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The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous

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For an hour it was deadly dull, and I was fidgety. Miss Watson would say, “Dont put your feet up there, Huckleberry;” and “dont scrunch up like that, Huckleberry—set up straight;” and pretty soon she would say, “Don’t gap and stretch like that, Huckleberry—why don't you try to behave?” Then she told me all about the bad place, and I said I wished I was there. She got mad, then, but I didn’t mean no harm. All I wanted was to go somewheres; all I wanted was a change, I warn’t particular. She said it was wicked to say what I said; said she wouldn’t say it for the whole world; she was going to live so as to go to the good place. Well, I couldn’t see no advantage in going where she was going, so I made up my mind I wouldn’t try for it. But I never said so, because it would only make trouble, and wouldn’t do no good.1

I. INTRODUCTION

A healthy dose of anticlericalism runs through American culture, but religion is not necessarily a trivial thing. In fact, nonlegal scholars have argued that religion, as a psychological phenomenon, is an essential attribute of the human experience.2 If they are correct, the emergence of modern, positive government creates a dilemma. As ostensibly secular government comes to dominate such classic domains of religion as education, medicine, and charity, people have less exposure to religion as a metaphor for psychological development, and the metaphor they...
do have may be deficient. However, if it will not suffice for the proper development of the religious side of human nature for government to adopt an utterly neutral position toward religion, the question arises whether there are ways in which government can incorporate religion into its activities without compromising the clarity of separationism and disestablishment.

Formal separation of church and state and modest accommodation of religious development may not be categorically reconcilable, but they can and should be reconciled by a contextual

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3. See infra notes 282-83 and accompanying text.

4. Franklin I. Gamwell argues that such a position is not possible:
   On either account [of the "privatist" view of religion, according to which religion and politics should occupy discrete spheres of influence], the meaning of religious freedom is so identified that it explicitly denies the comprehensive order of reflection and, therefore, explicitly denies what every religious adherent affirms, namely, that her or his conviction is valid. Because neither account legitimates any religion, the privatist view is not a coherent resolution of the modern political problematic [which seeks to answer the question "What, if anything, is the proper relation between politics and religion, given that the political community includes an indeterminate plurality of legitimate religions?"].


If Gamwell is correct, government cannot exist without "establishing" religion in some sense, unless, as Gamwell later argues, government constitutes itself by the question "What is the best religion?" See infra note 6. It would therefore follow that government would have some affirmative obligation to facilitate or accommodate religious growth, because, if Gamwell is correct, government would be incapable of maintaining strict neutrality on the issue.

5. Religion as religion, that is. The government has often depended, without constitutional infirnity, upon religious entities to perform public services, but not in their capacity as religious entities. Thus, the government may authorize hospitals affiliated with a particular denomination to care for the impoverished sick. See Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding public aid to an explicitly Roman Catholic organization that was limited by its own charter to the secular purpose of operating a hospital); Quick Bear v. Leupp, 210 U.S. 50 (1908) (upholding the disbursement of federal funds in trust to Catholic schools for the education of the Sioux); Bowen v. Kendrick, 487 U.S. 589 (1988) (acknowledging that a public program designed to address teen pregnancy could work through organizations with religious pedigrees, provided such organizations are not "pervasively sectarian"). The question I am addressing here is whether the government may ever depend upon religion in its proper sense.

6. Gamwell argues that there is a solution to the "modern political problematic," which he expresses in the question "What, if anything, is the proper relation between politics and religion, given that the political community includes an indeterminate plurality of legitimate religions?" GAMWELL, supra note 4, at 5. Gamwell contends that this problem can be resolved if the state constitutes itself by the comprehensive question, that is, if it constitutes itself by the question "what makes human activity as such authentic?" Id. at 24. Gamwell would thus resolve the tension I discuss in the text by making the question "What is the best religion?" a central part of the democratic agenda.
legal regime that mediates between the two. By such a regime, I mean one that takes into account the psychological process by which people come to embrace religious beliefs and principles. In fact, Alan Schwarz argued that the United States Supreme Court should, and generally does, pursue a nonformalist course in resolving cases, maintaining that the Establishment Clause of the First Amendment "should be read to prohibit only aid which has as its motive or substantial effect the imposition of religious belief or practice; and that the Supreme Court's decisions and much of its language are consistent with this proposed standard." Similarly, Justice O'Connor has advocated the kind of contextual approach that I have described, and Justice Kennedy,

7. Indeed, Justice O'Connor has urged on at least two occasions that the Supreme Court abandon its attachment to a single rule that applies in all instances in which the Establishment Clause is invoked. See infra notes 9 and 240. Justice O'Connor's proposal would necessarily lead to case-by-case or context-based analysis of claimed violations of the Establishment Clause, at least until new general rules emerge. In the absence of a single formalist rule, courts could adopt what might be referred to as an "impact-based approach" to nonestablishment, which would be one based directly upon the process by which people become religious or change their outlook in that regard. My interest in this Article is primarily on this approach, which has been advocated by such scholars as Alan Schwarz and Michael McConnell. See Alan Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 YALE L.J. 692, 693 (1968); Michael W. McConnell, Accommodation of Religion, 1985 SUP. CT. REV. 1, 34-41. See infra notes 253-57 and accompanying text. In practice, of course, this approach may lead to a generally applicable "meta-rule," such as Schwarz's proposal that only official practices that have as their "motive or substantial effect the imposition of religious belief or practice" be deemed to violate the Establishment Clause. Schwarz, supra, at 693. The contextual nature of such a test, as Schwarz concedes, would arise in its application. See id. ("[An imposition standard] would not, however, provide automatic answers. For instance, the question whether providing textbooks to parochial schools or school children constitutes aid to a religious function would not be dispositive, since aid to a religious function is constitutional so long as no imposition results."). The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

8. Schwarz, supra note 7, at 693. In Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947), for instance, the Supreme Court formally announced that under no circumstances may government aid religion. See id. at 15-16. Yet the Supreme Court went on to uphold a local plan that, among other things, reimbursed parents for the costs of sending their children to Catholic school by bus. See id. at 17.

9. Justice O'Connor has on several occasions called for a decentralization of Establishment Clause doctrine. See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 852 (1995) (O'Connor, J., concurring) ("When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified."); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]nother danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted."); Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("Every government
at least at one time, advocated an impact-based approach to nonestablishment.\(^\text{10}\)

Finally, the Supreme Court’s recent decisions in such cases as *Rosenberger v. Rector and Visitors of the University of Virginia*\(^{11}\) and *Agostini v. Felton*\(^{12}\) may signal a shift, albeit implicit, to contextual decision-making in the area of nonestablishment. Notwithstanding these comments and trends, however, the Supreme Court’s leading articulated tests for the Establishment Clause still tend to be formalist and, for the most part, separationist.\(^{13}\)

Excessive attachment to separationism may not serve the polity or all of its citizens well. Moreover, if religion is an innate aspect

practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.\(^{1}\)). One of the most prominent of her proposed alternatives to a “Grand Unified Theory” has been her “endorsement” test. See infra notes 241-45 and accompanying text.


13. *See*, e.g., *Everson*, 330 U.S. at 15-16. The Supreme Court declared that:

The [Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

*Id.* *See also* *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”). Somewhat similarly, in *Lemon v. Kurtzman*, the Supreme Court held that a law violates the Establishment Clause if its purpose is religious, if its primary effect is to promote or inhibit religion, or if it fosters excessive entanglements between church and state. 403 U.S. 602, 612-13 (1971). The three-part “*Lemon* test” has often been recognized as the prevailing test for applying the Establishment Clause.

Although a strong argument can be made—and often is made—that *Lemon* is dead, *see*, e.g., Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 797 (1993), the decision has not been overruled, and lower courts routinely apply it. *See*, e.g., *O’Connor v. California*, 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) (upholding a requirement that a person convicted of a multiple offense for driving under the influence participate in a county alcohol and drug education program as well as an “additional program” that, because of logistics, was often A.A., on the grounds that the primary purpose and effect of requiring attendance at an additional program was to combat drunken driving, not to promote religion, that the requirement did not foster excessive entanglements, and that at least one secular alternative to A.A., a program called “Rational Recovery,” was available). In fact, the Supreme Court appeared to adhere to *Lemon* in the recent case *Agostini v. Felton*, 117 S. Ct. 1997, 2010, 2014-15 (1997).
of the human experience, it should not be surprising that Alcoholics Anonymous (A.A.), a widely known and arguably religious support group for problem drinkers, has become a common and effective means of combating alcoholism. Also, it should not be surprising that probation officers, parole officers, judges, bar overseers, wardens, and myriad others exercising state authority routinely push individuals toward A.A. Arguably, however, official referral of problem drinkers to A.A. violates current interpretations of the Establishment Clause because of the quasi-religious nature of the program. Much of A.A. is functionally and textually "religious" in the broad sense of the word. For example, many A.A. meetings conclude with a prayer. Moreover, the first three of A.A.'s "Twelve Steps" provide, respectively, that "We admitted we were powerless over alcohol—that our lives had become unmanageable," that "[we c]ame to believe that a Power greater than ourselves could restore us to sanity," and that "[we m]ade a decision to turn our will and our lives over to the care of God as we understood Him." Accordingly, one might wonder whether, under current doctrine, a state or local government violates the Establishment Clause when it requires a person convicted of driving under the influence to attend A.A. meetings as a condition of probation, whether a state may require prisoners to attend A.A. meetings as a condition of incarceration, or

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15. See infra notes 316-23 and accompanying text.
16. ALCOHOLICS ANONYMOUS WORLD SERVS., INC., TWELVE STEPS AND TWELVE TRADITIONS 21 (1952) (hereinafter TWELVE STEPS AND TWELVE TRADITIONS).
17. See id. at 25.
18. See id. at 34 (emphasis original). In the forward to this book, the authors write: "The basic principles of A.A., as they are known today, were borrowed mainly from the fields of religion and medicine, though some ideas upon which success finally depended were the result of noting the behavior and needs of the Fellowship itself." See id. at 16.
19. See O'Connor v. California, 855 F. Supp. 303, 304 (C.D. Cal. 1994) (municipal court ordered individual convicted of a multiple driving under the influence offense to attend either A.A. or "Rational Recovery" meetings as a condition of probation); Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1070 (2d Cir. 1997) (municipal court, upon the recommendation of a county department of probation, required individual convicted of a third alcohol-related driving offense to attend A.A. meetings as a condition of probation). The Second Circuit may have vacated the cited opinion in Warner, see Orange County Dep't of Probation v. Warner, 968 F. Supp. 917, 918 n.1 (S.D.N.Y. 1997) (mem.), but the underlying facts seem accurate, as they reflect the facts set forth in earlier district court decisions. See, e.g., Warner v. Orange County Dep't of Probation, 870 F. Supp. 69, 70 (S.D.N.Y. 1994).
whether a state may refuse to reinstate the driver's license of an individual who has been convicted of driving while intoxicated for his failure to participate in a “support system” for problem drinkers. Given the extensive interaction between regulatory and penal authorities, on the one hand, and A.A. or groups based upon A.A., on the other, these questions can have profound consequences. More to the point, if we as a society appreciate this interaction and what it accomplishes, then either the Supreme Court has misinterpreted the Establishment Clause, the Establishment Clause itself reflects shortsighted judgment, or we have to live with the effects of uncontrolled alcoholism. Arguably, the most desirable conclusion would be that the Supreme Court has misinterpreted the Establishment Clause. Otherwise, a monolithic interpretation of the Constitution may preclude an effective response to an admitted scourge.

Although separationism helps both church and state, our Constitution does, and should, permit some dialogue between the two, not in the sense of permanent, open-ended connections, but in the sense of minute, almost case-specific accommodations that reflect the close fit between human nature and religion. To support this argument, I point out in Part II of this Article that a variety of somewhat inconsistent sentiments underlay the Religion Clauses at the time of their adoption and that one of these sentiments was a desire to protect authentic, private religious growth, with or without officially established religion. Although this may not be apparent from modern interpretation of the Establishment Clause, it follows readily from the fact that many of the people who originally supported the First Amendment also supported established religions in their home states. The Establishment Clause only prevented Congress from establishing a religion. Given this predicate, an interpretation is faithful to

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22. The Establishment and Free Exercise Clauses together provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST. amend. I.
23. See infra notes 44-60 and accompanying text.
24. Cf. Permoli v. First Municipality, 44 U.S. (3 Howard) 589, 609 (1845) (addressing the argument that a law of the State of Louisiana might violate the Free Exercise Clause) ("The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."). See Jay S. Bybee, Taking Liberties with the First Amendment: Congress, Section 5,
much, if not most, of the original intent of the Clauses if it preserves the freedom of the individual to grow along authentic religious lines, irrespective of the state’s position on religion. A contrary interpretation would have to ignore much of that original intent.\textsuperscript{25} In this Part, I also note that the history of the United States—especially the early history—contains abundant examples of nondenominational “establishments” by the federal government, as well as both nondenominational and overtly denominational establishments by the states. This, I note, lends further support to the argument that the Establishment Clause did not originally focus upon strict separation.\textsuperscript{26}

In Part III, I discuss modern Establishment Clause doctrine, focusing on the formal, separationist dictum of \textit{Everson v. Board of Education of Ewing}\textsuperscript{27} and the relatively formalist, three-part test of \textit{Lemon v. Kurtzman}, under which a law is unconstitutional if its purpose or primary effect is to promote or inhibit religion or if it fosters excessive entanglements between church and state.\textsuperscript{28} I argue in this Part that \textit{Lemon}, \textit{Everson}, and similar decisions have not succeeded in resolving the ambiguity created by the founders. In fact, as I argue in this Part, the Supreme Court’s failure to produce and to adhere to a coherent separationist interpretation of the Establishment Clause—or any formalist interpretation of that provision—demonstrates the deficiency of such rules.

In Part IV, I discuss with approval some of the contextual approaches to the Establishment Clause that have been advocated by Justices O’Connor and Kennedy and by such commentators as Alan Schwarz and Michael McConnell.\textsuperscript{29} Drawing on nonlegal sources, I also suggest in this Part that, as a psychological and theological matter, formal separationist rules may compromise important principles of religious freedom and disserve at least some portions of the populace.\textsuperscript{30} I conclude in this Part that the

\textsuperscript{25} See Scott C. Idleman, \textit{Liberty in the Balance: Religion, Politics and American Constitutionalism}, 71 Notre Dame L. Rev. 991, 996-97 (1996) (reviewing ISSAC KRAMNICK & R. LAURENCE MOORE, \textit{The Godless Constitution: The Case Against Religious Correctness} (1996)) (“[T]he notion that among the Framers, or even the principal framers, there was a strong, unitary consensus about the godlessness of the Constitution, let alone the godlessness of the derivative political order, seems much too simplistic.”).

\textsuperscript{26} See infra notes 74-82 and accompanying text.

\textsuperscript{27} See 330 U.S. 1, 15-16 (1947).

\textsuperscript{28} 403 U.S. 602, 612-13 (1971).

\textsuperscript{29} See infra notes 240-57 and accompanying text.

\textsuperscript{30} See infra notes 261-83 and accompanying text.
Establishment Clause is best implemented by a contextual approach to the proper relationship between church and state and that a law should be deemed to violate the Establishment Clause only if it interferes with authentic religious development or if it actually constitutes sponsorship of a denomination. After making this claim, I then discuss A.A. in Part V, arguing that, although it sufficiently resembles a religion to trigger the Establishment Clause, the government ought to be able to incorporate A.A. into its activities, albeit with some limitations, without running afoul of the Constitution. I then apply my analysis concerning A.A. to several court decisions in which the issue has been presented.

II. THE EARLY HISTORY OF THE ESTABLISHMENT CLAUSE

A. Various Schools

The framers of the Religion Clauses were not of a single mind concerning the meaning of religious freedom. In fact, John Witte argues that there were at least four overlapping schools of thought concerning the appropriate relationship between religion and government prevailing in the late Eighteenth Century. He describes these schools as those of "congregational Puritans," "free church evangelicals," "civic republicans," and "enlightenment thinkers." As the names suggest, the first two arose from religious beliefs, and the second two from political beliefs.

According to Witte, the Puritan school was characterized by a belief that church and government were discrete, yet mutually supportive, means of securing the kingdom of God on earth. Thus, for the Puritans, church and state were formally separated for the sake of efficiency and effectiveness, but not out of a be-

31. See infra note 325 and accompanying text.

These four views—Puritan, evangelical, enlightenment, and republican—helped to inform the early American experiment in religious rights and liberties. Each view was liberally espoused by federal and state leaders in the early American republic, informally in their letters and pamphlets, and formally in the Constitutional Convention and ratification debates. Each left indelible marks in the documents and developments of early American constitutionalism.

See id. at 388.
lie that the two were unrelated. For them, the separation of church and state was much like the "separation" of legislative, executive, and judicial powers within a government—official, important, and healthy, but by no means absolute. Just as Congress and the President play separate roles in creating laws, yet ultimately work together to do so (except in the instance of an override), the Puritans expected church and state to work together to build the "Citty vpon a Hill." In contrast to the Puritans, the evangelicals, who had historically been mistreated by the Puritan religion and other established religions, called for a fairly complete division between temporal and spiritual authority. In fact, Roger Williams, an evangelical preacher who had been banished from one of the early Puritan colonies in Massachusetts, first resorted to the metaphor of a "wall" between church and state.

Civic republicans, adherents to one of the two political schools of thought, believed that there ought to be some intercourse between church and state, holding that a stable, healthy democracy required a modicum of education and virtue in the citizenry that only religion could produce. Many Puritans, such as John Adams, were adherents to this school as well, but the civic republican school also included such southerners as George Washington. The enlightenment school, on the other hand, of which Thomas Jefferson, James Madison, Benjamin Franklin, and Thomas Paine were noteworthy exponents, opposed intercourse between religion and politics on both theological and nontheological grounds. Their theological opposition arose from the

33. See id. at 378-79 ("[The Puritans] conceived of the church and the state as two separate covenantal associations, two seats of Godly authority in the community. Each institution, they believed, was vested with a distinct polity and calling.").
34. See John Winthrop, Christian Charitee: Modeell Hereof (1630), reprinted in John T. Noonan, Jr., The Believer and the Powers That Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government 64 (1987) ("[F]or wee must Consider that wee shall be as a Citty vpon a Hill.") (editor's note omitted).
35. See Noonan, supra note 34, at 94-96 (discussing the persecution of Separate Baptists in colonial Virginia, a practice that irritated James Madison).
36. See Witte, supra note 32, at 386.
37. Williams called for a "wall of Separation between the Garden of the Church and the Wilderness of the world." See Witte, supra note 32, at 381 (quoting Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered (1644), reprinted in 1 The Complete Writings of Roger Williams 392 (1963)). The Baptist preacher John Leland was more emphatic: "The notion of a Christian commonwealth should be exploded forever." See Witte, supra note 32, at 382 (quoting John Leland, The Writings of the Late Elder John Leland 118 (1845)).
38. See Witte, supra note 32, at 386. See also McConnell, supra note 7, at 17-19.
39. See Witte, supra note 32, at 378, 385.
40. See id. at 385.
high value they placed on the power of reason, which they perceived as a means of freeing the human mind from centuries of dogmatic thought. In addition, many enlightenment thinkers advocated strict separationism in order to liberate the state from religious interference. Because of a congruence of goals, there was some sympathy between the religious evangelical school and the political enlightenment school, and these two groups tended to be the strongest proponents of a strict separation of church and state.

According to Witte, each of these schools had a number of adherents, and no school was excluded from the discourse. Moreover, Witte argues that the ideas espoused by adherents of these schools were sufficiently influential in the postrevolutionary period to justify the conclusion that the founders “incorporated” them into the Religion Clauses. Consequently, any distillation of the intentions originally underlying the Establishment and Free Exercise Clauses must acknowledge at least two disparate, and perhaps even logically irreconcilable, approaches to religious freedom—one contemplating strict separation, and another contemplating a moderate level of association between church and state. For this reason, it would be no more faithful to the intentions originally underlying the Religion Clauses to adopt the

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41. See id. at 383 (“The primary purpose of enlightenment writers was political, not theological. They sought not only to free religion and the church from the interference of politics and the state, as did the evangelicals, but, more importantly, to free politics and the state from the intrusion of religion and the church.”).

42. See id. at 378.

43. See id. at 404. Witte writes:

   Indeed, it might not be too strong to say that the “first incorporation” of religious rights and liberties was engineered not by the Supreme Court in the 1940s when it incorporated the religion clauses into the due process clause, but by the First Congress in 1789 when it drafted the First Amendment religion clauses. This “first incorporation”—if it can so be called—had two dimensions. First, the pregnant language that “Congress shall make no law respecting an establishment of religion” can be read as a confirmation and incorporation of prevailing state constitutional precepts and practices. Such state practices included “the slender establishments” of religion in the New England states . . . [and] the “establishments of religious freedom” . . . that prevailed in Virginia and other southern and middle states. . . . Second, the embrace terms “free exercise” and “establishment” can be read to incorporate the full range of “essential rights and liberties” discussed in the eighteenth century.

See id. at 404-05 (emphasis in original) (footnotes omitted). See infra notes 61-68 and accompanying text regarding the movement toward the “establishment of religious freedom” in Virginia. See infra notes 44-60 and accompanying text regarding what Witte describes as the “essential rights and liberties” of religion.
brand of separationism advocated by enlightenment thinkers and evangelicals as the definitive mindset of the framers than to adopt the establishmentarianism of the Puritans and civic republicans.

B. Various Principles

Although disparate schools of thought prevailed in the late Eighteenth Century, Witte argues that the founding generation more or less consensually embraced a series of principles concerning religious freedom that suffused and informed the Religion Clauses. According to Witte, these principles were as follows: liberty of conscience, free exercise of religion, pluralism, equality, separationism, and disestablishment of religion. These principles, which Witte describes as "the essential rights and liberties of religion," characterized and animated the founding generation's thoughts about the American experiment in religious freedom. Moreover, argues Witte, they functioned not as formal imperatives, but, instead, as principles that, through relation to each other, gave form to the Religion Clauses.

The first of these essential rights and liberties was liberty of conscience, which Witte describes as the "general solvent used in the early American experiment in religious liberty." The primary rationale for liberty of conscience—a rationale that, according to Witte, even the strongest establishmentarians were willing to concede—was that there can be no true religious choice that does not arise authentically from the conscience of the believer. This idea, which has often been described as "voluntarism," permeated early American literature. In fact, it even appeared to

45. See Witte, supra note 32, at 403-05.
46. See id. at 389.
47. See id. at 389 & n.86.
48. See, e.g., id. at 390-91 (quoting John Leland, The Rights of Conscience Inalienable (1791), reprinted in Political Sermons of the American Founding Era, 1730-1805, 1079 (1991) ("Every man must give an account of himself to God and therefore every man ought to be at liberty to serve God in that way that he can . . . reconcile it to his conscience."). As John Garvey writes with respect to voluntarism and ritual:

There is in our traditions a religious argument for religious freedom that is peculiarly associated with ritual acts. It is, simply, that it is futile to coerce people to perform ceremonies (prayer, worship, declarations of belief) they don't believe in. This idea has ancient roots, but it was most fully devel-
dominate the writings of Madison and Jefferson. 49

The remaining essential rights were, to a significant extent, corollaries of the first. Free exercise of religion, for instance, was cherished because it respected the right of individuals to act according to the choices their consciences dictated. 50 Similarly, pluralism, the third essential right identified by Witte, was valued in significant part because it served the theological purpose of letting God decide which religions should prosper. 51 Equality, the fourth essential right, served as a buttress to the first three, protecting people from being treated differently because of their religious choices and preventing the government from skewing the “market” among religions or religious ideas. 52

According to Witte, there was a relatively high degree of consensus about the meaning of these first four “essential rights and liberties.” About the remaining two, separationism and disestablishment, however, there was considerably less consensus.

Witte argues that separationism bore some instrumental relationship to the values of liberty of conscience and free exercise of religion. That is, separationism was understood by many in the late Eighteenth Century as a means of preventing the government from interfering with theological disputes within the confines of a particular faith, or within the conscience of an in-

oped by English Protestants during the seventeenth century. . . . Coerced ritual is futile because it cannot put the soul in touch with God. The individual cannot hear God unless he has faith. And faith does not come to people just because they go through the ritual motions. God gives it to whom he wills. It is an idea characteristic of Protestantism that this happens in a very individual way. The most effective medium is Scripture, through which God may speak to the pious reader.

See John H. Garvey, What Are Freedoms For? 50 (1996) (citations omitted). Michael McConnell similarly argues that:

Religious liberty demands some degree of neutrality between religion and unbelief. Unbelief is, after all, a system of opinions regarding the existence of God and thus regarding ultimate religious questions of life and value. If “[t]he Religion then of every man must be left to the conviction and conscience of every man,” each person must be as free to disbelieve as he is to believe.

McConnell, supra note 7, at 10, quoting James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 1 (1785), reprinted in Everson v. Board of Educ., 330 U.S. 1, 64 (1947) (appendix).

49. See infra note 71 and accompanying text.

50. See Witte, supra note 32, at 394.

51. See id. at 396. Some founders also advocated religious pluralism in the hope that religions would check each others’ excesses and that a plurality of religions would ensure a division of temporal influence among them, thus preventing any single religion from dominating national politics. See id.

52. See id. at 398.
However, not everyone understood separationism in just this way. Although few would have objected to separating church and state for the protection of church autonomy, some believed strongly that such separation was also beneficial for the polity.54

This lack of consensus also existed with regard to disestablishment. In fact, Witte writes that disestablishment was the least consistently understood or supported principle of religious freedom of the founding era. As Witte notes, disestablishment was viewed by some, such as the Puritans, as nonessential to religious freedom.55 First, several states maintained an established religion until well into the Nineteenth Century, as is reflected by Madison's proposed text for the Religion Clauses, which would have specified that there could be no national religion.56 Furthermore, disestablishment was understood by many others as simply a prohibition against any attempt by the government to ordain or to support a particular faith.57 Although these people subscribed to some version of the essential rights and liberties identified by Witte—including, presumably, disestablishment at the national level—they did not countenance the kind of strict disassociation advocated vehemently by others.

53. See id. at 399-400.
54. See id. at 399-401.
55. See id. at 401. Witte notes that

[for some eighteenth century writers, particularly the New England Puritans who defended their "slender establishments," the roll of "essential rights and liberties [of religion]" ended [with liberty of conscience, free exercise of religion, pluralism, equality, and separationism]. For other writers, however, the best protection of all these principles was through the explicit disestablishment of religion.

See id.
56. See Bybee, supra note 24, at 1559.
57. See Witte, supra note 32, at 401-02. Today, most nations of the world do not share the United States' correlation of religious freedom with nonestablishment, and international conventions of religious liberty do not include provisions for disestablishment. See id. at 439-40. In a recent commentary on the reconstruction of civilization in Asia, Anwar Ibrahim, Deputy Prime Minister of Malaysia, argued that:

This reconstruction of civilization, moreover, would not be possible without a renewal of faith in the divine. This would be Asia's singular contribution to the world. Unlike the West since the Enlightenment, which severed itself from the dominant world view of the Age of Faith, Asia, despite centuries of change, still preserves its essential religious character. Faith and religious practice are not confined to the individual; they permeate the life of the community.

On the other hand, numerous thinkers who were active in the late Eighteenth Century did call for a fairly strict separation of church and state, basing their advocacy on both theological and nontheological justifications. With respect to nontheological grounds for separation, for instance, Madison argued that established religion tended to induce docility, and he provocatively linked the spirit that had fomented the revolution to religious dissension:

If the Church of England had been the established and general Religion in all the Northern Colonies as it has been among us here [in Virginia] and uninterrupted tranquility had prevailed throughout the Continent, [i]t is clear to me that slavery and Subjection might and would have been gradually insinuated among us. Union of Religious Sentiments begets a surprising confidence and Ecclesiastical Establishments tend to great ignorance and Corruption[,] all of which facilitate the Execution of mischievous Projects.

The multiplicity of religions also played a role in Madison's general approach to preventing tyranny in Congress. However, theological grounds for strict disestablishment were also strong in some instances, particularly in Virginia in the 1780s.

Virginia had an established Anglican Church until sometime in the late Eighteenth Century, which was accompanied by persecution of religious dissenters. In particular, adherents of certain Baptist sects—corresponding to the evangelical school described by Witte—were subjected to prolonged official abuse. In 1779, just before Thomas Jefferson was elected governor of Virginia, he proposed "A Bill for Establishing Religious Freedom." The bill reflected the enlightenment's preoccupation with reason as the best tool for testing religious views and rested on such ar-

58. See Witte, supra note 32, at 403.
59. 1 THE PAPERS OF JAMES MADISON 105 (William T. Hutchinson et al. eds., 1962).
61. See Everson v. Board of Educ. of Ewing, 330 U.S. 1, 38, 42 n.33 (1947) (Rutledge, J., dissenting) (quoting H.J. ECKENRODE, THE SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 53, 64 (1910) (fixing the date for Virginia's disestablishment at either 1777, when the act suspending the payment of tithes took effect, or 1784, when Virginia defeated a proposal to revive assessments)).
62. Madison bemoaned this persecution. See Everson, 330 U.S. at 11 n.9 (quoting 1 THE WRITINGS OF JAMES MADISON 18, 21 (1900)). Jefferson wrote in a similar vein about the persecution of Quakers in colonial Virginia. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA: QUERY XVII, reprinted in 1 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 623-24 (Nina Baym et al. eds., 2d ed.).
arguments as the following, excerpted from the preamble of the bill:

[T]he opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds . . . Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; [and] all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness . . . .

The bill would have dislodged the Anglican faith as the established faith in Virginia, put all religions on an equal footing in the Commonwealth, and permanently ended the practice of assessing taxpayers for the support of churches. It did not prevail, however, until 1785.

Meanwhile, in 1784, the Virginia Assembly undertook to revive the assessment for the support of churches, which had been suspended since 1777. Unlike the old assessment law, the new law would permit taxpayers to specify the faith to which their payments should be applied, although choices were limited to varieties of Christianity. With Jefferson away in France, Madison led the opposition to the bill, publishing a now-famous tract entitled Memorial and Remonstrance Against Religious Assessments. In this tract, Madison vehemently opposed the bill, not simply because it was limited to Christian sects, but because he believed, like Jefferson, that true religious experience is insusceptible to official coercion. He also contended that what began as a negligible assessment for the support of any Christian sect could later be expanded into a substantial assessment for the support of a particular sect. For Madison, the crucial point at which to mount an opposition to a mingling of church and state was at the first threatened incursion, even a minor one:

[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in

63. See Noonan, supra note 34, at 103 (emphasis omitted).
64. See Everson, 330 U.S. at 36-37 (Rutledge, J., dissenting).
65. See Noonan, supra note 34, at 104.
66. See James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 8 The Papers of James Madison 298 (Robert A. Rutland et al. eds., 1973) [hereinafter “Madison Papers”].
67. See Madison, supra note 66, reprinted in Madison Papers, supra note 66, ¶ 1.
exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? 68

This time, the enlightenment thinkers prevailed. The bill did not pass, and one year later, the Assembly adopted Jefferson’s Bill for Religious Freedom.

The evidence seems fairly clear, then, that one powerful movement at work in the revolutionary era, specifically the movement responsible in Virginia for dislodging the Anglican Church and enacting Jefferson’s Bill for Religious Freedom, could be counted on to oppose many forms of establishment. However, it is difficult to extrapolate far from this. As the language of Jefferson’s Bill for Religious Freedom and Madison’s Memorial and Remonstrance demonstrates, both men couched their arguments in favor of religious freedom in theological terms. Furthermore, both their approaches were explicitly deistic. Similarly, Jefferson supported a variety of bills that sustained the general religious flavor of his native commonwealth after the revolution. 69

Moreover, although it can be argued that Jefferson and Madison couched their arguments in terms that they believed would appeal to their audience, that kind of argument cuts both ways. That is, there may have been other explanations for the Virginia Assembly’s decision not to revive forced tithing, 70 just as there may have been ulterior explanations for Jefferson’s and Madison’s rhetoric. More importantly, however, Jefferson’s and Madison’s private correspondence suggests some appreciation for religion, if not to the extent manifested in their public utterances. 71 In any case, the historical record suggests that, however

68. See id. ¶ 3.
69. See Witte, supra note 32, at 385 (citing 2 THE PAPERS OF THOMAS JEFFERSON 555-58 (Julian P. Boyd, ed. 1950)).

The law of Virginia did not live entirely by the gospel of the enlightenment, however. Even Jefferson supported the revision of Virginia’s post-revolutionary laws, which included a Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers; A Bill for Appointing Days of Public Fasting and Thanksgiving; and a Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage . . . .

Id.

71. Madison, for example, advised a young correspondent always to “keep the Ministry obliquely in View whatever your profession be,” noting that “[t]his will lead you to cultivate an acquain[t]fice occasionally with the most sublime of all Sciences and will
radically Madison, Jefferson, and similar thinkers may have wanted to separate church and state, the new nation as a whole did not entirely share their thinking.

The arguments and events of the founding era thus included certain bedrock principles that any subsequent interpretation of the Religion Clauses ought to accommodate. Principal among these was liberty of conscience, together with liberties that were in many respects ancillary to that liberty—free exercise, pluralism, and equality. Beyond that lay separation and disestablishment—critical, widely held principles, but principles about which there was little consensus, particularly at the state level. As Michael McConnell has argued:

It is sometimes forgotten that religious liberty is the central value and animating purpose of the Religion Clauses of the First Amendment. The separation of church and state—a phrase that does not appear in the First Amendment or in the debates surrounding its adoption—is a more problematical, a

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7. See 1 THE PAPERS OF JAMES MADISON 96 (William T. Hutchinson et al. eds., 1962) (letter of Sept. 25, 1773 to William Bradford, later Attorney General of the United States). See also NOONAN, supra note 34, at 93-94. Although there may be something Machiavellian in Madison’s words, his description of the ministry as a “sublime Science” does not appear to be facetious. Similarly, Thomas Jefferson instructed a young man with regard to religion that:

Your reason is now mature enough to receive this object. In the first place divest yourself of all bias in favour [sic] of novelty and singularity of opinion. Indulge them in any other subject rather than that of religion. It is too important, and the consequences of error may be too serious. On the other hand[.], shake off all the fears and servile prejudices under which weak minds are servilely crouched.

8. See 12 THE PAPERS OF THOMAS JEFFERSON 15 (Julian P. Boyd ed., 1955) (letter of August 10, 1787 to Peter Carr.). In this letter, Jefferson went on to advise his correspondent to let his investigations lead him where they may:

Do not be frightened from this enquiry by any fear of [its] consequences. If it ends in a belief that there is no god, you will find incitements to virtue in the comfort and pleasantness you feel in [its] exercise, and the love of others which it will procure you. If you find reason to believe there is a god, a consciousness that you are acting under his eye, and that he approves you, will be a vast additional incitement. If that there be a future state, the hope of a happy existence in that increases the appetite to deserve it; if that Jesus was also a god, you will be comforted by a belief of his aid and love. In fine, I repeat that you must lay aside all prejudice on both sides, and neither believe nor reject any thing because any other person, or description of persons have rejected or believed it. Your own reason is the only oracle given you by heaven, and you are answerable not for the rightness but uprightness of the decision.

See id. at 16-17.

more contingent, ideal than is religious liberty. The main components of religious liberty are the autonomy of religious institutions, individual choice in matters of religion, and the freedom to put a chosen faith (if any) into practice. Both free exercise and nonestablishment directly protect religious liberty: the government may not interfere with a person's chosen religious belief and practice by prohibiting it or by exerting power or influence in favor of any faith. The separation of church and state is a different matter; sometimes separation enhances religious liberty and sometimes separation diminishes it.\footnote{McConnell, \textit{supra} note 7, at 1. Witte similarly writes:

The vague language of the First Amendment—"Congress shall make no respecting an establishment"—could readily accommodate \ldots separationist, equality, or noncoercion readings of "disestablishment[\ldots]" \ldots [t]he best way to assess whether a Congressional law violates this prohibition is to see whether it compromises any one of the cardinal principles of separationism, equality, and noncoercion protected by the disestablishment guarantee.}

Consequently, the intentions originally underlying the Religion Clauses neither required nor precluded the government from acting in limited, general ways to accommodate or facilitate religious growth. What these intentions did demonstrate was that government was obligated not to use its power and prestige to influence religious development. In any case, it must be borne in mind that, but for incorporation, the Religion Clauses would not even apply to the states, theoretically leaving them free to adopt an official religion. Granting the wisdom and interpretive correctness of incorporating the Establishment Clause into the Due Process Clause of the Fourteenth Amendment, the question remains which of the various sentiments underlying the Establishment Clause, if any, ought to—or coherently can—dominate modern doctrine. As I will discuss in the following subpart, the founders did not cure the ambiguity of their legacy in the early years of the republic.

\footnote{Witte, \textit{supra} note 32, at 402-03.}

\footnote{The principles of pluralism, equality, and separationism—separately and together—served to protect religious bodies, both from each other and from the state. It was an open question, however, whether such principles precluded governmental financial and other forms of support of religion altogether.}

\textit{Id.} at 400.
C. Early Establishments

The practices of the founding generation shortly after the ratification of the Religion Clauses confirm the enduring strength of the Puritan and civic republican models in postrevolutionary American political culture. First, several state governments that were not subject to the Establishment Clause, but that honored at least a local version of the "essential rights and liberties" identified by Witte (and exercised far more power relative to the federal government than they do today), did sponsor religion during that time, both as a whole and in particular senses.\textsuperscript{74} The Commonwealth of Massachusetts, for instance, officially sponsored the Congregationalist faith until 1833.\textsuperscript{75} Similarly, the Commonwealth of Virginia's antipathy to the Anglican (modern-day Episcopalian) faith resulted in a wholesale confiscation of church lands in the late Eighteenth Century\textsuperscript{76} and prompted a prohibition against ecclesiastical corporations that continues to this day in Virginia and West Virginia.\textsuperscript{77}

In addition, certain broad, nondenominational forms of religious sponsorship were observed at the national level in the early years of the republic. For instance, the first Congress—the Congress that generated the text of the First Amendment—installed paid legislative chaplains.\textsuperscript{78} That Congress also re-enacted the Northwest Ordinance of 1787, which recognized "[r]eligion, morality, and knowledge" as "necessary to good government and the happiness of mankind," and which, therefore, provided that "schools and the means of education shall forever be encouraged."\textsuperscript{79} Similarly, President Washington, acting upon congressional authorization, proclaimed a day of Thanksgiving in 1789 to express gratitude to the Creator for the beneficence of nature, and the practice has continued more or less uninterrupted since that time.\textsuperscript{80} In fact, these establishments were so

\textsuperscript{74} See Everson v. Board of Educ., 330 U.S. 1, 14 n.17 (1947).
\textsuperscript{75} See generally Witte, supra note 32, at 404, 405-06. See also NOONAN, supra note 34, at 114.
\textsuperscript{76} See Witte, supra note 32, at 385 (citing ECKENRODE, supra note 61, at 116).
\textsuperscript{77} See Witte, supra note 32, at 385 (citing Paul G. Kauper & Stephen C. Ellis, Religious Corporations and the Law, 71 Mich. L. Rev. 1499, 1529-33 (1973)).
\textsuperscript{78} See Witte, supra note 32, at 406.
\textsuperscript{79} 1 Stat. 50 (1789); see also Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (noting that "[t]he House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights").
\textsuperscript{80} See NOONAN, supra note 34, at 127-30.
prevalent in this country that they furnish the basis for exceptions to the harshness of modern separationist doctrine,\textsuperscript{81} as well as for criticisms of that doctrine.\textsuperscript{82}

III. MODERN ESTABLISHMENT CLAUSE DOCTRINE

I have argued that the original intentions underlying the Religion Clauses were sufficiently ambiguous to permit a variety of interpretations of the Establishment Clause, ranging from strict separation to moderate, even-handed association. I have also argued that the practices and behavior of the founding generation confirms that strict separation was, at most, a potential model for the Establishment Clause. I have attributed this in part to the fact that disestablishment was not the rule for several states and in part to the fact that the federal government itself did not adhere to a model of complete separation.

One plausible inference from the existence of this ambiguity would be that, today, lawmakers have leeway to adopt an interpretation of the Establishment Clause that comports with our needs as a society. On the other hand, this original ambiguity

\textsuperscript{81} In \textit{Marsh v. Chambers}, for instance, the Supreme Court upheld the Nebraska state legislature's practice of retaining a legislative chaplain, who at the time of the Supreme Court's decision was a Presbyterian minister receiving nearly $320 per month from the state, and who had held the position for 18 years. See \textit{Marsh v. Chambers}, 463 U.S. 783, 785 (1983). Writing for the \textit{Marsh} Court, Chief Justice Burger reasoned that:

\begin{quote}
In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. . . . The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.
\end{quote}

\textit{Id.} at 792. Also in this genre was \textit{Walz v. Tax Commission of the City of New York}, in which the Supreme Court upheld New York's practice of exempting churches, along with other charitable institutions, from property taxes, reasoning that:

\begin{quote}
The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.
\end{quote}


\textsuperscript{82} Members of the Supreme Court have invoked the historical argument in criticism of the harsh rule of \textit{Lemon} in several cases. See, \textit{e.g.}, \textit{Lee v. Weisman}, 505 U.S. 577, 631-32 (1992) (Scalia, J., dissenting) (arguing that there is a "longstanding American tradition of nonsectarian prayer to God at public celebrations generally").
would be irrelevant under some modes of constitutional interpre-
tation if it has subsequently been resolved to the satisfaction of
the polity. Alexander Bickel made such an argument about
whether the framers of the Equal Protection Clause of the Four-
teenth Amendment contemplated that the Supreme Court would
eventually interpret that provision to prohibit segregation by race
in public schools. According to Bickel, the framers did not have
such an intention with regard to the "immediate effect" of the
Equal Protection Clause on "conditions then present." However,
continuing his analysis, Bickel then asked whether legisla-
tors familiar with "latitudinarian" interpretation of the Constitu-
tion might have contemplated that, over time, a court would
interpret the Equal Protection Clause to prohibit segregation in
the schools. Concluding that such an outcome was not inconsis-
tent with the legislative history, Bickel argued that the Supreme
Court's decision in Brown v. Board of Education was not a repudia-
tion of original intent. Chief Justice Warren made a similar, al-
beit less elaborate, argument in the Supreme Court's opinion in
Brown.

However, it probably cannot persuasively be argued that the
original "irresolution" of the Religion Clauses has been elimi-
nated to the satisfaction of the polity. Although the modern Su-
preme Court has often expressed a strict separationist view of the

83. See, e.g., Bruce Ackerman, We the People: Foundations 44 (1991) (arguing that
Reconstruction Republicans and New Deal Democrats engaged in "self-conscious acts of
[non-Article V] constitutional creation that rivaled the Founding Federalists in their
scope and depth").
84. Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69
Harv. L. Rev. 1, 63-65 (1955). The Equal Protection Clause provides that "No State shall
... deny to any person within its jurisdiction the equal protection of the laws." U.S.
Const. amend. XIV, § 1.
85. See Bickel, supra note 84, at 58.
86. Id. at 59-64.
87. Id. at 64-65; see Brown v. Board of Educ. of Topeka, 347 U.S. 483, 495 (1954)
declaring unconstitutional racial segregation in public schools). Michael McConnell
has argued that, in fact, Bickel got it wrong when he argued that the framers of the
Fourteenth Amendment did not specifically think that school segregation violated the
Equal Protection Clause. See Michael W. McConnell, Originalism and the Desegregation
Decisions, 81 Va. L. Rev. 947, 1093 (1995) ("IIt is clear beyond peradventure that a very sub-
stantial portion of Congress, including the leading framers of the Amendment, sub-
scribed to the view that school segregation violates the Fourteenth Amendment").
Because I simply use Bickel's argument as an illustration of how courts may conclusively
resolve ambiguity in the meaning of constitutional provisions, provided they accurately
capture prevailing sentiment at the time they make their decisions, it is not relevant
whether in fact Bickel's reading of history was valid.
88. See Brown, 347 U.S. at 489.
Establishment Clause, there are many indications that this language has not acquired the finality of the *Brown* decision. Specifically, although the Supreme Court has spoken in terms of a "wall" between church and state, the Supreme Court has nevertheless allowed gaps in that wall under a variety of rationales. Prominent among these rationales are the arguments, first, that denying public benefits to individuals or groups because of their religious orientation would violate principles of free exercise and equality toward religions and, second, that government should be free to "accommodate" religious practices, particularly in light of the Free Exercise Clause. Similarly, the Supreme Court's long-standing, official rule for deciding cases under the Establishment Clause—the three-part test of *Lemon v. Kurtzman*—although somewhat separationist in that it will not permit accommodation, is not entirely separationist. Instead, it is an amalgam of separationist, free exercise, and equality principles. Consequently, the argument that the modern Supreme Court has resolved what the founders left ambiguous is not persuasive. In the following three subparts, I will discuss the strict separationist, accommodationist, and equal-access approaches to religious freedom.

A. **Strict Separationism**

The strict separationist approach to religious freedom reflects the enlightenment and evangelical views of the postrevolutionary era described by Witte. Members of these schools advocated a relatively discrete relationship between church and state. At least as a rhetorical matter, the modern Supreme Court has embraced this approach to a remarkable extent. In fact, the modern Supreme Court's first pronouncement on the Establishment Clause, which appeared in the 1947 decision *Everson v. Board of Education of Ewing*, was decidedly separationist. In that decision, Justice Black declared on behalf of the majority that:

89. See, e.g., *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.").

90. The "accommodationist" rationale also tends to reflect the civic-republican and even Puritan views on the relationship between church and state identified by Witte.


92. See *supra* notes 35-37 and 41 and accompanying text.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.94

This language was certainly a strong statement of separationism. However, the interpretive maxim for the holding in Everson was not the above-quoted language, but, like the Lemon test that was to follow some twenty-four years later, an amalgam of separationist, free exercise, and equality principles.

1. Everson v. Board of Education of Ewing

Everson involved a New Jersey law that authorized local school districts to enter into contracts for the transportation of children to any school in the district, public or private, that was not operated for profit.95 The Township of Ewing enacted a resolution pursuant to this law that authorized reimbursement for the cost of sending children to public "and Catholic" schools.96 Everson, a taxpayer in the district, argued that the reimbursement violated the Establishment Clause because tax money was being used to transport children to parochial schools.

Justice Black's response to Everson's Establishment Clause argument had two phases, a strict separationist phase and a balancing phase, the latter of which included the Supreme Court's ratio decidendi. Justice Black began the separationist phase of his opinion by describing the dangers of religious establishment, going over, in general terms, the religious strife that had plagued Europe during the Reformation and Counter-Reformation.97 At the culmination of this history, he declared that "[t]hese practices

94. See id. at 15-16.
95. See id. at 3.
96. See id. at 62 n.59 (Rutledge, J., dissenting). Although one would hope that the school board adopted the words "and Catholic" in recognition of the fact that parents in the district happened to send their children either to public or parochial school, the various opinions in the case were silent on the issue. See also Larue, supra note 70, at 28.
97. See Everson, 303 U.S. at 8-10. For an interesting literary analysis of Justice Black's history of religious strife in Europe and the settlement of the eastern seaboard, see Larue, supra note 70, at 18-27. See also supra notes 61-62 and accompanying text for a discussion of Virginia's established church in the colonial and revolutionary era and of some of the persecution that accompanied that establishment.
became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence," at which point he cited Madison's vexation at the imprisonment of Baptists in Virginia. 98 He then went on to quote heavily from Jefferson's Bill for Religious Freedom and Madison's Memorial and Remonstrance 99 and to argue that the Supreme Court could infer a nationwide sentiment from Virginia's experience. He concluded this discussion by explicitly adopting the strict separationist language quoted above as the guiding principle for interpreting the Establishment Clause. 100

If the Supreme Court had stopped its analysis at this point, the result would probably have been clear. That is, if the Establishment Clause prohibited aid to religion, the Township could not provide free bus rides to parochial schools in which religious doctrine was taught. However, the Supreme Court did not do this. Instead, in something of an about-face, Justice Black noted that the Free Exercise Clause required the State of New Jersey not to discriminate on the basis of religion in the distribution of a generally available public benefit. 101 After making this observation, however, the Supreme Court faced a dilemma. If the Establishment Clause forbade aid to religion, how could people participate on equal terms in a public program in which that participation would indirectly aid religion? The Supreme Court did not answer this question directly. Instead, it engaged in a sub silentio balancing test, pursuant to which it compared the degree to which the reimbursements promoted safety—a secular value—and the degree to which the reimbursements promoted religion. Concluding that the aid offered by the Township flowed to the student and not to the school and thereby suggesting that the causal link between the reimbursements and safety was more immediate than the link between the reimbursements and religion, the Supreme Court upheld the program. 102 Although Justice Black acknowledged that permitting the reimbursement might have the effect of encouraging attendance at parochial schools, he reasoned that providing bus rides and police and fire protec-
tion was commonplace and would not contribute to the religious function of churches and church-related schools. Strictly speaking, this could not have been true. The Township was aiding religion, albeit indirectly.

Justice Jackson picked up on this. Dissenting, he claimed that the rule announced in the first portion of the opinion—that is, the separationist dictum about “no aid” and high walls—seemed correct, but the decision seemed wrong.

Because the 

Everson Supreme Court’s ratio decidendi was a balancing of separationist against “equal access” and free exercise principles, Justice Black’s “no aid” declaration was technically dictum. Nevertheless, it was strongly worded. In fact, his adoption of strict separationist rhetoric purported to resolve the ambiguity left by the founders. That is, by equating Virginia’s approach to religious freedom with that of the colonies as a whole and by ignoring the divergent schools of thought in the colonies at the time, particularly in New England, the 

Everson Court seemed to elevate evangelical and enlightenment views to a level of dominance that could only by supported by revisionist history.

In fact, even the balancing test upon which the 

Everson Court rested its decision was more separationist than the founders’ legacy because that test indicated that the Supreme Court would not permit official acts that happened to aid religion, except when such aid was “incidental” to the pursuit of a secular goal. This approach would prohibit government actions intended to aid religion, a category of actions that would have been integral to a Puritan or civic-republican approach to religious freedom. This

103. See id. at 17-18.
104. See id. at 18.
105. See id. at 19 (Jackson, J., dissenting) (“[T]he undertones of the [Court’s] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters”). Justice Rutledge made an argument similar to Justice Jackson’s but stated his views much more emphatically:

The Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Id. at 31-32 (Rutledge, J., dissenting).
106. See generally LARUE, supra note 70, at 24-27.
category of actions would also seem to cohere with the free-exercise principle identified by Witte, as well as with the words of the Free Exercise Clause. Before long, however, the impact of Everson's dictum and rationale were limited by the emergence of the accommodationist principle and by the expansion of the equal-access principle.

This is not to suggest, however, that Everson's dictum never bore fruit. On the contrary, the Supreme Court went on to cut a fairly clear "no aid" path in a long line of cases with only one exception that involved religion and the public schools. In fact, in the first case involving the Establishment Clause after Everson, McCollum v. Board of Education, the Supreme Court adhered to a strict separationist position in invalidating a "release time" program for religious instruction in a public school system.

2. McCollum v. Board of Education

McCollum involved a program in the public schools in Champaign, Illinois. Under this program, time was set aside during the school day for religious instructors to enter the schools and to instruct, in religious matters, those students whose parents had signed authorization cards. The school enforced attendance through its ordinary rules against truancy. Students whose parents did not authorize release time were required to "leave their classrooms" and go elsewhere in the building—presumably study hall—to pursue secular studies during the release time period.

With only one dissent, the Supreme Court struck down the practice. Justice Black, the author of Everson, began his opinion for the McCollum Court by describing the case as one about "the power of a state to utilize its tax-supported public school system in aid of religious instruction." By framing the issue in this manner, Black suggested that Champaign's schools were seeking to exact for religious instruction the same "threepence" that had

107. See infra notes 123-30 and accompanying text.
108. See infra notes 157-227 and accompanying text.
110. 333 U.S. 203 (1948).
111. See id. at 205.
112. See id. at 207-08 & n.2.
113. Id. at 209.
114. Id. at 204-05.
exercised Madison in 1784.\textsuperscript{115} What bothered Black was that school facilities, physical resources paid for by taxpayers, together with the compulsory education laws, were being used to facilitate religious instruction.\textsuperscript{116} Moreover, unlike the program at issue in \textit{Everson}, in which the Township had indirectly promoted religious education while pursuing the secular goal of ensuring the safety of schoolchildren, the Champaign program did not appear to serve any secular purpose. The school board made no argument, for instance, that keeping the students on school property during religious instruction ensured their safety. The program, in short, was a pure accommodation of religion that was designed to make religious instruction easier.

Aside from elevating \textit{Everson}'s strict separationist dictum to the level of black-letter law, however, \textit{McCollum} did little to resolve the ambiguity created by the \textit{Everson} decision. The holding in \textit{Everson} had turned on a comparison of the causal links between free bus rides, safety, and religious instruction, but had offered little guidance about how these links were to be compared. The \textit{McCollum} case did little to rectify this situation because the free facilities (classrooms) and services (enforcement of the anti-truancy laws) provided in \textit{McCollum} were incidental to nothing, and no balancing was required. Thus, \textit{McCollum} was an easy case for a Court convinced of the wisdom of \textit{Everson}. Nevertheless, \textit{McCollum} was a clear instance of separationism, however sporadically the Supreme Court has adhered to that doctrine in other cases involving the Religion Clauses.

3. Separationism since \textit{McCollum}

\textit{McCollum} was only the first of many decisions in which the Supreme Court adopted a strict separationist approach to religion and the public schools. Over the years, in fact, the Supreme Court has often interpreted the Establishment Clause to prohibit religious texts and iconography from the public schools, striking down such diverse practices as the reading of a uniform non-denominational prayer daily in the classroom to invoke God's blessings,\textsuperscript{117} the daily reading of verses from the Bible,\textsuperscript{118} the place-

\textsuperscript{115} See \textit{supra} note 68 and accompanying text.
\textsuperscript{116} See \textit{McCollum}, 333 U.S. at 209-10.
\textsuperscript{117} See Engel v. Vitale, 370 U.S. 421 (1962). The prayer was as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.” See \textit{id.} at 422.
ment of the Ten Commandments on the wall of classrooms (except as a subject of comparative study), the official authori-

119 zation of a moment of silence for the purpose of facilitating pri-

120 vate prayer, a requirement that Darwin’s theory of natural se-

121 lection always be taught in conjunction with Creationist

122 explanations of the origin of species, and a nonsectarian

123 prayer at a high school graduation ceremony. However, the

balance of the Supreme Court’s Establishment Clause doctrine

118 has been decidedly less separationist. I will now discuss the ac-

119 commodationist and equal-access approaches to religious free-

120 dom, neither of which may be reconciled neatly with strict

122 separationism.

B. Accommodationism

Official “accommodation” of religious practices is a lesser in-

cluded component of a civic-republican or Puritan approach to

the relationship between church and state. That is, without neces-

sarily agreeing that religion is intrinsically good for people or

for the state, the accommodationist would at least allow the gov-

do-ment to facilitate religious practices in order to preserve tran-

quility. Moreover, accommodationism is a cognate of the free-

exercise principle described by Witte and articulated by the Free

Exercise Clause because it recognizes an affirmative power in

government to act to facilitate free exercise. However, as Michael

McConnell has argued, it is difficult to fix its constitutional

pedigree:

Despite its prominence in recent Terms, the concept of ac-

118 commodation has not been precisely defined or located within

119 First Amendment doctrine. Is it an exception to the Establish-

120 ment Clause, an adjunct to the Free Exercise Clause, or simply

122 the result of “play in the joints” between the two Clauses?

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121. See Edwards v. Aguillard, 482 U.S. 578 (1987). The Supreme Court has also
struck down a state law forbidding the teaching of Darwin’s theory in the schools, rea-
soning that the motivation behind the exclusion was to protect religious ideas. See Epps-
122. See Lee v. Weisman, 505 U.S. 577 (1992). The Supreme Court’s solicitude to
the potential for establishment in the public schools has generally been attributed to
the impressionability of children. See, e.g., Wallace, 472 U.S. at 60 n.51.
123. McConnell, supra note 7, at 4.
Nevertheless, accommodation, a category of actions logically excluded by strict separationism, has long served as a rationale for decisions interpreting the Establishment Clause. In fact, only four years after the Supreme Court staked out a clear separationist position in *McCollum*, the Supreme Court issued an accommodationist opinion in *Zorach v. Clausen*, another case involving a release time program. This time, however, the Supreme Court sustained the program, notwithstanding the fact that it served no articulated secular purpose.

1. *Zorach v. Clausen*

The program at issue in *Zorach*, which had been adopted by the City of New York, was slightly different than the Champaign program, but not in a sense that should have mattered under a straightforward application of *McCollum*. Under the New York program, students were released during the school day on the condition that they attend classes for religious instruction or devotional exercises at a location off school grounds. Thus, the New York program differed from the Champaign program in two respects. First, clergy and other religious instructors did not enter the schoolhouse for purposes of instruction, and second, school facilities were not used for that purpose. However, the New York program and the Champaign program shared the characteristic of using the compulsory attendance laws, together with parental authorization, to enforce attendance at classes in religious instruction. They also shared, presumably, the characteristic of subjecting nonparticipating students to what might be considered dead time in study hall.

Inexplicably, given *McCollum*, the *Zorach* Court upheld the New York program even though the New York program aided religion in general and served no articulated secular purpose. Instead, the Supreme Court identified a value in the official accommodation of religious practices. As Justice Douglas, writing for the Supreme Court, reasoned:

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125. *See id.* at 308.
126. Writing for the Supreme Court, Justice Douglas indicated in a footnote, however, that the school system did not ultimately punish any students for failure to attend religious education classes. *See id.* at 311 n.6.
127. *See id.* at 315.
When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.128

With this declaration, Justice Douglas appeared to constitutionalize a civic-republican or Puritan approach to religious freedom.129 He also announced a rule that comported far more easily with the free-exercise and equality principles than did Everson's strict separationist dictum or the rule of McCollum. However, he certainly did not reiterate the strict separationism of Everson's dictum or McCollum.

Justice Douglas did not acknowledge any discrepancy between the earlier decisions, which he had joined, and Zorach. The discrepancy did not escape the notice of Justice Black, however, who argued in dissent that any use of the state's coercive power to aid or to inhibit religion “or to prefer all religious sects over nonbelievers or vice versa” violated the Establishment Clause.130 Although Justice Black's resolution of Everson had not cohered with his "no aid" dictum, his belief in the possibility of strict separation was consistent.

2. Accommodationism Since Zorach

In the years since Zorach, the Supreme Court has embraced an accommodationist rationale on a number of occasions, although rarely in the unadulterated sense of Zorach. In Walz v. Tax Commission of New York, for example, the Supreme Court upheld New York's practice of exempting church real estate—along with the real estate of several other categories of nonprofit groups—from property taxes.131 The exemption had the effect of accommodating church ownership of property and, therefore, aiding religion by exempting churches from an otherwise generally applicable burden. Moreover, although it may be argued that the exemption did not aid religion per se because it applied to certain

128. Id. at 313-14.
129. See supra notes 33-34 and 38-40 and accompanying text.
130. 343 U.S. at 318 (Black, J., dissenting).
nonreligious entities as well, this argument ultimately falters because churches were still included within the category of favored entities. In other words, religion was preferred to some extent.

3. Accommodationism via Interpretation of the Free Exercise Clause

Notwithstanding such relatively straightforward accommodationist decisions as Zorach and Walz, however, perhaps the most telling example of “accommodationism” has come with expansive interpretation of what the Free Exercise Clause requires of lawmakers. To the extent that the courts subject actions that restrict free exercise to critical review, the duty of legislators to avoid such restrictions in order to preempt lawsuits expands. A discussion of the development of free-exercise doctrine will illustrate the pressure to “accommodate” religion that arises as a consequence of judicial enforcement of that Clause, although recent changes in free-exercise doctrine may limit the impact of this phenomenon.

a. Early Free-Exercise Doctrine and Sherbert v. Verner

Many of the Supreme Court’s early decisions interpreting the Free Exercise Clause involved claims by adherents of minority religions that states were infringing on their rights of free exercise. This line of cases probably reached its zenith in the 1963 decision Sherbert v. Verner. In this case, a Seventh-Day Adventist lost her job because she refused to work on Saturday, her chosen Sabbath. After she failed to find another employer who could accommodate the demands of her religion, Sherbert sought bene-

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132. Cf. Schwarz, supra note 7, at 695 (arguing that a “no religious classification” test would not permit singling out churches, along with other entities, as the beneficiaries of a ordinance prohibiting raucous noise near activities requiring tranquil surroundings, because, although the church would be protected along with other entities, it would still be favored over entities that are excluded from the ordinance).

133. See infra notes 142-55 for a discussion of recent limitations on the impact of the Free Exercise Clause.

134. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (striking down a state statute that prevented a Jehovah’s Witness from attempting to sell religious tracts door-to-door without a certificate issued by a local official); Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (striking down a local ordinance that imposed a tax upon persons who attempted to distribute and sell religious literature in a residential area without a license).

fits from the state's fund for the unemployed. The agency that administered the fund denied her claim, invoking a portion of the law governing the fund that denied benefits to persons who lacked "good cause" for refusing "suitable work when offered." In response, Sherbert argued that the Free Exercise Clause required the state to grant an exemption from the law to persons whose refusal to take employment arose from religious scruples. Agreeing, the Supreme Court ordered the state to carve out an exception for people in Sherbert's position. In reaching its decision, the Supreme Court engaged in two stages of analysis. First, it asked whether the state's rule, as applied to Sherbert, imposed a substantial burden on her exercise of religion. The Supreme Court concluded that it did. The Supreme Court then asked whether the state had a compelling reason to deny an exemption to Sherbert and concluded that it did not.

The Sherbert decision aligned the doctrine of the Free Exercise Clause with the doctrine of numerous other provisions of the Constitution designed to protect individual liberties. By ruling that lawmakers needed a compelling reason to impair substantially the free exercise of religion, the Sherbert Court required roughly the same degree of scrutiny for claims under the Free Exercise Clause as for claims under the Free Speech or Equal Protection Clauses. However, for purposes of this Article, the important thing Sherbert did was to encourage legislators seeking to avoid litigation to anticipate instances in which generally applicable laws would unnecessarily impose a substantial burden on free exercise. Consequently, and ironically, the Sherbert Court encouraged lawmakers to accommodate religion.

136. See id. at 401.
137. See id. at 410.
138. See id. at 403-04.
139. See id. at 407-09.
141. Cf. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."). Bolling, an action against an officer of the United States, actually involved the equal protection "component" of the Fifth Amendment Due Process Clause, which applies to the federal government. See id. at 500. That Clause provides that "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
b. Employment Division, Department of Human Resources v. Smith

The Supreme Court seemed to limit *Sherbert* to its facts, however, in the 1990 decision *Employment Division, Department of Human Resources v. Smith*. In *Smith*, the Supreme Court decided that, for the most part, facially neutral laws of general applicability that incidentally impose a burden on religion are subject to, at most, a form of intermediate scrutiny. Respondents, who counseled others regarding the abuse of drugs and alcohol, ingested sacramental peyote in the course of practicing their religion. They were fired when their employer, a drug rehabilitation program, learned of their act. Respondents then sought compensation from the state’s fund for the unemployed, but petitioner, the agency of the state charged with administering the fund, denied their application on the grounds that they had lost their jobs for committing a crime. In an action for legal and equitable relief, respondents argued that Oregon’s law prohibiting the ingestion of peyote violated the Constitution insofar as it prohibited their free exercise of religion. The Supreme Court disagreed, holding that the law did not violate the Free Exercise Clause as long as its impact upon religious practice, as opposed to religious belief, was incidental to the enforcement of a facially neutral, generally applicable law. Because the law applied uniformly to all ingestion of peyote, the Supreme Court concluded that it met the requirements of the Free Exercise Clause.

As a result of the *Smith* decision, it appears that, with some exceptions to be discussed presently, courts will subject claimed violations of free exercise to, at most, a heightened form of minimum rationality review. Consequently, under *Smith*, legislators arguably may ignore religious practices in enacting generally applicable laws, and at least some of the incongruity between nonestablishment and free-exercise doctrine has been eliminated.

On the other hand, at least part of the Supreme Court has

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143. See id. at 881-82.
144. See id. at 872.
145. See id.
146. See id.
147. See id. at 878-79.
148. See id. at 882.
criticized Smith. More importantly, the opinion itself contains several exceptions to its otherwise broad rule. These include an exception for Sherbert itself (or, more accurately, for cases involving unemployment benefits), a possible exception for situations in which "individualized government assessment" of a particular claim for relief is feasible, an exception when the government attempts to regulate pure belief, and an exception when so-called "hybrid rights"—such as a combination of free speech and free exercise—are at stake. In light of these many exceptions, it arguably is not advisable, even under Smith, for public officials to assume in all instances that laws of general applicability are insulated from effective challenge notwithstanding their incidental impact on religious practices. Finally, Smith does not apply when the government singles out a religious practice for negative treatment. And, to the extent officials take free-exercise concerns into account in order to avoid litigation, they anticipatorily accommodate religion.

c. Summary

The upshot of an expansive interpretation of the free-exercise principle, to the extent it survives Smith, is that lawmakers must

149. See, e.g., City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting) ("I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court's holding there."); id. at 2186 (Souter, J., dissenting) ("I have serious doubts about the precedential value of the Smith rule and its entitlement to adherence."); id. (Breyer, J., dissenting) (agreeing with Justice O'Connor that the Supreme Court should have directed the parties in Boerne to brief the question whether Smith was correctly decided).
150. See Smith, 494 U.S. at 883.
151. See id. at 884.
152. See id. at 877.
153. See id. at 881-82.
154. See id. at 877-78.
155. In 1993, Congress attempted to intervene in the controversy created by Smith by enacting the Religious Freedom Restoration Act (RFRA). Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1448 (1993) (codified at 42 U.S.C. § 2000bb (Supp. V 1993)). In the most important provision of RFRA, Congress provided that neither the federal government nor the states could impose a substantial burden on free exercise unless the burden promoted a compelling public interest and was the least restrictive means of doing so. See 42 U.S.C. §§ 2000bb-1(a), (b); 2000bb-2(1). Moreover, this rule applied even to laws of general applicability. See id. § 2000bb-1(a). By enacting RFRA, Congress purported to reinstate the rule of Sherbert and to "overrule" Smith. The RFRA's stated purpose was to do so. See 42 U.S.C. § 2000(b)(1). In 1997, however, the Supreme Court struck down RFRA as a violation of separation of powers. See Boerne, 117 S. Ct. at 2172. Congress's power to limit the impact of federal law on religious practice, however, may survive Boerne.
try to alleviate the effect of secular policies upon religious practices when the burden on religion is substantial, but the cost of accommodation would be slight. Although such an approach is fully consistent with an accommodationist view of nonestablishment, it is not consistent with strict separation. In fact, writing in the period between *Sherbert* and *Smith*, Michael McConnell identified as an anomaly of the Religion Clauses that an accommodation of religious practice by government was more likely to come about because of a lawsuit under the Free Exercise Clause than because of a voluntary accommodation by government, which is subject to the more exacting scrutiny of the *Lemon* test (or an interpretive equivalent).\(^{156}\) In any case, the very existence of the accommodationist principle, whether predicated on free-exercise or on civic-republican approaches to church-state relations, exhibits the failure of strict separationism to capture the debate. In the next subpart, I will discuss how the growing vitality of the equal-access principle in interpretation of the Religion Clauses further demonstrates this failure.

**C. Equal Access**

Like strict separationism, the "equal access" principle is a formal interpretive maxim for the Religion Clauses. This maxim is predicated upon the equality principle identified by Witte. In addition, like accommodationism, the equal-access principle cannot be reconciled with strict separation. With the possible exception of the Supreme Court's recent decision in *Rosenberger v. Rector and Visitors of the University of Virginia*,\(^ {157}\) however, the Supreme Court has never adopted a strict equal-access approach to the Religion Clauses. In other words, it has never held that religiously oriented entities may always participate in a public program on an equal footing with nonreligiously oriented entities, regardless of how much such participation in fact redounds to the benefit of religion.\(^ {158}\) Instead, the Supreme Court has always

\(^{156}\) See McConnell, supra note 7, at 6 ("Indeed, the Court's analysis [of cases implicating the Religion Clauses] creates the impression that an accommodation . . . is more likely to be required than permitted."). See also Schwarz, supra note 7, at 692 ("[I]t is arguable that the establishment clause invalidates military service exemptions granted conscientious objectors, while the free exercise clause compels them.").


\(^{158}\) Justice Scalia seemed to make the contrary claim in his plurality opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) ("[W]e have
tempered the equal-access rationale with considerations of the extent to which the official action at issue promotes religion.

The first instance in which this occurred was *Everson* itself. In that case, the Supreme Court upheld the reimbursement of parents for the cost of sending their children to Catholic school by bus on the grounds that, generally speaking, people ought to derive equal benefits from public programs without regard to religion and, specifically, that the reimbursements promoted the secular goal of safety more directly than they promoted religious education.

The Supreme Court's equal-access decisions since *Everson* have generally borne the imprint of that case, even after the three-part test of *Lemon v. Kurtzman* superseded the unarticulated balancing test of *Everson*. Moreover, as in *Everson*, the Supreme Court's equal-access decisions have typically rested upon constitutional provisions other than the Establishment Clause. These provisions have included the Free Exercise Clause, as was the case in *Everson*, or, more recently, the Free Speech and Press Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Most importantly, however, as was the case with *Everson*, none of these decisions has been reconcilable with strict separationism. In fact, in two recent cases prominently featuring free speech claims, as opposed to free exercise claims, *Capitol Square Review and Advisory Board v. Pinette* and *Rosenberger v. Rector and Visitors of the University of Virginia*, the Supreme Court has come close to, if not succeeded in, repudiating central values of strict separationism in its pursuit of the equal-access principle. In the following paragraphs, I will discuss some of the

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159. In *Lemon*, the issue for the Supreme Court's attention was whether two state programs for aid to private schools, including religious schools, violated the Establishment Clause. One, administered by the Commonwealth of Pennsylvania, provided for reimbursements to schools for the cost of teachers' salaries, textbooks, and instructional materials in certain secular subjects. 403 U.S. 602, 606-07 (1971). The second, administered by the State of Rhode Island, involved a supplement paid by the State to teachers in non-public elementary schools of 15% of their salary. See id. at 607. After weaving the rules of earlier cases together to form the now-famous test, see id. at 611-13 (citing Board of Education v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1971)), the Supreme Court concluded that both programs violated the Constitution because their enforcement would entail excessive entanglements between church and state. See id. at 613-14.


early equal access cases, after which I will discuss Pinette and Rosenberger.

1. **Widmar v. Vincent**

One of the Supreme Court’s first equal access decisions not predicated solely upon the Free Exercise Clause was *Widmar v. Vincent*, 162 which the Court handed down in 1981. In *Widmar*, the Supreme Court reviewed a policy at the University of Missouri at Kansas City (UMKC) under which registered student groups were prohibited from using university buildings and grounds for “religious worship or religious teaching,” but were otherwise generally permitted to use such facilities. A student group seeking to use university facilities for “nondevotional” religious purposes argued that this policy violated the Free Exercise and Free Speech Clauses of the First Amendment. In response, the University argued that allowing such activities in a public space would violate the Establishment Clause. The Supreme Court invalidated the exclusion. 163 Applying the *Lemon* test, the Supreme Court reasoned that permitting student groups to use the facilities on a content-neutral basis would promote free discussion, a secular goal. 164 Moreover, the Supreme Court reasoned, enforcing a religious exclusion would require the monitoring of student meetings, thereby risking excessive entanglements. 165 Finally, the Supreme Court concluded that allowing religious groups to use the facilities would only incidentally help religion. 166 Prominent in the Supreme Court’s analysis was the observation that the use of the facilities for nondevotional exercises would not give rise to an impression that UMKC was sponsoring religion. 167 However, it was not dispositive to the Supreme Court’s analysis that such use of the facilities might happen to help religion.

2. **Between Widmar and Pinette**

*Board of Education of Westside Community Schools v. Mergens* 168 and

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163. See id. at 277.
164. See id. at 271-72 & n.10.
165. See id. at 271-72 & n.11.
166. See id. at 274, 275.
167. See id. at 273-74.
Lamb's Chapel v. Center Moriches Union Free School District\textsuperscript{169} followed conceptually on the heels of Widmar, although Mergens did not feature a majority analysis of the Establishment Clause issue. In Mergens, the Supreme Court interpreted the federal Equal Access Act\textsuperscript{170} to require a local school district to permit a student “Christian Club” to meet on school premises to “read, discuss the Bible, have fellowship, and pray together.”\textsuperscript{171} That Act prohibited public secondary schools that receive federal financial assistance and that maintain a “limited open forum” from denying equal access to students who wish to meet in the forum on the basis of the content of the speech at the proposed meeting.\textsuperscript{172} Justice O'Connor, joined by three other Justices, concluded that permitting the club to meet at the school would not violate the Establishment Clause because school authorities would not lead or direct the meetings and because no message of official approval or endorsement for Christianity would be conveyed by the use of the meeting space.\textsuperscript{173} Similarly, in Lamb's Chapel, the Supreme Court required a school district to permit a group with a religious theme to use a generally available school facility during off-hours even though the facility was not a public forum.\textsuperscript{174}

Although Widmar, Mergens, and Lamb's Chapel were based on rationales that cannot be squared with strict separationism, these cases did manage to straddle separationism and equal access like Everson and Lemon. Such straddling occurred again in the recent decision Capitol Square Review and Advisory Board v. Pinette,\textsuperscript{175} although the straddle in Pinette, like the straddle in Mergens, can only be inferred from what the various opinions in the case had in common. Meanwhile, the Supreme Court's recent decision in Rosenberger v. Rector and Visitors of the University of Virginia\textsuperscript{176} either

\textsuperscript{169.} 508 U.S. 384 (1993).
\textsuperscript{171.} Mergens, 496 U.S. at 232-33.
\textsuperscript{173.} See Mergens, 496 U.S. at 250-52 (plurality opinion). Justice Kennedy, joined by Justice Scalia, reasoned that allowing the students to use the space would not violate the Establishment Clause because the school would not be conferring enough of a benefit upon religion to constitute an establishment, nor would it be coercing students into participating in religion. See id. at 260-61 (Kennedy, J., concurring in the judgment and concurring in part). Justice Marshall, joined by Justice Brennan, concurred in the judgment. See id. at 262-70.
\textsuperscript{174.} See 508 U.S. at 391-97.
\textsuperscript{175.} 515 U.S. 753 (1995).
\textsuperscript{176.} 515 U.S. 819 (1995).
explicitly elevated equal-access over separationist principles or was an instance of contextual decision-making.

3. Capitol Square Review and Advisory Board v. Pinette

In Pinette, the Ohio Ku Klux Klan (the Klan) wanted to erect a cross on Capitol Square, a small park surrounding the Ohio State Capitol Building in Columbus, Ohio. Petitioner, the Capitol Square Review and Advisory Board, was responsible for issuing permits for use of the park. When the Klan applied for a permit, the Board had already allowed at least one private party to place an “unattended display” in the park. The Board denied the Klan’s application, however, on the grounds that permitting a cross to be erected directly in front of the State Capitol would have given at least some people the impression that the state was sponsoring Christianity. The Klan, through its leader, Pinette, obtained an order in the United States District Court for the Southern District of Ohio requiring the Board to issue the permit, and the Sixth Circuit affirmed. The Supreme Court also affirmed.

In the parts of his opinion that constituted the opinion of the Supreme Court, Justice Scalia pointed out in fairly short order that on at least two previous occasions—in Widmar and Lamb’s Chapel—the Court had required instrumentalities of state governments to make generally available public facilities available to religious groups as well. Justice Scalia failed to mention in his discussion of these cases, however, that the Supreme Court had concluded in both instances that granting access to the religious group in question was not likely to be interpreted as a governmental endorsement of religion. Nor, however, did he make

177. See Capitol Square Review and Advisory Bd., 515 U.S. at 758. On the day the Klan filed its application, the Board granted permission to a rabbi to erect a menorah on the park. See id.
178. See id. at 761.
180. See Pinette v. Capitol Square Review and Advisory Bd., 30 F.3d 675 (6th Cir. 1995).
181. See Pinette, 515 U.S. at 770.
182. See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993); Widmar v. Vincent, 454 U.S. 263, 275 (1981). In Lamb’s Chapel, the Supreme Court concluded that “[u]nder these circumstances, as in Widmar, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would
the contrary assertion that a perception of official endorsement of religion would have been irrelevant to the Courts that decided *Widmar* and *Lamb's Chapel*. Meanwhile, Justices O'Connor, Souter, and Breyer, who joined this portion of his opinion, adhered to the familiar rule that the mere appearance of religious favoritism by government officials can, in some instances, constitute a violation of the Establishment Clause, even if the officials' only affirmative acts are to extend a generally available benefit to a group with a religious message.\(^{183}\)

The opaque position staked out by the plurality and joined by the concurring justices preserved the balance between strict separationism and equal access that the Supreme Court had achieved in such varied decisions as *Everson* and *Widmar*. However, although the rationale of *Pinette* followed the inchoate balancing of earlier decisions, the separate opinions in the case illustrated the divergence of views on the Supreme Court and the potential for a radical equal-access principle.

Perhaps most striking was the balance of Justice Scalia's opinion, which was joined by only three other justices.\(^{184}\) In this part of his opinion, Justice Scalia argued that the test for violation of the Establishment Clause, at least with respect to public forums, is not whether there has been an *appearance* of government endorsement of religion, but whether there has actually *been* such endorsement.\(^{185}\) He, thus, demonstrated a willingness to uphold a neutrally applied law against all Establishment Clause challenge, even if the effect of the law would be to promote religion substantially. Meanwhile, both the concurring and dissenting Justices adhered to the familiar practice of balancing.\(^{186}\)

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\(^{183}\) *Lamb's Chapel*, 508 U.S. at 395.

\(^{184}\) See infra note 186 for a discussion of Justice O'Connor's and Justice Souter's opinions in *Pinette*. Justice Breyer joined in these opinions.

\(^{185}\) Chief Justice Rehnquist and Justices Kennedy and Thomas joined this portion of Justice Scalia's opinion. See *Pinette*, 515 U.S. at 763.

\(^{186}\) See *Pinette*, 515 U.S. at 778-82 (O'Connor, J., concurring). Justice Souter espoused a
The Pinette Court thus came within one vote of embracing, at least in one context, a radical approach to equal access that would have cut that principle from any connection to strict separationism. In Rosenberger v. Rector and Visitors of the University of Virginia, by contrast, the Supreme Court either found a fifth vote for the elevation of equal access over strict separationism or engaged in a context-based analysis.

4. Rosenberger

In Rosenberger, the University of Virginia, an instrumentality of the Commonwealth of Virginia, refused to release money from a student activities fund for the printing of a student newspaper, Wide Awake, because of the newspaper's religious message, although the University generally released money from the fund for the expenses of student papers. By a five-four majority, the Supreme Court held that the University could not deny funding to the students without running afoul of the Free Speech and Press Clauses of the First Amendment.

a. Facts

In Rosenberger, the University of Virginia recognized certain student groups as "contracted independent organizations," or similar position. See id. at 785-92 (Souter, J., concurring). Dissenting Justice Stevens was not willing to attribute as much background knowledge to this theoretical passerby as the concurring justices. See id. at 800 n.5 (Stevens, J., dissenting) ("[Justice O'Connor's] 'reasonable person' comes off as a well-schooled jurist, a being finer than the tort-law model.").

The dissenting justices, Justices Stevens and Ginsburg, agreed that the appearance of endorsement alone could suffice to state a violation of the Establishment Clause, but, unlike Justices O'Connor, Souter, and Breyer, maintained that sufficiently apparent endorsement was present in this case. See id. at 806-07 (Stevens, J., dissenting) (arguing that "the Constitution generally forbids the placement of a symbol of a religious character in, on, or before a seat of government"), 817 (Ginsburg, J., dissenting) ("If the aim of the Establishment Clause is genuinely to uncouple government from church, a State may not permit, and a court may not order, a display of this character [citation omitted]."). In fact, their essentially prophylactic argument approached strict separationism.

187. In this regard, the Supreme Court came close to embracing the principle of "no religious classification" advocated by Philip Kurland, pursuant to which the two Religion Clauses would be unified to prohibit any official classification based upon religion, whether by way of inclusion or exclusion. PHILIP B. KURLAND, RELIGION AND THE LAW 18 (1962).

189. See id. at 823-27.
190. See id. at 845-46.
“CIO’s.” This designation entitled the group to use certain facilities belonging to the University, such as meeting rooms and computer terminals.191 Wide Awake Productions (WAP), the organization that published Wide Awake, was a CIO, although it would have been ineligible for that status had it been a “religious organization,” defined by University Guidelines as “an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.”192 In addition, the University maintained a “Student Activities Fund,” or “SAF,” for which it collected fourteen dollars per semester from each full-time student. Under guidelines promulgated by the University, CIO’s could request an SAF disbursement for “appropriate” third-party expenses, subject to certain exceptions.193 One such exception was that the University would not release SAF funds to pay for the costs of printing any paper that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”194

Pursuant to this guideline, the Appropriations Committee of the Student Council denied WAP’s application for SAF funding of their newspaper, Wide Awake: a Christian Perspective at the University of Virginia.195 WAP could not realistically deny that this exception applied to its activities. In fact, as Justice Souter pointed out in his dissent, the editors and contributors to the journal adopted an explicitly evangelical Christian approach to journalism.196 After the full Student Council and the Student Activities Committee sustained the Appropriations Committee’s decision,197 WAP filed suit in the United States District Court for the Western District of Virginia, arguing that the University had violated its rights to freedom of speech and press, to free exercise of religion, and to equal protection of the laws.198 The district court ruled in favor of the University,199 and the Fourth Circuit affirmed.200 In an opinion written by Justice Kennedy and joined

191. See id. at 823.
192. Id. at 826.
193. Id. at 824-25.
194. Id. at 825.
195. Id. at 827.
196. See id. at 868 (Souter, J., dissenting). See infra text accompanying note 217 for an excerpt of Justice Souter’s argument about the newspaper’s evangelism.
197. See Rosenberger, 515 U.S. at 827.
198. See id. at 827.
200. See Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 288 (4th
by four other Justices, the Supreme Court reversed, adhering to an apparently equal-access rationale. Justice Souter, joined by three other justices, dissented on separationist grounds.

b. The Opinion of the Supreme Court

As in Widmar, Mergens, and Lamb's Chapel, the Establishment Clause played a defensive role in the litigation in Rosenberger. In other words, the University was trying to use the Clause as a shield to WAP's action under other provisions of the Constitution. Consequently, the Supreme Court first had to decide whether WAP had a persuasive complaint under those provisions. After deciding that it did, the Supreme Court turned to the University's defense.

The SAF, Justice Kennedy noted, was generally available for the support of, among other things, the student press at the University. Because it could be administered without regard to the religious or nonreligious viewpoint of recipients, Justice Kennedy concluded that using the SAF to pay for the printing of Wide Awake would not violate the Establishment Clause. Invoking the equality principle, he argued that such use would satisfy the requirement of "neutrality towards religion," which he described as a "significant factor" in upholding official practices against challenge under the Establishment Clause.

Had Justice Kennedy stopped here, his opinion for the Supreme Court substantially would have subordinated separationist to equal-access principles. That is, the Supreme Court would have held that an instrumentality of a state government could pay for the printing of an explicitly religious newspaper if the benefit conferred was generally available to nonreligious newspapers. However, Justice Kennedy mitigated the impact of his reasoning by going on to identify certain technical distinctions that, he argued, justified the Supreme Court's decision. For instance,

Cir. 1994).

202. See id. at 863 (dissenting opinion).
203. See id. at 837. Justice Kennedy argued that Wide Awake's approach to issues of student interest was more a point of view than a distinct subject matter. Consequently, he reasoned, the University could not exclude it without discriminating on the basis of viewpoint, an act that would presumptively violate the Free Speech and Press Clauses of the First Amendment. See id. at 830-31, 835-37.
204. See id. at 840.
205. Id. at 839.
he noted that the money at issue came from a student fund and not a general tax, such as the tax that Virginia would have imposed had Madison not prevailed in the 1780s. Moreover, Justice Kennedy observed that WAP would never receive SAF money directly. Finally, he argued that there was little chance that SAF funding for WAP would be perceived as governmental support for religion due to the "pains" taken by the University to dissociate itself from WAP. In light of these caveats, the Rosenberger Court arguably did not elevate equal-access principles over separationist principles, particularly in light of Pinette, decided the same term, and in light of Justice O'Connor's concurrence in Rosenberger itself.

c. Justice O'Connor's Concurrence

Although Justice O'Connor joined the opinion of the Supreme Court, she wrote separately to stress her belief that the holding in Rosenberger was predicated on certain circumstances present in that case and not necessarily likely to recur often. Her opinion gave a temporary flavor to the assertions of the majority. The factors that led her to perceive Rosenberger as something of an ad hoc decision were as follows: (1) the newspaper explicitly disclaimed any association with the University; (2) the University would pay Wide Awake's vendors directly; therefore, at no point would the students' money fall into the hands of WAP; (3) the press at the University comprised numerous alternative points of view, reducing the possibility that Wide Awake would dominate discourse or that people could reasonably perceive official endorsement of religion; and (4) Justice O'Connor noted that students

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206. See id. at 840-41.
207. See id. at 842-44.
208. Id. at 841-42.
209. See id. at 852 (O'Connor, J., concurring).
210. See id. at 849-50 (O'Connor, J., concurring).
211. See id. at 850 (O'Connor, J., concurring).
212. See id. at 850-51 (O'Connor, J., concurring). In this regard, Justice O'Connor's opinion in Rosenberger was reminiscent of her opinion in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995). In her separate opinion in Pinette, Justice O'Connor argued that the Capitol Square Review and Advisory Board could not justify denying the KKK a permit to place a cross on Capitol Square, not only because the Free Speech Clause of the First Amendment generally required the government to adopt a neutral policy with regard to the substance of a speaker's message, but also because no reasonable person would have ascribed the message communicated by the Klan's cross to the State of Ohio. See id. at 783 (O'Connor, J., concurring).
who objected to paying for the printing of *Wide Awake* theoretically could receive a partial rebate from the SAF. In Justice O'Connor's mind, these factors dissociated the state from the newspaper enough to deprive the University of a legitimate basis for denying funding to the students.

**d. Justice Souter's Dissent**

Justice Souter, joined by three other justices, disagreed sharply with the majority, describing the holding as the Supreme Court's first approval of "direct funding of core religious activities by an arm of the State." In making this argument, he reiterated classic separationist principles. In Justice Souter's eyes, *Wide Awake's* message was distinctly unlike that of any ordinary organ of "student news, information, opinion, entertainment, or academic communicatio[n]"—the activities that the University sought to encourage with funding from the SAF. Instead, Justice Souter saw *Wide Awake's* struggle as distinctively religious and not merely in an academic sense:

The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

For Justice Souter, the distinction between speech about religion and "the preaching of the word" made all the difference. He argued that requiring the University to apportion money from the SAF to *Wide Awake* fell squarely within the Establishment Clause's prohibition of the direct subsidies of religious practice and propagation. He supported this argument by referring to Virginia's experiences during the revolutionary and post-revolutionary period. With this history in mind, Justice

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214. See id. at 852 (O'Connor, J., concurring).
215. Id. at 863 (Souter, J., dissenting).
216. Id. at 867-68 (Souter, J., dissenting).
217. Id. at 868 (Souter, J., dissenting).
218. Justice White made a similar argument in his dissent in *Widmar v. Vincent*, 454 U.S. 263 (1981) (White, J., dissenting), that there is a constitutionally significant difference between speech "about religion" and acts or words of devotion. Id. at 284 (White, J., dissenting). Like Justice White, Justice Souter discerned such an operative difference in Rosenberger. See Rosenberger, 515 U.S. at 867 (Souter, J., dissenting).
219. See Rosenberger, 515 U.S. at 868 (Souter, J., dissenting).
220. See id. at 868-72 (Souter, J., dissenting).
Souter concluded that the majority's holding was flatly inconsistent with the clear mandate of the Constitution.\(^\text{221}\)

The crux of Justice Souter's contention was that the majority had confused the "basic rule" of the Establishment Clause—the prohibition on direct aid to religion—with its "marginal criterion"—the requirement of neutrality when affirmative aid inures to the benefit of religion.\(^\text{222}\) Thus, Justice Souter called for a zone of activity from which all government programs, including programs of general applicability, would be excluded. According to Justice Souter, the mere fact that including WAP within the SAF was a "neutral" act, although "relevant," was not dispositive because the Supreme Court should have gone on to ask whether opening the SAF to *Wide Awake* would cause public money to go to the support of religion.\(^\text{223}\) If the majority had addressed this question, he argued, it would have upheld the University's decision. In fact, he noted, the majority itself had half-recognized the necessity of looking beyond mere neutrality—by taking pains to distinguish a student activities fee from a tax and by noting that no money would flow directly from the government to WAP\(^\text{224}\)—but had failed to draw the necessary conclusions.

According to Justice Souter, the fact that students' money would bypass WAP on its way to the printer was irrelevant because *Wide Awake* would be receiving public money in its capacity as an evangelical newspaper.\(^\text{225}\) He saw this as distinct from instances in which the Supreme Court had upheld schemes pursuant to which public money ultimately ended up in the hands of religious entities. In those cases, Justice Souter argued, the government had made money available to private parties on the basis of neutral criteria, just as it would in paying its employees, and those parties had then elected, as private citizens, to forward this money to religious entities.\(^\text{226}\)

\(^{221}\) See id. at 873-74 (Souter, J., dissenting).

\(^{222}\) Id. at 878-79 (Souter, J., dissenting).

\(^{223}\) Id. at 877-78 (Souter, J., dissenting) ("[T]he Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies.").

\(^{224}\) See id. at 864-65 (Souter, J., dissenting).

\(^{225}\) See id. at 886-87 (Souter, J., dissenting).

e. The Significance of Rosenberger

The Supreme Court’s decision in Rosenberger may have depended critically upon the facts of the case, as Justice O’Connor suggested. If this is true, then Rosenberger is evidence that the Supreme Court has adopted a contextual approach to the Religion Clauses.277 If so, the proper question for critical review would be whether the factors in the Supreme Court’s analysis—either those adduced by Justice Kennedy for the majority or those adduced by Justice O’Connor in her concurrence—are accurately perceived and persuasively relevant. If, on the other hand, the Supreme Court’s decision in Rosenberger portends a blanket adoption of a radical equal-access approach to nonestablishment, the argument surely fails that strict separationism has carried the day in the interpretation of the Establishment Clause.

D. Summary

I have attempted to demonstrate that the Supreme Court has not successfully resolved the ambiguity left by the founders regarding the nature of religious liberty in the United States. Although Everson’s opening dictum was separationist, the decision in that case ultimately turned upon a balancing of equal-access, free-exercise, and separationist principles. Moreover, it was this balancing test, not Everson’s strict separationist dictum, that ultimately evolved into the longstanding test for adjudicating disputes under the Establishment Clause, the three-part test of Lemon v. Kurtzman. In fact, aside from decisions involving religion and the public schools, the Supreme Court has never embraced anything close to strict separationist principles. In addition, the accommodation line of cases cannot be reconciled with

277. Another decision, handed down after Rosenberger, that appears to reflect a contextual approach to nonestablishment is Agostini v. Felton, decided in 1997. See 117 S. Ct. 1997. In Agostini, the Supreme Court upheld New York City’s practice of assigning municipal employees to provide remedial education in private, sectarian schools. In so doing, the Supreme Court overruled its decision in Aguilar v. Felton, 473 U.S. 402 (1985), that the practice constituted an establishment of religion. See id. at 413. Although the Supreme Court in Agostini more or less subjected New York’s practice to the three prongs of Lemon, see Agostini, 117 S. Ct. at 2101, 2014-15, its analysis rested on a somewhat case-specific evaluation of the impact of the program and the likely behavior of public employees in a sectarian environment. See id. at 2010-16. Of course, whenever a case turns on Lemon’s second prong, the critical question is whether the practice at issue has a religious effect that exceeds its secular effect. This would appear to call for a challenging, if not impossible, empirical analysis. Thus, even Lemon can be contextual, as long as the practice at issue has a secular purpose and some secular effect.
any version of separationism, ranging from the strict separationism of Everson’s dictum to the modest separationism of such varied decisions as Everson itself, Lemon, Widmar, Lamb’s Chapel, Pinette, or Rosenberger. Moreover, the equal-access line of decisions not only draws upon principles, such as equality and free exercise, that require a flexible version of separationism, but this line of decisions, if carried to its logical limits, would undermine almost any notion of separationism. Finally, the divergence of opinion in such recent decisions as Pinette and Rosenberger emphasizes the failure of any coherent formal interpretive maxim for the Establishment Clause to emerge in the modern era. Consequently, it is not persuasive to argue that the Supreme Court has resolved the ambiguity left by the founders to the satisfaction of the polity. Instead, that ambiguity is still with us, as a matter of constitutional doctrine and as a matter of political culture. In other words, the Supreme Court has never completely embraced separationism.

IV. CONTEXTUAL APPROACHES TO NONESTABLISHMENT

In light of the failure of strict separationism or of any other formal interpretation of the Religion Clauses to capture the debate, a contextual approach to nonestablishment may be the only feasible course. Moreover, such a course may better serve the underlying needs of much or all of the populace in terms of religious growth. In Part IV-A, I will discuss some of the contex-

228. Lemon, for example, has been challenged on a number of fronts, including the home front. See, e.g., Lee v. Weisman, 505 U.S. 577, 644 (Scalia, J., dissenting) (“Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test . . .”). See also McConnell, supra note 7, at 1-2 (“The much-discussed ‘tension’ between the two Religion Clauses largely arises from the Court’s substitution of a misleading formula (the three-part Lemon test . . .) and subsidiary, instrumental, values (especially separation of church and state) in place of the central value of religious liberty.”).

229. As Franklin Gamwell writes: [T]he Republic has never been more uncertain about the relation between politics and religion to which it is committed. Roughly speaking, there is a persistent division between contemporary separationists and contemporary religionists. For the former, the constitutional disestablishment of religion means that religious convictions are properly separated from the activities of the state; for the latter, the constitutional protection of religious exercise means that religious conviction is essential to civic virtue and the well-being of the civil order. Both positions endorse the First Amendment, but neither has been able to persuade the other that it does so consistently. Gamwell, supra note 4, at 3.
tual approaches to the Religion Clauses that have been proposed.230 Then, in Part IV-B, I will identify and concede some weaknesses to contextual analysis, yet conclude that courts nonetheless should use such analysis.231 Finally, in Part IV-C, I will argue that a contextual approach best protects the innate human need for religion.232

A. Some Proposals

Notwithstanding the formalism of many of the Warren- and Burger-era decisions involving the Establishment and Free Exercise Clauses, even then members of the Supreme Court occasionally indicated a preference for flexible interpretation of the Religion Clauses. Dissenting from the Supreme Court’s 1963 decision Abington School District v. Schempp, for instance, Justice Stewart called for a less “sterile” or “wooden” interpretation of the Establishment Clause than that adopted by the majority.233 Moreover, such an approach was arguably implicit in such accommodationist decisions as Zorach, Walz, and Marsh v. Chambers.234 In fact, a sophisticated jurist armed only with Lemon could arguably apply the Religion Clauses contextually. In recent years, however, contextual tests have played an increasingly important, although perhaps not authoritative, role in Establishment Clause doctrine. In this subpart, I will briefly describe several different, but nevertheless contextual, approaches to nonestablishment. Specifically, these are Justice O’Connor’s “endorsement” test,235 Justice Kennedy’s “coercion” test,236 which echoed a test set forth by Michael McConnell some time before,237 and Alan Schwarz’s “no imposition” rule.238 In this subpart, I will also briefly discuss Michael McConnell’s three rules for “permissible accommodations” of religion by government, which reflect the same basic

230. See infra notes 233-59 and accompanying text.
231. See infra note 260 and accompanying text.
232. See infra notes 261-86 and accompanying text.
235. See infra notes 241-45 and accompanying text.
236. See infra notes 246-52 and accompanying text.
238. See infra note 253 and accompanying text.
Perhaps the most prominent advocate of a contextual approach to the Establishment Clause has been Justice O'Connor. Her proposals have taken both a general and a specific form. As a general matter, she has advocated a "decentralization" of Establishment Clause doctrine, calling for a number of tests implementing the Clause, each designed to address a specific subject matter. Specifically, she has often promoted an endorsement test, according to which the interpretive maxim for the Establishment Clause would be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."

Justice O'Connor first set forth this test in a concurring opinion in *Lynch v. Donnelly*. In *Lynch*, the issue was whether a municipality could maintain a Christmas display on a privately owned park. The display included a nativity scene, as well as a number of secular symbols associated with Christmas. The Supreme Court, with Chief Justice Burger writing for the majority, essentially applied *Lemon* and allowed the display, reasoning that its purpose and primary effect were to promote the secular nature of the Christmas holidays, not their religious nature. Although Justice O'Connor joined the opinion of the Supreme Court, she wrote separately, calling for a refinement of *Lemon*. Specifically, she argued that the prongs of the test should be thought of in terms of their value in assessing the impact of official practices on people's religious identity and not abstractly. According to Justice O'Connor, the central question in an Establishment Clause dispute should be whether the practice being

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239. See infra notes 254-57 and accompanying text.
Justice O'Connor stated:

[A]nother danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

*Id.* (O'Connor, J., concurring in part and concurring in the judgment). She further stated that "[t]he hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework." See id. at 2500 (O'Connor, J., concurring in part and concurring in the judgment).

243. See id. at 681, 683.
244. See id. at 687-89 (O'Connor, J., concurring).
challenged "makes adherence to religion relevant to a person's standing in the political community."245

Like Justice O'Connor, Justice Kennedy has advocated a contextual coercion test for violations of the Establishment Clause, although his test appears to have a higher threshold before official action is deemed to violate the Clause than Justice O'Connor's test. Justice Kennedy's first articulation of this test was in a separate opinion in *Allegheny County v. ACLU, Greater Pittsburgh Chapter.*246 One of the main issues in this case was whether a private group could display a creche on the main staircase of a county courthouse. The Supreme Court held that it could not, due to the absence of secular iconography to detract from the religious message of the display.247 Dissenting from this portion of the Supreme Court's holding, Justice Kennedy argued that mere "passive displays," such as the one at issue in the case, did not violate the Establishment Clause because they posed no real risk of infringing on freedom of religion.248 Specifically, Justice Kennedy argued:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."249

Similarly, Justice Kennedy argued in his opinion for the Supreme Court in *Lee v. Weisman*250 that the important question in an Establishment Clause case is whether the government has "coerced" an individual "to support or participate in religion or its exercise."251 In that case, the issue was whether a public high school could have a rabbi deliver a nondenominational prayer at the opening of commencement ceremonies. The Supreme Court, in an opinion written by Justice Kennedy, ruled that it

245. See id. at 687 (O'Connor, J., concurring). The Supreme Court appeared to fold her test into *Lemon* in the later case of *Allegheny County v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 592-94 (1989).
247. See *Allegheny County,* 492 U.S. at 598, 601-02.
248. See id. at 662, 664-65 (Kennedy, J., concurring in the judgment in part and dissenting in part).
249. See id. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984)).
251. See id. at 587.
could not. In striking down the practice, the Weisman Court neither invoked nor even mentioned Lemon. Instead, the five justices who formed the majority simply agreed that high school students who were uncomfortable with the prayer and who were given the option to leave the ceremony during the prayer might feel “coerced” into adopting a religious practice in order to avoid feeling excluded from the ceremony.252

In 1968, Alan Schwarz argued that courts should interpret the Establishment Clause to prohibit official aid to religion that has as its “motive or substantial effect the imposition of religious belief or practice . . . .”253 This focus upon the “imposition” of religion closely resembles Justice Kennedy’s focus upon “coercion,” and, in fact, the two standards may be the same. Finally, Michael McConnell has argued with respect to permissible accommodations of religion by government254—that is, practices that are not mandated by the Free Exercise Clause but that accommodate religion—that such practices do not violate the Establishment Clause as long as they “facilitate the exercise of beliefs and practices independently adopted rather than inducing or coercing beliefs or practices acceptable to the government,”255 do not “interfere with the religious liberty of others by forcing them to participate in religious observance,”256 and do not “favor one form of religious belief over another.”257 Although McConnell proposed these principles as means of deciding whether voluntary practices of governments violate the Establishment Clause, they suggest a contextual approach to evaluating any government practice regarding religion and, in that sense, resemble the tests advocated by Schwarz and Justices O’Connor and Kennedy.

I will not argue that these tests are the same, but they share important characteristics. In particular, they share the characteristic of focusing on the objectively foreseeable impact of an official practice on individual religious growth. In doing this, these tests both reflect voluntarism and contemplate the possibility of atheism. Moreover, they can be distinguished from tests that do

252. See id. at 593-96.
253. Schwarz, supra note 7, at 693 (“[The Establishment Clause] should be read to prohibit only aid which has as its motive or substantial effect the imposition of religious belief or practice[,] and . . . the Supreme Court’s decisions and much of its language are consistent with this proposed standard.”).
254. McConnell, supra note 7, at 34-41.
255. Id. at 35.
256. Id. at 37.
257. Id. at 39.
not ask how specific practices actually affect people. In this respect, these tests are conceptually similar to tests for negligence based upon what a reasonable person would do in particular circumstances.

B. Some Weaknesses

The weaknesses of a contextual approach to the Establishment Clause are manifold and come easily to mind. Perhaps most obvious is the abstract position that the separation of church and state is both a formal and a desirable imperative of the Establishment Clause. I have attempted to demonstrate the failure of the interpretive aspect of this argument in Part III of this paper, and I will attempt to address the failure of its political aspect in Part IV-C.

Another potent criticism is that officials will never know the meaning of the Establishment Clause and will be exposed to constant litigation. Similarly, a legal Platonist might object to the Constitution forbidding a specific practice in one context, but not in another. Although there is merit to these arguments, there are also responses. First, if the subject is sufficiently important, there is virtue in getting the right answer. If religion is thought of as an elective endeavor, no more important to its adherents than athletics or preservation of the mailbox rule, it follows that a clear rule easily administered by local magistrates would be preferable. However, if, as I have argued, religion is a defining aspect of character, the importance of arriving at the best decision practically achievable heightens. The difficulty of combating alcoholism without such quasi-religious organizations such as A.A. supports this line of thought. Moreover, I attempted to demonstrate in Part III of this Article that, notwithstanding years of effort, the Supreme Court itself has failed to establish coherent uniform rules for the Religion Clauses. As I have noted, the Establishment Clause and the Free Exercise Clause do not necessarily leave room for each other, at least as the Su-

258. Compare Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.").

259. In fact, Justice O'Connor argued in terms of a "reasonable person" in her separate opinion in Pinette, and other justices responded to her argument. See supra note 186.
preme Court has interpreted them. Consequently, officials and courts have no real alternative but to try to understand what the two Clauses together are meant to do and to remain mindful of that deeper meaning, deciding cases in context, with an eye toward the actual impact of official practices on private choices and growth. Over time, arguably, rules will emerge that will work and that will aggregate with other rules to establish clear, tested doctrine. In other words, if the Religion Clauses are really intended to protect religious growth but, beyond that, not to interfere with official practices, timeless doctrine is not a worthwhile goal. Assuming that neither the text of the Constitution nor judicial propriety prohibits a contextual approach to the Establishment Clause, I will now argue that such an approach may comport better with psychology and theology than separationism.

C. Squarely Addressing Theology and Psychology

I have argued that the intentions behind the Religion Clauses neither precluded nor required modest, even-handed association between church and state. I have further argued that the practices of the founding generation after ratification of the Religion Clauses confirms the existence of this leeway. Finally, I have argued that the Supreme Court’s abortive attempts to resolve this ambiguity in favor of strict separation have demonstrated the difficulty of such a resolution. I will now attempt to argue with reference to nonlegal sources that there may be theological and psychological reasons why such a resolution may not be advisable.

As the historian Christopher Dawson has argued, people in ancient cultures had little, if any, difficulty imagining a world populated by forces beyond their control or understanding—forces that may otherwise be described as gods. Consequently, they did not readily distinguish between religion and such other social phenomena as education, medicine, charity, and even

261. See CHRISTOPHER DAWSON, THE AGE OF THE GODS 22-23 (1928) (“[T]he study of primitive culture is intimately bound up with that of primitive religion. . . . Wherever and whenever man has a sense of dependence on external powers which are conceived as mysterious and higher than man’s own, there is religion, and the feelings of awe and self-abasement with which man is filled in the presence of such powers is essentially a religious emotion, the root of worship and prayer.”).
262. Virtually all universities and schools began as centers of religious study, and
politics. Military campaigns, migrations, or the location of villages, for instance, often depended upon divine instruction, or what was perceived as divine instruction.\textsuperscript{265}

Needless to say, the world has changed since then. The psychoanalyst Carl Jung, for instance, argued that the mental state with which we are most familiar, consciousness, gradually emerged during and after the period of which Dawson wrote.\textsuperscript{266} Similarly, another psychoanalyst, Erik Erickson, suggested that the first expression of the modern psyche was by Martin Luther, who was courageous enough in 1520 to oppose dogma that

\[\text{many still are. See, e.g., 1 William Blackstone, Commentaries 54 ("To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded } \text{ad studendum et orandum, for the encouragement and support of religion and learning.").}\]

\text{263. Medicine and religion have a long history of being essentially the same thing. See Jung, C.W., supra note 2, at 102-04 at } \text{\S 230-31 ("Modern therapy is not much aware of this, but in ancient medicine it was well known that the raising of the personal disease to a higher and more impersonal level had a curative effect"), and millions of people recognize the possibility of healing by faith. The writers of Alcoholics Anonymous, the "Big Book" of the A.A. program, similarly claim that, although alcoholism is an illness, the appropriate treatment for it is essentially spiritual. See Alcoholics Anonymous World Services, Inc., Alcoholics Anonymous 18, 25 (1955) [hereinafter Alcoholics Anonymous].}\n
\text{264. Charity is mandated and even institutionalized by many religious traditions. See, e.g., Robert M. Cover, Obligation: A Jewish Jurisprudence of the Social Order, 5 J.L. & Religion 65, 66 (1987) ("The basic word of Judaism is obligation or mitzvah."). See also 1 John 3:17-18.}\n
\text{[a]ny examination of Roman government in action leads immediately to the practices, concepts, and terms of the state religion and to a wide variety of ritual. Both permeated public life. The Greek historian Polybius . . . expressed puzzlement over the degree to which the Romans had turned their religious observances into rites and the extent to which these formalities entered into public and private life. These same formal attributes, moreover, also characterized many seemingly secular operations. An investigation into the concrete process of administration, therefore, is also a study of the place of ritual and of religion in Rome's public life.}\n
\text{Id.}\n
\text{When Carl Jung asked certain East Africans about their dreams, they replied that they did not dream, for that was the prerogative of their leaders. One of their leaders then explained to Jung that he did not dream either because there was now a colonial administrator in the district, who told the people where to live and who knew everything about war and diseases. For these people, Jung argued, "dreams were formerly the supreme political guide, the voice of Mungu, 'God.'" 11 C.G. Jung, The Collected Works of C.G. Jung 18, } \text{\S 30 (emphasis in original) (Sir Herbert Read et al. eds., 2d ed. 1969) [hereinafter Jung, (2d ed.). See also Jung, C.W., supra note 2, at 111-12, } \text{\S 250 (discussing the exegesis of dreams with a religious theme in other ancient political fora).}\n
\text{266. See Jung, C.W., supra note 2, at 193-94, } \text{\S 439-40.}\]
served as the fabric of western existence.267

The western world, however, has not pulled off this emergence flawlessly. Jung argued that, as we came to understand and to objectify nature, the world came to be no longer full of gods. Instead, our image of a deity gradually retreated to deep within us, largely beyond our conscious selves.268 This, in turn, permitted, or even required, us to deny the role of religion as part of the human experience.269 Consequently, as Warren Nord argues:

[W]e have separated the sacred and the secular. Most of us no longer believe that religious ideas and values are integral to our understanding of history and nature, psychology and society, the economy and politics. As Wilfred Cantwell Smith put it, religious traditions that were once "coterminous with human life in all its comprehensiveness, have actually found themselves supplemented more and more by considerations from other or newer sources, so that the religious seems to be one fact of a person's life alongside others."270

However, as Jung and others have argued, such denial or repudiation of religion as part of the human experience is not necessarily healthy because, after all, we may need some image of a god:

It seems dangerous for such a man [as Nietzsche] to assert that "God is dead": he instantly becomes the victim of inflation. Far from being a negation, God is actually the strongest and most effective "position" the psyche can reach, in exactly the same sense in which Paul speaks of people "whose God is in their belly." The strongest and therefore the decisive factor in any individual psyche compels the same belief or fear, submission or devotion which a God would demand from man.271

268. See 11 JUNG (2d ed.), supra note 265, at 82-83, ¶ 140.
269. See 12 JUNG, (2d ed.), supra note 265, at 50-52, ¶ 60. Jung wrote:

The resistance of the conscious mind to the unconscious and the deprecation of the latter were historical necessities in the development of the human psyche, for otherwise the conscious mind would never have been able to differentiate itself at all. But modern man's consciousness has strayed rather too far from the fact of the unconscious. We have even forgotten that the psyche is by no means of our design, but is for the most part autonomous and unconscious.

Id. at 50, ¶ 60.
271. JUNG (2d ed.), supra note 265, at 85-86, ¶ 142 (citations omitted). Similarly, in SYMBOLS AND THE INTERPRETATIONS OF DREAMS, published in 1961, Jung wrote:

[1]n our time there are countless people who have lost faith in one or
According to Jung, who devoted much of his professional life to the care of patients, religions are metaphors for the development of the psyche. For his purposes, it mattered less whether his patients embraced a particular religion than whether they somehow authentically participated in the process that he identified as distinctly human and critical to the psyche’s proper development.

Jung’s approach to religion offers a valuable perspective on the debate over the proper scope of the Establishment Clause. Instead of concentrating in the abstract on what the Constitution requires, knowing that the Constitution offers considerable leeway, Jung’s approach suggests that we should think in terms of what people require. Moreover, Jung’s approach has the advantage of not advocating on behalf of traditional religion per se, except where traditional religion presents itself as authentic to a particular individual.272 In fact, Jung’s statements bear some relation to the idea of voluntarism that permeated the founding generation.273

other of the world religions. They do not understand them any longer. While life runs smoothly, the loss remains as good as unnoticed. But when suffering comes, things change very rapidly. One seeks the way out and begins to reflect about the meaning of life and its bewildering experiences. . . . People feel that it makes, or would make, a great difference if only they had a positive belief in a meaningful way of life or in God and immortality. The spectre of death looming up before them often gives a powerful incentive to such thoughts. From time immemorial, men have had ideas about a Supreme Being (one or several) and about the Land of the Hereafter. Only modern man thinks he can do without them. Because he cannot discover God’s throne in heaven with a telescope or radar, or establish for certain that dear father or mother are still about in a more or less corporeal form, he assumes such ideas are not “true.” I would rather say that they are not “true” enough. They have accompanied human life since prehistoric times and are still ready to break through into consciousness at the slightest provocation.

Jung, C.W., supra note 2, at 246, ¶ 565.

272. See Jung (2d ed.), supra note 265, at 45, ¶ 79 (“I reinforce a means of defence against a grave risk, without asking the academic question whether the defence is an ultimate truth. I am glad when it works and so long as it works.”).

273. The following excerpt from a discussion that took place after Jung lectured to the Guild of Pastoral Psychology in London in 1939 is illustrative of his thinking on this subject:

The Bishop of Southwark

What are we to do with the great majority of people we have to deal with who are not in any church? . . .

Professor Jung

I am afraid you can’t do anything with such people. The Church is there and is valid for those who are inside. Those who are outside the walls of the Church cannot be brought back into the Church by the ordinary means. . . . I wish that a new generation of clergymen would come in and
In light of observations like those made by Jung, it can be argued that the project of “secularizing” a society or “privatizing” religion is far more easily said than done. In fact, as John Garvey and Alan Schwarz have argued, the treatment of religion as “elective” is both theologically offensive and, because of the extent of governmental activity in the twentieth century, potentially oppressive for many. Consequently, the privatization of religion in the era of positive government arguably violates many of the principles of religious liberty identified by Witte.

Garvey touches on this issue in the context of evaluating what he describes as “the autonomy theory” of religious freedom. According to this theory, the value of religious freedom is that it affords the individual maximum authority to choose a particular religion, or no religion at all. In fact, Garvey argues, the essential value in the autonomy model is not the quality of the outcome, but the existence of the choice. He maintains, however, that this view is predicated on an assumption about human nature that we are able to withdraw from our convictions and desires and reorganize them according to more deeply held preferences, referred to by Garvey as “second-order preferences,” that we freely choose. However, Garvey argues that this assumption:

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do the same as they do in the Catholic Church: that they would try to translate the language of the unconscious, even the language of dreams, into proper language. [There is a member of a German liturgical movement who] has given me quite a number of instances, which I am able to check, where he translated the figures of dreams into dogmatic language with the greatest success, and these people quietly slipped back into the order of the Church. . . . Several of my patients became Catholics, others went back into the Church organization. But it must be something that has substance and form. It is by no means true that when one analyses somebody he necessarily jumps into the future. He is perhaps meant for a church, and if he can go back into a church, perhaps that it is the best thing that can happen.

Mr. Morgan:

What if he can’t?

Professor Jung:

Then there is trouble; then he has to go on the Quest; then he has to find out what his soul says; then he has to go through the solitude of land that is not created.

Jung, C.W., supra note 2, at 284-85, ¶ 670-73. Jung also described his own inability to find meaning in traditional religious dogma. See id. at 276, ¶ 632.

274. See Garvey, supra note 48, at 44-45.
275. See id. at 45.
276. Id. at 44.
is inconsistent in several ways with recurring ideas in Christian theology. The notion of original sin is meant to suggest the inherent imperfection of human nature. In the strongest statements of this idea—Augustine's is a good example—it entails our inability to master sinful desires and to freely will doing good. In the common phrase, human nature is the slave of sin. The counterpoint to this unhappy view of human nature is the idea of grace. It is a kind of sharing in divine life, a power that enables us to control sinful desire, live good lives, and win salvation. But grace is given to us by God gratuitously... It is out of our control. This aspect of grace, followed to its logical conclusion, leads to the Calvinist notion of predestination: our salvation is entirely in God's hands, and some are not saved.277

Adherents to this sort of faith, Garvey argues, would reject the kind of "choice" underlying the autonomy model because the choice is not as much the individual's as God's. As he puts it, "I might have to accept God's choice and cooperate in carrying it out, but I am cast as a supporting actor."278 Garvey concludes that, for those who take this view of human nature, the "freedom" to run one's life according to elective second-order preferences is not true freedom. "It sounds paradoxical," Garvey writes, "but it is accurate to say that Christian freedom consists not in making our own choices but in obeying the law of God."279 In light of Garvey's observation, we should hesitate to adopt an approach to the Religion Clauses that trivializes the deeply held beliefs of some—or many.

Similarly, Schwarz argues that ignoring the theological source of social or personal imperatives or suggesting an alternative, secular source trivializes, and may even deny, theological explanations. "Religion," he writes, "is most necessary, and hence most believable, when it provides the sole explanation for all phenomena. A system which provides answers without reference to relig-

277. Id. at 45 (internal footnotes omitted). Compare Jung:
[W]e are so used to the idea that psychic events are wilful and arbitrary products, or even the inventions of a human creator, that we can hardly rid ourselves of the prejudiced view that the psyche and its contents are nothing but our own arbitrary invention or the more or less illusory product of supposition and judgment. The fact is that certain ideas exist almost everywhere and at all times and can even spontaneously create themselves quite independently of migration and tradition. They are not made by the individual, they just happen to him—they even force themselves on his consciousness. This is not Platonic philosophy but empirical psychology.
JUNG (2d ed.), supra note 265, at 7, ¶ 5.
278. GARVEY, supra note 48, at 46.
279. Id.
Garvey and Schwarz make distinct, but related, arguments. Garvey argues that the government must in some instances support religion because treating religion as purely elective is in some respects derogatory toward religion. Similarly, Schwarz suggests that prolonged exposure to coherent explanations of phenomena that exclude supernatural explanations ultimately disparages such explanations.

The theological arguments made by Garvey and Schwarz underscore the importance in the lives of at least some people—and Jung might argue all people—of retaining a connection to the nonsecular and of believing somehow that that connection is more than "elective" as an economist might use the word. As Garvey puts it, the bottom line of the Religion Clauses must be that "God [i]s [g]ood." But, if Garvey and Schwarz are correct, then strict separation, which will not permit government aid to religion in general, is antithetical for theological reasons to many of the principles embraced by the founders as essential to the American experiment in religious liberty.

Moreover, if Garvey and Schwarz are correct, it is not a persuasive response that only government is precluded from supporting religion because modern, positive government is not just a "posse" put together to solve a particular problem, but embraces vast amounts of social territory in which religion formerly played a primary role, such as in education, medicine, and charity. As Schwarz argues with respect to the exclusion of religious ideas from the public school curriculum: "Ignoring the theological source of the imperative—and, worse, supplying an alternative secular source—tends to belittle, perhaps even negate, the theological." 283

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280. Schwarz, supra note 7, at 700-01.
281. GARVEY, supra note 48, at 42.
282. As Justice Kennedy argued in Allegheny County:
    In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality. Allegheny County v. ACLU, 492 U.S. 573, 657-58 (Kennedy, J., concurring the judgment in part and dissenting in part).
283. Schwarz, supra note 7, at 700 (footnote omitted). See also James Hitchcock, Church, State, and Moral Values: The Limits of American Pluralism, in LAW AND RELIGION 155, 165 (Wojciech Sadurski ed., 1992) ("If the schools are regarded as helping to shape the
Marsh v. Alabama provides an analogy for the argument that an expanding public sector may be obligated to support religion. In Marsh, the Supreme Court held that the Gulf Shipbuilding Corporation, the owner of a company town, Chickasaw, was subject to requirements of the Constitution that govern only state entities, even though the corporation was privately owned. The Supreme Court reasoned that, when a private entity undertakes to provide virtually all of the services ordinarily associated with the state—such as streets and utilities—that entity also acquires the obligation to observe strictures that apply to the state—such as the strictures of the Fourteenth Amendment. It could similarly be argued that, by taking over many of the functions traditionally associated with and constitutive of religion—such as education, medicine and charity—the government acquires some obligation to accommodate religion within its own activities. In fact, there is an example of the government upholding the kind of constructive obligation to aid religion that I suggest in the practice of retaining military chaplains. These individuals are paid with tax dollars and directly support religion, but their presence on the federal payroll arguably does not violate the Establishment Clause because the retention of chaplains compensates for the government’s isolation of soldiers from ordinary religious connections.

In sum, we surely have a problem if what people require and what the Establishment Clause permits are in opposition. This question, I submit, is presented in the A.A. cases.

child’s total world, then the exclusion of religion cannot help but shape a religionless world. At the most formative period of their lives, children are in effect taught that religion is unimportant or even perhaps false.”).

285. See id. at 506-08.
286. Ironically, according to the “Big Book” of A.A., Jung was unable to treat successfully one of the pioneering members of the program. See ALCOHOLICS ANONYMOUS, supra note 263, at 26-27. The Big Book contains the following conversation between Jung and the patient:

The doctor said: “You have the mind of a chronic alcoholic. I have never seen a single case recover, where that state of mind existed to the extent that it does in you.”

He said to the doctor, “Is there no exception?”

“Yes,” replied the doctor, “there is. Exceptions to cases such as yours have been occurring since early times. Here and there, once in a while, alcoholics have had what are called vital spiritual experiences. To me these occurrences are phenomena. They appear to be in the nature of huge emotional displacements and rearrangements... In fact, I have been trying to produce some such emotional rearrangement within you.”

Id. at 27.
V. ALCOHOLICS ANONYMOUS

A. Public Resort to A.A.

Many jurisdictions in the United States routinely refer convicted misdemeanants and felons, as well as others dependent upon the state, to support groups if they demonstrate signs of alcohol or drug abuse.\(^{287}\) Often, the support program is A.A., or a program modeled on A.A., Narcotics Anonymous. Although there are other programs, A.A. is essentially free of charge,\(^{288}\) by far the most available, and, at least in terms of the number of participants, the most successful.\(^{289}\) People who fail to participate in the appropriate program are often incarcerated, denied a license or privilege,\(^{290}\) or, if they are already behind bars, subjected to extended incarceration.\(^{291}\) Thus, subtle pressure by the state often lies behind individual decisions to participate in A.A. and similar programs.\(^{292}\)

\(^{287}\) See, e.g., CAL. CODE REGS. tit. 9, § 9860 (1992) (amended 1995) (permitting individual counties to require an "additional program" for individuals convicted of drunk driving offenses, which may, in some circumstances, include such self-help programs as Alcoholics Anonymous). See also Michael G. Honeymar, Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?, 97 COLUM. L. REV. 437, 468-71 (1997) (describing California's new requirement that counties that list A.A. as a possible "additional program" must list nonsectarian alternatives). Cf. Stafford v. Harrison, 766 F. Supp. 1014, 1015 (D. Kan. 1991) (describing a decision by the Kansas Parole Board to continue holding an inmate in custody pending his completion of a treatment program for alcohol and drug abuse that incorporated the principles of both Alcoholics Anonymous and Narcotics Anonymous).

\(^{288}\) The "Preamble" of A.A., which is read at many meetings, includes a statement that "there are no dues or fees for A.A.; the only requirement for membership is a desire to stop drinking." TWELVE STEPS AND TWELVE TRADITIONS, supra note 16, at 160. There are voluntary collections, however. The Seventh Tradition of A.A. provides that "Every A.A. group ought to be fully self-supporting, declining outside contributions." See id.

\(^{289}\) According to at least one source, there are over 35,000 A.A. programs in the United States, with over one million members. See Warner v. Orange County Dept. of Probation, 827 F. Supp. 261, 262 (S.D.N.Y. 1993).

\(^{290}\) Cf. Youle v. Edgar, 526 N.E.2d 894, 898, 899 (Ill. App. Ct. 1988) (upholding an administrative refusal to reinstate Youle's driving privileges on the grounds that Youle refused to participate in a support program for alcoholism, although Youle was not obligated to choose A.A. as a support program). Cooperation between bar and other professional associations and support groups such as A.A. is extensive.

\(^{291}\) Cf. Stafford, 766 F. Supp. at 1015-16 (action under 42 U.S.C. § 1983 where an inmate at a state prison was continued to be held in custody for failure to make progress in a treatment program incorporating the principles of A.A. and Narcotics Anonymous).

\(^{292}\) The practice is often quite subtle. For example, probation officers, judges imposing sentences, bar examiners, and a variety of similar figures with authority to decide the fate of individuals with respect to both trivial and important matters often may take
Although A.A. is not a religion per se, and explicitly denies being one, it bears many of the characteristics of religion and depends on principles that not only translate easily from religion, but that are themselves quintessentially religious. Consequently, official pressure to participate in A.A. may run afoul of Lemon because, if the primary effect of the government's action is to provoke some form of religious conversion, a violation of the Establishment Clause has occurred, even if the government's intentions are purely secular.

Several courts have addressed the constitutionality of official pressure to participate in A.A.; some uphold the pressure as constitutional, and at least two courts have held that such pressure violates the Establishment Clause. Although the facts of these

into account an individual's habit of attending A.A. or his commitment to do so. See generally Christopher K. Smith, Note, State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation, 1 WM. & MARY BILL OF RTS. J. 299, 306 (1992) ("Although some DWI or rehabilitation statutes mandate cooperation with AA or endorse AA principles, drunk drivers are not compelled to attend AA by specific legislation. Rather, rules made pursuant to state drunk driving statutes create a post-conviction system for determining the appropriate punishment and rehabilitation for the drunk driver. These post-conviction evaluations determine whether the sentence will include AA.")).

293. Cf. TWELVE STEPS AND TWELVE TRADITIONS, supra note 16, at 26 (concerning the second step of Alcoholics Anonymous: " Came to believe that a Power greater than ourselves could restore us to sanity "):

Listen, if you will, to these three statements. First, Alcoholics Anonymous does not demand that you believe anything. All of its Twelve Steps are but suggestions. Second, to get sober and to stay sober, you don't have to swallow all of Step Two right now. Looking back, I find that I took it piecemeal myself. Third, all you really need is a truly open mind. Just resign from the debating society and quit bothering yourself with such deep questions as whether it was the hen or the egg that came first.

Id.; see also ALCOHOLICS ANONYMOUS, supra note 263, at 569-72.

The terms "spiritual experience" and "spiritual awakening" are used many times in this book which, upon careful reading, shows that the personality change sufficient to bring about recovery from alcoholism has manifested itself among us in many different forms. . . . Among our rapidly growing membership of thousands of alcoholics such transformations, though frequent, are by no means the rule. . . . We find that no one need have difficulty with the spirituality of the program. Willingness, honesty and open-mindedness are the essentials of recovery.

Id. at 569-70.

294. For example, many A.A. meetings close with a recitation of the Lord's Prayer, and the authors of the "Eleventh Step" of A.A., which involves prayer and meditation, suggest use of the Prayer of Saint Francis, which begins "Lord, make me a channel of thy peace. . . ." See infra notes 316-23 and accompanying text for a short discussion of the religious aspects of A.A.

cases have differed in important respects, they have also illustrated a shortcoming of separationist doctrine—specifically, that, in some instances, religion is such an important thing, either instrumentally or for its own sake, and government is so inextricably involved in people's lives, that government may have no realistic choice except to act with a general, positive view toward religion, such as by advising A.A. 296

In instances like those presented in the A.A. cases, the Establishment Clause should be applied sparingly with attention to the

the influence participate in a county alcohol and drug education program as well as an "additional program" that, because of logistics, was often A.A., on the grounds that the primary purpose and effect of requiring attendance at an additional program was to combat drunken driving, not to promote religion, that the requirement did not foster excessive entanglements, and that at least one secular alternative to A.A., a program called "Rational Recovery," was available; Stafford, 766 F. Supp. at 1017 (action under 42 U.S.C. § 1983) (upholding requirement that an inmate at a state prison participate in a treatment program based on A.A., reasoning that the requirement neither imposed a religion upon him nor interfered with his practice of religion); Youle v. Edgar, 526 N.E.2d 894, 898, 899 (Ill. App. Ct. 1988) (upholding an administrative refusal to reinstate Youle's driving privileges on the grounds that Youle refused to participate in a support program for alcoholism, reasoning that the primary function of A.A. is to combat alcoholism, and that Youle was not obligated to choose A.A. as a support program); with Griffin v. Coughlin, 673 N.E.2d 98, 108 (N.Y. 1996), cert. denied, 117 S. Ct. 681 (1997) (holding that prison's requirement that an inmate participate in a twelve-step program based upon A.A. in order to be eligible for a "Family Reunion Program" violated the Establishment Clause); Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1074-75 (2d Cir. 1997) (holding that a state-imposed obligation to attend A.A. meetings violated the Establishment Clause). The Second Circuit may have vacated the cited opinion in Warner, see Orange County Dept. of Probation v. Warner, 968 F. Supp. 917, 918 n.1 (S.D.N.Y. 1997) (mem.), but the district court seems to have complied with the tenor of the Second Circuit's opinion on remand. See Warner, 969 F. Supp. at 923-24.

296. In other words, if one thinks of religion as a means of "making profoundly good people," whatever such an amorphous phrase means, the more government seeks to reform the wayward, the more it will adopt religious practices (assuming other practices are less effective). With reference to Christianity, for example, the psychiatrist Edwin F. Edinger has argued that:

The image of Christ, and the rich network of symbolism which has gathered around Him, provide many parallels to the individuation process. In fact when the Christian myth is examined carefully in the light of analytical psychology, the conclusion is inescapable that the underlying meaning of Christianity is the quest for individuation.

EGO AND ARCHETYPE 131 (1972). Similarly, John Garvey has argued that the Supreme Court's interpretation of the Free Exercise Clause ultimately reflects a positive appreciation for religion:

[T]he religious justification is the only convincing explanation for the split-level character of free exercise law. Sometimes religious believers and nonbelievers are treated alike; but sometimes the law protects only religious believers . . . The only convincing explanation for such a rule is that the law thinks religion is a good thing.

GARVEY, supra note 48, at 57.
presents underlying it, rather than to formalist rules—such as the Lemon test—designed to implement it. These purposes, I argue, are those identified by Justices O'Connor and Kennedy and by such scholars as McConnell and Schwarz, which focus on prohibiting government from imposing religious choices. Although pushing an individual who suffers from alcoholism or drug abuse into the arms of A.A. might appear to constitute exactly such an imposition, I would argue that, in light of the circumstances, and assuming official pressure is not applied beyond a short period, such pressure should not be deemed to violate the Establishment Clause.

In order to decide whether the Establishment Clause even applies to the A.A. cases, however, I must first determine whether A.A. is a religion at all. That determination begins by deciding how religion can be recognized.

B. What Is Religion?

Although no definition of religion has emerged as authoritative, several courts have addressed the issue. In United States v. Seeger, the Supreme Court had to decide whether an agnostic who opposed war for “religious” reasons was entitled to conscientious objector status pursuant to an act of Congress. Although the Seeger Court claimed to refrain from defining religion, it did set forth a “function” test, according to which a system of beliefs that functions in place of a belief in God qualifies as a religion for purposes of the conscientious objector statute. Thus, the Seeger Court included within the concept of religion “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God.”

Writing in two cases arising directly under the Religion Clauses, Judge Arlin Adams of the Third Circuit later molded the “place parallel” language of Seeger into a three-part inquiry. His first opinion was a concurrence in Malnak v. Yogi, which involved a claim that Transcendental Meditation (TM) classes

297. After all, apostasy is itself a form of religious conversion. When called before the Diet of Worms to recant his heresy, for example, Martin Luther declared “Here I stand, I cannot do otherwise,” setting in motion titanic religious changes. See generally Douglas Laycock, Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century, 80 MINN. L. REV. 1047, 1050 (1996).
299. See id. at 176.
300. Id.
taught in a public school violated the Establishment Clause. The court held that the classes constituted a violation. Agreeing, Judge Adams noted that TM had three important traits that are characteristic of religion. First, it seeks to answer fundamental questions about life, death, and the nature of humankind. Second, it attempts to answer these questions comprehensively. In other words, it does not purport to answer such a question as “Where did the universe come from?” without addressing other issues of similar import. Finally, TM has a certain amount of ritual and ceremony which, although not dispositive, made the classes look somewhat like a religion. Because the classes were offered in a public school, Judge Adams concluded that they constituted a violation of the Establishment Clause.

In a later majority opinion, Africa v. Pennsylvania, Judge Adams used his three-part test to adjudicate the claim of a member of the radical group MOVE. The member claimed that, for religious reasons, his prison diet had to consist entirely of raw meat. Finding that MOVE’s belief system did not attempt to answer profound questions, was not comprehensive, and bore none of the external indicia of religion, Judge Adams characterized it as a mere philosophy and rejected Africa’s free exercise claim.

In making this last determination, Judge Adams drew from dictum in the Supreme Court’s decision Wisconsin v. Yoder, in which the Court distinguished between philosophical and religious matters of conscience.

301. 592 F.2d 197 (3d Cir. 1979).
302. See id. at 207-08 (Adams, J., concurring in the result).
303. See id. at 208-09, 213 (Adams, J., concurring in the result).
304. Id. at 209, 213-14 (Adams, J., concurring in the result).
305. See id. at 209-10, 214 (Adams, J., concurring in the result).
306. See id. at 214-15 (Adams, J., concurring in the result).
308. See id. at 1025.
309. See id. at 1036.
310. See id. at 1034 (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (upholding Amish parents’ claim that requiring their children to attend public school after the eighth grade interfered with their religion and their way of life, and distinguishing a “mere philosophy,” which would not be entitled to free exercise protection, from religion).

The D.C. Circuit faced a similar issue in Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), in which that court had to decide whether Scientology was a religion. The court concluded that it was, with reasoning similar to that of Seeger and the later Adams’ opinions. See Founding Church of Scientology, 409 F.2d at 1160 (noting that Scientology’s writings “contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions”). See generally Eric C. Freed, Note, Secular Humanism, the Establishment Clause, and Public Ed-
Notwithstanding the guidance provided by such decisions as Seeger, Yoder, Malnak, and Africa, however, courts may never come up with an authoritative definition of religion. This is in part because any definition of religion could undermine the purpose of the Free Exercise Clause which, presumably, is to protect religion as it is, not as an outside observer would define it. As Angela Carmella has noted, the state possesses the ultimate authority to decide what is religious, and therefore not subject to political regulation, and what is secular. Consequently, she contends, the government—and particularly the courts—bear an important obligation not to define religion in a way that would deny it the opportunity to function, grow, and adapt to new situations. Similarly, George Freeman has argued that, because there is no one “essence” discoverable in every religion, religion cannot be defined. Nevertheless, because the Establishment Clause prohibits the establishment of religion, courts may have no alternative but to attempt some definition of religion, and perhaps the “purposes and functions” test of Seeger, Malnak, and Africa will have to do. After all, morphological approaches to tough questions of identification are standard practice in other fields.

C. Is A.A. Religion?

Applying either Seeger, Malnak, and Africa, or a general morphological test, I would argue that A.A. bears sufficient resemblance to religion to implicate the Establishment Clause. Certainly the complaints brought by the various plaintiffs in the cases I will discuss suggest that A.A. struck them as religious.

Like the many self-help programs that it has spawned, A.A. is based on the “twelve steps of recovery,” the first three of which are as follows:

Step One: We admitted we were powerless over alcohol—that

312. See id.
314. Secular Humanism, supra note 310, at 1167.
315. There is, for instance, the saying that if an animal walks like a duck and talks like a duck, it probably is a duck.
our lives had become unmanageable;\textsuperscript{316} Step Two: We came to believe that a Power greater than ourselves could restore us to sanity;\textsuperscript{317} Step Three: We made a decision to turn our will and our lives over to the care of God as we understood him.\textsuperscript{318}

Although the first three steps of the program imply a complete syllogism of sorts—that members cannot respond to their problem alone, that they come to believe that a greater power can, and that they try to allow that power to do so—the remaining nine steps add to and appear to enhance the syllogism of the first three. Thus, the fourth through seventh steps involve a “moral inventory,” culminating, in the seventh step, in a request that God remove personal shortcomings. The eighth through tenth steps involve making amends to people whom the recovering alcoholic has hurt. The eleventh and twelfth steps involve continuing moral and spiritual growth. Specifically, the eleventh step provides that members seek “through prayer and meditation to improve [their] conscious contact with God as [they understand] Him, praying only for knowledge of His will for [them] and the power to carry that out.”\textsuperscript{319} The twelfth provides that “[h]aving had a spiritual awakening a result of these steps, [they try] to carry this message to alcoholics, and to practice these principles in all [their] affairs.”\textsuperscript{320}

The nature of A.A. suggests that it comes close enough to being a religion—even if it is not technically one—to implicate the Establishment Clause. Although the program does not purport to answer questions about death, the afterlife, or the origins of the universe,\textsuperscript{321} it does offer a set of principles, the steps, designed to facilitate a new way of life, albeit with sobriety as the overriding goal. Moreover, it blends religious practices into the steps in such a thorough manner as to defy dissection. In fact, A.A., like psychoanalysis,\textsuperscript{322} might function more as a facilitator of estab-

\textsuperscript{316} See TWELVE STEPS AND TWELVE TRADITIONS, supra note 16, at 21.

\textsuperscript{317} See id. at 25.

\textsuperscript{318} Id. at 34 (emphasis in original).

\textsuperscript{319} Id. at 96 (emphasis in original).

\textsuperscript{320} Id. at 106.

\textsuperscript{321} In fact, A.A. suggests that the recovering alcoholic not worry about such questions and focus on other matters. See supra note 293.

\textsuperscript{322} See The Symbolic Life, in JUNG, C.W., supra note 2, at 284-85, ¶ 671. In the course of a discussion including several members of the clergy, Jung stated there is now in Germany . . . a liturgical movement; and one of the main representatives is a man who has a great knowledge of symbolism. He has given me quite a number of instances, which I am able to check, where he has translated the figures in dreams into dogmatic language with the great-
lished religions than as a religion of its own. As one of the writers of *Alcoholics Anonymous*, the “Big Book” of the program, wrote at the conclusion of his story:

I had accepted Catholicism somewhat as an inheritance. My education had been pretty much pagan—science. I resolved that if I were going to continue with the Catholic Church, I was going to know the roots of the doctrine, since those roots had caused me some confusion. So I enrolled at the university for night courses in religion, and I pursued those courses for a year. In summing up, I can say that A.A. has made me, I hope, a real Catholic.323

Nevertheless, under formalist doctrine, it is doubtful that a constitutionally material distinction between A.A. and religion could be predicated on the fact that A.A. acts more as a facilitator for religious growth than as a religion itself. If this were a meaningful distinction, the “no aid” principle of *Everson* would have to be repudiated.

D. When Does Government “Establish’’ A.A.?

Some present practices may violate *Lemon*, which prohibits official actions that have the primary effect of promoting religion. Given the religious nature of A.A., it can be argued persuasively that the “primary effect” of sending people to A.A. is the promotion of religion. Conversely, if one accepts as persuasive the argument that the primary effect of official referral to A.A. is a more sober citizenry, it becomes difficult to argue that outright subsidies to parochial schools—and even churches—would violate the Constitution, insofar as such institutions help mold a stable, healthy citizenry.324

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324. In fact, Justice O’Connor to some extent condoned such motivations in her concurrence in *Lynch v. Donnelly*, in which, speaking of such official “acknowledgments” of religion as non-denominational legislative prayers, the declaration of Thanksgiving as a public holiday, the printing of “In God We Trust” on coins, and the opening of court sessions with “God save the United States and this honorable court,” she argued that such practices “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” See *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O’Connor, J., concurring).
Notwithstanding the irreconcilability of current practices with Lemon, however, I would argue, in light of the contextual tests for the Establishment Clause that I have cited, that government runs the risk of "establishing" A.A. as a religion and thereby violating the Establishment Clause only if it requires a person to participate in the program to the extent that his process of religious growth is dominated—subdued—by an external authority. This conclusion resembles the approaches espoused by Justices O'Connor and Kennedy and also reflects the tests advocated by Schwarz and McConnell. Although the test is ultimately subjective, it is not subjective in the sense that each person ordered to attend meetings may decide for himself whether an establishment has occurred. Instead, a court would ask what a reasonable person in that person's position would feel. Subjectivity, of course, would remain with the finder of fact, but appellate courts could set forth certain general guidelines, such as the following: First, whenever A.A. is required, the government should try to make a more secular program, such as Rational Recovery, an alternative, if possible, assuming such programs demonstrate an ability to deal with alcohol abuse effectively. Second, the government should never require affirmation of the principles of A.A., nor should the government require persons referred to A.A. to do more than attend, listen, and obtain evidence of attendance. Finally, no person should be assigned to A.A. for a long-term or permanent basis. If a government adheres to these guidelines, chances are that any decision by a person, initially referred by the government to A.A., to participate in the program and to adopt its principles would constitute an independent, albeit facilitated, religious or quasi-religious choice. Moreover, this is the approach A.A. itself expects. A.A. does not expect people to participate in the program upon the insistence of others. Rather, it is based on a decision by the individual to participate. In fact, A.A. has taken a similar approach to religious matters, subordinating religious controversy to the primary purpose of achieving sobriety, but at the same time stressing that progress through the program, as individuated as it may be, is essentially spiritual.325

325. See Alcoholics Anonymous, supra note 263, at 28.

We think it no concern of ours what religious bodies our members identify themselves with as individuals. This should be an entirely personal affair which each one decides for himself in the light of past associations, or his present choice. Not all of us join religious bodies, but most of us favor such memberships.

Id.; see also id. at 28-29 ("Many who once were [agnostic] are now among our members.

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I will now attempt to apply the foregoing approach to non-establishment to some of the A.A. cases that have been decided.

E. The Cases

1. O'Connor v. California

In O'Connor v. California, an individual who, in effect, was required to attend either A.A. or Rational Recovery as a condition of his probation for a multiple drunk-driving offense argued that A.A. was a religious organization and that Rational Recovery was not a viable option for him because it met rarely in the vicinity of his home. The court concluded that A.A. was religious in nature, but upheld the condition of his probation, reasoning that the existence of a secular alternative to A.A., Rational Recovery, eliminated any potential Lemon violation, even though O'Connor had little meaningful access to this nonreligious alternative. Significantly, the court wrote that "the fact that the concept of God is incorporated in a program in which the State encourages participation does not in itself violate the Establishment Clause. More state involvement—whether it is called 'entanglement' or 'endorsement'—is required than has been shown here."

This decision was essentially correct, although not entirely for the reasons cited by the court. Sending O'Connor to A.A. indirectly promoted religion, particularly because Rational Recovery, the secular alternative, was not a viable option for O'Connor.

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Surprisingly enough, we find such convictions no great obstacle to a spiritual experience."

Michael G. Honeymar has written an extensive analysis of A.A. as a condition to probation and the Establishment Clause. See Honeymar, supra note 287. Although Honeymar does not challenge current interpretations of the Establishment Clause, he does suggest that programs that preserve individuals' choice between religious and non-religious programs may survive judicial review. Id. at 465 (arguing that, if a probationer has a "meaningful choice," there is no violation, even if he attends A.A., because "it is the probationer that has made the choice"). Honeymar's suggestions for how to avoid "mandatory" A.A. are more elaborate than those set forth here. See id. at 465-67. He also describes a program that California initiated after O'Connor v. California, see infra note 331, that "explicitly categorizes A.A. as a sectarian organization and requires [counties] to list nonsectarian self-help groups if it lists sectarian groups such as A.A." Honeymar, supra note 287, at 468.

327. See id. at 304-05.
328. See id. at 307-08.
329. See id. at 308.
330. The argument exists that Rational Recovery must be religious if it can accom-
The court's decision was correct, however, because O'Connor did not demonstrate that being forced to attend A.A. meetings was likely to result in an imposition of religion. He only demonstrated that the government had referred him to A.A. He failed to demonstrate any actual interference with his religious growth or decision-making process.\footnote{331}{In response to O'Connor, the California Department of Alcohol and Drug Programs amended the section of the California Administrative Code that governs the program pursuant to which O'Connor attended A.A. meetings. See generally Honeymar, supra note 287, at 468. As amended, the section recognizes A.A. as a "sectarian group" and requires counties to make both sectarian and nonsectarian alternatives available. 332. 766 F. Supp. 1014 (D. Kan. 1991). 333. See id. at 1015. 334. See id. at 1017. In response to Stafford's claim that his own free exercise of religion had been unconstitutionally infringed, the court decided that the state's policy of treating alcohol abuse by requiring prisoners to participate in the program was "reasonably related to legitimate penological interests." See id. at 1017-18 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).}

2. \textit{Stafford v. Harrison}

In \textit{Stafford v. Harrison},\footnote{332}{766 F. Supp. 1014 (D. Kan. 1991).} an inmate at a state prison in Kansas brought an action under 42 U.S.C. § 1983, claiming that his freedom of religion had been violated because he had been required to participate in a recovery program based on A.A. as a condition of his incarceration.\footnote{333}{See id. at 1015.} The court rejected his claim, holding that the state had not imposed a religion upon Stafford because A.A. is not a religion.\footnote{334}{See id. at 1017.}

The \textit{Stafford v. Harrison} court's decision that A.A. does not at least implicate religion sufficiently for purposes of the Establishment Clause is unwarranted, given the character of A.A. Nonetheless, the court probably came to the correct conclusion on the facts shown because, again, it does not appear that the state imposed a religion on Stafford. Like O'Connor, Stafford merely established that the government pushed him toward A.A. Given Stafford's imprisonment, however, it is possible that the government's actions did tend to overbear Stafford's decision-making process. Additional facts may show this.
Youle requested reinstatement of his driving privileges, which had been revoked for driving while intoxicated. The Secretary of State for the State of Illinois, Edgar, denied Youle's request because Youle refused to participate in a "support system" for "problem drinkers." The court upheld the requirement that problem drinkers participate in a support system as reasonable and, therefore, upheld the Secretary's denial. The court addressed Youle's argument that being forced to participate in A.A. was a violation of the Constitution as follows:

Plaintiff attacks the Alcoholics Anonymous support system by stating it is a quasi-religious organization, and, therefore, it is a violation of his constitutional rights to require him to participate in such an organization. This is meritless. The primary function of Alcoholics Anonymous is to cope with the disease of alcoholism. It is a well-recognized support program, in part, because it achieves a measure of success. Moreover, the Secretary does not require participation in Alcoholics Anonymous, but in an ongoing support program. Plaintiff offered no alternative programs. The Youle court's decision seems to have been correct because Youle had alternatives to A.A. If each of these alternatives were as religious as A.A., however, the correct decision would have turned on the amount of official pressure applied on Youle to conform to the expectations of the program. Here, there might have been a problem. Youle lost his driving privileges after being convicted of driving under the influence of alcohol and subsequently of driving with a revoked license. Pursuant to his fourth application for restored driving privileges, Youle submitted to an "alcohol evaluation," from which it was determined that he was a "Level III—Problematic User" of alcohol; therefore, his license could not be reinstated unless he, among other things, "established an ongoing support/recovery program." The hearing officer noted:

Given Petitioner's denial of being alcoholic despite evidence classifying him as such, places the Petitioner at risk and warrants specific treatment to address that problem. Merely discontinuing the use of alcohol (abstaining) does not necessarily

336. See id. at 897.
337. See id. at 899.
338. Id. at 897.
mean a person has attained "sobriety" in the sense that A.A. and most in the field of alcoholism treatment view sobriety. When considered in the context of alcoholism, sobriety becomes indicative of an attitude or way of thinking—a manner of living—not simply non-intoxication. Unless and until the alcoholic has attained such sobriety by truly accepting the problem, by not drinking, [by] exercising healthy, appropriate behavior and by utilizing available resources for continued outside support, he will feel uncomfortable with not drinking and is in imminent danger of suffering a relapse.339

If A.A. were the only feasible support group for Youle, or if his alternatives were also quasi-religious in nature, the State of Illinois's potentially unlimited requirement that he participate in the program could constitute imposition in violation of the interpretation of the Establishment Clause I have advocated.

4. Warner v. Orange County Department of Probation

In late 1990, Warner was ordered to attend A.A. meetings as a condition of probation after he had been convicted of a third alcohol-related driving offense.340 In January 1991, however, he began complaining about the religious nature of A.A., stating that he was an atheist and that A.A. was "objectionable" to him.341 Thereafter, Warner's probation officer determined that Warner was not sufficiently serious about the program. Accordingly, the probation officer recommended that Warner attend "step meetings" designed to enhance his participation in the program and engage an A.A. "sponsor."342 Some time later, after Warner filed a motion in state court challenging the requirement that he attend A.A. meetings, the Orange County Department of Probation (OCDP), the office that had originally recommended his attendance at the meetings, furnished him with an alternative to A.A.343 Warner thereafter brought suit under 42 U.S.C. § 1983 against OCDP, seeking damages and a declaration that defendant had violated the Establishment Clause.344 After a bench trial, the district court ruled that OCDP had violated the Establish-

339. Id.
340. See Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1069-70 (2d Cir. 1997).
341. Id. at 1070.
342. Id.
343. See id.
344. See id. at 204-05.
ment Clause and ordered it to pay plaintiff nominal damages of one dollar and attorney's fees.\textsuperscript{345}

The Second Circuit affirmed the district court in all respects pertinent here.\textsuperscript{346} Applying the coercion test of \textit{Lee v. Weisman}, the court concluded that A.A. has a "substantial religious component" and that OCDP had coerced Warner into participating in the program by virtue of its recommendation to the sentencing judge, which, at first, had not included an alternative to A.A.\textsuperscript{347} Dissenting, Judge Winter argued, among other things, that OCDP's recommendation did not violate the Establishment Clause because it satisfied the \textit{Lemon} test.\textsuperscript{348} He argued that the recommendation had the secular purpose of rehabilitating Warner, had only an incidental effect of promoting religion, and did not foster excessive entanglements. More importantly, he pointed out that Warner himself had chosen to attend A.A. meetings before sentencing in order to impress the judge.\textsuperscript{349}

The court's decision in \textit{Warner} may have been correct, although it is hard to say on the facts given. As Judge Winter pointed out, the choice to attend A.A. meetings was originally Warner's. Consequently, it is hard to conclude that the OCDP imposed religion upon Warner by suggesting that he continue to attend meetings that he had already chosen to attend. More difficult questions arise with respect to Warner's subsequent objections to A.A. and with respect to the OCDP's response to his objections. The facts related by the Second Circuit do not show the extent to which the OCDP tried to impose A.A. upon an unwilling probationer after he first complained about the program's religious character.\textsuperscript{350}

\textsuperscript{345} See id. at 205.
\textsuperscript{346} The court remanded the case for a determination of whether Warner's failure to object to A.A.'s religious nature when he was sentenced constituted waiver of his claim. See id. at 1081-82. On remand, the district court found neither waiver nor consent and adhered to its earlier judgment in favor of Warner. See \textit{Warner v. Orange County Dep't of Probation}, 968 F. Supp. 917, 924 (S.D.N.Y. 1997).
\textsuperscript{347} Id. at 1075.
\textsuperscript{348} See id. at 1080-81 (Winter, J., dissenting).
\textsuperscript{349} See id. at 1078 (Winter, J., dissenting). Judge Winter wrote:

This lawsuit is an instance of remarkable gall. Warner voluntarily selected and began attendance at A.A. meetings on the advice of counsel in order to impress the sentencing court . . . . Now he complains that a subsequent recommendation of a probation officer that he attend such meetings entitles him to monetary damages.

\textit{Id.}

\textsuperscript{350} The facts related by the district court on remand do suggest a fair amount of tension between the OCDP and Warner after Warner's sentencing. See \textit{Warner}, 968 F.
VI. Conclusion

Sometimes, religion can be such a good thing that the government is realistically forced to—or at least ought to—work with it rather than despite it. This approach, however, would be difficult to reconcile with a bright-line rule, such as that of Lemon v. Kurtzman, that categorically prohibits the government from taking the positive attributes of religion into account in seeking to effect good public policy. The alternative to such a bright-line rule, however, must be a contextual approach, which many have advocated and which I too advocate, guardedly. One danger with such an approach, of course, is that it lacks clarity and is not easy to apply. This is reflected in the examination of the A.A. cases set forth in Part V. Another danger, and perhaps a far more serious one, is that, to some extent, the vitality of religion depends on its privacy. Nevertheless, the question a court must ask with respect to A.A. is whether official pressure to participate in such a program will impose a religious belief or practice on a person or proximately cause him to adopt a practice that he would not have adopted but for the pressure. I say proximately because a person who drinks heavily and drives under the influence of alcohol may undergo a religious or quasi-religious change because of official pressure to participate in A.A. while his decision to become actively involved in the program might be personal. In fact, of course, this is the premise of A.A.

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351. See Schwarz, supra note 7, at 693.
352. See McConnell, supra note 7, at 35.
353. The Third Tradition of A.A. provides that: “The only requirement for A.A. membership is a desire to stop drinking.” TWELVE STEPS AND TWELVE TRADITIONS, supra note 16, at 139. Cf. id. at 145 (“So the hand of Providence early gave us a sign that any alcoholic is a member of our Society when he says so.”).