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Do Good Walls Make Good Neighbors?

The Sacred and the Secular in Religion Clause Jurisprudence

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by

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Do Good Walls Make Good Neighbors?

The Sacred and the Secular in Religion Clause Jurisprudence

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In deliberating on the application of the Establishment and Free Exercise Clauses of the United States Constitution's First Amendment, the Supreme Court since 1947 has consistently failed to develop a principled distinction between religion and non-religion. This has hampered its ability to respond to developing challenges in Religion Clauses jurisprudence and to interpret those clauses in a systematic manner. Its recourse to facile characterizations of secularism and pluralism has exacerbated this problem. Attending to incoherence in the Court's understanding of religion points to a definition of religion based in revelation and grounded not in the language of preference, identity or value, but in natural law and metaphysics.

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

- First Amendment, U.S. Constitution (1791)

In deliberating on the application of the Establishment and Free Exercise Clauses of the United States Constitution's First Amendment, one question routinely confronts the Supreme Court: what is religion? Or, more particularly, what does the First Amendment mean by "religion"? What cannot be established? What must be freely exercised? Does it encompass non-Christian religions? Need religion even involve a god? Does it include secular humanism? Satanism? Any individual's self-identified "ultimate concern"?

For its part, the Court has sought through the years to avoid this knotty question, with mixed results. While in most cases the Supreme Court can adopt a "we know it when we see it" policy, the exigencies of some cases would seem to demand that they face this question squarely. With such decisions, perhaps most famously *Zorach v. Clauson*[1], one sees the dangers in trying to answer difficult questions about the meaning of "religious establishment" when "religion" goes undefined. When will the Supreme Court finally define "religion"?

The constitutional lawyer might object that defining religion must never be the Court's chief goal, but rather the interpretation of the Constitution and its

[1] *Zorach v. Clauson*, 343 U.S. 306 (1952)

relevance to the constitutional questions at hand. This counterproposal is a false alternative. The Supreme Court in fact does regularly weigh in on the nature of religion and the secular; that it often does so in a refractory manner for derivative purposes does not diminish the impact of such conclusions. That such formulations are often implicit and based on negative criteria does, however, means that such definitions may well lack coherence, frequently inconsistent with the meanings of religion posited in other cases.

How does the Supreme Court define religion? Taken on balance, we can say this much: religion would seem to be each individual's independently-formed opinion about whatever gives meaning and order to his life, his "ultimate concern." The Court takes a dim view of "organized" religion: the risk of political discord and indoctrination turns out to be great.[2] As we will see in an analysis of Thomas Jefferson's "wall of separation" language, the Court treats religion as an entirely private matter. The Court thus equates an individual's confession of a particular creed with religion itself, as though a person's preference for a revealed source of knowledge about law, justice and morality were the main attribute of religion.[3] This

[2] Many cases involving schools and children focus on the fear of impressing moral outlooks on children that interfere with their ability to arrive at their own worldviews, the promise held out in *Planned Parenthood v. Casey* (1990): "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," 505 U.S. 833, 852. As to whether such a goal is attainable, and what it would entail, one should consult Rousseau's *Emile*.

[3] See "Religion is not a Preference" by Joshua Mitchell, *Journal of Politics* 69 (May 2007): 351-62, for an insightful study of liberalism's misunderstanding of the nature of religious belief.

emphasis on the individual, while understandable to the extent that Court cases concern rights-bearing citizens, distorts the communal nature of religious community, leading to a definition of religion that is at once reductionist and expansively indeterminate.

On this account, the sacred and secular fluidly feed into one another: one man's Nativity crèche is another man's holiday pastiche. Since 1947, the Court has wrestled with whether the government can privilege religion over non-religion or "irreligion," but that *a priori* distinction has disappeared: the Court's differentiations between the religious and the non-religious, as exemplified by *Van Orden v. Perry* and *McCreary v. ACLU*, are now grounded in an approach that treats nothing as essentially religious or secular, but evaluates them through quasi-semiotic methods for constructed meanings.

In those two cases the Court split down the middle, dividing over the utility of the *Lemon* test, whether a state can support religion over irreligion, and whether, at end, there exists a "wall of separation" between church and state in the United States. Yet the justices appealed to the same opinions, the same arguments in distinguishing the religious from the secular, and ultimately none of them defined "religion." It would seem that precedents have failed to give the Court firm guidance in this matter. Thus the Supreme Court as late as 2005 has arrived at no principled distinction between religion and irreligion. The Supreme Court has assumed that

secularism means only the absence of religion.[4] Granted these conclusions, two questions present themselves: Can coherent judgments be rendered as to whether a religion is being preferred over another (or over irreligion) if the Court can arrive at no principled distinction between religion and irreligion? Can the Court avoid rendering judgments in favor of irreligion over religion if it defines secularism (more or less) as irreligion? While we would expect the answer to vary from case to case, in general the answer to both questions would seem to be: "No."

In what follows I outline three overlapping and mutually reinforcing developments in the Supreme Court's understanding of religion as it has advanced it in Establishment Clause cases since 1947. We will examine the Court's reduction of religion to belief in the face of the failure of the wall metaphor to advance any concrete notion of religion; its elevation of individualistic expressive values as the core attribute of religious belief; and the Court's shift in usage of the word "secular" from "non-religious" to a context of unstable meanings of "religion" and "non-religion" in a pluralist and religiously and spiritually fragmented era.

Given the dominance of Jefferson's wall metaphor in those decisions, however, we must start with a Free Exercise clause case, the 1878 *Reynolds v. United States*, to examine the effects of the that language on subsequent cases. In turning to four other Free Exercise cases, we will see the how the implications of *Reynolds* in

[4] The Court seemingly remains oblivious to the work of scholars from Weber and Löwith to Taylor and Casanova in advancing an understanding of secularism beyond a simplistic public/private or state/society distinction.

subsequent Free Exercise cases continue to influence the course of Establishment Clause jurisprudence.

I. Conceptualization Must Proceed Quantification: Religion Tests

When one thinks of Establishment Clause cases, phrases like "*Lemon* Test," "wall of separation" or "endorsement test" come first to mind. More recently, a five-point test has arisen from the *Zelman* majority opinion. What accounts for the prevalence of such tests? Why does the Court have such difficulty in establishing criteria for establishment? Consider the language of the 1878 case *Reynolds v. United States*, in which Chief Justice Waite tries to sort out difficulties in answering the question "Should the accused [Reynolds] have been acquitted if he married the second time, because he believed it to be his religious duty?":

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is what is the religious freedom which has been guaranteed.[5]

Waite in directing the question to the character of "religious freedom" has developed two lines of inquiry: what religious freedom is protected by the Constitution, and how is it religious? If we call something "religious," what does that

[5] *Reynolds v. United States*, 98 U. S. 145 (1878), at 162. *Reynolds*, it is rarely noted, pertains to the Free Exercise rather than to the Establishment Clause, but its invocation of the "wall of separation" remains a controlling precedent for both groups of cases. Then-Justice Rehnquist made this helpful point in his dissent in *Wallace v. Jaffree* (1985),472 U.S. 38, 91-106.

imply about "religion"? Unfortunately, Waite does not pursue the second question. Instead he quotes, in a citation almost as famous as the original text itself, Thomas Jefferson's 1802 "Letter to the Danbury Baptist Association," in which the president underlines religious freedom while defining religion in only nebulous terms:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions -- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' *thus building a wall of separation between church and State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties. [Emphasis added.]

Jefferson puts the accent on an immutable separation: whatever religion and politics are, they can be thoroughly separated, resting on independent bases. If religion and politics rest on independent bases, what are those foundations?

Does the nature of religion and the secular define "the true distinction between what properly belongs to the church and what to the State," or do church and State have arbitrarily drawn spheres of influence? Most puzzlingly, if religion is a matter "between man and his God," why does Jefferson posit a separation between church and state? Why not simply religion and state, i.e. Congress, as enshrined in the Constitution? One could argue that some people's relations with God will lead them to form a church, but is that a concern of government? It would seem not,

based on Jefferson's account of religion. Perhaps "church" is a metonymy for "religion"? Waite, however, seemingly not bothered by the questions left unanswered by Jefferson, immediately concludes:

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[6]

Waite never reaches a substantive definition of religion. His original question – What is religion? – becomes subsumed by the question, Is opinion subject to government control? He answers wholly in the negative. If religion were not simply opinion, however, then he has hardly answered his question. Unless, of course, the answer is that religion is irrelevant to the Free Exercise clause.

Religion is opinion. How will we know which opinions? On one level, Waite seems to argue that this question does not matter: actions can be regulated regardless of their justification, religious or otherwise, and true religion consisting in opinion stands in no need of regulation. Does he imply that no opinion can be regulated by the government? He might also be said to answer, however, that we will separate politics and religion – perhaps intuitively? – and then we will see them for what they are. Is the wall of separation between church and state simply that between opinion and action? Why then is there a free exercise clause set apart from

[6] *Ibid*., 164

the freedom of speech? Why single out religion? More to the point, if religion has been so notoriously difficult to separate from politics, at least since Hobbes, Machiavelli, Spinoza and Locke made their separation the project of liberalism,[7] how can we speak of a simple "wall of separation" between them? This metaphor would seem to assert rather than to prove that politics and religion are autonomous spheres.

A "wall of separation" implies that we can identify definitively what is being separated, i.e., religion and politics, that they can be analyzed in two in a regular and principled manner, and that they can be impermeably separated without qualification. Neither Jefferson nor Waite gives us confidence that any of these conditions can be satisfied, and that shortcoming has not gone unnoticed. In subsequent cases Court justices have jettisoned the wall metaphor in the same breath in which they invoked it, replacing it with more explicit if less concrete "tests" to ensure the wall's integrity. A studied agnosticism as to the nature of religion, however, unites them all. The wall metaphor would seem to encourage one to speak as though one could analyze religion and politics and see what falls on each side, as though they were data-point clusters in a statistical distribution.

This approach violates what Giovanni Sartori excoriates in a famous 1970 article – famous, that is, to comparative political scientists, if not Supreme Court

[7] I leave as an open question what "separation" entails, whether for politics to avoid moral questions or to subjugate religion for its own purposes, or still other possibilities.

justices. In that article, "Concept Misformation in Comparative Politics," among other things Sartori lays out the nature of a common problem in empirical political science: "we simply tend to forget that *concept formation stands prior to quantification*."[8] [Emphasis in original.]

> … we have been swayed by the suggestion that our difficulties can be overcome by switching from "what is" questions to "how much" questions. The argument runs, roughly, as follows. As long as concepts point to differences of kind, i.e., as long as we pursue the either-or mode of analysis, we are in trouble; but if concepts are understood as a matter of more-or-less, i.e., as pointing to differences in degree, then our difficulties can be solved by measurement, and the real problem is precisely how to measure...[9]

We see just such a move in *Zorach*, in which Douglas argues, "The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree."[10] The trick has become to establish where to build the wall based on an analysis of concepts whose nature remains obscure. That project would seem to be a failure.

The *Everson*, *McCollum* and *Zorach* decisions claim a solid foundation in *Reynold*'s "wall of separation" argument, although Justice Black, the author of the majority opinions of *Everson* and *McCollum*, violently disagreed with the ruling in *Zorach*, whose famous majority Douglas wrote. *Everson v. Board of Education* (1947) set the tone for 20th-century cases, arguing for a highly literal interpretation of the

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[8] Giovanni Sartori. "Concept Misformation in Comparative Politics," *American Political Science Review* 64 (Dec. 1970), 1038.
[9] Sartori, 1036.
[10] 343 U.S. 306, 314

"wall of separation" metaphor.[11] "The 'establishment of religion' clause of the First Amendment," it reads, "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... Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

The Court explicitly decided *McCollum v. Board of Education* (1948) 8-1 on the principles of *Everson*. *Zorach v. Clauson*, however, reveals fissures lying beneath the apparent unanimity of *McCollum* and *Everson*. The *Zorach* majority notable excluded Justices Black, Frankfurter and Jackson, who all voted with the *McCollum* and *Everson* majorities, and Black famously writing both cases' majority opinions. *Zorach* upheld a New York school's time-release program that, while in other respects similar to that at issue in McCollum, was deemed constitutional because the religious education did not use public buildings, employees or funding. Douglas, advancing a strong accommodationist line, argued that "We are a religious people whose institutions presuppose a Supreme Being," and urged the government to

[11] That *Everson*'s holding did not seem to follow the logic of the decision's majority raises questions beyond the scope of this paper, but see the Rutledge dissent, 330 U.S. 1, 28-75.

"accommodate… the public service to their spiritual needs," lest it "show a callous indifference to religious groups."[12]

Yet *Everson* and *McCollum* both seemed to advocate such a "callous indifference," arguing that government cannot aid even all religions. Douglas in *Zorach* seems to implicitly agree, arguing, "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated… the separation must be complete and unequivocal." Douglas argues that the state can aid religion in many ways short of establishment without violating the "complete and unequivocal" separation. Black finds this argument infuriating, disavowing its connection with the conclusions of *Everson* and *McCollum*:

> Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all.[13]

This disagreement raises a problem beyond the scope of this paper: what is establishment? Indeed, much ink has been spilt on the coherence and accuracy of the "wall of separation" as a metaphor for establishment. We are not interested in uncovering its metaphorical meaning, but rather its role as obstructing the clarification of the meaning of one of its underlying referents, religion. For present purposes, we can see that confusions over the meaning of "establishment" could

12 343 U.S. 306, 314
13 343 U.S. 306, 318

never be clarified so long as the justices have never defined "religion." If "it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral" that the First Amendment's aims can be achieved, then the Supreme Court in *Everson* and *McCollum* set a much higher bar than the majority of justices in *Zorach* realized.[14] Black's dissent thus raises the stakes for defining religion: the Supreme Court in guarding against establishment has no room for discretion.

Only with *Lemon v. Kurtzman* does dissatisfaction grow with the unwieldiness of the wall metaphor to the point of needing a test for this principle, and only at that point does a sufficient body of decisions exist from which to draw. In that case, the majority set out the following terms for identifying and avoiding establishment:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

All three of these "prongs" clearly reflect the influence of the wall metaphor, although particularly the first two. In fact, Justice Black wrote only before, "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[15] Walls are

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[14] 343 U.S. 306, 319

[15] 403 U.S. 602, 612

not typically something one can only “dimly perceive”; in general they are the least subtle of man’s artifacts. One does not negotiate with a wall; one does not need to interpret the purpose of a wall; one does not go through a wall. Unless, that is, the wall in question has cracks. Continuing, Burger writes:

> The language of the Religion Clauses of the First Amendment is at best opaque... Its authors did not simply prohibit the establishment of a state church or a state religion... Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause.

Quibbles about “respecting” seem somewhat less important than what the law “respects” in the first place. And what could be the point of the language of “lines of demarcation” in such a context? The image of a “wall” implies a regular and principled distinction between religion and politics; Justice Black promises no such thing. If by “wall” he means a definite but irregular boundary, something selective but imposing, we will need to alter the spatial metaphor. Perhaps we had better think of an airport security check. Whatever one wants to call it, however, what separates religious from political activity lacks the assured stability, regularity and impermeability of a wall.[16] No matter what the test, any application of Jefferson’s “wall of separation” metaphor is bound to fail so long as the subjects the metaphor

[16] William Rehnquist dramatically makes this point in his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-106.

serves as a vehicle for remain undefined. In this context, we will see, the idea of religion as solely "belief" had little trouble taking hold.

II. The Revenge of Reynolds*: Belief and Action in Free Exercise Cases*

Our investigation began with *Reynolds v. United States*, the case that established the Jeffersonian wall metaphor as a central means, however ill-equipped, for defining religion and establishment. This would be enough to assure *Reynold*'s landmark status. Its influence as a precedent does not, however, end there. For while *Reynolds* fails to define "religion" in any sufficient way, it does assign to religion a signal attribute, distinguishing it as opinion or belief as distinct from act.

Reynolds, and after it *Employment Division, Department of Human Resources of Oregon v. Smith* (1990)[17], makes a rigorous distinction between act and belief, one also borrowed from Jefferson, holding that the Free Exercise clause only protects religion as a belief. It does not, in other words, provide a reason *prima facie* to break laws that are in other respects unobjectionable. *Sherbert v. Varner* (1963)[18] and *Wisconsin v. Yoder* (1972)[19], on the other hand, carve out exemptions for conscientious objection to laws in certain situations, in an important sense rejecting the precedent set by *Reynolds*. Justice Scalia for his part rejects that the Court in

[17] 494 U.S. 872
[18] 374 U.S. 398
[19] 406 U.S. 205

Smith reversed precedent in a return to *Reynolds*. Consider the change in Scalia's own language, however.[20] Here is Scalia in 1989:

> In such cases as Sherbert v. Verner, Wisconsin v. Yoder, Thomas v. Review Bd. of Indiana Employment Security Div., and Hobbie v. Unemployment Appeals Comm'n of Fla., we held that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.[21]

And here is Scalia in 1990, for the Court in *Smith*:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.[22]

Which Scalia will sit on the Court in subsequent cases? Which Scalia will write future controlling opinions? Much ink has been spilled on this controversy, but in either case, an interesting problem remains: that is, what would it mean to define religion in terms of opinion or belief, without regard to act? How coherent could a definition of religion that equates it with opinion be? Does conceiving of religion as "opinion" solve the problem of government neutrality between religious sects and between religions and irreligion?

One must distinguish the validity of a definition from the consequences of that definition. The consequences, however, can point to incoherence in that

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[20] Laycock singles out these passages in "The Remnants of Free Exercise," *The Supreme Court Review* 1990 (1990), 3.
[21] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38
[22] 494 U.S. 872, 878-9

definition's assumptions about other concepts and knowledge in general. There are four problems with conceiving religion exclusively as belief, three with its validity and one with its consequences. As to its validity, it: first, fails to grasp religion as a truth claim; second, does not properly conceive of the relation between reason and faith; and, third, does not account for religion as communal. The primary consequence of this characterization is the frustration of genuine tolerance, one that can be the grounds of true dialogue and true peace. [23] Understanding religion as an opinion is a fundamental misreading of religion's status as truth. Religion claims truth propositionally and experientially, as did many philosophical systems aligning themselves with religion until recently. We now live in the land of hypothesis. What if one shed one's pluralism-induced agnosticism and considered the claims of a religion sanctioning certain elements of life and ways of living as good through their relation to a supreme good?

Did the drafters of the U.S. Constitution acknowledge the dictates of natural law? If they were the Christians of their time that they claim to be, they did, although some were certainly influenced by Enlightenment rationalism. More importantly, monotheistic religions of that time and now claim to be recipients of a truth rather than creators of an opinion. The simple explanation is that Supreme Court wants to

[23] It has recently been brought to my attention that anthropologists of religion have long engaged in this question in the context of their own discipline's interest. While those investigations are beyond the scope of my present inquiry, I for now point the reader toward them and myself hope to address them in later iterations of this argument.

define “religion” in a way that treats all religions the same. There are some good reasons for that strategy, but the claim of the Catholic Church for example is not that it advocates a personal lifestyle or attitude that could just as well be replaced by another religion or ethical viewpoint if the believer was so inclined. And the claim of Orthodox Judaism is not that religious adherence is a therapy useful or pleasant for the individual, but a responsibility incumbent on the person by the very fact of his creation by God.

Charles Taylor in his *A Secular Age* has much to say on the phenomenon of religion as a hat one must take off when dealing with atheists or believers in other faiths. Over time, that experience of alternating between “engagement” with one’s faith and “disengagement” can vitiate our experience of the divine. One of the most important conditions to change, Taylor argues, is how we view belief itself, which in our times seems to require disengagement, an existential vision that recognizes the pluralism of confessions and unbelief. He does not simply mean tolerance or recognition of *factum brutum* plurality. In some sense disengagement is viewed as the existential dimension of tolerance.

Someone who can disengage from his own faith to consider the panoply of other moral or spiritual “outlooks” must be tolerant insofar as he recognizes the non-violent and non-insurrectionary ones as legitimate, reasonable ways of relating to the good. But diversity of opinion can raise questions about the truth of one’s own ways of conceiving the world: if they practice thus, why do I not do so as well? Every

vision alternative to one's own difference could become, if one reflected upon it, a provocation of doubt about the meaning of those differences that distinguish oneself.[24]

In some sense the Supreme Court urges just such a situation upon believers in urging them to think of religion as an opinion in principle separable from their actions as a citizen and in public. As a theory of action, what does it matter that you can be called to do something, called to the service of some truth, but can never do it, can never respond to that call? Such a restriction undercuts practical reason and its conditioning in the development of habits. If you think of happiness as an activity, then who cares that you can "think" whatever you want? If you can wish but can never do, then you will never be able to deliberate about what is important.

A closely related problem is the Court's treatment of the relation between faith and reason in religion. The possibility of revelation requires one to consider, as Thomas Aquinas does in *Summa Contra Gentiles* I.8, that God authors not only divine revelation but also man's own natural cognitive faculties. If one admits that such could be the case, then one must accept the possibility that reason and revelation do not conflict. If one cannot imagine this possibility, article 8 of the *Summa Theologiae* explains, then subsequent discussion is irrelevant. Such a person can enter into no sort of debate about the possibility of revealed knowledge of God. This would seem

[24] Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press, 2007), 2-4.

to be the position of the Supreme Court in restricting the range of meanings of religion to opinion.

Thus, when Leo Strauss in his lecture "Reason and Revelation" argues that reason and revelation cannot refute one another (although Meier thinks this a noble lie on Strauss' part), he misses the point.[25] Reason cannot refute the possibility of revelation, to be sure, and a revelation that proclaims the goodness and intelligibility of creation could have no interest in "refuting" a reason it stands above. But if reasonable men will not consider the possibility that something exists beyond man's reason, that something exists beyond man, then an artificial impasse between man and any such possible being must of necessity arise. A rationalist ideology serves an overweening conception of reason, but not man. As James Schall writes, "Human reason does not "explain" everything. But it is curious about *all that is*."[26] The Supreme Court in ruling out the possibility of religion as an expression of revealed truth seems to be ruling on our perception of *all that is* and limiting our rational capacity to explore it.

As to the third incoherence in treating religion solely as opinion, traditionally religions have thought of themselves as communities. They are not simply groups of people who happen to hold the same opinion, but are united metaphysically and

[25] "Reason and Revelation" in Heinrich Meier, *Leo Strauss and the Theologico-political Problem*, tr. Marcus Brainard (Cambridge: Cambridge University Press, 2006), 141-180.
[26] James V. Schall, S.J. "Fides et Ratio: Approaches to a Roman Catholic Political Philosophy" *The Review of Politics* 62 (2000): 54. Emphasis in original.

supernaturally to one another. The common fellow-feeling that anyone can experience with other people is perfected, a Jew or Muslim or Christian might argue, through their knowledge of one another as children of the same creator, and in their worship as a family, as a body, as an order. They are organized not simply as individuals with "preferences" or "identities," but as called and chosen, as elected and justified. Thus it matters a great deal whether a religion is "internally derived " or "externally compelled," to use Daniel Seeger's jaundiced language.[27] These facts do not simply create new opinions about the good: they describe the world far differently than the Court does and require actions that the Court might well refuse to tolerate. It implies responsibilities between believers that require action; it requires action of believers unto non-believers, such as the always-controversial issue of proselytism. These are actions that go beyond thoughts and words.

If this were all that is wrong with defining religion strictly in terms of opinion, the Supreme Court would have a problem. But as it is, it might be possible that the Court's achieved objective might be possible though its reasoning toward how to achieve it flawed. But, of course, restricting religion to opinion does not because it cannot service its intended purpose. In fine, can a government ensure neutrality between religions and between religion and non-religion by employing a sort of harm principle to enforce solely secular norms for action without respect to the opinions apparently relating to a disposition toward that behavior? In short, no.

[27] 380 U.S. 163, 167

In *Smith* Justice Scalia does not simply suspend the use of balancing tests that require proving a substantial government interest against the dictates of conscience: he abandons them.[28] Exempting a behavior on account of religious belief could not "be limited to situations in which the conduct prohibited is "central" to the individual's religion, since that would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith." It is difficult to see, however, how Scalia does not draw a false dichotomy between the *Sherbert* balancing and *Smith*'s strident secularism. If a legislature through the enactment of a law offends the religious sensibilities of its citizens through ignorance, is that ignorance an excuse? The executor of the law for his part would tell a criminal citizen *ignorantia legis non excusat*. Are there no good reasons for thinking that the legislator should be held to a similar standard? In terms of defending minorities, it would seem that sensitivity to such issues would be precisely called for, that a pillar of tolerant pluralism would seek understanding of those the majority unthinkingly rides roughshod over.

In fact, Oregon's ban on peyote use could easily appear to the "reasonable observer" to be a prohibition on a religious practice, whether or not the legislators were aware of that effect. This would seem to be a claim in line with O'Connor's concurrence, although she does not ultimately find that argument controlling:

[28] 494 U.S. 872, 873

> The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. Ante, at 878. But a law that prohibits certain conduct - conduct that happens to be an act of worship for someone - manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.[29]

Scalia seems to think that man and citizen naturally come into conflict, that in some sense the religious obligations of the believer will necessarily come into conflict with this duties as citizen, or why else would Scalia give up on balancing their interests? O'Connor at least holds out the possibility of a more optimistic theological anthropology. But by Scalia's lights state and federal laws will violate the religious opinion "It would be good to do X" every time they prohibit X, which by his fiat could happen with no regard to the believer. And so long as legislatures are more concerned to avoid endorsing any religion than to avoid offending religion *tout court*, we will expect their embrace of secularism to be the stronger. And so long as the Court tends to define "secular" as "non-religion," we will expect non-religion to be systematically privileged over religion. It is not clear, however, how such a state of affairs would be neutral or tolerant, save by the lights of the most "callous indifference," to recall Douglas' phrase.

[29] 494 U.S. 872, 893

III. Between Man and His God: The Subjectivity of Religion

In a series of cases the Court has taken to heart Jefferson's claim that religion concerns only the individual and only as opinion at that. We easily forget how radical such a claim would have seemed at the time. Even such staunch anti-clericalists as the Presbyterians and the Baptists of Jefferson's own time would have objected that every man's moral character has a profound impact on his social and political interactions, and that society and polity in turn have a responsibility to ensure that every man be educated to fulfill his duties as a moral person and citizen. Yet the progeny of *Reynolds* deny this line of thought.

Having made some sense of the Court's reduction of religion to belief, we must next consider its elevation of individualistic expressive values as the core attribute of religious belief. How do we distinguish religious belief from belief in general, or from other parts of religion? I will explore two developments of this thought and their implications. In one line of cases (notably *Zorach*, *Torcaso* and *Seeger*) I trace the Court's expansion of the meaning of religion to the point where it may well be asked: Is there anything in principle that can not be religion? The second line of cases (*Lynch*, *Van Orden* and *McCreary*) answers: no.

Zorach poses many challenges to the student of Supreme Court religion clauses cases. Beside its apparent inconsistencies with *Everson* and *McCollum* mentioned above, *Zorach* appears to contain two contradictory definitions of religion. On the one hand, *Zorach* appears to view religion in orthodox terms, as a

monotheistic practice oriented around church. In this respect it seems to be in line with *Everson* and *McCollum*, which do not disagree that "…[w]e are a religious people whose institutions presuppose a Supreme Being."[30] As Douglas continues, however, he evokes a vision of Romantic expressivism that goes far beyond the bounds of classical conceptions of religion:

> We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.[31]

Man has spiritual needs: that seems uncontroversial. But does each man have unique spiritual needs? What is man that his nature varies from man to man? This would seem to mean that man has no nature, to bespeak his abolition. If man has no essential nature, it is difficult to understand how he could be created, i.e. how there could be a "Supreme Being." Perhaps such a being is not the Judeo-Christian Creator-God, but a demiurge who fashions matter rather than creates it *ex nihilo*? But many spiritualities have nothing to do with God or a god, as will be famously grappled with in *Torcaso*. Does Douglas mean to exclude those dogmas from those that form the basis of religious life in America? And what do these statements have to do with our institutions, the ones that somehow "presuppose a Supreme Being"?

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[30] 343 U.S. 306, 313
[31] Ibid., 313

For if the First Amendment protects non-traditional religions, or even non-religion, then it does so with the sanction of either the law of the Judeo-Christian "Supreme Being" or something else. If the former, then protections for other religious outlooks other than Abrahamic ones are secured on the basis of Judeo-Christian traditions, and in that sense inferior. If such protections are grounded in something else, however, then Douglas would seem to err in arguing that America's "institutions presuppose a Supreme Being," at least as that statement impinges on the question of religious tolerance. In the former case, as should be clear, how can the government be neutral among religions? Christianity would seem to be uniquely privileged. In the latter case, how could the U.S. not be neutral between religion and non-religion with regard to the First Amendment? Consider Douglas' words a few lines later:

> The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.[32]

If the government were to follow this imperative, it would have to be capable of identifying sects to avoid inappropriate policies and actions toward them. By Douglas' lights those sects could be one of two sets of institutions: traditional ones in light with the religious heritage of the United States, or every and any religion founded in the budding pluralism of American spiritual life. In the former case, the

[32] 343 U.S. 306, 314

nature of religion would be clear however narrow the toleration; in the latter, religion's purview would be indeed expansive, but so would be the accommodation to its scope. Later cases would seem to solve the first problem without identifying the second. Note the famous language of *Torcaso v. Watkins* (1961), a decision which notably re-united Black, Douglas and Frankfurter.[33]

> We repeat and again reaffirm that neither a State nor the Federal Government can… aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. [Footnote 11]

Already we see the Court opting for Douglas' second option, including non-traditional religions that do not share in a constitutional faith in a Supreme Being. The footnote to this passage takes one more step:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

Although we do not yet have a clear-cut definition of religion, the Supreme Court has frequently taken the position that several of them exist in the United States, and that they can be differentiated or at least their differences respected. On Douglas' terms, this tolerance can be justified on the grounds that whatever man elects to fulfill his spiritual needs counts as religion. Thus, on the one hand, as we argued in the preceding section, the Court has restricted the scope of religion to opinion. This

[33] 367 U.S. 488

restriction however begins to look like an expansion insofar as any opinion can be a religion.

United States v. Seeger (1965) for a time settles the tension in *Zorach* by equating the two definitions; it does not, however, take cognizance of what *Torcaso* implies but stops short of making explicit: if "religion" refers to personal belief rather than an established orthodoxy, no limitations on its extension would seem legitimate. Three men claimed exemption from combat duty under the Universal Military Training and Service Act of 1951, enacted curiously a year before *Zorach*, which included provisions for conscientious objections based on "duties beyond a human relationship" relating to a "Supreme Being." The Court for its part held that, though the men did not subscribe to an "orthodox religious sect," nonetheless merited protection under the Act. "We have concluded," Justice Clark wrote for the majority,

> that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.[34]

To ensure that "Supreme Being" is not taken to mean something other than what it does, Clark describes the test of the Act: "a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption." While this would seem to be a highly

[34] 380 U.S. 163, 165

inclusive category – and it is not clear what it would mean for a belief's place to be "parallel" to God – the Court in that definition and later in the decision took some effort to establish restrictions on this definition of religion:

> The exemption does not cover those who oppose war from a merely personal moral code nor those who decide that war is wrong on the basis of essentially political, sociological or economic considerations rather than religious belief.[35]

How one would distinguish such beliefs from religious beliefs remains unstated: the Court seemed again happy to rely on intuition. Seeger for his part claimed a sort of agnosticism, electing "to leave the question as to his belief in a Supreme Being open" and with apparent support from several philosophers. He argued for "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." In short, his religion was that of "ethical belief in intellectual and moral integrity."[36]

What occupied a place in Seeger's life parallel to God? Seeger seemed in search of such a lodestone, and until then it remains unclear what he could have meant by "goodness" and "virtue" except quite mundane things in the tradition of Benjamin Franklin, ones that would seem to correspond perfectly to "a merely personal moral code."[37] Seeger could well have been concerned for his moral

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[35] 380 U.S. 163, 163
[36] 380 U.S. 163, 166
[37] Consider Franklin's *Autobiography*, which in addition to the above virtues extols those of cleanliness, silence and frugality.

development as he understood it, in strictly human and social terms of sobriety, industry and diligence, but that does not seem to rise to the level of a God-substitute. How, in other words, can a description such as is given below be attributed to religion?

> …he declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" belief; that he preferred to leave the question as to his belief in a Supreme Being open, "rather than answer `yes' or `no'"; that his "skepticism or disbelief in the existence of God" did "not necessarily mean lack of faith in anything whatsoever"; that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." R. 69-70, 73. He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense."[38]

What Seeger would have had to show is how a belief could qualify as “duties beyond a human relationship” without making reference to a god, or at least to the transcendent. That he did not, however, shows the great confusion on the part of the Supreme Court. What of a physicist who claimed adherence to scientism? A Marxist who claimed fidelity to historical progress? How would the Court tackle these putatively ethical positions? An observer might recall claims by Gilson and Löwith that modern secular notions of the good might resemble theistic ones quite closely formally, however far metaphysically they diverge from classical religion. The Court,

[38] 380 U.S. 163, 166

in creating conditions to determine religion that it thereafter immediately and obliviously violates, seems to be falling into the trap those scholars elucidate.[39]

Thus, while a narrow strand of the ruling in *Seeger*, one that focused on Justice Clark's emphasis on the necessity of something occupying a place commensurate to God, might seem to rule out many belief systems enumerated for protection in *Torcaso*, most obviously secular humanism, that is not the case's broad direction, one that emphasizes that such beliefs need not required a God *per se*, nor is that how later cases invoke it. A secular humanist could surely believe in an "Ultimate Reality" without reference to a god. Even if such a person were not avowedly an atheist, espousing agnosticism does not make one a theist. Indeed, the Court cites theologians, e.g. Paul Tillich, whose conceptions of God are vague to the point of indeterminacy.[40]

It is worth noting that the Court also cites as evidence the Second Vatican Council's *Nostra Aetate,* particularly as they cite that declaration as though it proceeds from the same principles as those of Tillich and Robinson. *Nostra Aetate*, however, seems a bad support for the Court's argument. The Catholic Church did not

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39 Etienne Gilson, *Études sure le rôle de la pensée médiévale dans la formation du système cartésien* (Paris: Vrin, 1930) and Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* (Chicago: University of Chicago Press, 1949).

[40] 380 U.S. 163, 181. More on Tillich's definition of religion as an "ultimate concern" can be found in his *Dynamics of Faith* (New York: Harper and Row, 1957), 1-2. Tillich in his attempts to define "ultimate concern" as specifically religious encounters the same problems the Court does with its imprecise language use, struggling with distinguishing it from ideology and secular "value systems."

affirm the beliefs of individuals across religions insofar as such beliefs reflect the self-constitution of an autonomous individual's ethical framework "parallel" to God, even should such people fail to find the grounding of their beliefs in the objective reality of that God, but rather insofar as such beliefs reflect the unity of man in his creation in the image of God as a creature and as he is drawn back toward his maker as his greatest good. In other words, *Nostra Aetate* issues theological statements true for all people across all times rather than socio-cultural descriptions of each person in each culture finding his or her own ultimate concern.

Thus we are back to *Zorach*. If religious freedom in the United States rests upon a conception of religion as roughly Abrahamic, then there can be no talk of their equality with belief systems that claim to supplant God. Christianity might well respect non-Christians for Christian reasons, but it would not "respect" their beliefs as such. If religion for the First Amendment, however, means finding one's own Walden Pond, then it will be difficult if not impossible to discern the location at which to build the Jeffersonian wall upon which so much depends.

With reference to the wall, we might be in a better position to answer an early question of our inquiry: if religion is a matter "between man and his God," why does Jefferson posit a separation between church and state? Why should the Constitution treat on man's religion in terms of "church" rather than "belief"? Moving beyond Jefferson, why would the Court invoke a separation "between man and his ultimate concern?

First a distinction is in order. The cases of this section are Free Exercise clauses. As goes Free Exercise clause cases, the Court historically has defined religion quite liberally because, as we have seen, religion has been equated with opinions of almost any sort. When it comes to establishment clause cases, however, the Court's primary target seems to be the sorts of entities that one associates with more traditional definitions of religion, ones that through their advanced institutional capacities are in a better position to solicit and utilize public funding for conspicuous purposes, particularly education-related functions. If Jefferson's wall aims to protect each individual's freedom of conscience and keep government free of sectarian influence, it is exactly such organizations that he would want to see kept in line. The Establishment clause's target seems to be less religion writ large than specific ecclesiastical institutions.

In fact, although the question of church would seem to be irrelevant from a Jeffersonian position, the Court has frequently invoked the concept to discuss the deleterious nature of religion when exercised corporately. This paper cannot treat on this subject as sufficiently as Russell Hittinger has already done, but hopefully it clarifies how this suspicion fits in with a larger view of the Court's understanding of religion. In his review of Supreme Court religion cases from *Everson* (1947) to *Lee v. Weisman* (1992), Hittinger summarizes the Court's characterization of religion as divisive, coercive, irrational and "whatever an individual want it to mean."[41] One

[41] Vid. *The First Grace* (Wilmington, DE: ISI Books, 2003), 163-82

must distinguish between the first three attributes, which apply to "organized" religion, and the fourth, which applies to individual belief. Clearly the "right" type of religion involves self-expressive values, and presumably these are anti-ecclesiological "preferences."

Hittinger cites Justices Black's and Douglas' *Lemon* concurrence, in which they approvingly quote a virulently anti-Catholic book, Loraine Boettner's *Roman Catholicism*.[42]

> The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.[43]

"We deal not with evil teachers," they write in explanation of this passage, "but with zealous ones who may use any opportunity to indoctrinate a class."[44] Now the teacher might not be evil, but given the extremity of the above-claim, the teacher would have to possess a nearly all-consuming zeal indeed, a zeal that would blind him or her to reasonable concerns about distinguishing between the secular and sacred. Such zeal would have to be profoundly irrational. Understandably the

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[42] Loraine Boettner. *Roman Catholicism* (Phillipsburg, NJ: Presbyterian & Reformed Publ., 1962), 360. Douglas Laycock provides a fascinating commentary on this work in his "Civil Rights and Civil Liberties," 54 *Chicago-Kent Law Review* (1977): 418-21.
[43] 403 U.S. 602, 634
[44] 403 U.S. 602, 635

Court's opinion of organized religion would be dim indeed should it assume such bodies' membership and structure lack all reason.

Hittinger wonders why this sort of activity would be allowed even on a private level. The dangers seem to go far beyond a concern to avoid government's entanglement in the religious, but a fear that the objective well-being of a child will be mutilated by such psychologically unhealthy teachers and their sadistic methods.[45] Indeed, recall Chief Justice Waite's words in *Reynolds*:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[46]

What of "social duties" and "good order"? If religion be "solely between man and his God," we do not know if that fact commands government to respect that privacy, or authorizes governments to develop a civil religion that after all *ex definitione* can in no way bear upon man's private religious life. It also does not tell us whether the individual-oriented nature of religion might have salutary communal effects, say as a buttress of social mores. Many thinkers have seen in religion a source of order and the virtues of citizenship, but Chief Justice Waite seems to imply the converse: the government must ensure the good morality of religion.[47] In fact, the Supreme Court

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[45] One is reminded of Adorno's facile portrayals of hierarchical authority in *The Authoritarian Personality*, (New York: Harper & Brothers, 1950).
[46] 403 U.S. 602, 164
[47] *Wisconsin v. Yoder* 406 U.S. 205 (1972) contains striking examples of that line of thought.

has historically been divided as to whether religion is good or bad for society. The more the Court has come to apprehend, if not define, religion in terms of radically individualistic expressivism, however, the more we might expect it to see hierarchical and regulative structures as unconscionable impositions on freedom of conscience and the Millian government that would encourage such freedom.

IV. Secularism as Hermeneutics: Lynch*,* Van Orden *and* McCreary

Few cases have spurred as much controversy in recent years as the two 2005 cases relating to Ten Commandment displays on government property: *Van Orden v. Perry* and *McCreary v. ACLU*.[48] In those decisions we witness the Court's attempts to grapple with what "religion" could mean after the term's expansion to the point of indeterminacy.

The traditional narrative of how the Supreme came to grapple with secularism begins in 1984 with *Lynch v Donnelly*.[49] In that case a 5-4 decision upheld a city's arguments that a crèche display (arranged with other holiday symbols) does not constitute an Establishment Clause violation because of the crèche's "secular" meaning in a non-religious context.

> The concept of a "wall" of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the

[48] *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). I am grateful to William Blake for our conversations on this section.

[49] 465 U.S. 668

> relationship that in fact exists. The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference," Zorach v. Clauson, 343 U.S. 306, 314, that was never intended by the Establishment Clause.

Chief Justice Burger begins the majority opinion with the intriguing claim: “Here, the focus of the inquiry must be on the creche in the context of the Christmas season. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”[50] This statement proved to be quite right, for Brennan in his energetic dissent describes the crèche as “a distinctively religious element,” one whose secular purpose whatever it might be would be far better served by a secular element.[51]

> JUSTICE BRENNAN states that "by focusing on the holiday `context' in which the nativity scene appear[s]," the Court "seeks to explain away the clear religious import of the creche," post, at 705, and that it has equated the creche with a Santa's house or reindeer... Of course this is not true.[52]

Not much of an argument. But in cases where one would already expect the word “religion” and its adjectival forms to be defined poorly, the inclusion of one of modernity’s most equivocal words, “secular,” only adds to the muddle.

Lynch, in line with *Torcaso*, *Seeger*, and a certain strand of thought in *Zorach*, raises the question: If any religious symbol can be interpreted as secular in the right

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[50] 465 U.S. 668, 669
[51] Ibid., 700
[52] Ibid., 676

context, can any secular symbol "become" religious? If, as was argued in *Torcaso*, even secular humanism can be included among "those religions founded on different beliefs," i.e. non-theistic, but still deserving of protection equal to theistic religions, then religion and the secular would seem to be pseudo-universals. *Mutatis mutandis*, arguments that find secular meaning in the Ten Commandments or a crèche come as no surprise.

In the cases *McCreary* and *Van Orden*, the issue at hand was how to view the purpose of public displays whose meaning and content would surely have been accepted as simply religious in the not-too-distant past. Reflecting the *Lemon* test, however, arguments were made in both cases that, even if public displays are required to have in intent primarily secular rather than religious intentions, public displays could nonetheless promote a basically secular purpose despite their inclusions of objects of normally religious meaning. This is how Justice Breyer viewed the situation in *Van Orden*:

> The case before us is a borderline case… On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Diety [sic]. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.[53]

[53] 545 U.S. 677

In Breyer's opinion, the decision came down to that "the Commandments' text as used on this monument conveys a predominantly secular message" that despite an admittedly "religious aspect" can nonetheless be integrated into "a broader moral and historical message reflective of a cultural heritage."[54]

This argument does not seem to define "secular" simply as "the absence of religion." And that is just as well, for such a definition tends to the benefit of the non-religious against the religious. The Court in *Everson* or *McCollum* could assume a certain religious orthodoxy, and in *Reynolds* had no problem enforcing it, but the Religion Clauses cases of the second half of the 20th century, in taking in the profusion of systems that could perhaps count as religion, left potentially nothing in the "non-religion" category – or left everything in it, which amounts to the same thing. So what could secular mean in such a context?

In what senses can something be secular? If those senses will not be the same for every person, if they depend upon the subject, then whose viewpoint will be privileged? The Ten Commandments, for example, do not have a merely "secular" historical meaning for Christians and Jews; they have a sacred meaning as part of a sacred history in God's intervention in time. It is difficult to see how from this perspective the Latin cross or Ten Commandments could be seen as part of some vague, undifferentiated culture or history. Someone "grasped by ultimate concern" ought to see the cosmos rather differently than some who wants to leave the

[54] *Ibid*.

question of God's existence open. Indeed, Augustine of Hippo goes so far as to say these two sorts of men live in two entirely different cities.[55]

The Court does seem to gesture toward a more nuanced view of the secular than the secularization thesis proposed by Hegel and his successors, called "subtraction stories" because they center around the retreat of religion, superstition and enthusiasm in the glorious advance of Enlightenment rationalism in all of its forms.[56] But that nuance must not come at the cost of a principled distinction between religion and non-religion, between religion and the secular, if the Court indeed will continue to use those terms. No one reading the conflicting opinions of *Van Orden* and *McCreary* would suspect for a moment that the justices in their arguments over establishment and the wall of separation metaphor had the same notions of religion and the secular in mind. As Souter wrote in his *Van Orden* dissent:

> What these observations underscore are the simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.

He clearly has no dynamic understanding of religion and the secular in mind. What of the much-vaunted context the Court has so frequently invoked of late? In fact,

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[55] Augustine, *The City of God*, ed. R. W. Dyson (Cambridge: Cambridge UP, 1998), Book I, Preface; Book XIX, cc. 24-28.
[56] Vid. Michael Gillespie, *The Theological Origins of Modernity* (Chicago: University of Chicago Press, 2008), 10-11.

even a person entirely oblivious to religion, one with "no training in religious doctrine," could immediately identify the Ten Commandments display at the Texas Capitol as an unambiguously religious declaration. Pluralism for Souter creates problems for toleration, but not of understanding: the atheist can comprehend the religious as well as the believer can.

In fact, although Scalia fondly invokes contextual readings of such displays, he like Souter tends to zero in on more essentialist interpretations of the objects at hand. And Justice Steven's approach famously finds no room for a contextual reading, either:

> Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.[57]

The Supreme Court's attempts to define the secular have taken two approaches: one, to distinguish it as the non-religious, and two, to see it as not in fact necessarily exclusive of the religious, but part of a larger context in which dominant messages can be profoundly ambiguous. While to some extent reflecting the genuine difficulties anyone would have sorting out these distinctions, the Court is of course entrusted with making decisions generalizable to classes of situations. I suspect that the Court's difficulties in distinguishing the secular from the religious will continue so long as the term "religion" remains vague.

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[57] 545 U.S. 677

V. Conclusions

In conclusion I offer two propositions, four questions that arise from them, and a modest proposal of my own. As to the two propositions:

(1) The Supreme Court has arrived at no principled distinction between religion and irreligion.
(2) The Supreme Court has assumed that secularism means only the absence of religion; and in recent divergences from that definition has developed no coherent definition for the secular.

These propositions I take as the summary of my arguments in the paper. From them four questions arise:

(1) Can coherent judgments be rendered as to whether a religion is being preferred over another (or over irreligion) if the Court can arrive at no principled distinction between "religion," "irreligion" and the secular?
(2) Can the Court avoid rendering judgments in favor of irreligion over religion if it defines secularism (more or less) as irreligion?
(3) If religion were simply a set of opinions, is there a need for protections for it beyond freedom of speech? Why?
(4) If the line of arguments from *Reynolds* to *McCreary* rejects privileging religion over irreligion in state and national governments, can this line of reasoning be used to reject arguments from the natural law and natural theology?

We have reasons to answer "No" to the first two questions and to express some confusion as to the answer to the third. The reader might also, however, be confused by my fourth question pertaining to natural law. It amounts to a response to the modern condition of religious diversity. What does the brute fact of diversity require of us? If religion is not merely opinion, but claims to safeguard vital truths,

then would the mere existence of another religion have any bearing on the truth of the first religion's belief? It is not obvious why such would be the case.

One could argue, however, that tolerance would be desirable to secure peace in cases in which competing claims between the religions could not be adjudicated. At this point natural law and natural theology enter the picture. Holding side by side, the claims of Christianity and, say, secular humanism, perhaps there seems no "neutral" way to adjudicate between them. But what if certain facts about the nature of reason and man's goods could be reasonably demonstrated to believer and non-believer alike? What if such facts pointed to the existence of a god? Those facts make a case for natural law, and the things we can know through reason about God – that is natural theology.

Religion has not abated in the West, after all, and continues to play a prominent role in above all places the United States. As Jean Elshtain notes, "The vast majority of political scientists, having reduced religion to a set of private attitudes that had to give way before the onslaught of the powerful forces of modernization … missed all sorts of strong urgencies and relationships and beliefs."[58] But while scholars have been preoccupied by the West's recent religious resurgence, the more basic question of secularism's relation to religion has been obscured. How is it that religion can ebb and rise in the face of powerful philosophies negating its purpose in public and private life?

[58] Elshtain "Religion and Democracy", *Journal of Democracy* 20 (April 2009), 7.

Thus I turn to my proposal. How should the Supreme Court define religion? Whatever else can be said, the Supreme Court has not met revealed religion on its own terms since *Reynolds* in 1878. It has not accepted, I have argued, that religion could be more than a subjective opinion, that it could attain to truth. If the Court did, it would see that the reason that directs man to his good also directs him to know his greatest good, and this includes knowledge of his source and end. In pursuit of that final good, not all religions would seem to be equal.

So, how is it that religion can ebb and rise in the face of powerful philosophies negating its purpose in public and private life? I believe the answer can be stated simply: it is philosophically incoherent to deny the possibility of revelation. If reason cannot disprove the possibility of revelation, then a sociology or politics of culture and religion that does not take seriously that option is going to misread fundamentally the culture at hand. This insight takes us as far as we can go with natural law, to the threshold of theology. On the one hand, this definition would undoubtedly take us back to more traditional understandings of religion, for many contemporary ideologies and cults do not make claims to truth or to know the good at all. On the other hand, we might suspect that understanding the Abrahamic religions in this light would deepen our awareness of them as cultural influences and as sources of knowledge of good, thus illuminating the ways in which they inform our politics, which after all seeks human goods as well.

Jefferson's wall metaphor fundamentally leaves open the possibility that the good man is not the good citizen, and that leaves open the possibility that America is not the best regime. These statements deserve to be explored and argued rather than asserted, for too much is at stake in their implications. The danger of living in a political community, after all, is thinking that life lived by its norms is all that is.

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