCE* 104 (1975). Others have noted a strand of anti-Catholicism in the Court's jurisprudence of the religious clauses. See, e.g., Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 194-97 (1980); Tushnet, *Deviant Science in Constitutional Law*, 59 TEX. L. REV. 815, 820 (1981).

177. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359, 1362 (1984); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (plurality opinion); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 761 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Justice Rehnquist finds inadequate the primary judicial test in establishment clause cases, the test in *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971). He argues that difficulties with the test arise, because it "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." *Wallace v. Jaffree*, 105 S. Ct. 2479, 2158 (1985) (Rehnquist, J., dissenting).

178. See, e.g., cases cited *supra* note 177.

179. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 (1984) (Constitution "affirmatively mandates accommodation, not merely tolerance"); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (benevolent neutrality); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (government attitude should not be one of callous indifference to religious groups).

180. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1360-61 (1984); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 792 (1973); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

181. The Court has stated that it gives great weight to the historical acceptance

The structure of the formal tests leaves little room for an articulated consideration of policy concerns. The primary tests that the Court employs were formulated in *Larson v. Valente*<sup>182</sup> and *Lemon v. Kurtzman*.<sup>183</sup> The Court has employed the *Larson* test to evaluate legislation that arguably discriminates against a religious denomination.<sup>184</sup> The test requires that the legislation be justified by a compelling state interest and be closely fitted to further that interest.<sup>185</sup> This balancing test results in a strong stand against arguably discriminatory legislation; questionable measures face a very difficult task in surviving the test's requirements.<sup>186</sup> Only that elusive commodity, the compelling state interest, outweighs competing concerns, and then only if the legislation is closely fitted to its purpose. The test thus leaves little room for consideration of religion's secular contribution to exert a significant impact on the decision, particularly because the consideration would militate against upholding the challenged legislation, which already bears an enormously heavy burden.

The Court has employed the *Lemon* test when the challenged legislation arguably benefits one religion over another or benefits religion over nonreligion. Examples are a publicly funded display of a particular religion's holiday symbol<sup>187</sup> or a program of financial assistance to religiously affiliated schools.<sup>188</sup> The tests require that the legislation have a secular purpose and a principal or primary effect that neither advances nor inhibits religion. It also requires that the legislation not foster an excessive government entanglement with religion.<sup>189</sup> Excessive entanglement may be of the administrative or politi-

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of a particular practice, especially when the acceptance extends back to the Framers' era. See *supra* text accompanying notes 123-28. Precisely how this factor is included in the Court's formal test remains unarticulated.

182. 456 U.S. 228 (1982).

183. 403 U.S. 602 (1971). The Court consistently has emphasized its refusal to be bound to a single test in all establishment clause cases. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1362 (1984); *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). Yet, since 1971, it has employed the *Lemon* test in all establishment cases except for *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), and *Larson v. Valente*, 456 U.S. 228 (1982). In *Larson*, the Court applied a new test, but stated that the statute in question also would fail under the *Lemon* test. *Id.* at 247-55.

184. *Larson v. Valente*, 456 U.S. 228, 246-47, 252 (1982).

185. *Id.* at 247.

186. See *id.* at 246.

187. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1362-65 (1984).

188. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Larson v. Valente*, 456 U.S. 228, 252 (1982), the *Lemon* test is used to evaluate "laws affording a uniform benefit to all religions, and not to provisions . . . that discriminate among religions." *Id.* (emphasis in original). The Court, however, applied the *Lemon* test in *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984), in which the public creche arguably benefited only the Christian religion. The cases thus seem to distinguish between provisions that arguably discriminate against a religion by imposing a direct burden on it and provisions that favor a religion by awarding it a direct benefit. Cf. *Lynch*, 104 S. Ct. at 1366 n.13 (appearing to accord with my conclusion).

189. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

cal variety. Administrative entanglement is excessive when the government significantly intrudes into the operation of sectarian institutions.<sup>190</sup> Political entanglement is excessive when government action has an impermissibly high potential for political divisiveness along religious lines.<sup>191</sup> None of the elements calls for an express balancing. Religion's secular contribution would seem to be an appropriate subject for consideration under the test's public purpose prong. Yet the public purpose analysis usually is perfunctory, since the prong poses no threat to legislation's validity except when an illicit purpose is plainly apparent to the Court.<sup>192</sup>

Despite the lack of express balancing, the *Lemon* test's precise formulation and application varies with the policy judgments of the Court majority. In the most recent cases, a slim majority of the justices has applied the test with an increased accommodationist bent.<sup>193</sup> The Court also has restated the test so that it will yield more accommodationist results. It has rejected empirical evidence as proof of illicit effect and thus has seriously weakened the ability to demonstrate a violation of the secular effect prong.<sup>194</sup> It also has limited consideration of excessive political entanglement to cases concerning direct financial subsidies to church sponsored schools and other religious institutions.<sup>195</sup> The close votes on these holdings, however, invite speculation on their precedential value.<sup>196</sup>

190. *Id.* at 618-22.

191. *Id.* at 622-24. The Court has never held that political divisiveness alone can serve to invalidate otherwise permissible government conduct. *See Lynch v. Donnelly*, 104 S. Ct. 1355, 1364-65 (1984). It recently has limited consideration of political divisiveness to cases concerning direct subsidies to church-sponsored schools or colleges or other religious institutions. *See id.* at 1365; *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983).

192. *See supra* text accompanying notes 152-56.

193. *See Lynch v. Donnelly*, 104 U.S. 1355, 1370-71 (1984) (Brennan, J., dissenting); *Mueller v. Allen*, 103 U.S. 3062, 3071-78 (1983) (Marshall, J., dissenting). The Court, however has not made a radical policy shift. *See, e.g., Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (rejecting a program aiding students in religious schools); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985) (rejecting two programs aiding students in religious schools); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (rejecting statute authorizing silent meditation and prayer in public schools).

194. *See Mueller v. Allen*, 463 U.S. 388, 402 (1983). The Court recently fleshed out the meaning of the effects prong, perhaps to revitalize it. In *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3223-30 (1985), the Court invalidated two programs in which state employed teachers taught classes in classrooms leased from religious schools. The Court found an illicit primary effect, because the teachers might subtly or overtly engage in religious indoctrination; the symbolic union of church and state inherent in the programs might convey a message of state support for religion; and the programs effectively subsidized the religious mission of the affected institution.

195. *See supra* note 191.

196. Both the refusal to consider empirical evidence in applying the secular effect prong and the limitation on considering the degree of political entanglement first arise in *Mueller v. Allen*, 463 U.S. 388, 402, 403 n.11 (1983) (5-4 decision). The Court reaffirmed the limitation on considering excessive political entanglement in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1365 (1984) (5-4 decision).

Whatever the current majority interpretation, the *Lemon* test's structure creates a bias favoring strict separation of church and state. The excessive entanglement prong most clearly discloses the separatist bias. It can invalidate government action that offers merely a potential risk of an unacceptably high degree of government support for religion, religiously based discord, or political divisiveness along religious lines.<sup>197</sup> Certainly some risk is always present. The Court, however, never has explained how attenuated the risk must be before it is insufficient to invalidate legislation.<sup>198</sup> The excessive entanglement prong does not permit articulation of interests that might outweigh the risk. The Court instead has merely described the risk as sufficient or insufficiently attenuated to raise a constitutional obstacle. The emphasis on risk, the inevitable presence of some risk, and the lack of criteria for determining when other concerns outweigh the risk create a bias favoring a finding of unacceptable risk and hence excessive entanglement.

The secular effect prong shares similar characteristics. As applied, it requires that government action not have the direct and immediate effect of advancing or inhibiting religion.<sup>199</sup> Though some nonsecular effect probably is always present in actions that affect religion, the court offers little guidance in determining how insignificant the nonsecular effect must be for the measure to be constitutional. The prong does not permit articulation of countervailing interests. The emphasis on nonsecular effect, the inevitability of some nonsecular

197. See, e.g., *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 618-21 (1971). Though the Court never has decided a case solely on grounds of political divisiveness, it has often noted that the potential for political divisiveness has informed its determinations. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794-97 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971); L. TRIBE, *supra* note 4, § 14-12 at 868-69 (1978). A similar bias creating a heightened sensitivity to potentially excessive entanglement also arises in cases dealing with internal ecclesiastical disputes, though the cases are decided on free exercise grounds. See *Sirico*, *supra* note 171, at 3, 56-64. For a discussion of the entanglement concept's appearance in recent free exercise cases, see *Ripple*, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1210-14 (1980).

198. The Court has offered three criteria for determining whether or not entanglement is excessive: "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). These criteria are too general to offer much guidance, as the many divided Court opinions since *Lemon* illustrate. See *Ripple supra* note 197, at 1216-18 (by requiring the Court to predict the probability of unconstitutional consequences, the entanglement test greatly increases the degree of judicial subjectivity); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Courts in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 211 (1980) (describing the political divisiveness component of the entanglement test as "not a test at all but a standardless mask disguising the real reasons why federal judges nullify controversial legislation").

199. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); see also L. TRIBE, *supra* note 4, § 14-9, at 840.

effect, and the lack of criteria for determining when other concerns outweigh any nonsecular effect create a bias favoring a finding of unconstitutional effect. The Court certainly may determine that the effect is not unconstitutional, just as it can find a lack of excessive entanglement. In doing so, however, it must overcome the *Lemon* test's inherent bias.

Despite these observations, my purpose here is not to reformulate the Court's tests for deciding cases with religious dimensions. Rather, I encourage greater consideration of religion's secular contribution in deciding these cases. In cases that use an explicit balancing test, the inclusion of an additional consideration poses no great difficulty. In cases governed by tests that do not permit express balancing, the advocate may only raise the additional consideration and ask that it inform the judicial determination. In the Article's concluding section, I supplement this brief discussion by applying my argument to an area populated by closely decided cases: state financial aid to church related schools.

### III. APPLYING THE THESIS: GOVERNMENT AID TO RELIGIOUS SCHOOLS AND COLLEGES

In this section, I begin by restating the Supreme Court case law concerning government financial assistance to religiously affiliated schools and colleges. The discussion is limited to federal Supreme Court decisions. Though some state courts have reviewed assistance programs under the state and federal constitutions, their analyses raise no additional issues.<sup>200</sup> I then offer an explanation for the unsatisfactory nature of the Court's analysis and conclude by describing the type of case in which my thesis might have the greatest influence.

#### A. *The State of the Case Law*

The following seven paragraphs summarize the Supreme Court holdings on government assistance to religiously affiliated educational institutions. The government programs on which the Court has ruled have directed aid either to nonpublic institutions alone<sup>201</sup> or to public and nonpublic institutions concurrently.<sup>202</sup> Challenges have been lodged against parts of the programs that aid private institutions, because religiously affiliated institutions are included in their number. In the case of primary and secondary private schools, the bulk

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200. See, e.g., *California Teachers Assoc. v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981); *Gaffney v. State Dep't of Educ.*, 192 Neb. 358, 220 N.W.2d 550 (1974); *Dickman v. School Dist.*, 232 Or. 238, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962); *Bloom v. School Comm.*, 376 Mass. 35, 379 N.E.2d 578 (1978); *Bowerman v. O'Connor*, 104 R.I. 519, 247 A.2d 82 (1968).

201. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 782 n.38 (1973).

202. See, e.g., *Mueller v. Allen* 463 U.S. 388, 395 (1983).

of these institutions are religiously affiliated.<sup>203</sup> In the following paragraphs, the phrase "private schools" includes nonpublic primary and secondary schools when a very significant number of the schools have religious affiliations. The phrase "private colleges" includes nonpublic colleges and universities, some of which have religious affiliations.

### 1. Tax Benefits and Financial Aid to Students

The government may permit parents to take tax deductions for tuition, textbook, and transportation expenses when the deduction is available for expenses incurred in sending children to either public or private schools.<sup>204</sup> It may not permit parents to deduct a designated amount that varies with their income and the number of enrolled children when the tax benefit is available to parents only for children in private schools.<sup>205</sup> It may not reimburse parents for tuition they pay to private schools.<sup>206</sup> It may fund a program to award financial aid to public and private college students when the students use the funds to cover only educationally related expenses.<sup>207</sup> It may grant funds to private colleges to use as scholarship assistance for financially needy students. These students may use the assistance only for secular educational purposes. The college must provide reports and certification showing compliance with the limitation on the use of the funds.<sup>208</sup>

### 2. Transportation

The government may reimburse parents of public and private school students for the cost of bus transportation to school.<sup>209</sup> It may not reimburse private schools for the cost of bus transportation for field trips.<sup>210</sup>

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203. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (96% of Ohio's nonpublic schools had religious affiliation); *Lemon v. Kurtzman*, 403 U.S. 602, 610 (1971) (in 1969, 96% of Pennsylvania's nonpublic school students attended schools with religious affiliations); see also *infra* text accompanying notes 275, 282-85, 297-99.

204. *Mueller v. Allen*, 463 U.S. 388, (1983) (5-4 decision).

205. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 790-91 (1973) (6-3 vote on the issue).

206. *Id.* at 780 (6-3 vote on issue); *Sloan v. Lemon*, 413 U.S. 825, 828-33 (1973) (6-3 decision).

207. *American United for Separation of Church and State v. Blanton*, 434 U.S. 803, *summarily aff'g*, 433 F. Supp. 97 (M.D. Tenn. 1977) (three justices would have noted probable jurisdiction and set the case for oral argument).

208. *Smith v. Board of Governors*, 434 U.S. 803, *summarily aff'g*, 429 F. Supp. 871 (W.D.N.C. 1977) (three justices would have noted probable jurisdiction and set the case for oral argument). The limitation on using the funds for only secular educational purposes meant that the funds could not be used to assist students enrolled in a program designed as preparation for a religious vocation. 429 F. Supp. at 873.

209. *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947) (7-2 decision).

210. *Wolman v. Walter*, 433 U.S. 229, 252-55 (1977) (5-4 vote on issue).

### 3. Instructional Materials

The government may loan secular textbooks to private school students.<sup>211</sup> It may not loan instructional materials or educational equipment to private schools<sup>212</sup> or their students,<sup>213</sup> even if the materials and equipment are secular, neutral, and nonideological.

### 4. Auxiliary Services

The government may provide a program in which state employed professionals perform speech, hearing, and psychological diagnostic services on private school premises.<sup>214</sup> It may provide a program in which state employed professionals offer therapeutic services, but only if they provide the services off private school grounds.<sup>215</sup> The government may not employ teachers to conduct classes in private schools as part of a program to offer remedial classes and guidance services to educationally deprived children from low income families.<sup>216</sup>

### 5. Grants to Institutions

The government may not make direct grants to private schools to maintain and repair their facilities.<sup>217</sup> It may provide funds to private colleges to construct facilities to be used solely for nonreligious purposes, provided that the limitation on use continues as long as the facility retains any financial value.<sup>218</sup> It also may issue revenue bonds to benefit private colleges to finance construction of facilities to be used solely for nonreligious purposes when the colleges repay the bonds from their own revenues.<sup>219</sup> It also may make annual, noncategorical grants to private colleges when the government screens each college to make sure that it is not pervasively religious and when each college gives adequate assurance that it will use the funds for secular purposes and reports on how it spends the funding.<sup>220</sup>

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211. *Id.* at 236-38 (6-3 vote on issue); *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975) (6-3 vote on issue); *Board of Educ. v. Allen*, 392 U.S. 236, 238-48 (1968) (6-3 decision).

212. *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975) (6-3 vote on issue).

213. *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977) (6-3 vote on issue).

214. *Id.* at 241-44 (8-1 vote on issue).

215. *Id.* at 244-48 (7-2 vote on issue); *see also Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975) (6-3 vote on issue) (rejecting on premises therapeutic services).

216. *Aquilar v. Felton*, 105 S. Ct. 3232 (1985)

217. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 774 (1973) (8-1 vote on issue).

218. *Tilton v. Richardson*, 403 U.S. 672 (1971) (5-4 decision).

219. *Hunt v. McNair*, 413 U.S. 734, 736-49 (1973) (6-3 decision).

220. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 754-67 (1976) (5-4 decision). *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), permits government to grant a property tax exemption to religious educational institutions as part of a general exemption



## 6. Salaries

The government may not pay a supplement to the salaries of private school teachers, even under the guise of purchasing specified educational services.<sup>221</sup> The government may not pay the salaries of government employed teachers and assign them to teach classes in private schools.<sup>222</sup>

## 7. Testing

The government may reimburse private schools for the cost of administering and grading standardized achievement tests when the tests are prepared by public officials,<sup>223</sup> even when the tests include some essay questions.<sup>224</sup> It may not reimburse a private school for the costs of state mandated testing when the private school prepares the tests.<sup>225</sup> It may reimburse private schools for the cost of keeping attendance and other government-required records when legislation imposes auditing safeguards to insure that reimbursements cover only the cost of this activity.<sup>226</sup>

### B. *The Lack of a Satisfactory Judicial Analysis*

The lack of apparent consistency in these holdings has become a commonplace observation.<sup>227</sup> The holdings on loans of instructional material and provision of auxiliary services illustrate the unsatisfactory nature of the judicial analysis. The government, for example, may loan secular textbooks to students

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for nonprofit institutions. A private school or college may not enjoy an exemption from federal taxation when its admissions policy includes racial discrimination and justifies the discrimination as a mandate of religious doctrine. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

221. *Lemon v. Kurtzman*, 403 U.S. 602, 615-25 (1971) (8-0 decision concerning Pennsylvania statute; 8-1 decision concerning Rhode Island statute).

222. *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985).

223. *Wolman v. Walter*, 433 U.S. 229, 238-41 (1977) (6-3 vote on issue).

224. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 656 (1980) (5-4 decision).

225. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 481-82 (1973) (8-1 decision).

226. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 656 (1980) (5-4 decision). See *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 481-82 (1973) (8-1 decision) (invalidating lump sum per pupil payment that was designed as a reimbursement).

227. See, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479, 2518-20 (1985) (Rehnquist, J., dissenting); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1567-69 (10th ed. 1980); Kurland, *The Relevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 21-23 (1978); Ripple, *supra* note 197, at 1216-18; Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1463-73 (1981); Note, *State Aid to Parochial Schools: A Quantitative Analysis*, 71 GEO. L.J. 1063, 1064-74 (1983).

in religious schools,<sup>228</sup> but it may not loan secular, neutral instructional materials or equipment to the students,<sup>229</sup> their parents,<sup>230</sup> or the schools themselves.<sup>231</sup> According to the Court, the textbook loan is valid, because the financial benefit runs to the parents and children.<sup>232</sup> The loan of materials, however, has the unconstitutional primary effect of advancing religion, because it benefits schools of a predominantly religious character.<sup>233</sup> The Court has determined that textbooks enjoy a unique presumption of neutrality and has expressly chosen not to extend the presumption to similar teaching materials.<sup>234</sup>

According to the Court, the government may provide speech, hearing, and psychological diagnostic services on school premises,<sup>235</sup> but it may not provide services to remedy the diagnosed difficulties on school premises.<sup>236</sup> The Court has declared that diagnostic services have little or no educational content and require only limited contact with the child.<sup>237</sup> It therefore has reasoned that these factors reduce pressure on the diagnostician to allow intrusion of sectarian views and that diagnosis offers limited opportunity for transmission of such views.<sup>238</sup> In contrast, according to the Court, the therapist operating on school grounds might depart from religious neutrality. In the Court's words, he or she would be "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."<sup>239</sup> Yet the Court has permitted provision of therapeutic services at religiously neutral locations that serve only sectarian pupils, because the locations lack the environmental pressures that might subvert the therapist's task to the service of religion.<sup>240</sup> Though the Court's analyses in these examples fall within the realm of customary judicial argumentation, the highly refined nature of the distinctions suggests a thinness to the Court's reasoning. The Court's critics frequently find the distinctions unpersuasive and therefore conclude that the holdings are inconsistent.<sup>241</sup>

The decisions have failed to conform to any theory seeking to furnish a principled analysis. The child benefit theory, for example, would permit finan-

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228. *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977); *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975); *Board of Educ. v. Allen*, 392 U.S. 236, 238-48 (1968).

229. *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977).

230. *Id.*

231. *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975).

232. *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968).

233. *Meek v. Pittenger*, 421 U.S. 349, 363-66 (1975).

234. *Wolman v. Walter*, 433 U.S. 229, 251 n.18 (1977).

235. *Id.* at 241-44.

236. *Aguilar v. Felton*, 105 S. Ct. 3232 (1985); *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975).

237. *Wolman v. Walter*, 433 U.S. 229, 244 (1977).

238. *Id.*

239. *Meek v. Pittenger*, 421 U.S. 349, 371 (1975).

240. *Wolman v. Walter*, 433 U.S. 229, 247 (1977).

241. *See supra* note 227.

cial benefits to parents and children, but not to religious educational institutions.<sup>242</sup> Even if such a distinction were possible, it would not reconcile the Court's holdings permitting the state to loan secular textbooks, but not instructional materials, to parents and children, for example. In rejecting the loan of instructional materials, the Court declared that to approve such loans to parents and children, but not to schools "would exalt form over substance" and noted the impossibility of separating the secular education function from the sectarian function.<sup>243</sup> In this instance, the distinction between child benefit and institutional benefit seems impossible to make.

Another theory would approve services that are furnished off school premises, but not services furnished on them. The Court, nonetheless, has upheld diagnostic services furnished on school premises.<sup>244</sup> A pragmatic approach would have the cases turn on the relative amount of financial aid that the state disburses to religious educational institutions.<sup>245</sup> The Court has suggested that the amount of aid is a significant factor in determining whether an assistance program impermissibly advances religion.<sup>246</sup> The Court, however, has upheld programs allocating substantial aid to religious schools;<sup>247</sup> in some instances, it has upheld programs offering greater aid to religious institutions than was offered in programs that it has rejected.<sup>248</sup>

The Court's only consistent pattern has been to permit aid to religiously affiliated colleges and universities in virtually every instance and to permit aid to religiously affiliated primary and secondary schools in only some instances. It has invalidated a college aid provision only once.<sup>249</sup> In *Tilton v. Richardson*, the Court upheld federal construction grants for college buildings to be used

242. For discussions of the child benefit theory, see, e.g., *California Teachers Ass'n v Riles*, 29 Cal. 3d 794, 807-11, 632 P.2d 953, 960-64, 176 Cal. Rptr. 300, 307-10 (1981); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 313-18 (1968).

243. *Wolman v. Walter*, 433 U.S. 229, 250 (1977).

244. *Id.* at 241-44.

245. See Note, *State Aid to Parochial Schools*, *supra* note 227.

246. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 365 (1975); *Wolman v. Walter*, 433 U.S. 229, 256 (1977) (Brennan, J., concurring in part and dissenting in part).

247. See, e.g., *Committee for Public Educ. v. Regan*, 444 U.S. 646, 665 (1980) (Blackmun, J., dissenting) (upholding program allocating most of an eight to ten million dollar appropriation to religious schools); *Wolman v. Walter*, 433 U.S. 229, 233 (1977) (upholding most of a program appropriating most of eighty-eight million, eight hundred thousand dollars biennially to religious schools).

248. For example, in *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472, 474 (1973), the Court struck down a twenty-eight million dollar assistance program, most of which would have aided religious schools. In *Wolman v. Walter*, 433 U.S. 229, 233 (1977), the Court upheld most of an assistance program that carried a biennial appropriation of eighty-eight million, eight hundred thousand dollars, most of which would have gone to religious schools. See Note, *Rebuilding the Wall*, *supra* note 227, at 1469-70 (suggesting that construction grants permitted in *Tilton v. Richardson*, 403 U.S. 672 (1971), provide greater financial benefits than the maintenance and repair funding rejected in *Committee for Pub. Educ. v. Nyquist*, 418 U.S. 756 (1973)).

249. *Tilton v. Richardson*, 403 U.S. 672, 682-83 (1971).

solely for secular purposes.<sup>250</sup> Under the program, the government could demand return of grant money if a college were to use a building for religious purposes. The Court invalidated a statutory provision prohibiting the government from demanding return of grant money after twenty years, even if the college then used the building for religious purposes.<sup>251</sup>

The explanation for the judicial pattern lies in the way the Court has categorized educational institutions. In its opinions, the Court always has found that the particular colleges and universities receiving aid were not pervasively religious.<sup>252</sup> In contrast, it always has assumed that primary and secondary sectarian schools were pervasively religious.<sup>253</sup> It also has noted that the impressionable ages of pupils in the latter institutions enhance the process of religious indoctrination, while the skepticism of college students limits the effectiveness of sectarian influences.<sup>254</sup> Though advocates sometimes have argued that a particular school is not pervasively religious or that a particular college is, the Court has uniformly adhered to its stereotypes. Even if the judicial stereotyping explains the college aid cases, it still fails to shed light on the primary and secondary school aid cases.

The inadequacies of the Court's opinions yield dual practical consequences. First, the cases offer no analysis that permits accurate predictions on the results of subsequent cases. Second, comparing the fact patterns of prior cases and new cases also offers limited predictive assistance. The distinction between textbooks and other instructional materials, for example, proved to be a pivotal factual distinction to determine the constitutionality of an aid program,<sup>255</sup> as did the distinction between diagnostic and therapeutic services.<sup>256</sup> The problem lies not with a judicial failure properly to apply a clear constitutional directive or even to apply some proposed rule that would represent a judicially acceptable interpretation of the Constitution. Neither clear constitutional directive or any proposed rule exists that would attract a broad judicial or scholarly consensus. The problem is symptomatic of national disagreement over the proper relationship of church and state.

The text of the establishment clause furnishes no clear guidance in deciding specific cases. A prohibition on establishing religion, originally intended to forbid establishment of a national church,<sup>257</sup> offers no help in determining the

250. *Id.* at 677-82, 684-89.

251. *Id.* at 682-83.

252. *See* *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755-59, 764-65 (1976); *Hunt v. McNair*, 413 U.S. 734, 742-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 684-87 (1971).

253. *See, e.g.*, *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3223 (1985); *Wolman v. Walter*, 433 U.S. 229, 235 n.4 (1977); *Lemon v. Kurtzman*, 403 U.S. 602, 615-18 (1971). For a discussion on the Court's use of standardized institutional profiles, see *Ripple supra* note 197, at 1221-24.

254. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971).

255. *See supra* text accompanying notes 228-34.

256. *See supra* text accompanying notes 235-40.

257. *See supra* notes 101-03 and accompanying text.

constitutionality of a particular type of government assistance to a religious school. The principle that today's Court derives from the establishment clause is separation of church and state.<sup>258</sup> Though the principle enjoys general acceptance, Court members invoke it to justify very different conclusions in a given case.

Operative rules for implementing this principle, for example, the *Lemon* test,<sup>259</sup> naturally reflect the disagreement over the separation principle's meaning and therefore fail to yield predictable results. For example, when the Court applies the *Lemon* test to a particular set of facts, any difference between the facts and the facts of a prior case requires the Court to determine if the difference is material to the new case's outcome. For example, the Court must decide whether the difference between textbooks and other instructional items is material or whether the difference between diagnostic and therapeutic services is material. To make the determination on materiality, the Court must apply the ambiguous separation principle. Variations in the facts—the meat of most litigation—thus require a return to basic, but indeterminate principles.<sup>260</sup> The Constitution's text, the separation principle, and the *Lemon* test, then, fail to furnish predictable judicial results in educational aid cases.

The indeterminacy of legal principles and operative rules perhaps characterizes all fields of law. Here, however, the steady stream of fragmented decisions and the visibility of the substantive issue makes the indeterminacy particularly apparent. The problem's resolution does not lie with finding a new test that both possesses greater predictive ability and reflects a consensus of the establishment clause's meaning as applied to the educational aid cases. Though a new test might possess greater predictive ability, it could not attract the necessary consensus.

Any test with greater predictive ability gains this quality by incorporating a strong bias for or against educational aid. For example, one proposed test would uphold government assistance to church affiliated schools so long as the amount does not exceed the value of the secular educational service that the schools provide.<sup>261</sup> This test springs from the accommodationist principle that the establishment clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.<sup>262</sup> The test thus would offer con-

258. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355, 1358-59 (1984).

259. "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); see *supra* text accompanying notes 187-99.

260. For a more elaborate discussion of these problems in another context, see Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 527-43 (1984).

261. See Choper, *supra* note 242, at 265-66, 283-311.

262. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980).

siderable predictability, but would be unacceptable to many because of its accommodationist bias. In contrast, Justice Brennan has proposed a test that would forbid "those involvements of religion with secular institutions that . . . serve the essentially religious activities of religious institutions; . . . employ the organs of government for essentially religious purposes; . . . or use essentially religious means to serve governmental ends, where secular means would suffice."<sup>263</sup> This test also would offer considerable predictability, because it likely would invalidate virtually all educational aid programs. It has failed to gain adoption, presumably because it reflects Justice Brennan's severely separatist position. A decision to adopt a more predictive test than the *Lemon* test thus would require a consensus to adopt a more definite policy for or against educational aid.<sup>264</sup>

Supreme Court decisions, however, indicate a decided lack of consensus and an inability to adopt a new policy except by a close, transitory majority vote. A statistical analysis of the decisions and a reading of the opinions disclose that the justices divide into three highly cohesive blocs.<sup>265</sup> Justices Bur-

263. *Abington School Dist. v. Schempp*, 374 U.S. 203, 294-95 (1963).

264. In addition to the fundamental policy considerations, an additional judicial concern must be with a state legislature enacting a statute that attempts to grant aid by slightly revising a statute that the Court already has invalidated. At the same time, legislatures also must face frustration when the Court rejects legislation that seems to conform with prior judicial statements. One authority has described the process as an "historic game of chess." Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783, 787 (1977) (quoting Leo Pfeffer).

Tracing the history of legislative efforts in a given state illustrates the process. In 1971, *Lemon v. Kurtzman*, 403 U.S. 602, struck down a Pennsylvania statute that authorized direct payments to nonpublic schools. See PA. STAT. ANN. tit. 24 § 5601-09 (Purdon 1970) (repealed 1977). The legislature then authorized a program to reimburse parents for school tuition. See PA. STAT. ANN. tit. 24 § 5701-09 (Purdon Supp. 1984). *Sloan v. Lemon*, 413 U.S. 825 (1973), invalidated this program. In 1972, the legislature authorized a program providing on-site auxiliary services, loans of instructional materials and equipment to nonpublic schools, and a textbook loan program modeled after the program upheld in *Board of Educ. v. Allen*, 392 U.S. 236 (1968). See PA. STAT. ANN. tit. 24 § 9-972 (Purdon Supp. 1984). *Meek v. Pittenger*, 421 U.S. 349 (1975), rejected all but the textbook loan program. In 1980, the legislature enacted a program that provides auxiliary services in a manner almost identical to the manner upheld in *Wolman v. Walter*, 433 U.S. 229, 241-48 (1977). See PA. STAT. ANN. tit. 24 § 9-972.1 (Purdon Supp. 1984). For a brief summary of a similar process in Ohio, see Kancelbaum, *Shifting Currents in the Narrow Channel of State Aid to Parochial Schools*, 38 OHIO ST. L.J. 757, 768 (1977).

265. For a detailed statistical analysis of the Court's voting blocs, see Peterson, *The Thwarted Opportunity for Judicial Activism in Church-State Relations: Separation and Accommodation in Precarious Balance*, 22 J. CHURCH & STATE 435, 442-57 (1980); see also G. GUNTHER, *supra* note 227, at 1568; Young, *supra* note 264, at 788, and accompanying notes. The most recent school cases indicate a continuing lack of consensus. See *Aguilar v. Felton*, 105 S. Ct. 3232 (1985); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985). The outcomes of the cases are consistent with the outcomes of prior cases. Because Justice Brennan authored the majority opinions, they emphasize policy themes that separatists emphasize.

ger, White, Rehnquist, and apparently O'Connor<sup>266</sup> have comprised the accommodationist bloc and almost consistently have voted to uphold educational aid programs. Justices Brennan, Marshall, Stevens, and former Justice Douglas have comprised the separatist bloc. Justices Blackmun, Powell, and former Justice Stewart have served as the middle bloc, whose swing votes frequently have determined case outcomes. In recent opinions, Justice Blackmun has seemed to lean more toward the separatist bloc.<sup>267</sup> Supreme Court decisions, then, fail to demonstrate a policy consensus on the issues. They demonstrate only that a majority of justices decided to vote for a given result for a variety of reasons. A change in Court personnel easily could lead to changes in the results of cases already decided.

In sum, even if a new test were to gain adoption, it would join the *Lemon* test in failing to produce an analytic consensus unless the Court bench were to acquire a more homogeneous character. If the Court were to achieve homogeneity, it would fail to reflect the diversity of opinion in American society. In a recent school aid case, Justice White identified the problem:

This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.<sup>268</sup>

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266. Justice O'Connor dissented in *Aguilar v. Felton*, 105 S. Ct. 3232, 3243 (1985), and concurred in part and dissented in part in *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3231 (1985). She joined the majority in *Mueller v. Allen*, 463 U.S. 388 (1983). An accommodationist philosophy is also indicated by her votes in *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), and *Lynch v. Donnelly*, 104 S. Ct. 1355, 1366 (1984) (concurring opinion), in which she proposed an accommodationist interpretation of the *Lemon* test. An accommodationist theme runs through her concurring opinion in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2496 (1985).

267. Justice Blackmun joined the majority in both *Aguilar v. Felton*, 105 S. Ct. 3232 (1985), and *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985). He joined the dissent in *Mueller v. Allen*, 463 U.S. 388 (1983), and wrote a strong dissent in *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980).

268. *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980). The extensive litigation over government aid to church schools sharply contrasts with the paucity of challenges—much less successful challenge—to government funding of church-run social service programs. To argue that the latter relationships are easily structured to insure church-state neutrality while the former frequently are not poses a highly debatable proposition. Social programs that serve the young and the infirm would seem to harbor a serious potential for undue religious influence over the clientele.

The reason for the virtual immunity of the social programs from constitutional

To assist the judiciary in deciding these cases, scholars and other thoughtful advocates may assume one of three roles. First, they may seek to amend or reformulate the current operative test so that it more precisely implements the test's underlying principle. The judiciary's philosophical disarray, however, suggests that the effort would prove unproductive.

Second, advocates may propose a new or amended test with the understanding that they really are arguing for a stronger position favoring or opposing educational aid programs. For example, the test permitting aid not in excess of the value of a school's secular educational service offers an accommodationist test.<sup>269</sup> Justice Brennan's proposal offers a separatist test.<sup>270</sup> Another example is the current Court majority's reformulation of *Lemon's* primary effect test to exclude statistical evidence.<sup>271</sup> By eliminating a previously powerful tool for challenging aid programs, the Court has shifted to a more accommodationist approach.<sup>272</sup>

Third, advocates may introduce factual information or policy designed to influence judicial decisions. This effort seeks to bolster the positions of judges sympathetic to the advocate's position by furnishing persuasive information or increasing the emphasis that an existing consideration receives. It also seeks to encourage other judges to change their positions at least incrementally as they decide a given case. In this latter effort, the primary audience consists of judges who are neither resolutely separatist nor accommodationist.

My efforts fall into the third category. Rather than arguing for a revision or replacement of the *Lemon* test, I seek to influence the way courts apply the test to close cases, that is, cases in which judicial policy preferences do not already dictate the outcomes. By directing attention to religion's secular contribution, I seek to exert a modest influence on how courts interpret the basic constitutional principle and apply it to specific disputes.

### C. *The Impact of the Thesis*

Whether increased attention to religion's secular contribution would exert

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attack may stem from an historical acceptance of the church-state partnership in the welfare field and from the lack of a challenge from supporters of government programs who might see the church programs as a drain on their funding. My point is that judicial decisionmaking in religion cases encompasses far more than technical legal analysis. For further discussion of the constitutionality of government funding for church-run social programs, see Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 554-60 (1968); Pickrell & Horwich, *Religion as an Engine of Civil Policy: A Comment of the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 L. & CONTEMP. PROB. 111 (1981).

269. See *supra* text accompanying notes 261-62.

270. See *supra* text accompanying note 262.

271. See *Mueller v. Allen*, 463 U.S. 388, 401 (1983).

272. See *id.* at 408-11 (1983) (Marshall, J., dissenting); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 154-55 (1983). But see *supra* notes 193 & 194.



a significant impact on the educational aid cases is difficult to predict in light of the judicial unpredictability in this area. An impact, however, is possible. The Court decisions are products of slim majorities and usually are determined by swing voters.<sup>273</sup> Attaching increased weight to a relevant consideration could affect critical votes. In two particular instances, increased emphasis on religion's secular contribution could be decisive: the especially close case and the case with facts that make my argument especially relevant. These instances now receive attention.

### 1. The Particularly Close Case

Though virtually all the educational aid cases are close ones, some are particularly close. To determine whether a case falls in the latter category requires looking not merely at the closeness of the judicial vote, but also at the judicial analysis, at the votes of specific justices, and at other circumstances. Cases ruling on attempts to give aid through tax statutes offer an illustration. I develop the illustration to demonstrate what makes a case a particularly close one.

The relevant Supreme Court cases are *Committee for Public Education and Religious Liberty v. Nyquist*<sup>274</sup> and *Mueller v. Allen*<sup>275</sup>. In *Nyquist*, the Court invalidated a New York statute granting benefits to parents of children attending nonpublic elementary and secondary schools. Under the statute, a parent with an annual taxable income of less than five thousand dollars was eligible for a partial reimbursement for tuition. A parent in a higher income bracket could receive a state tax deduction of a designated amount that varied with adjusted gross income and the number of children enrolled, but that did not vary with the amount of tuition actually paid.<sup>276</sup> Approximately eight-five percent of the nonpublic schools in the state were church-related.<sup>277</sup>

The *Nyquist* Court applied the *Lemon* test and found that the scheme had the impermissible effect of advancing religion. In an opinion by Justice Powell, six justices agreed that, in effect, the legislation provided financial support to sectarian schools with no means of guaranteeing that the aid would be used exclusively for secular purposes.<sup>278</sup> The majority thus found the program indistinguishable from a program of general grants awarded directly to the schools.<sup>279</sup> The majority recognized the validity of the state legislature's secular interest in promoting pluralism and diversity among the state's public and

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273. See *supra* notes 265-67 and accompanying text.

274. 413 U.S. 756 (1973).

275. 463 U.S. 388 (1983).

276. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 764-67 (1973).

277. *Id.* at 768. Seven hundred thousand to eight hundred thousand students, almost 20% of the State's entire elementary and secondary school population attended over two thousand nonpublic schools. *Id.*

278. *Id.* at 780-94.

279. *Id.* at 780.

nonpublic schools and its interest in maintaining a school system that reduces the burden on public schools.<sup>280</sup> It nonetheless concluded that proper legislative purpose and secular benefits do not immunize legislation from further scrutiny under the *Lemon* test.<sup>281</sup>

In *Mueller v. Allen*<sup>282</sup> the Court upheld a Minnesota statute that permitted state income taxpayers to deduct expenses for tuition, textbooks, instructional materials, and transportation for dependents in public and nonpublic secondary and elementary schools. By a five to four vote, the Court held that the statute passed muster under the *Lemon* test. Writing for the majority, Justice Rehnquist found that the statute had a valid public purpose, because it reduced the burden on public schools and provided them with a benchmark.<sup>283</sup> The statute's challengers argued that the statute had an unconstitutional primary effect. They noted that the major deduction would be for tuition and therefore primarily would benefit parents of nonpublic school children, ninety-six percent of whom attended religiously affiliated schools.<sup>284</sup> The majority, however, rejected determining the statute's primary effect on statistical evidence and instead relied on the statute's facial neutrality to find a permissible effect.<sup>285</sup> It found a neutral effect, because the deductions were available to parents of both public and nonpublic school children.<sup>286</sup> The Court also found no excessive administrative entanglement of church and state.<sup>287</sup> In addition, it declared that the part of the entanglement test concerning divisive political potential applies only when the government pays direct financial subsidies to religious schools or their teachers.<sup>288</sup>

The *Mueller* Court failed to overturn any prior holdings in the area and took pains to distinguish the *Mueller* statute from the *Nyquist* statute. The Court found two major distinctions. First, the Court stated that the *Nyquist* statute conferred "thinly disguised 'tax benefits,' actually amounting to tuition

280. *Id.* at 795.

281. *Id.* at 783 & n.39. This holding does not reject my argument. I do not argue that a secular purpose and a secular contribution should dispense with the need to apply the remainder of the *Lemon* test. I argue that the presence of a secular contribution should influence the Court's determinations under the *Lemon* test. In the close cases, this influence may determine a case's outcome.

282. 463 U.S. 388 (1983).

283. *Id.* at 395.

284. *Id.* at 401.

285. *Id.*

286. *Id.* at 397, 402. The Court stated that any inequality of effect favoring religious school parents over public school parents could be justified as a rough return to the religious school parents for the benefits they provide to the state by sending their children to religious schools—supporting schools that offer wholesome competition to public schools and reducing the financial cost of operating public schools. *Id.* at 402.

287. *Id.* at 403.

288. *Id.* at 403 n.11. The Court raised the issue on its own. None of the statute's challengers had argued that it ran afoul of the political divisiveness part of the entanglement test. *Id.*

grants, to the parents and children attending private schools.<sup>289</sup> It noted that the grants to low income parents did not take the form of ordinary tax benefits and that the amount of the deduction given to middle income parents was unrelated to the actual amount they expended on tuition.<sup>290</sup> The Court described the *Mueller* deduction as a genuine tax deduction and therefore accorded deference to the state legislature's judgment in granting it.<sup>291</sup> It explained that it traditionally has recognized that legislatures enjoy great latitude in making classifications and distinctions in tax statutes, because legislators, familiar with local conditions, possess a special ability to distribute the tax burden equitably.<sup>292</sup> The Court admitted that the economic consequences of the *Nyquist* and *Mueller* statute might be difficult to distinguish, but argued that "the form of the state's assistance to parochial schools must be examined for the light that it casts on the substance."<sup>293</sup> The Court did not elaborate.

Second, the Court noted that the *Mueller* deduction is available to parents with children in public schools as well as nonpublic schools.<sup>294</sup> In contrast, the *Nyquist* statute benefited only parents of children in nonpublic schools. The Court held that state assistance to so broad a range of citizens indicates a secular effect.<sup>295</sup>

In his dissent, Justice Marshall argued that the *Mueller* deduction has the unconstitutional effect of advancing religion.<sup>296</sup> According to Marshall, it ultimately confers a benefit on religious schools without restricting the benefit to the school's secular function.<sup>297</sup> He rejected the majority's arguments that distinguished the *Nyquist* statute. Marshall found no relevance to the distinction between *Mueller's* genuine tax deduction for tuition and *Nyquist's* tax benefits for tuition. He argued that both schemes have the same economic effect: aiding parents is the equivalent of aiding schools without restricting the aid to the schools' secular functions.<sup>298</sup>

Marshall also rejected the majority's argument based on the availability of the *Mueller* deduction to all parents of school children. He argued that the statute's primary benefit is the tuition deduction, and public school parents would not enjoy its benefits.<sup>299</sup> Though public school parents could claim deductions for other expenses, Marshall characterized these benefits as de minimis.<sup>300</sup> He noted, moreover, that ninety-six percent of the taxpayers eligi-

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289. *Id.* at 394.

290. *Id.* at 396 n.6.

291. *Id.*

292. *Id.* at 396.

293. *Id.* at 397 n.6 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

294. *Id.* at 397.

295. *Id.*

296. *Id.* at 405.

297. *Id.* at 406-07.

298. *Id.*

299. *Id.* at 408-11.

300. *Id.* at 409.

ble for the tuition deduction send their children to religious schools.<sup>301</sup>

Marshall would have invalidated deductions for the cost of textbooks and other instructional materials;<sup>302</sup> he also strongly questioned the persuasiveness of prior case law permitting the state to loan secular textbooks to students in religious schools.<sup>303</sup> He nonetheless would permit a deduction for the cost of travel between home and school apparently because of transportation's secular nature.<sup>304</sup>

Reasonable justices could differ over the validity of the *Mueller* majority's two distinctions between the *Mueller* and *Nyquist* statutes. The Court failed to explain its distinction between a genuine tax adjustment and a benefit masquerading as a genuine tax adjustment. Any legitimate tax provision benefits certain categories of taxpayers. The Court was not persuasive in rejecting the *Nyquist* statute on the ground that its benefits were not precisely related to the parental expenditure in each case.<sup>305</sup> The benefit's size varied according to the taxpayer's income and number of children enrolled—hardly arbitrary criteria. The Court cited no precedent requiring that the size of a deduction or credit be tied to the size of the expenditure. A graduated income tax system, for example, makes the tax benefit of identically sized deductions vary with the taxpayer's income. The *Nyquist* Court feared that a state could employ tax legislation as a subterfuge to indirectly subsidize religious schools.<sup>306</sup> Both the *Nyquist* and *Mueller* Courts failed to furnish any clear criteria for distinguishing illegitimate government assistance from legitimate tax adjustments.

The *Mueller* dissent, however, failed to explain why the *Nyquist* tax benefits and the *Mueller* tax deduction are indistinguishable. It instead declared that whatever distinction might be made, such indirect aid to religious schools is unconstitutional unless government restricts the aid to assisting only the schools' secular function.<sup>307</sup> Reasonable justices, however, might disagree with the refusal to distinguish between a tax deduction to an individual and an unrestricted grant to a religious school. They might decide that the tax benefits religious schools in too attenuated a fashion to classify it as equivalent to a direct grant to a school.<sup>308</sup>

Reasonable justices also could disagree over the majority's distinction based on the breadth of the class of taxpayers benefited. The *Mueller* deduction is available to parents of children in both public and nonpublic schools, while the *Nyquist* benefits accrued only to parents with children in nonpublic schools. The *Mueller* dissent, however, looked beyond the *Mueller* statute's

301. *Id.*

302. *Id.* at 414.

303. *Id.* at 415.

304. *Id.* at 415 n.6. The dissent's reasoning is not precisely articulated.

305. *See id.* at 396 n.6; *id.* at 411-13 (Marshall, J., dissenting).

306. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-87, 789-91 (1973).

307. *Mueller v. Allen*, 463 U.S. 388, 411-13 (1983).

308. *See id.* at 400.

facial neutrality and pointed out that ninety-six percent of all taxpayers eligible for the tuition deduction send their children to religious schools.<sup>309</sup> As for other deductible expenses, for example, expenses for gym clothes, pencils, and notebooks, which apply to the broad base of public school and nonpublic school parents, the dissent dismissed these benefits as *de minimis*.<sup>310</sup> It thus skirted the difficult task of judging the constitutionality of the benefit when a broad based group receives some benefit and a decidedly smaller subgroup receives most of the benefit.<sup>311</sup>

The dissent, moreover, failed to acknowledge the high degree of judicial deference that the tax provisions enjoy.<sup>312</sup> Deference to legislative classifications and distinctions in tax statutes could have overcome the dissent's concern with the breadth of the benefited class.

As this discussion demonstrates, neither side offers a conclusively persuasive argument. From the perspective of legal analysis, tax benefit cases are close ones. The split votes by the Court also evidence the closeness of the cases. Further evidence comes from a look at the votes of the individual justices. Justice Powell, author of the *Nyquist* majority opinion, was the single swing vote that determined which side would comprise the majority in *Mueller*.<sup>313</sup> As we have seen, the *Mueller* majority took special care not to question the *Nyquist* holding.

The unpredictability in this area is further illustrated by the controversy over the proposal for a federal tuition tax credit.<sup>314</sup> Though the proposal has taken various forms, in essence it would grant a federal income tax credit for a portion of the tuition expenses that an individual pays for dependents in private primary and secondary schools.<sup>315</sup> Neither *Mueller* nor *Nyquist* permits a safe prediction on how the Court would evaluate the tax credit's constitutionality.

As with the *Mueller* statute, the tax credit likely would be recognized as a genuine tax adjustment and not as a subsidy masquerading as a tax adjustment. The Supreme Court never has held a federal income tax statute to be

309. *Id.* at 409.

310. *Id.*

311. See *supra* note 286 and accompanying text.

312. See *supra* text accompanying notes 291-92.

313. In *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), Justice Powell's opinion spoke for Justices Douglas, Marshall, Brennan, Stewart, and Blackmun. Justices Burger, Rehnquist, and White concurred in part and dissented in part. The latter three justices would have upheld the tuition reimbursement and tax benefit program. In *Mueller v. Allen*, 463 U.S. 388 (1984), Justices Rehnquist, Burger, White, Powell, and O'Connor comprised the majority, and Justices Marshall, Brennan, Blackmun, and Stevens comprised the dissent.

314. For discussions of the proposal, see, e.g., Henzke, *The Constitutionality of Federal Tuition Tax Credits*, 56 *TEMPLE L.Q.* 911 (1983); *Tuition Tax Credits*, CONGRESSIONAL DIGEST, Jan. 1984, at 3; Note, *Mueller v. Allen: A Constitutional Crosswalk to Federal Tuition Tax Credits*, 11 *J. LEGIS.* 163 (1984).

315. See, e.g., *Tuition Tax Credits*, *supra* note 314, at 3, 6, 8.

unconstitutional on its face<sup>316</sup> and recently has described Congressional tax powers as "virtually without limitation."<sup>317</sup> Whether this traditional deference would sway the *Mueller* dissenters remains to be seen.

The tax credit differs from the *Mueller* deduction in that it would benefit only individuals with dependents in private schools. The class of beneficiaries would be similar to the class in *Nyquist*, as opposed to the broad class in *Mueller*. Approximately eleven percent of the nation's primary and secondary students attend nonpublic schools, and approximately eighty-four percent of the nonpublic schools have a religious affiliation.<sup>318</sup>

Thus, of the two grounds that the *Mueller* majority used to distinguish the *Nyquist* tax benefit, one ground—the genuineness of the benefit as a tax adjustment—favors finding the tax credit to be constitutional, and the other ground—the breadth of the benefited class—disfavors finding it constitutional. The Court, of course, might also decide to make a critical metaphysical distinction between a tax deduction and a tax credit.<sup>319</sup> Given the closeness of the case, an increased attention to the policy consideration for which I argue easily could tip the judicial scales.

## 2. The Particularly Relevant Fact Pattern

The educational assistance cases have fact patterns that make consideration of religion's secular contribution particularly persuasive. The cases deal with programs that aid a substantial number of schools and colleges. As the Court has recognized, these institutions reduce the state's financial obligations, increase educational diversity, and encourage excellence in their public counterparts.<sup>320</sup> They also make the contribution on which my thesis focuses. Religious schools and colleges provide a value oriented education that assists in developing civic virtue. Some values with a religious foundation promote ideals and conduct that are beneficial from a secular perspective. These institutions train members of society to act virtuously and to demand virtue of public officials. Religion's secular contribution, then, is sufficiently visible in religious educational endeavors to make it an influential consideration in determining the constitutionality of educational assistance measures.

A further refinement of the argument is possible. My argument is conceivably more relevant and persuasive in some educational assistance cases than in others. Some might argue that religious primary and secondary schools

316. See Henzke, *supra* note 314, at 914.

317. *United States v. Ptasynski*, 103 S. Ct. 2239, 2242 (1983) (upholding exemptions from Windfall Profits Tax).

318. See *Tuition Tax Credits*, *supra* note 314, at 5 (U.S. Dept. of Labor statistics for Fall, 1980).

319. See *Mueller v. Allen*, 463 U.S. 388, 411-13(1983) (rejecting the distinction as formalistic and as not reflecting the reality that both can have the same economic consequences).

320. See *supra* text accompanying notes 161-64.

make a greater secular contribution that do religious colleges and universities. I would reject this position, because an equally persuasive position might hold that the colleges and universities make the greater contribution.

The argument favoring colleges and universities would note that these institutions train a select pool of students that will supply a significant number of public officials and citizens influential in public affairs. As centers of advanced learning, the institutions offer education directly related to government and public affairs. As centers of scholarship, their academic work may influence public opinion and public decisionmakers. Because colleges and universities are less explicitly religious and more committed to academic freedom than their primary and secondary school counterparts, their skeptical students and other audiences may attribute greater credibility to their teaching and scholarship. In contrast, religious primary and secondary schools would be viewed as exerting a far less direct influence on public affairs because they teach younger students and provide them with a less critical analysis of the educational subject matter.

The argument favoring primary and secondary schools would emphasize that they are pervasively religious and value oriented. Therefore, the argument would go, these institutions exert a very strong influence on young citizens in their formative years. Because the education is of a general sort, it usually deals less pointedly with specific political issues and therefore is less likely to encourage political division along religious lines than is the education furnished by institutions of higher learning. Therefore, support for the argument might come from those concerned with excessive entanglement of church and state.

Reasonable judges could disagree over which set of arguments is stronger. I would vote for the arguments favoring religious colleges and universities, because the teaching and scholarship are more directly concerned with public affairs and the public aspect of living a fulfilling life. Nonetheless, I can accept the conclusion of others that the pervasively religious, value oriented education at the lower levels ultimately proves more influential. Neither set of arguments is conclusively the more persuasive. Both types of institutions make a secular contribution in a different way. To declare one contribution greater than the other is to engage in an overly refined, speculative analysis. Both sets of arguments, moreover, derive from a stereotypical characterization of the respective institutions that harmonizes with the stereotypes on which the Supreme Court relies.<sup>321</sup> The stereotypes certainly are inaccurate as applied to some institutions and perhaps substantially inaccurate as general propositions. I therefore would make my argument on religion's secular contribution equally applicable to religious schools, colleges, and universities.

To offer a contrast, I would not find my argument particularly persuasive in deciding a case concerning a government sponsored display of a nativity

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321. See *supra* text accompanying notes 252-54.

scene.<sup>322</sup> The display might generate some feelings of good fellowship and generosity that ultimately translate into good citizenship. This effect, however, would seem extremely less significant<sup>323</sup> than the secular contribution of religious schools, colleges and universities.

#### IV. CONCLUSION

In some of the early establishment clause cases, judicial rhetoric about the dangers of close church-state relations assumed the tone of purple prose. For example, Justice Black wrote: "Colonial history had already shown that here, as elsewhere, zealous sectarians entrusted with government power to further their causes would sometimes torture, mame, and kill those they branded 'heretics,' 'atheists,' or 'agnostics.'"<sup>324</sup> The rhetoric extended to specific religions. In one case, Justice Douglas quoted a prominent anti-Catholic book:

In the parochial schools, Roman Catholic indoctrination is included in every subject . . . . Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.<sup>325</sup>

Justice Jackson wrote: "Our public school, if not a product of Protestantism, is at least more consistent with it than with the Catholic culture and scheme of values."<sup>326</sup> Such statements could not help but affect the development of constitutional doctrine.<sup>327</sup>

More recently, the Supreme Court has suggested that the old era has come to an end. The *Mueller v. Allen* majority has quoted Justice Powell's observation:

At this point in the 20th century, we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes—or even of deep political divisions along religious lines—is remote . . . .<sup>328</sup>

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322. See *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

323. See *supra* note 132.

324. *Zorach v. Clauson*, 343 U.S. 306, 318-19 (Black, J., dissenting); see *supra* note 176.

325. *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.2 (1971) (Douglas, J., concurring), quoting L. BOETTNER, *ROMAN CATHOLICISM* 360 (1962). The seventh circuit repeated the quote in *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1122 n.12 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979). See Laycock, *Civil Rights and Civil Liberties*, 54 CHI-KENT L. REV. 390, 418-21 (1977). Justice Douglas also characterized other religions in unflattering terms. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 246 n.5 (1972) (Amish); W. DOUGLAS, *THE BIBLE AND THE SCHOOLS* 39-46 (1966) (Moslems).

326. *Everson v. Board of Educ.*, 330 U.S. 1, 23 (1947) (Jackson, J., dissenting).

327. See *supra* note 176.

328. 103 S. Ct. 3062, 3067 (1983), quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring in judgment in part, dissenting in part). But see *Aguilar v. Felton*, 105 S. Ct. 3232, 3440-41 (1985) (Powell, J., con-



The *Lynch v. Donnelly* majority has concluded: "We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leader behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government."<sup>329</sup>

The danger of a preoccupation with one factor, such as the dangers inherent in church-state relations, is that other factors receive disproportionately less attention. The time is ripe for the Court to give greater consideration to religion's secular contribution. The basic principles of neutrality and separation should remain in place. At least in the close cases, however, increased attention to religion's positive contribution would permit an important consideration to enjoy appropriate attention.

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curing) (expressing concern that a school aid program could cause political divisiveness).

329. 463 U.S. 388, 400 (1984).