

# COMMENT

## TRENDS IN THE SUPREME COURT: MR. JEFFERSON'S CRUMBLING WALL — A COMMENT ON *LYNCH v. DONNELLY*

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*This comment is based upon an address by Professor Van Alstyne to the Annual Conference of the United States Court of Appeals for the District of Columbia Circuit, delivered on May 17, 1984, at Williamsburg, Virginia.*

Although the first amendment belongs to all the states, it especially belongs to Virginia.<sup>1</sup> The most notable antecedent debates occurred here. The seminal contributions by James Madison and Thomas Jefferson originated here. The strongest resolves to protect religious liberty from political interference were memorialized here. My immediate purpose is to comment on one particular case decided last term in the Supreme Court, *Lynch v. Donnelly*,<sup>2</sup> which sustained a municipality's nativity display against a constitutional challenge. I mean

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1. The Supreme Court wrote in *Everson v. Board of Educ.*, 330 U.S. 1, 11 (1947):

No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

*See also* JEFFERSON, *An Act for Establishing Religious Freedom*, in 2 THE WRITINGS OF THOMAS JEFFERSON 300-03 (A. Bergh ed. 1905); J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 298-306 (1973). *See generally* T. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787* (1977); H. ECKENRODE, *THE SEPARATION OF CHURCH AND STATE IN VIRGINIA* (1910); A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 366-97 (1964) (one-vol. rev. of A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950)).

2. 104 S. Ct. 1355 (1984). The case furthers the trend represented in the preceding term by *Marsh v. Chambers*, 103 S. Ct. 3330 (1983), a decision upholding the conduct in a state legislature of regular sectarian prayer, led by ministers paid from tax revenues.

briefly to examine the case by the light of an understanding of the first amendment that Jefferson and Madison may have shared. My broader purpose is to suggest the extent to which *Lynch v. Donnelly* may serve as a synecdoche of a larger drift that now appears to be winning acceptance in the Supreme Court.

This trend can be summed up as a movement from one national epigram to another; it is the movement from "E Pluribus Unum" to "In God We Trust," from the ideal expressed by our original Latin motto—one nation out of highly diverse but equally welcome states and people—to an increasingly pressing enthusiasm in which government re-establishes itself under distinctly religious auspices. *Lynch v. Donnelly* is the clearest expression to date that acts affiliating government and religion may be deemed consistent with the first amendment, at least if accomplished gradually, that is, incrementally. A constitutional neologism has nearly displaced the much different figure of speech, that of a "wall of separation" between church and state, which Thomas Jefferson once used in commemorating the ratification of the first amendment.<sup>3</sup> The neologism is that insofar as most persons are religious, it is altogether natural that government should itself reflect that fact in its own practices. Thus, according to this neologism, it is not helpful to regard the first amendment as having emplaced a wall separating the practices of religion from the practices of government, for it is not walls, but bridges, that the first amendment contemplates. Even the absorption of a dominant religion within government itself may be deemed altogether unexceptionable—as though it were but a part of natural history. It is thus symbiosis, not separation, that the first amendment may be interpreted to accommodate. At least I cannot understand *Lynch v. Donnelly* otherwise, although I think it very far re-

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3. Jefferson wrote of a "wall of separation" in replying to an address from a committee of the Danbury Baptist Association of Connecticut:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

T. JEFFERSON, Letter of Jan. 1, 1802, in 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Bergh ed. 1905). In *Lynch*, 104 S. Ct. at 1359, Chief Justice Burger writes of Jefferson's "wall":

The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

He goes on to say that far from requiring "complete separation of church and state," the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

moved from the interpretation of the first amendment originally agreed upon by all nine Justices of the Supreme Court when the issue was first comprehensively addressed, in *Everson v. Board of Education*,<sup>4</sup> nearly forty years ago.

## I.

Although there is of course very substantial controversy over the "right" meaning of the religion clauses of the first amendment,<sup>5</sup> there is nonetheless considerable agreement that they originally met with broad support from at least three distinct sources. The disagreement has been not so much whether there were not at least these three sepa-

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4. 330 U.S. 1 (1947).

5. As a sampler of academic books and articles on the religion clauses of the first amendment, the following may be helpful: R. CORD, *SEPARATION OF CHURCH AND STATE* 5, 15 (1982) (first amendment was not intended to preclude federal aid to religion "on a nondiscrimination basis"); M. HOWE, *THE GARDEN AND THE WILDERNESS* 1-31 (1965) (discussing federalism and the first amendment); W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 12-13 (1964) (supporting a theory of "full neutrality, . . . requiring the government to be neutral not only between sects but also between believers and nonbelievers"); P. KAUPER, *RELIGION AND THE CONSTITUTION* 45-51 (1964) (arguing that historical sources are inconclusive and that "it is more useful [in construing the religion clauses] to look at what actual results have been reached in [their] application"); P. KURLAND, *RELIGION AND THE LAW* 112 (1962) (also supporting the neutrality theory; "democratic society cannot survive if these elements of the rule of law are rejected"); M. MALBIN, *RELIGION AND POLITICS* 1-17 (American Enterprise Institute Studies in Legal Policy, 1978) (arguing that Madison compromised with those in the first Congress who believed that Congress should be free to prefer religion over irreligion); L. PFEFFER, *CHURCH, STATE AND FREEDOM* (rev. ed. 1967) (a compendious history); *THE WALL BETWEEN CHURCH AND STATE* (D. Oaks, ed. 1963) (collecting articles); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) (arguing that "the establishment clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom"); Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 349 (1984) (arguing that the establishment clause "does not disassociate religion from government" but acts as "a limitation on any mutual dependence"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1384-85 (1967) (proposing "a rather simple scheme of the elementary factors weighed by the court in evaluating religious liberty claims"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968) (continuing Part I); Moore, *The Supreme Court and the Relationship Between the 'Establishment' and 'Free Exercise' Clauses*, 42 TEX. L. REV. 142 (1963) (supporting a neutrality theory); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980) (examining conflict between the two religion clauses); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 693 (1968) (arguing that the establishment clause "prohibit[s] only aid which has as its motive or substantial effect the imposition of religious belief or practice"); Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865 (1963); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1463 (1981) (proposing "a standard that erects an impregnable wall between church and state"); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978) (proposing a "narrower" definition of religion under the establishment clause than under the free exercise clause).

rate sets of political interest, each of which could be well served by the proposed clauses; it was rather whether one or another was so dominant that acts of government consistent with that set of interests, albeit not necessarily equally consistent with one of the other sets of interests, should be deemed consistent with the clauses as ratified. Up to a point, however, the Supreme Court treated them as converging on a single legal principle and thus felt no compulsion to treat those interests as rivals among which it need choose. Rather, the matter was seen as yielding a single legal principle, quite robust by itself, and substantially consistent with all three sets.

These diverse inputs were the concerns of voluntarism, separatism, and federalism. The first, voluntarism, was derived largely from the moderate spirit of religious toleration associated with the Quaker tradition of Pennsylvania.<sup>6</sup> The second, separatism, was derived principally from the successful efforts of Madison and Jefferson in Virginia to disentangle the affairs of government from religious establishments, especially in respect to taxes and levies for religious assistance.<sup>7</sup> The third, federalism, was derived from the preferences of other states that—in contrast with Virginia—maintained particular religious establishments, which they were concerned to keep free from the interference of the national government.<sup>8</sup> It was quite consistent with all three concerns that they would converge on a single proposition: Congress should be disabled from legislating on religion.<sup>9</sup> The final form of agreement in-

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6. Maryland, Rhode Island, and Pennsylvania have been grouped together as "the most successful colonial experiments in religious freedom which the transformers of colonies into states and the framers of our American Constitution had before them." 1 A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 364 (1950). Of these, Penn's colony was "the most consistent." *Id.* Penn's influential *Frame of Government* (1682) provided that all persons otherwise qualified who "possess faith in Jesus Christ" were eligible to serve in legislative and executive capacities. 2 *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 1526 (B. Poore ed. 1877). This toleration of all Protestant sects and of Catholicism was remarkable in its day, though, as Stokes writes, Penn was "no modern secularist." 1 A. STOKES, *supra*, at 207; *cf.* P. KAUPER, *supra* note 5, at 48 (crediting Roger Williams and other religious leaders who contributed to "the American experiment in religious liberty").

7. *See supra* note 1.

8. *See* M. HOWE, *supra* note 5, at 1-31. At the time that the first amendment was adopted, five states had established churches—Massachusetts, Connecticut, New Hampshire, Maryland, and South Carolina. 1 A. STOKES, *supra* note 6, at 559; *see also* Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 *MINN. L. REV.* 561, 562-63 (1980).

Madison attempted to write a guarantee of religious liberty for all citizens into the Bill of Rights, which would have overridden those states that had not yet guaranteed their citizens such rights. He failed. *See* I. BRANT, *JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800*, at 273 (1950). Not until 1833 did all states abandon established religion. *See* L. PFEFFER, *supra* note 5, at 126.

9. "To leave the thorny matter of religion to each state, and at the same time to clearly guarantee no jurisdiction in the matter by the national government, was the expedient compromise." Esbeck, *supra* note 5, at 364; *see also infra* text accompanying note 18.

troduces the first amendment itself: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Accepted at face value, the concerns of voluntarism, separatism, and federalism were not at odds with one another. They framed no tension; rather, they mutually reinforced a single proposition: Questions of religious choice were not to be the business of the national government.<sup>10</sup> Article VI of the Constitution had already provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States,"<sup>11</sup> a provision meant to make it quite clear that "unbelievers or Mohammedans" were not excludable.<sup>12</sup> The motto of the new nation, proposed in a Continental Congress committee report by Franklin, Adams, and Jefferson, and adopted for use in the Great Seal of the United States in 1782, was "E Pluribus Unum."<sup>13</sup> The original legend on new coins, first on continental dollars, then on the fugio cent minted in Philadelphia, in 1787, was "Mind Your Business."<sup>14</sup> The inscription on the obverse side of the Great Seal was "Novus Ordo Seclorum," a New Order of the Ages.<sup>15</sup> The secular separation assured each individual that none need feel alien to this government, whatever his own religion or personal philosophy, for it was to be a temporal government not commingled with a clergy, a theism, or a church. At the same time, this wall of separation—in Jefferson's terminology<sup>16</sup>—assured the several states that they would be immune from attempts by the national government to influence or limit their own religious establishments in any respect.

The resolve to forbid this national government from adopting a religion or reserving its offices for only the religious carried over to the field of international affairs. Whatever the disposition of other nations, each might expect a relationship of amity with the United States, which

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10. See M. HOWE, *supra* note 5, at 17-23. *But cf.* R. CORD, *supra* note 5 (concluding that the first amendment does not absolutely bar government from religious involvement). See generally P. KURLAND, *supra* note 5; L. PFEFFER, *supra* note 5.

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

12. See I A. STOKES, *supra* note 6, at 603; see also J. STORY, COMMENTARIES ON THE CONSTITUTION § 1871 (Boston 1833) (referring to the article VI guarantee that "the Catholic and the Protestant, the Calvinist and the Armenian, the infidel and the Jew, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship").

13. See G. HUNT, THE HISTORY OF THE SEAL OF THE UNITED STATES 7, 41 (1909); A. STOKES, *supra* note 6, at 467-68.

14. THE COMPREHENSIVE CATALOGUE AND ENCYCLOPEDIA OF UNITED STATES COINS 53, 201 (J. Rose & H. Hazelcorn eds. 1976).

15. G. HUNT, *supra* note 13, at 41.

16. T. JEFFERSON, *supra* note 3.

itself incorporated no religious predisposition against any nation. This observation is illustrated in article XI of our 1797 treaty with Tripoli:

As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity [sic] against the laws, religion, or tranquillity of Musselmen—and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.<sup>17</sup>

So strongly was the principle respected by some that they were to risk quite substantial political opprobrium in its behalf, even where the risk may have seemed unnecessary to undertake. Thus, when Congress resolved to request merely precatory presidential statements of annual thanksgiving, themselves seemingly harmless and altogether uncontroversial gestures unlikely to offend anyone, Washington and Adams easily acquiesced—but Jefferson could not. The practice was doubtless well intentioned, he admitted, but the principle was careless and unsound. “I do not think myself authorized to comply,” Jefferson wrote,

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or inatter among them. . . .

I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another. Be this as it may, every one must act according to the dictates of his own reason, and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.<sup>18</sup>

17. Treaty of Peace and Friendship, Nov. 4, 1796-Jan. 3, 1797, United States-Tripoli, art. XI, 8 Stat. 154, 155, T.S. No. 358. *But see* 1 STOKES, *supra* note 6, at 497-98 (claiming that the language “the government of the United States is not, in any sense, founded on the Christian religion . . .” was “virtual[ly] repudiat[ed]” by its omission less than a decade later from the extended Tripoli Treaty).

18. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON 428-30 (A. Bergh ed. 1905). For further discussion on Jefferson’s

Madison, as president, did not adhere to Jefferson's example but, even after he had discounted such ceremonial utterances for fasts and festivals as "merely recommendatory" and "absolutely indiscriminate," he acknowledged that in fact they constituted a "deviation from the strict principle" he shared with Jefferson.<sup>19</sup> Similarly, Madison acknowledged that he had been quite mistaken in approving—as a member of the House, in 1789—bills for the payment of, congressional chaplains.<sup>20</sup> "Is the appointment of Chaplains to the two Houses of Congress," he asked,

consistent with the Constitution, and with the pure principles of religious freedom? . . . In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. . . . If Religion consists in voluntary acts of individuals, singly, or voluntarily associated, and [if] it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense.<sup>21</sup>

The feature of tax subsidy was especially offensive to Madison—unsurprisingly, since it was that very practice that he and Jefferson had successfully opposed in Virginia. There, Madison had written that not even "three pence" should be coerced of any person, through taxes, for the propagation of religious views with which he disagreed.<sup>22</sup> The

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view of the proper relationship between government and religion see L. LEVY, *JEFFERSON AND CIVIL LIBERTIES* (1963).

19. 1 A. STOKES, *supra* note 6, at 491.

20. *Id.* at 456. Robert Cord has suggested that these reflections by Madison should be dismissed for the same reason, he says, that it would be "absurd" for any serious analyst or historian to give the slightest credence to equivalent statements by Mr. Nixon respecting the wrongness or unconstitutionality of surreptitious tape recordings in which he participated when he was president. R. CORD, *supra* note 5, at 36. But even supposing one accepted his comparison of James Madison with Richard Nixon, his idea of what the serious analyst or historian should do seems odd. If, indeed, Mr. Nixon were even now to suggest that he may have been quite wrong, and that he now does regard what he did as president as having been inconsistent with the fourth amendment, is it the case that every serious analyst or historian should: (a) dismiss such a statement as wholly unworthy of credence, and (b) record Mr. Nixon as necessarily having held the view that what he did as president was wholly consistent with the fourth amendment? Why would the serious analyst or historian do so?

21. Madison, *Aspects of Monopoly One Hundred Years Ago*, HARPER'S MAG. 489, 493 (1914), quoted in 1 A. STOKES, *supra* note 6, at 346-47; cf. *Marsh v. Chambers*, 103 S. Ct. 3330, 3336-37 (1983) ("Remuneration [of a state legislature's chaplaincy] is grounded in historic practice initiated . . . by the same Congress that adopted the Establishment Clause . . .").

22. J. MADISON, *supra* note 1, at 300. The particular application of the establishment clause as a use restriction on congressional appropriations drawn from taxes is a source of taxpayer standing that has thus far been unique to the first amendment. See *Flast v. Cohen*, 392 U.S. 83, 101-06 (1968) (two-part test: taxpayer has standing only where he alleges (a) exercise of congress-

point, reflecting Madison's broader, Virginian, perspective went beyond the abuse of the tax power as such. Thus, although no taxes were involved, and although the matter was obviously not one he needed to interfere with, Madison, as president, vetoed a grant of land made by Congress for what Congress thought a benign use by a Baptist church

*[b]ecause the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church, comprises a principle and precedent, for the appropriation of funds of the United States, for the use and support of religious societies; contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment.*<sup>23</sup>

The separation principle, moreover, operated in both directions; it was meant to keep religion from entangling the state as well as to keep the churches free from the state influence that would have been the inevitable concomitant of state financial support. *The Memorial and Remonstrance Against Religious Assessments*, of 1785, inveighed against the risk that "the Civil Magistrate . . . may employ Religion as an engine of Civil policy," and equally against the infusion of any particular religion within government "because it will have a like tendency to banish our Citizens," i.e., to make them aliens to their own government.<sup>24</sup> Competition among religions for position within government must be avoided so that none need fear any other, as each might otherwise seek its own establishment through government or within

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sional taxing and spending power and (b) violation of a "specific constitutional limitation" upon that power). Cf. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82 (1982) (first prong of *Flast* test not satisfied where complaint was based on agency, not congressional, action and congressional authorization of agency action was not derived from taxing and spending power); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (taxpayer, failing to show "direct injury," denied standing to challenge constitutionality of federal statute).

For examples of how the free exercise clause may appropriately permit exemption from government regulation, as distinct from either requiring or permitting a tax subsidy for a religious practice, see discussion and cases *infra* notes 30, 31; see also Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 690-93 (1980) (disapproving *Sherbert v. Verner*, 374 U.S. 398 (1963), insofar as "compulsorily raised tax funds" paid to plaintiff to enable her to practice her religion were improper as a forbidden levy on others). In a passage reminiscent of Madison, see *supra* text accompanying note 21, Choper writes:

[T]he Establishment Clause should be held to forbid the government's paying chaplains to minister to the religious needs of prisoners and military personnel. It may be that, under a Free Exercise Clause balancing test, the state could not exclude chaplains who volunteer for these purposes. But the Establishment Clause makes it the financial responsibility of the church and not the state to attend to its members' religious needs.

Choper, *supra*, at 693-94.

23. President's Message of Feb. 28, 1811, to the House of Representatives, Returning a Bill, 22 ANNALS OF CONG. 1098 (1811).

24. J. MADISON, *supra* note 1, at 301-02.

government.<sup>25</sup>

Voluntarism, then, was the principle of personal choice. Separatism was the principle of non-entanglement. Federalism was the principle of pure state autonomy, immune from national power, respecting policies that affect religion. Laws favoring religious establishments, like laws prohibiting the free exercise of religion, were thus altogether disallowed. The contributing streams of the first amendment were not, in this view, jostling and competitive. Rather, they converged on a single proposition thought eminently suitable for the national government. Citizens from all states, regardless of each state's own internal practices, would be assured of being able to meet on common secular ground to conduct the civil business of a purely civil government. The authority of that government was of enumerated civil powers that incorporated none of a religious provenance or cast, and was constrained from directing or otherwise influencing the voluntarism of private choice. No religious tests of any kind were to be associated with that government, for no sort of favored religion or "national" religion would be appropriate for Congress even to consider. Laws tending to finance religion, like laws tending to prohibit particular religions or to favor preferred religions, were prohibited to the national government in order to leave room for such diverse and separate policies as each state might individually elect. The motto of the country, "E Pluribus Unum," was significant: One nation, a civil and neutral polity, from many states of highly diverse people and practices.

Then, with the abandonment, circa 1834, of the last state-established religions and the subsequent enactment, in 1868, of the fourteenth amendment, a principle originally felt suitable to apply to Congress partly on behalf of the states ultimately became applicable to the states as well.<sup>26</sup> The detachment of government from religion that

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25. See Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615 (1981) (discussing Madison's concern with the political divisiveness of factions, reflected in his conception of the separation of church and state).

26. The Court, in *Everson*, regarded the fourteenth amendment as incorporating the establishment clause, 330 U.S. at 14-15, and its analysis in *Lynch*, 104 S. Ct. 1355, 1358 (1984), maintains the consistency of that interpretation. In *Abington School Dist. v. Schempp*, 374 U.S. 203, 215-17 (1963), the Court chastised those for whom this issue seems less clear cut than it has seemed to the Court for engaging in practices "of value only as academic exercises." *Id.* at 217. For recent scholarly debate on the issue of the incorporation of the Bill of Rights, see R. BERGER, *GOVERNMENT BY JUDICIARY* 134-56 (1977) (stating that the fourteenth amendment was simply designed to prevent discrimination against blacks in those rights guaranteed by the Civil Rights Bill of 1866 and was not intended to make the Bill of Rights binding on the states); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) (arguing that legislative history shows that the privileges and immunities clause of the fourteenth amendment was designed to apply the Bill of Rights to the states); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435

Jefferson and Madison had originally fought to achieve in Virginia had become a general obligation.

## II.

In their first full address to the subject, in *Everson v. Board of Education*,<sup>27</sup> all nine Justices of the Supreme Court agreed in this view. Indeed, the following summary by Justice Black was faulted by no one on the Court:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>28</sup>

Rather, four of the nine Justices, agreeing entirely with Black's view, dissented solely on the separate basis that they, unlike the majority, believed it had not been honored, that is, that the particular law in question<sup>29</sup> was defective. Indeed, it was on the basis of Justice Black's description of the first amendment, rather than on the basis of some different description, that the dissent itself also relied.<sup>30</sup>

Fourteen years later, Justice Frankfurter, who had concurred in *Everson* with Justice Black's sentiments even while dissenting in the particular case, returned to the same theme. "The Establishment Clause," he declared,

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(1981); Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983); Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights*, 62 N.C.L. REV. 517 (1984). For more dated examples, see L. PFEFFER, *supra* note 5, at 142-49; Van Alstyne, *supra* note 5, at 866-67.

27. 330 U.S. 1 (1947).

28. *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

29. *See id.* at 46 (Rutledge, J., dissenting). The particular law at issue in *Everson* was a local law providing for bus fare reimbursement for sums spent by parochial as well as by public school children to ride municipal buses.

30. *See id.* at 31-43 (Rutledge, J., dissenting).

withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it.<sup>31</sup>

Difficult cases still arise, of course, even under the Black-Frankfurter view of the establishment clause. Generally, however, the difficulty of such cases has been limited to circumstances in which the good-faith conduct of civic business has imposed a hard choice on individuals whose personal religion has instructed them in opposition to the law. In such cases, there is a fair question whether the relevant public policy is so pressing that, whatever the strength of the religiously-grounded opposition to it, exceptions will not be tolerable, or whether, to the contrary, respect for religious pluralism counsels a measure of state self-restraint.

At one extreme, criminal prohibitions of homicide, mutilation, or child abuse cannot yield regardless of the intensity of the religious passion that demands such exceptional forms of "free" exercise. At the other extreme, however, the civil polity is not seriously distressed if it excuses those for whom ritual forms of respect for the state are acts of blasphemy. In the latter circumstance, the doubtfulness of the state's policy, the meanness of disallowing conscientious abstention, and the gratuitousness of the damage to the sincerely pious weigh in favor of accommodating sincerely held religious beliefs.<sup>32</sup> The establishment clause as described by Jefferson or Madison and summarized in the quoted excerpts from opinions by Justices Black and Frankfurter is not necessarily hostile to such an accommodation. Therefore the occasional wisdom of accommodation does not constitute an objection to traditional establishment clause doctrine. To the contrary, respect for so modest an accommodation as would be required in these circum-

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31. *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961).

32. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639-42 (1943). For a more recent example, see *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (compulsory school attendance law not applied to Amish) and compare *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (selling of religious literature not exempted from state prohibition of sale of literature by minors on the streets). *See also* Choper, *supra* note 5, at 673.

stances would be strongly counselled by the free exercise clause.<sup>33</sup> In between these extreme and thus rather obvious cases, the closer and more difficult issues must continue to be addressed without inconsistency with the principles of neutrality and separation.

In sharp contrast to those closer issues and presenting a paradigmatic disregard of the establishment clause in virtually every dimension of its concerns would be a case involving all of the following deliberate acts of government:

1. The overt alignment of government with the particular theology of one, politically dominant, religious sect;
2. The collaboration of government with commercial interests to stimulate consumer purchases by the government's own promotional use of a particular religion's artifacts and mysteries;
3. The propagation under government sponsorship of distinctly religious symbols uniquely associated with one sect's most holy event—the miracle of divine birth of its particular prophet and messiah;
4. The purchase and maintenance through tax levies, and promotional display in outdoor public location each year, of sectarian objects, during the season designated for the Mass or eucharist of one religion's principal sacrament.

The facts of *Lynch v. Donnelly*<sup>34</sup> fit this paradigm exactly. Accordingly, when appropriately petitioned by a natural coalition of plaintiffs, a federal district court enjoined the governmental practice.<sup>35</sup> The state had not merely aided "all" religions but rather had promoted emphatically and exclusively *one* religion. It had not only broken with a general neutrality regarding purely religious doctrine, it had also preferred one religion over others. It had used tax money in support of a religious activity and encouraged belief in, and endorsed, the particular holy day—Christ's Mass—of one sect. It openly participated in the affairs of one church by duplicating in wood and plastic the imagery of a sacred event in order to encourage a general secular, commercial enthusiasm to intensify its holy day. The wall of separation between church and state had clearly been breached by a clear governmental, politicized, symbiotic embrace of one faith's preferred holy day.<sup>36</sup>

33. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (freedom of worship "may not be infringed on . . . slender grounds.").

34. 104 S. Ct. 1355, 1358 (1984).

35. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1181 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982) (2-1 decision), *rev'd*, 104 S. Ct. 1355 (1984). The plaintiffs in *Lynch* included an objecting taxpayer, offended members of minority religions, and aggrieved residents alienated by the absorption by government of a partisan religious observance that the government had adopted and sponsored. 525 F. Supp. at 1153-57.

36. *See id.* at 1173 (concluding that the municipality had "tried to endorse and promulgate religious beliefs by including a nativity scene in its display").

In its examination of this obtuse collaboration, the district court had little problem. The entanglement with religious controversy, the identification of the state with one favored theology, the alienation of many of its own residents embittered by the hubris of local government enlisting the tax power and regulatory authority to identify itself with the creed of one religion's martyred prophet, the objectively communicated support and endorsement of that religion's singular claims, all ought to have made the case easy.

In *Lynch v. Donnelly*,<sup>37</sup> a divided panel in the United States Court of Appeals for the First Circuit affirmed. The Supreme Court, in an opinion by the Chief Justice, with four justices dissenting, reversed both lower court holdings that the municipal purchase, maintenance, and periodic illuminated Christmas display of a purely Christian nativity scene was unconstitutional. The opinion perfunctorily acknowledged the "three-prong" test of the Court's earlier cases, which demands that a challenged statute have a "secular legislative purpose;" that its "primary effect" neither "advance nor inhibit" religion; and that it not promote "an excessive entanglement" with religion.<sup>38</sup> Purporting to apply the "primary effect" prong of this test the Chief Justice observed:

Of course the creche is identified with one religious faith *but no more so* than the examples we have set out from prior cases . . . .<sup>39</sup>

We can assume, *arguendo*, that the display advances religion . . . ; [but] whatever [the] benefit to one faith . . . [.] display of the creche is *no more* an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as "Christ's Mass" . . . .<sup>40</sup>

[T]o conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as *more* beneficial to and *more* an endorsement of religion . . . than . . . [specific forms of assistance previously allowed such as textbook loans to parochial schools and bus fare reimbursements, or] *more* of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland* . . . [or the payment of chaplain salaries sustained in *Marsh v. Chambers*].<sup>41</sup>

37. 691 F.2d 1029 (1st Cir. 1982).

38. *Lynch*, 104 S. Ct. at 1362, (paraphrasing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

39. *Id.* at 1365 (emphasis added).

40. *Id.* at 1364 (emphasis added).

41. *Id.* at 1363 (emphasis added) (citing, for example, *Marsh v. Chambers*, 103 S. Ct. 3330 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (permitting expenditure of public funds for textbooks for students attending church-sponsored schools); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947)).

We are unable to discern a *greater* aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative . . . .<sup>42</sup>

Such was the tenor of the analysis under the purported “three-prong” approach; but, given the Chief Justice’s warning that the Court would not be “confined to any single test or criterion in this sensitive area”<sup>43</sup> we should assuredly be alert to the possibility that an altogether new test was aborning. What is that test? Apparently it is an “*any more than*” test. Here, in one possible summary, are its parts.<sup>44</sup>

First, the court must determine whether the government acts that have been questioned plainly sponsor, assist, promote, or advance a particular religion, its specific practices, its distinctive theology, or its establishment.

Second, assuming that the acts complained of plainly do sponsor, assist, promote, and advance a particular religion, its specific practices, its distinctive theology, and its establishment, the court must then nonetheless also determine whether in doing so, the government has merely acted in a manner consistent with what it has regularly done—or with what Congress has regularly done—in the past.

Third, unless the court finds that the additional acts are more egregious than other acts of government of a like kind—that is, unless the new acts advance this religion “any more than” government has generally advanced a preferred religion—the court shall sustain the acts in question.<sup>45</sup>

42. *Id.* at 1364 (emphasis added).

43. *Id.* at 1362.

44. Actually, if one pays very close attention to the cases, it appears that in fact a majority of the Court has been applying a “*scarcely* any more than” test; the question is whether what government has done in the instant case is *scarcely* any more than what a majority of the Court has acquiesced in in the recent past. Thus, from the five-to-four decision in *Everson*, one may trace forward through *Board of Education v. Allen*, 392 U.S. 236, 241-49 (1968); *Walz v. Tax Comm’n*, 397 U.S. 664, 674-80 (1970) (upholding property tax exemptions for religious property); *Hunt v. McNair*, 413 U.S. 734, 741-49 (1973) (upholding state revenue bonds to finance a Baptist college; approximating the phraseology of the “any more than” test); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-70 (1976) (upholding public grants to private colleges and religious institutions); *Wolman v. Walter*, 433 U.S. 229, 241-55 (1977) (providing textbooks, standardized testing and scoring, diagnostic services and career guidance for parochial students constitutional, but providing instructional materials and equipment and field trip services unconstitutional); *Committee for Pub. Educ. v. Regau*, 444 U.S. 646, 653-62 (1980) (upholding use of public funds to reimburse nonpublic schools for performing state-required testing and reporting); *Mueller v. Allen*, 103 S. Ct. 3062, 3065-71 (1983) (upholding tax deductions for expenses of sending child to nonpublic school); and *Marsh v. Chambers*, 103 S. Ct. 3330, 3332-37 (1983). To be sure, even now not every gross practice will be sustained. For example, mandatory posting of the Ten Commandments in public schools was held invalid in *Stone v. Graham*, 449 U.S. 39, 39-43 (1980) and legislative delegation to churches of an absolute veto over neighborhood liquor licenses was held invalid in *Larkin v. Grendel’s Deu*, 459 U.S. 116, 120-27 (1982).

45. This summary is of course my own and certainly would not be useful if recited to the Court in any actual case. Even so, this mere parody of a test was at once applied by a lower

In an artless sense—but in no sense that will withstand even the mildest scrutiny—the *Lynch* case can also be fitted within the literal wording of the “three-prong” test a majority of the Court has declared that it will usually apply to establishment clause claims.<sup>46</sup> The first prong, we recall, is that the law or governmental practice must possess a “secular” purpose. If “secular” is taken merely descriptively, simply as a synonym for whatever things temporal or civil government thinks appropriate to undertake as a temporal and civil government, then the facts of the *Lynch* case do indeed fit a “secular” purpose. That purpose is the government’s own decision to identify its own conduct, and the uses of its tax revenues, with the events, values, mysteries, customs, and monotheism of a particular religion—the religion, hardly coincidentally, that is most widely subscribed to nationally as well as locally. The municipal purchase and annual, public, illuminated, tax-supported Christmas display of a nativity scene fit within *that* purpose exceedingly well. By the same gesture, the “primary effect” of the city’s practice is without doubt to bring about that secular, that is, governmental, objective. Moreover, because the local government pursues its policy strictly through the uses of its own monies and its own property and does not engage any church to provide the place for its illuminated display, there are obviously no “entanglements” with any church or religious body as such.<sup>47</sup>

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federal court, in *Fausto v. Diamond*, No. 80-0520S (D.R.I. June 19, 1984) (available Sept. 12, 1984, on LEXIS, Genfed library, Dist file). The case rejects a taxpayer’s suit to enjoin city tax funding and maintenance of an anti-abortion memorial, dedicated to the “unknown child,” which was located on city-owned property and was the object of an overtly religious dedication ceremony. *Id.* Although the court acknowledged the affiliating linkages with the locally dominant religion—remarking that “two. . . commissioners declaimed, in effect, that their church required them to vote in support of the [religiously inscribed, anti-abortion] plaques,” *id.*, and that “it is impossible to ignore the imposing backdrop of the cathedral,” *id.*—it turned aside the complaint on the basis that “this court is unable to discern that the memorial is a *greater* aid to the Roman Catholic faith than was the *ereche* in *Lynch*,” *id.* (emphasis added).

See also *Katcoff v. Marsh*, 582 F. Supp. 463, 474 (E.D.N.Y. 1984), which sustained congressional appropriations of \$84 million per year for military chaplain salaries and related religious programs. The court held that in light of the Supreme Court’s acceptance of a state legislature’s use of tax funds to pay its own in-house chaplains—in *Marsh v. Chambers*, 103 S. Ct. 3330, 3335-37 (1983)—it could see no sufficient distinction from the case before it even though the sums were vastly greater, the chaplains many times more numerous, and the programs much more pervasive. *Katcoff*, 582 F. Supp. at 474; see also *supra* note 44 and cases cited therein.

46. *Lynch*, 104 S. Ct. at 1362; *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

47. Concurring in the Court’s decision in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Brennan wrote:

What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of gov-

Viewed this way, the decision need not have been compromised by the majority opinion's ineffectual attempt to compare the city's illuminated, commercially-manufactured, outdoor nativity scene to the mere inclusion of historic religious paintings in a public museum.<sup>48</sup> Neither need the opinion have been hedged by suggesting that had the nativity scene been unaccompanied by additional Christmas tokens such as Santa and reindeer—additions, incidentally, that embarrass the suggestion that the entire display was otherwise similar to the collection of a public art museum—it might have been unconstitutional.<sup>49</sup> Rather, a square logical fit can be made to the conventional three-prong test, albeit a fit that is at once self-validating and ironic. Essentially, it is the following, as, regretfully, I believe was the real case.

Insofar as the theology, artifacts, and liturgy of a particular religion have already formally been adopted into government itself and made a regular feature of government's own practice, the religion has itself been partly secularized. That is, it has been assimilated into and

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ernment for essentially religious purposes; or (c) use essentially religious means to serve governmental ends. . . .

*Id.* at 294-95 (emphasis added). The last point, that government may not "use essentially religious means to serve governmental ends," meant, in the context of *Schempp*, that even supposing the sole reason for Bible readings at the opening of each class day were utterly secular—that is, not at all to induce belief in the Bible but solely as a clever device to get students to quiet down—they were nonetheless unconstitutional because the religion clauses meant to forbid government from exploiting religious forms as a deliberate tool of secular policy. The license of the state, to appropriate the forms of religion as instruments of state policy, may subject each such religion to degraded uses over which it can exercise no control. Avoidance of that hazard was a principal theme of Madison's *Memorial and Remonstrance*. See J. MADISON, *supra* note 7. In *Lynch*, however, the Chief Justice virtually stood the Brennan criteria upside down. First, he declared that it is enough that there be any discernible secular purpose, no matter how minor; he explicitly declares that it need not be exclusive or even dominant. *Lynch*, 104 S. Ct. at 1363 n.6. Then, insofar as any secular purpose *is* present, he declares that even assuming essentially religious means have been appropriated by government as the means of effectuating that secular objective, it is "irrelevant." *Id.* at 1363 n.7.

But *why* it is "irrelevant" is not explained, nor is it clear why anyone would not think it relevant. If the object were purely to build military morale, and the principal effect were indeed to build such morale rather than, for example, to assist a particular church, would it be similarly "irrelevant" that the means chosen to build such morale involved the government in producing and distributing crosses, copies of militant hymns such as "Onward Christian Soldiers" and the like, in preparing troops for the capture of oil fields in Iran? The majority's failure to see "relevance" in such a matter is dismaying.

48. See *Lynch*, 104 S. Ct. at 1369.

49. *Id.* at 1358, 1362-63. Justice Brennan's dissent sought to narrow the decision accordingly, *id.* at 1370, and a later district court decision limiting the damage wrought by *Lynch* has enjoined a city's funding of a nativity scene where "no Santa Clauses or trees" outfitted the display, *ACLU v. City of Birmingham*, No. 83-CV3348DT (E.D. Mich. July 23, 1984) (available Sept. 12, 1984, on LEXIS, Genfed library, Dist file). But see *McCreary v. Stone*, 739 F.2d 716, 729 (2d Cir. 1984) (holding that *Lynch* was not "based upon the physical context . . . of the creche" but rather upon the context of the "holiday season"), *cert. granted sub nom.* Board of Trustees v. *McCreary*, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 84-277).

made a part of the state temporal, and not simply left to the church spiritual. To whatever additional extent other incidents of that religion are similarly annexed and identically made a part of official state practice, the acts that are necessary to do so obviously do serve a "secular" purpose, namely, the appropriation of a particular religion or faith as a practice of government. The events that do this may be individually modest, discrete, and extremely gradual, as has happened in the United States.<sup>50</sup>

This movement, a movement of gradual, secularized Christian ethnocentrism, has tended to elude the establishment clause itself. Originally, in merely marginal, seemingly trivial, and obviously nonjusticiable<sup>51</sup> ways, statesmen and politicians easily commingled religiously colored habits of personal conduct with their deportment in public office. Some no doubt did so naturally, without thinking about it. Others, perhaps somewhat crassly, doubtless saw strong political advantage in making great public display of their piety. The commonplace personal tendency, to identify preferred "religious truths" with national policy, is institutionally irresistible in times of greatest sacrifice, such as war time. Thus, it is scarcely surprising, given the religious antecedents of the abolitionist movement, that the Union cause in the Civil War would be mingled with the assimilation of Christian symbolism, and that Christian theology thus would itself become part of the cause. Recall, for instance, the Battle Hymn of the Republic. That "In God We Trust" was first authorized for use on American coins in 1864, therefore, is scarcely remarkable.<sup>52</sup> That the fuller transition was made during the 1950's, with the alteration of the national motto,<sup>53</sup> the insertion of a common monotheism in the Pledge of Allegiance,<sup>54</sup> and the mandatory insertion of "In God We Trust" on all United States currency and money,<sup>55</sup> is equally unsurprising. Jingoistic desires to paint a vivid contrast in the Cold War, separating ourselves, claiming "God" within "our" government, for sanctimonious contrast with "Godless atheistic" Communism, made the deliberate appropriation of a pervasive religiosity an irresistibly useful instrument of state policy.<sup>56</sup>

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50. See, e.g., the Chief Justice's own presentation in *Lynch*, 104 S. Ct. at 1360-62 (reciting government's official acknowledgements since 1789 of religion's role in American life).

51. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (discussing the Court's "policy of strict necessity in disposing of constitutional issues").

52. A. STOKES & L. PFEFFER, *supra* note 1, at 568.

53. H.R. REP. NO. 1959, 84th Cong., 2d Sess. 2, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 3720, 3720-21.

54. A. STOKES & L. PFEFFER, *supra* note 1, at 570.

55. *Id.*

56. *Id.* at 570-71. See also W. MILLER, *PIETY ALONG THE POTOMAC* 41-46 (1964) (discussing religion and anti-Communism during the 1950's).

In these marginal, gradual, ordinary ways, then, virtually from the beginning the nation has drifted, reidentified itself, and become, like so many others, accustomed to the political appropriation of religion for its own official uses. In exchange, it now purchases religious support. Late arrivals to America may suppose they can take the government's religiosity or leave it, but they are stuck with the reality that clashes so clearly with the first amendment: Ours is basically a Christian-pretending government where they will be made to feel ungrateful should they complain. The gradual but increasingly pervasive installment of compromised religious ritual within government itself thus draws that which was formerly outside to the inside; the prevailing monotheism has been made a commonplace exhibition in state practice, and put to service and supported by the state when felt useful. Additional appropriations from sectarianism may then become logically fitted as part of this "secular" but sectarian state. Distinctly religious practices, insofar as they serve the state, thus by definition have virtually succeeded in satisfying a secular purpose and promoting a secular interest. In this gradual absorptive fashion, then, satisfying the Court's current "test" can scarcely ever be a problem.

### III.

Not so long ago, Justice Powell said that he believed we were now far removed from the dangers that so troubled Jefferson and Madison.<sup>57</sup> It is difficult to agree that that is so and, in any event, the supposition seems scarcely sufficient ground for the Court to modify the first amendment simply to accord with its own confidence. "E Pluribus Unum" should mean something to us all, aspirationally, that we ought not abandon although Congress itself has seen fit to do so. The idea of a civil nation of free people, diverse in their thoughts, equal in their citizenship, and with none to feel alien, outcast, or stranger in relation to civil authority, remains powerful and compelling. The installation of a state theism has not been worthy of the United States. *Lynch v. Donnelly* was itself not a credit to an able and distinguished Court. Both the case and the tendency it represents are disappointing reminders that religious ethnocentrism, as well as religious insensitivity, are still with us. I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed.

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57. *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, dissenting in part).