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MAKING SENSE OF THE ESTABLISHMENT CLAUSE

George Washington University, February 18, 2009

JEFFREY SHULMAN*: While the jurisprudence of the Establishment Clause may not make much sense (common or otherwise) as a substantive legal matter, it does make sense as a series of jurisprudential maneuvers by which the Court has sought to make more room for religion in civic life. In fact, there is a method to the “massive jumble... of doctrines and rules” that forms the law of church-state relations. It is the method of a somewhat disorderly retreat from the Constitution’s foundational principle of disestablishment. The accommodations made by the Court to religious belief and conduct have allowed for discrimination against non-religion, edging the Court ever closer toward a non-preferentialist perspective.

Or, perhaps more precisely, a nominally non-preferentialist perspective. For the Court’s accommodating attitude is premised on the privileged position of normative religious belief and practice. By adopting a majoritarian approach to church-state controversies, the Court has joined the power, the prestige, and the financial support of the government to the conventional theism that dominates our cultural heritage.

But, in constitutional law as elsewhere, we should be careful what we ask for. As the Supreme Court continues to retreat from a position of separationism, the pressure to define religion—that is, to say what faith is entitled to government support and what faith is not—will inevitably increase. A broad definition of religion guarantees a wide variety of claimants for government support, including some whose beliefs will not be tolerable to adherents of more mainstream religious traditions. When witches and pagans can no longer be preferred as a matter of constitutional law to Christians and Jews, the political premises of non-preferentialism would seem to be poorly served; and in a strange twist of constitutional history, the very principles by which non-preferentialists have sought to support religious practice should prompt a reconsideration of the virtue of high and impregnable walls.

Like Benjamin Button, the Establishment Clause was born old. In 1947, it seemed that a strict separation of church and state was constitutionally required. The *Everson* Court can certainly lay claim to having established the high-water mark of separationist rhetoric, but though the *Everson* majority promised not to approve even the slightest breach in Jefferson’s wall, the rhetoric of that decision receded before a tide of practicality. Justice Black’s words delivered less than they promised, and, of course, the Court held that New Jersey’s reimbursement scheme was permissible.

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The possibility that *Everson* breached the wall it purported to erect did not go unremarked. For Justice Jackson, the “undertones” of the opinion seemed utterly discordant with its conclusion. Jackson considered the absolute terms of the Establishment Clause to be necessitated by the unique volatility of religious controversy. In his words: “That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom.” That difference, according to Justice Rutledge, required the court to create a “complete and permanent” separation of the spheres of religious activity and civil authority.

It is against this faith in the strength of good walls that we can chart the course of the Court’s modern Establishment Clause jurisprudence. The post-*Everson* Court has sought some mechanism to make religion a part of the public business—that is, some way to read the Establishment Clause in less than absolute terms. The *Lemon* test reflects, in part, the separationist sentiment of the *Everson* dissenters, but it is a test that hedges its bets a bit too much. It objects to governmental action with a *principal or primary* effect of advancing or inhibiting religion. It objects to *excessive* government entanglement with religion. These qualifiers would lead (probably inevitably) to inconsistent results, and indeed they have. The purpose prong, too, is an invitation to messy speculation, if not outright guessing, about legislative intent and motive.

But if the much-maligned *Lemon* test is more subjective than its multi-part analytical structure might suggest, the endorsement test is truly fertile ground for shifting Supreme Court sentiment. Justice O’Connor’s endorsement standard is a model of heavy-handed wordplay. Rather than ask whether the government has a secular purpose or whether the government action has a primary effect that advances religion, we now ask whether a governmental action communicates a message of endorsement or disapproval of religion. Endorsement is in the eye—or, perhaps more accurately, in the hurt feelings—of the observer. To focus on the government’s communicative effect, however, is to render establishment law little more than a form of intuition or, to use today’s vogue word, empathy. Worse, by substituting a vague, judicially defined majoritarianism for the purported neutrality of the *Lemon* test, the endorsement test erases the perception of anyone who does perceive endorsement. But government support of religion is no less so because the majority fails to perceive that conduct as an endorsement of religion. That fact can serve only to intensify the offense.

In this respect, in its implicit concession to the indirect coercive pressures of majority sentiment, the endorsement test is of a piece with other jurisprudential strategies by which the Court seeks to secure a constitutional accommodation with religion. Ceremonial deism (the notion that religious practices, through rote repetition, may lose significant religious content) is most obviously a concession to the religious norm. The ubiquity of a religious practice ought to testify to its continuing vitality, a power and a vitality that are seen whenever these practices

are, in fact, challenged. But by some distortion of common sense, the pervasiveness of a practice becomes evidence of its innocuousness. After all, no reasonable person could object to what so many reasonable people say or do as a matter of course. A focus on history and tradition shares with ceremonial deism a common constitutional alchemy, likewise transforming what is unobjectionable to the religious majority into what is constitutionally normative.

Taken together, these accommodationist strategies, by permitting the distribution of government recognition and benefits to religious groups, have enabled the Court to adopt a *de facto* preferentialism in the name of neutrality and choice.

For, after all, it is misleading to speak of the religious majority as some sort of abstract entity. In our society, the religion of the majority is Christianity. The God of ceremonial deism, the God of our national traditions, the God who benefits the most from government recognition, is the God worshiped by Christians. To the extent that other religions worship some variant of a Christian God, the religion of the majority is theistic. Both Jews and Christians (and post Justice Scalia's *McCreary* dissent, we should add Muslims) can pledge their allegiance to one nation under (some version of) God. In fact, the erasure of other religions or other religious beliefs is nowhere better seen than when the Court denominates prayer—and, remarkable to say, the prayer's recipient—as nonsectarian.

On many occasions, the challenge to the accommodationist argument has come, naturally enough, from nonbelievers. But non-preferentialism stands for the proposition that the government may not discriminate among sects. Given that, could a believer who does not believe in God be constitutionally offended by, say, the Pledge of Allegiance? If so, then the Pledge would fail, even by non-preferentialist standards. Times and cultural norms change, and there will come a time when accommodationism is challenged by followers of nontheistic faiths. Indeed, that time has come, and it has come in part because the Court has determined that non-theistic systems of belief are, for constitutional purposes, valid religions.

The Court's traditional definition of religion was closely tied to a belief in God. In 1890, following Madison, the Court grounded its definition of religion on the existence of a divine creator (and on the obligation of obedience to divine will). Eventually, the Court would acknowledge that religion does not mean, or does not have to mean, theism. The most generous definition of religion given by the Supreme Court occurred in a series of decisions interpreting the Universal Military Training and Service Act (the "Draft"). For the *Seeger* Court, the fact that Congress used the expression "supreme being," rather than the designation "God," indicated that religious belief was meant to embrace all religions. Ready with a test for all occasions, the Court decided that "the test of belief in a relation to a supreme being is whether a given belief occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."

For the traditional idea of God, the Court substituted Paul Tillich's "God above God," the source of some affirmation of ultimate concern. It is the subjective nature of this standard that makes *Seeger* so strikingly generous. Following Tillich, the Court

implied that everyone has an ultimate concern. In deciding that Seeger's belief was equivalent to that of the Quakers, the Court relied on Tillich's exuberant formulation of the test. This is Tillich: "And if that word 'God' has no meaning for you, translate it. Speak of the depths of your life, of your ultimate concern, of what you take seriously without reservation." This is not an "ultimate concern" test; it is a "your ultimate concern test." (Star Trekkies: take note.)

In response, lower courts trying to define what is and is not religion adopt a variety of what might be called low-threshold inclusion tests. The Court in *United States v. Myers* considered the defendant's claim that drug use was a central tenet of his religion. He belonged to the Church of Marijuana (he was, I think, the only official member of the Church of Marijuana, though I suspect that some of his beliefs are widely and enthusiastically shared). The Court presumed that the following sets of beliefs are religious: "Hari Krishnas, Bantus, Scientologists, Branch Davidians, Unification Church members, and Native American Church members (whether Shamanists or Ghost Dancers), Paganism, Pantheism, Animism, Wicca, Druidism, and Satanism, and what we now call mythology: Greek religion, Norse religion, and Roman religion." The Court asked the obvious question: Is anything excluded? Well, the not-so-obvious answer: alas, the Church of Marijuana.

This liberality threatens to undermine the accommodationist foundation of the Court's modern church-state jurisprudence. For the significance of religious conduct cannot be measured only by its continuing vitality for majority religious groups. That conduct may have a different significance for minority religions. For some, the continued use of theistic ritual may be highly offensive, and what was once a tolerable acknowledgment of beliefs widely held by the people of this country may amount today and tomorrow to the impermissible favoring of one religion over another. Moreover, if religious practice can lose its significance through rote repetition, it stands to reason that it could, under the right circumstances, regain spiritual vitality. If Satanists worship the archenemy of God, it's difficult to see how, from their perspective, government-sponsored use of God's name is not an endorsement of a particular religion, is not indirect, or fairly direct, coercive pressure to conform. It is equally difficult to see how the followers of God, faced with real religious opposition, will continue to invoke their deity's name with rote repetition.

Perhaps more disconcerting to the accommodationists on the Court is the fact that an expansive definition of religion undermines the political premises of non-preferentialism. If religion is meant to conserve public morals, it must first embody those morals. Thus, it is really public morality that defines true religion. Minority religious groups may be perceived as subversive of the public order (followers of Bacchus: take note), but on what basis could a non-preferentialist Court exclude them from public business?

My thesis is this: In a pluralistic society, non-preferentialism contains the seeds of its own undoing. The government must dole out its largesse with an even hand (or one must adopt, with Justice Scalia, a monotheistic originalism), but by providing support to diverse religious groups, the government ensures

that the drama of religious disagreement will be played out in the public square and at the public trough. That drama may be bound to continue, but the courts can and should contain it within proper constitutional limits. The place to start is with the recognition that Jefferson's wall stands in need of more than a little repair.

