NEUTRALITY AND THE ENDORSEMENT TEST

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INTRODUCTION

The collision of government power and religion provokes strong feelings and deep disagreements. As government's role, size, and power grow, the frequency and intensity of these disagreements inevitably grow as well. When these disagreements reach the Supreme Court, the Establishment Clause[1] and the Free Exercise Clause[2] serve as the primary sources of guidance in finding a resolution. Each of these clauses seeks to preserve important freedoms by restraining government action, but frequently, the freedoms protected by these clauses conflict with one another or with other important constitutional values.[3] In an effort to resolve these conflicts, the Supreme Court has adopted the concept of neutrality.

This Article examines the concept of neutrality as it relates to the Supreme Court's most recent Establishment Clause test, the endorsement test.[4] I argue that the concept of neu-

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

2. *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

3. McCreary Cnty. v. ACLU, 545 U.S. 844, 875 (2005).

> The First Amendment has not one but two clauses tied to "religion," the second forbidding any prohibition on "the free exercise thereof," and sometimes, the two clauses compete: spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions. At other times, limits on governmental action that might make sense as a way to avoid establishment could arguably limit freedom of speech when the speaking is done under government auspices.

Id. (citations omitted).

4. Lynch v. Donnelly, 465 U.S. 668, 691–94 (1984) (O'Connor, J., concurring).

trality and the endorsement test are fundamentally incompatible, that the concept of neutrality cannot be meaningfully applied without violating this test. First, I set out the central, load-bearing role that the Supreme Court has given to the concept of neutrality in its Establishment Clause jurisprudence. Second, I argue that, as a matter of logic, the concept of neutrality cannot guide or clarify government's relationship with religion unless the parties in conflict (religion and its opponent) are clearly defined. Third, I show that any meaningful definition of religion is precluded by the endorsement test, which would lead the Supreme Court to hold that such a definition is unconstitutional. Fourth, I examine some possible solutions to this dilemma. I conclude that to preserve the concept of neutrality, the Supreme Court should abandon the endorsement test and adopt a coercion test instead.

I. Neutrality is the Supreme Court's Paradigm for Government's Treatment of Religion

Since *Everson v. Board of Education*[5] in 1947, the Supreme Court has adopted neutrality as the paradigm for government's treatment of religion.[6] The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be

5. Mitchell v. Helms, 530 U.S. 793, 878 (2000) (Souter, J., dissenting) ("[T]he Court first referred to neutrality in *Everson*, simply stating that government is required 'to be a neutral' among religions and between religion and nonreligion." (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947))); *see also McCreary*, 545 U.S. at 874 ("The importance of neutrality as an interpretive guide is no less true now than it was when the Court broached the principle in *Everson* . . . .").

6. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995); Bd. of Educ. v. Grumet, 512 U.S. 687, 696; Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384 (1990); Buckley v. Valeo, 424 U.S. 1, 92 (1976); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745–46 (1976); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Walz v. Tax Comm'n. of N.Y. 397 U.S. 664, 669-70 (1970); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Bd. of Educ. v. Allen, 392 U.S. 236, 242 (1968); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963); Sherbert v. Verner, 374 U.S. 398, 409 (1963); Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); Zorach v. Clauson, 343 U.S. 306, 313–14 (1952); McCollum v. Bd. of Educ., 333 U.S. 203, 210–12 (1948).

used so as to handicap religions than it is to favor them."[7] In two recent cases, the Court reaffirmed this commitment to neutrality: "The first and most fundamental of these principles, one that a majority of this Court today affirms, is that the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another."[8] And again, "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[9]

While the Supreme Court clearly favors neutrality as the guiding principle for government's treatment of religion, it remains unclear as to what neutrality requires. Despite consensus about the importance of neutrality in broad terms—government should neither advantage nor disadvantage religion—there remains fierce disagreement about how that mandate applies to specific government actions.[10] In other words, "We can agree on the principle of neutrality without having agreed on anything at all."[11] This ambiguity has its root in commentators' and courts' failure to first define the opposing sides of the dispute towards which government must be neutral.

II. The Concept of Neutrality Cannot Guide or Clarify Government's Relationship with Religion Unless Religion is Clearly Defined

It is a logical prerequisite to any meaningful application of the concept of neutrality to clearly define the opposing sides

7. *Everson*, 330 U.S. at 16–18.

8. Van Orden v. Perry, 545 U.S. 677, 709 (2005) (citing *McCreary*, 545 U.S. at 875–76).

9. *McCreary*, 545 U.S. at 860 (quoting *Epperson*, 393 U.S. at 104).

10. Justice Souter pointed out this problem in his dissenting opinion in *Mitchell v. Helms*. He claimed that while the overarching principle of neutrality between government and religion remains a constitutional imperative, the Court's use of the term has vacillated over time, taking on at least three different meanings: equipoise, secular or non-ideological aid, and evenhandedness. 530 U.S. at 882–83 (Souter, J., dissenting).

11. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 994 (1990).

of the dispute. *Neutrality* is a context-dependent concept: it identifies a middle position between opposing sides.[12] This implied positional element is what differentiates neutrality from disinterestedness and impartiality. Neutrality does not only mean that the neutral party has no personal interest in the dispute; it also implies a commitment by the neutral party to not favor either of the opposing sides.[13] Consequently, any ambiguity in the definitions of the opposing sides results in ambiguity in the meaning of neutrality, and until religion and its opposite are clearly defined, neutrality cannot guide government's decisions respecting religion.[14]

In 1968, the Court struck down as unconstitutional an Arkansas law that prohibited public school teachers from teaching evolution to their classes.[15] The Court determined that the law violated the principle of neutrality because it was enacted "for the sole reason that [the theory of evolution] is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group."[16] Because the Court did not define religion or religion's opponent, the Court's decision appeared to violate the very principle of neutrality that it

12. John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 91 (1986) ("Neutrality cannot exist context-free. Both the parties and the issues or terms must be specified for a claim of neutrality to be meaningfully asserted and assessed."); Alan Montefiore, *Neutrality, Indifference and Detachment*, *in* NEUTRALITY AND IMPARTIALITY: THE UNIVERSITY AND POLITICAL COMMITMENT 4, 5 (1975) ("Questions of neutrality arise in reference to situations of actual or possible conflict between parties or policies; one cannot be neutral if there is, so to speak, nothing to be neutral between."); *Neutrality Definition*, DICTIONARY.OED.COM, http://www.oed.com/viewdictionaryentry/Entry/126461 (last visited Feb. 18, 2010) ("An *intermediate* state or condition, not clearly *one thing* or *another*; a neutral position, middle ground." (emphasis added)).

13. Valauri, *supra* note 12, at 90.

14. On this point I disagree with Professor Valauri, who argues that it is unnecessary to define religion before determining whether the government has violated the principle of neutrality. *Id.* ("Note that it is not necessary to define religion in order to determine whether government in its actions prefers nonreligion over religion or vice versa. Nor is it necessary to determine whether secular humanism, for example, is a religion."). Professor Valauri identifies two essential components of neutrality: noninvolvement and impartiality. *Id.* at 125. But the identity of the opposing sides is logically prior to both of these components. Before government can be noninvolved, it must know with whom or what remains noninvolved, and the same applies to impartiality.

15. Epperson v. Arkansas, 393 U.S. 97 (1968).

16. *Id.* at 103.

claimed to follow. In his concurrence, Justice Black commented on the confusion:

> If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? The very cases cited by the Court as supporting its conclusion hold that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory.[17]

The confusion that Justice Black identified came from the Court's failure to clearly define what it meant by religious and anti-religious.[18] Because the Court failed to provide context by defining what it meant by religion, neutrality became a mere empty label.[19] Without a clear definition of religion, government cannot possibly determine whether it is acting in a permissible, neutral fashion.[20] Such a determination is only possible if religion is clearly defined.

Correcting the problem identified by Justice Black is not simply a matter of drafting a clear definition. The Supreme Court's endorsement test construes the Establishment Clause so rigidly that any such definition would be unconstitutional.[21] Referring to the problems with a government definition of religion, Professor Stanley Ingber commented, "The word 'define' describes the process of proscribing the parameters of an idea or concept. This process also can be characterized as the description of the defined word's essential qualities. The very act of definition, therefore, of drawing a category of inclusion and exclusion, arguably violates the establishment clause . . . ."[22] The Court has relied on three different tests when evaluating Establishment Clause challenges: the *Lemon* test, the coercion test, and the

17. *Id.* at 113 (Black, J., concurring).

18. *See id.* at 104.

19. *See id.*

20. *See id.*

21. *See* Lynch v. Donnelly, 465 U.S. 668, 694 (O'Connor, J. concurring).

22. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses* 41 STAN. L. REV. 233, 239–40 (1989).

endorsement test.[23] The endorsement test is currently in vogue,[24] and it bars government from clearly defining religion.[25]

III. The Endorsement Test Precludes any Meaningful Definition of Religion

The *endorsement test* "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[26] Writing for a majority of the Court, Justice Blackmun described the endorsement test as central to the meaning of the Establishment Clause:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[27]

In application, the endorsement test "examines the effect of the challenged governmental action symbolically, looking in particular at its objective meaning. Thus, the Court is to determine whether a 'reasonable observer' or an 'objective observer,' properly informed of the relevant history and context, would find in the government's action a message that endorses religion."[28] Because the Court has used the term "religion" so broadly in its past cases,[29] any clear definition of

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23. Daniel O. Conkle, Constitutional Law: The Religion Clauses 113 (2003).

24. *See* Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010) (voiding as inappropriate an injunction issued by the lower court, but remanding for inquiry into whether the enjoined compromise was "insufficient accommodation in light of the earlier finding of *religious endorsement*" (emphasis added)). *But see* Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (arguing that a single test cannot resolve all Establishment Clause cases).

25. *See Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

26. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment).

27. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 593–94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

28. Conkle, *supra* note 23, at 118–19.

29. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a

religion will seem exclusive and preferential to an objective observer and will be impermissible under the endorsement test.[30]

There are two general methods used to define a term: *extension* and *intension*.[31] "The extension of a term is the class of objects to which the term conventionally applies. The intension of a term is the set of properties shared by all the objects in the term's extension and by virtue of which these objects are included in its extension."[32]

Defining a term by its extension violates the endorsement test because it requires reliance upon convention.[33] Imagine that you are teaching a child what is meant by religion. To define *religion* by extension, you would rely on your knowledge of what religion conventionally means, and then direct the child to items that fall within the category of religion. This may be done by ostention (pointing out religious things), enumeration (listing religious things with which the child is already familiar), or subcategorization (identifying categories of religious things).[34] Relying upon a conventional understanding of religion would violate the endorsement test because an objective observer would see this as an impermissible entrenchment of the existing conventional religions to the exclusion of unconventional religions.[35] This would violate the endorsement test prohibition that government may not "convey a message that religion or a particular religious belief is favored or preferred."[36]

Definitions by intension "explain the meaning of a term by specifying the properties an entity must have in order to be included in the term's extension."[37] Definitions by intension have an advantage over definitions by extension because they

belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

30. *See Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

31. K. CODELL CARTER, A FIRST COURSE IN LOGIC 71 (2004).

32. *Id.* (emphasis omitted).

33. *See id.*; *see also Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

34. CARTER, *supra* note 31, at 72.

35. *See* CONKLE, *supra* note 23, at 118–19.

36. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment).

37. CARTER, *supra* note 31, at 73.

can be predictive. A definition by extension relies on the existing conventional understanding of what things *are* properly included in a term's extension,[38] whereas a definition by intension provides criteria by which to discover what things *may be* a member of a term's extension.[39] Applied to the problem of defining religion, a definition by extension would rely on conventional understanding to determine which organizations and beliefs *are* religious; conversely, a definition by intension would provide criteria by which to determine whether an organization or belief *may be* deemed religious. This allows a definition by intension to escape the restrictions of conventional understanding.

Despite this advantage that intensional definitions have over extensional definitions, an intensional definition of religion would still violate the endorsement test. No matter what criteria or properties the government selected as the defining attribute of religion, an objective observer would find that there was an endorsement of one religion or group of religions over others.[40]

An example of a failed effort to define religion is the drifting language and the Supreme Court's flexible interpretation of the Universal Military Training and Service Act.[41] Before scrutiny by the Supreme Court, this statute exempted individuals from compulsory military service who,

> by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[42]

The Court dealt with this statute in 1964,[43] and, under the guise of statutory interpretation, it substituted a new defini-

38. *Id.* at 71.
39. *Id.* at 73.
40. *See* CONKLE, *supra* note 23, at 118–19.
41. 50 U.S.C. app. § 456(j) (1964).
42. *Id.*
43. United States v. Seeger, 380 U.S. 163, 176 (1964).

tional criterion in place of the one articulated by Congress.[44] Congress' criterion defined a belief as religious if it was "in a relation to a Supreme Being involving duties superior to those arising from any human relation."[45] The Court's new criterion stated that a belief was religious if it "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[46]

The 1967 version of the Universal Military Training and Service Act codified the Court's test and eliminated reference to a Supreme Being.[47] The new version exempted individuals who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."[48]

In 1970, the Court's ruling in *Welsh v. United States*[49] broadened this definition even further.[50] Welsh claimed exemption as a conscientious objector, but specified that his objection derived from his "reading in the fields of history and sociology" and denied that his views were religious.[51] The Court disregarded the language of the statute that withheld exemptions for "political, sociological, or philosophical views."[52] Instead the Court reasoned that "[b]ecause his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions."[53] Notice that the Court again substituted a new criterion (opposition to participation in war by reason of beliefs that function as a

44. *Id.* at 165–66.
45. 50 U.S.C. app. § 456(j).
46. *Seeger*, 380 U.S. at 166.
47. 50 U.S.C. app. § 456(j) (Supp. IV 1964).
48. *Id.*
49. 398 U.S. 333, 343 (1970).
50. Ingber, *supra* note 22, at 259.
51. *Welsh*, 398 U.S. at 341.
52. 50 U.S.C. app. § 456 (j) (Supp. IV 1964).
53. *Welsh*, 398 U.S. at 340.

religion) in place of the statutory criterion (opposition to participation in war by reason of religious training and belief).[54]

Although these decisions were ostensibly based on statutory interpretation, the Court's intent, at least in part, was to "avert the collision between [the statute's] plainly intended purpose and the commands of the Constitution."[55] But under the endorsement test, even this broad definition is unconstitutional.[56]

As such, the endorsement test "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[57] Any criteria that the government might rely upon to define what is, or is not religious, will favor certain factors or attributes exemplified by qualifying religions. Consequently, defining religion by either intension or extension would lead an objective observer to perceive favoritism for one religion or a group of religions over others. Under the endorsement test, this is unconstitutional.

IV. Possible Solutions

Since the Court cannot define religion without violating the endorsement test and cannot meaningfully apply neutrality without a clear definition of religion, either the concept of neutrality or the endorsement test must yield. Given neutrality's long history as the paradigm for government's treatment of religion,[58] the endorsement test is the more likely candidate for elimination.

There are other measures that might help avoid intellectual embarrassment about neutrality. For example, the neutrality problem could also be largely avoided by scaling government back to a laissez-faire state, thereby eliminating government funding of private organizations, schools, and other battleground areas in the relationship between govern-

54. *Id.*; 50 U.S.C. app. § 456(j) (Supp. IV 1964).

55. *Welsh*, 398 U.S. at 354 (Harlan, J., concurring).

56. *See* Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment).

57. *Id.*

58. *See supra* Part I.

ment and religion.[59] The neutrality problem might also be largely avoided if the Court followed Justice Thomas's suggestion and ruled that the Establishment Clause should not be incorporated against the states: "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause."[60] Freeing state governments from Establishment Clause restraints would remove from federal court some of the most contentious issues of government and religion, such as religion in government schools. Instead, these issues would be decided by state courts according to state constitutional law. While these and other solutions might correct the problem, they would require far more drastic changes than simply eliminating the endorsement test.

The best chance for legitimately preserving neutrality as the Supreme Court's paradigm for government's relationship with religion is to discard the endorsement test in favor of a *coercion test*. Instead of seeking to divine what an objective observer would deem endorsement, a coercion test would prohibit only "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[61] Under a coercion test, the Establishment Clause would be violated "only if the governmental action substantially impedes the freedom of individuals to make and implement religious choices, including especially the choice not to participate in religious conduct."[62] If the Establishment Clause were understood to prohibit only direct coercion of religious orthodoxy or financial support, there would be no constitutional bar to defining religion, and neutrality could be meaningfully applied.

59. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 2–3 (40th anniv. ed. 2002).

60. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (Thomas, J., concurring).

61. Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

62. CONKLE, *supra* note 23, at 122.

Conclusion

The Court consistently selects neutrality as the paradigm for government's relationship with religion. However, neutrality is a context-dependent concept designating a relational position between opposing sides of a dispute. Therefore, to have any real meaning, neutrality requires that the opposing sides be clearly defined. In the context of the Establishment Clause, this means that government must define religion.

The endorsement test, however, forecloses the possibility of a clear definition of religion. Defining religion either by extension or by intension will appear to an objective observer to be impermissible favoritism of one religion or a group of religions over others. If neutrality is in fact the bedrock principle of the Establishment Clause that the Court has held, then the Court must discard the endorsement test.