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THE NO RELIGIOUS TEST CLAUSE AND THE CONSTITUTION OF RELIGIOUS LIBERTY: A MACHINE THAT HAS GONE OF ITSELF*

*Gerard V. Bradley***

The article VI ban on religious tests for federal offices is the sole provision on the topic of religion in the original Constitution. Since the seminal Everson decision in 1947 the courts and commentators have labored mightily to craft a thoroughgoing constitutional philosophy of church and state, in recognition of the profoundly problematic relationship between religion and law in our society. Yet none has looked carefully at the test clause for guidance. This Article does just that.

Professor Bradley argues that notwithstanding the complete absence of attention to article VI, its story tells us all we need to know about the appropriate constitutional philosophy of religion: there is none. Instead, the test ban provides the design for a machine of religious liberty that has gone of itself for two hundred years.

INTRODUCTION

AMONG THE EVER-MULTIPLYING curiosities of the Supreme Court's church-state decisions is the near ubiquity of the evidentiary rule of "Inverse Proportion." That maxim provides that the intellectual breadth, societal importance, and case-resolving prowess of a constitutional principle be directly, but contrarily, related to the evidence supporting judicial election of it for constitutional enshrinement. Imagine a triangle perched on one of its points—or Jackie Gleason standing on his head. You are now able

* Readers will recognize an adaptation of the title to Michael Kammen's recent study *A MACHINE THAT WOULD GO OF ITSELF*, a title itself taken from a century-old observation on the Constitution by James Russell Lowell. See M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 125 (1986). Lowell remarked that the constitutional order worked with little self-conscious tinkering. *Id.* That he at least correctly described the constitution of religious liberty is my thesis.

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to intuitively apprehend the rule's substance. A first concrete illustration: No ordering principle is more widely cited than the "wall of separation" between the realms of religion and government. First deployed in 1878 by the Supreme Court to seal the fate of a convicted Mormon polygamist,¹ the "wall" metaphor lay dormant until 1947's seminal *Everson v. Board of Education* opinion,² where it capped the Court's Olympian pronouncements on the meaning of nonestablishment. It has been a mainstay of the law ever since. Some people may therefore have been surprised by the Justices' 1985 admission that the phrase derives neither from the constitutional text, nor from its structure, nor from the contemporaneous understanding of those who created it. Rather, it stems from a single letter by Thomas Jefferson to a community of Connecticut Baptists, which was written more than a decade after the first amendment's birth.³

Another illustration of the Inverse Proportion rule is found in *Everson*. There is no more important principle in church-state law than *Everson's* proscription of governmental encouragement of religion, even where the state aid does not discriminate among faiths.⁴ Arguably, the entire nonestablishment opus is little more than an excruciatingly belabored footnote to this part of *Everson*. Yet like the "wall" metaphor, the no-aid principle is not traced to text or structure, or to the history of the first amendment. Instead, the *Everson* opinion championed the views of two men—Madison and Jefferson—concerning a Virginia imbroglio over forcing Christians to pay their ministers' salaries.⁵ Not to put too fine a point on it, the recent inclination of some Justices—especially Chief Justice Rehnquist—to gauge the constitutionality of church-state activities like nativity scenes,⁶ legislative chaplains,⁷ and public school prayer⁸ by appeals to "tradition" (that is, whether the "Framers"

1. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (defendant Reynolds was charged with violating Georgia statute forbidding polygamy).

2. 330 U.S. 1, 15-16 (1947) (upheld a statute challenged by taxpayer, which authorized the reimbursement of parents of parochial school students for money spent on bus fares paid for transportation of the children to the parochial schools).

3. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1359 n.1 (1984).

4. *Everson*, 330 U.S. at 14.

5. *Id.* at 11-14.

6. *Lynch*, 104 S. Ct. 1355 (1984) (no violation of establishment clause when city displayed nativity scene).

7. *Marsh v. Chambers*, 463 U.S. 783 (1983) (upheld a practice of Nebraska legislature opening each session with a prayer by a state-paid chaplain).

8. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (struck down Alabama statute allowing prayer and meditation in public schools).

countenanced a similar endeavor) observes the law of Inverse Proportion. To be sure, no ambitious "norm" is derived from scant evidence, but this decisionmaking methodology does not even purport to inquire into the meaning of the constitutional text or structure. Furthermore, a volatile contemporary issue like school prayer is evidently to be validated by the fact that George Washington preached a sermon on Thanksgiving Day, 1789.⁹

No doubt there is at least the usual ration of judicial willfulness at work here. So it is easy to observe, as Justice Brennan has, that the appeal to "tradition" probably covers for a favored political agenda.¹⁰ So it might. But, one must still insist that there is no necessary correlation between slender justification and doctrinal indeterminacy. Put differently, principles which are crisp and clear enough to constrain political predispositions may well be derived from the flimsiest evidence. And however controversial, relying upon ancient missives for the resolution of vexing modern problems is hardly a pipe dream. Fundamentalists do it with Paul's Epistles all the time.

Neither is the indeterminacy of the justificatory process itself the real culprit here. True, flaccid standards of historical proof cannot effectively ground even an intellectually honest and politically neutral search for constitutional principles for the simple reason that almost any principle may be justified. Therefore, almost none can be excluded, so long as a letter by one "Framer" suffices. Madison opposed "state aid to religion," as the popular and judicial conceptions have it. Is it not enough to stymie analysis to observe that Washington favored it?¹¹

The real deformity is the rule of Inverse Proportion itself, in all its bloated majesty. On one hand (or on top, as the maxim's imagery suggests) we have a judicially crafted, conceptually over-stuffed common law of church and state: an obese body of rules rooted in the most fundamental notions about our political order. These rules also extend to minutiae. They are poised to settle the

9. *Id.* at 2520 (Rehnquist, J., dissenting).

10. Address by Justice William Brennan, Georgetown University (Oct. 12, 1985) (copy in author's possession).

11. See CORRESPONDENCE OF WASHINGTON 404 (J. Sparks ed. 1853). Washington wrote of the General Assessment (in response to Mason's appeal to support his opposition to it):

Although no man's sentiments are more opposed to any kind of restraint upon religious principles than mine are, yet I confess, that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess.

Id.

tinest, most prosaic issues, distinguishing permissible bus rides (to and from parochial schools)¹² from the impermissible (field trips),¹³ and requiring inclusion of plastic reindeer to save a creche from constitutional invalidation.¹⁴ The absolutely critical—yet largely unjustified—assumption is that the Constitution contains a correct prescription for practically any church-state malady. At a minimum, the constitutional quest is for right principles possessing encyclopedic application. In sum (and I think this fairly characterizes the judicial and scholarly enterprises) we are all looking for a “constitutional philosophy” of religion. Since a philosophy is like a ship—even the smallest gap in its structure will sink it—comprehensiveness is a must; since it is a *constitutional* philosophy, it need be rooted in fundamental principles somehow traced to the constitutional text or plausible interpretive aids. But the document itself bears only opaque terms like “establishment” and “free exercise,”¹⁵ whose meanings remain shrouded in the dense mists of history. As we learn little from them, but remain convinced that constitutional answers to our questions exist, we trudge on. The next logical step: “framers’ intent.” What the Framers meant to say about religion and government is the question to which nostrums like “wall of separation” and “no-aid” are answers. Thus, the other hand, or at the “bottom” of the delicately balanced triangle is the historical evidence of how the Framers “intended” to relate God and Caesar and the Garden to the Wilderness, but which they failed to specify in the Constitution.

Things do get “curiouser and curiouser,” as Alice remarked while tumbling through Wonderland. All but completely ignored in this high stakes speculation is the *only* occasion on which the Constitution’s makers actually addressed the problem: the article VI, section 3 ban on religious tests for federal office.¹⁶ Neither court nor commentator has shown any interest in it as a clue to the Constitution’s “philosophy” of religion. The absence of any judicial

12. See *Everson*, 330 U.S. at 17.

13. See *Wolman v. Walter*, 433 U.S. 229 (1977) (struck down Ohio statute allowing the state to fund field trips of non-public schools).

14. See *Lynch*, 104 S. Ct. 1355 (1984).

15. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I, cl. 1.

16. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

opinions actually resting on article VI— there are indeed none¹⁷—is no excuse, for there are no cases construing Madison's "Memorial and Remonstrance"¹⁸ either. Judges and scholars, however, are still infatuated with it. Remember, we are not talking about a re-statement-type summary of practical legal doctrines, but about an ambitious opus aiming to relate the Framers' plan for religion and government from any available fragment of evidence. To cite just one outstanding example of article VI neglect is Professor Tribe's relegation of his article VI discussion to a single footnote. He observes that it is "now of little independent significance."¹⁹ That's it.

That's also unfortunate because the full story of article VI definitively reveals the "constitutional philosophy" for church and state: there wasn't any, and none was intended. Indeed, the Constitution thwarts any attempt at a "constitutional philosophy" of religion. At the same time, I shall argue that the full story of the test ban tells us everything we need to know about the Framers' constitution of religious liberty, and about the manner in which religious liberty has actually been maintained throughout our history. If the preceding sentences seem paradoxical, two advices may help. First, distinguish a "philosophy" from the term "constitution," with a small "c." The latter is not a systematic account of justified principles, but rather a design or arrangement of elements for something that "works" in practice. The submission here is that our present regime of religious liberty, such as it is, and without normatively judging it, is a political outcome due to historically prevailing conditions of religious pluralism. Most importantly, it is not the product of a commitment by the people, their representatives, or by the Supreme Court to toleration or to religious liberty as a matter of abstract principle. Indeed, central to the plan was and is the realistic assumption that right principles, however expressed, have little effect upon the interaction of faith and politics. Second, and more or less therefore, it helps to think of article VI as function, not meaning. It does have a fairly compact, reasonably ascertainable legal meaning; but more importantly, it is both reflective and constitutive of the social realities and political power that the Framers anticipated would affect religious freedom *without* devotion to principles of religious freedom by anyone. The plan was for a machine which would run by itself, and produce religious freedom without the lubrication

17. See *infra* Part II.

18. The Memorial and Remonstrance is printed in its entirety in the *Appendix* to Justice Rutledge's *Everson* dissent. *Everson*, 330 U.S. at 63-72.

19. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 813 n.1. (1978).

of a "constitutional philosophy." The most important upshot is a dramatically curtailed and qualitatively different judicial role in sustaining religious freedom.

I. THE STORY OF ARTICLE VI

*Girouard v. United States*²⁰ is the rare judicial discussion of article VI. In *Girouard*, the Supreme Court ignored the plain congressional intent to exclude aliens who would not bear arms in defense of the Constitution, and allowed a pacifistic Seventh Day Adventist to settle on our shores.²¹ The rejected interpretation, stated the Court, would have effectively authorized a religious test for citizenship in a country with no similar obstacle to office holding: "It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state."²² The court said it could not assume that Congress intended to make "[s]uch an abrupt and radical departure from our traditions," which regard the test oath as simply "abhorrent."²³

One would never guess from the historical facts that "tradition" helped produce article VI at all, much less that religious tests were "abhorrent" to it. Rather, it is the decisive break with ongoing practice—which, after all, is tomorrow's "tradition"—that stands out. The Philadelphia Framers banned religious tests, with only North Carolina dissenting,²⁴ even though at the time every state (save perhaps Virginia) employed religious tests for office. In other words, religious belief stood at the door of practically every state political office in 1787 America. Moreover, there is compelling evidence that these practices were precisely as the vast majority of Americans wanted them to be. Yet, the Framers positively forbade them. Proper interpretation of this "about-face" then is a pivotal point for further speculation. If misinterpreted, analysis will derail at the start. While little has been made of this specific discontinuity—just as little has been made generally of article VI—a cognate break between establishmentarian state practices and the First Amendment's nonestablishment decree has been parlayed into the grand prize by both sides of the church-state debate. Justice Black's simple formulation in *Everson* is now classic: colonial practices

20. 328 U.S. 61 (1946).

21. *Id.* at 62.

22. *Id.* at 66. The Court neglected to note that the Constitution has long prevented *any* naturalized citizen from becoming President. See U.S. CONST. art. II, § 1, cl. 5.

23. *Girouard*, 328 U.S. at 69.

24. See *infra* note 114 and accompanying text.

were horribly illiberal and the First Amendment consequently marked a complete rupture with "tradition."²⁵ "[F]reedom-loving colonials" were (again) "shock[ed] . . . into a feeling of abhorrence" at their habits, and inaugurated a new dawn of religious liberty with their Bill of Rights.²⁶ Black's pivot is a broad-based popular one: the people simply changed their minds about church and state, and the law followed from this renewed disposition. On the other side, many have challenged the Court's latitudinarian views with the same historical facts: such a founding generation simply did not believe in separationism, and would not, and did not, build a "wall of separation" as we and Jefferson envision it.²⁷ See, for example they would say, how these same Framers ordered their home state's affairs.²⁸ This pivot is also founded in "the people." It surmises that a not-particularly liberal public wrote about a not-particularly liberal Constitution, so that it is historically faithless to ascribe liberal views to either the Framers or their Constitution.

Neither interpretation comes close to the point when applied to the test ban because they share a common flaw. Each presumes consistency between the people's substantive views on church and state relationships and the constitutional language. Law flowed from popularly-held principles in both accounts, and the argument has to do with the color of those principles. But article VI *was* a significant departure from existing legal practice and from popular beliefs. In other words, the test ban is explainable not by any sudden eruption of Enlightenment rationalism or Jeffersonian skepticism, which transformed overnight a society's thinking, but instead by some (for now, unspecified) element which refracted or deflected the founders' traditional habits and beliefs in an unexpected way. To put the proposition most succinctly: the founding generation entered the process of constitution-making firmly convinced that only Christians (and largely, only Protestants) should hold public office. They exited the process with those views intact. Yet, article VI was clearly understood to contravene that belief.

Next I turn to what happened to explain the abrupt departure. A preliminary hypothesis centers upon the obvious variable: a government of national scope and federal character presented considerations different from those presented to state lawmakers.

25. See *supra* note 2 and accompanying text.

26. *Everson*, 330 U.S. at 11.

27. See generally G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987).

28. See *infra* Part A.

A. *An Overview of Religious Tests in Pre-Constitution America*

Since one cannot, or at least should not, theorize without the facts, a survey of religious test practices extant in 1787 is necessary. The short of it: "non-Christians" could not hold public office anywhere in the states, except perhaps in Virginia, and there is no record of *that* actually occurring. Catholics were the only non-Protestant Christians around, and they were clearly eligible in Pennsylvania, Delaware and Maryland where members of the influential, very Catholic Carroll family *did* serve during the early national era.²⁹ Elsewhere only Protestants could hold office. By the time of the Philadelphia conclave, no state discriminated among Protestant sects in eligibility for public station, though Virginia and the New England states arguably withheld that even-handedness in other facets of public life.³⁰

The long of it has to do with the punctuation marks around "non-Christians" and "Protestants" in the short account, and is comprised of qualifications which, however, do not affect the central point. A few states—Georgia,³¹ New Hampshire,³² South Carolina³³—went right to the point: their constitutions said that only "Protestants" could serve. The unsaid included what sufficed as proof of such allegiance, so that future theological debates like whether a Unitarian was a "Protestant" turned into political and legal controversies. In these states the legislatures presumably filled out the constitutional requirement with some verbal formula, but the evidentially warranted supposition is that "Protestant" was not a term of limitation, but rather a residual catch-all for all Christians who were not Roman Catholic. Rhode Island, as in many church-state matters, was a special case: the Protestant monopoly there flowed from an exclusion of Catholics and Jews from citizenship, and not, precisely, from political office.³⁴

In the remaining "Protestant only" states, the law was more convoluted, although it made little practical difference. In theory, a Catholic (but not a non-Christian) could hold office in Vermont,

29. For example, Charles Carroll (who later served in the First Congress as a Senator from Maryland) helped draft the Maryland Constitution of 1776. See G. BRADLEY, *supra* note 27, at 76-77. Also, the Maryland legislature sent kinsman Daniel Carroll to the Constitutional Convention in Philadelphia.

30. See *infra* notes 45-52 and accompanying text.

31. I FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 379 (Poore 2d ed. 1972) [hereinafter Poore].

32. II Poore, *supra* note 31, at 1286.

33. *Id.* at 1621.

34. E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 108 (1972).

Massachusetts, North Carolina, New Jersey, New York and Connecticut, but only by compromising or denying his Catholicism. In Massachusetts, for instance, the Constitution at one point declared that offices should be filled by those who "declare [themselves] to be of the Christian religion."³⁵ At another point, the textually-prescribed oath required a declaration reminiscent of the old English oath of supremacy. Candidates had to swear "that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this commonwealth."³⁶ With one stroke, Crown loyalists and Roman Catholics—earmarked from their Protestant contemporaries by fealty to the Pope—were rendered ineligible. Chester Antineau and his collaborators contend that the oath struck more generally at Anglicans (and not just those loyal to the King).³⁷ Due to the episcopal nature of that church at a time when all bishops resided in Britain, the inference is plausible but I think incorrect. Given the general tenor of the times—sect discrimination among Protestants was waning (even in New England) with Baptists the remaining objects of scorn—it is historically counterintuitive. In any event, there are simply no known instances of an Anglican barred from office in the early national period due to a test oath. Vermont's Constitution was indistinguishable from its Massachusetts counterpart.³⁸ The New York legislature in 1788, with prompting but no explicit direction from the state constitution, enacted a similar oath of abjuration for officeholders, but stopped short of disenfranchising Catholics.³⁹

North Carolina's Constitution evinced a perhaps unintended subtlety: only one who *denied* "the truth of the Protestant religion" (or the existence of God or his inspiration of both Old and New Testaments) was excluded.⁴⁰ In fact a Catholic acceded to the governor's office in 1781, and another held numerous elective offices on the theory that he merely did not affirm that truth.⁴¹ New Jersey's constitution of 1776 simply turned North Carolina's approach

35. I Poore, *supra* note 31, at 964, 970.

36. *Id.* at 971.

37. See C. ANTINEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 95 (1964).

38. See II Poore, *supra* note 31, at 1861.

39. J. PRATT, *RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY* 107 (1967).

40. II Poore, *supra* note 31, at 1413.

41. See C. ANTINEAU, *supra* note 37, at 109; M. BORDEN, *JEWS, TURKS AND INFIDELS* 43 (1984).

around: “[A]ll persons, *professing* a belief in the faith of any Protestant sect, shall . . . be capable of being elected into any office of profit or trust”⁴²

Connecticut substituted Trinitarian orthodoxy for the truth of Protestantism in a statute otherwise identical to the North Carolina Constitution.⁴³ Again, Catholics theoretically were eligible, but Connecticut’s hostility to non-Protestants was so pronounced that such an interpretation cannot be sustained. There were virtually no Catholics in Connecticut; one reason was the legal limitation of ecclesiastical corporate privileges to Protestant sects.⁴⁴

The effective exclusion of “non-Christians” was most simply articulated in the Maryland Constitution: only “Christians” could hold office.⁴⁵ Delaware was carved out of Pennsylvania,⁴⁶ and remained in some ways juridically subordinate until 1776.⁴⁷ Both required public officers to declare their faith in Scripture’s “divine inspiration,”⁴⁸ with Delaware further demanding a Trinitarian affirmation.⁴⁹ Virginia was uniquely tolerant, setting up no doctrinal obstacle either by the Constitution of 1776 or by subsequent statutes.⁵⁰ There is no doubt that had a professed atheist, polytheist, or unorthodox Christian (like a Unitarian) been elected, he had a legal right to the post. But he would have had to serve from jail, because both by common law and statute Virginia criminalized at least the public utterance of such views.⁵¹ Note as well that Anglicanism was “established” or preferred even to other Protestant sects in Virginia until 1786.⁵²

Two distinctions arise from this survey, which are essential to understanding the founding generation’s mentality. Together with additional observations below, they empirically support the proposition that the founders believed in religious tests for office both before and after they ratified article VI.

The first distinction has to do with the “freedom of conscience”

42. II Poore, *supra* note 31, at 1313 (emphasis added).

43. THE FIRST LAWS OF THE STATE OF CONNECTICUT 67 (Cushing 1982) [hereinafter CONN. LAWS].

44. *Id.* at 21-22.

45. I Poore, *supra* note 31, at 820.

46. *Id.* at 270.

47. See G. BRADLEY, *supra* note 27, at 49.

48. I Poore, *supra* note 31, at 276.

49. *Id.*

50. See, e.g., II Poore, *supra* note 31, at 1956.

51. Isaac, *Evangelical Revolt: The Nature of the Baptists’ Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY L. REV. 345-68 (1974).

52. S. BOLTON, SOUTHERN ANGLICANISM 5 (1982).

extended to *all* persons under the state constitutions,⁵³ and the limitations denoted by the religious tests in those same charters. On this there was no difference between "liberal" Pennsylvania and "bibliocratic" Massachusetts. The Massachusetts Constitution guaranteed that "no subject shall be hurt, molested, or restrained . . . for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments. . . ."⁵⁴ In other words, the welcome mat was laid out to everyone, and persecution was forbidden. But non-Protestants could not, and should not, expect to govern: "As the People of this Commonwealth are generally, if not universally, of the Protestant reformed religion, it would be a matter of Great and General Concern that any person might be elected . . . over them or their Posterity, who should not be of the Protestant Religion."⁵⁵ This is the "descriptive" explanation: given the overwhelming fact of shared popular belief, it was appropriate that rulers also share those sentiments. Analytically distinct was the "normative" justification: republican institutions were so premised upon the Protestant style of Christianity, especially the autonomy of individual conscience so lacking (they argued) in Roman Catholicism, that governing a republic required a Protestant outlook.⁵⁶ The practical conjunction was unmistakable: only Protestant Christians were fit to govern in the United States, and that fitness was legally enforced.

The second distinction helps explain the prevalence of the religious tests among a people boastful of the complete "religious liberty" abroad in America. In addition to the notion that "liberty" did not necessarily entail political power, freedom was also limited (for everyone) by the Framers' special application of Mill's theory of liberty.⁵⁷ Despite the universal presence of what we today call "morals" legislation,⁵⁸ the Framers might still have subscribed to Mill's theory of "other-regarding action": the state justifiably interfered in individual autonomy only to prevent "harm" to others.⁵⁹ But, notwithstanding legislated morality, the Framers (like Mill) were not primarily paternalistic. The prohibitions were not designed primarily to better the wayward soul indulging his appe-

53. E. SMITH, *supra* note 34, at 108 (1972).

54. I Poore, *supra* note 31, at 957.

55. C. ANTINEAU, *supra* note 37, at 95.

56. I Poore, *supra* note 32, at 957.

57. J. MILL, ON LIBERTY 484 (1961).

58. For example, statutes curtailing blasphemy, gambling, swearing, drunkenness, and Sunday activities.

59. See J. MILL, *supra* note 57, at 484.

tite, for he was probably predestined for eternal torment anyway. The laws *did* prevent "harm" to others, because unlike us (but perhaps like Mill), the Framers included the community's moral and religious sensibilities among objects susceptible to "harm." Further, the Calvinist strand which ran through all of the major non-Anglican Protestant sects⁶⁰ remained impressed with the fate of Sodom and Gomorra, which embraced the belief that God might punish the community for the moral backsliding of a few members. While not exactly what Mill had in mind, there is certainly nothing paternalistic about sobriety in the face of Divine wrath. The result of these tendencies of course was a practical subsumption of autonomy within concern for communal liberty or welfare that is not reliably transmitted by our modern Constitutional law.⁶¹

This reconceptualization of "liberty" helps dissolve what so many commentators carrying modern conceptions regard as "anomalies" in the Framers' minds. Everyone *was* entitled to believe what he liked and to worship accordingly, but he was equally obliged to present a public demeanor respectful of community mores. The best illustration of these notions is an opinion by the New York Court of Appeals in an 1811 blasphemy prosecution.⁶² One Ruggles had publicly observed that "Jesus Christ was a bastard, and his mother must be a whore."⁶³ In an opinion affirming Ruggles' conviction, Chancellor Kent conceded that blaspheming a non-Christian faith was perfectly legal, but concluded:

[T]o revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right [of religious liberty]. Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those imposters Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no references to any such establishment. . . . [The New York Constitution] will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations, incident to a religious

60. Morton Borden reports that 62% of America's churches were united in Calvinist theology. See M. BORDEN, *supra* note 41, at 9.

61. Cf. F. McDONALD, *NOVUS ORDO SECLORUM* 71 (1985).

62. *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811).

63. *Id.* at 291.

establishment. . . . [T]he framers of the constitution intended only to banish test oaths, disabilities and the burdens, and sometimes the oppressions, of church establishments; and to secure to the people of this state freedom from coercion, and an equality of right, on the subject of religion.⁶⁴

A postscript on the role of religious tests in this mentality is necessary. Looking only at the white society from which any political office would be filled for reasons unrelated to religious disqualifications, there was little "practical" reason for limiting office to Protestants. The most generous estimate encountered on the number of American Jews is about two thousand (and probably far fewer), clustered almost exclusively in Charleston, Savannah, Philadelphia, New York City, and Newport, Rhode Island.⁶⁵ Roman Catholics numbered perhaps ten thousand, with a heavy concentration in Maryland. Their relative scarcity is illustrated by the presence of no more than a thousand in New York State in 1790, out of a total population of 300,000.⁶⁶ There were, as Professor Turner's research reveals, literally no atheists in a land of four million souls.⁶⁷ Moreover, even where Catholics were excluded from office by law, as in Georgia⁶⁸ and North Carolina,⁶⁹ they sometimes served anyway.

In all, there is persuasive evidence that test oaths, though all but universally employed up to the time of constitution drafting in Philadelphia, excluded no one from office who was otherwise electable and willing to serve.⁷⁰ Prevalence of the oaths, as well as the vehemence of the agitation for one in the federal Constitution described in section C below, obliges the conclusion that the prime purpose of religion tests in early America was not "practical" in the narrow sense of actually disqualifying would-be candidates because of heterodox religious beliefs.

Morton Borden supplies an historical example of the value of religious tests to a religiously homogeneous political community. The setting was the 1835 North Carolina constitutional convention;

64. *Id.* at 295-97.

65. M. BORDEN, *supra* note 41, at 6.

66. J. PRATT, *supra* note 39, at 107.

67. J. TURNER, WITHOUT GOD, WITHOUT CREED 44 (1985). Turner notes that nonbelief became acceptable after the Civil War. *Id.*

68. R. STRICKLAND, RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY 119-21 (1939).

69. See *supra* note 40 and accompanying text.

70. Morton Borden relates two instances of actual exclusion in Massachusetts since 1780. M. BORDEN, *supra* note 41, at 30. It is not clear when after 1780 the occasions arose, so his findings are a caveat to my claim in the text.

the issue was modification of the continuing exclusion of non-Protestants from office. The delegates agreed upon a modification opening public responsibilities to all "Christians," thereby providing for Catholic eligibility, but there they drew the line. The common starting point of further debate was stated by William Gaston, who opposed any restriction at all. The test clause may not have "kept out of public service any individual who might have otherwise entered into it,"⁷¹ for there were very few Jews in the state, and no atheists. But Gaston observed that the test clause nevertheless worked evil. One bad effect would be "if it has impaired the attachment of any citizen to the institutions of his country, by causing him to feel that a stigma was cast . . . upon him in its fundamental law."⁷² That a Jew or an atheist would feel "outside" or not at home in North Carolina was also a matter of agreement, thereby validating Gaston's suggestion that a stigma was cast. But Gaston considered that observation almost self-evident grounds for criticism. The delegates felt quite otherwise: that was the precise reason for the test clause. A Moravian representative remarked that the limitation "has stood as a beacon to aspirants for office, as an axiom that we prize Religion, and tells the world we are a Christian people."⁷³ The chief function of the "Christian only" sign at the public office door was to identify the shared religious commitment of the people, thereby defining them as a community.

B. *The Constitutional Convention*

Some prominent members of the founding generation which composed and ratified the federal Constitution abhorred religious tests for office. They thought that such tests were wrong and unjust. Of organized religious groups, only the Baptists generally subscribed to this view. Their leading spokesmen, Isaac Backus of Massachusetts⁷⁴ and John Leland of Virginia,⁷⁵ denounced such tests as a profane intervention in the sacred relationship between God and man. No doubt inspired by Jesus' general condemnation of oaths,⁷⁶ the infirmity—actually a kind of sacrilegious exercise of pride—was man's presumptuous attempt to claim God as a witness, or to domesticate God for humanly-conceived, mundane pur-

71. *Id.* at 45.

72. *Id.*

73. *Id.* at 46.

74. *See, e.g.,* C. ANTINEAU, *supra* note 37, at 101-02.

75. M. BORDEN, *supra* note 41, at 12, 17.

76. *See Matthew* 5:33-37.

poses.⁷⁷ Like all Baptist critiques of the church-state practices of their contemporaries, this was a theological and not a political objection. New Hampshire's William Plumer was another noted foe of tests,⁷⁸ but, as usual, Jefferson was the most renowned of these heterodox thinkers. As early as 1776, he had publicly urged in his draft Bill for Religious Freedom:

That our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore, the proscribing any citizen as unworthy of the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right.⁷⁹

This was easy for Jefferson to say: having lots of political views but little religious sentiment, he naturally detected no connection between the two. But here, as with his views on religion and government generally, Jefferson was thoroughly unrepresentative of his generation. Virtually everyone else believed that a man's belief in God and a future state of rewards and punishments was profoundly relevant to his fitness for public affairs. And the Baptist account was simply unpersuasive to contemporaries: granted that faith was a matter of personal choice and divine prerogative, non-Baptists detected no "interference" between God and man at all. They sought evidence of fitness in whatever relationship God and a particular political aspirant had chosen to establish. Even so, not even Baptists—and not even Jefferson—rejected the more general proposition that the state ought to foster and encourage Christianity, if only (as for Jefferson) because it was an effective instrument of social control.⁸⁰

This is good to keep in mind, for the records of the Philadelphia Convention reveal only that article VI, Section 3 (in the words of Luther Martin, a Maryland delegate) "was adopted by a great majority of the convention, and without much debate."⁸¹ In fact there is *no* recorded "debate"; all that survives is Roger Sherman's critical observation that article VI was "unnecessary, the prevailing lib-

77. See J. MEIER, *MATTHEW* 53 (1980).

78. See M. BORDEN, *supra* note 41, at 13, 30.

79. Quoted in C. ANTINEAU, *supra* note 37, at 97.

80. W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 31 (1976).

81. Quoted in C. ANTINEAU, *supra* note 37, at 100.

erality being a sufficient security [against] such tests."⁸² Yet in spite of the sparse official chronicle, and notwithstanding Martin's faint suggestion to the contrary,⁸³ we may still confidently conclude that the rejection of religious tests did *not* stem from the delegates' condemnation of them as a matter of principle. Of this there is no doubt, and there is even less uncertainty about whether article VI is rooted in a "constitutional philosophy," much less one which held that government ought to be foreclosed from aiding and supporting religion.

Sufficient proof of the latter proposition is elsewhere documented: literally no one in America thought that the state should be so hamstrung.⁸⁴ For the former, the state practices outlined above are a good basic justification. Specifically, a few illustrations comparing the views of individual delegates to their votes on article VI should do. The *Convention Journal* shows that only North Carolina voted against the test ban (meaning both its delegates present, Hugh Williamson and Richard Dobbs Spaight, were opposed), and that Connecticut and Maryland were divided (indicating an even split in the delegations).⁸⁵ All others present voted for the ban. This "opposition" to religious tests included George Read, responsible for the test clauses in the 1776 Delaware Constitution,⁸⁶ and probably Delawareans Richard Bassett (who assented to tests in that Convention)⁸⁷ and John Dickinson (who had earlier written to Read favoring a general assessment for Christian teachers).⁸⁸ New Hampshire and Massachusetts offered no objection, and the Bay State representation included Rufus King and Elbridge Gerry, both clearly committed in their long public careers to state sustenance of

82. II M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 468 (rev. ed. 1937).

83. In his report to the Maryland legislature on November 29, 1787, Martin sarcastically (sympathetic to religious tests) recalled that:

there were some members [of the Convention] so unfashionable as to think, that a belief of the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of our rulers, and that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism.

Id. at 227.

84. See generally G. BRADLEY, *supra* note 27.

85. II M. FARRAND, *supra* note 82, at 460.

86. W. READ, *LIFE AND CORRESPONDENCE OF GEORGE READ 182-187* (1870).

87. The 1766 Constitutional Convention Journal reveals "unanimous" assent to a test for seating delegates. *Id.* at 186. Bassett was a delegate to that Convention. See a brief biographical sketch in *The Journal of the Senate*, 1st Cong., 1st Sess. (Claussen ed. 1977).

88. W. READ, *supra* note 86, at 412-13 (letter of April 20, 1786).

religion.⁸⁹ The New Hampshire delegates were Federalists John Langdon and Nicholas Gilman, whose political cohort enthusiastically supported the New Hampshire state constitution's limit of public office to Protestants.⁹⁰ Georgia's Abraham Baldwin voted for article VI despite his sponsorship of the Georgia General Assessment Regulation,⁹¹ and his authorship of laws creating the State University with a Board of Trustees limited to Christians.⁹² George Washington supported both article VI and the Virginia General Assessment,⁹³ as did fellow Virginia delegate Edmund Randolph,⁹⁴ who was later Washington's Attorney General.

Connecticut's delegation was divided on article VI, and a good guess would be that Sherman's was the dissenting vote.⁹⁵ William Samuel Johnson must therefore have supported the measure since the other designated representative, Oliver Ellsworth, was apparently absent.⁹⁶ Ellsworth, however, lauded article VI in public essays during the ratification struggle,⁹⁷ even while he relentlessly opposed a similar equality of sects in Connecticut itself.⁹⁸ Johnson too was no Jeffersonian on church-state. Earlier in his career he supported public aid to religion,⁹⁹ and one may well presume that Jeffersonian views of religion would have short-circuited *any* political career in Connecticut. Note well that Sherman objected to article VI as unnecessary, given the temper of the times, and not as an injustice. This corresponds to his private stance, which was entirely supportive of Connecticut's hostility to non-Protestants,¹⁰⁰ he ex-

89. See THE LIFE AND CORRESPONDENCE OF RUFUS KING 50 (Charles R. King ed. 1894).

90. See M. BORDEN, *supra* note 41, at 18; 10 PROVINCIAL AND STATE PAPERS OF NEW HAMPSHIRE 41-42 (N. Bouton ed. 1876).

91. R. STRICKLAND, *supra* note 68, at 165-66 (1939).

92. FIRST LAWS OF THE STATE OF GEORGIA 286 (Cushing 1981).

93. See *supra* note 11.

94. III ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 656 (1901).

95. See *supra* note 82 and accompanying text.

96. See III M. FARRAND, *supra* note 82, at 586-90 for attendance records of all the delegates. Ellsworth is recorded as having been in New Haven, Connecticut on August 27.

97. Ellsworth stated that a religious test in favor of "any one denomination of Christians would be absurd." He rebutted antifederalist criticism of the Constitution in a series of letters which were published in *The Connecticut Courant* in 1787-88. M. BORDEN, *supra* note 41, at 18.

98. *Id.* At that time, Connecticut law not only discriminated against Jews, Catholics, and atheists, but also against dissenting Protestants. Ellsworth, then governor of Connecticut, opposed elimination of laws favoring the Congregational church. *Id.*

99. See G. GROCE, WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION 13, 44, 45 (1937).

100. In 1784, Sherman (along with Roger Law) compiled for codification Connecticut's

hibited a more pronounced hostility to Roman Catholicism.¹⁰¹ Even more remarkably, hostility to Roman Catholics, and to all non-Christians, was stitched into the fabric of the legal order both before and after article VI passed. Yet it passed the Convention and was ratified by the States in a process which made painfully clear that "papists," "Jews," "Turks," and "Infidels" were indeed eligible for election to federal office, including the Presidency.

If a sudden and near universal explosion of Jeffersonian skepticism or Baptist scruples does not explain the easy way out of this worst case scenario, what does? Fortunately, we have no shortage of explanations and defenses of article VI, but no thanks to the proceedings in Philadelphia during that summer of 1787. There was much discussion of article VI among those who inserted it into the Constitution, but not until *after* they adjourned. Careful inspection of those late comments follows. For now, whatever answer to the riddle of article VI that can be reconstructed from the Convention records themselves is the order. Besides, a look at the Convention's work is a necessary prelude to the discussion below of proper interpretation of Article VI as an operative legal norm.

The sparseness of the *Convention Journal* and surviving debates¹⁰² is a vital clue. Here were fifty-odd of the leading men of a generation involved in a bitter, difficult, protracted process of defining the proper scope of "religious liberty" from government constraints, and who, as state leaders, had expended great energy on the problem. With the Revolution successfully completed, most likely no other issue was more agitated in the early national era than church-state relationships, and every state constitution drawn up in that time spoke directly, frequently at substantial length, to the issue.¹⁰³ This group of men drafted an entire scheme of national government in this climate, and religion is barely, rarely mentioned. A total "non-issue."

How much of a "non-issue"? Well, with a caveat for a disputed claim by Charles Pinckney to an early proposal that Congress should pass "no law on the subject of religion"¹⁰⁴ (a submission

Laws. The Laws are perhaps singularly hostile to non-Protestants. See CONN. LAWS, *supra* note 43, at 21-22.

101. Sherman abhorred the Roman Catholic Church, and thoroughly distrusted the Episcopal system. He feared that an Episcopal bishop might embody just another form of British tyranny. See R. BOARDMAN, ROGER SHERMAN: SIGNER AND STATESMAN 319 (1938).

102. See generally J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (A. Koch ed. 1966) [hereinafter NOTES].

103. See generally C. ANTINEAU, *supra* note 37; G. BRADLEY, *supra* note 27, at 21-67.

104. See III M. FARRAND, *supra* note 82, at 595 app. D, 599.

which had little effect on the Convention),¹⁰⁵ the “subject of religion” is not mentioned at all until after, and only because of, proposals to bind all state and federal officers to the Constitution by “oath.” When precisely this occurred depends upon the timing and exact composition of Pinckney’s suggestion. It may not have been until August 20, three months after convening, that the “subject” first arose. At that time, we know that Pinckney proposed that “[n]o religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S.”¹⁰⁶ Pinckney’s entire plan was then referred to a committee without further comment or action.¹⁰⁷ This scheme *did* include a Bill of Rights of sorts with habeas corpus, press liberty, and the present third amendment—against billeting soldiers in homes—expressly articulated.¹⁰⁸ Still, the test ban was the only reference to religion or religious liberty; the evidence suggests that the more comprehensive ban on Congressional legislation was added by Pinckney much later, when efforts to gather material for publication of the secret Convention debates began.¹⁰⁹

On August 30th, what was then “Article 20,”¹¹⁰ but soon to become article VI, clause 3 as we know it, was put together. First, the words “or affirmation” were added to the oath required of all governmental officers,¹¹¹ and then the joining of the test prohibition to the oath clause was passed unanimously.¹¹² Madison reports that Sherman objected to the addition, observing that “the prevailing liberality” made it unnecessary.¹¹³ However, after Gouverneur Morris voiced approval, the motion for addition passed without recorded dissent.¹¹⁴ On “the whole Article,” though, which was slightly reworded from August 20, Madison notes that North Caro-

105. Madison did not take a copy of the draft, nor did Pinckney supply him one. The Pinckney draft was not debated; it was used in neither the Committee of the whole, nor in the Convention. NOTES, *supra* note 102, at 33 n.36. See also *infra* note 107 and accompanying text. But see C. ANTINEAU, *supra* note 37, at 230 n.43 (some studies suggest that the Pinckney Plan contributed greatly to the formation of the Constitution).

106. See NOTES, *supra* note 102, at 486.

107. *Id.* The Committee of Detail appears to have made some use of the Pinckney Plan. An outline of it was found among the papers of James Wilson, a delegate from Pennsylvania. *Id.* at 33 n.36.

108. *Id.* at 485-86.

109. *Id.* at 33 n.36.

110. *Id.* at 560.

111. *Id.*

112. *Id.* at 561.

113. *Id.*

114. *Id.*

lina opposed it, and only Maryland was divided.¹¹⁵ The *Journal*, on the other hand, adds Connecticut to the divided column,¹¹⁶ a plausible correction given Sherman's views. In any event, that was *all* the Convention had to say about the test clause, and practically about religion too, until its waning moments.

In late September, the grounds for antifederalist opposition to the Constitution were presaged with a proposal for a "Bill of Rights" by Virginia's George Mason, voted down unanimously by the states.¹¹⁷ Such a declaration would likely have included some reference to freedom of conscience, though when individual elements of a Bill were proposed later—press freedom,¹¹⁸ civil jury trials,¹¹⁹ no standing army¹²⁰—religion was again absent. Madison's proposal for a non-denominational federal university was also summarily dispatched, with Sherman suggesting that the government's plenary power over the ten square mile reservation—the District of Columbia—covered the subject.¹²¹

The deep discontinuity between the Framers' convictions, as revealed in their shaping of the state regimes, and the federal church-state order is confirmed by the wording of article VI itself. It subjects all officers—state and federal—to the oath requirement, but only federal officials to the test ban. Presumably here, as well as in the voter qualifications actually left to state law by article I,¹²² the Framers *could* have cut into the comparatively "illiberal" state orders had they wanted to. Put differently and largely as a matter of legal analysis and not political wisdom, an incision at this point could certainly have been justified as a necessary, limited protection of the federal regime, and not as a wholesale invasion of state autonomy. This reticence and the overall sparseness of the record at least plausibly confirm Pinckney's proposal as a matter of observation, both about the completed legal framework *and* the Framers' intentions: Congress should not regulate the "subject of religion."

As a consequence, the Constitution does not even address the

115. *Id.*

116. II M. FARRAND, *supra* note 82, at 460.

117. NOTES, *supra* note 102, at 630. Colonel Mason wished the plan had been prefaced with a Bill of Rights. He believed that this would give "great quiet" to the people. After Sherman commented that the Constitution would not repeal the State Declaration of Rights, the states apparently agreed that their being in force was sufficient, and voted against the Bill of Rights. *Id.*

118. *Id.* at 640.

119. *Id.* at 630.

120. *Id.* at 639.

121. *Id.*

122. U.S. CONST. art. I., § 2.

church-state problem, much less solve it, comprehensively or haphazardly. Are we then at an interpretive roadblock? Are attempts to wring some blueprint from the framers bound to frustration, like trying to coax a "philosophy" of church and state from the Judiciary Act of 1789, another seminal charter with nothing about religion in it? Must we, or are we permitted to, then fall back upon the best available evidence of such a scheme, even if it means relying upon a letter here or a speech there? While I think the answer to that question is "No"—that the absence of reliable evidence is an impediment to judicial speculation and not a license for it—there is no need to debate it. There still is a blueprint here, a lesson beyond the legally operative effect of article VI itself. This realm is unlocked by the bitter debate in the states over the wisdom of article VI, section 3.

C. *Ratification: 1788-89*

The antifederalists' vigorous criticism of article VI, and their related demands for fuller, more explicit guarantees of religious liberty, obliged the document's "federalist" defenders to explain and justify both the test ban *and* the general attitude of the new government to religion. Scholars have unfortunately slighted the explanatory potential of this protracted ratifying process.

Morton Borden observes in his study of Jews' struggle for civil and religious equality that "[d]uring the ratification debates in the various states, article VI, section 3 proved not to be a significant issue."¹²³ Allowing that "significant" is quite a commodious qualifier, Borden is still mistaken. Chester Antieau is less wide of the mark, but still understates the volume and the importance of the commentary on article VI.¹²⁴ There are, however, several layers to the correct observation that article VI *was* a "significant issue." Initially, we must note (and Borden does not contravene this) that the charge that "[f]reedom of religion is...in danger"¹²⁵ was profoundly agitated during the debates, and that article VI was the foundation of that charge. Time shortly revealed that the Framers had misread, or at least insufficiently considered, the spirit of their age. They undervalued the bitter which they served to the people—a "secular" Constitution with no taste of religiosity to it—with the "sweet":

123. M. BORDEN, *supra* note 41, at 15.

124. *See* C. ANTINEAU, *supra* note 37, at 100-08.

125. *See* III ELLIOT'S DEBATES, *supra* note 94, at 204 (speech of Edmund Randolph).

religious liberty assertedly secured by the federal disability on the subject.

Nevertheless, divine omniscience would have been required to anticipate the precise contours of the main attack: the test clause made the Constitution inadequately "Christian," and that religious liberty was threatened by this "latitude" in the new government. Pennsylvanian Benjamin Rush unquestionably stated the minimum complaint in his letter to John Adams: "Many pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution."¹²⁶ Rush hoped that some "acknowledgment may be made of his goodness or of his providence" in the amendments before Congress,¹²⁷ proposals which eventuated in the Bill of Rights.

We may regard such sentiments as insipid, if not banal, and thus find it difficult to believe that the entreaty really mattered to serious people. But it did. And we are not as far removed from that mentality as we might think. For one thing, agitation for a "Christian Amendment" to the Constitution was a perennial nineteenth century political issue, vitally important to a significant minority of Americans including at least three members of the post-Civil War Supreme Court.¹²⁸ For another, the bare recognition of Providence in such an amendment is indistinguishable from, for example, the school prayer invalidated by the Court in *Engel v. Vitale*,¹²⁹ and from the content of church-state issues (a moment-of-silence, nativity scenes) that *do* get us excited. The Framers, no less than we, appreciated the symbolic importance of such acts of devotion. The difference is that, in addition, the founding generation was, as a matter of sociological fact, a Christian community at a time when Christians, especially the majority who subscribed to a Calvinist theology, really believed they were dependent upon an Almighty God for all good things, a God who stood in constant judgment of them.

126. Letter of June 15, 1789, LETTERS OF BENJAMIN RUSH 516-517 (L. Butterfield ed. 1951).

127. *Id.*

128. Morton Borden documents the active participation of Justices William Strong and David Brewer in the affairs of the National Reform Association, whose *raison d'être* was securing a Christian Amendment to the Constitution. See M. BORDEN, *supra* note 41, at 71, 73. He also mentions the association of Justice Harlan, while an Iowa Senator, with a group known as the "Christian Statesmen." *Id.* at 66. For a fuller account of the Association, and further notice of Strong's leadership role in it, see G. SMITH, THE SEEDS OF SECULARIZATION 58-68 (1985).

129. 370 U.S. 421 (1962).

That the Constitution's draftsmen and their allies at least perceived such a widespread sentiment, and thus a threat to ratification of their handiwork, is demonstrated by their response to the Rush supplication. First, they developed a distinction which modern Philadelphia lawyers would view with envy. The ban on religious tests was not really a ban on religious tests. There were two kinds of tests, and only one was outlawed. Oliver Ellsworth (among many others) described a "particular" oath in his "Landholder" series, an oath which discriminated among denominations of Christians as the tests in England did in favor of Anglicans.¹³⁰ Such a provision would, Ellsworth argued, be "to the last degree absurd" in the United States for it would necessarily exclude a majority of Protestants from office.¹³¹ He rightly calculated that most Americans rejected this "indignity."¹³²

Ellsworth then described a "general" oath requiring a belief in a Supreme Being, a future state of rewards and punishments, and perhaps agreement on the divine authenticity of Scriptures.¹³³ A test so defined resonated with popular wishes. State practices make that clear. And the rationale for putting them in the state constitutions was the same for inserting them in the federal charter: public offices in America ought to be limited to orthodox Protestant Christians. That is evident from the catalog of undesirables who—thanks to article VI—might hold federal office. One New Hampshire antifederalist objected that a "Turk, a Jew, a Rom[an] Catholic, and what is worse than all, a Universal[ist] may be President of the United States".¹³⁴ Similar arguments were made in the Virginia and North Carolina ratifying Conventions.¹³⁵ "Pagans,"¹³⁶ "deists,"¹³⁷ "hea-

130. *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, 1787-1788*, at 169 (P. Ford ed. 1892) [hereinafter *ESSAYS*].

131. *Id.*

132. *Id.* Ellsworth hastened to deny any implication that he believed that the civil government had no right to "interfere in the matters of religion. It [the government] has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment. For this reason, I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism." *Id.* at 171.

133. *Id.* at 169; Boyd, *A North Carolina Citizen on the Federal Constitution, 1788*, 16 *N. C. HIST. REV.* 36, 52-53 (1939).

134. II C. WINGATE, *LIFE AND LETTERS OF PAINE WINGATE* 487 (1930) (Letter of Sullivan to Belknap on February 26, 1788).

135. III ELLIOT'S DEBATES, *supra* note 94, at 631 (Va.) (speech of James Innes); IV ELLIOT'S DEBATES, *supra* note 94, at 191-205 (N.C.).

136. IV ELLIOT'S DEBATES, *supra* note 94, at 198 (speech of Governor Johnston).

137. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 1788, at 219 (Boston 1856) [hereinafter *MASS. CONV.*].

thens,"¹³⁸ and "Mahometans"¹³⁹ were variously added to the list.

At this juncture Jefferson (and perhaps a few others) maintained their view that a man's religious belief had no bearing on his fitness for public station. There is also no doubt that the publicly-aired opinions on both sides of the dispute over article VI placed no stock in this proposition. Even the relatively few who opposed tests as a matter of principle—like the Baptists previously discussed¹⁴⁰—neither said nor believed that a man who actually did not believe in God or final judgment, as distinguished from one unwilling or unable publicly to swear to it, was fit for office. As a simple demographic matter, such an "atheist" was virtually non-existent in the Framers' world, and this imagined character would have been alarmingly unsocialized and deviant, as well as monumentally independent of thought. The epithet "atheist" was thrown around quite liberally, although from the reading of the historical sources, no one, not even Jefferson, was ever actually identified as one. One suspects with good reason then that were such a creature to appear in their midst, the Framers would have regarded him as quite exotic, and quite mad. And there is more than narrow prejudice to it. Chronologically they lived in a post-Cartesian philosophical world in which the only certitude was thought itself, from which one deduced the existence of both God and the external world. But the Framers understandably regarded God and judgment not as conclusions to a series of inferences, but rather as self-evident truths, as matters of common sense available to any properly functioning human intellect. They were "spontaneous conclusions," in Etienne Gilson's account of the relevant epistemological claims, "not products of conscious reflection."¹⁴¹ And therein is the key to the unity suggested: belief in God and an afterlife evinced the minimum rationality necessary for public office, the "ante" for participation in the political life of the community. Absence of these beliefs signalled more than theological dissent, it bespoke depravity.¹⁴²

The impropriety of an explicit test to this effect for federal office was thus not obvious. The omission of such a "general" oath proved to be a hard sell for the Constitution's defenders. One tack which may have defused some of the criticisms of article VI as it stood was the rather startling claim made possible by the distinction that arti-

138. IV ELLIOT'S DEBATES, *supra* note 94, at 199 (speech of David Caldwell).

139. *Id.* at 194 (speech of James Iredell).

140. *See supra* notes 74-77 and accompanying text.

141. E. GILSON, THOMIST REALISM AND THE CRITIQUE OF KNOWLEDGE 41 (1986).

142. *See* J. TURNER, WITHOUT GOD, WITHOUT CREED, XI-XII (1985).

cle VI did not prohibit a "general" test. Reopening the door thought closed by the test ban, federalists suggested that an "oath of office implied beliefs in God and a future state, and thus the ban was only upon a "particular" test oath.¹⁴³ This concession ripened into a formal amendment offered by the South Carolina ratifying convention that the word "other" be inserted between "no" and "religious" in article VI.¹⁴⁴ In fact, this change was proposed in both the House¹⁴⁵ and in the Senate¹⁴⁶ during the First Congressional session which passed the Bill of Rights, but to no avail.

The federalists argued against all religious tests—"general" as well as "particular." They argued that tests were useless, counterproductive, and unnecessary. "Useless" because unprincipled men with no firm beliefs could pass them by faking the required piety.¹⁴⁷ "Counterproductive" because therefore only principled, good men scrupulous of the test—Baptists for instance, and perhaps even Papists, Jews, and those possessing only "natural religion"—would be excluded.¹⁴⁸ "Unnecessary" because in a pious, more or less democratic society, only "good" characters stood a chance of winning election anyway.¹⁴⁹ One Massachusetts delegate added that a "Christian" oath was undefinable in any case,¹⁵⁰ an observation contradicted by the widespread use of such a device among his listeners.

143. Boyd, *supra* note 133, at 52-53.

144. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES, 1786-1870, at 140 (1965).

145. 1 ANNALS OF CONG. 807 (J. Gales ed. 1789).

146. 1 THE JOURNAL OF THE SENATE 122 (M. Claussen ed. 1977). Sherman opined that the amendment was unnecessary; its omission in the original being a mere clerical error, it could be corrected without constitutionally prescribed formalities. ESSAYS, *supra* note 130, at 235.

147. See, e.g., MASS. CONV., *supra* note 137, at 190 (speech of Theophilus Parsons), *id.* at 220 (speech of Rev. Shute); IV ELLIOT'S DEBATES, *supra* note 94, at 200 (speech of Samuel Spencer).

148. See, e.g., IV ELLIOT'S DEBATES, *supra* note 94, at 194 (James Iredell discussing the possibility that people with no religion might be elected to public office, but suggesting that this will not happen because people are unlikely to trust their rights to persons with different religious beliefs).

149. See *id.* at 194 (James Iredell stating that "the worst part of the excluded sects would comply with the test, and the best men only be kept out of own counsels"); *id.* at 199 (Governor Johnston stating that it is unlikely that the American people will choose government officials who have sentiments much different from their own); *id.* at 208 (Richard Spaight stating: "No power is given to the general government to interfere with [religion] at all. Any act of Congress would be a usurpation." Furthermore, "every man has the right to worship as he chooses. All men of equal capacity and integrity, are equally eligible to offices," and thus, no test should be required.)

150. MASS. CONV., *supra* note 137, at 190 (speech of Theophilus Parsons).

These arguments possessed some logical and practical appeal, but it is hard to say that they made any difference to the antifederalists. These counter points did not deny the desirability of staffing the new government with orthodox Protestants, but denied only the effectiveness of this particular means of doing so. Even so, they said little if anything new or not self-evident. And many comments upon article VI steadfastly (and correctly) insisted that article VI departed from traditional practices. One North Carolinian complained that it was "an invitation for Jews and pagans of every kind to come among us."¹⁵¹ The response: "Christian immigration" would outstrip such disreputable characters, and in all probability, their children would be Christians.¹⁵² Along the way, federalists implicitly conceded the most contested ground of all, the one on which article VI's attackers blithely sat: Rome. The defending forces had said nothing to placate the pronounced anti-Catholicism of the founding generation, flames being joyfully fanned by antifederalist operatives.

This is not the place to "prove" or even substantially document the inhospitable situation of Roman Catholics in America during the early national period. Sufficient for our purposes should be the state background noise which audibly discriminated against Catholic political aspirants. One way to appreciate the extent of it is to see it as the flip-side of the equally pronounced tendency among the founders to identify America and republican institutions with Protestant Christianity. In the American mind, Catholics were spiritually tyrannized by a Romish clergy, and the lack of autonomous moral judgment characteristic of Protestants rendered Catholics ill-suited and, to many, completely unfit to be Americans.¹⁵³ John Jay, first Chief Justice of the United States, frankly estimated Catholicism and American citizenship to be fundamentally incompatible.¹⁵⁴

That the founders' anti-Catholicism would be difficult to overestimate can be gleaned from the ratification debate over article VI. North Carolina, which eventually decided against ratification, was hardly "illiberal" on religion for its day. It disestablished Anglicanism in 1776 with little event,¹⁵⁵ a reflection of the practical shallowness of Episcopal Supremacy in a heterogeneous society. Yet the

151. IV ELLIOT'S DEBATES, *supra* note 94, at 199 (speech of David Caldwell).

152. *Id.* at 200 (speech of Governor Johnston).

153. G. BRADLEY, *supra* note 27, at 126-28.

154. See J. PRATT, *supra* note 39, at 84-85.

155. See G. BRADLEY, *supra* note 27, at 32-33.

Convention deliberations bogged down in a broadside "charge" that the Pope might one day become President of the United States.¹⁵⁶ The problem for federalists was that it was literally possible; but just barely being possible was enough to get the delegates' attention. An antifederalist named Lancaster would have restored the kind of general test used in the states. He explained:

For my part, in reviewing the qualifications necessary for a President, I did not suppose that the pope could occupy the President's chair. But let us remember that we form a government for millions not yet in existence. I have not the art of divination. In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists may occupy that chair, and Mahometans may take it. I see nothing against it. There is a disqualification, I believe, in every state in the Union—it ought to be so in this system.¹⁵⁷

Destined for a seat on the Supreme Court, but then the Constitution's leading proponent in the North Carolina Convention, James Iredell responded to the pamphlet allegation at length:

No man but a native, or who has resided fourteen years in America, can be chosen President. I know not all the qualifications for pope, but I believe he must be taken from the college of cardinals; and probably there are many previous steps necessary before he arrives at this dignity. A native of America must have very singular good fortune, who, after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of cardinal, afterwards that of pope, and at length be so much in the confidence of his own country as to be elected President. It would be still more extraordinary if he should give up his popedom for our presidency.¹⁵⁸

Iredell's discourse may have reassured that the Pope would remain content governing the Papal States and leave the United States alone. But worries about priestly accession to office persisted;¹⁵⁹ after all, one *would* have time for Holy Orders *and* an illustrious political career, and a reasonable man might well leave parish office for the nation's highest. Still, popular anxiety did not rest at the simple prospect of a punctured Protestant monopoly over political appointments, or even lost hegemony.

Although the preservation of Protestantism's close social, cultural, and political "fit" with America was clearly a good enough reason to doubt article VI, the Constitution's detractors did not rest

156. See *infra* notes 157-59 and accompanying text.

157. IV ELLIOT'S DEBATES, *supra* note 94, at 215 (speech of William Lancaster).

158. *Id.* at 196 (speech of James Iredell).

159. *Id.* at 212 (speech of Zachias Wilson).

after scaring up that bugaboo. No less than a Catholic takeover loomed. North Carolina delegates wondered whether a treaty with a foreign Catholic state might result in compelled adoption of Catholicism at home.¹⁶⁰ In the Massachusetts Convention, Baptist leader Isaac Backus addressed “[s]ome serious minds” concerned “lest, if all religious tests should be excluded, the Congress would hereafter establish Popery or some other tyrannical way of worship.”¹⁶¹ One of these minds had already “shuddered at the idea . . . that Popery and the Inquisition may be established in America” due to article VI.¹⁶²

To demonstrate how the arguments had come almost full circle, some delegates, no doubt encouraged by antifederalist rhetoricians, expressed fears that one Protestant sect might gain national ascendancy and oblige others to conform to its ways.¹⁶³ These seeds too were sown on fertile ground. Even though Protestant sect-equality was the norm throughout the union (with a caveat for a “rough equality” in New England) it was just ensconced in most states after 1776. Virginia, we noted, did not disestablish Anglicanism until 1786.¹⁶⁴ Antifederalist agitators here held up the Supremacy Clause: sect equality was guaranteed by state constitutions and bills of rights. But since federal law was superior to state law, what would stop Congress from nullifying, for instance, the sect equality so fiercely and so recently secured in some states?¹⁶⁵ Or would New England Congregationalists have the upper hand in national councils?¹⁶⁶ Here, the antifederalists reached for and tapped a motherlode of deep suspicion, resentment, and antagonism. The focus now travelled from Rome to Canterbury: the Episcopal Church with hierarchical ties to England was disdained and resented by many who had experienced the sting of its colonial establishment. Baptists were widely viewed as enemies of good government, a disposition satisfactorily evidenced (to most minds) by the political lunacy of that Baptist refuge, Rhode Island. All this supplemented

160. *Id.* at 192 (speech of Henry Abbott).

161. MASS. CONV., *supra* note 137, at 251 (speech of Rev. Backus).

162. *Id.* (speech of Rev. Thacher).

163. *See, e.g.*, IV ELLIOT'S DEBATES, *supra* note 94, at 192 (speech of Henry Abbott); *Id.* at 203 (speech of William Lenoir).

164. *See supra* note 52 and accompanying text.

165. *See* III ELLIOT'S DEBATES, *supra* note 94, at 150 (speech of Patrick Henry); *Id.* at 266 (speech of George Mason); I PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 421 (McMaster & Stone ed. 1970) [hereinafter McMaster & Stone].

166. IV ELLIOT'S DEBATES, *supra* note 94, at 199 (Governor Johnston addressing the concern over the eastern states' influence, and explaining that such concern is unnecessary as religious influences in the East are somewhat diversified).

the enduring hostility to Jews among the founders, as demonstrated by Morton Borden.¹⁶⁷ Attitudes towards Catholics were no better. "Turks," "Infidels," "heathens," and their peers lay totally behind the horizons of civility.

Our starting point—a popularly rooted "illiberal tradition"—turns out to be *the* obstacle for article VI: the people were much more religiously chauvinistic and parochial than the Constitution offered in their name. Now the federalists made this tradition their starting point too. Madison saw this, and posited it as a "given" of his analysis. Telling Jefferson of New England's anxieties over an "opened door" for nonbelievers, he added, "I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power" on the part of government.¹⁶⁸ Neither did he spy "illiberality" just in Puritanland:

In Virginia, I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of conscience, it is well known that a religious establishment would have taken place in that State, if the Legislative majority had found, as they expected, a majority of the people in favor of the measure; and I am persuaded that if a majority of the people were now of one sect, the measure would still take place . . . notwithstanding the additional obstacle which [Jefferson's Bill For Religious Freedom] has since created.¹⁶⁹

How do you sell a no-test clause to *these* customers?

The answer is deceptively simple. Federalists said, in effect: article VI prevents you from subordinating the despicable sect of your choice. So it does. But it also protects you from the oppressive designs of all the other sects, who think that your views are despicable and would subordinate you—as you would them—if an instrument of oppression such as religious tests were available. "Serious minds" wondered whether, absent a test, "Popery" or some other "tyrannical way of worship" might be established. In fact the opposite was true: "[I]t is most certain that no such way of worship can be established without any religious test."¹⁷⁰ The ban on tests protects the Protestant character of the nation against a forced absorp-

167. See M. BORDEN, *supra* note 41, at 3-22.

168. Letter from Madison to Jefferson (Oct. 17, 1788), reprinted in 1 LETTERS AND WRITINGS OF JAMES MADISON 424 (1865).

169. MADISON'S WORKS at 424-25.

170. MASS. CONV., *supra* note 137, at 251 (speech of Rev. Backus).

tion of Romish ways, while it incidentally and perhaps unhappily secures Roman Catholics the legal eligibility for office.

The no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: "Constrain yourself as you would constrain others." *This* is how conditions of pluralism ultimately accounted for article VI. Constitutional apologists convinced enough Americans that governmental power must be distributed, or withheld, on the assumption that the designs of future wielders of that power were unknown, but in the expectation that (in the words of Massachusetts' Reverend Shute) "most of men, somehow, are rigidly tenacious of their own sentiments in religion, and disposed to impose them upon others as the standard of truth."¹⁷¹ These premises, mixed with a gamble that the instinct to be free of oppression is stronger than the temptation to oppress, explain ratification of article VI. Notwithstanding the *Everson* Court's glib references to "freedom-loving colonials,"¹⁷² Shute correctly depicted his contemporaries' minds, and nothing which has happened in American history since belies its application to their successors.

The classic expression here is of course Madison's. His Tenth Federalist Paper¹⁷³ has endured as a landmark in both constitutional exegesis and political theory. The cure concocted there for the mischief of faction—extending the sphere to encompass the broadest possible collection of interests—is appreciated as a profound contribution to constitutional theory. Underappreciated, if appreciated at all, is Madison's treatment in Federalist Ten of religio-political conflict as but another example of factional discord, one more symptom demanding the same remedy. "A multiplicity of sects" assured religious liberty, just as a plenitude of factions was conducive to civil liberty generally.¹⁷⁴

Madison's expression is not only classic, it was seminal. The tonic of Federalist Ten—that a multiplicity of antagonistic, aggressive sects was the only reliable guarantee of spiritual freedom—was reiterated by federalists in the ratifying Conventions, in the newspapers, and wherever religious liberty was thought endangered by the new Constitution.¹⁷⁵ While that idea was perhaps neither originated by, nor the exclusive property of Madison, we do know

171. *Id.* at 220 (speech of Rev. Shute).

172. *See supra* note 26 and accompanying text.

173. THE FEDERALIST NO. 10, at 77 (J. Madison) (Mentor ed. 1961).

174. *Id.* at 79.

175. *See* G. BRADLEY, *supra* note 27, at 69-81.

that the Tenth Federalist appeared around Christmas of 1787,¹⁷⁶ that the "Publius" series of which it was an installment was freely circulated in the states,¹⁷⁷ and thus available for use in the conventions of winter and spring of 1788. Moreover, Madison provided a fleshy outline of his argument to Jefferson in October, just weeks after the Philadelphia convention concluded.¹⁷⁸ We may assume that the ideas so early formulated found their way into other Madisonian, if not Jeffersonian, correspondence and conversation.

That missive to Jefferson accentuates the features of Federalist Ten most interesting to us, those features exploring the problem of religious faction. Madison first previews his key premise: "All civilized societies" are characterized by distinctions of property and material interest, and thus all societies are beset by the major cause of faction.¹⁷⁹ In addition to these "natural" distinctions, "artificial" ones rooted in "opinions," political as well as religious, will surface.¹⁸⁰ Madison then affirms the lamentable steadfastness of popularly-held ideas: "However erroneous or ridiculous these grounds of dissension and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind, who are neither Statesman nor philosophers, will continue to view them in a different light."¹⁸¹ In his search for effective antidotes to faction, he elaborated upon the dim view of homoreligiosity propounded by Massachusetts' Reverend Shute:

The inefficacy of this restraint [religious belief] on individuals is well known. The conduct of every popular assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts against which their consciences would revolt, if proposed to them, separately, in their closets. When, indeed, Religion is kindled into enthusiasm, its force, like that of other passions, is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of Religion, and whilst it lasts will hardly be seen with pleasure at the helm. Even in its coolest state, it has been much oftener a motive to oppression than a restraint from it.¹⁸²

Few Americans have been less sanguine about the religiously-

176. The first installment appeared on October 27, 1787 and succeeding issues appeared at short intervals thereafter until the seventy-seventh was published on April 4, 1788. See THE FEDERALIST PAPERS, *supra* note 173, at viii (introduction by Clinton Rossiter).

177. *Id.* at xi.

178. Letter from Madison to Jefferson (Oct 24, 1787) reprinted in 1 MADISON'S WORKS, 349-52.

179. *Id.* at 351.

180. *Id.*

181. *Id.*

182. *Id.* at 352.

propelled citizen than Madison. Unfortunately, many who share Madison's pessimism have failed to heed his rejection of attempts to solve the problem by overriding factious religious opinions with right opinions. Since here is where travellers on the analytical road either sign on for the duration or conclusively part company, Madison's next move is worth careful note. His diagnosis is indeed like that of Reverend Shute: the problem is not so much unprincipled sectarians. The religious man suffers from a surfeit of principles; he overflows with right ideas and with conceptions of the public good.¹⁸³ *That* is the problem. The "enlightened statesman" (men like Madison, perhaps) can see that the zealot's notion of "the public good" is in fact sectarian parochialism, that it is the "private good" characteristic of factions. But, and it is difficult to overstate this next step, that is little consolation.

It is imperative to appreciate what suggested cure for the causes of faction is rejected here. For Madison, the "enlightened statesman" personifies "the public good," a notion repeated throughout *Federalist Ten* and contrasted with the perspective of the factious.¹⁸⁴ But it is by no means clear that Madison really believes in "the public good" or has any idea what it is. All one can safely deduce from the essay is a purely heuristic principle: "the public good" is that which factions usually do not care about. It need not be defined further, and is not by Madison. The rhetorical device is a bit like the traditional "definition" of what is meant by the term "Person" in Trinitarian formulations: it is simply what there is One of in Jesus and Three of in God. In other words, we don't have a definition. It may therefore be observed, with warrant, that the pluralistic account is agnostic, or better still, deistic: yes, there is such a being as "the public good," but mortal men are not vouchsafed knowledge of it.

The alternative reading yields the same practical effect. That is, even if one reads the *Federalist* as contemplating a palpable, meaty "public good," embodied in the "enlightened statesman" (who also may be assumed to exist), it is clear that the system constructed does not rely upon them at all. Indeed, since we cannot count on these fellows, Madison says, we must construct the machinery on the assumption that they are unavailable, and a machine constructed on this premise addresses only the effects of factions.¹⁸⁵ Most importantly, we have foregone the option of waiting for the

183. See *supra* note 171 and accompanying text.

184. See THE FEDERALIST NO. 10, *supra* note 173, at 77-84.

185. *Id.* at 84. Note the contrary interpretation of Madison by Gordon Wood, *Interests*

man of wisdom astride a white horse. The system withholds the power of "curing the causes" of faction with the enlightenment that such a savior would provide. In other words, this messiah would have no power. The system is indeed self-perpetuating: it does not "recognize" enlightened claims as authoritative, and will not change at the statesman's appearance.

After careful consideration then, did Madison propose to leave the religious citizen not only unencumbered, but positively empowered to do political combat? He said:

A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.

If the same sect form a majority, and have the power, other sects will be sure to be depressed. Divide et impera, the reprobated axiom of tyranny, is, under certain qualifications, the *only* policy by which a republic can be administered on *just principles*.¹⁸⁶

This perpetual motion machine—one that yielded a raucous but just equilibrium once the contending forces of sectarian ambition were unleashed—was the proffered guarantee for religious liberty. Madison made precisely this argument to the Virginia Convention which ratified the Constitution.¹⁸⁷ Edmund Randolph seconded him;¹⁸⁸ James Iredell made potent use of it.¹⁸⁹ In North Carolina, Governor Johnston agreed,¹⁹⁰ and the argument was made wherever the "Publius" series circulated. It carried the day and with it article VI. It prevailed not because Madison or even a group of luminaries said so, as the rule of Inverse Proportion would have it, but because it explains how the American people could have accepted the demise of religious tests. At least it squares a fervid commitment to rule by Protestants with an open door for Papists. And *that* is a big square to fill. But, the pluralist account required context and some filling at the edges. The federalists were up to it but in the end it was only a catastrophic, strategic, rhetorical blunder by their adversaries that secured the victory.

The first elaborating effort upon the "multiplicity of sects"

and Disinterestedness in the Making of the Constitution in R. BEEMAN, *BEYOND CONFEDERATION* 91-92 (1987).

186. THE FEDERALIST NO. 10, *supra* note 173, at 84 (emphasis added).

187. III ELLIOT'S DEBATES, *supra* note 94, at 330 (speech of James Madison).

188. *Id.* at 469.

189. IV ELLIOT'S DEBATES, *supra* note 94, at 194 (speech of James Iredell).

190. *Id.* at 199 (speech of Governor Johnston).

theme was predictable, unimaginative, and presumably had little effect. Alternating between lectures on world history and guided tours of the late-eighteenth century globe, federalist lecturers hailed the demise of tests—"that grand engine of persecution in every tyrant's hand"¹⁹¹—as a triumph of the light of American freedom over the darkness which haunted mankind through the ages. Tench Coxe, in an important pro-Constitution pamphlet, proudly contrasted the United States with the European Catholic countries which barred Protestants from office, and to England which banned all those not a member of the state church.¹⁹² Backus hearkened that "the history of all nations . . . from that day (of Constantine) to this" shows that tests have been "the greatest engine of tyranny in the world";¹⁹³ tests have been "the foundation of persecutions in all countries," argued Samuel Spencer of North Carolina.¹⁹⁴ Iredell opined: "Under the color of religious tests, the utmost cruelties have been exercised"; anyone "in the least conversant in the history of mankind" knows that.¹⁹⁵ Oliver Ellsworth, in one of his influential Landholder series of articles in the *Connecticut Courant*, linked tests to "tyrannical kings, popes, and prelates."¹⁹⁶ But when "the clouds of ignorance began to vanish," so did tests.¹⁹⁷ Reiterating a constant theme, he explained the pernicious operation of test laws in England, striving to hit home with "protestant dissenters," the non-Anglicans in his audience who would be ineligible for public trust in England.¹⁹⁸ Everywhere, article VI was urged as a litmus which distinguished America from the cruel scourge of "religious persecution." The unspoken sum was, if Attila the Hun had given it any thought—and if he had any religion—he would have used tests too.

These learned sermons could not have hit home for one simple

191. From a letter by a group of Presbyterians to George Washington, *reprinted in C. ANTINEAU, supra* note 37, at 107.

192. Coxe, *An Examination of the Constitution of the United States of America*, *The Pennsylvania Gazette*, Oct. 24, 1787, *quoted in C. ANTINEAU, supra* note 37, at 107.

193. II ELLIOT'S DEBATES, *supra* note 94, at 148. Reverend Backus argued against any religion test as "religion is a matter between God and individuals," and man cannot "impose any religious test, without invading the essential prerogatives" of God. *Id.*

194. IV ELLIOT'S DEBATES, *supra* note 94, at 200. Samuel Spencer argued that some worthy leaders, being religious, may refuse to take tests while many "vicious characters" would take them just to get into office. Furthermore, the Constitution should free religion from "any connection with temporal authority." *Id.*

195. *Id.* at 192-93 (James Iredell also noted that failure to adopt a particular creed does not signify immorality).

196. ESSAYS, *supra* note 130, at 168.

197. *Id.*

198. *Id.* at 168-69.

reason: all of their hearers lived with tests in their home states,¹⁹⁹ and none could reasonably mistake say, Pennsylvania, for Constantine's Rome. The implicit but logical conclusion was: if tests were the earmark of the tyrant, every American must be living in a state of tyranny. This was surely news to everyone and here even the federalists refuted themselves: another part of their standard litany praised the "liberality" of both the American citizen and his legal order to suggest that an explicit Bill of Rights (another antifederalist demand) was unnecessary.²⁰⁰

Some forensic retooling now was urgent. The constitutional defenders experimented with a milder version of the parade of horrors. This time, tests were the earmark of religious "establishments," with no illustrative flourishes from the saga of human misery. Rather, the positive case was posited: article VI effectively guaranteed equality of sects which the states now enjoyed (some quite recently), and which *was* a prize of American liberty. This argument mingled two familiar components. First, the Constitution provided *no* authorization to "intermeddle" in religion at all. There was no enumerated power and any attempt to so interfere would be, in the words of Philadelphia Framer Richard Dobbs Spaight, "a usurpation."²⁰¹ There was but one possible exception. "As to the religious test, I should conceive that it can imply at most nothing more than that without [it], a power would have been given to impose an oath involving a religious test as a qualification for office," Madison wrote to Randolph. "The constitution of necessary offices being given to Congress, the proper qualifications seem to be evidently involved."²⁰²

The second element amounted to a restatement of the Federalist Ten empowerment theme. Because no test was required, the operative result was sect equality. Spaight drew this conclusion for the North Carolina delegates,²⁰³ Madison²⁰⁴ and Randolph drew it for the Virginians. Randolph argued:

199. See *supra* notes 29-73 and accompanying text.

200. G. BRADLEY, *supra* note 27, at 154-57.

201. IV ELLIOT'S DEBATES, *supra* note 94, at 208. Richard Spaight stated that there is no need for a religious test as an infidel would never be elected except by those sharing his beliefs. *Id.*

202. Letter from James Madison to Edmund Randolph (April 10, 1788), quoted in III M. FARRAND, *supra* note 82, at 297.

203. See IV ELLIOT'S DEBATES, *supra* note 94, at 208 (speech of Richard Spaight). Spaight stated that equally honest men are "equally eligible to office." *Id.*

204. See III ELLIOT'S DEBATES, *supra* note 94, at 330 (James Madison asserting that tolerating numerous religions will result in equality of power).

Although officers, &c., are to swear that they will support this Constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States. I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States! How many different sects will be in Congress! . . . And there are now so many in the United States, that they will prevent the establishment of any one sect, in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty.²⁰⁵

Iredell most succinctly synthesized the instrumental value of article VI to the nonestablishment desideratum no doubt shared by his audience. "This article is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution."²⁰⁶

These arguments drew a nonestablishment sum from the lack of federal jurisdiction over religion plus the test ban. Article VI was "establishment clause" enough for a federal government of specific enumerated powers, since the oath requirement was the only plausible power one sect might use to gain the upper hand. But this secondary connotation did not hit home. That is, a sufficient number of people were unpersuaded that article VI was a large enough dose of the nonestablishment prescription, so they demanded and got in the first amendment a general sect-equality constraint upon the national government.

The argument missed its primary objective. It did not save article VI because the people for years had been having their cake and eating it too: they enjoyed sect equality in the states, *and* had religious tests to keep the usual suspects out of office. Colonel Jones was visibly unimpressed with federalist rhetoric, and put it bluntly before the Massachusetts Convention: "[R]ulers ought to believe in God or Christ; and that, however a test may be prostituted in England, . . . if our public men were to be of those who had a good standing in the church, it would be happy for the United States."²⁰⁷ The Colonel concluded: "[A] person could not be a good man without being a good Christian."²⁰⁸

This was square one, and the federalists were back to it. Most

205. *Id.* at 204 (speech of Edmund Randolph).

206. IV ELLIOT'S DEBATES, *supra* note 94, at 196 (speech of James Iredell).

207. MASS. CONV., *supra* note 137, at 221 (speech of Colonel Jones).

208. *Id.*

American Christians probably agreed with the last observation, and practically every American was Christian. Why should anyone *but* a good Christian rule over them? The federalists had yet to show why *this* Christian people in *this* place with *their* history should constitutionally bind themselves to share political power with Papists, Jews, and Turks.

The stage was now set for the antifederalists to shoot themselves in the foot—fatally as far as article VI was concerned, and, perhaps, regarding the entire Constitution. Antifederalist strategy placed great reliance upon threats (real or imagined, depending upon which side one was on) to personal liberty posed by the proposed federal government. Religious liberty was high on this list.²⁰⁹ An essential premise was available all along, and it was apparently implicit, never explicit, in the new tack.

While the state tests were a known, fixed entity and were utilized by almost all states, the debated federal test was an unknown quantity to be flushed out by future Congresses. And the feeling of security with a test-laden regime experienced by the ordinary American had always been the problem. This was not England, nor was it Constantine's Rome. Everyone knew that, and that sect equality was harmonious with religious tests. For this precise reason the federalists' audience lacked the psychological precondition necessary to conversion: the ordinary American could not imagine himself as the object of "discriminatory" general tests—that was the lot of infidels. So the central argument failed to resonate: yes, in principle, the door to persecution may be opened by admitting tests, but no, in practice it will do precisely what it ought to do and no more: limit offices to good Christians.

Antifederalists to the rescue! *They*, and *not* their adversaries, widened the vista of the ordinary citizen by suggesting implausible—but theoretically possible—scenarios like Popes becoming President,²¹⁰ Turks commanding our navy,²¹¹ hordes of pagan immigrants,²¹² a Roman Catholic establishment via the treaty power,²¹³ and ecclesiastical courts.²¹⁴ Amos Singletary, a Massachusetts critic of article VI, said what federalists should have said: the Constitution was for the ages, and in article VI, "[w]e were giv-

209. See *supra* note 200 and accompanying text.

210. See IV ELLIOT'S DEBATES, *supra* note 94, at 196 (speech of James Iredell).

211. See III ELLIOT'S DEBATES, *supra* note 94, at 635 (speech of James Innes).

212. See IV ELLIOT'S DEBATES, *supra* note 94, at 199 (speech of David Caldwell).

213. See *id.* at 192 (speech of Henry Abbott).

214. See *id.* at 208 (speech of Richard Spaight).

ing great power to—we know not whom.”²¹⁵ By their exaggerated “worst case” scenarios, antifederalist rhetoricians instilled that sense of potential minority status in the ordinary Protestant essential to seeing article VI as a self-protective device. *These spokesmen* dredged up the spectre of Protestant sectarian warfare so recently pacified in the states. *They* suggested a federal establishment of Presbyterianism or Anglicanism.²¹⁶ *They* repeatedly demanded a general prohibition of sect privileges.

In sum, the antifederalists made the Madisonian vision of a “multiplicity of sects” the practical assumption, rather than the uniformity of religion which in fact existed insofar as restoring a general test oath was concerned. Only when you *really* think the Pope might land on the Jersey shore with his faithful legion—undoubtedly comprised of wily Jesuits—do you want to withhold governmental power as much as possible. A similar scenario, more accessible to modern readers, is John Rawls’ starting point for speculation on political arrangements.²¹⁷ In the “original position,” individuals behind a veil of ignorance regarding their lot in life reason on the same assumptions: a power granted might well be exercised in a manner inimical to their welfare.

D. *Denouement: Nonestablishment and the First Amendment*

The way is now prepared to tie article VI to the centerpiece of the constitutional settlement—the first amendment’s nonestablishment command. They are joined in two quite distinct ways. One is narrative. The debate over article VI spawned the establishment clause as if the latter were a final chapter or epilog. That is, what started out in Philadelphia as a tidy “non-issue” burgeoned into a comprehensive discussion of religious liberty and how best to guarantee it.

The Philadelphia Framers were not concerned with religion, because they believed theirs was a project unrelated to it. When the oath requirement was recognized as a gap in this self-assurance, they plugged it with a complete disability, rooted in a commitment to sect equality. This did not sell, and so they were obliged to jus-

215. MASS. CONV., *supra* note 137, at 143 (speech of Amos Singletary).

216. See IV ELLIOT’S DEBATES, *supra* note 94, at 192, 199 (speech of James Iredell).

217. See generally J. RAWLS, A THEORY OF JUSTICE (1971). Rawls summarized his approach: “What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant[:] . . . an alternative systematic account of a justice that is superior . . . to the dominant utilitarianism of the tradition.” *Id.* at viii.

tify their disabling "plug" with ever-widening assertions of fact, theory, and value so that the article VI story eventually became a thorough-going examination of church-state relationships, resulting in the sect-equality, pluralistic settlement. This is precisely what nonestablishment meant. We thus have the antifederalists to thank for the first amendment in a new sense: by refusing to acquiesce in a limited discussion of oaths and tests, and by insisting that the "limited" nature of federal power was not so limited that article VI was a comprehensive settlement, a general ban on sect preferences was forged. This gave rise to the second, more analytical joining: while article VI has a distinct legal meaning, in function it is a nonestablishment clause. *It* guarantees sect-equality in public office holding, the first amendment guarantees it more broadly. The effect is the same, as was the theoretical justification: by mandating an equality among beliefs, religious liberty was insured.

Because of the analytical derailment evident in Leonard Levy's recent contribution to the church-state debate,²¹⁸ a pause here is justified. Levy makes the Pinkneyian formula—"no power over the subject" of religion²¹⁹—the centerpiece of a constitutional philosophy of religion. "At bottom, the [first] amendment expressed the fact that the Framers of the Constitution had not empowered Congress to act in the field of religion."²²⁰ There are obvious pitfalls here. One is the dizzying notion that this residual emptiness can be "incorporated" by the Due Process Clause, and thus fastened upon the states. Another is its inconclusiveness: even so, what does that tell us about state aid to religious schools? Government can do that with its taxing or spending powers, or its power over education.²²¹ Less obvious, but more insidious, is the deformity introduced by halting analysis in September 1787. It is true that the Philadelphia drafters thought—in one specific but incomplete sense that I shall describe momentarily—that the federal government had no power over religion. But what logically follows is that the Constitution is like the Judiciary Act²²² after all: it does not "intersect" with religion and therefore has *nothing* to say about it. How this can be passed off as instructive, much less as an organizing insight into the plan for religion, is not apparent.

218. See generally L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

219. See *id.* at 63-89.

220. *Id.* at 84.

221. Levy appears to recognize this, but fails to appreciate how deeply it cuts into his attempts to make the "no power" notion analytically valuable. See *id.* at 172-74.

222. 1 Stat. 73-92 (1789).

The point that bears most careful note is the twofold sense in which Levy's historical conclusions are false. As a matter of Constitutional and legal fact, he is wrong. The federal government undoubtedly had power "over religion" in the territories, the military, Indian relations, and in the District of Columbia.²²³ Sherman's Convention comment on Madison's nondenominational university evidences this,²²⁴ as do the actions of the First Congress and its successors, who consistently exercised these powers. The plentiful comments regarding "no power" had as their point of reference the states, as if to say, "Congress has no power over religious practices in the states because state governments retained plenary authority over the matter." Here, Levy's conclusion drawing is also suspect. The better inference, drawn by several commentators, is that the Framers' "intent" was to perpetuate undisturbed the vast network of state aid to religion as well as (ironically) religious tests.²²⁵ In any event, it is not true that the federal government had no power over religion in the states, and experience has shown that only a very short-sighted view of the Necessary and Proper Clause, as well as other federal powers like naturalization, sustains that error.²²⁶ That does not really matter though, nor does it matter that antifederalist boogey-men like treaties embracing Catholicism were exaggerated, though literally possible. What matters is this: the first amendment is simply inexplicable except against a background in which the federal government is believed to have power over religious practices in the states. Further, it was the joint accomplishment of both federalists and antifederalists finally to convince the ratifying generation that this was in fact the case.

The first amendment simply *cannot* be interpreted in a manner like Levy's, which begins with Pinckney's observation. At a minimum, Levy's argument leads only to the conclusion that the first amendment was hypothetical or conjectural, setting limits on non-existent powers. It does not change the meaning of it, which remains sect equality.

223. Again, Levy sees this but fails to draw the obvious conclusions. See L. LEVY, *supra* note 218, at 172-74.

224. See *supra* note 121 and accompanying text.

225. See, e.g., G. BRADLEY, *supra* note 27, at 86-112.

226. See, e.g., Levy's discussion of expanded federal authority, *supra* note 223; for the effect of the federal monopoly on naturalization and immigration upon state prerogatives touching upon religion, see, e.g., J. PRATT, *supra* note 39, at 108 n.22.

II. THE LAW OF ARTICLE VI

There is a refreshing clarity, and brevity, to our constitutional law of religious tests. The clarity partly results from the Constitution's directions about when religious tests are permitted: never. No such device shall be required, and one need only compare the indeterminacy of the free exercise clause (one giant balancing act) and the inscrutable "no laws respecting an establishment of religion"²²⁷ (translation: no establishments, whatever that might be) to be thankful for the lucidity of article VI. And we have a vigorous discussion among the Framers concerning the nature of religious tests. One estimable member of the group—Oliver Ellsworth, member of the First Congress and subsequently Chief Justice of the Supreme Court—pointedly stated:

A religious test is an act to be done, or profession to be made, relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain doctrines) for the purpose of determining whether his religious opinions are such, that he is admissible to a publick office.²²⁸

We also know, through the unambiguous text, that only the federal government is constrained by the no-test clause. Article VI, section 3 itself has never been "incorporated," or otherwise declared applicable to the states.²²⁹ As late as 1876, Congress considered and almost passed on to the states for ratification, a constitutional amendment which would have declared state tests contrary to fundamental law.²³⁰ In fact, save for one holding (discussed below) that a particular oath was *not* a religious test,²³¹ no judicial decision has rested upon the clause, and so there is no judicial littering upon this seemingly pristine landscape. Add to the picture the case of *Torcaso v. Watkins*,²³² which, while not an exposition of article VI itself, effectively prohibited state religious tests, and one is tempted to conclude this section here.

A point of further reflection is this dearth of judge-made law.

227. U.S. CONST. amend. I, cl. 1.

228. ESSAYS, *supra* note 130, at 169.

229. *Torcaso v. Watkins*, 367 U.S. 488, 489 n.1 (1961) (Court struck down, on first amendment grounds, a Maryland test which barred from public office those who did not declare their belief in the existence of God).

230. See *infra* note 302 and accompanying text.

231. See *American Communications Ass'n v. Douds*, 339 U.S. 382, 414-15 (1950) (holding constitutional § 9(h) of the National Labor Relation Act, which imposed restrictions and denied benefits to those union officers who have not filed so-called "non-communist affidavits").

232. 367 U.S. 488 (1961).

This void is not explained, as Professor Tribe intimates, by the subsumption of article VI by the first amendment's religion clause, so that the test ban "is now of little independent significance."²³³ It may be so, *now*, but that cannot explain, for example, the absence of federal cases in the nineteenth century. Rather, the long judicial vacation here testifies that Congress had abided the pluralistic settlement. There are no cases, not because the first amendment has been drafted to invalidate tests, for there have been no tests. Since the very first Congress convened in 1789 with at least three Roman Catholic members,²³⁴ the machine of sectarian jealousies has worked. Even when Congress—and the people—might have wanted to exclude undesirables like Catholics and Mormons from office, they have not. The remarkable factor is that in an area so conflict-ridden as church-state, one teeming with judicial interventions, the ban on religious tests has been self-executing.

There *are* vital and intriguing interpretive questions attending article VI. Before an attempt can be made to identify and answer them, we must confront its bullying by the first amendment. Since the nonestablishment and free exercise constraints constrain all state and federal governmental acts, including (presumably) religious tests, whether article VI now "stands on its own" at all is a necessary preliminary inquiry. Where the states are concerned, it is only the first amendment (via the due process clause) which curtails religious tests. But that same guarantee (without due process mediation) controls the national government as well. *Is there any legally operative independent significance to article VI?*

Who knows? That question asks for a conclusive settlement of a practical issue by the ever-shifting currents of the Court's nonestablishment and free exercise doctrines. What if, for instance, a majority of Justices enamored with the Framers' "original intent" tried the question? Did the Framers "intend" to countenance a general oath? What about the historical facts showing that the Framers "intended" that Christianity be encouraged and nurtured by the state? What if the establishment clause is interpreted—as it should be—to require only "sect-equality"? Is a sect-neutral test possible? If it were, would article VI still prohibit it?

Or, to take the prevailing doctrinal approaches, free exercise

233. L. TRIBE, *supra* note 19, at 813 n.1.

234. Thomas Fitzsimons of Philadelphia and Daniel Carroll of Maryland served in the House of Representatives. Charles Carroll was a Maryland Senator. See UNITED STATES GOVERNMENT PRINTING OFFICE, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1961, at 49-50 (1961).

protects against governmental burdening of consciences.²³⁵ Yet, the Supreme Court (correctly) recognizes that the explicit constitutional authorization of an "oath" demonstrates that the Framers thought "an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved."²³⁶ How, then, does one distinguish an "oath" from a very general "religious test?" Nonestablishment, on the other hand, protects against state aid to religion. Does a "test" "aid" religion so much as it protects the state? The Framers would say yes.

One need look no further than *Torcaso v. Watkins* to appreciate the need to examine critically article VI itself for answers to practical questions that might elude first amendment scrutiny. The oath-test distinction lay at the case's heart. The appellant was denied his commission as a notary because "he would not declare his belief in God."²³⁷ (The Maryland Constitution provided that "no religious test" be required "other than a declaration of belief in the existence of God.")²³⁸ The Justices got quite excited by the required declaration, though given their statements in other cases it is hard to see why. First, Maryland required only a profession, not evidence of genuine belief itself. One simply had to mouth the words and engage in a brief public performance indistinguishable from platitudes required of functionaries in any field. As a notary, Mr. Tarcaso would make people raise their right hands and swear to the truth of certain allegations, whether *he* wanted to or not.

Second, the declaration is void of content, at least as far as the Court should be concerned. Elsewhere, in the *Ballard*²³⁹ case and its progeny,²⁴⁰ was a steadfastly imposed veil of agnosticism upon citizen assertions of religious belief. Whatever the citizen sincerely claims to be a religious belief, is a religious belief, and this sincerity alone helps trigger exacting inspection of otherwise "faith-neutral"

235. See *Thomas v. Review Bd.*, 450 U.S. 707, 713-20 (1981) (denial of unemployment compensation to Jehovah's Witness who quit job after employer switched him to military work was a violation of first amendment free exercise right); *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972) (compulsory public school attendance imposed on Amish is violation of first amendment free exercise right); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963) (South Carolina statute unconstitutional which denied unemployment benefits for termination for refusing to work on Saturdays).

236. *Douds*, 339 U.S. at 415.

237. *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

238. *Id.*

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

240. See *id.* at 86. See also *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

government action.²⁴¹ Closer in time to the *Torcaso* decision, the Court subscribed to the Tillichian notion of God as "ultimate concern."²⁴² With that, all practical objection to the Maryland oath may evaporate. Everyone has an "ultimate concern" and thus a "God" so defined. Maryland required no specifics, nor did it indicate that a Christian or Jewish "God" was peculiarly interested in Maryland notaries. Nowhere did *Torcaso* disavow such a belief, and the challenged law required no more than that *he* profess *his* belief in *his* "God." If any dispute remains, it is one over nomenclature.

Third, much more than such nominal objections *have* been subordinated to oaths. The general federal oath of office²⁴³ squeezes conscience more than Maryland's did, as did the oath expressly validated by the Supreme Court in *Douds*.²⁴⁴ Indeed, on a raw numerical indicator, the infringements in these latter examples are a "five" (on a ten point scale); in *Torcaso*, the needle labors up to around one or two.

Sure, there are distinctions to be made. In *Douds* the oath was one of governmental loyalty with an incidental but measurable effect on conscience. One might suggest that in *Torcaso* the belief in God was foreign to any reasonable, politically-required loyalty. Of course, that depends upon a conceptual infrastructure not shared by all, and certainly not by the Framers who equated belief in God with elementary political soundness. In any event, the Court made no such distinctions, and it is difficult to figure out what distinctions it did make. The focus of the opinion is the sect discrimination carried by the oath, a discrimination between "religions" founded upon belief in God's existence against those founded on "different beliefs."²⁴⁵ Maryland's "power and authority" are "put on the side of one particular sort of believers;"²⁴⁶ some "particular kind of religious concept"²⁴⁷ was required in violation of the Constitution. Despite these strong signals, the Court was quite vague about which clause was offended. Much of the opinion was an establishment clause sermon, but the opinion expressly found an invasion only of *Torcaso's* "freedom of belief and religion."²⁴⁸ Besides the main

241. See *Ballard*, 322 U.S. at 86.

242. See *United States v. Seeger*, 380 U.S. 163, 176 (1965).

243. 5 U.S.C. § 3331 (1982). The government oath concludes with the words "so help me God." *Id.*

244. *Douds*, 339 U.S. at 385-86. See *supra* note 234.

245. See *Torcaso*, 367 U.S. at 495.

246. *Id.* at 490.

247. *Id.* at 494.

248. *Id.* at 496.

thrust along sect-partiality lines, there were accompanying assertions that the Maryland law aided "religions as against non-believers,"²⁴⁹ and that a person could not be forced to profess belief in any religion.²⁵⁰ Whether these points are either (a) applicable to the facts, or (b) intelligible given the Court's overall account of religious belief, need not be debated because the central message of the opinion is unmistakable: Maryland imposed a religious test in violation of the federal Constitution. That is all the rhetoric amounts to, and need be parsed to yield. The opinion includes a rehearsal of the colonial experience with tests,²⁵¹ and how they are "abhorrent to our traditions."²⁵² Article VI looms large in the Court's discussion in *Torcaso*, and even the important footnotes are to Ellsworth and Iredell on article VI!²⁵³

Torcaso is so heavily indebted to article VI that the test clause ought to foreclose. Now we *really* need to know what the federal Constitution's ban on religious tests means: given the uncertain modification of article VI by the first amendment, it behooves educated speculation to act as if it stands on its bottom. And *Torcaso*, if it is to be grasped at all, affects an "incorporation" of article VI as much as if the Court expressly said so.

The proposed interpretive scheme falls along two lines: what is prohibited, and when is it prohibited? Religious tests are prohibited "as a Qualification to any Office or public Trust under the United States."²⁵⁴ Excluded from its ambit then are such important public acts as voting (which is addressed separately in article I²⁵⁵) and naturalization, according to the Supreme Court in *Girouard v. United States*.²⁵⁶ "Qualification" seems clear enough: a test may not constitute an obstacle to or "disqualification" from office. The remaining problem is, do "any Office or public Trust under the United States" constitute words of limitation? Most especially, are members of Congress covered by the test ban? The answer is not self-evident. A roughly parallel provision of the North Carolina Constitution, for instance, *was* read to permit the seating of a Jew in the legislature despite a test requirement of "all civil officers," oddly

249. *Id.* at 495.

250. *Id.*

251. *See id.* at 490-92.

252. *Id.* at 491. *See supra* notes 20-23 and accompanying text.

253. *Torcaso*, 367 U.S. at 494-95 nn.9-10.

254. U.S. CONST. art. VI, cl. 3.

255. U.S. CONST. art. I, § 2, cl. 1; art. I, § 4.

256. 328 U.S. 61 (1946).

resulting in a competence to make laws but not to execute them.²⁵⁷

Another rough parallel described by Morton Borden is closer to home. Apparently under present law, legislators of the United States are not impeachable; they are not "civil officers" as that term denotes potential subjects of impeachment.²⁵⁸ The seminal discussion is just a little more recent than the Constitution.²⁵⁹ In the course of Senate deliberations in 1799 concerning the impeachment of William Blount, in Blount's defense, Alexander Dallas relied heavily upon the Constitution's ambiguous use of the term "officer." Briefly, Dallas argued that if the Constitution forbids Senators and Representatives from holding a "civil office *under the authority of the United States*,"²⁶⁰ a distinction was implied. "Nothing could more strongly mark the discrimination between a legislator and an officer," Dallas concluded.²⁶¹ Legislators are not "under" the United States; they "are" the United States. He might have added that article I's specific commission to each house to judge the qualifications of its members²⁶² suggests an autonomy from other, more general provisions like article VI. The Vice President, as presiding officer of the Senate, might be grouped with "legislators" here. The Presidential oath of office is singularly prescribed by the Constitution,²⁶³ and through an implied negative, would be excepted from this asserted exception to article VI.

The distinctions between officers "under" the United States and legislators is probably too paltry and picayune to sustain the claimed dispensation from article VI. The ratification debates confirm this judgment, and weigh heavily against branding the phrase as one limiting the reach of the test ban. Rather, the discussions clearly reveal a belief that article VI was applicable to the entire lawmaking process, and occurred against a background of religious tests for precisely those high executive and legislative offices supposed to have been excepted by such technical distinctions.

The guiding rule of construction ought to be inclusive of "officer or public Trusts" in doubtful cases. The question now is, what precisely is precluded in those cases. The sticking point is the one upon which the Philadelphia Convention hung—oaths are fine, but reli-

257. See M. BORDEN, *supra* note 41, at 43-44.

258. M. BORDEN, *THE FEDERALISM OF JAMES A. BAYARD* 213 n.39 (1968) [hereinafter BAYARD].

259. See U.S. CONST. art. II, § 4.

260. BAYARD, *supra* note 258, at 57 (emphasis added).

261. *Id.*

262. See U.S. CONST. art. I, § 5, cl. 1.

263. See U.S. CONST. art. II, § 1, cl. 8.

gious tests are out. While the mainstream cases are quite distinguishable—no one would mistake a vow to take the Eucharist in the Episcopal mode for a simple oath—there is simply no clear boundary between the two. For example, the standard oath for federal employees closes with the words “so help me God.”²⁶⁴ Is that presumably valid summation obviously different from Maryland’s requirement of a simple profession of belief in God? Nevertheless, the Court was likely correct in *Torcaso* that it had a religious test before it. Notwithstanding arguments to the contrary, there should be no doubt from the Constitutional text and the history of its ratification that both “particular” and “general” tests are foreclosed. The attempts in Congress to insert “other” between “no” and “religious” evince the Congressional proposers’ understanding of that. And the brouhaha in the ratifying states is intelligible *only* if general tests, an affirmation of God’s existence and a future state, were at stake. So many people could not have been agitated by a proposition to ban sectarian preferences in office holding.

Still, the Court is quite right that an oath—any oath—necessarily works the same effect intended by a religious test: some are ineligible because of religious scruples. A bare declaration of political loyalty and fidelity to the Constitution—seemingly the minimum of any plausible oath—is impossible for some believers, whose political affiliations are quite tentative, owing to their “total” religious commitments. Put differently, anyone with serious religious convictions can foresee divergences between religious obligations and a sworn duty to, say, uphold positive law. When the potential conflict between the loyalties is significant, one will decline the oath. Thus, the Supreme Court’s indignation in *Girouard*, because a person (there, a pacifist) might be ineligible to settle here due to religious conviction is puzzling.²⁶⁵ That must be expected, and the Justices’ comments in the *Douds* case make clear their appreciation of the inevitable clashes.²⁶⁶

So much for the trees, on to the forest. Thus far we have picked at disparate points of meaning when the guiding principle for each point rests in function. To pursue the machine metaphor, the judicial task here is maintenance and repair, not design and much less creation *ex nihilo*. Article VI ensures equal opportunity for religious factions to be represented in office, and is thereby a key cog in the apparatus. The Court should indeed closely scrutinize anything

264. See *supra* note 243.

265. See *supra* notes 20-23 and accompanying text.

266. See *generally* *American Communications Ass’n v. Douds*, 339 U.S. 382 (1950).

smacking of a religious test for office, lest malfunction occur. But that is all the Court should do. Article VI is literally not an invitation to grand theorizing about church and state, and its story makes clear that it cannot be so construed consistently with the Constitutional order as a whole. One thing article VI is not is a direction that citizens should not, for instance, vote their religious consciences. For what it is worth, the machine contemplates that people will do just that. More generally, article VI “machine maintenance” workers—that is, the judiciary—must be content with occasional, minor tinkering. All of this means that article VI is not a womb for Constitutional philosophies of religion.

III. ARTICLE VI: PARADIGM FOR THE WHOLE?

The demonstration so far has accounted for the personal liberty guaranteed by article VI, section 3 by attributing it *not* to either popular or elite commitment to religious equality, but rather to the conditions of pluralism. No abstract principle but the jealousies of antagonistic sects wrought the test ban. Now we are to seek answers to two further questions constituting the single challenge. Is this account paradigmatic for the whole? Can we place faith in it as an explanation both for the whole system of religious liberty crafted by the Framers, *and* for the manner which religious liberty has been, and is, guaranteed in this country?

The problems of proof here are formidable enough, but any honest, well-grounded attempt must at the outset eschew two proffered burdens of persuasion. The first is the rule of Inverse Proportion, which stamps a particular episode illustrative of our whole “tradition” due chiefly to coincidence with the stamper’s own political sensibilities.²⁶⁷ In *Everson*, for example, *no* proof whatsoever for the *General Assessment’s* infusion into the first amendment is offered, save for the participation of James Madison on both occasions.²⁶⁸ The problem here is not justifying an argument—that’s easy—but showing that one argument is justifiable while others are not.

The second standard demands too much, requiring evidence warranting “cocksure” historical conclusions before bowing to an interpretation.²⁶⁹ Someone once said that the beginning of wisdom is to ask for no more certainty than a subject matter affords. If so,

267. See *supra* note 10 and accompanying text.

268. See generally *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

269. L. LEVY, *EMERGENCE OF A FREE PRESS* 268 (1985).

this standard is unwise. And, one suspects that such unrealistic demands of proof are simply a function of the demander's political sensibilities, or, to be more precise, the desire to substitute those sensibilities for constitutional meaning. Once "history" is branded "inconclusive"—as it was intended to be by such "beyond a doubt" burdens of proof—one is free to speculate without firm restraint. Supreme Court members have commented that "history" is no clear guide to modern church-state problems.²⁷⁰ The inference drawn from this indeterminacy is judicial license to fashion a personal church-state philosophy.²⁷¹

A. *Was it a "Machine" that the Framers Built?*

Is the pluralistic account of article VI illustrative of the whole constitutional order envisioned by the Framers? There should be only a little doubt that it is. The "denouement" to Part I revealed how the nonestablishment provision is neither more nor less than a generalized version of article VI's effective guarantee of sect equality. Enough said.

The remaining element of the constitutional system is the guarantee of "free exercise" of religion. While this term is more elusive definitionally than nonestablishment, there is sufficient reason to render it a "minimalist" interpretation, as suggested by the article VI story. Free exercise gave all believers the right to actually believe and worship as they pleased. A good cognate term is the one found in several state constitutions, protecting against "molestation" on account of belief.²⁷² These were non-aggression promises by the state and the dominant Protestant sects that comprised it. But the article VI story shows too that this was a genuine pact with mutual obligations. The state not only intended to leave alone those minority sects who needed such protection, but also it expected reciprocity. The "dissenters" should not expect to govern or to affect measurably the course of public events. The blasphemy laws were

270. See, e.g., *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 820 (1973) (Jackson, J. commenting that "one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations."); *McCullum v. Board of Educ.*, 333 U.S. 203, 238 (J. White stating that the Constitution offers little aid in defining where "secular ends and sectarian begins It is a matter on which we can find no law but our own prepossessions.").

271. Justice White concluded that courts have therefore "carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships." *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

272. See, e.g., I Poore, *supra* note 31, at 819 (MD. CONST. art. XXXIII); *Id.* at 957 (MASS. CONST. art. II).

one example of a further contractual obligation: the "public square" was, and would remain, unashamedly Christian, owing to the religious sentiments of the majority. Perhaps the best synonym then is "toleration," a guarantee of undisturbed private belief and worship. Nothing more. Here it is important to recall that the only anticipated beneficiaries of Free Exercise protection were unpopular, small, and non-Protestant knots of believers.²⁷³ They were pretty much like those who have actually benefitted in our Supreme Court from it: the Amish,²⁷⁴ Seventh-Day Adventists,²⁷⁵ and Jehovah's Witnesses.²⁷⁶ For believers closer to the mainstream, sect parity functioned as a protection against persecution, since potentially hostile legislation was countered by the requirement of general applicability.

The important point is, free exercise was not a "systemic" element and did not contribute to the machine generating religious liberty. It was rather a theoretically-unrelated addendum to a system for the benefit of very small numbers of "tolerated" dissenters. Even then, its protections were often overcome by a zealous Protestant community. And therein lies a further clue to where the Framers actually placed their faith in crafting a constitution of religious liberty. Here, Madison's views are again most helpful. Among many others, he derided the very idea of "guaranteeing" religious liberty by stating principles in a constitution. Such "parchment barriers,"²⁷⁷ he little doubted, had not and would not constrain a majority from exploiting a minority sect, so he developed the theories of Federalist Ten. Principles, constitutionally ensconced or otherwise, had little effect upon the citizen generally and the religiously-motivated citizen in particular. There is certainly much in American history to support this view. Madison cited some examples from his experience;²⁷⁸ Morton Borden relates the coincidence of happy, Fourth-of-July-Speech, libertarian principles and the legacy of Jewish oppression.²⁷⁹ Catholics have fared little better;²⁸⁰

273. See generally G. BRADLEY, *supra* note 27 for the implicit establishment of Protestantism in the Framers' America.

274. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *supra* note 235 and accompanying text.

275. See *Girouard v. United States*, 328 U.S. 61 (1946); *supra* notes 20-23 and accompanying text.

276. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *supra* note 235 and accompanying text.

277. See Letter from Madison to Jefferson, *supra* note 168, at 426.

278. See *supra* note 168 and accompanying text.

279. See generally M. BORDEN, *supra* note 41.

280. See, e.g., *supra* note 30-32 and accompanying text.

Mormons have suffered even worse.²⁸¹ Even now, and despite the “freedom-loving” rhetoric of Supreme Court opinions (especially its “liberal” wing) close inspection of the cases reveals an admitted diminution of religious freedom and greater devotion to public peace, stability, and order.²⁸² And I have speculated elsewhere²⁸³ that the entire contemporary church-state opus is a mind-shaping enterprise warring upon “religious consciousness.”

Now Madison was probably on target in his grand scheme, and as an historical matter, he was probably more right than most of us admit. Contrary to our most basic assumptions, he and his contemporaries lived in an experimental era, and the subjects of the experiment were bills of right. Only some states had them. There they were frequently ignored (as Madison said), and were widely regarded as judicially unenforceable.²⁸⁴ It was, in short, quite uncertain whether an obviously sect-preferential law would ever be challenged anywhere but in the electorate and in the legislature.

That subsequent generations, or at least fairly recent ones, have proven more amenable to judicial superintendence is one factor in the next question—whether article VI is paradigmatic for the way things have since worked out—but has no effect upon the question of what the Framers envisioned. The Framers’ vision was circumscribed by both the electoral and judicial “inefficacy” of constitutional guarantees. Predictably then they placed their faith in a machine operable without much judicial assistance, and which ran on principle-less fuel.

B. *Has the Machine Gone of Itself?*

Do the conditions of pluralism which account for article VI also account for the regime of religious liberty which we inhabit? Certainly, compelling “proof” of the proposition is hard to imagine, but so is proof of the alternative. Indeed, there is comfort there, for due to adherence to the rule of Inverse Proportion, mere assertion probably suffices to “call” the other side’s evidence. It would go beyond the Court’s offers of proof to cite the conclusion of Cornell

281. Good recent histories of early Mormonism are L. ARRINGTON, *BRIGHAM YOUNG: AMERICAN MOSES* (1985); R. BUSHMAN, *JOSEPH SMITH AND THE BEGINNINGS OF MORMONISM* (1984).

282. See *infra* notes 291-94 and accompanying text.

283. See Bradley, *Dogmatomachy—A “Privatization” Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986).

284. See, e.g., III ELLIOT’S DEBATES, *supra* note 94 at 583 (speech of James Madison), 191 (speech of Edmund Randolph); IV ELLIOT’S DEBATES, *supra* note 94, at 66 (speech of William Davie), (speech of James Iredell).

historian R. Laurence Moore that it was not belief in the intrinsic goodness or value of toleration that explains our regime.²⁸⁵ "Contemporary studies that point to a strong correlation between religious affiliation and prejudice should remind us that religious tolerance was not the free gift of a dominant religious group, the Constitution notwithstanding, but instead the product of uneasy arrangements made between groups that did not like one another very much."²⁸⁶ Moore's portrait is rooted in detailed attention to the nineteenth century landscape, and confirms the central insight of a burgeoning opus in political history, picturing that era's politics as a battleground among antagonistic ethnic, religious, and cultural groups.²⁸⁷ Whatever the state of religious liberty in that environment, it is difficult to attribute it to the generosity of dominant groups.

However, we can go further back for at least episodic confirmation of the pluralistic account. We have seen how nonestablishment at the federal level was an "uneasy arrangement" between hostile groups. It should not be a surprise, therefore, that the various state disestablishments affected during 1776-1786 were also political settlements among contending factions. As a very general but accurate observation, the disestablishment of Southern Anglicanism at the Revolution's dawn was due to the sudden withdrawal of imperial control. The Crown's disappearance permitted colonial "dissenters" like Presbyterians and Baptists to demand equality with the dominant "tidewater" Anglican gentries as their recompense for joining in the war effort. In this scenario, the circumstance of war so increased the raw political power of dissenters that they held the regnant sect hostage. Anglicans had little choice but to pay the ransom.²⁸⁸

The most significant post-Revolution, pre-Constitution episode is analytically indistinguishable. The Court and its scholarly fellows would have us believe that the libertarian ideals of Madison and Jefferson, as chiefly expressed in Madison's *Memorial and Re-*

285. R. MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* 205 (1986).

286. *Id.*

287. The most prominent work is P. KLEPPNER, *THE THIRD ELECTORAL SYSTEM, 1853-1892* (1979). See also R. JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-96* (1971); R. KELLEY, *THE CULTURAL PATTERN IN AMERICAN POLITICS: THE FIRST CENTURY* (1979). For the critical role of political party as moderator of the conflicts described by the above authors, see the works of Joel Silbey, including J. SILBEY, *THE PARTISAN IMPERATIVE: THE DYNAMICS OF AMERICAN POLITICS BEFORE THE CIVIL WAR* (1985).

288. G. BRADLEY, *supra* note 27, at 71-77.

monstrance against a General Assessment, swept Virginians up in a principled embrace of religious diversity, even accepting those with no religion at all. In fact, evangelicals overcame the *General Assessment* because they had sufficient political power to do it, after a public campaign which included charges that the plan was conceived to revive the dying Anglican establishment.²⁸⁹ With all that, it seems that conditions of poverty—currency-poor Virginians simply wanted no more taxes—ultimately assured the *Assessment's* demise.²⁹⁰

Moore's conclusions and the so-called "new" political history previously mentioned are all the general proofs submitted to sustain the pluralistic account of religious freedom in the nineteenth century: the portrait collectively painted is of a highly religious-laden politics tamed not by an overarching "public philosophy," but rather by the interest-aggregating function of political parties. Add to that account this theme discussed later: there is no doubt that the the judiciary added nothing to the religious freedom wrought by the political machinery during that century.

In the early part of the century, Chancellor Kent's *Ruggles*²⁹¹ opinion typified the prevailing motif, which regarded Christianity as virtually part of the common law. Later, Supreme Court opinions reflected at least as much Christian parochialism as that possessed by the average voter. In one series of cases,²⁹² the Justices proved to be enthusiastic accomplices in the general harassment of Mormons, whose beliefs (regarding polygamy in particular) were not "religious" at all according to the "common sense of mankind."²⁹³ On another occasion, state laws disqualifying women from legal practice were validated after the state argued that they merely implemented "the will of the Creator."²⁹⁴ In general, we should recall

289. See T. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787*, at 175 (1977) (evangelicals constituted a stronger force in Virginia's settlement than Madison and his supporters).

290. See *id.* at 155; Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison, and Assessment Establishment*, 8 J. CHURCH & ST. 344, 362 (1966).

291. *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811).

292. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (Court affirmed Congress' power to repeal the incorporation of the Mormon Church and to appropriate its property); *Davis v. Beason*, 133 U.S. 333 (1890) (Court upheld conviction of defendant, who, despite his Mormonism, attempted to register to vote by taking the required oath that he did not practice or encourage bigamy or polygamy); *Reynolds v. United States*, 98 U.S. 145 (1878) (Court upheld statute prohibiting bigamy as not violative of religious freedom).

293. See *Davis*, 133 U.S. at 342-44.

294. *Bradwell v. State*, 83 U.S. (16 Wall) 130 (1872) (affirms Illinois' refusal to issue a law license to a female).

that the late nineteenth-century *Lochner* court has rarely been accused of cosmopolitanism.²⁹⁵

It does not necessarily follow from judicial ineffectiveness that religious liberty was due to a pluralistic political environment, for it might still be rooted in a *popular* commitment to principles of freedom. Yet the predicament from which the Justices refused to rescue the Mormons suggests that when left to their own inclinations, and without a countervailing political muscle like that possessed by Catholics, the people would mistreat powerless, unpopular sects.

A few "particular" proofs of the continuing presence of "Federalist Ten" style religious liberty must suffice here. Joseph Story's *Commentaries*, for instance, confirm an enduring sect-equality reading of nonestablishment.²⁹⁶ In 1853, the Senate Judiciary Committee defined an "establishment" as state favor of "a particular religious society."²⁹⁷ No grand schemes or constitutional philosophies here—just the minimum assurance of diffused political power. The one "microcosmic" example pursued in detail confirms that suspicion.

The 1800's witnessed the full blossoming of that characteristic American phenomenon called "denominationalism." The schism in New England Congregationalism which yielded Unitarianism, for example, is a major factor in the demise of establishmentarian practices in that area. Basically, Trinitarians gave up the idea of an Establishment when it ceased to work to their advantage.²⁹⁸ Nevertheless, the Catholic story most illustrates our theme. The rapid, mid-century influx of millions of Catholic immigrants significantly affected the course of American religious history, when Catholics became voters in numbers sufficient to constitute a potent political force. Until then, they were treated much like they were at the time of the Constitution—tolerated, but domesticated by a Protestant culture and public life. Their eligibility to vote and to hold office guaranteed eventual influence in the public square. The guarantee was made good, but not because sympathy and respect was won from Protestant natives. Indeed, quite the opposite occurred. As Catholic political power increased, so did native hostility and backlash. Tolerance quickly evaporated due to the stubborn determination of Catholics to remain Catholic, as evidenced by the

295. See *Lochner v. New York*, 198 U.S. 45 (1905).

296. See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 632 (5th ed. 1891).

297. S. REP. NO. 376, 32d Cong., 2d Sess. 1 (1853).

298. See L. LEVY, *supra* note 218, at 37-38.

construction of a separate, parochial school system.²⁹⁹

The perspective to be gained lurks in one "backlash" episode. It is especially illuminating because of its role in the 1948 *McCollum* decision,³⁰⁰ and in commentary³⁰¹ suggesting that it holds key insights into our tradition. That backlash is the "Blaine Amendment" of 1876,³⁰² a Congressional effort to propose a sixteenth amendment to the Constitution. In relevant part it would have prohibited *state* funding of sectarian schools, and it would have made the first amendment and article VI generally applicable to them. Here is one insight: Congress felt obliged to add a "no-aid" rule to the nonestablishment directive, thereby reflecting the "sect-equality" understanding of the Establishment Clause.

Now, there is no doubt that as a practical matter the Blaine Amendment was a partisan exercise in religious intolerance. "During the closing days of the Congressional session, Republicans in both houses, hoping to capitalize on anti-Catholic sentiment, pushed unsuccessfully for a constitutional amendment to prohibit the use of public funds for parochial schools."³⁰³ Yet, the verbal formula considered essential to curbing Catholicism's staying power was rooted in the "multiplicity of sects" populating America: the proposal outlawed *all* public aid to *all* "particularist" tenets and

299. In addition to the works cited *supra* note 285, see generally J. DOLAN, *THE IMMIGRANT CHURCH: NEW YORK'S IRISH AND GERMAN CATHOLICS, 1815-1865* (1975); V. LANNIE, *PUBLIC MONEY AND PAROCHIAL SCHOOLS* (1968).

300. *McCollum v. Board of Educ.*, 333 U.S. 203, 218-19 (1948) (noting that President Grant's strong address against public financial support of sectarian schools prompted the Blaine Amendment).

301. See, e.g., O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. REV. 137, 140-41 (1963); Meyer, *The Blaine Amendment and The Bill of Rights*, 64 HARV. L. REV. 939 (1951).

302. The version actually passed by the House of Representatives read:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

H.R. Res. 1, 44th Cong., 1st Sess. (1876).

303. K. POLAKOFF, *THE POLITICS OF INERTIA* 115 (1973).

dogma. This was not because all sects were in fact believed to be equally true or equally valuable to the American system: the Blaine Amendment is premised instead upon a perceived inferiority of Catholicism on *both* of those scores. Like the federal sect-equality provisions of article VI and the first amendment, power was withheld across the board to extirpate one perceived abuse of it (state aid to Catholic schools), and to prevent similar future abuses. In effect, Protestant proponents were willing to hamstring themselves in order to thwart their nemesis, the Roman Church, in another application of the Machiavellian Golden Rule.

Pressing now is an examination of our own era, specifically the condition of religious liberty and its causes since judicial intervention began with *Everson* in 1947. Before then, there was effectively no judge-made law of church and state. On the free exercise side and apart from Mormon bashing, there was occasional relief for the lonely sectarian pamphlet distributor³⁰⁴ and the like. Most importantly, there was no establishment clause law at all. The three pre-*Everson* public funding cases were all victories for Catholic recipients,³⁰⁵ which, coupled with the *Pierce* decision's³⁰⁶ protective shield for parochial schools, emphasize that judicial chauvinism was at least Christian, not just Protestant. Indeed, these earlier courts might well surpass our own in solicitude for Catholic interests. In no case before *Everson* was any doctrine articulated; the cases were not decided on establishment clause grounds.³⁰⁷ Thus, Justice Rutledge rightly counted *Everson* the Court's first "square confrontation" with nonestablishment,³⁰⁸ and it marks the birth of a

304. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

305. See *Cochran v. Board of Educ.*, 281 U.S. 370 (1930) (upheld state statute authorizing local school boards to purchase text books for parochial school students); *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upheld payments by federal government to Catholic missionaries operating schools on Indian reservations); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (allowed reimbursement by District of Columbia to Catholic Sisters of Charity for care administered in their hospital to public charges).

306. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

307. Because the establishment clause was not yet applicable to the states, the constitutional issue in *Cochran* was whether aid to parochial schools was an appropriation of public money for private purposes. *Cochran*, 281 U.S. at 374. The payments in *Quick Bear* were determined to be from a tribal trust fund administered by the federal government. Therefore, the "aid" was not out of public monies. *Quick Bear*, 210 U.S. at 78. The government won in *Bradfield* because the plaintiff could not establish that the hospital was in fact a religious corporation. The documents of incorporation listed the secular names of the individual sisters, and did not indicate their clerical affiliation. However, it was apparent from the facts that the sisters of Charity operated the hospital and that they were a Roman Catholic order. See *Bradfield*, 175 U.S. at 297-99.

308. *Everson v. Board of Education*, 330 U.S. 1, 29 (1946).

sustained, integrated, and ongoing attempt at judicial management of church-state affairs.

It is reasonable to question whether religious liberty has increased (if it has at all) in spite of, rather than because of, the Court's prolific pronouncements on the subject. Attitudes *have* changed. But Professor Moore reminds us that if ours is indeed a more tolerant society, it is probably because we care less about religion.³⁰⁹ One sense in which he is right has to do not with a decline in belief itself, but rather in the meaning of belief to believers: lacking the certitude of their forbearers, pious Americans are not prone to see other religions as wrong or heretical, but instead as just another person's view of things. This development is *not* to be confused with a positive belief in political tolerance or religious diversity. It is simply a by-product of changes in the religious mind itself.

This is at best a partial explanation, as at least segments of our society still take religion quite seriously. It surely is not an explanation available to the Supreme Court. The Justices have taken the opposite view as the *raison d'être* of judicial intervention: but for judicial settlement of potentially "explosive" religious issues, we would suffer political divisiveness. This "divisiveness" rationale is a staple of its opinions,³¹⁰ and has been critically examined elsewhere.³¹¹ Our purposes are served by reiterating that it is a descriptive account of religio-political activity which corresponds almost perfectly to the Madisonian prediction. Warring, antagonistic sects stand ready to do battle in the public arena. Considering the Court's assertions of deference to Madison, it is ironic that they stand him on his head: where Madison saw the necessary elements for a self-policing political machine, the Court sees the justification for taking all such issues from that machine. It is not surprising then that the overall thrust of the post 1947 opus has not even purported to be freedom or autonomy, but rather societal peace, stability, order, and tranquility.

The free exercise cases dealing with minorities oppressed by supposedly neutral laws can be pushed aside. Despite all the rhetoric

309. See R. MOORE, *supra* note 285, at 205.

310. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Walz v. Tax Comm'n.*, 397 U.S. 664, 695 (1970); *Board of Educ. v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting); *Everson*, 330 U.S. at 34-35, 53 (Rutledge, J., dissenting).

311. See, e.g., Bradley, *supra* note 283, at 301-09; Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980).

of freedom in those cases, the Court over forty years has offered up in this guise an occasional liberal gesture to politically impotent sects.³¹² As pertains to my argument, those few cases simply have no systemic importance.

In the nonestablishment stream where the vast bulk of cases swim, three prominent features demonstrate the plausibility of seeing the Court as an institutional brake upon religious liberty. First is the "divisiveness" theme, which quite avowedly circumscribes religious activity in the interests of an orderly public life. While there is more going on here than is immediately apparent, subordination of liberty to the needs of order is obvious.

Second is the constitutional anointing of the public school. The public schoolroom has been and is primarily a vehicle for socializing youth with values supportive of our political institutions, "a culture factory."³¹³ The Justices, in their candid moments, confess their allegiance to this character-forming purpose of compulsory education.³¹⁴ And we must see the negation of many forms of parochial school aid as a function of this positive loyalty. Now, whatever the public school is or is not, it is *not* dedicated to individual autonomy, religious or otherwise. The law makes everyone attend, and escape to private alternatives is difficult for persons of marginal means. Of course, socialization does not work unless it subjects everyone to approximately the same influences. Here one need only consult the superb article by Professor Coons to estimate the antagonism between individual autonomy and our system of public schools.³¹⁵

The third theme has not been as fully explored in the literature. William Marshall captured for us the pervasive principle of the 1984-85 term,³¹⁶ during which the Court strove to eliminate "symbolic unions" of church and state. The putative vice here is improper government "endorsement" of religion or a particular brand of it to the supposed detriment of subscribers to unendorsed beliefs.

312. See cases cited *supra* note 235. These are the only Supreme Court victories for religious dissenters standing upon the free exercise conduct exemption. For some very recent decisive defeats, see *Bowen v. Roy*, 106 S. Ct. 2147 (1986) and *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

313. S. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860* (1973).

314. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 241-42 (Brennan, J., concurring); *McCullum*, 333 U.S. at 216-17 (Frankfurter, J.).

315. Coons, *Intellectual Liberty and the Schools*, 1 J. L. ETHICS & PUB. POL'Y 495 (1985).

316. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

One virtue of this formulation is finally to inter the bizarre definitions of "coercion," which the Court has been offering. For instance, it is more plausible (though perhaps incorrect) to describe government aid to Catholic schools as an endorsement of sorts, rather than a "coercion" of non-Catholic taxpayers as involuntary subscribers to that faith.³¹⁷ As Professor Morgan pointed out years ago, given the miniscule amounts involved, only a conscience of prodigious sensitivity could be so coerced.³¹⁸ Similarly, the common "aid" scheme which does not transfer any funds, but allows a tax deduction or exemption for tuition paid by believing parents, need no longer be branded tantamount to direct government funding. Aid thus given is not tantamount to direct funding.³¹⁹ It was alleged to be so only so it could be invalidated by finding some involuntary contributor to the religious enterprise. We also have a more descriptively palatable approach to problems such as nativity scenes and crosses on public property and voluntary prayer in public school.

With respect for the sensitivities of non-Christians when confronted by Christian symbols decking the common public square, it is not helpful to speak in terms of "coercion." What is occurring can better be described as an "endorsement." Subscribers to the "unendorsed" faiths are being told here that society, or at least the state, does not equally serve or belong to them; the endorsed faith is at home here, and theirs is not. This message of "at homeness" and its opposite message of outsider, alien, or intruder status is the vice, and whatever feelings this engenders in the hearts and minds of "outsiders," those feelings are not fairly called "coercive."

This analysis is grievously flawed. First, this problem of "at homeness" and alienation is inherently insoluble. Like it or not, the nature of governmental action is to take stands which some citizens will reject due to their religious scruples. For example, ask a pacifist for his feelings of "at homeness" with federal taxation, about one-third of which goes for instruments of mass violence, or a "Prolifer" about his discomfort with our constitutional order. The notion that government makes decisions which steer a "neutral" course among religious belief is a comforting illusion, just as "value

317. See *Lemon v. Kurtzman*, 403 U.S. 602, 641-42 (1971) (Douglas, J., concurring).

318. See MORGAN, *The Establishment Clause and Sectarian Schools: A Final Installment?* in CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT n.134 (P. Kurland ed. 1975).

319. The best example of this bizarre reasoning is found in *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

free" politics is. If "symbolic union" is supposed to be an analysis only of a very discrete set of issues—like school prayer—it requires a reworked formulation and a new justification, so that we know why only these issues are so analyzed.

Second, the analysis is unwise because it is a characteristic *judicial* approach to the problem. Judges decide cases piecemeal, which means they evaluate one law and one demarcation line at a time. Consequently, they will always find an "outsider" or non-endorsed group in the discrete case before them. Therefore, all laws will be invalidated. The most that can be hoped for, and all that Madison envisioned, is a rough equilibrium over a period of time. For example, non-Christians are rankled by public nativity scenes. Very well. But who is more rankled by public schools these days than Catholics and fundamentalist Christians? Jews and fundamentalist Christians generally applaud American support of Israel. How do most Muslims feel about that? Jews and non-Catholic Christians until very recently have railed against parochial school aid; Catholics, of course, saw either Protestantism or secular humanism endorsed in public schools.³²⁰ Everyone but Catholics sued Ronald Reagan for his diplomatic recognition of the Vatican.³²¹ And so on. The rejoinder here is *not* that the Madisonian vision of ever-shifting majorities with no recurrent minority sect is demonstrably valid. America certainly bears a Christian slant, but more and more Christians think it brands them as outsiders. Rather, Courts are institutionally unable to address the proper subject of scrutiny: the whole system, over time. Put differently, to approach the issues judicially with this analysis in hand is already to have rejected Madisonian synthesis, and probably unwittingly.

Third, in looking at the flawed analysis, and with assistance from Professor Moore, one must hesitate to call the "insider"-"outsider" effect of "symbolic union" a "problem." Moore has argued that religious groups often consciously seek and cultivate "outsider" status for various reasons; among them is the boost it gives the group's powers of self-definition.³²² This supplements the earlier point that all groups are, sooner or later, "outside" and adds another layer of "insolubility": non-endorsed groups may *want* to be non-endorsed. The basic reason is not elusive: religious communi-

320. See *Lemon v. Kurtzman*, 403 U.S. 602, 628-29 (1971) (Douglas, J., concurring); see generally *V. LANNIE*, *supra* note 299.

321. See the list of plaintiffs in *Americans United v. Reagan*, 786 F.2d 194 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 314 (1986).

322. See generally *R. MOORE*, *supra* note 285.

ties commonly strive to live eschatologically, that is, in the "end-time" but *now*. They do not want to live in ordinary history but instead want to live outside it. The most important example of eschatological communal norms in our culture is Jesus' Sermon on the Mount,³²³ which is suffused with inversions of common sense such as "the last shall be first."³²⁴ Jan Shippo describes the internal communal life of Mormons in America as rooted in this same tension between worldly and eschatological norms.³²⁵ The friction is built in: eschatological ethics are neither intended nor able to govern a concrete society organized for action in history.

Who would feel "at home" in the naked public square portended by devotion to this kind of neutrality? An axiological nudist? A person with no values? The problem is, no one has "no" values. Symbolic union analysis being so ill-founded makes it difficult to tell whether the Supreme Court's pursuit contributes to religious liberty. It is doubtful. But undoubtedly, the Court's devotion to these principles has *cost* us liberty. Even the Justices must admit that the immediate effect of its Title I, "symbolic union" opinions,³²⁶ for instance, is a diminution of educational opportunity for poor, learning-disabled children in inner city, parochial schools. Anyone acquainted with urban public schools, especially in ghettos, laments the consignment of poor children to public schools which are often little more than custodial institutions.

These examples indicate that it is debatable whether the Supreme Court has contributed to or taken away from the present state of religious liberty—if indeed that describes the present state. We should recall that it has been the political process which has yielded the most important victory for religious freedom in our day—the statutory prohibition on religious discrimination in the work place.³²⁷ This civil rights law³²⁸ may partially reflect a genuine devotion to nondiscrimination on the part of lawmakers and their constituents. But this seeming devotion to religious nondiscrimination seems diminished by Henry May's observation that it would have been easier for a candidate critical of mainstream reli-

323. See *Matthew* 5:21-48; see also J. MEIER, *supra* note 77, at 54.

324. *Matthew* 2:16.

325. See J. SHIPPO, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* 109-29 (1985).

326. See *Grand Rapids v. Ball*, 105 S. Ct. 3216 (1985); *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

327. See 42 U.S.C. § 2000e-2(a) (1982).

328. This provision was originally Title VII of the 1964 Civil Rights Act. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

gion to be elected President in Jefferson's time than in our own.³²⁹ I suspect that it is not principled devotion to tolerance, nor principled belief at work, but instead a large dose of indifference, and an equally large habit of mind fostered by the conditions of pluralism.

One condition is that pluralism, or the presence of many diverse beliefs, sects, and churches in one place at the same time, makes religious certitude—the notion that God requires my beliefs, and that others are wrong—an extremely fragile commodity. The average person, by relativizing all belief, may well cope with the presence of “good” people who subscribe to different religions or to none at all.³³⁰

Second, certain intellectual habits follow from politically salient religious belief in a pluralistic society with democratic institutions. As Jeffrey Poelvoarde remarks, “Since the public realm is constituted by more than one religious group, attempts to persuade fellow citizens on issues of public policy must find a basis of appeal wider than only the language and authority of one tradition.”³³¹ In other words, even a Madisonian politics of religious faction generates a non-sect-specific, if not a secular, public discourse. Poelvoarde continues: “[O]n the issue of abortion, Catholics who wish to persuade other religious groups to join with them in the condemnation of abortion must explain why abortion is not simply a ‘Catholic’ concern. And all of them must explain to non-religious citizens why abortion is not simply a religious concern.”³³² Another example drawn from Catholic political activity is the recent *Bishops’ Pastoral Letter on the American Economy*.³³³ While deeply rooted in traditional Catholic thinking, the Pastoral is addressed to a wider audience—the public—and thus it reads much like a “secular” document. Indeed, a popular criticism of the letter is that it sounds like something the Democratic Party Platform Committee would have written about twenty years ago.

A third feature of this pluralism is that this public discourse has

329. MAY, *Intellectual History and Religious History* in IDEALS, FAITHS, AND FEELINGS: ESSAYS ON AMERICAN INTELLECTUAL AND RELIGIOUS HISTORY, 1952-1982, at 158 (H. May ed. 1983).

330. See I McMaster & Stone, *supra* note 165, at 299; ESSAYS, *supra* note 130, at 3, 14-15. See Bradley, *supra* note 283, at 299, 314-15.

331. Poelvoarde, *The American Civil Religion and The American Constitution* in forthcoming volume by American Enterprise Institute.

332. *Id.*

333. The Text of the Pastoral, officially titled “Economic Justice for All: Catholic Social Teaching and the U.S. Economy” (June 1986), is available from the National Conference of Catholic Bishops, Washington D.C. On Catholic social teaching generally, see M. NOVAK, FREEDOM WITH JUSTICE (1984).

most often taken the form of "rights" talk, a jargon which is part of our tradition as much as religion is, even among religionists who do not believe in rights at all. Two examples illustrate this "rights" talk. The Unification Church headed by the Reverend Sun Myung Moon is ecclesiologically authoritarian, and church doctrine probably envisions an authoritarian polity. Yet, when subjected to what he considered an unfair tax prosecution, Reverend Moon, his lawyers (including Laurence Tribe), and an impressive interfaith array of religious supporters criticized the tax prosecution in liberal, democratic "rights" talk.³³⁴ Less recently, nineteenth-century American Catholics argued that public funding of parochial schools was an issue of fundamental religious equality and liberty.³³⁵ But at the same time, the Church bitterly denounced western individualism and religious freedom, and the American hierarchy was still determined to resist accommodation with American culture and institutions.³³⁶ The lesson here is that the desires or preferences or even selfish interests of American church groups are publicly articulated as claims of "right," and "rights" by definition extend to other religions as well. Thus, the medium of the message has a leavening effect upon sectarian rivalries.

The Mormon decisions obliquely illustrate this third "self-executing" feature of pluralism.³³⁷ There, the Supreme Court evidently felt obliged to deride Mormon beliefs as "not religious" in order to circumscribe them. In reality, the Justices probably saw the problem as clearly involving a religion, or at least a sect, one which radically negated certain mainstream Christian, and therefore American, practices. Apparently the Justices did not think they could simultaneously curtail Mormon practices (a curtailment demanded by Christian necessity, as they perceived it) in a sect-equality regime, and admit that those practices were religious.

The final witness to the dynamic underlying modern developments is our present Supreme Court. While its members may be driven by a commitment to abstract principles or to a constitutional philosophy of religion, they, no less than Madison, must "sell" their ideas to the people. This selling is necessary since the Court's

334. CONSTITUTIONAL ISSUES IN THE CASE OF REV. MOON: AMICUS BRIEFS PRESENTED TO THE UNITED STATES SUPREME COURT 10 (Studies in Religion and Society, vol. 10) (H. Richardson ed. 1984).

335. See J. PRATT, *supra* note 39, at 190-203.

336. On the "adjustment" of Catholicism to American institutions, see E. SMITH, *supra* note 34, 185-225 (1972).

337. See *supra* notes 292-93 and accompanying text.

church-state opinions are so prominently featured in the popular media. What has been the Court's sales pitch? It seems to me at least that the "divisiveness" rationale is *the* primary argument.³³⁸ The Court says that its defense of principles we do not share protects us against the zealotry and fanaticism of our neighbors.³³⁹

A recent Second Circuit case abundantly illustrates the discussion so far.³⁴⁰ Hasidic Jews believe in a strict segregation of the sexes from a very early age.³⁴¹ Because of a more inclusive desire to maintain their distinctive values, Hasidim generally separate themselves from society as much as possible,³⁴² surpassing even the Amish in their desire to be left alone. One consequence is that Hasidic girls are educated in private schools which do not enroll boys. Now, federal law entitles *all* "educationally deprived" children living in low income areas like the Williamsburg section of Brooklyn to "remedial" classes at public expense.³⁴³ It used to be that public school employees conducted the mandated classes in the school of eligible youngsters,³⁴⁴ including Hasidic girls. But in 1985, the Supreme Court decided that this arrangement welded a "symbolic union" between church and state.³⁴⁵ The Hasidim and public school officials then sought the required "neutrality" by conducting classes in public schools. Since Hasidic beliefs require segregation, Hasidic girls were taught in a separate wing of the public school by Yiddish speaking women.³⁴⁶ The Second Circuit struck *this* down as another violation of government "neutrality" toward religion.³⁴⁷ New York City's argument that mixing Hasidic girls with other students violated the Hasidic faith, and would end in a refusal to send the girls at all, went nowhere.³⁴⁸ "The lengths to which the City has gone to cater to these religious views, which are inherently divisive," Judge Kearse wrote, "are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith."³⁴⁹ In fact, the regular

338. See *supra* notes 310-11 and accompanying text.

339. *Id.*

340. See *Parents' Assoc. of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986).

341. *Id.* at 1237.

342. *Id.*

343. *Id.*

344. *Aguilar v. Felton*, 473 U.S. 402 (1985).

345. See *Grand Rapids School Dist. v. Ball*, 473 U.S. 402 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985).

346. *Quinones*, 803 F.2d at 1237.

347. *Id.* at 1240-41.

348. *Id.* at 1238.

349. *Id.* at 1241.

public school students would think “the City’s Plan may appear to endorse not only separatism, but the derogatory rationale for separatism expressed by some of the Hasidim.”³⁵⁰ The “derogatory rationale” was the stated fear of Hasidic Jews that too much contact with non-Jewish youngsters would eliminate the isolation necessary to cultural preservation.³⁵¹

Many observations demand mention. We will indulge a few, and linger over none. First, this analysis is perfectly consonant with Supreme Court guidelines. Second (and this is not contradictory of the first), the case is on all fours with the validation of Amish separatism in *Wisconsin v. Yoder*.³⁵² But the Amish are quaint, and not politically aggressive like Brooklyn’s Hasidim, a difference which may well explain the disparate judicial treatment. Third, the Hasidim are a consummate example of religious outsiders who like it that way. They do not want to feel “at home” in our culture for to do so would mean they had ceased being Hasidic. Fourth, Judge Kearse’s “likely to be perceived” and “may appear to endorse” language³⁵³ affirms that the focal point of “symbolic union” analysis is the *feeling* of “outsideness” among non-endorsed spectators. Fifth, the opinion is the absurd but logical result of judicial abandonment of *Federalist Ten*. It is simply absurd to suggest that New York City is “endorsing” Hasidic Judaism, or “symbolically uniting” with it. It is even more ludicrous to suppose that the rest of us need judicial protection from a government entente with this brand of Orthodox Judaism. Yet, this shortcoming is inseparable from the judicial enterprise. Maybe, just maybe, if you look at this episode in isolation, you can detect some faint endorsement, and that is the *only* vantage point available to a court. But there are good reasons why Hasidim do not meander about the public square: viewed as a whole, the sum of political outcomes is deeply hostile to their beliefs. In *Federalist Ten* terms, the political system itself will erase any endorsement of Hasidic beliefs in short order. Sixth, the opinion amply details the thoroughly illiberal intent and effect of modern judicial interventions. Note initially that the Hasidim secured the desired protection for religious autonomy and dissent through the political process. Note too that judges, and not politicians, branded the desire to be different “inherently divisive” and “deroga-

350. *Id.*

351. *Id.* at 1238.

352. 406 U.S. 205 (1972).

353. *Quinones*, 803 F.2d at 1241.

tory,"³⁵⁴ sufficient grounds for reversing the political outcome. Finally, note one plausible summation, one I have offered elsewhere as the animating feature of the post-1947 judicial effort:³⁵⁵ our judge-made constitutional law is not designed to protect religious dissent and shield it from forced absorption into the cultural mainstream, but is intended to do exactly the opposite. And anyone who thinks that the Second Circuit decision represents some "value neutral" resolution of the controversy better think again, for there is no value-free sanctuary in this area of the law.

Now we can pause over the central teaching of the episode. The main point has not to do with the dismaying result or with the application of "neutrality" analysis, but with the justification offered for the principle of neutrality itself. In the end, the very same fear of sectarian oppression which the federalists ultimately capitalized on is still at work. Judge Kearse wrote: "The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs."³⁵⁶ Then, quoting from the Supreme Court's opinion in the Bible-reading case, she concluded: "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions."³⁵⁷

The testimony is this: The judiciary's church-state principles do not resonate with popular sentiments. They seem counterintuitive to the average citizen and the Court knows it. Does it make sense, for instance, that our government should be neutral between Christianity and the Baha'i faith, or that a Krishna disciple should feel as "at home" in America as a Methodist? There is certainly no such "neutrality" as a descriptive matter, and almost no one expects it as a normative one. Another example: in *United States v. Ballard*³⁵⁸ the Court noted the Constitution's agnostic approach to assertions of faith: all such truth claims are equally true or, if you like, equally false.³⁵⁹ They are all matters of opinion. Yet, ordinary believers do not feel that way: they believe what they believe because they detect

354. *Id.*

355. See *supra* note 282 and accompanying text.

356. *Quinones*, 803 F.2d at 1240.

357. *Id.*

358. 322 U.S. 78 (1944).

359. *Id.* at 86.

superior qualities in their beliefs. In each example, the Court's principles are legal fictions designed to govern a people who feel otherwise.

This leads to the second half of the testimony. These unpopular principles are sold as instruments of self-protection, as a Machiavelian Golden Rule. Unless the Court articulates and the people abide them, we will be like Northern Ireland or Lebanon, embroiled in consuming religious animosities. This is of course a fantastic notion, and the Justices have *never* even attempted to provide any evidence that the Lebanonization of our politics is an empirical possibility. Still, case after case justifies its holding with precisely *this* rerun of the eighteenth-century article VI story.

IV. THE MORAL OF THE STORY

Objections that I have inaccurately related the past or unfairly interpreted some judicial opinion will likely be the most common critical response to my argument. Criticisms rooted in such "correspondence" notions of truth, that my conclusions do not correspond to the historical evidence or to constitutional source materials, are welcome, and must be confronted one by one. Here, I hasten to emphasize two caveats: as to the claim in Part III³⁶⁰ at least—that conditions of pluralism account for the regime's historical development and present condition—my aim has been only to submit a plausible argument, not an exhaustively documented one. The latter is not possible, and there are surely counter-examples. Whether they outweigh my positive examples is, I submit, doubtful. Also, consider the alternative case before concluding from counter-examples that my argument fails. Consider especially the rather undocumented competing paradigms exemplifying the Rule of Inverse Proportion³⁶¹ in the Introduction.

Two less frequent but nevertheless prominent objections are no cause for concern. My experience in discussing constitutional law with students (and yes, with professors and judges) reveals a vocal minority whose first and unyielding *assumption* is maintenance of the present intensive level of judicial intervention. Some people simply cannot conceive of a sound theory that results in a significantly diminished and much less intellectually challenging judicial assignment. Put the other way, any such result renders the theory unsound. Since such a modest judicial (and scholarly) role is *precisely*

360. See *supra* text accompanying notes 267-359.

361. See *supra* text accompanying notes 1-19.

the upshot of my analysis, there is nothing to appease them with but abandonment of the whole theory. If the theory need be abandoned, it is not because of a priori assumptions like this one. Similarly there is little to say to the reader whose only criterion for judging constitutional law is the political acceptability of concrete, programmatic results. Choose an issue—parochial school aid, nativity scenes, school prayer—and there are some whose *only* concern is to either condemn or condone. There is little to say to such persons, because they and my arguments are operating in different frames of reference. The criterion of “truth” here is not political savvy but adequacy as an explanation of the sources. These are not really “criticisms” anyway: observations from different frames of reference are just that, observations and not critiques. It is rather like inquiring upon observing the “Mona Lisa,” “How does it work”—that is, substituting function for beauty as the element of value. The “Mona Lisa” does not “work,” but few regard that as a shortcoming of the portrait.

The most important anticipated objection deserves more careful consideration. I suspect that many may be willing to concede that the history is more or less sustainable, and that our regime of religious liberty is largely a political outcome. But even so, the proposal will be rejected on the grounds that it is not *morally* acceptable. At the heart of this critique is a fundamental characteristic of much of the best and most original recent work in constitutional theory, exemplified by the works of Cass Sunstein,³⁶² Kenneth Karst,³⁶³ and Sanford Levinson.³⁶⁴ It is woven into the recent casebook by Sunstein, Stone, Tushnet and Seidman.³⁶⁵ It is the implicit premise of much of Critical Legal Studies writing, and in some, but not all, attempts to locate an “American Civil Religion.”³⁶⁶ This charac-

362. See, e.g., Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (Sunstein states that the Constitution's purpose is to promote public good).

363. See Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 377 (1986) (Karst proposes that a study of Constitutional history shows that ours is a “society characterized by tolerance and ‘the spirit of mediation.’”).

364. Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440 (1986) (Levinson argues that the purpose of loyalty oaths is to preserve community among American citizens).

365. G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 5 (1986).

366. The seminal article on American civil religion is still R. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (Winter 1967). The best recent article on the topic is Poelvoade, *supra* note 331.

teristic I call (with little originality) "the communitarian urge" in constitutional law. The "urge" is for some unifying conception of American public life, some overarching account of the "public good" or public philosophy, in sharp contrast to the pork barrel politics of mere "interests," so that we may begin to articulate the outlines of a truly national community.

Professor Sunstein's carefully argued case against "raw political preferences" as a constitutionally sufficient justification for law is the best exposition of these solidaristic accounts of constitutional law.³⁶⁷ Sunstein is *not* reiterating the familiar notion that some political outcomes—indeed, some entire areas of public policy like criminal procedure or freedom of speech—need to be compared to a judicially-crafted, normative framework. Rather he is talking about all law, and saying that naked majoritarianism is *never* enough. Implied then is a normative system with comparative reference points for *all* legal subjects—"constitutional philosophy," a prescriptive for public life as such. Where shared—or at least superimposed—principles of public life are so exhaustive that the justified expectation is that community cannot be far behind.

This urge for national Community unifies the Supreme Court's church-state cases.³⁶⁸ The judicial vehicle for wider indulgence of the urge promises to be a new "rational basis" test. Already an examiner of all law, the rationality requirement has previously served only one useful purpose: by imagining legislative scenarios of means and ends, it has allowed us to divert our eyes from the raw political hardball, which actually explains much legislation. Simple "losers" in the political process, like the now legendary opticians,³⁶⁹ may then disappear from concern. Recent cases like *Cleburn*³⁷⁰ and *Palmore*³⁷¹ indicate a judicial willingness to subject all law to the tests of "impartiality" and "neutrality." This idealistic approach requires more than popular support as a justification, and is designed to expose political outcomes to the scrutiny of a politically detached, philosophical system.

The communitarian impulse differs sharply from political effects of "pluralism" here described. The urge may even be a self-con-

367. See Bradley, *supra* note 283, at 327-30.

368. See generally Sunstein, *Naked Preferences*, *supra* note 362.

369. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (Court held that an Oklahoma regulatory system for opticians had a rational basis and was therefore constitutional).

370. *Cleburn v. Cleburn Living Center*, 105 S. Ct. 3249, 3259, 3261 (Stevens, J., concurring); *Id.* at 3263-75 (Marshall, J., concurring in part, dissenting in part).

371. *Palmore v. Sidoti*, 464 U.S. 1035, 1038-39 (1984).

scious attempt to displace “the interest group liberalism” which has long enjoyed favor in political science literature: the fundamental distaste among communitarians is for public policy molded not by the light of truth but by politics. Bear in mind that the Golden Rule itself, sans the Machiavellian spin, is little more than enlightened self-interest; despite its presence in Jesus’ moral discourse, it is not rooted in Christian insight or experience. It is traceable to Herodotus’ writing in the fifth century B.C., and has subsequently enjoyed the life of a common proverb.³⁷² In all, it is just not morally inspiring to be told that the foundation of constitutional liberty was a system of ambition, jealousy, and parochialism of our hallowed founding generation. For instance, one of the government-funded, Bicentennial, celebratory projects is “baseball cards” of the fifty-five framers. I doubt that the vital statistics on the back of Roger Sherman’s card will include his hatred for Catholics.³⁷³

The lack of moral enthusiasm among intellectuals and other capitalistic commentators is instructive, and probably parallels the communitarian urge in constitutional law. At their best, both capitalism and the pluralistic account of religious liberty promise an outcome which is tolerable. Neither aspires to philosophy or truth; quite obviously, neither the market nor the ballot-box is a likely means to those ends. Neither carries anything like a “vision,” Utopian or otherwise. In each case, no attempt is made to realign the moral priorities or political wisdom of individuals. In each, these are taken as givens, even as they are presumed to be detrimental to the “public good.” It is therefore easy to see how the honorable and understandable urge for community cannot abide such approaches to “constituting” our public life.

Since inquiry is best served when a decisive disagreement over fundamentals is clearly stated, rather than obscured by sentiments of ecumenism or fellowship, there is here conclusive parting of the ways. But the precise fork in the road must be identified. All that I maintain is that the communitarian urge is misplaced in *constitutional law*, and in a precise but important sense. The Constitution is *hospitable to community*, and I think should our collective decision-making process—our politics—produce more community in our society, proper Constitutional interpretation should accommodate it. This reflects the easily observable fact that the radical individualism and subjectivist morality running through our present Constitu-

372. See J. MEIR, *supra* note 77, at 70.

373. See *supra* note 95 and accompanying text.

tional jurisprudence is an exogenous growth grafted onto the Constitution by modern liberalism. The Constitution though does not "make" community, nor is it an active agent of greater solidarity.

Since, like most misplaced good ideas, this one is mischievous, even dangerous to personal liberty, some statement of reasons properly accompanies the farewell. If the communitarian urge *is* one in constitutional law, one is prompted to imitate the audacious soul who asked, "What would you *do* with the grail once you found it?" What would we *do* with a constitutionally-grounded account of the public good? Enforce it judicially? How? Preach it as a sermon to incoming Congressmen? Read it aloud on the Fourth of July? Here, the Cooley lectures by Professor Greenawalt are insightful.³⁷⁴ Striving to ascertain a "shared conception of the public good" and to determine where religious conviction falls within—and without—it, Greenawalt hesitates to call this constitutional analysis. Rather, he is precise to note that this is only what "liberal democracy" entails.³⁷⁵ This is fine as long as we remember Professor Garvey's exception to this concession: we simply are not talking about constitutional law here.³⁷⁶

Another related reason why the communitarian urge is misplaced in constitutional law is best illustrated by the candid discussion in Frank Michaelman's *Harvard Law Review* Foreword.³⁷⁷ From the text alone, the casual reader might think Michaelman's discussion of the "republican tradition" was constitutional history.³⁷⁸ But a more careful look at the text and at a frank footnote reveals it is not so intended.³⁷⁹ Rather, Michaelman, and apparently the communitarians, are talking about imposing their philosophies upon us. But these systems have little to do with the Constitution.

Another related and more contentious reason why the communitarian urge is misplaced follows. The urge is one in constitutional law; yet, the Constitution is so often beside the point. One surmises

374. See Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

375. *Id.* at 357.

376. See Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288, 1293 (1986).

377. Michaelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

378. *Id.* at 17-55. This excerpt includes Michaelman's review of the republicanist theories of (primarily) Cass Sunstein, who evidently intends them as a guide to deciphering the actual thoughts of the historical Framers. Michaelman seems unpersuaded that a history lesson, as opposed to a speculative philosophical discussion, actually occurs.

379. *Id.* at 36 n.175.

that systems founded in the communitarian impulse operate in different frames of reference than does constitutional law. Their criteria of truth are like those of philosophy: breadth and completeness, "incontestable" starting points, and rigorously derived inferences and conclusions. These criteria overlap only to a limited extent with those most often associated with constitutional exposition (those which I have relied upon): language, structure, originating context, history, and judicial exposition. Readers will notice that herein lurks the deep, methodological heterodoxy now fracturing constitutional theory. What *is* the frame of reference, or criterion of validity, appropriate to constitutional reasoning? We need not resolve that question, for there is value in simply noting that divergent frames of reference are at work. But any purported resolution should well consider that some entities, great works of literature and classic texts, like the Bible for example, evoke their own frames of reference. I suspect that the Constitution is another example, and I am quite sure that it does not evoke a philosophical reference point.

What one can do at this point is to observe problems or advantages of the pluralistic account of the communitarian urge, describe them carefully, and identify the perspective from which those advantages are detected. The pluralistic account is rooted in presentable constitutional sources, and thus is a better explanation of *our* Constitution. The pluralistic account addresses and locates the communitarian urge in its theory. Madison referred in *Federalist Ten* not only to religious opinion, but also to opinions about government as causes of political faction.³⁸⁰ The generic phenomenon described was righteous political sentiment. A comprehensive public philosophy is one example. The "communitarian urge" is not as absent from the pluralistic account as one might think; it is identified as part of the problem. It most certainly is not part of the solution.

A second advantage to the pluralistic account is the one originally reckoned: it is the more effective guarantor of personal liberty, both individually considered and (just as important) from the perspective of communities not politically organized like families and other mediating institutions. All truth claims, not just religious ones, are potentially divisive and thus potentially oppressive. Constructing a "national community" upon shared premises will certainly be hampered by the centrifugal forces of freedom, and will

380. THE FEDERALIST NO. 10, *supra* note 173, at 79.

have to overcome those concerns to succeed. Indeed, personal autonomy is concededly inapposite to most of these analyses, which are at least "post-liberal" conceptions with little solicitude for modern Western individualism. As far as I can tell, groups organized around insights different from those likely to undergird a "national community"—practically all churches, for example—will fare little better. So, those whose value judgments are dependent upon a commitment to liberty in both senses should hesitate to follow the path of the communitarians.

A last advantage to the pluralistic approach is that so far the communitarian schemes proposed cannot work. They cannot achieve even their own stated objective of community, at least not in the United States as we know it. The problem is religious belief, its prevalence, and its nature. The vast majority of Americans are self-consciously religious. Religious claims characteristically, and as experienced by the ordinary believer, are inclusive of political claims, and stand in critical judgment of them. That is, faith is potentially destructive of attempts to ground community in shared political commitments. My guess is that only the most prodigious and most tyrannical socializing effort—if that—could conceivably overcome this religious obstacle.

There is even deep irony here. If one's objective is American community, the most effective means is quite obvious: make the most widely-shared faith commitments into a public philosophy. Probably the closest we can come to "national community" is precisely what the pluralistic account gives us: a politics containing the religiosity of the people. That is what the founders used religious tests for. "General" tests were, more than anything else, a unifying symbol, a stamp of communal identity. They did not exclude officers so much as remind Americans who they were. Put more simply, if there is to be a national community in this country, it will have to be a religious and therefore a Christian one. That the Court and some commentators would use the Constitution's guarantees of religious freedom to invert this—to chase religion into the "private" sphere and found a unified public sphere upon political speculation—is, among other things, sobering.

V. CONCLUSION

The final advantage to the pluralistic account is that it works. By "works" I mean that we enjoy a reasonable amount of civic peace and unity, as well as substantial liberty. And the "machine"

has worked precisely because it never aspired to a "right answer" to the contending claims of religious factions. Since the outstanding feature of our history has been how religion has confounded everyone's expectations for it, a "right answer" can hardly be conceived. At least no one has yet conceived one. Just think of the Framers' expectations. Wouldn't they be surprised to learn that the largest denomination in this country is Roman Catholicism, and that half of all believers are either Catholic or Baptist?³⁸¹ Or, would nineteenth-century guardians of the republic be chagrined to learn that Mormonism is now the closest thing we have to an "American" religion—not in its theology but in its clean, well-scrubbed, free enterprise face? The Supreme Court's attempts at a "right answer," at a constitutional philosophy of church and state, have not been admired for their coherence, practical utility, or anything else. The genius of the pluralistic account has been its modest ambition to preserve modicums of liberty and order, and to leave truth to others. It has been reasonably good at that. Given the nature of the problem and how tragically other societies have wrestled with it, that is saying quite a lot.

381. According to a recent study, Catholics are more than 42% of church adherents, Baptists approximately 16%. See B. QUINN, *CHURCHES AND CHURCH MEMBERSHIP*, Table 1 (1982).