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Against Idols: The Court as a Symbol-making or Rhetorical Institution

Abstract

Symbolic politics can be quite powerful. This article pursues the question of how the Supreme Court signifies itself, how it discovers and enacts the metaphors from which it will play its part in the American political drama aimed at containing some of the nightmares of human existence, while affirming and encouraging the possibilities for human flourishing. Embedded in this inquiry is the question of how the Court can signify itself while still preserving the truth-telling and humility necessary to legitimize Court decisions.

Keywords

Ethics, Truth-telling, Humility, Symbols, Metaphor, Idols

Disciplines

Supreme Court of the United States

AGAINST IDOLS: THE COURT AS A SYMBOL-MAKING OR RHETORICAL INSTITUTION

Marie A. Failinger*

INTRODUCTION

The power of symbolic politics has recently been much in evidence. President Bush's endorsement of a constitutional marriage amendment¹ served, for some significant number of voters, as a symbol of strength against what many would describe as an alarming decline in American morality, just as his war on Iraq served a symbolic function in reassuring American voters that Americans could hold on to their sense of security and priority in world politics. As President Bush tried his best to re-describe the marriage amendment, as well as his seeming lack of concern about Osama bin Laden's whereabouts,² it appears from his perspective that these issues are not ultimately about the strength or moral character of the opponent; rather, they are about the vulnerability of American culture unmasked—a vulnerability that he believes we must at all costs reject.

This politics of invulnerability underscores the ways in which symbolic politics always serve as more than collective self-congratulation, or as more than a striped flag raised indomitably amid a smoldering

* Professor of Law, Hamline University School of Law. For the discussion of ritual in general and of political ritual in particular, including the Pledge of Allegiance in Section I, I am indebted to an early draft of Sheldon H. Nahmod's *The Pledge as Sacred Political Ritual*, 12 WM. & MARY BILL RTS. J. 771 (2005). My thanks to Mark Berkson, who supplied much of the ritual bibliography for this article; Timothy Zick, who was kind enough to read and comment on it; the University of Pennsylvania Journal of Constitutional Law staff, who so kindly provided this opportunity; my conference colleagues; my research assistants Colleen Daly and Stephanie Rust-Small; and editor Allison Cohn, who worked hard to prepare this article for publication.

¹ See, e.g., Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 WEEKLY COMP. PRES. DOC. 276 (Feb. 24, 2004) ("Today I call upon the Congress to promptly pass and to send to the States for ratification an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife."); cf. Carla Marinucci, *Gay Republicans Say They Are Unlikely to Back Bush, GOP Platform; Many Upset at President's Support for Marriage Amendment, a Draw for Evangelicals*, S.F. CHRON., Aug. 30, 2004, at A7 (noting Log Cabin Republicans' reluctance to endorse Bush due to his support of a federal marriage amendment banning same-sex marriage).

² Cf. George J. Scardena, Op-Ed., OCEAN COUNTY OBSERVER, Oct. 19, 2004, at A10 (listing a number of apparent discrepancies between President Bush's campaign platform promises and his positions as an elected official); Zay N. Smith, *Let's Just Act Like We Don't Notice Him*, CHI. SUN-TIMES, Oct. 17, 2004, at 44 (suggesting that President Bush was inconsistent in his statements about whether or not he was concerned by Osama bin Laden).

ruin. The controversial Max Lerner wrote, eloquently, but misunderstandingly:

Like children and neurotics man as a political animal lives in a world riddled with bugbears and tabus—a dream-world of symbols in which the shadows loom far larger than the realities they represent. . . . [Men] live in a jungle of fear, filled with phantoms of what they have heard and imagined and been told. Their world is the world of child's nightmares—dark and brooding, crowded with dreads and anxieties, with the distortions of real objects, with the cruelest [sic] *nonsequiturs* and anti-climaxes.

That is why men always find themselves forced to seek some symbol of divine right.³

In fact, it is the tragic and senseless reality that we are vulnerable creatures that looms large for us. Symbol-making is not a way for us to avoid going to sleep in the dark. It is a disorderly attempt to order the death, suffering, betrayal, loss, and brutality that constitute part of our daylight experience, for some of us a larger part than others. Perhaps Lerner was among those lucky ones for whom such realities do not loom so large; perhaps he was simply trying hard to convince himself that human tragedy is just a nightmare, not reality.

Yet most human beings do not make symbols to reassure themselves against phantoms. Rather, they mean to reassure themselves against the painful and frightening reality embodied, if not in their own personal lives, then in the chaotic and harsh suffering of other human beings that any compassionate person cannot help but witness. Symbol-making is the distinctively human exercise in enveloping within a form the deep realistic fears we have of exposure and loss. It is the search for an object, tangible or ideal, that will contain a thick brew of annihilation and hope. It is coveting a vessel for our world's complexity that can be grasped within our own hands.

That we live as symbol-makers, and not only in the drama of thought and emotion we enact toward each other day by day, is a truism in all modern studies of culture. Borrowing from Clifford Geertz's metaphor, human beings from morning to night spin the webs of our significance,⁴ almost thoughtlessly, in acts as well as words that comprise our daily lives as fragile but self-aware creatures. We are being "read" as much when we pick up a piece of trash from the sidewalk and throw it into a nearby city garbage bin as when we perform on a stage. We are disclosing ourselves and our commitments to—or betrayals of—present, past, and future communities as much

³ Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1290–91 (1937) (citations omitted).

⁴ See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973) (writing that he and Max Weber believe that "man is an animal suspended in webs of significance he himself has spun").

when we cut off another driver in traffic as when we wave the American flag.

Even the Supreme Court, that constitutional institution most entrusted to reflect on the message that government action sends, cannot escape its enmeshment in meaning-making, despite its slight remove from the pressure of populist culture. Out of habit and necessity, because it is still human in act and word, the Supreme Court necessarily makes symbolic responses to the often frightening realities of human existence. In its calling to signify a constitutional culture from the nightmare of interpersonal and inter-institutional—indeed, international—conflicts, the Supreme Court is forced in each decision to choose which message it will speak. That message may be as unassuming as what an obscure securities law might mean to a small group of investors, or as world-changing as what human dignity requires for each person who inhabits the earth.

The tradition of judicial restraint reflects the especially complex ethical demand placed upon this meaning-making institution. The Supreme Court must not only reflect upon how it makes meaning for the litigants before it and for the multiple wider societies to which it now speaks—to jurists and litigants from South Africa to Canada, from rural Arkansas to urbane New York.⁵ This Court tradition of self-restraint also demands that members constantly reflect on how the Court as an institution signifies itself, in contrast to the ragged tradition of thoughtlessness the executive and legislative branches exhibit on the long-term signification of their own decisions.

One question I wish to pursue here is how the Court signifies itself, how it discovers and enacts the metaphors from which it will play its part in the American political drama aimed at containing some of the nightmares of human existence, while affirming and encouraging the possibilities for human flourishing. Embedded in this inquiry is the question of how the Court can signify itself while still preserving the truth-telling and humility necessary to the Court.⁶ These two are not saccharine virtues: truth-telling and humility are themselves ethical antagonists, for any attempt to tell the truth is necessarily play-acting at divinity, while any attempt at humility can easily lie about the possibility of understanding the truth.

⁵ Among others, Namibian, South African, and Canadian judges consult American constitutional jurisprudence in making their national constitutional law. See generally Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17–23 (1998) (describing how the legal opinions of the United States are influencing judicial systems around the world through a process of giving and receiving).

⁶ See, e.g., Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 157–64 (1998) (describing the important role of humility in the judicial task as a “balance both within and between the virtues of mercy and justice”).

More critically, I want to ask whether there is a role for the Supreme Court as our national symbol-maker, and particularly a symbol-maker in First Amendment religion cases. Professor Christopher Smith, for one, has argued that the Supreme Court should function as a symbol-maker in American culture, albeit with some care,⁷ while Professor William Marshall suggests that the Court does indeed function symbolically in the Religion Clause cases.⁸ But should we want to imagine members of the Court as the high priests tending the temple of our own national commitment and culture,⁹ at least where religion is concerned? (I am not prepared to extend the analysis to non-Religion Clause arguments, because the problem of the Court's role in secular matters, including what some have called matters of civil religion, is in my mind trickier.) After exploring scholars' arguments that symbolic activity is an essential human enterprise, I will discuss why the Supreme Court might be easily drawn into imagining itself as a symbol-making authority in these cases, a role that explains some Religion Clause jurisprudence better than any Grand Theory. Second, I will suggest that as the Supreme Court expresses itself symbolically in the religion cases, the Court creates its own self-images: as a neutral observer, as our political tradition-keeper, as the voice for the powerless, and as the bulwark of liberty. Third, I will argue that the Court would be better advised to embrace a rhetorical self-conception than to understand itself as an American symbol-maker, at least where Religion Clause cases are concerned, for reasons that underlie the clauses themselves.

The distinction I am making between a symbol-making and a rhetorical approach deserves some initial attention because this distinction would not immediately seem obvious to most who work in these fields. Indeed, the writers of a popular text on rhetoric define it as a purposive, symbolic, human action, meaning that rhetoric communi-

⁷ See Christopher E. Smith, *Law and Symbolism*, 1997 LAW REV. MICH. ST. U.-DETROIT COLLEGE L. 935, 936–37 (explaining that “[t]he use of symbols . . . helps to reinforce the legitimacy of the judiciary as the non-political branch of government—despite the fact that courts and judges are not divorced from politics” (citations omitted)).

⁸ See William P. Marshall, “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 518–31 (1986) [hereinafter Marshall, “*We Know It When We See It*”] (identifying a pattern within Supreme Court decisions whereby condensation symbols are used to absorb tensions between the Religion Clauses and eliminate the perception of improper governmental action as opposed to the practical impact of that action).

⁹ See Smith, *supra* note 7, at 937–38 (describing judges as guardians of the Constitution, which serves as the nation's sacred text); Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J.L. & RELIGION 427, 427–28 (2004) (describing how lawyers and the law have replaced priests and religion as the focus of our common public framework).

cates with symbolic signs.¹⁰ But there are important political and moral distinctions between the speaker who attempts to symbolically capture the values reflecting the existing situation, beliefs, attitudes, and hopes of a political community (a symbol-maker) and the speaker who attempts to convince such a political community that it should embrace and act upon certain values and visions for the good of the community (a rhetor). If a visible image would help, we might imagine the difference between a priest responding to a moment of natural disaster or social chaos for a traditional community by holding up a sacred object for veneration and reassurance, and the praetor Cicero, haranguing a crowd about why they should support a particular law or condemn a traitor to death.

With these images, the contrast between the priest/symbol-maker and the rhetor becomes clearer. A symbol-maker proceeds with some certainty that he or she is describing an image of a political community's past and present even if that expression is complicated or multivalent. A rhetor realizes that he or she must convince a community to embrace an alternative future, cognizant of the fact that many in the community may not be initially disposed to embrace that future and make it come to pass. A symbol-maker represents the community in ritual observance, enacting its meaning through the use of symbols. A rhetor carries some authority of the rhetorical office that he has earned through consistent and trusted engagement with the community. To take the well-known fictional and historical rhetor, Marc Antony, his status as a significant political figure and accomplished persuader is not an inconsequential part of his ability to convince his audience to turn against Brutus, for the rhetor's character is one of three integral parts of successful rhetoric.¹¹ While the success-

¹⁰ SONJA K. FOSS ET AL., *CONTEMPORARY PERSPECTIVES ON RHETORIC* 14 (2d ed. 1991) ("When we say rhetoric is an action humans perform when they use symbols for the purpose of communicating with one another, we are saying four things: (1) rhetoric is an *action*; (2) rhetoric is a *purposeful* action; (3) rhetoric is a *symbolic* action; and (4) rhetoric is a *human* action.").

¹¹ The structure of rhetorical argument, as identified by Aristotle, not only followed a particular form, depending on its purpose and audience, but also intended each part of the structure to appeal to a particular aspect of the audience's human reactions to speech: (1) the ethical (related to the character of the speaker), (2) the logical (related to the reasonable basis for accepting what the speaker says), and (3) the pathetic (relating to the emotions engendered in the audience). Thus, to be an effective rhetor, one would need to take into account the purpose of the particular address, its audience, the process of composing it, its argumentation, and its style. See Aristotle, *Rhetoric*, in ARISTOTLE: *SELECTED WORKS* 603, 609–15 (Hippocrates G. Apostle & Lloyd P. Gerson trans., 1982) [hereinafter Aristotle, *Rhetoric*] (describing the different means of persuasion and the essential elements of rhetoric, noting that "a speech involves three elements: the speaker; the subject of the speech; and the person to whom the speech is addressed" and that "there must be three kinds of rhetorical speeches: (1) deliberative, (2) forensic, and (3) oratorical display"); see also PATRICIA BIZZELL & BRUCE HERZBERG, *THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT* 145–46 (1990) (discussing the hierarchy of Aristotle's theory of rhetoric); *id.* at 3–4 (noting that the rhetorical

ful rhetor identifies himself with the community, he also sets himself apart from it by acknowledging that their vision and their will may not be the same as his at the time he speaks. The very nature of his speech—urging, exhorting, cajoling, inspiring—presumes that his audience has not yet come to accept his opinion as their own and that he will only be in a position to require acceptance of that opinion if his speech is successful. Moreover, symbol-making, while it is multivalent and somewhat unpredictable, is relatively close-textured as compared to rhetoric, which utilizes innumerable methods of persuasion to achieve its objective.

One can, of course, make a strong argument that neither of these images describes the Supreme Court. As a law-making institution, the Supreme Court helps to enact a future as much as to encourage it: when it speaks, it speaks to an audience that is not completely free to agree or disagree with the Court's pronouncement, since its juridical authority requires that the case participants, at least, adopt the law of the case as binding on them on pain of having force used against them. However, in significant constitutional cases, the Court's ability to coerce is clearly not pervasive or plenary: one only has to look to the aftermath of *Brown v. Board of Education*¹² or, more pertinently here, the school prayer cases to realize that the Court cannot enforce its own judgments much beyond the litigants before it. If those who receive a Court opinion are not convinced by it, or at least not convinced that it is the law of the land that they must obey, the Court's ability to back up its opinions by force has relatively little worth.

Nevertheless, I would suggest that there is a palpably different resonance to a Court opinion in which the Court is attempting to serve as symbol-maker, and one in which it is making a rhetorical argument to the public about how it should envision our common life together. In the former, it presents assumptions about public life; in the latter, the Court invites assent.

I. PRESSED INTO SERVICE: THE COURT AS SYMBOL-MAKER

It is almost a necessary maxim for any such article as mine to begin with the phrase "hopelessly confused"¹³ when describing the Supreme Court's Religion Clause cases. To the extent that Court-watchers have searched for philosophical consistency in the Court's

process, for Aristotle, requires attention to invention, arrangement, style, memory, and delivery).

¹² 347 U.S. 483 (1954).

¹³ Marshall, "We Know It When We See It," *supra* note 8, at 497 (noting the Court's own acknowledgement of the internal inconsistency of its Establishment Clause jurisprudence) (citing inter alia PHILLIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT (1962)).

analysis¹⁴—for example, whether the Court has treated like cases alike, applied constitutional principles logically to the facts of each case before it, utilized a consistent justification for the adoption of a constitutional principle, or even used the same constitutional principles or rules to decide every case—this analysis is almost surely correct. Many such articles make one of three contentions: they exult in demonstrating the Court's principled inconsistencies, propose a unified theory to explain all or most of the cases, or propose an ideal constitutional theory to describe how such cases *should* have been decided.¹⁵ These are surely worthy endeavors, as they hold an institution that purports to judge Religion Clause cases from a detached and neutral perspective to its own claims, and I do not mean to demean the intellectual and moral work they evince.

Yet, it appears that some explanations of the Court's seemingly erratic behavior in the religion cases can take the Court too literally. Some scholars seem to paint the Court as simply not careful enough to avoid inconsistencies in its own positions or not smart enough to find the Grand Theory that will ensure logically consistent or historically accurate decisions.¹⁶ Painfully, many scholars' justifiable sense

¹⁴ See, e.g., Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1112–15 (2002) (noting that the Court's attention to neutrality in Establishment Clause cases was "often as an afterthought" and "often discordant" but that "a more 'coherent' notion began to emerge" in the mid-1980s); Marshall, *"We Know It When We See It," supra* note 8, at 495 ("From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common. . . . [T]he Court has reached results in establishment cases that are legendary in their inconsistencies.").

¹⁵ See, e.g., Green, *supra* note 14, at 1116–17 (arguing that the Court is divided on "whether neutrality is supreme and dispositive" or "whether it merely has equivalent value and status with separationism" and proposing "a third view" that "neutrality serves as an adjunct to separationism"); Samuel J. Levine, *The Challenges of Religious Neutrality*, 13 J.L. & RELIGION 531, 535–37 (1999) (reviewing FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995)) (describing Gedicks' criticism of the Supreme Court's use of secular individualism to decide church-state law and the Court's "contradictory and unrealistic attitudes" about American social life in determining Religion Clause doctrine); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1051 (1986) (proposing that the appropriate Establishment Clause standard should be the "endorsement/disapproval principle" put forth by Justice O'Connor); Marshall, *"We Know It When We See It," supra* note 8, at 495–96 (noting that the Supreme Court's cases are lacking in consistent results, confusing in their use of legal standards, and wavering in the underlying theory employed).

¹⁶ See, e.g., George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 67–68 (suggesting that the Court's "hostility to accommodation leads to decisions that would be laughable but for the pain they inflict on injured sects"); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 131–32 (1994) (asserting that "[t]he opinion in [*Board of Education of Kiryas Joel Village School District v. Grumet*] affirmed the Court's allegiance to neutrality, but perpetuated the confusion of its religion jurisprudence by failing to identify the discrete values intended to be served by the many faces of neutrality" (citation omitted)). However, as will be-

that they have a better intellectual grasp of the problem is consistently being undone by hungry scholars who come along to challenge their own thoughtfully constructed Religion Clause theories.¹⁷

Other scholars, Lerner among them, imply that there is a conspiracy among at least some members of the Court. In the Grand Inquisitor version of this conspiracy theory, members of the Court, recognizing their status as high priests of the rule of law, compassionately pretend that the Court is deciding cases according to announced principles in order to reassure the masses that someone is indeed in charge.¹⁸ Secretly, however, they know the frightening truth: that freedom has its costs, including the denial of certainty and the creation of suffering¹⁹ and that their opinions can only stave off those realities. A more cynical version suggests that the justices are trying to pull the proverbial wool over the eyes of the public with lofty and objective-sounding arguments while secretly they vote ac-

come evident, I prefer Gedicks' point that "[c]oherence is much overrated, as any parent knows." Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1233 (1997).

¹⁷ See, e.g., Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 240-49 (1989) (critiquing the "reduction" principle espoused by William Marshall and Jesse Choper, the "neutrality principle" proposed by Philip Kurland, and the "self-defining principle" offered by Professors Jonathan Weiss and Anita Bowser, and finding "none to be workable or desirable"); see also Gedicks, *supra* note 16, at 1233, 1258 (noting that "recent scholarship on the religion clauses has displayed a persistent preoccupation with the obvious lack of coherence in the Supreme Court's decisions in this area" which only demonstrates that "coherence is not likely to be found in this area of constitutional law," and that "religion clause theorists might do better to deal with what is, rather than searching for what is unlikely ever to be found"); D. Heath Bailey, *Deconstructing Deconstruction*, 1999 BYU L. REV. 823, 826-29, 831 (1999) (reviewing FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995)) (describing Gedicks' deconstruction of secular individualist discourse, but then critiquing his proposed solution because "[a] return to a religion-based discourse would bring with it some of the problems of subjectivity that Professor Gedicks identifies in his critique").

¹⁸ See, e.g., Lerner, *supra* note 3, at 1308-09 (arguing that the Court functions as "Platonic guardians that watched over the mythical Greek republic" and that the "role of guardianship . . . has become the official theory of the court's [sic] power"); Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 962-63 (arguing that judges should not be "our Platonic Guardians" or "enlightened despots to impose justice upon us or to trick us into doing justice by pretending that they are implementing the popular will when they are really doing what they think is right"). But see Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 39 (1998) (arguing that judges and Establishment Clause interpreters are engaging in self-deception when they "purport to be guided by the Clause's terms" and that rather than extracting meaning from the Clause, they are "invok[ing] the Clause to justify resolutions they favor . . . for reasons having nothing to do with that clause or any other constitutional provision").

¹⁹ See William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 850-51 (1993) [hereinafter Marshall, *The Other Side*] (noting that "[t]he religion of the Grand Inquisitor . . . is based upon 'miracle, mystery and authority'" (quoting FYODOR DOSTOEVSKY, *NOTES FROM THE UNDERGROUND AND THE GRAND INQUISITOR* 132 (Ralph E. Matlaw trans., 1960))).

ording to their own personal interests, prejudices, or intuitions about injustice.²⁰ In other versions of the conspiracy theory, the Court functions much like the vision of democratic politics with a small “d”—the garbled opinions of the Court are simply a matter of “horse trades”²¹ of text and outcome cloaked in the seemingly detached and neutral language of justice.²²

A. *Four Self-Images of Adjudicatory Responsibility*

Certainly, the Court may, and does, conceive of its constitutional role in many different ways, possibly including the scenarios offered by conspiracy theorists. For example, the Court may imagine its efforts as *pragmatically adjudicative*—e.g., as making somewhat arbitrary attempts to finish off a controversy or to provide a resolution that will be at least minimally satisfying to the parties involved.²³ Though generally the Supreme Court does not take its cases merely to finish off a controversy, sometimes its jurisprudence, including the Religion Clauses arena, suggests that the Court has ultimately settled on that course of action as it has reviewed the cases. The long line of parochial school financing cases—making minute distinctions between

²⁰ See Spiropoulos, *supra* note 18, at 915 (noting that many Americans believe that judges “pretend they are interpreting the law, but instead impose their narrow political preferences on citizens who never voted for these policies”).

²¹ *But see* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 163–65 (1991) (noting that neither Justices nor law clerks interviewed about the process of granting certiorari “mentioned anything resembling horse trading, and many said explicitly that it never occurred”).

²² For historical examples of vote-getting compromises or vote-counting opinions in Free Exercise cases, see Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 285, 308–09 (2000), in which Bybee describes Justice Jackson’s vote-trading practices used in *West Virginia State Board of Education v. Barnette* to get sufficient votes to override *Minersville School District v. Gobitis*, and suggests that Justice Scalia would have overruled *Sherbert v. Verner* and the other unemployment insurance cases in *Employment Division v. Smith* if he had the votes to do so. *Cf.* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2331–32, 2331 n.101 (1999) (noting that while explicit vote trading occurs only rarely, if at all, those scholars who have done empirical research demonstrate evidence that “a form of implicit and informal vote trading is common”).

²³ *See, e.g.*, Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 504–05 (1997) (distinguishing between two conflicting conceptualizations of the proper scope and exercise of the Court’s power: (1) the principled decision-making paradigm, which “represents a more restrictive traditional or formalistic view of the legitimate exercise of judicial power;” and (2) the pragmatic adjudication paradigm, which “favors an expansive definition of the court’s powers” and “is a decision designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future” (quoting P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1250–51 (1980)).

provision of buses for transport to school but not field trips,²⁴ books but not maps,²⁵ and so forth²⁶—certainly smacks of a pragmatic adjudicative approach. The Court's recent decision in *Elk Grove Unified School District v. Newdow*²⁷ to deflect the controversy over the Pledge of Allegiance through standing doctrine is another such case.

Even in constitutional jurisprudence, the Court may focus on its second role, as *shaper and predictor of the future*.²⁸ In this role, the Court's opinions are primarily crafted with the understanding that it has a duty to give guidance in such clear and concrete language that lower courts, as well as administrators saddled with constitutional implementation, can be relatively certain about their legal responsibilities. Arguably, *Employment Division v. Smith*²⁹ might be an example of

²⁴ *Compare* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (upholding a New Jersey statute that authorized reimbursement of bus transportation costs to the parents of children attending parochial school as “[t]he State contributes no money to the [parochial] schools . . . [and] does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools”), *with* *Wolman v. Walter*, 433 U.S. 229, 254–55 (1977) (holding that the state funding of parochial school field trip transportation was unconstitutional as “an impermissible direct aid to sectarian education”).

²⁵ *See* *Meek v. Pittenger*, 421 U.S. 349, 362, 366 (1975) (holding that the loan of secular textbooks to parochial school children was constitutional but prohibiting the loan of instructional materials and equipment as “constitut[ing] an impermissible establishment of religion”).

²⁶ *Compare* *Wolman*, 433 U.S. at 248 (1977) (upholding as constitutional the provision of therapeutic and remedial services at a neutral site off the premises of the nonpublic schools as such provisions neither have the “impermissible effect of advancing religion” nor constitute an “excessive entanglement between church and state”), *with* *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (prohibiting the financial assistance to parochial schools for remedial education of low-income children as “the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate”). For a general chart of these cases, see MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 479–80 (2d ed. 2002).

²⁷ 124 S. Ct. 2301, 2308–12 (2004) (holding that a non-custodial parent lacked prudential standing to pursue a challenge to his daughter's school's practice of reciting the Pledge of Allegiance under the Establishment and Free Exercise Clauses). For a discussion of the Pledge as a sacred ritual, see Sheldon H. Nahmod, *The Pledge as Sacred Political Ritual*, 13 WM. & MARY BILL RTS. J. 771, 772 (2005) (“[The Pledge plays a] significant role . . . as a sacred political ritual, one that is an important component of American civil religion. The Pledge reinforces patriotic myths, it organizes individuals into a political community, and it communicates values that provide individuals with important aspects of their sense of reality.” (citations omitted)).

²⁸ *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 216–17, 342 (1960) (arguing that the ideal of decision-making is “reasonable regularity,” which will “guide” and absorb future cases); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 990, 996, 1003 (1992) (discussing the distinction between contemplative explanations, which “help[] us to know who we are,” and instrumental explanations, which “help people to choose among competing actions . . . [and] are guides to planning,” and noting the tendency of “instrumental explanation[s]” to develop a simple model of prediction and to “minimiz[e] social conflict”).

²⁹ 494 U.S. 872, 890 (1990) (holding that Oregon's denial of unemployment benefits to persons dismissed from their positions for sacramental peyote use did not violate the Free Exercise Clause).

this predictive approach, although I will suggest that there are symbolic aspects to the Court's decision as well.

A third function, which I will explore in more depth, is that the Court may take a *rhetorical approach* to its work, trying to make an ethical argument to other branches of government as well as citizens about how they should treat each other. *Torcaso v. Watkins*³⁰ and *West Virginia State Board of Education v. Barnette*,³¹ which find fault with the government's willingness to override individual conscience, might be examples of such cases. Indeed, *Good News Club v. Milford Central School* might be another. In *Good News Club*, the Court rejected the school district's Establishment Clause argument and implied that the district distorted the difference between religious community group and other group activity, thereby sending a message of exclusion to the Good News Club, however unintended.³²

However, conspiracy theory analyses seem to have a tin ear for a fourth possibility: that the inconsistencies in the Court's Religion Clause jurisprudence are a good faith attempt by the Court's members to live out their self-understanding that they comprise a symbolic institution.³³ In that symbolic role, the Court may utilize cherished abstractions such as freedom and equality, as well as concrete images such as particular Religion Clause litigants or their acts, to symbolize an American vision, to declare who we are as a people and what we believe.

If one views the Court as symbol-maker, rather than as one of its more functional roles as adjudicator or predictor, one may be less inclined to view its members as puppeteers who calculatingly manipulate Religion Clause jurisprudence to send a message to the unwashed that the rule of law is securely in place, perhaps while pursuing their own ideological or other self-interests. Rather, if we imagine that justices are attempting to fulfill their roles as symbol-

³⁰ 367 U.S. 488, 496 (1961) (invalidating a state requirement that public officials, including notary publics, declare a belief in the existence of God, as this condition violates the candidate's freedom of belief and religion).

³¹ 319 U.S. 624, 642 (1943) (striking down as unconstitutional a requirement that public school students, including Jehovah's Witnesses, must pledge allegiance to the flag or face such consequences as expulsion from school).

³² 533 U.S. 98, 111-14 (2004) (arguing, inter alia, that "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse'" and that the "Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 821 (1995))).

³³ See Marshall, "We Know It When We See It," *supra* note 8, at 498 (suggesting that the confusion in Establishment Clause analysis may be explained if the Court's jurisprudence is viewed as symbolic and not substantive, that it is less concerned with eliminating government involvement in religion than with eliminating the perception that the government is acting improperly).

makers, we begin to conceive of them as sincere, reflective individuals who try to simultaneously represent the competing forces of social conflict, the Court's tradition of jurisprudence, the values they understand the Constitution to embody, and the stories of the litigants before them, while avoiding capture by any one of these forces. As they evaluate their place within a key social institution, members of the Court may easily come to imagine that they can make symbolic gestures critical of American political and social life through their opinions.

B. *Why the Need for a Symbol-Maker?*

Students of symbolic behavior contend that creating symbols and employing them in ritual activity is an essential human endeavor that makes social life possible. For the individual, Catharine Bell suggests that the creation or employment of symbols in ritual behavior is critical to directing action out of thought and often to the integration of beliefs and ideas with action.³⁴ Without representations of what is sacred or ideal, action cannot become purposive, and thought cannot become embodied in action. And purposive action—action directed toward others and toward ends—is a necessary ingredient of social life itself.

At the social level, anthropologists tell us that as quintessentially religious, meaning-making beings, we have no choice but to create a cultural ethos, that is: "the tone, character, and quality of [a person's] life, its moral and aesthetic style and mood—and their worldview—the picture [that people] have of the way things in sheer actuality are, their most comprehensive ideas of order."³⁵

Symbolic activity plays a multitude of roles in allowing social life to continue, particularly life among strangers with divergent histories, ties, and beliefs. For example, "the symbol system[s] we learn as members of our culture . . . provide a 'shield against terror.'"³⁶ Our ability to interpret what we see and are makes it possible for us to avoid the sense that chaos engulfs us. Geertz argues that, while religious belief systems render the cultural ethos "intellectually reasonable by being shown to represent a way of life ideally adapted to the actual state of affairs the world view describes,"³⁷ symbols render the world view "emotionally convincing by being presented as an image

³⁴ CATHERINE BELL, *RITUAL THEORY, RITUAL PRACTICE* 19–20 (1992) (describing a structural pattern that views "ritual as a type of functional or structural mechanism to reintegrate the thought-action dichotomy").

³⁵ GEERTZ, *supra* note 4, at 89.

³⁶ DAVID I. KERTZER, *RITUAL, POLITICS, & POWER* 4 (1988) (quoting PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 22 (1967)).

³⁷ GEERTZ, *supra* note 4, at 89–90.

of an actual state of affairs peculiarly well-arranged to accommodate such a way of life."³⁸ For Geertz, religious symbols "formulate a basic congruence between a particular style of life and a specific (if, most often, implicit) metaphysic, and in so doing sustain each with the borrowed authority of the other."³⁹

Geertz suggests that symbols function as cultural forms of reassurance against three specific forms of threat to the human sense that the world is meaningful:

[Symbols function] at the limits of [man's] analytic capacities, at the limits of his powers of endurance, and at the limits of his moral insight. Bafflement, suffering, and a sense of intractable ethical paradox are all, if they become intense enough or are sustained long enough, radical challenges to the proposition that life is comprehensible and that we can, by taking thought, orient ourselves effectively within it⁴⁰

Certainly, the need for a sense of the meaning of life and one's personal place within it has not been relieved by modernity. Nor, as Thurman Arnold once chided, has the necessity for symbolic action been obviated by modernity.⁴¹ Utility has not replaced meaning-making as the primary basis for human action, even if we would not want to go so far as Arnold in suggesting "that all human conduct and all institutional behavior are symbolic."⁴² Rather than being simply a "primitive" and "irrational" form of action, symbolic behavior aims at (and if it is effective, achieves) a holistic expression of human fears, desires, commitments, and hopes that answers the radical challenge to comprehensibility that Geertz poses.

Symbolic activity also makes social interaction among strangers possible by performing numerous communicative functions that cannot be as well accomplished without symbols. Symbols permit more complex self-communication than is possible if we are left to abstractions, and more efficient self-communication than is possible if we must recite a full narrative of the foundation of our beliefs and commitments to each other. To take a mundane example, a man wearing a cheesehead announces his loyalty to the Green Bay Packers (as well as a complex set of emotions) to anyone within sight who is culturally competent in Midwestern culture (or American football). We imme-

³⁸ *Id.* at 90.

³⁹ *Id.*; see also Nahmod, *supra* note 27, at 788–93 (discussing the Ninth Circuit's *Newdow* decision and the Pledge of Allegiance as an "important component of American civil religion" in which the Pledge "promoted solidarity, encouraged political community, and connected the individual to the history, myths, and transcendent values of the United States").

⁴⁰ GEERTZ, *supra* note 4, at 100.

⁴¹ See KERTZER, *supra* note 36, at 3 (quoting legal scholar Thurman Arnold for the proposition that "people in modern societies [do not necessarily] behave in pragmatic, goal-oriented ways . . . [; rather,] people are more influenced by symbolic forms than by utilitarian calculations").

⁴² *Id.*

diately know not to criticize Brett Favre to the man's face, unless we want to risk a confrontation (possibly diffused by sporting our own stern-faced Eagle or purple Viking character).

In political and legal culture, symbolic activity similarly permits complex but efficient expressions of the way in which power, authority, and justification coalesce.⁴³ Symbolic messages, transmitted through political and legal ritual activity, "communicate power relations not just among the political elite, but between the powerful and the powerless as well."⁴⁴ Whether this is a good or bad thing is a subject of some debate. If real power is indeed to be found in the construction of reality,⁴⁵ and if symbols construct reality more powerfully than other forms of speech and action, we should anticipate this debate given differing views about human nature. Some students of political ritual behavior have described these communications as, effectively, ways in which smart elites can manipulate the goodwill and complex emotions of the powerless.⁴⁶ Still others read symbolic communication as a way of warning non-elites about the limits of social action that they should not transgress, on pain of both stigmatic and tangible sanctions.⁴⁷ Students of political-legal symbolization note as well how elites can reinforce their power by virtue of the fact that they *are* the symbol-makers. This position invests them with a mystique and authority that compels recognition of their superior position by non-elites.⁴⁸ Similarly, political and legal unknowns can

⁴³ See, e.g., *id.* at 29–30 (describing how the ritualistic entrance of a victorious General into Rome served to reinforce the hierarchy of power essential to the Republic); Nahmod, *supra* note 27, at 778 (explaining David Kertzer's belief that rituals counteract individualized thinking by suggesting a single, particular interpretation of reality).

⁴⁴ KERTZER, *supra* note 36, at 31.

⁴⁵ See *id.* at 5 ("The symbolic is not a residual dimension of purportedly real politics; still less is it an insubstantial screen upon which real issues are cast in pale and passive form. The symbolic is real politics, articulated in a special and often most powerful way." (quoting CLIVE S. KESSLER, *ISLAM AND POLITICS IN A MALAY STATE: KELANTAN 1838–1969*, at 244–45 (1978))).

⁴⁶ See *id.* ("Creating a symbol or, more commonly, identifying oneself with a popular symbol can be a potent means of gaining and keeping power . . ."); *id.* at 87 ("Far from simply reflecting existing power relations, rituals are often important in doing just the opposite, that is, in fostering beliefs about the political universe that systematically misrepresent what is going on."); *id.* at 90 (describing how the President of the United States is "undoubtedly the country's premier ritual actor and symbol manipulator" as he uses political rituals to display the power of the Presidency and to gain the trust of the populace); see also Smith, *supra* note 7, at 940 (citing Murray Edelman for the proposition that politicians often take symbolic but ineffective stances on anxiety-producing issues, such as crime, because such symbolic stances imbue politicians with a sense of political credit in the eyes of the public).

⁴⁷ See KERTZER, *supra* note 36, at 24–30 (explaining that "[r]itual is used to constitute power, not just reflect power that already exists").

⁴⁸ See *id.* at 25 (suggesting that the position of being royalty is best defined by being treated like royalty by subordinates); Smith, *supra* note 7, at 936–37 (outlining some of the physical pageantry, including "temple-like marble courthouses, judicial robes, and elevated benches," used by the judiciary to express its stature and reinforce its legitimacy as the "non-political branch of government").

gain (or lose) social power by identifying with certain existing symbols, from Bibles to swastikas.⁴⁹

On the positive side, if symbols help to announce where, in any given society, individuals find their place, symbol-making may substitute for violence and other forms of coercion as a method for establishing social relationships. Moreover, symbolic action conveyed through a ritual process can provide an orderly way of making a transition from one historical moment to another. We can scarcely imagine, for example, how the precise transition from one President to another would be determined if some form of ritual (in this case voting by the people and then the electors, followed by an inauguration) were not employed.

Perhaps as critically, symbolic action may create or foster a sense of belonging and solidarity with diverse others in a community that simply is not possible through either pragmatic action or abstract argument. In arguing about political organizations, Kertzer states that “[n]ot only does the individual come to feel a part of the . . . organization by adopting the symbols associated with it, but, just as importantly, he also comes to be recognized as a fellow member by others in the organization.”⁵⁰ Ritual behavior, guided by social symbols, makes it possible for highly complex, pluralistic societies to create a sense of belonging and unity that would not be possible if such societies had to achieve consensus on abstract principles or goals.⁵¹ In the form of a civil religion, such behavior may respond to the need in Western society to “recapture some of the lost, organic solidarity of premodern societies by linking political ideas and institutions, naturally shared by all, with a network of hallowed meanings. By doing so, a society can link its political ideas and institutions to its basic, heartfelt sentiments and aspirations.”⁵²

In terms of latent conflicts between individual and community, Catherine Bell argues that “[t]he strategies of ritualization clearly generate forms of practice and empowerment capable of articulating

⁴⁹ See, e.g., KERTZER, *supra* note 36, at 5, 94–95, 164–65 (arguing that the Nazi party’s use of symbols and rituals was frighteningly effective in the adulation it created of Hitler, while President Reagan’s ceremonial trip to a cemetery in Germany “spawned special outrage” as “the symbolism of Nazism proved too powerful for Reagan”).

⁵⁰ *Id.* at 17; see also Nahmod, *supra* note 27, at 776 (“Political rituals construct power by showing ‘people as a coherent and ordered community based on shared values and goals’ and by ‘demonstrat[ing] the legitimacy of th[o]se values and goals.’” (quoting CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 129 (1997)) (alterations in original)).

⁵¹ See, e.g., Nahmod, *supra* note 27, at 778–81 (breaking down the Pledge of Allegiance into its component parts and demonstrating how they emphasize the collective Republic rather than the individual).

⁵² Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1250 (1986).

an understanding of the personal self vis-à-vis community.”⁵³ Such strategies permit the individual to “deploy schemes that can manipulate the social order on some level and appropriate its categories for a semicoherent vision of personal identity and action.”⁵⁴ On a larger scale, symbolically driven ritualization makes it possible for members of a social body to “agree while disagreeing.”⁵⁵ As one example, Americans can experience a sense of solidarity with other Americans through the symbols of the flag or the Constitution even when they hold fully incompatible ideas about what those symbols mean or what vision for America they would wish to achieve.

Indeed, if we follow Bell, symbol-driven ritual is essential in making relations of power possible at all, either for those who wield power or for those who receive its force. Such ritualization “necessitates and engenders both consent and resistance”⁵⁶ by those who find themselves the objects of symbolic communication. That is, even while ritualized activity will “school the social body,”⁵⁷ it necessarily creates power in both the actor and the one acted upon, for “[a] power relationship undoes itself when, pushing to quell completely the insubordination necessary to it, it succeeds in reducing the other to total subservience or in transforming the other into an overt adversary.”⁵⁸ Power as struggle is most acutely realized in symbolic interactions between those who would hold power over others and those who find themselves “under” that power.

⁵³ BELL, *supra* note 34, at 217; *see also* Janet L. Dolgin, *Religious Symbols and the Establishment of a National 'Religion'*, 39 MERCER L. REV. 495, 502 (1988) (“People appropriate and transform . . . myths [about a Nation, its history, and its people] . . . into an integral part of everyday life that informs people about what it means to be an ‘American’ (or a member of any other national group) and about who is marginal to that definition of self.”).

⁵⁴ BELL, *supra* note 34, at 216; *see also* Nahmod, *supra* note 27, at 778 (describing Kertzer’s theory as proposing that the most effective rituals are those that allow individuals to involve their personalities in the ritual participation).

⁵⁵ *See* KERTZER, *supra* note 36, at 13–14 (“[S]ince rituals are non-verbal, they have no contraries. They can therefore be used to produce harmony of wills and actions without provoking recalcitrance” (quoting Taoist philosopher Chuang Tzu, in J.G.A. Pocock, *Ritual, Language, Power: An Essay on the Apparent Meanings of Ancient Chinese Philosophy*, 16 POL. SCI. 6 (1964))); KERTZER, *supra* note 36, at 76 (“[Durkheim’s] genius lies in having recognized that ritual builds solidarity without requiring the sharing of beliefs. Solidarity is produced by people acting together, not by people thinking together.”); Smith, *supra* note 7, at 939 (providing the example of *Brown v. Board of Education* as a unifying ruling and “important symbolic statement” for America despite its lack of immediate implementation).

⁵⁶ BELL, *supra* note 34, at 218; *see also* Eisgruber, *supra* note 28, at 990–91 (suggesting that partaking in the debate of symbolic issues, such as abortion and affirmative action in education, requires both a desire to form broad agreement and a desire to maintain individual combativeness); Smith, *supra* note 7, at 939 (noting that litigation may reinforce the Constitution as a symbol, encouraging participation in the legal system rather than rejection of it).

⁵⁷ BELL, *supra* note 34, at 215.

⁵⁸ BELL, *supra* note 34, at 201; *see also* Eisgruber, *supra* note 28, at 991 (citing Anne Norton and John Stuart Mill for support of the proposition that dynamic opposition is an essential element of any polity).

C. Why Would the Court Assume a Symbol-Maker Role?

There are, of course, good reasons why the High Court might feel (perhaps reluctantly) led into this role as symbol-maker, particularly in modern political circumstances where the power of elites is always being challenged. In charismatic political cultures, there can be a high-level alignment between the leadership itself and the intellectual and emotional justifications explaining why the existing political structure is “peculiarly well-arranged to accommodate”⁵⁹ culture as a value system. Metaphorically, philosophers and priests often act in service of the king, under his authority, and, to the extent that they call the king to account, prophesy within a culture already predetermined by that charismatic authority.

The introduction of the Word in religion and law explodes this alignment.⁶⁰ When philosophers and priests are beholden to a text that points to, represents, or even constitutes a higher authority than human governors, intellectual and emotional justifications inevitably challenge and correct as often as they justify and shore up political and legal power. In such cultures, philosophers and priests, for the most part, no longer function as extensions of a cultural ethos, infusing its intellectual and emotional power throughout a community. Rather, they lurk on the edges of community life, at times as provocateurs of change, but most often as scapegoats, annoying pests, irrelevant jesters, or even as “mere women,” foolishly pressing the egalitarian and sacrificial idealism of private communities like family and congregation into public space.⁶¹

Of course, the Word can be spoken by those in power as well as those outside of power. And so elites in democratic systems who have

⁵⁹ GEERTZ, *supra* note 4, at 90.

⁶⁰ Cf. Patrick McKinley Brennan, *Meaning's Edge, Love's Priority*, 101 MICH. L. REV. 2060, 2065 (2003) (“[White notes that] it is through a cognitive method, rather than through the shortcut of an epiphanic moment of cognitive magic or mystery, that we humans create and discover meaning . . .” (emphasis omitted)) (reviewing JAMES BOYD WHITE, *THE EDGE OF MEANING* (2001)).

⁶¹ See, e.g., ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 10–11, 18–20, 37 (1977) (describing the early twentieth century equation of ministers with women and the marginalization of well-educated clergy because they were considered effeminate, as well as the attempts by such clergy to identify as masculine by diminishing women’s potential contribution to public life); Joseph William Singer, *Should Lawyers Care About Philosophy?* 1989 DUKE L.J. 1752, 1752, 1754 (reviewing RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989) and ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988)) (noting that American culture holds philosophy to sometimes “be essential to define and support just social institutions, and [to] sometimes . . . undermine those institutions or . . . be irrelevant to them” and that American analytic philosopher Richard Rorty stands with those who believe that philosophy is not relevant to public life); see also Brennan, *supra* note 60, at 2080 (noting White’s view that poets, philosophers, and lawyers live “on the edge of language, where meaning is made” (quoting WHITE, *supra* note 60, at 258)).

struggled for power by understanding themselves as outsiders not really different from philosophers and priests will call those same persons into power with them as they advance. Despite popular debates about whether religious leaders and political ideologues are the pipers calling the tune to political leaders, or are themselves (as Billy Graham was often accused of) dancing to the politicians' pipes,⁶² these cynical "manipulation" narratives fail to account for a more likely reality. That is, they fail to take elites at their word: political elites, even Presidents, may well have come to see themselves as allies of philosophers and priests in the service of an imagined just and moral order. Similarly, philosophers and priests accompany elites to places of power and re-take their places in the structure of charismatic authority precisely because they convince themselves that they are helping to "bring in the kingdom of God."⁶³ Witness, for example, Jerry Falwell's view of the 2004 election results:

After more than 25 years since I formed the Moral Majority and began mobilizing evangelicals to participate in the political process, I actually realized the fruit of my labors nationwide as Macel and I watched the election returns into the early hours of Wednesday. I could not hold back the tears of joy. Hour by hour, we observed a "slam dunk" as the Church of Jesus Christ made the difference in initiating the return of this nation to moral sanity and the Judeo-Christian ethic.⁶⁴

Or Charles Colson's view of the election:

"This was Providence," evangelical leader and presidential adviser Charles Colson told Beliefnet. "Anybody looking at the 2000 election would have to say it was . . . a miraculous deliverance, and I think people felt it again this year." By allowing Bush to stay in office, Colson said, God is "giving us a chance to repent and to restore some moral sanity to American life."⁶⁵

Yet, even these temporary alignments are subject to the relentless challenge of the Word. Because of the tangible reality of the Word,

⁶² Some of Billy Graham's fellow Southern Baptists felt that Graham was "too close to the powerful and too fond of the things of the world, [and] have likened him to the prophets of old who told the kings of Israel what they wanted to hear." William Martin, *Billy Graham*, 19 CHRISTIAN HIST. 12, 14 (2000) (alteration in original). Indeed, "presidents and other political luminaries clearly regarded their friendship with Graham as a valuable political asset," and Nixon even instructed his staff to call Graham bi-weekly, so that Graham would know that Nixon was interested in his support in key states. *Id.* at 14-15.

⁶³ See, e.g., International Branch of Lion of Judah, *We Are at the Dawning of the Kingdom of God*, <http://www.vinesbranch.com/view/?pageID=49602> (last visited Feb. 22, 2006) (noting that as the word of the Lord is revealed, Christians should "rise up and be a part of bringing forth the Kingdom with glory" by righteous behavior and witness).

⁶⁴ Jerry Falwell, *Christian Voters Triumph over Hollywood Left*, WORLDNETDAILY, Nov. 6, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=41324.

⁶⁵ Deborah Caldwell, *Did God Intervene?: Evangelicals Are Crediting God with Securing Re-election Victory for George W. Bush*, BELIEFNET, http://www.beliefnet.com/story/156/story_15602.html (last visited Jan. 22, 2006).

charismatic leadership in a modern democratic culture cannot fully co-opt, threaten, or marginalize its traditional opposition among legal and political philosophers and religious leaders. The pervasiveness of the Word also makes it possible for such alignments between political authority, ideology, and religion to be exposed and critiqued on a scale simply impossible in pre-modern, non-media cultures. Just as a Chinese Christian can discover through the Internet how his co-religionists are being treated by political authority,⁶⁶ so too can political elites in democratic cultures come relentlessly under the daily microscope of the official and unofficial press. The disjuncture between even their most thoughtless words and their deeds and promises is made instantly available through television news or written press reports⁶⁷ and even through technological innovations such as blogs.⁶⁸

In such circumstances—where public reassurance in public leaders who act as symbol-makers and in the symbols themselves is constantly being undermined—it would seem only natural for the Supreme Court to feel intuitively obliged to step up in its role as symbol-maker. The paradigmatic modern cases that seemed to insist on such a role for the Court might, arguably, be the civil rights cases after *Brown v. Board of Education*,⁶⁹ though one could plausibly propose predecessor cases as well. The media exposé of the disjuncture between both southern and northern political/religious ideology and actual practice—captured vividly by southern police mowing down children with firehoses and dogs, and behind-the-scenes foot-dragging by most visible northern political, social, or religious lead-

⁶⁶ See, e.g., Patrick Goodenough, *Chinese Christians Continue to Face Persecution for Their Faith*, CNSNEWS.COM, Dec. 16, 2003, <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200312/FOR20031216a.html> (exemplifying these Internet reports). Even though the Chinese press is recognizing religious diversity more frequently, there remain strict controls on religion and continued violations of religious rights. See R. Lanier Britsch, *The Current Legal Status of Christianity in China*, 1995 BYU L. REV. 347, 363 (“[T]here is a disparity between the legal rights of Chinese Christians and their actual freedom to practice their religion as they would choose.”); Eric Kolodner, Comment, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407, 421 (1994) (“While citizens of China today certainly enjoy more religious liberty than during any period of communist rule, the Chinese government still strictly controls religious belief and activity.”).

⁶⁷ See, e.g., *News from CNN: Life in Prison or Death?; U.S. Troops Expressing Concerns About Safety in Iraq* (CNN television broadcast Dec. 10, 2004) (transcript on file with the University of Pennsylvania Journal of Constitutional Law) (discussing the controversy over Donald Rumsfeld’s off-hand statement that “[y]ou go to war with the Army you have, not the Army you might want or wish to have” in response to troops complaining about inadequate equipment and vehicles).

⁶⁸ See James Lileks, *The Blog of the Year, or the Year of the Blog?*, NEWHOUSE NEWS SERVICE, Dec. 22, 2004, available at <http://www.newhousenews.com/archive/lileks122204.html> (commenting on the Newsweek “Blog of the Year” award to Power Line for exposing the hoax on CBS about President Bush’s National Guard service).

⁶⁹ 347 U.S. 483 (1954).

ers⁷⁰—may have almost forced the Supreme Court to understand itself briefly as the sole political institution willing and able to pronounce and act upon what was plain for all to see but that few would admit.⁷¹

Second, the Court has come to be seen as the institution carrying out the priestly functions necessary to ritual observance of the ideals of the Constitution, with the flag, the Pledge, and the Declaration of Independence being the most tangible symbols of the national ethos.⁷² Even those who lament the “deviant” Court’s jurisprudence are forced to begin any critique assuming the primacy of the Court’s role in preserving the Constitution as a symbol, only then accusing members of the Court either of abandoning their priestly roles or

⁷⁰ See Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1018 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)) (describing Northerners’ sudden realization that they had to act, and noting that “had the Court ducked the issue of separate but equal in *Brown*, or had the Court simply demanded equalization of facilities, there would have been no institution providing the moral authority to lead to an end to segregation”); Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1622, 1628–33 (2004) (noting, inter alia, that the Supreme Court was uneasy about deciding *Brown v. Board of Education*, but “[w]hen Southern sheriffs used beatings, police dogs, and fire hoses to suppress protesters, . . . media attention escalated, . . . Northerners reacted with horror and outrage, . . . [and] [c]itizens voiced their ‘sense of unutterable outrage and shame’” (citation omitted)).

⁷¹ See Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065, 1071 (2004) (noting that civil rights cases “forced the federal government to choose between the high ideals of equality . . . and a system of racial oppression profoundly at odds with those ideals . . . [which] [t]he Supreme Court eventually responded [to] by resurrecting the Reconstruction-era civil rights laws”); cf. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 487–88, 516 (2000) (“The executive and judicial branches of the federal government were thus forced to decide whether to support protesters confronting racial segregation . . . or instead to back state authorities deploying state criminal law in support of the right of private property owners to discriminate,” but “[t]he Court, acting alone, could not overcome these deeply entrenched social norms.”).

⁷² See Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15 L. & HUM. BEHAV. 183, 183 (1991) (“The Constitution . . . stands as a major source of . . . symbolic legality[.] . . . mean[ing] the ideological core of values and beliefs that we associate with law and justice in democratic society.”); Lerner, *supra* note 3, at 1293–94, 1296 (describing Constitution-worship and the use of the Constitution as a totem); Marshall, *“We Know It When We See It,” supra* note 8, at 511 (describing the Constitution as a “sacred document,” American constitutional law as the “American civil religion,” and the Supreme Court as its “institutional church that incarnates the sacred document”); Nahmod, *supra* note 27, at 772, 784 (describing the Pledge of Allegiance and flag as sacred symbols); Smith, *supra* note 8, at 937–38 (describing how the Constitution functions as a “sacred text” and as an “effective and powerful symbol”); see also Debora K. Kristensen, *In Search of Judicial Independence*, 46 ADVOC. 27, 27 (2003) (citing Chief Justice William Rehnquist’s statement that judicial independence is “one of the crown jewels of our system of government”); David M. Skover, *Reconstituting “Original Intent”: A Constitutional Law Encyclopedia for the Next Century*, 86 MICH. L. REV. 1257, 1264 (1988) (reviewing LEONARD LEV ET AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (1986)) (noting that the ENCYCLOPEDIA authors confirm that “the Constitution is a symbol of American civil culture [that] molds the practices and the belief that sustain and reshape that culture”).

manipulating that symbol in service of personal ideologies.⁷³ Members of the Court, mindful of their roles as keepers of an intention passed to them by history, may understandably feel compelled to symbolize, however reluctantly.

Third, a symbolic institution may well be necessary in a democratic culture that has consigned religious (and other cultural) institutions and leaders to social roles that carry few of the trappings of worldly power that traditionally accompanied the institution of symbol-maker. (This would be especially true if religious institutions were not simply relegated to roles in private life⁷⁴ but more narrowly conceptualized as authoritative only over each accepting individual's conscience.) A social void quickly becomes apparent. If culture—if, indeed, community—is dependent upon the creation of common meaning through symbolizing, and if religion has lost or been stripped of its symbolizing role, it would seem that some social institution must fill the void. Whether it is because the Constitution is the most central common symbol that America has, or whether because it is the only common symbol America has, the Court seems next in line for the role of national symbol-maker.

Fourth, the Court may be one of the few institutions still functionally capable of symbolizing American culture. Effective symbols are complex creatures: they are inherently multivalent and multi-vocal. They “represent and unify a rich diversity of meanings,”⁷⁵ both in the sense that diverse and even divergent meanings are evoked by one symbol even for the same onlooker, and also in the sense that a particular symbol can mean different things to different people.⁷⁶ Strong symbols at once reassure and threaten; they secure and challenge the status quo. Strong symbols at once consolidate meaning and un-hinge it whirling into an unknown future. As any common religious symbol such as the Christian cross demonstrates, powerful symbols make people rejoice and mourn, feel assurance and guilt, experience wonder and fear all at the same time.

⁷³ *But see* Smith, *supra* note 7, at 943 (“Some judicial decisions may be shaped by judges for self-interested or symbolic purposes, but other decisions with symbolic impacts may [be] the inadvertent product of regular legal processes.” (citations omitted)).

⁷⁴ *See, e.g.*, STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 8 (1993) (“[W]e often ask our citizens to split their public and private selves, telling them in effect that it is fine to be religious in private, but there is something askew when those private beliefs become the basis for public action.”).

⁷⁵ KERTZER, *supra* note 36, at 11.

⁷⁶ *See id.* (“[R]itual symbols [have] *multivocality*, the variety of different meanings attached to the same symbol. . . . [M]ultivocality suggests . . . that the same symbol may be understood by different people in different ways.”); *see also* Eisgruber, *supra* note 28, at 1010–11 (describing the complexity of explaining national identity “in edifying ways” and noting the “complex habits of mind” and “curiosity” that permit the Court to do so).

The ambiguity and ambivalence captured in a political symbol like the flag or the Constitution⁷⁷ is difficult for a large, bureaucratic institution such as Congress to evoke, since such a body will rarely speak with one voice. This truism is best illustrated by the rare counterexample, such as Congress's decision to sing "God Bless America" on the Capitol steps on the evening of the 9/11 attack,⁷⁸ or, more recently, the decision of many Congressional members to recite the Pledge of Allegiance on those same steps in the wake of the Ninth Circuit's *Newdow v. United States Congress* decision, holding that the language "under God" of the Pledge was unconstitutional as violating the Establishment Clause.⁷⁹

Moreover, the sheer complexity of a culture-sustaining symbol calls for a corresponding complexity of thought and expression that evades the typical sound-bite politician, whether a legislator or executive. While few academic observers would accuse the Court of overly complex intellectual reasoning in its opinions, the Court opinion itself, accompanied by concurrences and dissents, carries an opportunity for more sophisticated justification of a decision than most political speeches or even administrative rulings.

Fifth, if Bell and others are indeed correct in arguing that symbolic ritual is essential to creating the possibility for power relations by empowering those in the "under" position in a contested and resisting activity, then a Court that understood its function as, at least partially, advocating for the oppressed might be drawn to employing symbols as a means of joining the question of mutual power.

Sixth, although in recent years this claim is being hotly contested, there is some reason to believe that the Supreme Court might be perceived as the political branch least self-interested in manipulating

⁷⁷ See Eisgruber, *supra* note 28, at 1011 (noting the ambiguous nature of the Constitution).

⁷⁸ See Philip Elwood, *The Making of a Peace Anthem*, S.F. CHRON., Sept. 14, 2001, at C1 ("On Tuesday, [September 11, 2001,] the second 'day of infamy' in my lifetime, tens of millions of Americans . . . saw and heard the assembled members of the U.S. Congress, standing on the Capitol steps, sing those familiar lines [of 'God Bless America'] in the manner of rendering the national anthem.").

⁷⁹ 292 F.3d 597, 612 (9th Cir. 2002) ("In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause."); see Nahmod, *supra* note 27, at 771 ("Congress . . . reacted with outrage and disbelief to the Ninth's Circuit's 2002 decision in *Newdow v. United States Congress*. . . Members of Congress demonstrated their displeasure by reciting the Pledge of Allegiance on the steps of the Capitol."); Maura Dolan, *Atheist to Address High Court Today on Pledge in Schools*, FORT WAYNE J. GAZETTE, Mar. 24, 2004, at 3A, available at 2004 WLNR 17612803 (noting that after the Ninth Circuit's decision, ninety-nine Senators voted to support the Pledge and approximately 100 members of Congress stood on the Capitol steps to sing "God Bless America"); Barbara Dority, *Under God Divides the Indivisible*, HUMANIST, Sept.-Oct. 2002, at 6, 8 (noting that members of the House of Representatives and the Senate protested the *Newdow* decision "when they recited the pledge, including the now-declared unconstitutional phrase, on the Capitol steps").

the public. Though some strong political leaders have proven masters at the art of symbolizing American values, in an age of exposure, even the most well-meaning and skillful President's attempts to act as symbol-maker on behalf of a common good will immediately be subject to cynical re-interpretation or critique. Pundits will shortly (or sometimes after delay, if the attempt to symbolize proves sufficiently powerful in the right circumstances, as it was after September 11th) identify hidden psychological, economic, or other self-interested political motives for these attempts to capture the emotions of a community. While the Court is certainly not exempt from these criticisms, the most that justices may plausibly be charged with is misguided ideological fervor, and not, for example, an attempt to deflect the public from the Court's misdeeds (as Clinton's attack on Iraq was portrayed, ironically, by conservative news outlets)⁸⁰ or to further the economic interests of the Court's friends (as Bush's foray into oil-rich Iraq is often portrayed).⁸¹ Thus, to the extent symbol-makers are required to embody the virtues of selflessness and objectivity on behalf of their culture, the Supreme Court may be the best institution for the job, as the most seemingly pure keeper of the flame. Or so members of the Court may reassure themselves.

Moreover, the nature of the Court's work may explain its temptation to symbolize. Difficult constitutional decisions often occur at the convergence of the three threats to meaning that Geertz identifies: "the limit[s] of [man's] analytic capacities, at the limits of his powers of endurance, and at the limits of his moral insight."⁸² Many constitutional conflicts—from affirmative action battles to "right to die"⁸³ or same-sex marriage cases⁸⁴—are fought out at the borderlands of hu-

⁸⁰ See Vijay Bangaru, *Wag the Dog Revisited*, U-WIRE, Nov. 2, 1999 (questioning whether there was any relationship between Monica Lewinsky giving her grand jury testimony and, on the same day, the United States deciding to bomb a Sudanese pharmaceutical plant); Editorial, *Picking Fights: Missiles for Monica Lead Us Astray—and into Harm's Way Worldwide*, THE GAZETTE, Nov. 6, 1999 (asking whether President Clinton attacked a Sudanese plant to deflect attention from the Lewinsky scandal, paralleling the plot of the movie WAG THE DOG).

⁸¹ See Kate Dourian, *After War, Next Battle May Be for Control of Iraq's Huge Oil Potential*, PLATTS OILGRAM NEWS, Oct. 11, 2002, at 1, available at 2002 WLNR 2396364 (discussing reader inquiries and Iraqi envoy charges that President Bush's interest in Iraq relates to his desire to control its oilfields); Maria Elena Martinez & Joshua Karliner, Editorial, *Rumors of War: Axis of Oil and Iraq*, S.F. CHRON., Nov. 13, 2002, at A25 (questioning the relationship between Bush/Cheney oil interests and the attack on Iraq).

⁸² GEERTZ, *supra* note 4, at 100.

⁸³ See, e.g., *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 285 (1990) (upholding as constitutional a state's refusal to terminate artificial hydration and nutrition for a patient, despite a request by the patient's guardian to do so).

⁸⁴ See, e.g., *Castle v. Washington*, No. 04-2-00614-4, 2004 WL 1985215, at *2-*3, 16 (Wash. Super. Ct. Sept. 7, 2004) (holding that the state Defense of Marriage Act statute prohibiting same-sex civil marriage did not violate Washington's Equal Rights Amendment but did violate the Privileges or Immunities Clause of the Washington Constitution).

man existence. In those borderlands, the human ability to construct a logical "decision tree" to resolve what the community should do about specific incidents of injustice or human need is exhausted. The human ability to find a way to tolerate difference in others' core beliefs and significant actions is sorely tested to the point of breaking. The ability of even the best minds to find a compromised justice that respects the equal sanctity and worth of all persons is confounded. Each of these constitutional cases, sustained and intense, is a "radical challenge[] to the proposition that life is comprehensible and that we can, by taking [rational] thought, orient ourselves effectively within it."⁸⁵ If symbolizing is, indeed, the only alternative to surrendering to the chaos of human existence, then it should be no wonder that the Court feels compelled toward symbolic expression.

Finally, the Supreme Court may be lured by the fractious and ambivalent nature of American politics to play a symbolizing role. Because symbolic rituals carry unitive promise, a Supreme Court troubled by the contentious nature of public debate in constitutional lawsuits may see the opportunity to create some solidarity and healing between contending political factions by employing or creating symbols that have the power to embrace the contested understandings involved in any such struggle. Rather than considering the Court as inconsistent, incoherent, or irrational as it pronounces ambivalently upon an issue of constitutional law, we might consider whether the Court is attempting to find common ground which, illogical and multivalent though it might be, has the opportunity of bringing peace to a constitutional war, allowing both sides to read in its opinion some victory and some substantiation of their views.

We might, of course, identify an underside to this desire by the Court to play a unitive role. As a contemporary nation deeply wedded to values decidedly different than, if not opposed to, most historical moral traditions, values such as autonomous choice and technological progress, the United States poses a particular allure to those who would play God. Intellectuals, including lawyers and judges, may be tempted to save the polity from the misjudgments its members are bound to make due to public disinterest in history, distaste for received wisdom, and disability in coercing common behavior through social and religious institutions.

Where all symbolic politics is utilitarian, and no symbols are treated as sacred beyond their utility for constructing a practical future, the temptation to separate some American ideas as untouchable and beyond criticism by treating them as sacred objects is particularly compelling. Thus, whether the Court consecrates equality and

⁸⁵ GEERTZ, *supra* note 4, at 100.

choice, or “the Framers’ intent,” the impetus to find and preserve an American tradition that binds a shifting and conflicted polity together from election to election is strong; and the Court, as the institutional presence whose members outlast elections, can easily find itself pushed in the direction of assuming the role of symbol-maker.

II. HOW THE COURT CONCEIVES ITS OWN ROLE SYMBOLICALLY

In many First Amendment cases, the Court plays a complex role: it may be simultaneously “reading” symbolic behavior of the litigants, attempting to create or find symbols that will properly adjudicate the case, and trying to find a symbolic image that portrays its own role in the controversy in a good light. The Court’s work at creating its own image is understandably complex in these cases. It is made even more complex by the fact that some of its own members attack the Court when it is trying especially hard to construct expression adequate to the task of reflecting a diverse nation’s complicated self-understanding. Even the Justices are not themselves consistent on that score. Justice Scalia, for one, has been unrepentant in attacking members of his Court for attempts at symbolic communication. He often sounds a pragmatic note as he repetitively demands that the Court leave certain matters to the democratic process,⁸⁶ though he himself is not above employing symbolic gestures.

As earlier suggested, perhaps the critical symbolic self-image that the Religion Clause cases exhibit is the Court as “neutral observer.”⁸⁷ The “neutral observer Court” has powerful resonance as a symbol in a society that has staked its claim to moral superiority on the rule of law

⁸⁶ See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1222 (2005) (Scalia, J., dissenting) (decrying the Court’s decision that juveniles cannot be sentenced to the death penalty, noting that “the reason for insistence on legislative primacy is obvious and fundamental: ‘[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976) (Joint Opinion of Stewart, Powell, & Stevens, JJ.))). In *Webster v. Reproductive Health Services*, Justice Scalia argued in his concurrence that the abortion ruling serves

needlessly to prolong this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.

492 U.S. 490, 532 (1989).

⁸⁷ This is, of course, the role that the Court claims the state should play vis-à-vis religious claimants. E.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652, 678–79 (2002) (describing the government’s responsibility to be neutral in its allocation of financial aid as between religious and non-religious recipients). It is also the imagined role that the average person judging the constitutionality of a government display of religion should play. E.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (requiring that the constitutionality of a display’s effect be judged from the standpoint of a “reasonable observer”). However, as the display cases suggest, the imagined observer must clearly be the Court, since the Court adjudicates constitutionality.

and the equality of citizenship: only a "neutral" Court could, presumably, deliver on those values. It is no surprise that this symbolism is particularly prevalent in Religion Clause cases, given the vast amount of popular and academic literature presumably read by the Court that pounds the theme that religion has been divisive in all of human history, that it was divisive at the founding, and that it remains a particularly dark portent of potential social and political divisiveness today.⁸⁸ Many of the Court's Religion Clause opinions are replete with this theme, sometimes recited briefly as a necessary premise for beginning the Court's argument, and other times developed with historical loving care.⁸⁹ Only by honestly understanding and portraying itself as a "neutral observer" on the scene of religious conflict in the United States could the Court adequately reassure a society anxious about further cultural conflict that, at least, it will not be along religious lines.

It should also not be a surprise that a Court that intuitively understands its opinions as symbolic expressions should modify what its "neutral observer" role means over time. Judges are creatures of the cultural zeitgeist, as well. During the post-war period, when American cultural expression was becoming largely focused on celebrating individual autonomy and throwing off the shackles of tradition, the Court's understanding of neutrality was not surprisingly framed from the perspective of the individual as he bears the brunt of government's attempt to coerce him. There is, for example, that early harbinger in *Barnette*, in which the Court superimposes the image of a young and earnest religious schoolchild against the government's demand to conform.⁹⁰

Similarly, *Sherbert v. Verner* and its progeny reflect a powerful symbolic message that the religious individual is on a par with, and can demand an explanation from, the government when government in-

⁸⁸ See, e.g., Michael W. McConnell, "God is Dead, and We Have Killed Him!": *Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 173-74 (noting modern liberalism's "tendency to see traditional religion as authoritarian, irrational, and divisive," and citing both law professors and Justice Stevens decrying the "divisive forces" of religion). Perhaps the best-known statement of this position from a legal academic comes from William P. Marshall. See Marshall, *The Other Side*, *supra* note 19, at 852-54, 859-60 (describing the "dark side" of religion and its potential for becoming a "powerfully destructive political force").

⁸⁹ For examples of Justices citing the Framers' concerns regarding the potential divisiveness of religion and the need for religious accommodations for minorities, see *City of Boerne v. Flores*, 521 U.S. 507, 550-53 (1997) (O'Connor, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); and *County of Allegheny*, 492 U.S. at 646-48 (Stevens, J., concurring in part and dissenting in part).

⁹⁰ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-37, 640-42 (1943) (emphasizing the coercion of the state over young minds in requiring students to pledge allegiance to the flag).

trudes upon her autonomous religious choices.⁹¹ Using the *Sherbert* rule, the government was asked to explain itself exceedingly carefully in *Thomas v. Review Board of the Indiana Employment Security Division*,⁹² *Cantwell v. Connecticut*,⁹³ and such religious speech cases as *Widmar v. Vincent*.⁹⁴ Cases difficult to conceptualize under the autonomy paradigm, most notably the Indian sacred lands cases,⁹⁵ are virtually ignored as locations for a symbolic message about the importance of religious freedom.

Many of the Establishment Clause cases decided in this period similarly express the message that the individual stands toe-to-toe with the state, an American analogy to looking the Tiananmen Square tank commanders in the eye.⁹⁶ In terms of the symbolic message that the individual can stand up against the government, there is perhaps no better example than *Flast v. Cohen*, holding that one lone taxpayer has standing to challenge the federal government's provision of funding for religious schools.⁹⁷ Similarly, the Court has held that the state must have a better explanation than religious majoritarianism or tradition for requiring that a dissenter child attend public school⁹⁸ or be

⁹¹ See *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963) (holding that the state failed to justify denial of unemployment compensation to a woman unable to obtain employment due to her observance of the Sabbath).

⁹² 450 U.S. 707, 718–19 (1981) (finding that, in the denial of unemployment compensation to a Jehovah's Witness who left a job because of a religious objection to producing arms, the state's interests were not sufficiently compelling nor was its evidence sufficiently strong to overcome the burden placed on Thomas's free exercise rights).

⁹³ 310 U.S. 296, 307, 310–11 (1940) (indicating the need for statutes limiting the free exercise of religion to be narrowly drawn and demonstrative of a clear and present danger to a state interest).

⁹⁴ 454 U.S. 263, 265, 270, 276 (1981) (applying strict scrutiny to strike down as unconstitutional a state university's content-based regulation that excluded organizations from use of university buildings for "purposes of religious worship or religious teaching").

⁹⁵ See, e.g., Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 774–75, 777 (2001) (noting that "when ethnic and religious conflicts come to the American courts, the master stories of people in conflict with the state, which lie at the heart of these conflicts, are likely to be given short shrift or ignored altogether").

⁹⁶ For a discussion of the symbolic power of the photographic image of the single man who stopped a tank column moving toward Tiananmen Square to crush the freedom movement in 1989, see James Barron, *One Man Can Make a Difference: This One Jostled Briefly with Goliath*, N.Y. TIMES, June 6, 1989, at A16.

⁹⁷ 392 U.S. 83, 103–06 (1968) ("The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing . . .").

⁹⁸ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213–15, 222–23 (1972) (ruling that a state's interest in universal education is constrained by the Free Exercise Clause, as well as the demonstrated ability of a community independently to provide sufficient training).

exposed to the Ten Commandments⁹⁹ or prayer in schools in any of its iterations.¹⁰⁰

However, since the Court's interaction with culture, both intellectual and popular, necessarily shapes its self-image as symbol-maker, the Court has naturally re-interpreted the "neutrality" requirement that it seeks to embody as well as to impose upon government litigants in response to cultural and intellectual pressure. In recent times, those who claim that religious majorities are being excluded from public discussion or short-changed in their ability to express their religious freedom have made headway due to the Court's self-conception as a neutral observer and the demands it places on litigants to practice neutrality. As re-interpreted by a different Court majority, the new symbolism of neutrality is a species of "equal treatment" for majority and minority religions alike. Thus, under *Zelman v. Simmons-Harris*¹⁰¹ and *Mitchell v. Helms*,¹⁰² direct aid programs to majority religious educational institutions are now constitutional unless they evidence some preference for particular religions. Through this message, the "neutral" Court holds that all religions are equal, just as all individual citizens are equal as between themselves, not only as before the state.

In the modern religion cases, the Court struggles to decide cases through undertaking at least three additional images of its role in American politics. The first self-understanding is the Court as the "keeper of the Ark," that is, of American social tradition, the institution that reflects the "long view" of American political and constitutional history influenced not only by the constancy of American virtue and

⁹⁹ See, e.g., *Stone v. Graham*, 449 U.S. 39, 42 (1980) (declaring that the purpose behind posting the Ten Commandments in a public schoolroom was "plainly religious in nature" and therefore violated the Establishment Clause).

¹⁰⁰ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 57 n.43 (1985) (holding that a daily period of silence at public schools, which the sponsor of the legislation admitted was solely intended to "return[] voluntary prayers to the public schools," violated the Establishment Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222, 225 (1963) (rejecting the school district's argument that a daily reading of Bible passages and recitation of the Lord's Prayer was only a "minor encroachment on the First Amendment" and, instead, determining that the religious practice contravened the religious neutrality demanded by the Court); *Engel v. Vitale*, 370 U.S. 421, 435 (1962) (prohibiting official prayer in public school, stating that "each separate government in this country should stay out of the business of writing or sanctioning official prayers").

¹⁰¹ 536 U.S. 639, 652 (2002) (holding that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause").

¹⁰² 530 U.S. 793, 810 (2000) (allowing religious institutions to receive government aid where the aid is only the "result of the genuinely independent and private choices of individuals" and not the result of the "unmediated" will of government [that] determine[s] what schools ultimately benefit from the government aid, and how much" (citations omitted)).

community but also by practical innovation. The second is the Court as “*voice and shield of the vulnerable*,” the institution that will intervene when all other government institutions are indifferently stepping over the individual, or even hatefully stepping on him. Under this self-conception, the Court reminds institutions that individuals are sacred human beings that should not be harmed or disregarded. The third self-conception is the Court as a “*Madisonian bulwark*” against powerful forces arrayed in opposition to a pluralistic, democratic social order. These forces do not only include majoritarian religious institutions and government that, when joined together, threaten the sort of totalitarian tyranny symbolized by the former Soviet Union in twentieth century American imagination. For some Justices, like Justice Scalia, they also include the forces of rampant individualism.

In some Religion Clause cases, several of these roles seem to align easily, as evidenced by the Court’s ringing and powerful imagery. Perhaps most tellingly, we see the confluence of these roles in the Court’s opinion in *Wisconsin v. Yoder*, which I quote at length because it demonstrates how the Court can occasionally speak out of several of these symbolic roles at one time:

The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson’s ideal of the “sturdy yeoman” who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

....

We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts.

....

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State’s enforcement of a statute

generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.¹⁰³

In the above passage, the Court in *Yoder* has consolidated its symbolic role as a *keeper of American traditions*. It describes with praise both the humane tradition of compulsory education that Wisconsin is trying to further and the proud and “pure” religious tradition of the Amish. These two traditions express many of the most cherished individual and communal values in American life. Speaking sociologically as a neutral observer, the Court notes that Amish society is “highly successful,”¹⁰⁴ “self-sufficient,”¹⁰⁵ independent, and unique-minded. At the same time, the Court celebrates its role as the *voice for the underdog*. Unless the Court stands up for the Amish, Wisconsin’s perhaps laudable but unconsciously destructive tradition of public education threatens to bulldoze their community into non-existence.¹⁰⁶ Any sense that there is something more at stake, such as actual human struggle between the demands of the state and parental stubbornness, for example, or between the Amish child’s needs and desires and those of his community (a point that Justice Douglas raises without result),¹⁰⁷ is stifled by the majority. Any attempt to do justice to Amish life, which historians and reporters tell us is not quite the perfect picture painted in *Yoder*,¹⁰⁸ is discarded. As a symbol-

¹⁰³ *Yoder*, 406 U.S. at 225–27, 235–36 (citing *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

¹⁰⁴ *Id.* at 222 (“[T]his record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream.’”).

¹⁰⁵ *Id.* at 213 (recognizing the Amish as “law-abiding and generally self-sufficient members of society”).

¹⁰⁶ *Id.* at 221 (“[W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.”).

¹⁰⁷ *Id.* at 242–43 (Douglas, J., dissenting in part) (noting that as a result of this ruling, Amish parents will have the ability “to impose [their own] notions of religious duty upon their children,” potentially stifling a child’s independence and invading the child’s rights without “cavassing his views”).

¹⁰⁸ See, e.g., SHAWN FRANCIS PETERS, *THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS* 55, 167–68 (2003) (describing the refusal of the Amish to require their children to attend even their own parochial schools to the state-mandated age of 16, Amish run-ins with state sanitation laws, and the destruction of the community through a schism in the mid-1970s); see also Paul Levy, *You Didn’t Talk About It: A Woman’s Startling Account of Sexual Assaults by Amish Family Members Has Prompted Others to Come Forward with Similar Stories of Abuse—and of*

making institution, this Court is intent on providing a picture of Amish life that can reflect back to American society the purest and noblest image of its own past as a society of religious people who continue to enjoy religious freedom.

As others have pointed out more extensively, the “neutral observer” Court sometimes takes a backseat to the Court as “tradition-keeper.” For example, the celebratory treatment we find in *Yoder* is not extended to traditions out of line with the standard “American” story. Except for some minor attempts in dissenting opinions, Native American traditions are not given the same laudatory treatment, nor are Jehovah’s Witnesses or atheists or Christian Scientists, even when they win. We might, for example, have seen more language in *Lyng v. Northwest Indian Cemetery Protection Ass’n*¹⁰⁹ or *Smith*¹¹⁰ regarding Native American values, such as protection of the sacredness of the earth, or the ways in which rituals, such as peyote, strengthen community ties. We might have seen an extensive discussion of the fact that many of the sacred site rituals that Native Americans perform in *Lyng* are attempts to bring healing to the whole world, not just self-absorbed psychological exercises of individual men and women.¹¹¹ Instead, we get the following nod from the Court, which suggests that any larger purposes by the Native American community are illusory and that these sacred space rites are purely self-interested: “Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself.”¹¹²

Similarly, Jehovah’s Witnesses like Newton Cantwell are described as misguided and perhaps a little strange (but essentially harmless)

Having to Leave a Community Behind, MINNEAPOLIS-ST. PAUL STAR TRIB., July 18, 2004, at 1A (detailing the failure of a western Wisconsin Amish community to deal effectively with sexual assaults against female members of the community).

¹⁰⁹ 485 U.S. 439, 457 (1988) (declining to consider competing values of two cultures because “[w]e would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program”).

¹¹⁰ 494 U.S. 872, 890 (1990) (upholding the constitutionality of Oregon’s prohibition of peyote use for sacramental religious purposes and acknowledging that while less common religions may be at a disadvantage under this holding, “each conscience [cannot be] a law unto itself . . . [and] judges [cannot] weigh the social importance of all laws against the centrality of all religious beliefs”).

¹¹¹ See *Lyng*, 485 U.S. at 460 (Brennan, J., dissenting) (“[T]ribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.” (citing U.S. FED. AGENCIES TASK FORCE, AM. INDIAN RELIGIOUS FREEDOM ACT REP. 10–11 (1979))).

¹¹² *Id.* at 451.

individuals exercising their religious freedom rights.¹¹³ As the Court in *Sicurella v. United States* reviews the Department of Justice's decision to reject a request for conscientious objector status made by a Jehovah's Witness with skepticism, if not disdain, it states:

Granting that these articles picture Jehovah's Witnesses as antipacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to participation in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

We believe that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets.¹¹⁴

Such attempts to characterize some religious dissidents as model citizens and others as humorous or irrelevant implies that the Court is attempting to comply with its role as a political symbol-maker on behalf of America's own chosen traditions rather than as a neutral adjudicator. As a political symbol-maker, it must carefully choose among traditions, while not being too rigid about the particulars given its broad audience. The Court must, thus, choose a version of the tradition that can embrace the Amish nonconformist who is still willing to conform to more important values, such as keeping one's religion to oneself and demonstrating the American work ethic.

The roles of "voice for the powerless" and "bulwark of liberty" that the Court imagines for itself are also illustrated in the religion cases. Viewed as a line of cases logically and consistently derived from a single and simple guiding legal principle, the Court's cases are surely incoherent. Moreover, in light of contemporary histories, which de-

¹¹³ See *Murdock v. Pennsylvania*, 319 U.S. 105, 109, 111 (1943) (stating "[n]or do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be" and referring to petitioner as "[b]ut an itinerant evangelist, however misguided or intolerant he may be"); *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940) ("There is no showing that [Jesse Cantwell's] department was noisy, truculent, overbearing or offensive. . . . It is not claimed that he intended to insult or affront the hearers by playing the records. It is plain that he wished only to interest them in his propaganda.")

¹¹⁴ *Sicurella v. United States*, 348 U.S. 385, 390-91 (1955).

scribe the movement against parochial schools as largely animated by anti-Catholic bias,¹¹⁵ at least the school finance cases are hardly expli- cable as minority-protecting religious freedom decisions. Seen, how- ever, as the Court's symbolic expression of its role as bulwark against the oppression and chaos engendered when the church and the gov- ernment join forces corruptly, these cases take on more meaning. *Everson v. Board of Education's* lengthy history describing the purpose of the Establishment Clause is replete with language stressing the abuses of power that come with the conjoining of ecclesiastical and secular power. For example, the Court in *Everson* notes:

A large proportion of the early settlers of this country came here from Europe to escape the *bondage of laws* which compelled them to sup- port and attend government-favored churches. The centuries immedi- ately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects *determined to maintain their absolute political and religious supremacy*. With the power of government supporting them, at various times and places, Catholics had *persecuted* Protestants, Protestants had *persecuted* Catholics, Protestant sects had *persecuted* other Protestant sects, Catholics of one shade of belief had *persecuted* Catholics of another shade of belief, and all of these had from time to time *persecuted* Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been *fined, cast in jail, cruelly tortured, and killed*.¹¹⁶

In terms of the Court's self-selected symbolic role as spokesperson for those religious persons who are run roughshod over by an uncar- ing government, we might look at the Court's decisions in *Lee v. Weisman*¹¹⁷ and *Santa Fe Independent School District v. Doe*¹¹⁸ as dramatic

¹¹⁵ See, e.g., Susanna Dokupil, *Function Follows Form: Locke v. Davey's Unnecessary Parsing*, 2004 CATO SUP. CT. REV. 327, 331–32 (describing the simultaneous suppression of funding for Catho- lic schools and the promotion of Protestant values in publicly funded schools).

¹¹⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947) (emphasis added). The Court continues:

An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves *hounded and proscribed because of their faith*; Quakers who followed their conscience *went to jail*; Baptists were peculiarly ob- noxious to certain dominant Protestant sects; men and women of varied faiths who hap- pened to be in a minority in a particular locality were *persecuted because they steadfastly per- sisted in worshipping God only as their own consciences dictated*. And all of these dissenters were *compelled to pay tithes and taxes* to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

Id. at 9–10 (emphasis added).

¹¹⁷ 505 U.S. 577, 596 (1992) (noting that the government may not compel a high school stu- dent objecting to a prayer at her graduation ceremony because “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice”).

¹¹⁸ 530 U.S. 290, 317 (2000) (affirming Mormon and Catholic students' assertion that having a student-led prayer recited over the loudspeaker before public high school football games amounted to an endorsement of religion in violation of the Establishment Clause).

examples. As Justice Scalia mocks the majority, if the Court's job is simply to act as a dispassionate, logical arbiter of tangible injuries that give rise to damage claims, it is hard to see harm in cases like *Lee* when a student only has to endure a brief, religiously denuded benediction at her high school graduation.¹¹⁹ Similarly, nobody was required to engage in a prayer broadcast over the loudspeaker at the Santa Fe High School's weekly football games, and there is no evidence that any Buddhist, Jew, Muslim, or Hindu was physically or monetarily injured because she refused to participate.¹²⁰ Moreover, both of these cases properly raise the hackles of anyone who insists that the Court's role is to derive a logical Establishment principle, divorced of context, and apply it in consistently analogical fashion. *Santa Fe*, especially, is an amalgam of Establishment Clause principles with no attempt to identify which of the conflicting justifications offered by the Court most likely explains the result.¹²¹

On the other hand, if the Court's role is primarily symbolic—to stand in the way of the government trampling individuals, even indifferently—then *Lee* and *Santa Fe* take on much greater power. In both of these cases, the Court argues, the state has defiantly and indifferently walked all over conscientiously different children and young adults who are in no reasonable social position to stand up to such bullying, unless we ask of them courage that no average adult would display. Moreover, in the Court's "bulwark" role, the glimpse of the totalitarianism off in the distance is clearer as well. Particularly in *Santa Fe*, we see a religious majority aligned with the state exercising its muscle to flout the rule of law just because it can; it disregards the religious rights of its community's minorities in order to make clear that its religion is hegemonic, the social "law of the land" in Santa Fe, Texas. Given its stubborn insistence on circumventing established law and flouting the spirit of the Establishment Clause, the majority's

¹¹⁹ See *Lee*, 505 U.S. at 637–39 (Scalia, J., dissenting) ("The Court's notion that a student who simply sits in 'respectful silence' during the invocation and benediction . . . has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. . . . [S]urely 'our social conventions' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . [M]oreover, . . . maintaining respect for the religious observances of others is a fundamental civil virtue that government . . . can and should cultivate" (citations omitted)).

¹²⁰ See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 813 (5th Cir. 1999) (noting the lack of actual, compensable harm from this practice).

¹²¹ For examples of responses to the decision, see Jeremy E. Warren, *Without a Prayer: The Status of School Prayer After Santa Fe Independent School District v. Doe*, 42 S. TEX. L. REV. 925, 944 (2001), which argues that the Court had "attempted to rework its faulty precedent by adding another murky test to its Establishment Clause jurisprudence," and Ross Schmierer, Note, *An Attempt to Pick Up the Fallen Bricks of the Wall Separating Church and State after Santa Fe v. Doe*, 67 BROOK. L. REV. 1291, 1332 (2002), which describes the opinion as "The Mixing and Matching of Different Establishment Clause Tests."

claim that it is itself a religious minority persecuted by the Supreme Court is unpersuasive.

Sometimes, of course, the Court's enacted roles do not dovetail so easily with each other, causing not only doctrinal but symbolic confusion. And sometimes—indeed, often—members of the Court do not agree on what symbolic role they are playing. *Lynch v. Donnelly*, in which the Court's self-image as preserver of tradition comes into conflict with its image as defender of minorities, can be seen as premiere among these cases.¹²² In *Lynch*, as in many religion cases, the most popular of American traditions lines up on the state's side, not the challenger's. Ultimately, the Court determines that its symbolic role as tradition-preserver outweighs its role as voice for the underdog, in part because no specific underdog like Deborah Weisman or Jane Doe appears to embody the disgrace and exclusion experienced by the religious outsider. Instead, the Court is forced in *Lynch's* successors to imagine the "reasonable observer,"¹²³ an abstraction that cannot bear the weight of a symbolic pronouncement.

Similarly, the Court's other symbolic roles can conflict with its role as bulwark of liberty,¹²⁴ particularly when the Court begins to imagine itself as shoring up the edifice of the state against all forms of chaos. Virtually every attempt except unadulterated majoritarianism has failed to explain Justice Scalia's rant in *Smith* that granting two followers of the Native American Church their unemployment compensation benefits would result in anarchy, i.e., in every man becoming a law unto himself.¹²⁵ The Court as "neutral observer" surely cannot so easily come to the conclusion that the state's interest must always outweigh the religious adherent's unless the state has "come after" the claimant in a mean-spirited attempt to destroy his religion. At the very least, neutrality would seem to require the appearance that the Court try to balance state and individual interests before making a determination. Nor, clearly, does the Court's self-image as keeper of tradition square with the *Smith* decision, since it is justified on the

¹²² 465 U.S. 668 (1984) (holding that the City of Pawtucket, Rhode Island did not violate the Establishment Clause when it displayed the crèche among other Christmas displays, including a Santa Claus house, a Christmas tree, cutout figures, candy-striped poles, and a "Seasons Greetings" banner).

¹²³ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (applying the "reasonable observer" standard in order to determine if a holiday display violates the Establishment Clause).

¹²⁴ Although the Court points to many provisions of the Constitution, including the Establishment Clause, as constituting such a bulwark, see, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (describing the Constitution as a "bulwark against infringements" of liberty); *Flast v. Cohen*, 392 U.S. 83, 104 (1968) (recalling the Framers' intent that the Establishment Clause be a bulwark against government attempts to use its taxing and spending powers to aid religions), it seems clear from reading the Court's opinions that the Court considers itself an integral part of the fortress.

¹²⁵ *Employment Div. v. Smith*, 494 U.S. 872, 888, 890 (1990).

fully contemporary metaphor of the war on drugs. And, the decision hardly fits the Court's self-image as voice of the vulnerable, given how it once again negatively distinguishes the Native Americans. However, if Justice Scalia's claim is that both a culture of autonomy and a government of oppression can threaten liberty, then his attempt to symbolize the Constitution and the Court itself as a bulwark makes more sense.

It should be noticed that these self-conceptions through which the Court exercises its function as symbol-maker are consistent with the traditional roles that symbol-makers and symbol-keepers have served in many cultures. As a neutral observer, the Court can signal to the public that it serves as subordinate to a higher authority, the perduring values of the Constitution, and that what it decides is not subjective, personal, or fleeting, but always pointing to the vision embodied in that central symbol. Thus, the Court's ritual of pointing always to the Constitution and away from itself is a litany to the importance of the rule of law in American political life. More importantly, it is a testimony to the power, not only the sacredness but also the relative omnipotence, of the text. That the text is more powerful and perduring than any historical event or political movement is a critical reassurance in times when the forces of violence appear poised to overwhelm these values. We might think, for example, how important the belief in the constitutional text as super-powerful has been recently, particularly right after the 9/11 attacks when it was not clear how powerful the enemy of the United States was or what forms of chaotic violence it had planned. Even more tellingly, we might think about how President Lincoln called obliquely on the power of the text to allay despair and fears of the Civil War¹²⁶ or how President Roosevelt called indirectly upon the power of the text to erase public fears not only about the strength of Nazi Germany but also about the economic crisis in the United States.¹²⁷

¹²⁶ See President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 263, 263 (1992) ("It is rather for us to be here dedicated to the great task remaining before us . . . that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.").

¹²⁷ See President Franklin Delano Roosevelt, Message to Congress: The Four Freedoms (Jan. 6, 1941), in *THE HUMAN RIGHTS READER: MAJOR POLITICAL WRITINGS, ESSAYS, SPEECHES, AND DOCUMENTS FROM THE BIBLE TO THE PRESENT* 403, 405 (Micheline R. Ishay ed., 1997) ("In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression The second is freedom of every person to worship God in his own way The third is freedom from want—which . . . means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants The fourth is freedom from fear—which . . . [means] that no nation will be in a position to commit an act of physical aggression against any neighbor").

As the keeper of American traditions, the Court can ritualize what is novel and frightening in human constitutional conflict into the quotidian by pouring the hot liquid of a lively constitutional controversy into the mold of traditional legal categories, much as symbol-makers in primitive cultures pour interpersonal conflicts into ritualistic forms, such as the combat or the ordeal. The ability to render the novel and uncertain into traditional categories—the *Lemon* test¹²⁸ or the *Sherbert* analysis,¹²⁹ for example—makes human practices that initially seem detestable or frightening, from child deaths by faith healing to animal sacrifice to religious consumption of drugs, seem bearable and comprehensible to the average person. Tradition-keeping can tie the dilemmas of the present to the mythology of the past—for each crisis, for example, there can be a result that achieves the common good—in a way that borrows on the present. This pairing of mythological past to the heated battles of the present can reassure the public that constitutional pronouncements and the civic battles that have led to them are not radically discontinuous with preceding social history. Flag-burning, for example, can become a practice of free expression rather than a threat to national unity or to civic peace.¹³⁰ Similarly, such tradition-keeping practices can assure the average American that what the Supreme Court will do, even in its most “liberal” reaches, will not radically revise the constitutional values in ways that threaten existing communities.

At the same time, using the symbolic language of the tradition-keepers, the Court can challenge—without appearing to challenge—the status quo. By framing novel decisions in the rituals of constitutional interpretation, from *Sherbert*’s decision to put the state to the test to *Mitchell*’s elimination of a half-century of suspicion over government funding of parochial schools, the Court can move institutions more quickly to new relationships “on the ground” than the language it uses would imply.

As a voice for the powerless, similarly, the Court can perform a critical symbolic function: it can reassure a suspicious public that it has redeemed the egalitarian principle that keeps the powerful at

¹²⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (adopting a three-part test for constitutionality: (1) a statute must have a secular purpose; (2) a statute’s primary effect must neither advance nor inhibit religion; and (3) a statute must not create excessive entanglements between government and religion).

¹²⁹ See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (requiring a compelling state interest to uphold governmental actions that substantially infringe on an individual’s First Amendment rights).

¹³⁰ See, e.g., Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2307 (2004) (noting that flag-burning, nude dancing, and sacred symbols do not, in general, threaten America’s survival but are instead a part of American culture).

bay, even if only in one isolated case. Symbols remind communities that even terrible gods can be kept at bay if they are properly appeased. The symbolic role of power-balancer is critical in a culture in which social roles are fluid and individuals' beliefs in their current security and possibly better future depend on their confidence that social and governmental institutions will ultimately distribute benefits and burdens by way of the egalitarian principle. Even to the average person suspicious of the Court's "activism," the reassurance that one political institution is ultimately willing to say "no" to steamrolling of constitutional freedoms by the other branches is not trivial.

Similarly, in its role as bulwark, the Court can, like the priest who sacrifices a lamb to ward off divine punishment or engages in a ritual food offering to stave off a disastrous famine, offer reassurance that realistic threats to the basic pluralistic and egalitarian structure of democracy will be staved off, whatever their demonic source.

III. RHETORICAL VERSUS SYMBOLIC ROLES FOR THE COURT

While the Court's decisions come into somewhat clearer view if one understands these works as good faith attempts to symbolize American constitutional values as well as to enact its own role as symbol-maker, there are good reasons to doubt whether the Court should understand its role in this way, at least in the Religion Clause cases. Despite the cynicism of those like Lerner who deride the Court for embracing the self-conception of a high priest,¹⁵¹ the Justices are responsible for discovering or forming the symbols that will allow it to enact a ritual of reassurance and celebration. Yet, one need not take Justice Scalia's realist approach, mocking every argument that attempts to capture the ideals of American legal and political culture, to be concerned that the Court too easily understands itself as symbol-maker for justice or the high priest of the Constitution.

Of course, as I have previously suggested, used as a definition and not a metaphor, this binary choice between the Court as rhetor and the Court as symbol-maker is artificial. A good rhetor uses the tools available, which means reliance on those narratives and symbols that most powerfully convey his argument to his particular audience.¹⁵² A good rhetor similarly attends to the way in which the perception of her own character shapes the audience's willingness to trust her; a good rhetorician is self-reflective about the impact of her own expres-

¹⁵¹ See *supra* notes 18-20 and accompanying text (providing conspiracy theories of the true role or function that the Court plays, including that the Court considers itself to be a Platonic guardian).

¹⁵² See BIZZELL & HERZBERG, *supra* note 11, at 3-5 (1990) (describing invention as "the search for persuasive ways to present information and formulate arguments").

sion.¹³³ However, there are some dangers in a symbolic approach to the Court's work that are at least a little less dangerous when the Court conceives of itself primarily as a rhetor rather than as a symbol-maker. I believe there are political, ethical, and even theological concerns suggesting that the Court can live out a healthier self-conception if it takes a more rhetorical and less symbolic approach to its work in Religion Clause cases.

A. Rhetor v. Symbol-Maker: What Difference the Difference Makes

Christopher Eisgruber has argued that one of the most critical roles that the Supreme Court can play is to educate the American public, causing its citizens to identify American values with themselves and with their own lives.¹³⁴ Symbol-makers, called symbol-keepers as well, are also traditionally keepers of the knowledge of a culture: they do not simply hold the symbolic object, they have to explain to those who behold it what its history and meaning have been for that culture.¹³⁵ And, as Eisgruber implies, the Court is obligated to help average persons understand how their own lives are entwined with the values represented by such symbols, to make social values their own, and to live out of those values.¹³⁶ Indeed, symbol-makers are granted a privileged position to say what the meaning of an object is for their culture.

I believe that Eisgruber is correct that, most of the time, when the Court rules, it is not serving as a teacher in the sense of extending knowledge about the law and the requirements of justice to an igno-

¹³³ See Aristotle, *Rhetoric*, *supra* note 11, at 610 ("Since the purpose of rhetoric is to influence decisions . . . , the speaker must not only see to it that his argument is demonstrative and persuasive, but also that he is a man of good character and can put his listener into the right frame of mind."); BIZZELL & HERZBERG, *supra* note 11, at 145–46 (noting that Aristotle's *Rhetoric* condemns "tell[ing] how to pervert the judgments of those addressed" and providing an overview of how Aristotle analyzed and classified the elements involved in moving others to true knowledge).

¹³⁴ See Eisgruber, *supra* note 28, at 964–65, 973 (arguing for the Court to serve as a rhetorical teacher in that the Court can motivate people to "act ethically" and to "conform their behavior to some conception of justice" by showing them "that [this goal] is their own" and making it "plausible that constitutional action will conform to their identity").

¹³⁵ See Zick, *supra* note 130, at 2301–02 (noting that courts in a pluralistic culture act like ethnographers in that courts also engage in cultural interpretation and must consider, decipher, interpret, and translate "the symbolic acts, rituals, and associations of particular subcultures").

¹³⁶ See Eisgruber, *supra* note 28, at 972–73 (arguing that teaching an understanding of "matters" to those "who lack it" is an insufficient understanding of teaching and that teachers must understand their students, which in the case of the Court is the American people). Eisgruber offers a rhetorical model of teaching, which first "establishes community between its author and the audience," then "singles out some trait that is a source of pride to the audience," and "signals a willingness to share (rather than criticize) the audience's pride." *Id.* at 974. After identifying the principle that commends the trait and its limits, the teacher ultimately shows how the audience "displays the best version of the trait" accepted by the audience as its own. *Id.* at 975.

rant populace in the way a theologian might teach the dogma or religious narrative of a tradition embodied in a symbol. To be sure, the Court is authoritative, but not in the sense that it holds the exclusive key to the knowledge of the tradition. Rather, its authority derives from the fact that it can apply a particular tradition to a specific controversy in a way that the losing party must heed on pain of significant sanctions against his life. Rather than occupying the position of teaching Americans new theories of law or the Constitution, Eisgruber correctly argues that the Court serves one of its primary functions when it brings Americans to see that their own lives are part of a story of traditions.¹³⁷

Similarly, the Court indeed does, in some respects, serve the reassuring role that the priest conducting a ritual can serve. To the extent that symbolic expression through ritual action does create a sense of security and certainty, the Court often functions to clarify how parties in a situation of great uncertainty and high contest should proceed, thus lowering the insecurity and tension that can come with the lack of an authoritative pronouncement.

However, there is also a sharper dimension to the Court's work beyond what Eisgruber describes and beyond even its role as provider of certainty and security. In this role, which we might call prophetic,¹³⁸ the image of rhetorician is, in my mind, more useful than the image of symbol-keeper. The Court in this role does not simply describe to the American public, in terms that they can make their own, the values and aspirations of the Constitution and laws. In Eisgruber's sense, the tension between reality and alterity, so poignantly expressed by Robert Cover as a bridge on which lawyers and judges must stand,¹³⁹ is palpable. But the success of the Court's rebuke and plea to the public still rests on the public's willingness to come forward and make the connection with their lives and their commitment

¹³⁷ See *id.* at 968–69 (explaining the power of the “American thing” myth).

¹³⁸ See MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 147–48 (1988) (arguing that the Court can “tak[e] seriously the prophetic potential of [the] aspirational meaning of the constitutional text . . . [as well as] tak[e] seriously the prophetic voices . . . in the community (Martin Luther King, Jr.’s voice, for example . . . or Dorothy Day’s)”). As I have suggested, Eisgruber makes a slightly different claim, perhaps more consistent with the traditional understanding of the rhetor’s role: that the Court should explain matters in such as way as cause people “to recall values, commitments, or ideals which people have somehow neglected, and to cause people to honor these values in their actions.” Eisgruber, *supra* note 28, at 968. My argument presumes that people will often be recalcitrant in agreeing to do so, a problem Eisgruber allows but does not fully resolve.

¹³⁹ See Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983) (“Law may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative—that is, as a connective between two states of affairs . . .”); Ronald R. Garet, *Judges as Prophets: A Coverian Interpretation*, 72 S. CAL. L. REV. 385, 403–04 (1999) (linking judges to the Biblical tradition of authority).

to a better alterity.

In its prophetic function, however, the Court demands that citizens go beyond identification and commitment. It demands, like a prophet in the Jewish or Christian tradition, that citizens confess not just the gap between their noblest aspirations and life as they know it, but also their intransigence, their unwillingness, to act to close that gap. In its prophetic function, the Court asks citizens to lay bare for inspection their worst political instincts, whether they are to preserve their security at the cost of another's conscience or to preserve their sense of superiority at the cost of another's humiliation.

However, if the Court sees its primary role as a symbol-maker, it can play this prophetic role only with great difficulty. If it is self-consciously searching for words to express what the Constitution symbolizes, or what the American polity is, the Court will find itself torn. As a symbol-maker, it will search for an expression that uplifts its own tradition, one that has the power to move individuals passionately to action that embodies that tradition. By contrast, as prophet, it will be forced into criticism of both the constitutional tradition itself and those who refuse to uphold its highest aspirations.

Moreover, the Court as a symbol-maker is continually watching society observe its work. As the Court tries to embrace American ideals in words, the Court will experience something like one does when one looks at one's image in a mirror; the Court's focus will be so much on getting its own image right that it will neglect to focus on the need to reprove its audience. For example, if the Court spends most of its time worrying that it must appease its critics by serving as a model of the neutral observer applying logical, consistent reasoning as a symbol of the rule of law, it may neglect the dark and complicated injustice of a case that calls for nuanced consideration of context and relationship between state and citizen rather than lofty pronouncements or broad principles.

Sadly, very few of the cases where the Court has fulfilled its role as rhetor seem to be Religion Clause cases. Attempting to juggle, or perhaps to straddle, its four symbolic roles previously described, the Court has rarely come face to face with the American public and demanded that this public choose to live up to its own aspirations. Arguably, *Sherbert* was such a case, though I think it is more plausibly regarded as a symbolic attempt by the Court. One possible counterexample is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which the Court unmask a seemingly benign animal rights ordinance as a cover for religious discrimination and demands that the city live up to its responsibilities to treat its religious citizens with

equal respect.¹⁴⁰ Other examples might be *Wallace v. Jaffree*¹⁴¹ and *Santa Fe*.¹⁴² Both cases have been excoriated for their lack of consistency.¹⁴³ Opponents of *Wallace* criticized the Court for using the motivations of legislators as the primary basis for holding a law unconstitutional¹⁴⁴ and *Santa Fe* for its seeming attempt to throw all of Religion Clause jurisprudence at the problem without any attempt to identify a clear principle behind the decision.¹⁴⁵ Viewed, however, as cases where the Court is rhetorically exhorting government toward humility and demanding that it take responsibility for causing harm to children of minority religions, these cases send a clear and consistent message.

Searching for a more extended example of how the Court's self-conception as symbol-maker or rhetor makes a practical difference, one might consider the opinions in *Lyng*.¹⁴⁶ In some ways, *Lyng* is the

¹⁴⁰ 508 U.S. 520, 540–42 (1993) (finding that the challenged city ordinances were enacted with the object of suppressing the Santeria religion and its practice of animal sacrifice and were therefore unconstitutional).

¹⁴¹ 472 U.S. 38, 51–53 (1985) (noting that while the right to choose one's own creed and reject the majority's was once extended only to Christian sects, the current principle requires "equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism").

¹⁴² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (holding that "while Santa Fe's majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority").

¹⁴³ See, e.g., Leslie C. Griffin, *Their Own Prepossessions: The Establishment Clause, 1999–2000*, 33 LOY. U. CHI. L.J. 237, 238–39 (2001) ("[T]he opinions rely upon a hodgepodge of tests, including Souter's neutrality and Thomas' neutrality and private choice, O'Connor's actual diversion and Souter's divertibility, Stevens' government coercion and Thomas' diluted government endorsement. The array of tests explains the widespread sentiment that the Establishment Clause jurisprudence is muddled, even incoherent."); see also Lawrence J. Chanice, Comment, *Santa Fe Independent School District v. Doe: Establishment Clause Chaos on the High School Gridiron*, 75 ST. JOHN'S L. REV. 137, 151–52 (2001) (arguing that the Court in *Santa Fe* "move[d] the Establishment Clause analysis further away from both the historical understanding of the Establishment Clause and existing precedent"); Michael L. Forte, Note, *Misreading the Recipe: How the Court in Santa Fe Independent School District v. Doe Failed to Appreciate the "Ingredients" of Equal Access and Student Choice in a Policy Providing for After-School Religious Speech*, 31 STETSON L. REV. 219, 221 (2002) (arguing that the majority in *Santa Fe* "misapplied and selectively ignored controlling precedent" to the detriment of students' free-speech and free-exercise rights).

¹⁴⁴ See, e.g., Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 BYU L. REV. 337, 342–43 (claiming that the *Wallace* majority, in relying solely on the "careless statements of one legislator who supported the Alabama statute," misdiagnosed the intent issue, and arguing that intent, if relevant at all, should not be dispositive or subjectively examined); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 994 (1989) (arguing that a focus on legislative motivation "raises a potentially serious threat to the freedom of expression of legislators who hold religious beliefs and punishes not only the legislators but also their constituents").

¹⁴⁵ For examples of criticisms of the *Santa Fe* decision, see *supra* note 143.

¹⁴⁶ *Compare Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 440, 453 (1988) (holding that although the Constitution prohibits the government from discriminating on the basis of religion, it does not prevent the government from exercising its own rights on the land in ques-

odd Religion Clause case in which both the majority and the dissent concede the sincerity of the plaintiffs' beliefs and the significant damage of the federal government's decision to put a road through the sacred high country. As the Court notes, "[t]he Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."¹⁴⁷ Despite this fact, and despite the Court's seeming lack of dispute with the lower courts that "the Government had failed to demonstrate a compelling interest in the completion of the road [or challenged logging operations], and that it could have abandoned the road without thereby creating 'a religious preserve for a single group in violation of the establishment clause,'"¹⁴⁸ the Court reaches the conclusion that the government's action is permissible under the Free Exercise Clause. Moreover, this holding occurs despite the fact that, as Justice Brennan more graphically notes,

today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it.¹⁴⁹

To reach this result, the Court must return to the seemingly strict letter of *Sherbert*,¹⁵⁰ insisting that to be challengeable, government action must "coerce[]" or "penalize" religious individuals,¹⁵¹ not simply

tion), *with id.* at 459 (Brennan, J., dissenting) (arguing that there is a constitutional guarantee that bars any kind of governmental intrusion in religious practice).

¹⁴⁷ *Id.* at 451 (majority opinion). Of course, the Court just as quickly "takes back" this clear statement by noting dissensus among Indian tribes about the effect of the government's proposed action and alternative plans on the religious sites, stating:

To be sure, the Indians themselves were far from unanimous in opposing the G-O road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Id. One might note the Court's odd assumption that all Native American tribes concerned with these sites must necessarily have similar religious beliefs for there to be damage to the beliefs of one tribe or one part of a tribe. One can hardly imagine the Court saying that Christians, Muslims, and Jews would have to agree on the importance of Holy Communion for there to be damage to Christians if the practice were banned. Still, ultimately the Court concedes that "some" religious practices are "grave[ly]" threatened. *Id.*

¹⁴⁸ *Id.* at 445.

¹⁴⁹ *Id.* at 476 (Brennan, J., dissenting).

¹⁵⁰ See *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963) (noting that "[g]overnment may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . nor employ the taxing power to inhibit the dissemination of particular religious views" and asking whether the law imposes "any burden" on their free exercise).

¹⁵¹ *Id.* at 449.

“burden,” “discriminate against,” or “inhibit” religious practice, language used in previous Free Exercise precedents.¹⁵²

What could explain the Court’s refusal in *Lyng*, proceeded by *Bo wen v. Roy*¹⁵³ and subsequent cases, to grant relief to religious groups it concedes will be gravely harmed by government action that is not very necessary at all? The Court’s argument hearkens back to its symbolic roles as neutral observer and bulwark of pluralistic democracy. It says:

However much we might wish that it were otherwise, *government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.* A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. *Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.* That task, to the extent that it is feasible, is for the legislatures and other institutions. Cf. *The Federalist No. 10* (*suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects*).¹⁵⁴

In its symbol-making capacity, the Court acts to reassure both the government and the public that the potential chaos entailed in granting exemptions first to these Native Americans and then to others whose lives are affected by the government will be staved off.¹⁵⁵ In its symbolic role as bulwark of pluralism, the Court argues that Madison’s dream of democracy through competing religious factions is best effectuated by not recognizing the particularity of any, by refus-

¹⁵² See, e.g., *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (noting that where the state conditions or denies benefits based on religious conduct, “*thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists*” even if the compulsion is indirect) (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717–18 (1981)); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (discussing “inhibit[ion]” on religious practices). In *Lyng*, Justice Brennan uses the language “frustrate” or “inhibit” to describe these burdens. *Lyng*, 485 U.S. at 469 (Brennan, J., dissenting).

¹⁵³ 476 U.S. 693, 712 (1986) (holding that plaintiffs’ free exercise rights were not violated by the government’s refusal to accommodate the plaintiffs’ religious-based objection to obtaining a Social Security number for their daughter).

¹⁵⁴ *Lyng*, 485 U.S. at 452 (emphasis added).

¹⁵⁵ *Id.* at 458 (holding that a case-by-case analysis into whether the government’s actions with regard to public land infringes on a group’s religious beliefs would “require us to rule that some religious adherents misunderstand their own religious beliefs . . . [and] that such an approach cannot be squared with the Constitution or with our precedents, and that it would case the Judiciary in a role that we never intended to play”).

ing their “demands” on government.¹⁵⁶ In its role as neutral observer, the Court argues that giving in to such demands would not only risk offending other citizens, but also would risk the neutral application of the law.¹⁵⁷ In essence, then, the Court ignores the “facts,” the particularity of the situation which seems so easily resolvable by relatively modest accommodations by the government, in favor of a more symbolic role bespeaking what it perceives to be a public consensus of neutrality and egalitarian pluralism.

In contrast, Justice Brennan’s rhetorical approach to the problem does not begin by assuming that the Court’s job is to reflect the current attitudes, beliefs, and situation of the American public. Nor does it assume that he or any of the other Justices knows what that situation is, or how to effectively describe it. Rather, his dissent is, in one way, the nature of an argument to a polity as to the meaning of American diversity, and, in another, a reproach to the government, the majority, and the populace about the canyon that separates the reality of their common life together and the vision he believes he can convince them to adopt. First, prophetically, he unmasks what he perceives to be dissembling by the Court aimed not simply at papering over, but falsely describing, the power differential in this case:

[T]he Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not ‘doing’ anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government *de facto* beneficial ownership of federal property.¹⁵⁸

In the majority’s description, Native Americans are the ones attempting to exert power over a hapless and threatened federal government; Justice Brennan asks the Court to tell things as they are, to acknowledge that it is the federal government that has acted here when it did not have to act and that its action here threatens a disempowered minority.

Second, Justice Brennan paints a different vision of American equality in plurality, one he urges on a public he realizes may not yet be with him. First, he takes seriously the tradition that is seeking the Court’s protection, describing in careful and hospitable detail the nature of the practices and beliefs that give rise to the majority’s conclusion that religious beliefs and practices would be gravely threatened

¹⁵⁶ *Id.* at 452 (“The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government . . . that inevitably come up in so diverse a society as ours.”).

¹⁵⁷ *Id.* (“The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.”).

¹⁵⁸ *Id.* at 458 (Brennan, J., dissenting) (emphasis added).

by the government's action.¹⁵⁹ Calling the Court to account on its own acknowledgement of the harm that will be caused, Justice Brennan asks the reading public not to hide their heads in the sand, pretending not to know the nature of what they are doing through their government. He notes that the results in the real world produced by the Court's attempt to narrow the Free Exercise Clause "[are] demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."¹⁶⁰ Next, he takes issue with a misreading of text,¹⁶¹ constitutional principle,¹⁶² and precedent,¹⁶³ which only has the apparent purpose of preserving the unity and clarity of the Constitution as a symbolic expression of American values and a method of containing the potential chaos of differing government responses to different religious groups.

Finally, Justice Brennan exhorts his reading public to a true egalitarian vision, one in which profound disagreements about the nature of reality are settled not by point of sword but by recognizing the desert, the right of Native Americans to practice their traditional religions.¹⁶⁴

While one might take important exception to his work, as a rhetor, Justice Brennan has served to unmask the pretense of situation that the majority created in its roles as neutral decision-maker and bulwark of pluralistic democracy. In addition, by using the authority of his office, logos (the logic of the argument), and pathos (skillfully evoking empathy for a religious minority), he has put forward an alterity which promises to hold together both the distinctiveness and the egalitarianism of the Madisonian vision, rather than sac-

¹⁵⁹ See *id.* at 451 (describing the "devastating effects" that the logging and road-building projects could have on the Native American tribe's religious practices).

¹⁶⁰ *Id.* at 472. Especially surreal, in his view, is the fact that "by defining respondents' injury as 'nonconstitutional,' the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be 'sensitive' to affected religions." *Id.* at 473.

¹⁶¹ See *id.* at 467 (arguing that in *Wisconsin v. Yoder*, a compulsory school attendance law was not struck down because of its form but rather because of the impact it would have had on the religious practices of the Amish).

¹⁶² *Id.* at 468 (noting that constitutional principles require the Court to equally scrutinize threats "by governmental action that makes the practice of one's chosen faith impossible" and "governmental programs that pressure one to engage in conduct inconsistent with religious beliefs").

¹⁶³ *Id.* at 466 (claiming that the Court had "nowhere" suggested that coercion "exhausted the range of religious burdens recognized under the Free Exercise Clause" and arguing that the impact of the law was more important than the type of government action involved).

¹⁶⁴ *Id.* at 477 (suggesting that the government's actions could not be more insensitive and noting that "such a hollow freedom . . . makes a mockery of the 'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions'" (citation omitted)).

rificing one value for the sake of a symbolic representation of democracy that can assuage the nightmares of the public about the chaos of their real lives.

B. *Why Rhetor Rather Than Symbol-Maker*

There are quite a number of reasons why it might behoove the Court to imagine itself as a rhetor reproving an American public and calling it to its better self rather than a symbol-maker attempting to capture the American ethos. I will touch on merely some of them here; they include what I will categorize as reasons that are political and practical, reasons that are ethical, and reasons that are theological in nature.

1. *Political and Practical Reasons*

We might identify several political and practical reasons that the Court's decision to position itself as symbol-maker in American society is fraught with potential peril.

a. *Court Competence*

One such reason is well-familiar to constitutional readers: the limitations on the Court's institutional competence in identifying, much less designing, symbolic representations of a national ethos. In most modern political debates, as in modern cultures generally, symbols gain meaning and acceptability not primarily by the rite of passing them down through a priestly class as a set of received mysteries but rather by rising political consensus. Though presidents and other national leaders, more than others, have the ability to influence this consensus on matters, such as what the war in Iraq symbolizes to freedom-loving people, ultimately symbolic effectiveness is highly dependent upon wave upon wave of acceptance and use in popular culture. A seemingly trivial example of the way in which symbols are popularized by infectious adoption in democratic cultures might suffice: legend has it that the yellow ribbon, which now adorns communities symbolizing the wait for soldiers to come home from Iraq and cars that want to demonstrate their support for the war, hails from the inauspicious confluence of a country song and an American diplomat's wife's despair at her husband being taken hostage in Iran.¹⁶⁵

¹⁶⁵ Although like most folk symbols, the origins of the yellow ribbon as a symbol are hotly contested, its most recent manifestation can be traced to its popular deployment in a wave of American solidarity to bring home the hostages held in Iran. This movement started when one hostage diplomat's wife, recalling the pop/country song *Tie a Yellow Ribbon 'Round the Old Oak Tree*, tied her own ribbon. Memorialized in the *New York Times*, her gesture spread quickly as a

While, in my view, the Supreme Court is no less apt than any other institutional opinion-maker at identifying those literate and tangible objects capable of symbolizing American values,¹⁶⁶ the posture in which it receives the assignment to symbolize is not a good guarantee of success. Rarely, the Court may hear a case where there is public consensus about the multiple meanings and resonances of the case and its claims, and the Court's only job is to reflect that consensus through carefully chosen symbolic expression. Most often, particularly in constitutional adjudication, the Court is faced with a contest of competing symbols—a fully formed fetus vs. a woman's tired face—or a cauldron of conflict from which no clear expression of values and emotions has emerged. In such circumstances, there is no institutional way but guessing to identify a symbol that will resonate the various important values that are both open and hidden in the case. Taking an opinion poll—that is, attempting to openly identify or even develop a consensus—risks the Court's role as neutral observer.

b. *The Context of Supreme Court Cases*

Second, Supreme Court cases tend not to come to the Court in a form that promises the Court much help in choosing an effective symbol. We might, for example, think about the Christmas display cases.¹⁶⁷ What the Court receives in the briefs' statement of the case and the transcript will necessarily be a trivialized and denuded version of the actual experience of those involved in the litigation.¹⁶⁸ As

way through which the American public could cope with its despair and helplessness at this challenge to American invincibility. See Gerald E. Parsons, *Yellow Ribbons: Ties with Tradition* AM. FOLKLIFE CENTER (1981), http://www.loc.gov/folklife/ribbons/ribbons_81.html (tracing the history of the use of the yellow ribbon, including the "perhaps mistaken idea that wearing a yellow ribbon as a token of remembrance was a custom of the Civil War era"). An inauspicious resurrection for a national symbol, the yellow ribbon is nevertheless illustrative of the power of mass acceptance of a symbol in democratic culture.

¹⁶⁶ See, e.g., Eisgruber, *supra* note 28, at 1010–11 (arguing the Court's competence at identifying American values and identity).

¹⁶⁷ See *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989) (determining whether the display of a crèche in a county courthouse and a Chanukah menorah just outside a government building violated the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668, 670–71 (1984) (regarding the constitutionality of a city's display of a crèche amid other figures and decorations traditionally associated with Christmas).

¹⁶⁸ For example, the County of Allegheny's very objectively focused statement of the case reads as follows:

Since 1968, Allegheny County has invited various choirs to participate in a Christmas carol program. The performances for the program are scheduled during the weeks preceding the Christmas holiday and are held in two locations: the rotunda of Greater Pittsburgh International Airport and the first floor of the County Courthouse in an architecturally impressive area known variously as the Grand Staircase and the Courthouse Gallery/Forum. Each performance consists of various choirs, typically high school stu-

dents, singing both popular songs as well as religious and secular Christmas carols. The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of the missing in action of the Vietnam War. The carol program is publicized by a large banner hung outside the County Courthouse and by press releases. At the Courthouse, the caroling is broadcast by loudspeakers to the public at large.

On the steps of the Grand Staircase where the choirs perform is erected a nativity scene or creche. The creche consists of the traditional figures—a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, the Shepherds, various animals and an angel holding a banner reading “Gloria in Excelsis Deo”. [sic] The figurines range in height from three to fifteen inches. The nativity scene is enclosed by a fence and takes up a small area on the Grant [sic] Staircase.

The entire area of the Courthouse where the Christmas carol program is held and the nativity scene is displayed is decorated in traditional Christmas fashion—red and white poinsetta [sic] plants, evergreen trees with red bows and Christmas wreaths. These decorations are purchased and arranged by the County’s Bureau of Cultural Programs. Other decorations, including wreaths, trees and Santa Clauses, are displayed by various departments and offices throughout the Courthouse building.

Although a nativity scene has been displayed in conjunction with the choral program since the program’s inception, the particular nativity scene displayed on the steps of the County Courthouse at the time in question has only been used as part of the choral program since 1981. This nativity scene is not owned by the County; rather, it is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic mens’ [sic] organization. Ownership of the creche is noted by a sign in front of the nativity scene which reads “This display donated by the Holy Name Society.”

Other than providing storage space in the basement of the Courthouse for the past two years and a dolly to transport the display to and from its place of storage, the County has no other involvement with the nativity scene. The County provides no special security, lighting or maintenance for the display. Moreover, the creche is erected, arranged and disassembled each year by the moderator of the Holy Name Society without the assistance of County personnel.

In addition to serving as one of the locales for the annual Christmas carol program, the Grand Staircase—Gallery/Forum Area of the County Courthouse is used throughout the year for art displays and other civic and cultural events and programs.

Brief of Petitioner at *4–*7, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Nos. 87-2050, 88-90, 88-96), 1988 U.S. S. Ct. Briefs LEXIS 796. By contrast, the brief of respondent Malik Tunador recites the facts this way:

For several years, the County of Allegheny and the City of Pittsburgh have placed sectarian religious displays on the premises of the buildings which house their government offices. Allegheny County permits only government-authorized forms of expression in the courthouse. The courthouse Nativity Scene contains figurines representing the Virgin Mary and Joseph kneeling in front of a baby Jesus attended by three kneeling shepherds whose hands are clasped in prayer. The shepherds represent the three wise men who travelled [sic] to witness the miraculous birth of Jesus, as recounted in Matthew 2:11–12. An angel rests on the roof of the barn, holding a banner bearing the Latin inscription “Glory [sic] in Excelsis Deo,” or “Glory to God in the Highest,” taken from Luke 2:1.

A large Chanukah Menorah stands on the steps of Pittsburgh’s City-County Building. The Chanukah Menorah is a religious symbol commemorating miracles associated with the Jewish holiday of Chanukah, which marks the redemption of the ancient temple by the Jews.

In addition to various courts, the Allegheny County Courthouse contains the Sheriff’s office, the offices of the County Treasurer, County Controller, County Commissioner, and the County Clerk. The Pittsburgh City-Council Building houses the Mayor’s office, the City Council, the City-Treasurer, some civil courts and other governmental offices.

Anyone entering the Allegheny County Courthouse or passing by the Pittsburgh City-County Building cannot avoid seeing these religious displays. Plaintiffs of various religious faiths described the personal affront which they experienced upon viewing these religious symbols. Malik Tunador, a Moslem of Turkish origin, testified that he felt that

the fact statements in these cases suggest, trials are virtually designed to strip all but rational argument and clearly articulable facts from the record through the rules of evidence. How the Court could fully read the emotional, unexpressed experiences of those who have participated in these controversial events, especially when the record may say only that plaintiffs "were offended" by the displays, is certainly unclear. How the Court would then proceed to shape a symbol to represent the multivalent meanings embedded in such a controversy in a way that would draw contestants toward a common bond is even less clear. Especially given the way that cases come before them, it is not clear that courts, in general, are especially equipped to understand the deep feelings, the fears, the hopes, the ambivalences of a people.

Indeed, precisely because it is constantly conflicted between its more rational roles as adjudicator and predictor, and its less rational role as symbol-maker,¹⁶⁹ the Court's attempt to put its symbol-making face out front on a regular basis may result in even further scorn from the legal academy. Probably a majority of those academics firmly believe that the Court's contribution to the constitutional conversation is rationality, the giving of logical reasons for a decision and the stripping of the irrational aspects of the case that create the anger and confusion most litigants in these controversies experience. If members of the Supreme Court are not well-trained to exclude the irrational from their considerations, it is hard to know who is. And, some would argue, if the Supreme Court does not exclude the irrational from its considerations, focusing only on the text and a hard reading of the tradition of freedom to protect minority interests, who else will? Yet, reducing a controversy to its rational and articulable aspects, while it may have other virtues, is certainly inimical to symbol-making. A symbol that is reduced in such a way is, in Mircea Eliade's words, infantilized.¹⁷⁰

A rhetorical approach to constitutional adjudication in the Religion Clauses, by contrast, does not demand the same level of compe-

his government was discriminating against him. Ellen Doyle, a Roman Catholic, and Howard Elbling, a Jewish resident of Pittsburgh, explained that the religious symbols offended them in a similar manner.

Brief of Respondent Malik Tunador at *2-*4, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Nos. 87-2050, 88-96, 88-90), 1988 U.S. S. Ct. Briefs LEXIS 791. With the exception of the petitioner Chabad's brief arguing the history of the menorah at length, see Brief for Petitioner Chabad at *5-*7, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (No. 88-90), 1988 U.S. S. Ct. Briefs LEXIS 797, most of the other briefs are no more illuminating.

¹⁶⁹ See, e.g., Marshall, "We Know It When We See It," *supra* note 8, at 536-37, 538-40 (discussing the difficulty of the Court's role in identifying an objective and external perspective on American symbols while also arguing that legal principles can cabin subjectivity).

¹⁷⁰ MIRCEA ELIADE, *PATTERNS IN COMPARATIVE RELIGION* 444 (Rosemary Sheed trans., Meridian Books 1967) (1958).

tence by the Court. That is not to say it does not demand significant competence in non-rational aspects of a controversy. As a rhetor, the Supreme Court must have a deep understanding of the sorts of fears, hopes, motivations, and daily practices of a people that will enable it to craft an argument that will appeal to a widely diverse audience.¹⁷¹ This audience is even less unified by virtue of the fact that in the Religion Clause cases, many in the audience understand their perspectives in the case to be sacred truth.

Nevertheless, as a rhetor, the Supreme Court need not claim finality or any special sacred quality to its approach. Rather, it can work provisionally toward a solution to conflicts between secular and religious communities that might bear the promise of a more respectful, if not cooperative, relationship. Imagine, for example, if *Sherbert* had been framed in just a slightly different way. We might wonder what would have happened in subsequent cases, including the Native American cases, if rather than essentially holding that religious rights virtually always trump government concerns, the Court had adopted a modified version of Justice Marshall's approach in *Board of Regents of State Colleges v. Roth*,¹⁷² and had stated that "we don't see why the government cannot give a good reason for violating the deeply held religious beliefs of a people if it indeed has one."¹⁷³

c. *Reliance and Disappointment*

Third, the Court as a symbol-maker may promise more than it can deliver, given the limits of its authority. Symbolic argument is not only expressive of a wealth of emotions and beliefs; it is also promissory. Symbolic expression offers hope and assurance that chaos can be controlled and that deep conflicts can be bridged. If the Court persists in making highly symbolic but practically meaningless pronouncements about the nature of the American promise to its citizens, the fissure between the promise and the reality will soon be apparent. Citizens may become disillusioned when these promises cannot be fulfilled.¹⁷⁴ The paradigmatic case is *Brown*, in which the Court's attempt to symbolize the equality principle in its ruling

¹⁷¹ See Eisgruber, *supra* note 28, at 973 (discussing the importance of knowing the Court's audience in rendering effective identity arguments).

¹⁷² 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

¹⁷³ *Id.* (noting that it is not burdensome for the government to give reasons if they exist, and that "[a]s long as the government has a good reason for its actions it need not fear disclosure").

¹⁷⁴ See Smith, *supra* note 8, at 943–44, 947–48, 950, 953 (discussing the risks involved in over-using symbolism in the law and noting, *inter alia*, that "excessive reliance on symbolism can create public expectations that may ultimately be disappointed and can lead to a loss of confidence in law and legal institutions and, in worst-case instances, a loss of social stability for American society").

against separate-but-equal schools was met with subsequent disillusionment, anger, and arguably even violence when the promise could not be fulfilled.¹⁷⁵ This occurred even though President Eisenhower, who had more authority to enforce change, surprisingly stepped in to say that the government would make good on its promise in *Brown* by sending the 101st Airborne to protect the black students attempting to integrate Central High School in Little Rock, Arkansas.¹⁷⁶

We can see the same sort of dynamic in the early 1960s Religion Clause cases. *Sherbert* is an example of a case in which the Court's attempt to symbolize the superiority of individual conscience over quotidian government needs ultimately gave way (and probably had to give way) in subsequent cases to the quotidian. The promise of *Sherbert* to persons of minority religious faiths was not just that the government would treat them with an eye toward equal respect. *Sherbert* also implied that the Court would go out of its way to understand and value the differences in their religious beliefs and practices and find a way to preserve those practices against encroachments except for the most pressing, compelling government reasons.¹⁷⁷

As with Free Speech Clause jurisprudence, the Court was not fully prepared to back up that claim in subsequent cases. Its consistent failure to follow through on *Sherbert's* promise occurred not just because it lacked the courage to resist government scare tactics that exemptions would be a slippery slope for all kinds of fraud and disorganization. (Surely, however, the Court's jurisprudence in post-*Sherbert* cases evidences some lack of courage.) The fact is that when the Court was confronted with assessing alternative solutions in real cases, it found itself unable to make practical judgments about the strength of state interests and available accommodating alternatives. How, for example, was the Court going to decide whether a Sikh in the military could wear a ceremonial turban or a Rastafarian his dreadlocks if it granted a Jew the right to wear a yarmulke?¹⁷⁸ How

¹⁷⁵ See Eisgruber, *supra* note 28, at 1028 (explaining that while the Court's courage raised Americans' expectations, it failed to teach people to fight for its result). Eisgruber, however, captures a similar argument when he describes the Court's action as "[teaching] by example," reforming and inspiring by its own act of courage. *Id.* at 1027–28.

¹⁷⁶ See Juan Williams, *The 1964 Civil Rights Act: Then and Now*, 31 HUM. RTS. 6, 7 (2004) (recounting the "furious battle" surrounding desegregation and the passage of the 1964 Civil Rights Act).

¹⁷⁷ See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277 (1994) (finding that the promise of *Sherbert* to review interfering laws under the compelling state interest test is "largely unfulfilled in other contexts" but "enjoys widespread" critical support).

¹⁷⁸ See *Goldman v. Weinberger*, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring) (arguing the need for uniformity in military dress decisions because holding otherwise might open the door for a similar claim by a Sikh or Rastafarian to be dismissed as too extreme or unusual and that "inevitably the decisionmaker's evaluation of the character and the sincerity of the re-

was it going to assess the relative importance of economic or recreational activities such as logging or rock-climbing against the sanctity of unbroken wilderness in the Native American sacred sites cases?¹⁷⁹ Rather than making these hard and logically indefensible choices, the Court chose to renege on the promise of *Sherbert* in case after case, disillusioning even its critics.

Again, a rhetorical approach to the Religion Clauses that did not put the Court in the heady and expansive position of symbolizing its role as defender of the vulnerable might have resulted in a still-comprehensible rule that preserved as much, if not more, than the *Sherbert* rule ultimately did, without promising more than the Court was willing to deliver. Following Justice Marshall, putting the government to its proof—as the Court arguably did in occasional cases after *Sherbert*—without demanding the equivalent of “proof beyond a reasonable doubt” might have been less threatening to government initiatives. Moreover, it might have caused government administrators to take the necessary care to frame alternatives that, indeed, did preserve a space for religious minorities. Instead, the “all-or-nothing” cast of *Sherbert* encouraged government to play the only constitutional games available, arguing that its initiatives were necessary, even-handed attempts to govern, that the government’s interests were compelling, or worse, that they did not “substantially burden” minority religious interests.

d. *The Appearance of Political Equality*

Fourth, the attempt to create a consistent role for itself as symbol-maker leaves the Court open to even more effective charges of elitism.¹⁸⁰ In many, if not most, religious traditions, high priests occupy a place “above” the population. They are given higher status because of the perception that they are closer to the mind or heart of the sacred and deserving of extraordinary deference. This reality is, of course, in some tension with the perception that high priests effectively become effaced in the course of ritual performance; their selves

quester’s faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision”); Dolgin, *supra* note 53, at 510 (citing the Government’s exaggerated claims in *Goldman* that allowing yarmulkes in the military would lead to other religious members asking for exemptions and would produce a “rag-tag band of soldiers,” which “graphically illustrates the fear of marginality behind the Court’s decision”).

¹⁷⁹ See *Lyng v. Nw. Cemetery Protective Ass’n*, 485 U.S. 439, 452–53 (1988) (describing the difficulty in trying to satisfy “every citizen’s religious needs and desires” and in comparing potentially conflicting interests of other parties).

¹⁸⁰ See, e.g., Mirsky, *supra* note 52, at 1240 (noting that under some interpretations of the Establishment Clause, public religion can “operate as a vehicle for the establishment of a religious hegemony over the symbols and rhetoric of public discourse”).

recede as they become instruments for the playing out of the sacred in ritual.

However, in a democratic polity, with its suspicions of elitism, the Court's attempt to take its place as chief symbol-maker is guaranteed to open it up to the same charges of self-importance and arrogance currently leveled against it simply for deciding cases against the trend of today's opinion polls. And, indeed, there is no reason to think that these concerns are not genuine, that the Court is above hubris. Even if the Court understands its symbol-making power only as a last resort, preferring that national symbols derive from elsewhere when possible, that role as reluctant symbolizer does not make the Court any less susceptible to this temptation to resolve a national controversy by symbolic means. Indeed, the Court itself may come to see its role as somehow more significant than popular participation in the constitutional project, which is another disturbing prospect.

A rhetorical approach does not completely avoid the temptation toward arrogance. As the long-running battle about whether rhetoric is necessarily a moral discipline suggests, even rhetors can be sophists—they can understand their role as playing on (and playing to) public weakness in an attempt to sway the public to the opinion they wish them to have for their own purposes.¹⁸¹ That the Court's temptation is fueled not by traditional forms of sophistic self-interest, like power or wealth, but by members' ideological starting points does not guarantee that they are tempted less. Yet, a rhetorical relationship remains symbolically egalitarian. Rather than pronouncing to the public that they have no choice but to believe the Court's rulings because they are clothed in seemingly unchallengeable symbolic expression given from "on high," a rhetorical stance admits that the Court must still convince a public that its reasons are good ones.

Of course, a converse possibility also raises its head: the Court may not have the political capital to get people to buy its symbols. Because symbolic expression has traditionally been most effective when it is expressed through either charismatic authority or institutionalized authority conferred upon an institutional actor, such as a high priest,¹⁸² the Court would not be (and arguably has not always

¹⁸¹ See, e.g., George Anastaplo, *On Freedom: Explorations*, 17 OKLA. CITY U. L. REV. 465, 687–88 (1992) (noting that legal reasoning is often reduced to sophistry or "an art of deception" but observing that "the 'popular indignation' against the sophists reflects the fact that not only are underhanded arguments not liked by people but also that sophistry is not immune from being detected"). The dialogue between Callicles and Socrates on this point, particularly where Socrates notes that rhetoric is to the soul as cookery is to the body, is also illustrative. See PLATO, *GORGIAS* 456–64 (Benjamin Jowett trans., 1892) (380 B.C.E.), available at <http://classics.mit.edu/Plato/gorgias.html>.

¹⁸² See Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117, 152 (2003) (comparing the conferral of authority on

been) successful in its attempts to create an American symbolic system because it has neither the charisma nor traditionally granted authority to do so.

e. *The Resistance of Symbols to Change*

Fifth, with the power of symbols comes a problem: the very multivalence that explains their power must work against their destruction. Symbols, while they can add numerous layers of meaning and spread out to embrace various aspects of culture, are also resistant to destruction.¹⁸³ As Mircea Eliade has demonstrated, a fundamental religious symbol, such as a jade stone or a pearl, may come to signify a complex of meanings depending on the person and context of its use, but it becomes difficult to dislodge once it becomes ensconced in culture.¹⁸⁴

In a fast-changing, open-textured culture like America's, however, it is not clear that we should want our Supreme Court devising too many symbolic pronouncements that are resistant to destruction. My favorite example of a bad symbol resistant to change is Justice Holmes' "the marketplace of ideas."¹⁸⁵ This metaphorical icon has come to be so accepted in discussions of speech law¹⁸⁶ that it has become resistant to any criticism that equating the value of commodities with the value of ideas is morally shocking, if not destructive.¹⁸⁷ Similarly, in the Religion Clause area, if "be like the Amish" is a statement symbolically reflecting the Court's willingness to protect religious liberty, it is hard to know what might dislodge that message in

judges to the conferral of authority on priests because both sources of authority—law or God—stem from a text).

¹⁸³ See KERTZER, *supra* note 36, at 13 ("Once constructed, such symbolic understandings of the political order are resistant (though not immune) to change.").

¹⁸⁴ ELIADE, *supra* note 170, at 437–40, 443 (providing examples of precious or healing "magic stones" that have developed magic or religious symbolism, including jade and diamonds).

¹⁸⁵ The first introduction of this metaphor occurred in *Abrams v. United States*, 250 U.S. 616, 630 (1919), in which Justice Holmes, in his dissent, discussed the "free trade in ideas" and a market for competition in thought.

¹⁸⁶ See, e.g., Clay Calvert, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 ME. L. REV. 53, 60, 62–65 (2001) (noting how "the economic-based marketplace metaphor 'consistently dominates the Supreme Court's discussion of freedom of speech'" and discussing how the university has been closely linked to the marketplace of ideas metaphor).

¹⁸⁷ Some authors have effectively criticized the use of the metaphor. See, e.g., Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 952, 958 (1997) (arguing that the marketplace metaphor incorrectly trusts the market, misunderstands the nature of current political life, presumes the isolation of individuals, and discounts the durability of false ideas); Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 273 (2004) (arguing that the marketplace metaphor perpetuates a system of inequality "in which those in positions of social and political dominance continue to have more power to speak than members of disempowered groups").

favor of less compliant religious minorities except repeated factual battering of the image, an unmasking of the Amish as not Amish enough for the Court.

Rhetoric, by contrast, is much more destructible, because it is much more flexible. The shifting tactics of the rhetorical enterprise help to guarantee that an argument made in support of a certain public good will disintegrate as soon as its premises are proven faulty. Moreover, an institutional rhetor will be more than happy to substitute a new and better argument justifying its claim on the public once that argument becomes available, discarding the old one as it has lost its rhetorical appeal. Because rhetoric carries a less weighty amount of assurance than a symbol, a citizen audience is less likely to feel any intuitive threat to the stability of the democratic enterprise when the rhetoric in one court case is discarded for another, which could conceivably happen when a symbol is discarded. Moreover, symbols can still be used as part of a rhetorical enterprise, but they can be limited in resonance to the sort of constitutional cases to which they are appropriate. The Holmes marketplace metaphor, for example, can be used in a commercial speech case where economic arguments make sense, but abjured in a religious speech case where such a metaphor makes little sense.

f. The Misuse of Symbols for Ideological Ends

In light of the concern I have raised about the relative indestructibility of symbols, of course, Madisonian prudence also raises its suspicious head. If symbols are both hardy against destruction and powerful in their ability to convince the masses, and those in power cannot be trusted with power, then we should presume that symbols, hardy and powerful, will be first among the opiates offered to the masses. Their ability to cannibalize all aspects of social life without any effective opponents (except other powerful symbols) offers a dangerous tool in the hands of those who would rule all aspects of social life, who would remake the world in their own image. Even if the Court has sufficient self-critical tools to keep its own house clean, there is no guarantee that the symbols and images the Court creates on the pages of the Supreme Court Reporter will not be employed by those with less conscience toward more immediate political ends. Symbols can be destructive as well as life-giving. Any institution that has the power to make them needs to consider how much risk it wants to take on that score.

2. Ethical Arguments Against a Symbol-Making Role for the Court

A second set of reasons why the Supreme Court may wish to eschew its role as symbol-maker in Religion Clause cases might be

termed ethical. First, the Madisonian vision suggests that truth is, if not itself pluralistic, at least better sought in pluralistic polities where legal sanction is not available to punish error.¹⁸⁸ As Madison himself recognized, that may apply no less in Religion Clause cases than in speech cases.

Symbolic expression both captures and evades the best impulses of pluralism. Eliade argues that the various expressions of a particular symbol all “converge towards a common aim: to abolish the limits of the ‘fragment’ man is within society and the cosmos, and, by means of making clear his deepest identity and his social status, and making him one with the rhythms of nature—integrating him into a larger unity: society, the universe.”¹⁸⁹ This unifying aim has its dark side. Symbols, whose dynamic is to unify communities around a shared (albeit complex, multivalent) understanding and vision, may undercut the value of permitting plural religious traditions to “compete” as stories of the truth of human existence in the hearts and minds of the people. The teaching of the Memorial and Remonstrance, for example, is that in the hands of less-than-capable theologian-jurists, religion is bound to distort truth rather than find it.¹⁹⁰

Rhetoric, while it seeks to unify its audience in a common opinion, and while it must speak with some coherence of vision to be effective, necessarily employs language in more of a strategic than an ultimate way. Images and symbols are prized not for what they themselves inherently embody, but for how much punch they pack in convincing an audience to think in a certain way. Rhetoric acknowledges that it attempts to sell a public on a conclusion that is more true than the opponent’s; it pragmatically resists philosophical or religious claims to be after, or capable of uncovering, “the Truth” which will forever seal the political (or other) discussion. As such, it is less likely to produce Madison’s spectre of “the impious presumption of legisla-

¹⁸⁸ See, e.g., James Madison, Virginia Declaration of Rights ch. I, para. XVI (June 12, 1776) in *THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS* 190 (Gordon Lloyd & Margie Lloyd eds., 1998) (noting that all persons are equally entitled to exercise their conscience in the free exercise of religion and that it is “the mutual duty of all to practice Christian forbearance, love, and charity, towards each other”); see also James Madison, Argument and Speech of July 11, 1787, in *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 237 (Gaillard Hunt & James Brown Scott eds., Oxford University Press 1920) (1787) (arguing that “all men having power ought to be distrusted to a certain degree”).

¹⁸⁹ ELIADE, *supra* note 170, at 451.

¹⁹⁰ See James Madison, To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance (June 20, 1785), in WILLIAM LEE MILLER, *THE FIRST LIBERTY: AMERICA’S FOUNDATION IN RELIGIOUS FREEDOM* app. B at 259 (Georgetown University Press 2003) (1986) (noting that the implication that the “Civil Magistrate is a competent Judge of Religious Truth” is an “arrogant pretension” and that he may “employ Religion as an engine of Civil policy” is “an unhallowed perversion of the means of salvation”).

tors and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible."¹⁹¹

Second, while symbols perform numerous functions in social life, the priority of their role in giving assurance, or in helping people feel secure, may undercut their value for a morally-functioning democratic society. Eliade talks about symbols that have become hollow through "the processes of rationalization, degeneration and infantilization which any symbolism undergoes as it comes to be interpreted on lower and lower planes."¹⁹² This infantilization may degenerate the meaning of a symbol, as it comes to be "taken in a childish way, over-concretely, and apart from the system it belongs to."¹⁹³ For example, Eliade writes of the case where the direction to write the four Biblical rivers on a plate and then wash it with virgin water as a cure is taken literally—a belief that the cure comes from the words on the plate rather than the symbolism of purification behind them.¹⁹⁴ A second form of infantilization comes about when the symbol substitutes for that which it represents.¹⁹⁵ That is, people may use the symbol as a fetish to provide them false reassurance that the risks of their daily lives have been removed if they cling to the symbol.¹⁹⁶ The debates over flag-burning and gay marriage may be examples of the fetishism of symbols, and Justice Brennan's insistence on protecting flag-burning may be a reflection of his instinct about the dangerous nature of fetishism.

The creation of fetishes helps people avoid responsibility for the risks of democratic society. When the Court shores up a fetish by protecting it, and when it postures itself as a symbolic authority capable of resolving deep constitutional crises, it encourages citizens to seek security in authoritarian pronouncements from above rather than bearing responsibility for these risks. An authoritarian solution,

¹⁹¹ Thomas Jefferson, A Bill for Establishing Religious Freedom, 1777, in MILLER, *supra* note 190, app. B at 255.

¹⁹² ELIADE, *supra* note 170, at 444.

¹⁹³ *Id.*

¹⁹⁴ *Id.* ("In this case the infantilization is obvious in the simple, concrete way in which the symbolism of purification by the waters of paradise is interpreted: a man is to absorb the water which has touched the four written words.")

¹⁹⁵ *Id.* ("[T]he symbol [is] a substitute for the sacred object or as a means of establishing a relationship with it, and with this sort of substitution there must inevitably be a process of infantilization.")

¹⁹⁶ See Lerner, *supra* note 3, at 1294 (describing the Constitution as a fetish, a symbol that Americans "believe[] to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe"). For William Marshall's view of how religion can function as a false reassurance of security and can encourage religious coercion and divisiveness, see Marshall, *The Other Side*, *supra* note 19, at 850–53.

one that promises a magic talisman—even as abstract a talisman as freedom—that will make threats to life in a pluralistic society go away, is antithetical to the ethics of a democratic polity. Those ethics demand that people continue to engage in the debate over contested issues as well as their symbolic manifestations. Rather than making the polity content that a problem, such as abortion or the President's war-making powers, is resolved by the Court's pronouncements such that they leave their constitutional responsibilities for the more mundane hassles of life, the Court should be encouraging the public to renew its reflection, albeit in a less contentious way, about how a public crisis can be resolved. Taking a rhetorical approach to a constitutional crisis does that: it opens up and adds to the arguments for one side's position or the other's, rather than closing down the possibility of discussion.

Of course, demanding that citizens continue to talk past the point of Court decision about the things on which they differ seems to go against the aim of legal cases, which is to settle controversies. But, if we understand and accept that constitutional cases are only provisional settlements, aimed at preventing physical, emotional, and moral violence from deciding controversies rather making these controversies go away or "solving problems" in a mathematical sense, the less the seeming finality of rhetorical Court judgments represents an invitation rather than a demand. Rather than painting conflict as an all-out evil, this view of the Constitution can celebrate the way in which genuine engagement is borne out of conflict, and genuine insight out of the refusal of citizens either to secede from or to accede to the apparent finality of a Court pronouncement.¹⁹⁷ A Supreme Court that eschews the power to prematurely unify a polity by symbolic means can seek to engage citizens in self-reflective arguments about their own split of values on these matters, requiring them to be moral and not just material. Such a Court is also less likely to produce the response we have seen in, for example, the abortion cases. On the anti-abortion side of the controversy, some feel that the only choice left to them is civil disobedience or even violence because there is no acknowledgement of their most cherished beliefs.¹⁹⁸

¹⁹⁷ Recently, for example, I spoke to an audience in Brainerd, Minnesota. Many of the audience members had been involved in a legal controversy when the City refused to grant a peace group permission to march in a Fourth of July parade in protest of the war in Iraq. The MCLU-aided litigation that ensued not only heightened conflict among those who favored the war and those who opposed it; it also helped members of both sides see what was at stake in the conflict for their roles as citizens in debating these matters.

¹⁹⁸ See David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 146–47 (1995) (arguing that the violence in the pro-life movement can be attributed to the failure of the Supreme Court's opinions to convince anti-abortionists that it had not

Moreover, if the Supreme Court refuses to resolve social and political controversies once and for all by premature symbolizing, it thereby asks individuals to search for other centers of gravity in the pursuit of truth. It asks them to search for communities of meaning outside of the national community, whether in "mediating institutions" where ethical argument can be developed out of rich local understandings, or international communities where a wide diversity of understandings of the good can be brought to bear on a common problem affecting mankind. Forcing citizens to look to other communities of meaning is not only good for Madisonian reasons. It is not only good because it forces citizens to look back on what is at stake in symbol-making anyway, which is the creation of an effective community capable of sustaining a commitment to the common good when all is in peril. It is, ultimately, potentially more hopeful in our quest to re-understand our world as a community of nations and to symbolically enact our several roles in the several communities of which we are a part.

3. *Theological Reasons to Avoid a Symbolizing Role*

Finally, there are what we might term "theological reasons" for the Supreme Court's eschewing the role of symbol-maker, at least in the Religion Clause cases. As I have earlier suggested, the posture of Religion Clause cases is distinct from that of other constitutional cases. On the one hand, litigants are more disposed to thinking in religious terms. Thus, the Court's decision to act out a role identified with a religious tradition, such as the prophetic role, will be more readily understood by the litigants. On the other hand, in Religion Clause cases, even those involving secularist challenges to purported religious activity by the state, the Court is entering a contest in which those on all sides are likely to be acting out of loyalty to centers of meaning more ultimate than the Constitution. The arguments I have previously made might, on balance, lead to the conclusion that there is some reason for the Court to act in a symbol-making capacity where non-religious disputes, such as the meaning of equality, are at stake. But in the Religion Clause cases, the Court can never act as a final interpreter of meaning or truth without essentially questioning the religious commitments and beliefs of the litigants.

As I have suggested, the Court in the Religion Clause cases is capable of trading on the religious imagination of litigants by employing analogies, such as the prophetic analogy, which make its limited role in the dispute very clear. For example, trading on the religious

cheated in its decisions and the inability to reverse the "cultural revolution" through political and legal means).

metaphor of prophetic challenge by assuming a rhetorical rather than a symbol-making function, the Court may have more rhetorical power with the constitutional communities for which its decisions matter. It can forge hope for minority communities that are poised on the brink of oppression because of political fear, meanness, or indifference, not by a false promise of some political alterity that will come to pass through the Court's decision, but simply by standing with those minorities as powerful critics of the state's oppression. Rhetoric rests on the idea that the teacher must know the student as well as she knows the theory of rhetoric and must know how rhetoric performs morally as well as functionally.¹⁹⁹

Symbol-making, the legal expression of democratic core values through the Constitution, can be used "collectively to reassure ourselves that we are, after all, a fair and just society . . . [and] that each of us is indeed fair and just—because each of us embraces its noble ideals."²⁰⁰ The Court, so functioning, can simply provide an expression of our own self-justification and self-delusion about what kind of society our nation is willing to be committed to, the core of human sin.

If, however, the Court can see its role as learning to know the American polity in a deep way, it holds a promise of contributing to, not closing down, that conversation. The Court can accomplish this not by attempting to find the ultimate expression of what that polity believes or wishes to be the case, but by helping individual Americans and their political institutions to face the contradictions within themselves embodied in their own political structure and indeed religious history.

If we understood our polity as dedicated to republican common good versus democratic self-interest, a Court committed to the rhetorical enterprise can then ask what we would make of the Yoders' insistence that their children not go to school. It could ask, in cases such as *Reynolds v. United States*²⁰¹ and *United States v. Ballard*,²⁰² how we deal with our schizophrenic approach toward the stranger whose be-

¹⁹⁹ See PLATO, *supra* note 181 (discussing with Gorgias the nature of rhetoric and the elements of being a successful rhetor).

²⁰⁰ Haney, *supra* note 72, at 184.

²⁰¹ 98 U.S. 145 (1879) (affirming the conviction of a Mormon for violating the prohibition on bigamy and rejecting plaintiff's argument that because the Church of Jesus Christ of Latter-Day Saints imposes a religious duty on its male members to practice polygamy, the statute violated his free exercise rights).

²⁰² 322 U.S. 78, 79–80 (1944) (determining the role that religion should play in a criminal trial for mail fraud where the defendants claim that the distribution of literature and fund solicitation was in furtherance of the "I Am" religious movement, which claimed that the defendants "by reason of their alleged high spiritual attainments and righteous conduct, had been selected as divine messengers . . . [and had] the power to heal persons of ailments and diseases").

liefs we cannot even imagine. This is the case whether we embrace that stranger as part of our polity or distrust him. It could ask whether we are going to approach the daily interpretation of the Religion Clauses that our government administrators make, as they decide about religious symbols in the schools or exempting houses of worship from zoning laws, as pioneers and risk-takers, or as security-seekers, content with clarity and stability. It can question whether our polity wishes to see our world as materialist only or as imbued with transcendental meaning that is beyond the purview of the Courts' jurisdiction.

By attacking the validity of state suppression of religious belief and practice by way of questioning, delaying, invalidating, and inviting the state to re-build its own institutions, the Court can perform the priestly function of demanding penitence from a polity seemingly reluctant to confess their unwillingness to live up to their own ideals and their better selves. As a rhetor, for example, by invalidating (but not finally) the effects of an ordinance targeted at a new religious group, the Court can effectively ask the citizens of the City of Hialeah: "your own co-religionists, Catholics, have borne a great brunt of suspicion and discrimination in this country because of your different customs and magical rituals. Why would you turn around and do that to your own countrymen because their ways are strange and their rituals seemingly magical?" To demand that citizens confront their own refusal to live according to the ethical ideals they have set for themselves opens up the sort of self-critical reflection and expression of brokenness that is essential to prevent the public from succeeding in its selfish struggle to make democracy itself an idol.

Second, a rhetorical approach, which questions and exhorts but does not purport to capture all of the meaning of a constitutional controversy within a symbolic frame, requires litigants to look beyond the too-easy resolution of a conflict through a symbol. In the heat of constitutional battle, these litigants may be looking for the authority figure, here the Court, to signal its adoption of the standard borne by their side as a sign of victory over the enemy. Using its rhetorical discipline, however, the Court can instead demand that government workers or private individuals confront their adversaries not only as threatening presences to be overcome, and as battlegrounds over which their standards must be hoisted, but also as needy human beings who require their compassion as much as a victory. This is an ethical demand, but a theological one as well; it asks that citizens and governments abjure false gods of security through law for the uncertainty of ethical encounter.

Thus, for the Court to eschew a symbol-making role in resolving Religion Clause controversies is particularly critical because it refuses demands from citizens that the Court itself becomes an idol. Without an idol, citizens are required to look beyond the material or the hu-

man, even the loftiest human ideals that may be described in the Constitution, in search of their own security. Thrown on their own devices, they must seek a transcendent source of values and an Other who can make them truly secure. If citizens are thrown on their own devices, with no easy symbolic home in the Constitution, the Court's refusal to become an idol requires them to search for that Other who opens the lives they choose to shut to goodness because that Other makes risk possible on behalf of the neighbor.

CONCLUSION

Now, the argument I have just made is potentially problematic. It asks, for Religion Clause reasons, that the Court adopt a theology which recognizes a ground of ultimate meaning which is beyond the material, which is larger than the power and limits of human thought. A secular materialist might well object that the Court is preferring religion over non-religion if it adopts this stance, that it is acknowledging a theology behind its jurisprudence. I confess that to be potentially true. However, the converse option, which is for the Court to resolve constitutional crises by itself pronouncing the ultimate word for a democratic public, is no less a theological decision. For the Court to insist that citizens confess an ultimate allegiance to constitutional ideals is for the Court to demand religious conformity, rather than to adopt the stance of neutral observer toward the question of whether there is a God. For the Court in Religion Clause cases to make symbols to satisfy or even to challenge and motivate is to assume a religious role that makes it easier for citizens to abandon the search for a more transcendent source of hope for their common future. To make idols out of ideals or out of texts in order to deal with the deepest fears and hopes of a democratic polity is a theological choice, as much as eschewing idols.

In its capacity as rhetorician, then, the Court would ignore our Religion Clause theorist who wants every decision to be guided by a single overarching principle and be logically consistent with all other decisions. In doing so, it would recognize that the American audience that the Court must convince is not itself logically consistent nor wedded to a single constitutional value above all others. As a rhetorician concerned about its audience, the Court would express ambivalence toward claims that constitutional interpretation cannot give play to tradition, much less to complex interplay of emotion, power-lust, good faith, and ignorance that is the human condition interpreting its own story. Rhetoricians are, if nothing else, realistic about whom they speak to.

Nevertheless, on a more optimistic note, the rhetorical spirit is one steeped in the values of innovation, flexibility, and plurality; rhetoricians are not constrained by either the language or the con-

clusions of the past.²⁰³ Rhetoric is a complex discipline precisely because rhetoricians have invented so many different ways to convince their audience to come to believe as they do. Yet, the rhetorician would regard as foolish a dialogical understanding of constitutional interpretation that suggests that human beings can transcend their fear of others and of change, their hidden desires for self-aggrandizement and power over others, for open-ended and disinterested dialogue that uproots all tradition and expectation. On the other hand, as rhetorician, the Court would similarly dismiss our Scalian pragmatist who wants to suggest that symbolic power is illusory and that the Constitution is simply a backdrop for interest group politics, erecting no symbolic objection to anything that comes out of the political process, as Justice Scalia suggests in *Smith*.²⁰⁴

As rhetorician rather than symbol-maker or symbol-keeper, however, the Court is in a better position to keep that balance between humility and the good exercise of power, independence, and responsiveness, prophetic and celebratory argument that is necessary for its role. It is more likely to avoid the temptation to create a religious system or set of resonances that try to replace or overcome the religious experience of those who are coming before it. It can eschew those idols that threaten our ethical and religious life as a people of peoples.

²⁰³ See Eisgruber, *supra* note 28, at 1017 (arguing that in its educative role, the Court need not treat the American people as a "fixed variable," but instead can use them to "rethink the definition of the American community").

²⁰⁴ See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [L]eaving accommodation to the political process [may] place at a relative disadvantage those religious practices not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself.").

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