RELIGIOUS PARTICIPATION IN PUBLIC PROGRAMS

Religious Freedom at a Crossroads

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The Religion Clause jurisprudence of the Warren and Burger Courts is coming to an end—a victim, if not of its own internal contradictions, then of changes of personnel on the Court. To this we might happily say “good riddance,” for a more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to devise. Professor Leonard Levy observed that

the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.¹

I stand at a pole opposite to Levy on most of these issues, but I agree with that assessment.

The old jurisprudence failed to distinguish between government action that promotes the free exercise of diverse faiths and government action that promotes the majority’s understanding of

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¹ Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 163 (MacMillan, 1986).

proper religion—treating both with suspicion. The Court's conception of the First Amendment more closely resembled freedom *from* religion (except in its most private manifestations) than freedom *of* religion.² The animating principle was not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life touched by government. This approach successfully warded off the dangers of majoritarian religion, but it exacerbated the equal and opposite danger of majoritarian indifference or intolerance toward religion. There is reason to believe this period is coming to an end.

There is no guarantee, however, that the Rehnquist Court's approach to the Religion Clauses will be a great improvement. Initial decisions suggest that the Rehnquist Court may replace the reflexive secularism of the Warren and Burger Courts with an equally inappropriate statism. Just when the Court appears to be shedding its inordinate distrust of religion, it appears to be embracing an inordinate faith in government.

Already the new Court has adopted an interpretation of the Free Exercise Clause that permits the state to interfere with religious practices—even to make the central ceremonies of some ancient faiths illegal or impossible—without any substantial justification, so long as the regulation does not facially discriminate against religion.³ And in a prominent case before the Court this term, the Court has been urged to modify its interpretation of the Establishment Clause to permit a clergyman to deliver a prayer at a junior high school graduation ceremony.⁴ As the arguments in the invocation case illustrate, the debate over the Religion Clauses is all too often framed as if there were but two choices: more religion in public life or less; tearing down the wall of separation between church and state or building it up again. Opponents of the prayer have rallied around the Supreme Court's old Establishment Clause doctrine and have warned that any modifications would signal an erosion in our civil liberties. Defenders of the prayer contend that the government should have broader latitude to give voice to the religious sentiments of the community. Both positions, in my judg-

² Thus, Justice Blackmun could say that the term "secular liberty" encapsulates what "it is the purpose of the Establishment Clause to protect." *County of Allegheny v ACLU*, 492 US 573, 612 (1989). In a similar vein, Justice Frankfurter commented that the "essence" of the "constitutional protection of religious freedom" is "freedom from conformity to religious dogma, not freedom from conformity of law because of religious dogma." *West Virginia Board of Education v Barnette*, 319 US 624, 653 (1943) (Frankfurter dissenting).

³ *Employment Division v Smith*, 110 S Ct 1595, 1599-1602 (1990).

⁴ *Weisman v Lee*, 908 F2d 1090 (1st Cir 1990), cert granted, 111 S Ct 1305 (1991).

ment, are wrong. We should welcome doctrinal change, but not government prayer.

This Article presents another way. In Section I, I criticize the Religion Clause jurisprudence of the Warren and Burger Courts and its influence today. In Section II, I explain why the emerging Religion Clause jurisprudence of the Rehnquist Court appears to be moving in the wrong direction. Finally, in Section III, I suggest how a proper jurisprudence of the Religion Clauses should look. My position is that the Religion Clauses do not create a secular public sphere, as was often thought in the past;⁵ nor do they sanction government discretion to foster broadly acceptable civil religion in public life. Rather, the purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion. It is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism. It is to preserve what Madison called the "full and equal rights"⁶ of religious believers and communities to define their own way of life, so long as they do not interfere with the rights of others, and to participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character.

I. THE OLD JURISPRUDENCE AND ITS INFLUENCE TODAY

A. Inconsistency and Confusion

Any serious interpretation of the Religion Clauses must explain the relation between the two constituent parts, the Free Exercise Clause and the Establishment Clause, which are joined together in the single command: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷ The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, *any* government) to discriminate against religion, and may require affirmative accommodation of free exercise in some contexts. The Establishment Clause, however, has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions,

⁵ And as Professor Sullivan thinks today. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195 (1992).

⁶ James Madison (speech of Jun 8, 1789), in Joseph Gales, ed, 1 *Annals of Congress* 451 (Gales & Seaton, 1834).

⁷ US Const, Amend I.

this means that the government *must* discriminate against religion in the distribution of benefits. Thus the Establishment Clause is said to require what the Free Exercise Clause forbids.

The doctrinal confusion is compounded when we take into account the remainder of the First Amendment, which protects the freedoms of speech, press, petition, and assembly. The central feature of the constitutional law of speech and press is a prohibition on "content-based" discrimination,⁸ except in the most compelling of circumstances. Yet the distinction between religion and nonreligious ideologies and institutions—a distinction seemingly demanded by the very text of the Religion Clauses—is based on the content of ideas and beliefs. The content-neutral thrust of the Free Speech Clause thus coexists uneasily with the special status of religion under the Free Exercise and Establishment Clauses.

The Court has tended to address these problems one clause at a time, building up inconsistencies often without seeming to notice them. But more remarkably yet, the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test. The aptly named "*Lemon*" test, adopted in 1971, forbids government actions that either (1) have no secular purpose; (2) have a "primary effect" of advancing religion;⁹ or (3) foster an "excessive entanglement" between government and religion.¹⁰ In further elaborations, the Court has held that "primary effect" really means any "direct and immediate" ef-

⁸ See Geoffrey Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L. Rev. 189, 196-97 (1983); Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan L. Rev. 113, 113 (1981); Laurence H. Tribe, *American Constitutional Law* § 12-2 at 789-92 (Foundation, 2d ed 1988). For a case involving interplay of free exercise, establishment, and free press concerns, see *Texas Monthly, Inc. v Bullock*, 489 US 1 (1989). See especially *id.* at 25-26 (White concurring).

⁹ The "effects" test by its language forbids government action with the "primary effect" of either "advancing" or "inhibiting" religion. *Lemon v Kurtzman*, 403 US 602, 612 (1971). But in actual practice, actions "inhibiting" religion are dealt with under the Free Exercise Clause. The only instance in which the Supreme Court has invalidated an "inhibition" of religion under the Establishment Clause was *Larson v Valente*, 456 US 228 (1982), and the reasoning in that case was based on denominational discrimination. For clarity's sake I have confined the "effects" prong of the *Lemon* test to "advancement" of religion.

If *Smith*, 109 S. Ct. 1595, is extended to questions of institutional autonomy, as seems likely (but see *id.* at 1599 (citing the church property dispute cases)), litigants and lower courts are likely to invoke the Establishment Clause more often to challenge laws impinging on the ability of religious organizations to control their internal affairs and organization. See *Rayburn v General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169-71 (4th Cir. 1985) (striking down application of Title VII to hiring of clergy on establishment as well as free exercise grounds). See generally Carl Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984).

¹⁰ *Lemon*, 403 US at 613.

fect:¹¹ the state must be "certain" that religious organizations receiving government financial assistance for secular services to the public do not use resources purchased with those funds for the teaching or promotion of religion.¹² However, the Court has also interpreted the "entanglement" test to forbid the monitoring or surveillance of religious organizations necessary to achieve this certainty.¹³ Thus, the "entanglement" prong forbids what the "effects" prong requires—leaving states no alternative but to exclude religious groups altogether. The Court has acknowledged this "Catch-22,"¹⁴ but has not done anything to resolve the contradiction.

With doctrine in such chaos, the Warren and Burger Courts were free to reach almost any result in almost any case. Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers,¹⁵ but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to.¹⁶ It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their sabbath observances,¹⁷ but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and sabbath leads to discharge.¹⁸ It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior,¹⁹ but not to teach them science or history.²⁰ It is constitutional for the government to provide religious school pupils with books,²¹ but not with maps;²² with bus rides to religious schools,²³ but not from school to a museum on a field

¹¹ *Committee for Public Educ. v Nyquist*, 413 US 756, 783-85 n 39 (1973).

¹² *Lemon*, 403 US at 619; *Grand Rapids School Dist. v Ball*, 473 US 373, 385-86 (1985).

¹³ *Aguilar v Felton*, 473 US 402, 409 (1985); *Meek v Pittenger*, 421 US 349, 370 (1975); *Lemon*, 403 US at 619.

¹⁴ *Bowen v Kendrick*, 487 US 589, 615 (1988).

¹⁵ *Marsh v Chambers*, 463 US 783, 792-93 (1983).

¹⁶ *Wallace v Jaffree*, 472 US 38, 56 (1985).

¹⁷ *Estate of Thorntorn v Caldor, Inc.*, 472 US 703, 709-10 (1985).

¹⁸ *Frazee v Employment Security Dept.*, 489 US 829, 834 (1989); *Hobbie v Unemployment Appeals Comm'n of Fla.*, 480 US 136, 138-40 (1987); *Sherbert v Verner*, 374 US 398, 403-4 (1963).

¹⁹ *Kendrick*, 487 US at 611.

²⁰ *Lemon*, 403 US at 618-19.

²¹ *Board of Education v Allen*, 392 US 236, 238 (1968).

²² *Wolman v Walter*, 433 US 229, 249-51 (1977).

²³ *Everson v Board of Education*, 330 US 1, 17 (1947).

trip;²⁴ with cash to pay for state-mandated standardized tests,²⁵ but not to pay for safety-related maintenance.²⁶ It is a mess.

B. Hostility or Indifference Toward Religion

But analytical confusion was the least of the problems with the Religion Clause jurisprudence of the Warren and Burger Courts. More significant was the Court's tendency to press relentlessly in the direction of a more secular society. The Court's opinions seemed to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere. When religions stuck to the private functions of "spiritual comfort, guidance, and inspiration,"²⁷ the Court extended the protection of the Constitution. But the Court was ever conscious that religion "can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions."²⁸ The Court's more important mission was to protect democratic society from religion.²⁹

This set the Religion Clauses apart from the remainder of the Bill of Rights, which protects various nongovernmental activities from the power of democratic majorities.³⁰ Only the Religion Clauses have been interpreted to protect democratic society from the power of the private citizen, even from the supposed power of minority religions. (Consider the parochial school aid cases, which protect the non-Catholic majority from the Catholic minority.) The explanation presumably lies not in the logic of the Bill of

²⁴ *Wolman*, 433 US at 252-55.

²⁵ *Committee for Pub. Educ. and Religious Liberty v Regan*, 444 US 646, 653-54 (1980).

²⁶ *Nyquist*, 413 US at 774-80.

²⁷ *Grand Rapids*, 473 US at 382.

²⁸ *Id.*

²⁹ See Justice Stevens's dissenting opinion in *Board of Education of Westside Community Schools v Mergens*, 110 S Ct 2356, 2383-93 (1990), in which he described religions as "divisive forces," *id.* at 2391, and urged that they be excluded from public school premises on the ground that they "may exert a considerable degree of pressure *even without official school sponsorship*." *Id.* (emphasis added). Stevens's language reflects a belief that the Establishment Clause is concerned not so much with the power of government as with the dangerous propensities of religion. By 1990, Justice Stevens was no longer speaking for a majority, but his comments indicate that the secularistic orientation of the old jurisprudence lives on.

³⁰ Akhil Reed Amar has recently interpreted the Bill of Rights primarily to empower popular majorities rather than to protect individual rights. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1132 (1991). But the Court's approach to the Religion Clauses is no less peculiar under Amar's interpretation, for Amar suggests that churches should be understood as republican institutions—as vehicles for the mobilization of public opinion. Amar's view is inconsistent with the view that churches should be quarantined from public life.

Rights but in the Court's perception of religion. Before examining the details of legal doctrine, then, let us look at how the Court talks about religion.

Justice Hugo Black provides a starting point, since his opinions were so extremely influential in the early development of Establishment Clause doctrine. Black referred to the Catholics who advocated the loan of textbooks to religious schools as "powerful sectarian religious propagandists," and to their religious views as "preferences and prejudices."³¹ He accused them of "looking toward complete domination and supremacy of their particular brand of religion."³² This was a strange way to talk about people who sought equal rights for all families to direct the upbringing of their children.

The bigotry of Justice Black's language is particularly striking in light of its historical context. The reason Roman Catholics and Orthodox Jews created separate schools in the nineteenth century, while Protestants did not, was that the public schools were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching.³³ Opposition to parochial school aid at that time was part and parcel of nativist, anti-Catholic politics.³⁴ The same presidential candidate whose supporters campaigned against "Rum, Romanism, and Rebellion" put his name to an almost-adopted constitutional amendment that would have banned aid to parochial schools.³⁵ Only in the mid-twentieth century, when overt anti-Catholicism had subsided, were legislatures in Protestant-majority states willing to consider sharing a modest portion of the resources available for education.³⁶ For Justice Black to portray these minorities as "looking toward complete

³¹ *Allen*, 392 US at 251 (Black dissenting).

³² *Id.*

³³ For a review of this history, see Michael W. McConnell, *Multiculturalism, Majoritarianism and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U Chi Legal F 123, 134-39; Charles L. Glenn, Jr., *The Myth of the Common School* (Massachusetts, 1988); Jonathan D. Sarna, *American Jews and Church-State Relations: The Search for "Equal Footing"* (American Jewish Committee, 1989).

³⁴ See generally Diane Ravitch, *The Great School Wars* (Basic, 1974).

³⁵ The candidate was James G. Blaine. See Allen Johnson, ed, 2 *Dictionary of American Biography* 322, 326 (Charles Scribner's Sons, 1943). On the Blaine Amendment, see Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* 434 (Harper and Row, rev ed 1964).

³⁶ In New York, for example, the first enactment of parochial school aid was the provision of bus transportation, passed in 1936. See Stokes and Pfeffer, *Church and State in the United States* at 425 (cited in note 35).

domination and supremacy of their particular brand of religion" was to turn reality on its head.³⁷

The language in recent Supreme Court opinions is more guarded, but continues to evince suspicion of religion. In *Grand Rapids School District v Ball*,³⁸ and its companion case, *Aguilar v Felton*,³⁹ for example, the Court refused to allow public school remedial teaching specialists to enter the premises of parochial schools to provide remedial and other special assistance to educational and economically deprived schoolchildren attending those schools.⁴⁰ Writing for the Court, Justice William Brennan explained that

teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect.⁴¹

The evocative words in this passage—"conform," "dominantly religious," "indoctrination"—suggest that the Justices who joined the opinion believe that religious convictions are reached not through thoughtful consideration and experience, but through conformity and indoctrination. This view of religion justifies discriminating against religious schools, because indoctrination is the antithesis of democratic education. Moreover, the Justices seemed to view religion as not only unreasoned but insidious. The "atmosphere" of a Catholic school has such power to influence the unsuspecting mind that it may move even public school remedial English and math specialists to "conform"—though their only contact with the school is to walk down its halls.

³⁷ *Allen*, 392 US at 251. Justice Black was not the only Supreme Court Justice who indulged anti-Catholic prejudice. In *Lemon*, Justice William O. Douglas cited with approval an openly anti-Catholic hate tract. *Lemon*, 403 US at 635 n 20 (Douglas concurring) (quoting Loraine Boettner, *Roman Catholicism* (Presbyterian and Reformed Publishing, 1962)). Among other illuminating statements, Boettner claimed that Hitler, Mussolini, and Stalin learned the "secret[s] of [their] success" from the Roman Catholic Church, Boettner, *Roman Catholicism* at 363, and that "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come . . . from the [Catholic] parochial schools." *Id.* at 370. For a further description of the book, see Douglas Laycock, *Civil Rights and Civil Liberties*, 54 Chi Kent L Rev 390, 418-21 (1977).

³⁸ 473 US 373 (1985). Readers should be aware that the author argued this case in the Supreme Court in support of the petitioner.

³⁹ 473 US 402 (1985).

⁴⁰ *Grand Rapids*, 473 US at 397; *Aguilar*, 473 US at 414.

⁴¹ *Grand Rapids*, 473 US at 388.

This opinion stands in curious contrast to the Court's encomiums to the role of the public schools in inculcating moral values. The same Justice who wrote of "indoctrination" in the religious schools observed in another case that "local [public] school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.'"⁴² He reasoned that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."⁴³ In another opinion, the Court stated that the "inculcat[ion of] fundamental values" by public schools was "necessary to the maintenance of a democratic political system."⁴⁴ The Court seems to believe that a politically elected school board's inculcation of secular values for all schoolchildren of the jurisdiction is "necessary" for democracy. When individual parents choose an alternative set of (religious) values *for their own children*, however, this is "indoctrination" and must be viewed with suspicion.

This understanding of religion is not merely the idiosyncratic viewpoint of a transitory majority of the Court. It represents a specific and powerful philosophical position, most clearly articulated by John Dewey. Dewey, the leading philosophical influence on American secular liberalism, was a determined critic of traditional religion. He claimed that there was "nothing left worth preserving in the notions of unseen powers, controlling human destiny to which obedience, reverence and worship are due."⁴⁵ Unlike the scientific method, which is "open and public" and based on "continued and rigorous inquiry,"⁴⁶ religion is "a body of definite beliefs that need only to be taught and learned as true."⁴⁷ Religion, he said, is based on the "servile acceptance of imposed dogma."⁴⁸ This did not mean that Dewey and his followers were skeptical toward all moral teaching, or that the government should remain "neutral" toward conflicting points of view. To the contrary, Dewey contended that the public schools have an "ethical responsibility" to inculcate social values derived from scientific and democratic principles.⁴⁹

⁴² *Board of Education v Pico*, 457 US 853, 864 (1982) (Brennan plurality).

⁴³ *Id* (quoting Petitioner's Brief at 10) (footnote omitted).

⁴⁴ *Ambach v Norwick*, 441 US 68, 77 (1979).

⁴⁵ John Dewey, *A Common Faith* 7 (Yale, 1934).

⁴⁶ *Id* at 26, 39.

⁴⁷ *Id* at 39.

⁴⁸ *Id* at 5.

⁴⁹ John Dewey, *Moral Principles in Education* 7-10 (Southern Illinois, 1975). Inculcating these social values was a major theme in Dewey's work. See John Dewey, *John Dewey*

Dewey's point of view maintains a hold on mainstream thinking about religion and constitutional law, both in the academy and in the courts. Professor Kathleen Sullivan, for example, advocates the secularization of the public order on the ground that "the culture of liberal democracy" is constitutionally privileged over religious ideas. She quite frankly calls for "establishment of the secular public moral order."⁵⁰ Professor Ira Lupu argues that a vigorous protection of the free exercise of religious institutions "may undercut the project of constitutional democracy," because religions "frequently claim divine inspiration" and thus "discourage skepticism."⁵¹ The Supreme Court's education decisions stand in this Deweyite tradition, treating religious education as "indoctrination," while sanctioning secular moral education in the public schools. Whether the Justices were aware of it or not, their opinions reflected a philosophical position avowedly hostile to traditional religion.

If the Court's education decisions sometimes reflected hostility toward religion, other decisions more often displayed indifference or incomprehension. In *Estate of Thornton v Caldor, Inc.*, for example, the Court held it unconstitutional for a state to require employers to accommodate work schedules to their employees' days of sabbath observance.⁵² In a concurring opinion, Justice O'Connor explained that

On Education: Selected Writings 23-60, 295-310 (Modern Library, 1964); John Dewey, *The School As A Means of Developing a Social Consciousness and Social Ideals in Children*, 1 J Soc Forces 513 (1923). I do not mean to take a position here on whether Dewey's nontheistic philosophy is a "religion," a subject that is embroiled in the controversy over "secular humanism." For a thoughtful and sympathetic analysis of Dewey's "religion," see Steven C. Rockefeller, *John Dewey: Religious Faith and Democratic Humanism* (Columbia, 1991). For present purposes, the relevant point is that Dewey opposed all traditional theistic religion, supernaturalism, and metaphysical idealism, and thought that government should use education to impose an alternative secular morality.

⁵⁰ Sullivan, 59 U Chi L Rev at 198 (cited in note 5). Sullivan's "establishment" is expressly theological in nature. She explains that the civil moral order she sees embodied in the Constitution must be understood "not as a neutral *modus vivendi*, but rather as a substantive recognition that there is more than one path to heaven and not so many as once thought to hell." Id at 200. This is not the disestablishment of religion. It is the establishment of Unitarian-Universalism.

⁵¹ Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U Pa L Rev 555, 597 (1991). Ironically, though reasoning from a similar indictment of religion, Sullivan and Lupu reach opposite conclusions. Sullivan advocates strong protection for religious autonomy in the private sphere, but would exclude religious groups entirely from public programs. Lupu would provide no protection for religious institutional autonomy, but would allow religious groups (if they can survive government regulation intact) to participate in public programs, including education, on an equal basis.

⁵² *Estate of Thornton*, 472 US at 708-10.

[a]ll employees, regardless of their religious orientation, would value the benefit which the statute bestows on sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief.⁵³

It would come as some surprise to a devout Jew to find that he has “selected the day of the week in which to refrain from labor,” since the Jewish people have been under the impression for some 3,000 years that this choice was made by God.⁵⁴ Jewish observers do not seek the right to “select the day” in which to refrain from labor, but only the right to *obey* laws over which they have no control. Sabbath observers are not “favored” over co-workers, any more than injured workers are “favored” when given disability leave. The law simply alleviates for them a conflict of loyalties not faced by their secular co-workers. Justice O'Connor's error was to reduce the dictates of religious conscience to the status of mere choice. Some people like to go sailing on Saturdays; some observe the Sabbath. How could the State consider the one “choice” more worthy of respect than the other? In Stephen Carter's apt phrase, this is to “treat religion as a hobby.”⁵⁵

In *Lyng v Northwest Indian Cemetery Protective Ass'n*, the Supreme Court considered whether the Forest Service constitutionally could construct a logging road in a National Forest through the ancient sites of worship of the Yurok, Karok, and Talowa Indians of Northern California.⁵⁶ This road, the Court conceded, would “virtually destroy” the Indians' ability “to practice their religion.”⁵⁷ The Supreme Court nonetheless upheld the project without inquiring whether its purpose was “compelling”⁵⁸ or even important. The Court explained that “government simply could not operate if it were required to satisfy every citizen's religious needs and desires.”⁵⁹ One might think that the government would have to give some substantial justification to destroy a reli-

⁵³ Id at 711 (O'Connor concurring).

⁵⁴ See Exodus 20:9-10 (Revised Standard Version) (“Six days you shall labor, and do all your work; but the seventh day is a Sabbath to the Lord your God”). See also Nathan A. Barack, *A History of the Sabbath* 8-16 (Jonathan David, 1965).

⁵⁵ Stephen Carter, *Evolutionism, Creationism, and Treating Religion As A Hobby*, 1987 Duke L J 977.

⁵⁶ 485 US 439, 441-42 (1988).

⁵⁷ Id at 451.

⁵⁸ See discussion of the “compelling interest” test in text accompanying notes 67-70.

⁵⁹ 485 US at 452.

gion. But the Court responded that free exercise rights "do not divest the Government of its right to use what is, after all, *its* land."⁶⁰ There is, admittedly, no evidence of hostility to religion in the opinion, only indifference—an indifference so obvious that the Court was moved to warn that "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizens."⁶¹ But how could the opinion be read any other way?

These decisions do not give the impression that the Justices consider religion a particularly important aspect of life. Freedom of worship may be worthwhile in the abstract, but it is outweighed by virtually any secular interest. In its attitude toward religion, the Court may typify the gulf between a largely secularized professional and academic elite and most ordinary citizens, for whom religion commonly remains a central aspect of life.⁶² How many of the Justices and their clerks have had personal experience with serious religion—religion understood as more than ceremony, as the guiding principle of life?⁶³ How many have close friends or associates who have had such experiences? For those who have lived their lives among academics and professionals, it may be difficult to understand why believers attach so much importance to things that seem so inconsequential.

The religious symbol cases are a final example of the Court's uncomprehending attitude toward religion. According to the Court, a city may include the display of a religious symbol as part of a holiday celebration only if the religious symbol is in close proximity to secular objects, which mitigate its religious message. Thus, a plurality of the Court permitted the menorah in *County of Allegheny v ACLU* because it was next to a forty-five-foot tall Christmas tree,⁶⁴ and a majority permitted the nativity scene in *Lynch v Donnelly* because it was surrounded by a Santa Claus house, rein-

⁶⁰ Id at 453 (emphasis in original). One might ask from whom the government got the land, but that, evidently, is another question.

⁶¹ Id.

⁶² John Davidson Hunter, *Culture Wars* (Basic, 1991). For discussions of the differences in religious conviction between the most educated classes and other Americans, see Robert Wuthnow, *The Restructuring of American Religion* 161-64 (Princeton, 1988); George Marsden, *Are Secularists the Threat? Is Religion the Solution?*, in Richard J. Neuhaus, ed, *Unsecular America* 31, 32-33 (Eerdmans, 1986); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 Pa L Rev 149, 170-77 (1991).

⁶³ The backgrounds of some of the recent appointees suggest a more intensive engagement with religious life. It will be interesting to see how this affects the tone and reasoning of the Court's work in this area.

⁶⁴ 492 US 573, 617-18, 634-35 (1989).

deer, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a banner stating "Season's Greetings," and a talking wishing well.⁶⁵ In contrast, the Court held unconstitutional the nativity scene in *Allegheny*, which was tastefully displayed with a backdrop of greenery and poinsettias, but unaccompanied by secular signs of the season.⁶⁶ Practitioners have dubbed the holdings in *Lynch* and *Allegheny* "the three-plastic animals rule."

The Court appears to have arrived at the worst of all possible outcomes. It would be better to forbid the government to have religious symbols at all than to require that they be festooned with the trappings of modern American materialism. After all, no one's religion depends on whether the government displays the symbols of the Christian and Jewish holidays. But if there are to be religious symbols, they should be treated with respect. To allow them only under the conditions approved by the Court makes everyone the loser.

The religious symbols cases are themselves the perfect symbol of the Supreme Court's attitude toward religion. The Court does not object to a little religion in our public life. But the religion must be tamed, cheapened, and secularized—just as religious schools and social welfare ministries must be secularized if they are to participate in public programs that are supposed to be open to all. Authentic religion must be shoved to the margins of public life; even there, it may be forced to submit to majoritarian regulation.

C. Legal Doctrine

The formal legal doctrines espoused by the Warren and Burger Courts reinforced their lack of sympathy for religion. This may seem not to be true of the Free Exercise Clause doctrine, under which the Warren and Burger Courts forbade the enforcement of laws burdening the exercise of religion unless necessary to achieve a compelling governmental interest. The compelling interest test is, after all, the most exacting level of constitutional scrutiny. But in the years between the test's formal appearance in 1963⁶⁷ and its formal abandonment in 1990,⁶⁸ the Supreme Court rejected all but one claim for free exercise exemption outside the field of unem-

⁶⁵ 465 US 668 (1984). See also *Allegheny*, 492 US at 596.

⁶⁶ *Allegheny*, 492 US at 598-600.

⁶⁷ *Sherbert*, 374 US 398.

⁶⁸ *Smith*, 110 S Ct 1595.

ployment compensation.⁶⁹ In every other case decided on the merits, the Court found either that the claimant's exercise of religion was not burdened or that the government's interest was compelling.⁷⁰ The doctrine was supportive, but its enforcement was half-hearted or worse.

In its Establishment Clause doctrine, the Court upheld the values of religious liberty in a few important cases, most notably the school prayer cases of the early 1960s.⁷¹ But the formal Establishment Clause doctrine, the *Lemon* test, has an inherent tendency to devalue religious exercise. Each of the prongs plays a part.

The first prong requires a secular purpose for all government action.⁷² This requirement is right and proper—except when purposes that the majoritarian culture considers “secular” happen to be fraught with religious significance to a minority. Then a due regard to the interests of the minority should permit the government at least to take their religious needs into account, even if the accommodation serves no “secular” purpose. Was it really an establishment of religion for the Occupational Safety and Health Administration to modify its hardhat rule out of respect for the religious dress of Sikh construction workers?⁷³ Was it an establishment to exempt sacramental wine from Prohibition?⁷⁴ Did these provisions have any purpose other than the protection of religion? As Justice O'Connor has commented: “It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a gov-

⁶⁹ The exception was *Wisconsin v Yoder*, 406 US 205 (1972).

⁷⁰ *Jimmy Swaggart Ministries v Bd. of Equalization*, 493 US 378, 391-92 (1990) (not burdened); *Bowen v Roy*, 476 US 693, 709 (1986) (not burdened); *Tony and Susan Alamo Foundation v Sec'y of Labor*, 471 US 290, 303-05 (1985) (not burdened); *Bob Jones Univ. v United States*, 461 US 574, 604 (1983) (compelling interest); *United States v Lee*, 455 US 252, 258-59 (1982) (compelling interest); *Hernandez v Comm'r of Internal Revenue*, 490 US 680, 682 (1989) (probably no burden; in any event, compelling interest).

In special contexts, including prisons, the military, and the use of government land, the Court did not even purport to apply the test. See *O'Lone v Estate of Shabazz*, 482 US 342 (1977); *Goldman v Weinberger*, 475 US 503 (1986); *Lyng v Northwest Indian Cemetery Protective Ass'n.*, 485 US 439 (1988). There were a lot of special contexts.

⁷¹ *School Dist. of Abington Township v Schempp*, 374 US 203 (1963); *Engel v Vitale*, 370 US 421 (1962).

⁷² *Lemon*, 403 US at 612-13.

⁷³ See OSHA Instruction STD 1-6.3, originally Field Information Memorandum No 75-11 (Feb 4, 1975), revoked, OSHA Notice CPL 2 (Nov 5, 1990).

⁷⁴ Volstead Act of Oct 28, 1919, ch 85, Title II, § 3, 41 Stat 305, codified at 27 USC § 16 (1988), repealed, Act of Aug 27, 1935, ch 740, Title I, § 1, 49 Stat 872.

ernment-imposed burden.”⁷⁵ To the extent that *Lemon*’s purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance.

The second prong of the *Lemon* test prohibits government action which has the effect of “advancing religion,” even if the effect is unintended and even if the action also advances secular interests.⁷⁶ This prohibition tends to foster discrimination against religion in two ways. First, government action often benefits (or “advances”) a broad range of activities and institutions, but the effects prong implies that the benefitted class may not include religious activities or institutions. Thus, for example, if the government subsidizes child care services, the effects prong suggests that the government must exclude church-based day care centers or, in the alternative, must require church-based centers to cease religious training and exercises as a condition to receiving the money.

Second, the effects prong fails to distinguish between advancing *religion* and advancing *religious freedom*. Any advancement of religious freedom is an advancement of religion—but not vice versa. For example, giving government employees the option of taking leave on days of religious observance would “advance” religion. But it would not induce anyone to practice religion; it would only remove an impediment to religious practice and thus expand the freedom of government workers to exercise their faith.⁷⁷ On the other hand, requiring public officials to affirm a belief in God “advances” religion by privileging the theist and penalizing the atheist.⁷⁸ By failing to distinguish between these two forms of “advancement,” the effects prong of the *Lemon* test interferes with benign government actions to accommodate or facilitate free religious exercise.

The third prong of the *Lemon* test prohibits “excessive entanglement” between government and religion.⁷⁹ As with the purpose and effect prongs, there is an element of wisdom in this prohibition. Other things being equal, government involvement with religion almost always has some effect on religion, and the overarching purpose of the Religion Clauses is to minimize the effect of government action on the practice of religion. However, the entanglement

⁷⁵ *Jaffree*, 472 US at 83 (O’Connor concurring).

⁷⁶ *Lemon*, 403 US at 612.

⁷⁷ See *Ansonia Board of Education v Philbrook*, 479 US 60 (1986).

⁷⁸ See *Torcaso v Watkins*, 367 US 488 (1961).

⁷⁹ *Lemon*, 403 US at 613.

prong overlooks the fact that the practice of religion is frequently intertwined with public life, and consequently that government and religion must interact if religion is even to survive—let alone participate in civil society on a full and equal basis. Unfortunately, these interactions cannot always proceed on a purely secular plane, since to avoid trampling on religious interests the government must be aware of what they are. In other words, a government that is not to some extent “entangled” with religion is one that is indifferent toward it.

Moreover, for more than a decade the Court embellished the entanglement prong with the notion of “political divisiveness”—the theory that the Court must strike down any supposed benefit to religion that generates political controversy even if it is otherwise consistent with the First Amendment.⁸⁰ This was a particularly pernicious doctrine, because it armed opponents of religious interests with an invincible weapon: their mere opposition became a basis for a finding of unconstitutionality. Of course, the political victories of *either* side in such controversies could be divisive; but the doctrine did not—and could not—work both ways. In effect, the doctrine blamed the religious side of any controversy for the controversy. Since the early 1980s, the Court has abandoned the notion of “political divisiveness” as an independent ground for striking down legislation, and properly so.⁸¹

The three prongs of the *Lemon* test, in combination, can frustrate the goals of the First Amendment. Consider *Lyng*, the case in which Native American worshippers sought to prevent the Forest Service from building a logging road through their ancient places of worship. I have already criticized the Court’s unsympathetic application of Free Exercise Clause doctrine in *Lyng*.⁸² Now consider the converse case. Suppose that the Forest Service had done what the Native American plaintiffs asked in *Lyng*: had allowed their religious needs to trump the secular reasons for building the log-

⁸⁰ See *id.* at 622-23; *Nyquist*, 413 US at 796-97; *Aguilar*, 473 US at 416-17 (Powell concurring). For a critique of the doctrine, see Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St Louis L J 205 (1980).

⁸¹ See *Lynch v Donnelly*, 465 US 668, 684 (1984) (“[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise impermissible conduct.”); *Mueller v Allen*, 463 US 388, 403-04 n 11 (1983) (restricting political divisiveness doctrine to cases involving a “direct subsidy” to religious institutions). The last case in which political divisiveness played a significant role in the Court’s decision was *Aguilar v Felton*, 473 US 402 (1985), where Justice Powell, who provided the swing vote, concurred on political divisiveness grounds. *Id.* at 416-17.

⁸² See text accompanying notes 56-61.

ging road. How would this decision have fared under the *Lemon* test?

First, consider the *purpose* of the Forest Service's decision. All the secular criteria for building the logging road were satisfied; the only reason not to build the road would be that the Indians thought the sites to be holy. This manifestly religious reason for the Forest Service's decision would violate the first prong of the *Lemon* test.⁸³ Second, consider the primary *effect* of the Forest Service's decision. Clearly it would advance the religion of the Yuroks, Karoks, and Talowas. The Court itself stated that it would be a "subsidy of the Indian religion" not to destroy the Native Americans' worship sites.⁸⁴ That violates the second prong of the *Lemon* test. Finally, consider whether the Forest Service's decision would *entangle* government and religion. In order to determine where to build its roads and which portions of the National Forests to open for lumbering, the Forest Service would have to employ religious and anthropological experts to determine the character of purportedly holy sites. In the event of conflicts, the Forest Service would have to decide between conflicting claims of religious significance.⁸⁵

In short, to accommodate the Native Americans in *Lyng* would violate all three prongs of the *Lemon* test. Yet the purposes of the Religion Clauses are advanced, not frustrated, when the government administers its property in such a way as to avoid devastating injury to the religious lives of its people. If *Lemon* stands in the way, then *Lemon* is the problem.

It is the parochial school aid cases that most starkly illustrate the perverse effects of the *Lemon* test. In these cases, the Court generally has prohibited government aid to schools that teach religion.⁸⁶ But in *Pierce v Society of Sisters*, a celebrated decision, the Court held that parents have a constitutional right to send their children to private, including religious, schools.⁸⁷ The Court explained that "[t]he fundamental theory of liberty upon which all

⁸³ Compare *Epperson v Arkansas*, 393 US 97, 107 (1968) ("No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens.").

⁸⁴ *Lyng*, 485 US at 453.

⁸⁵ Indeed, the government conducted just such an investigation in *Lyng*—the investigation that concluded that this particular project would virtually destroy the Indians' religion. *Id.* at 442.

⁸⁶ See *Lemon*, 403 US at 625; *Wolman*, 433 US at 255; *Nyquist*, 413 US at 769. Only relatively modest forms of aid of a secular character have been permitted. See *Allen*, 392 US at 248; *Everson*, 330 US at 18; *Regan*, 444 US at 661-62.

⁸⁷ 268 US 510, 534-35 (1925).

governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”⁸⁸ Without aid to private schools, however, the only way that parents can escape state “standardization” is by forfeiting their entitlement to a free education for their children—that is, by paying twice: once for everyone else’s schools (through property taxes) and once for their own. By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools. Nondiscriminatory allocation of educational resources would restore religious parents to the neutral set of incentives they faced before the government taxed them to support secular education. Whether nondiscriminatory funding is constitutionally required to achieve the promise of *Pierce* is a complicated question, not unlike the question whether the constitutional right to abortion recognized in *Roe v Wade*⁸⁹ requires nondiscriminatory funding of abortion and childbirth.⁹⁰ But even if nondiscriminatory funding is not constitutionally *required*, it was one of the greatest inversions of constitutional values in its history for the Court to hold that nondiscriminatory funding is constitutionally *forbidden*.

In her contribution to this symposium, Professor Sullivan defends the parochial school aid cases on the ground that “[a]ll religions gain from the settlement of the war of all sects against all” as well as from the “provision of universal public education.”⁹¹ But nowhere does she explain why giving advantages to secular viewpoints over religious viewpoints is necessary to the achievement of civic peace.⁹² The “war of all sects against all” is more plausibly

⁸⁸ Id at 535.

⁸⁹ 410 US 113 (1973).

⁹⁰ See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv L Rev 989 (1991). The Supreme Court rejected a nondiscriminatory funding claim in a summary decision in *Lutkemeyer v Kaufman*, 419 US 888 (1974), over a dissent by Justice White and Chief Justice Burger. The question has never been squarely presented in a case on the merits. The principle of nondiscrimination does not necessarily make it unconstitutional for the government to pay for public schools but not to pay for private schools, since the discrimination in that case would be based on the ownership of the schools rather than their ideational content. But it would undoubtedly be unconstitutional for the government to pay for secular private schools and not religious schools, or to maintain a public school system with a monopoly on public funds if the dominant justification for this was to circumvent the requirement of equal treatment.

⁹¹ Sullivan, 59 U Chi L Rev at 221 (cited in note 5).

⁹² Professor Sullivan does not claim that public schools are, could be, or should be “neutral” toward competing points of view. Id at 200-01.

averted by a universal principle of equal treatment, where none is permitted to gain an advantage through the force of government. To permit religious choices only at the cost of forfeiting an equal share in public goods is not freedom of religion. Nor does Sullivan explain how educational choice conflicts with the idea that universal education is a public good, benefitting all. Any education that satisfies objective criteria standards of educational quality generates public as well as private benefits, and should be equally entitled to public support.⁹³ Religious parents do not seek to be absolved from paying their fair share toward the public good of education; their objection is to being excluded from that good. In any other context, Professor Sullivan would be the first to recognize that it is unconstitutional for the government to refuse to fund an otherwise eligible activity solely because of the content of its speech.⁹⁴

The parochial school aid decisions of the Warren and Burger Courts can be divided into two categories: those that forbade any assistance to nonpublic schools, and those that allowed assistance only upon conditions that undermined their purpose for being. In *Board of Education v Allen*, for example, the Supreme Court permitted the state to provide textbooks to parochial school students only if they used the same secular textbooks that the public schools used.⁹⁵ This holding effectively required the parochial schools to secularize their curriculum if they wished to receive assistance. The very "standardization" of education held to be unconstitutional in *Pierce* (when accomplished through the regulatory power) was held to be constitutionally required in *Allen* (when accomplished through the spending power). Even this conditional grant was too much for the dissenters, who argued that since the schools teach religious doctrine they should not receive *any* public assistance.⁹⁶ Not a single member of the Court suggested that religious freedom and diversity might be enhanced if parents could choose the philosophical orientation of their children's education without forfeiting their fair share of public educational resources.

⁹³ In this era of Afro-centric and other particularistic multi-cultural schools, it is no longer possible (if it ever was) to argue that religious schools should be excluded because they do not present a unifying common curriculum. See McConnell, 1991 U Chi Legal F 123 (cited in note 33).

⁹⁴ See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989).

⁹⁵ *Allen*, 392 US at 243-45.

⁹⁶ *Id* at 250 (Black dissenting).

Despite their differences, the two sides on the Warren and Burger Courts shared a conception that everything touched by government must be secular. One side was deeply suspicious of religion, especially Catholicism, and concluded that quarantine was the only way to stave off theocracy. The other side was willing to accept a certain role for religion in public life, so long as religious institutions sacrificed their distinctively religious character. Whichever side might prevail in a particular case—the results swung back and forth between the two—the decisions consistently favored the secular over the religious. The Justices simply did not conceive of a world in which the governmental role was confined to finance, and the content of education left to the free choices of individual families. The Court thus placed the welfare-regulatory state on a collision course with religious freedom. As the sphere of government expanded, the field of religious pluralism had to shrink.

II. THE EMERGING JURISPRUDENCE OF THE REHNQUIST COURT

The Religion Clause jurisprudence of the Warren and Burger era was thus characterized by a hostility or indifference to religion, manifested in a weak application of free exercise doctrine and an aggressive application of an establishment doctrine systematically weighted in favor of the secular and against genuine religious pluralism. Far from protecting religious freedom against the vagaries of democratic politics, the Religion Clauses during this period became an additional instrument for promoting the politically dominant ideology of secular liberalism.

The ideology of secular liberalism, while still strong among the American elite, has lost its position of unquestioned dominance. On the left, a postmodernist intellectual current has cast doubt on the idea that secular liberalism should enjoy a privileged position and has opened the possibility for treating religion as one of many competing conceptions of reality. It is no longer intellectually credible to maintain that secular liberalism is simply the “neutral” position.⁹⁷ On the right, the resurgence of conservative religious

⁹⁷ A major theme of feminist legal studies, critical legal studies, critical race studies, and other postmodernist jurisprudence is that the seemingly objective cultural norms of liberalism privilege a particular (white, male, capitalist, rationalistic, heterosexual, Eurocentric) point of view and should be replaced by a radically pluralistic, multi-cultural approach. See, for example, Stephen Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 Harv L Rev 1350, 1350-53 (1991); Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L J 1330, 1392-1407 (1991); Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice*

movements among both Protestants and Catholics—and to a lesser extent among Jews—has made religion a more salient force in the political culture. If taken to extremes, this religious resurgence might well support measures inconsistent with the pluralist religious ideals of the First Amendment. Calls for a “Christian America” and the return of organized prayers in the schools give genuine—if often exaggerated—cause for alarm. But appropriately channelled, this shift in popular attitudes could provide a corrective for the secularist biases of the previous judicial era.

It is too early to tell how the Rehnquist Court ultimately will treat the Religion Clauses. The new Court seems prepared to repudiate the approach of the old, and in important areas—discussed in detail in Section III—has ameliorated unfortunate features of Warren and Burger Court Establishment Clause doctrine. But these improvements on establishment issues have come at a heavy price: the radical reduction of free exercise rights. Moreover, even where the results seem correct, the Rehnquist Court has failed to articulate a coherent vision of what it is attempting to accomplish. The positive developments, without exception, have involved the Court’s decision *not* to overturn actions taken by the political branches. Thus, it is possible that the Court has mistaken the real vices of the old jurisprudence as ones of excessive judicial activism rather than of favoring the secular over the religious.

One of the anomalies of the Warren and Burger approach was its expansive reading of both the Free Exercise and Establishment Clauses (though in the case of free exercise this expansive reading was largely an illusion). If the government attempted to regulate a religious activity, it might be held to violate the Free Exercise Clause; if it carved out a religious exemption, this might be held an establishment. The government seemed destined to lose, no matter what policy it adopted toward religion. There was, accordingly, some legitimacy to then-Associate Justice Rehnquist’s complaint that “[b]y broadly construing both Clauses, the Court has con-

Engendered, 101 Harv L Rev 10, 11-12 (1987). One would think that this jurisprudence would be receptive to arguments for religious pluralism, on the ground that the old jurisprudence privileges a secular worldview in the guise of “neutrality” and suppresses the various religious alternatives. For the most part, however, postmodernist legal scholarship has either ignored religion or treated it with hostility, as if it were part of the hegemonic culture to be overthrown. See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 Cal L Rev 1011, 1015 (1989) (criticizing “the hostility toward and ignorance of theology . . . in feminist theory”). Notwithstanding the general failure of postmodernists to apply their critique to issues of religion, however, their attack on liberal neutrality has fatally wounded the Religion Clause jurisprudence of the Warren and Burger Courts as an intellectual position.

stantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.”⁹⁸

The initial response of the Rehnquist Court has been to shrink the scope of both Religion Clauses and thereby to restore a significant degree of governmental discretion. This response can be seen as part of a general jurisprudential shift in favor of greater judicial restraint, which in other constitutional areas may be a welcome corrective. But judicial restraint, for its own sake, is not a faithful mode of interpreting the Religion Clauses. There is a crucial difference between the discovery of “rights” not expressly or implicitly protected by the Constitution, where the dangers of judicial legislation and the need for judicial restraint are greatest, and the enforcement of rights firmly based on the text and tradition of the Constitution.

The original theory of the First Amendment was not deferential to government in matters of religion. Daniel Carroll, one of two non-Protestant members of the First Congress, captured the spirit during the deliberations over what would become the Religion Clauses of the First Amendment. “The rights of conscience,” he said, “will little bear the gentlest touch of governmental hand.”⁹⁹ The Religion Clauses were born of distrust of government in matters of religion, based on experience. Those groups most vocal in demanding protection for religious freedom—the Quakers, the Presbyterians, and above all the Baptists—were precisely those groups whose practices were out of keeping with the majoritarian culture and who had borne the brunt of governmental hostility and indifference.¹⁰⁰ It is a mistake to read the Religion Clauses as a triumph for the forces of Enlightenment secularism. Proponents of religious freedom were the least secular and most “enthusiastic” of the sects. But it is equally mistaken to treat the Religion Clauses as acquiescing in governmental interference with religion. The advocates of the Religion Clauses valued their religious convictions too much to allow them to be subjected to governmental power. The overriding objective of the Religion Clauses was to render the new federal government irrelevant to the religious lives of the people.

⁹⁸ *Thomas v Review Board*, 450 US 707, 721 (1981) (Rehnquist dissenting).

⁹⁹ Speech of Daniel Carroll (Aug 15, 1789), in Gales, ed, 1 *Annals of Congress* at 757-58 (cited in note 6).

¹⁰⁰ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1437-41 (1990).

This objective has been vastly complicated by the emergence of the welfare-regulatory state. During the early days of the Republic, the reach of the federal government was strictly limited, and the matters within its jurisdiction—chiefly foreign and military affairs and commerce—had little effect on religion. Recall that Madison and the other Federalists initially argued that a Bill of Rights was not necessary because the powers of the federal government were so limited that it could pose no danger to our liberties.¹⁰¹ With some exceptions, if the federal government simply took no actions directed at religion, the objectives of the Religion Clauses would be fulfilled.¹⁰² As the powers of the federal government expanded and the coverage of the First Amendment was extended to the states, however, this ceased to be true. The government now fosters a vast sector of publicly-supported, privately-administered social welfare programs, and the allocation of resources in this sector inevitably affects religion. The government also now regulates the non-profit sphere, and these regulations similarly affect religion. Where once the government could treat religious institutions with benign neglect, the welfare-regulatory state requires a substantive policy toward religion that will preserve the conditions of religious freedom without hobbling the activist state. Unfortunately, neither the free exercise nor the establishment jurisprudence that seems to be emerging in the Rehnquist Court addresses that central problem.

A. Free Exercise

The Rehnquist Court's tendency to defer to majoritarian decisionmaking is most clearly evident in its reversal of free exercise doctrine. As noted above, the Warren and Burger Courts held governmental action invalid when it imposed a burden on the exercise of a sincerely held religious belief without compelling justification.¹⁰³ This meant that the government sometimes had to make accommodations or exceptions to laws that burdened the exercise of religion. In 1990, in *Employment Division v Smith*, the Rehnquist Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or

¹⁰¹ Max Farrand, 2 *The Record of the Federal Convention of 1787* 587-88 (Yale, rev ed 1937).

¹⁰² For examples of how the enumerated powers of Congress could affect religion, see McConnell, 103 Harv L Rev at 1478 nn 342-52 (cited in note 100).

¹⁰³ See text accompanying notes 67-70.

prescribes) conduct that his religion prescribes (or proscribes).’”¹⁰⁴ If the law is “generally applicable,” the government need not show that it serves an important (let alone compelling) purpose, even if its effect—as in *Smith* itself—is to make the practice of a religion virtually impossible.¹⁰⁵ Thus *Smith* holds that the state may forbid the central religious practice of a centuries-old religion now called the Native American Church—the sacramental ingestion of peyote—even though there was no evidence that this practice had deleterious consequences for the practitioners or for anyone else.¹⁰⁶

I have criticized the *Smith* decision elsewhere at length,¹⁰⁷ and I will not repeat those arguments. Nonetheless, a few observations on *Smith* will illustrate why I am concerned that the Rehnquist Court may be as mistaken in its way as were the Warren and Burger Courts. First and foremost, the *Smith* decision gives social policy, determined by the State, primacy over the rights of religious communities to order their affairs according to their own convictions. *Smith* describes this effect as an “unavoidable consequence of democratic government.”¹⁰⁸ Is apprehension of illegal aliens a policy of the government? Then the government can dragoon the Quaker Church, which for centuries has welcomed strangers and aliens in compliance with its reading of biblical principles, into enforcing the law against immigration.¹⁰⁹ Does the government favor preservation of old buildings in their original configuration? Then the government can determine how churches design their houses of worship.¹¹⁰ Does the government believe that homosexuality is a legitimate lifestyle? Then the government can require a religious university, which preaches that homosexual acts are sinful, to play host to gay rights organizations on its campus and to support them with its student funds.¹¹¹ Under *Smith*, the state is more powerful, the forces of homogenization are more powerful, and the ability of

¹⁰⁴ *Smith*, 110 S Ct at 1600 (quoting *United States v Lee*, 475 US at 263 n 3).

¹⁰⁵ *Id* at 1599.

¹⁰⁶ *Id* at 1597-98, 1606.

¹⁰⁷ Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U Chi L Rev 1109 (1990).

¹⁰⁸ *Smith*, 110 S Ct at 1606.

¹⁰⁹ *American Friends Service Committee v Thornburgh*, 941 F2d 808, 809-10 (9th Cir 1991).

¹¹⁰ See Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 Villanova L Rev 401 (1991).

¹¹¹ *Gay Rights Coalition v Georgetown Univ.*, 536 A2d 1 (DC App 1987) (en banc); see Comment, *Georgetown Rights Coalition v. Georgetown University: Failure to Recognize a Catholic University's Religious Liberty*, 32 Cath Lawyer 170 (1988).

churches to maintain their distinctive ways of life depends upon their skill at self-protection in the halls of Congress.

Second, as the *Smith* opinion candidly acknowledges, its interpretation will place "those religious practices that are not widely engaged in" at a "relative disadvantage."¹¹² Some religions are close to the center of prevailing culture in America. Their practices rarely, if ever, will conflict with an "otherwise valid law,"¹¹³ because, in a democracy, the laws will reflect the beliefs and preferences of the median groups. Religious groups whose practices and beliefs are outside the mainstream are most likely to need exceptions and accommodations. If most Americans shared the Quakers' attitudes toward immigration, we would not sanction employers for employing aliens; if most residents of the District of Columbia shared the Catholic teaching on sexuality, the District would not forbid discrimination on the basis of sexual preference. Moreover, only some of the religious groups in need of exceptions and accommodations will win the ear of the legislature. Those groups whose beliefs are least foreign and least offensive to the mainstream, and those with the largest numbers and greatest visibility, will be better able to protect themselves than will the smaller, more unpopular groups. *Smith* thus not only increases the power of the state over religion, it introduces a bias in favor of mainstream over non-mainstream religions. That bias may not displease those who believe in the wisdom and virtue of majoritarian culture, but it is not consistent with the original theory of the Religion Clauses.

Third, the *Smith* Court treated the claim for a free exercise exemption as essentially a request for a special benefit. In an earlier opinion, Justice Scalia, the author of *Smith*, characterized free exercise exemptions as "intentional governmental advancement" of religion.¹¹⁴ This misstates the issue. The Native American Church was not asking government for "advancement"; it was asking to be left alone. When the government criminalizes the religious ritual of a church, it "prohibits" the free exercise of religion in the most direct and literal sense of the word. If the courts cannot distinguish the failure to "prohibit" from the decision to "advance," it is no wonder that their decisions are so confused. To conceive of free exercise exemptions as requests for special benefits implicitly assumes that the state has the natural authority to regulate the church, and that choosing not to do so is a favor. That is not the

¹¹² *Smith*, 110 S Ct at 1606.

¹¹³ *Id* at 1600.

¹¹⁴ *Edwards v Aguillard*, 482 US 578, 617 (1987) (Scalia dissenting).

inalienable right to freedom of religion conceived by those who wrote and ratified the First Amendment.

Finally, *Smith* converts a constitutionally explicit liberty into a nondiscrimination requirement, in violation of the most straightforward interpretation of the First Amendment text. If the Constitution guaranteed the "right to own cattle," who would interpret it to allow the government to ban the ownership of all animals, so long as cattle are not "singled out"? The freedom of citizens to exercise their faith should not depend on the vagaries of democratic politics, even if expressed through laws of general applicability.

B. Establishment

The Rehnquist Court's greatest contributions to Establishment Clause doctrine have been its dismantling of some of *Lemon's* mistakes. In *Corporation of Presiding Bishop v Amos*,¹¹⁵ the Court removed the most serious doctrinal obstacles to legislative accommodations of religion. For the first time, the Court held unequivocally that the government may exempt religious organizations from a regulatory burden, even when not required to do so under the Free Exercise Clause. The Court did not abandon the *Lemon* test, but held that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission,"¹¹⁶ and that the effects test is not necessarily violated by "statutes that give special consideration to religious groups."¹¹⁷ In *Board of Education v Mergens*,¹¹⁸ the Court upheld the Equal Access Act, which requires public schools to permit religious (as well as political and philosophical) student clubs to meet on school premises on the same terms as other noncurricular clubs. The Court rejected the argument that religious activities must be excluded from any officially-sanctioned presence within a public school, on the ground that secularism can be counter to neutrality: "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."¹¹⁹ The degree to which this decision breaks with the old jurisprudence is shown by the fact that four of the five

¹¹⁵ 483 US 327 (1987).

¹¹⁶ *Id.* at 335.

¹¹⁷ *Id.* at 338.

¹¹⁸ 110 S Ct 2356 (1990).

¹¹⁹ *Id.* at 2371.

courts of appeals to rule on the issue had held, under *Lemon*, that it would be unconstitutional to allow student religious clubs to meet.¹²⁰ In *Bowen v Kendrick*,¹²¹ the Court made strides toward allowing religiously affiliated organizations to participate in publicly funded educational and social welfare programs on an equal basis with secular groups. The implications of these decisions will be discussed at greater length in Section III.

Notwithstanding these encouraging decisions, the course of Establishment Clause doctrine remains very much in doubt. In none of these cases did the Court explicitly announce a change in doctrine. *Amos* was important in establishing the legitimacy of accommodation, but left the limits of the accommodation doctrine unclarified. *Mergens* is unlikely to have much application outside of its particular context. *Kendrick* entailed a rather unpersuasive manipulation of the ambiguous concepts of the *Lemon* test. It augured doctrinal change, but provided no hint of what form the change may take.¹²² The Court may well adopt an affirmatively pluralistic interpretation of the Establishment Clause, as is discussed in Section III, but it might also retreat to a posture of deference to majoritarian decisionmaking. In the remainder of this Section, I will discuss the specific proposals by members of the new Court for revising the *Lemon* test.

1. Dropping the entanglement prong.

Three members of the Court have proposed modifying the *Lemon* test by eliminating the third prong, "entanglement", which some have blamed for the chaotic and inconsistent results of the Court's establishment cases.¹²³ Justice White has attacked and ridiculed the entanglement prong ever since his dissent in *Lemon* it-

¹²⁰ *Brandon v Board of Education*, 635 F2d 971 (2d Cir 1980); *Lubbock Civil Liberties Union v Lubbock Independent School Dist.*, 669 F2d 1038 (5th Cir 1982); *Nartowicz v Clayton County School Dist.*, 736 F2d 646 (11th Cir 1984); *Garnett v Renton School Dist.*, 874 F2d 608 (9th Cir 1989), cert granted, judgment vacated, and case remanded, 110 S Ct 2608 (1990), on remand, 772 F Supp 531 (W D Wash 1991). Only the lower court in *Mergens*, in the Eighth Circuit, had upheld the Act. *Mergens v Board of Education*, 876 F2d 1076, 1079-80 (8th Cir 1989).

¹²¹ 487 US 589 (1988).

¹²² On its surface, *Kendrick* appeared to confine the rigors of the *Lemon* test to elementary and secondary education. But there is no persuasive reason to single out the educational sector for special constitutional rules.

¹²³ See, for example, Justice O'Connor's dissent in *Aguilar*, 473 US at 430. See also Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U Pitt L Rev 673, 681 (1980).

self,¹²⁴ calling it “curious and mystifying,” “insolubly paradoxical,” “redundant,” “superfluous,” and without “constitutional foundation.”¹²⁵ Recently Chief Justice Rehnquist and Justice O'Connor have joined him.¹²⁶ According to these Justices, state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. If a statute has neither a purpose nor an effect of advancing or endorsing religion, these Justices “would not invalidate it merely because it requires . . . some state supervision to ensure that state funds do not advance religion.”¹²⁷

Without modifying the effects prong, however, eliminating the entanglement prong could actually make matters worse. No longer would there be a constitutional obstacle to the government surveillance needed to ensure that funds are not used to “advance religion” (as that concept is misleadingly employed in the *Lemon* cases). The state could root out religious elements in the activities of all religious organizations participating in public programs. The effects prong without the entanglement prong imposes a classic unconstitutional condition: the recipient may receive benefits to which it is otherwise entitled under neutral criteria, if and only if the recipient waives its freedom of speech with respect to religion. For example, in *Lemon* itself, by agreeing to pay fifteen percent of the salaries of teachers in parochial schools, the state would have obtained not only the warrant, but the constitutional obligation, to ensure that those teachers excised any religious content from their classes, one hundred percent of the time. Only the entanglement prong of *Lemon* stood in the way. The *Lemon* Court held that the governmental interference with the operations of the parochial school which would have been necessary to enforce the secular use limitation was an unconstitutional entanglement between church and state; thus the Court denied the aid altogether.¹²⁸ In other words, the entanglement prong averted the unconstitutional condition by refusing to permit aid *even if* the school were willing to waive its freedom of speech.

Parochial school supporters universally perceived the result in *Lemon* as a disaster. But without the entanglement prong, the pro-

¹²⁴ *Lemon*, 403 US at 661-71 (White dissenting).

¹²⁵ See *Roemer v Maryland Public Works Bd.*, 426 US 736, 768-69 (1976) (White concurring) (quoting earlier opinions).

¹²⁶ *Aguilar*, 473 US at 430 (O'Connor, joined by Rehnquist, dissenting).

¹²⁷ *Id.*

¹²⁸ *Lemon*, 403 US at 611-25.

gram at issue in *Lemon* would have effectively destroyed religious education. Few schools could have resisted an offer of subsidies for their teachers' salaries, and the curriculum of the parochial schools would have become indistinguishable from that of the public schools. Under *Allen*, the religious schools would have received free textbooks, provided that those textbooks were strictly secular. Under *Lemon* faculty salaries would have been subsidized, provided that their classroom teaching was strictly secular. Religion would have become irrelevant to the core educational offerings of the school. The entanglement prong of the *Lemon* test, which cut religious schools off from funding, and thus from secularization, was a blessing in disguise for religious choice and diversity.

2. Dropping the purpose prong.

In a 1987 opinion joined by Chief Justice Rehnquist, Justice Scalia urged "[a]bandoning" the first prong of the *Lemon* test, the requirement of a "secular purpose."¹²⁹ He relied on two major points: (1) that it is not possible to determine legislative purpose;¹³⁰ and (2) that the Court has not clearly defined the requirement of a "secular purpose."¹³¹ The first point is not peculiar to the Religion Clauses. Indeed, the argument about legislative purpose is one of the most important questions cutting across the fields of constitutional law. It affects everything from the Equal Protection Clause to the Commerce Clause to the Bill of Attainder Clause.¹³² I shall not enter into the debate here, other than to say that it would be unprincipled to abandon the purpose prong of the *Lemon* test on these grounds if the Court intends to inquire into legislative purpose in other contexts.

Scalia's second point about the purpose prong is more telling. The Court *has* been singularly unhelpful in defining the requirement of a "secular purpose." Does it mean that the legislature may not have been motivated by "religious considerations?"¹³³ This definition would render all religious accommodations suspect, for

¹²⁹ *Edwards*, 482 US at 640 (Scalia dissenting).

¹³⁰ *Id* at 636-39.

¹³¹ *Id* at 613-19.

¹³² John Hart Ely's analysis of this issue, though more than twenty years old, is still the best general study of the question. See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L J 1205 (1970). With reference to the Religion Clauses, Ely advocates making illicit purpose a necessary, as opposed to a sufficient, element of the constitutional claim. *Id* at 1314.

¹³³ *Lynch*, 465 US at 680.

reasons discussed above.¹³⁴ Does it forbid the legislature from making religiously-informed judgments, or basing legislation on the religiously-informed judgments of their constituents? This definition would be bizarre, for religion remains the single most important influence on the values of ordinary Americans. Are laws against stealing suspect because most Americans would identify the Ten Commandments as the source of their moral intuition against theft? Left undefined, the purpose prong is an invitation to mischief—a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere. This understanding would be a sharp and unwarranted break from our political history. From the War for Independence to the abolition movement, women's suffrage, labor reform, civil rights, nuclear disarmament, and opposition to pornography, a major source of support for political change has come from explicitly religious voices.

Nonetheless, abandoning the purpose prong would be an overreaction. Legislative purpose is relevant in at least two contexts. First, one element in the Establishment Clause analysis of a statutory program is whether its benefits are available generally, to non-religious and religious recipients alike. Purpose is a necessary backstop to facial neutrality. A law's facially neutral categories may be pretextual, especially where they produce disproportionate effects. The absence of a strong secular justification for the categorization is the best evidence that the program favors religion over nonreligion, or one religion over another.¹³⁵

Second, a program with an effect that favors one religion may nonetheless be constitutional if there is a powerful secular justification for it. The National Holocaust Memorial in Washington contains many exhibits that pertain to the Jewish religion; but the obvious historical justification for "singling out" Judaism in this context should rescue it from any establishment challenge. Similarly (though less clearly), Congress made a large grant to the Roman Catholic Church a few years ago for the purpose of assisting illegal aliens in applying for amnesty under the Immigration Re-

¹³⁴ See text accompanying notes 72-75.

¹³⁵ The same is true for free exercise cases: a facially neutral rule that "happens" to bear most heavily on a particular religious practice should not be sustained without persuasive secular justification. A law outlawing all hallucinogenic drug use is nondiscriminatory; a law outlawing only peyote use would, in all likelihood, be a measure directed against the Native American Church. Under the legal framework of *Smith*, an inquiry into purpose is more necessary than ever before.

form Act.¹³⁶ Though the effect was discriminatory, the justification was strong: the target population is understandably mistrustful of government agents and the Catholic Church is uniquely positioned to reach them.

These considerations suggest that, instead of abandoning the inquiry into purpose, the Court should define the concept more carefully. But even if Justice Scalia were correct that the purpose prong should be abandoned, this modification to the *Lemon* test would be of relatively little consequence. Situations in which the legislature lacks *any* secular justification for its actions are rare, and in the vast majority of cases the Court has found the purpose prong easily satisfied. In only four cases has the Supreme Court struck down a statute because it lacked a secular purpose,¹³⁷ and in three of those cases the Court would likely have found the statutes unconstitutional on other grounds if it had not used the purpose test.¹³⁸ The purpose prong is the least significant part of the *Lemon* test, and eliminating it would do little to solve the problems created by *Lemon*.

3. Nonpreferentialism.

In several opinions in 1985, then Associate Justice Rehnquist urged that the Establishment Clause be interpreted solely to forbid "establishment of a national religion" and "preference among religious sects or denominations."¹³⁹ According to Rehnquist, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."¹⁴⁰ Rehnquist, who has not mentioned this suggestion since, may have abandoned it. Although the nonpreferentialist position may lead to correct results in a large number of cases, it is theoretically unsound. Under that approach, the government could use its taxing

¹³⁶ The Immigration and Naturalization Service contracted with "qualified designated entities" (QDEs) to perform most of these services, paying them \$15 for each application processed. Cheryl Devall, *Legal Status for Illegal Aliens Right Around Corner, U.S. Says*, Chi Trib 3 (May 3, 1987). The U.S. Catholic Conference, acting through its dioceses, was the most prominent QDE: by early 1987, the Catholic Charities of Los Angeles alone had registered 276,000 probable applicants. David Holley, *Groups in L.A. Ready to Assist Aliens Listed*, LA Times A1 (Apr 24, 1987).

¹³⁷ *Edwards*, 482 US at 585-89; *Jaffree*, 472 US at 56; *Stone v Graham*, 449 US 39, 40-41 (1980); and *Epperson*, 393 US at 106-07.

¹³⁸ *Jaffree* is the exception.

¹³⁹ *Jaffree*, 472 US at 106 (Rehnquist dissenting).

¹⁴⁰ *Id.*

and spending power to augment the position and resources of the religious sector—an effect that is no less objectionable than augmenting the secular sector under the *Lemon* test.

Rehnquist proposed the nonpreferentialist approach on the strength of certain seemingly powerful evidence of the original understanding.¹⁴¹ Since that time, however, more complete historical research has refuted the nonpreferentialist argument.¹⁴² I do not expect nonpreferentialism to figure prominently in future decisions.

Indeed, in the years since 1985, Rehnquist has joined opinions for the Court that implicitly reduce the standard of review for government actions that discriminate among religions.¹⁴³ These actions used to receive “strict scrutiny,” even more difficult to satisfy than the *Lemon* test. By contrast, the *Smith* opinion observed:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁴⁴

¹⁴¹ Rehnquist's dissent in *Jaffree* closely followed the historical research of Robert L. Cord, *Separation of Church and State* (Lambeth, 1982). See also Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (American Enterprise Institute for Public Policy Research, 1978).

¹⁴² See Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: “Nonpreferential” Aid to Religion: A False Claim About Original Intent*, 27 Wm & Mary L Rev 875 (1986). Dean Rodney Smith has offered a rebuttal to Laycock, but his principal argument seems to be with Laycock's use of the term “nonpreferentialism” rather than with Laycock's historical analysis of Rehnquist's position. Rodney K. Smith, *Nonpreferentialism In Establishment Clause Analysis: A Response To Professor Laycock*, 65 St John's L Rev 245 (1991). Smith distinguishes among three possible forms of “nonpreferentialism,” of which Smith supports one (nonpreferentialism as to matters of conscience) and Laycock supports another (nonpreferentialism between religion and nonreligion). *Id.* at 247-48. Smith and Laycock both reject the third (nonpreferentialism among religions), which is what Laycock means by “nonpreferentialism,” and which represents Justice Rehnquist's position in the *Jaffree* dissent.

¹⁴³ Under prior rulings, the Supreme Court treated discrimination among religions as the most serious of Establishment Clause offenses, subject to the highest level of scrutiny. See, for example, *Larson*, 456 US at 244 (“the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another”). This conclusion has voluminous support in the history of the First Amendment, and I know of no First Amendment theorist who disputes it. For a summary of the historical evidence, see McConnell, 57 U Chi L Rev at 1130-31 (cited in note 107).

¹⁴⁴ *Smith*, 110 S Ct at 1606.

This language indicates that the Justices who make up the working majority on the Rehnquist Court consider the principle of denominational neutrality to be less important than the need to avoid balancing tests. In *Hernandez v Commissioner*, a shocking decision that received little attention, the Internal Revenue Service had denied tax deductions to members of the Church of Scientology for certain fixed-price payments they made to participate in worship services.¹⁴⁵ The IRS had a formal written policy of allowing deductions for comparable practices by other religions, such as pew rent and the sale of tickets to Jewish high holy days, and the government offered no explanation for treating the Scientologists differently.¹⁴⁶ The Court nonetheless upheld the action, reasoning that "the IRS m[ight] be right or wrong with respect to these other faiths," and that the Court would have to wait for a more complete factual record about the other faiths before reviewing the allegation of discriminatory treatment.¹⁴⁷ This reasoning empties the requirement of equal treatment of any force, since the government is free to continue to treat Protestants and Jews in one way and Scientologists in another. Only Justices O'Connor and Scalia dissented in *Hernandez*; Justices Brennan and Kennedy did not participate in the decision.

Hernandez suggests that, far from making the principle of denominational neutrality the exclusive focus of Establishment Clause analysis, the Rehnquist Court is discarding or neglecting it. This trend will only exacerbate the Court's tendency toward acquiescence in governmental decisions that favor mainstream religious traditions.

4. The endorsement test.

A more prominent alternative to the *Lemon* test is the so-called "endorsement test," first proposed by Justice O'Connor in a concurring opinion¹⁴⁸ and sporadically embraced by opinions for the Court in subsequent cases.¹⁴⁹ According to Justice O'Connor, the most "direct infringement [of the Establishment Clause] is

¹⁴⁵ 490 US 680 (1989).

¹⁴⁶ *Id.* at 701-03.

¹⁴⁷ *Id.* at 702-03.

¹⁴⁸ *Lynch*, 465 US at 688 (O'Connor concurring).

¹⁴⁹ *Grand Rapids*, 473 US at 389-90; *Mergens*, 110 S Ct at 2371-72; *Edwards*, 482 US at 587; *Allegheny*, 492 US at 592-93.

government endorsement or disapproval of religion.”¹⁵⁰ She explained that

Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹⁵¹

There is some appeal to the endorsement concept, principally because it focuses on how the governmental practice affects the “outsider,” which I take to mean the religious minority. There is no obvious merit in government action with the sole purpose or effect of endorsing one religious belief over another, since the government is unlikely to be a valuable contributor to our understanding of spiritual truth. Notwithstanding its initial appeal, however, the endorsement test is not an attractive alternative to the *Lemon* test, for several reasons.¹⁵²

a) *The impossibility of defining “endorsement.”* First, the very “goal” of the endorsement test, according to Justice O’Connor, is to identify a principle that is “‘not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.’”¹⁵³ Yet this goal of consistency is the test’s greatest failing. There is no generally-accepted conception of what “endorsement” is, and there cannot be. Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no “neutral” position, outside the culture, from which to make this assessment. The bare concept of “endorsement” therefore provides no guidance to legislatures or lower courts about what is an establishment of religion. It is nothing more than an application to the Religion Clauses of the principle: “I know it when I see it.”¹⁵⁴ Consider the following examples:

¹⁵⁰ *Lynch*, 465 US at 688 (O’Connor concurring).

¹⁵¹ *Id.*

¹⁵² For other arguments in opposition to the endorsement test, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 Mich L Rev 266 (1987).

¹⁵³ *Jaffree*, 472 US at 69 (O’Connor concurring) (citation omitted).

¹⁵⁴ See William P. Marshall, “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S Cal L Rev 495 (1986).

(1) How would the parochial school aid cases fare under the endorsement test? The majority position has been that most forms of aid to religious schools are impermissible, in part because it creates an appearance of a "symbolic union" between church and state.¹⁵⁵ A significant segment of the population believes that the use of government funds to assist religious education is tantamount to putting priests on the payroll. On the other hand, granting funds to secular schools but not to equally qualified religious schools creates at least the *appearance* of disapproval. Parents of children attending religious schools often claim they are treated as second-class citizens, unable to receive public benefits to which they would otherwise be entitled for the sole reason that the ideological content of the education they have chosen is religious.

(2) Does tax-exempt status convey a message of endorsement of churches? The government grants tax exemptions on the theory that exempt organizations provide benefits to the public. Including churches on this list implies that they are wholesome and beneficial institutions, especially when the statute mentions "churches" explicitly. But what message would be conveyed by excluding churches from the class of tax-exempt charities?

(3) Do public schools endorse religion if they refrain from teaching evolution? The majority of the Supreme Court so held, on the ground that disbelief in evolution is a tenet of fundamentalist Christianity.¹⁵⁶ A fundamentalist Christian might think, however, that teaching evolution without discussing creationist objections expresses disapproval of his religious view.¹⁵⁷ Justice Black, in confronting this issue, concluded that leaving evolution out of the curriculum was a neutral way to avoid taking an official position on a controversial religious issue.¹⁵⁸

(4) Did the government endorse religion by providing worship services to the men and women fighting the war against Iraq? Or would failure to do so have conveyed disapproval?

¹⁵⁵ *Grand Rapids*, 473 US at 389-92.

¹⁵⁶ *Epperson*, 393 US at 107-09.

¹⁵⁷ Others think so too. See Gregory Gelfand, *Of Monkeys and Men—An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools*, 16 J L & Educ 271 (1987).

¹⁵⁸ *Epperson*, 393 US at 112-13 (Black concurring).

(5) Does exemption of religious organizations or of religiously motivated individuals from a law of general applicability “endorse” religion? Opponents of religious accommodations argue that “[s]pecial treatment for religion connotes sponsorship and endorsement”¹⁵⁹ and that exemptions “create[] ill will and divisiveness among the American people.”¹⁶⁰ Justice O’Connor agrees that exemptions cause resentment, but holds that this resentment is “entitled to little weight” because accommodations promote the “values” of the Free Exercise Clause.¹⁶¹ Others, such as Professor Laycock, say that exemptions do not appear to endorse religion at all.¹⁶² I know all of these people to be reasonable observers, well schooled in the values underlying the First Amendment. That does not seem to help.

For each of the above questions, it is tempting to answer “yes” to both sides of the question—the government action in question conveys endorsement, but the opposite action conveys disapproval. Any action the government takes on issues of this sort inevitably sends out messages, and it is not surprising that reasonable observers from different legal and religious perspectives respond to these messages in different ways. These examples raise some of the most important and most often litigated issues under the Establishment Clause, and the concept of endorsement does not help to resolve them.

To be sure, most of us have strong intuitions about how to resolve the foregoing examples. But those intuitions are based—or should be based—on substantive conceptions about the proper relationship between religion and government. Strict separationists will take the position that any provision of financial or other assistance to religion is an endorsement. Advocates of “facial neutrality” will take the position that any action that “singles out” religion for special treatment more favorable than that given to secular groups or ideologies is an endorsement. Accommodationists will say that benefits to religion that are either facially neutral or that accommodate the free exercise of religion are neutral in their

¹⁵⁹ William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U Chi L Rev 308, 320 (1991).

¹⁶⁰ Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J L Ethics & Pub Policy 591, 602 (1990).

¹⁶¹ *Jaffree*, 472 US at 83 (O’Connor concurring).

¹⁶² Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L Rev 993, 1003 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 S Ct Rev 1, 16-17.

symbolic effect, and that anything less would be an expression of disapproval. The concept of “endorsement” adds nothing to any of these analyses. Indeed, it detracts from the analysis, because it eliminates the need for the judge to explain the true basis for the judgment. A finding of “endorsement” serves only to mask reliance on untutored intuition.¹⁶³

b) *Inconsistency with accommodation.* Second, not only is the endorsement test indeterminate, it is not evenhanded. It perpetuates some of the implicit biases of the *Lemon* test.¹⁶⁴ The endorsement test casts suspicion on government actions that convey a message that religion is worthy of particular protection—as any accommodation of religion necessarily does—and thus encourages indifference toward religion. There is no way to distinguish between government action that treats a religious belief as worthy of protection, and government action that treats a religious belief as intrinsically valuable. Why accommodate religion unless religion is special and important? Justice O'Connor's endorsement test is therefore in tension with her accommodationist interpretation of the Free Exercise Clause.

Justice O'Connor attempts to avoid this tension by specifying that her “reasonable observer” who is the judge of endorsement “would take into account the values underlying the Free Exercise Clause.”¹⁶⁵ Presumably, the reasonable observer who is the judge of disapproval would similarly “take into account the values underlying” the Establishment Clause. But this attempt to reconcile accommodation to the endorsement test is circular. If our reasonable observers know the “values” underlying the Religion Clauses, and if those values are something other than endorsement and disapproval, what need have we of the endorsement test? We should look directly to the principles of the Free Exercise and Establishment Clauses and not be waylaid by issues of perception.

¹⁶³ Justice O'Connor has defended her endorsement test against the charge of indeterminacy. *Allegheny*, 492 US at 628-30 (O'Connor concurring). She admits that the test “may not always yield results with unanimous agreement at the margins,” pointing out that this is equally true of other tests. *Id.* at 629. But Justice O'Connor focuses her attention in this discussion solely on the religious symbols cases. My point is that the endorsement test is indeterminate in other contexts, where substantive doctrines provide reasonably clear guidance and superior results.

¹⁶⁴ See text accompanying notes 71-96.

¹⁶⁵ *Allegheny*, 492 US at 632 (O'Connor concurring).

c) *The bias against religion.* Much like the effects prong of the *Lemon* test,¹⁶⁶ the apparent symmetry of the endorsement test—its equal condemnation of actions that “endorse” and actions that “disapprove” religion—is spurious. No court applying the test has ever struck down a governmental action because it appeared to “disapprove” of a religion. The reason lies in the structure of the Religion Clauses. Disapproval of religion is not an “establishment” of religion because the government typically has a secular purpose for its action, and because there is no “religion” that is being “established.” For example, when the New York public schools train their teenage pupils in the use of condoms, this plainly creates an appearance of “disapproval” of a tenet of the Roman Catholic Church. (Imagine the reaction if the schools instructed their students in the method of natural family planning.) But there is no “religion” of condom advocacy on the other side—nothing but a particular secular view regarding public health and sexual hygiene. To solve difficulties of this sort, attorneys for traditionalist parents have tried to portray secular ideology as the religion of “secular humanism,” but this strategy has been a failure.¹⁶⁷ When the government prefers secular ideas to religious ideas, it does not violate the Establishment Clause, no matter how strong the “message of disapproval.”

The appearance of disapproval more plausibly violates the Free Exercise Clause. But plaintiffs who assert free exercise claims based on disapproval run afoul of the requirement that they identify a specific “burden” on their practice of religion.¹⁶⁸ In *Mozert v Hawkins County Board of Education*, parents of children in the public schools of Hawkins County, Tennessee, contended that particular textbooks, read as a whole, denigrated their religion.¹⁶⁹ They asked that their children be permitted to use substitute texts.¹⁷⁰ The Sixth Circuit rejected this claim on the ground that

¹⁶⁶ See note 9.

¹⁶⁷ See *Smith v Bd. of School Comm'rs of Mobile County*, 655 F Supp 939, 960-71, 980-83 (S D Ala 1987) (summarizing and adopting testimony and argument purporting to show that the public school curriculum was infused with the tenets of the “religion” of secular humanism), rev'd, 827 F2d 684 (11th Cir 1987). For a balanced introduction to the “secular humanism” controversy, see James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in James Davison Hunter and Os Guinness, eds, *Articles of Faith, Articles of Peace* 54 (Brookings, 1990).

¹⁶⁸ See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv L Rev 933 (1989); David C. Williams and Susan H. Williams, *Volitionalism and Religious Liberty*, 76 Cornell L Rev 769, 798-850 (1991).

¹⁶⁹ 827 F2d 1058 (6th Cir 1987).

¹⁷⁰ *Id.* at 1060.

enforced exposure to contrary views does not violate the Free Exercise Clause.¹⁷¹ "What is absent from this case," according to the Sixth Circuit, "is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion."¹⁷² If enforced exposure to materials denigrating one's religion does not communicate a "message of disapproval," I cannot imagine what would.

This result is in obvious contrast to the nativity scene cases, in which the Court has recognized a constitutional claim against being exposed to a government message supporting another religion, even when the claimant could easily avoid the exposure. Why is compelled exposure to governmental messages denigrating one's religion constitutional, while avoidable exposure to governmental messages favorable to another religion is not?

Justice O'Connor best illustrates this asymmetry in her application of her own test. In *Lyng*, the free exercise claimants, a small Native American religious minority, complained of governmental actions that were "deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment."¹⁷³ One might have expected Justice O'Connor to express concern that the government's destruction of holy sites would communicate the "message" that these members of a religious minority were "not full members of the political community." Instead, she maintained that the believers would have a free exercise claim only if they were "coerced by the Government's action into violating their religious beliefs."¹⁷⁴ "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs."¹⁷⁵ It is very odd that Justice O'Connor considers the "coercion" test so inadequate when the messages conveyed by public programs are *favorable* to religion, but embraces the "coercion" test when the messages are *offensive* to religion. Evidently, the government is free to disparage, but not to speak favorably of, religion.¹⁷⁶

¹⁷¹ Id at 1063-65 (emphasizing that plaintiffs' objection was to the children's "exposure" to the objectionable materials).

¹⁷² Id at 1069.

¹⁷³ *Lyng*, 485 US at 452. See notes 56-61 and accompanying text for a fuller discussion of the facts of the case.

¹⁷⁴ Id at 449.

¹⁷⁵ Id at 452.

¹⁷⁶ Justice O'Connor and some commentators have attempted to make a virtue of this inconsistency, arguing that "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *Allegheny*, 492 US at 628 (O'Connor concurring). Accord Laycock, 27 Wm &

d) *The bias among religions.* The endorsement test also has an implicit bias in favor of some religions and against others. Messages affirming mainstream religion (and especially "nonsectarian" theism) are likely to be familiar and to seem inconsequential. As Justice O'Connor has interpreted her approach, if a practice is "longstanding" and "nonsectarian," it is unlikely to "convey a message of endorsement of particular religious beliefs."¹⁷⁷ In our culture, most "longstanding" symbols are those associated with Protestant Christianity, and those most likely to be perceived as "nonsectarian" are symbols associated with liberal Protestantism, symbols common to the Jewish and Christian faiths, or symbols incorporating vague references to an unidentified deity.¹⁷⁸ Even so sensitive an observer as Justice Brennan has suggested that governmental religious symbols might be permissible if they are "non-denominational" or if they represent "ceremonial deism."¹⁷⁹ Brennan's suggestion looks very much like endorsement of a civil religion, something serious religionists of all faiths should find deeply troubling.

e) *The lack of historical support.* Finally, though I will not elaborate the point here, the endorsement test has no support in the history of the Religion Clauses. The generation that adopted the First Amendment viewed some form of governmental compul-

Mary L Rev at 922 (cited in note 142); Sullivan, 59 U Chi L Rev at 205 (cited in note 5). But properly understood, the two clauses are symmetrical and complementary—not redundant. The Establishment Clause is about the use of governmental power *in favor of* religion (either a particular religion or religion in general), and the Free Exercise Clause is about the use of governmental power *against* religion (either a particular religion or religion in general). There is no persuasive reason to limit one form of interference with religious liberty to coercion while expanding the other to endorsement. The effect of limiting establishment to cases involving coercion may appear to be "redundant" only because of the close relation between the Religion Clauses. Disadvantaging one religion tends to support the rest—and thus could be described as an establishment. See *Larson*, 456 US at 228. Advantaging one religion tends to disadvantage the rest—and thus could be described as a violation of free exercise. See *Hernandez*, 490 US at 680. In that sense, *either* clause could be said to be a redundancy. But this "redundancy" only points out the essential unity of the two Religion Clauses, and no more justifies an asymmetrical expansion of the Establishment Clause than it does an asymmetrical expansion of the Free Exercise Clause.

¹⁷⁷ *Allegheny*, 492 US at 630-31 (O'Connor concurring).

¹⁷⁸ The term "nonsectarian" has a long history as a euphemism for liberal Protestantism, in contradistinction to Roman Catholicism and evangelical Christianity. See McConnell, 1991 U Chi Legal F at 138 (cited in note 33).

¹⁷⁹ *Lynch*, 465 US at 700, 716 (Brennan dissenting). Justice Brennan has stated that "[s]hould government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgement must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion." *Id.* at 714. I am not sure what this means, if it means anything at all.

sion as the essence of an establishment of religion.¹⁸⁰ The religious freedom provision of the Virginia Declaration of Rights, long recognized as the precursor to the First Amendment, began with the statement that religion "can be directed only by reason and conviction, not by force or violence."¹⁸¹ Jefferson argued against the "error" that the "operations of the mind . . . are subject to the coercion of the laws,"¹⁸² and Madison denounced "attempts to enforce [religious obligations] by legal sanction."¹⁸³ The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways, without favoring one sect over another. Consider, for example, the resolution of the First Congress requesting the President to "recommend to the people" a day of thanksgiving and prayer;¹⁸⁴ or the scheduling of divine services following the inauguration of President Washington.¹⁸⁵ If noncoercive messages of endorsement raise a constitutional issue at all, they only do so at the fringes of the constitutional principle. The Religion Clauses were not directed against the evil of perceived messages, but of government power. Justice O'Connor's position that endorsement is the "most direct" infringement of the Establishment Clause is without support in history.

f) *Suggestions for improvement.* The indeterminacies of the endorsement test would not be so serious if it were recognized only as an approach to a specific problem: evaluating government action where the *only* effect on religion is symbolic. In this context, all clear tests sometimes produce wrong results, and all tests that provide tolerable results are irremediably unclear. The endorsement test is more harmful when it is applied to government action that has real, nonsymbolic consequences. There, focusing on the appearance of endorsement only distracts from attention to the real effects of the government action.

¹⁸⁰ See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm & Mary L Rev 933 (1986).

¹⁸¹ Virginia Declaration of Rights, § 16 (1776), reprinted in Philip B. Kurland and Ralph Lerner, eds, 5 *The Founders' Constitution* 70 (Chicago, 1987).

¹⁸² Thomas Jefferson, *Notes on the State of Virginia*, Query 17 (1784), reprinted in *id* at 79.

¹⁸³ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 US at 70.

¹⁸⁴ Stokes and Pfeffer, *Church and State in the United States* at 87 (cited in note 35).

¹⁸⁵ *Id.*

Even within the context of government symbols, the endorsement test suffers because it fails to distinguish between two quite different formulations. The most common formulation of the endorsement test asks, in the abstract, whether the government's message will be perceived as endorsing or disapproving religion.¹⁸⁶ But another formulation is that "[t]he endorsement test . . . preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."¹⁸⁷ The difference between these two formulations is important whenever the government "endorses" religion along with many other institutions or ideologies. It would be one thing for Illinois to declare Mormonism the official religion of the state, thus ranking it above the others; it would be another thing for Illinois to honor the accomplishments of the Mormons by creating a public monument in Nauvoo, Illinois.¹⁸⁸ Such a monument would not reflect negatively on the value of other religions.

The latter formulation of the endorsement test is better. The target of the endorsement test should be favoritism or preference, not endorsement. The "equal access" controversy illustrates why. The issue was whether public high schools could constitutionally permit religious student clubs to meet on their premises on the same conditions as other extracurricular student clubs. A typical condition was that a club must "contribute to the intellectual, physical or social development of the students and [be] otherwise considered legal and constitutionally proper."¹⁸⁹ Under the usual formulation of the endorsement test, a school could not constitutionally allow a religious club to meet under this condition, because to do so would convey the school's official opinion that the religious club would "contribute to the intellectual, physical or social development" of the students. That is an endorsement. But under

¹⁸⁶ *Lynch*, 465 US at 687-89 (O'Connor concurring).

¹⁸⁷ *Jaffree*, 472 US at 70 (O'Connor concurring). The problem is that Justice O'Connor and other advocates of the endorsement test have not distinguished between these formulations; instead, they have treated them as interchangeable. Compare *id* at 69 with *id* at 70. See also *Allegheny*, 492 US at 593-94 (Blackmun) (claiming that concepts of "endorsement" and "favoritism" are the same). This lack of distinction makes application of the endorsement test, even if confined to the domain of government speech, inconsistent and potentially destructive. A consistent reformulation of the endorsement test in terms of favoritism or preference would closely resemble the position of Professor Douglas Laycock, who terms the approach "substantive neutrality." Laycock, 39 DePaul L Rev 993 (cited in note 162).

¹⁸⁸ Nauvoo, Illinois, once the largest and fastest-growing city in Illinois, was founded by Joseph Smith in 1840 and was the center of Mormonism in the country. Sydney Ahlstrom, *A Religious History of the American People* 506 (Yale, 1972).

¹⁸⁹ *Bender v Williamsport Area School Dist.*, 741 F2d 538, 544 (3d Cir 1984), vacated, 475 US 534 (1986) (italics and footnote omitted).

the "favoritism" or "preference" formulation, allowing equal access would be constitutional since it would not "prefer" religion or any particular religion over the alternatives.¹⁹⁰

Moreover, a "favoritism" or "preference" test would enjoy the historical support that the pure "endorsement" test so conspicuously lacks. The supporters of constitutional protections for religious freedom were insistent that sect equality is an indispensable element of that freedom.¹⁹¹ To be sure, their principal focus was on differences in material treatment, but it is no great stretch to extend the principle to lesser evils.¹⁹² In this connection, it may be significant that the South Carolina Constitution of 1778 expressly "establishes" the religion of Protestant Christianity, but without any mention of material benefits other than the privilege of incorporation. This theory, however, provides no warrant for individuating government action that merely conveys a message favorable to religion, unless the context is one of actual favoritism or preference.

5. The coercion test.

Another candidate to replace the *Lemon* test is the "coercion test," which has been proposed by Justices Kennedy, White, and

¹⁹⁰ For a more difficult example, see Pub L 102-14, 105 Stat 44 (1991). This statute recites (among other things) that the seven Noahide Laws (principles from the Hebrew Bible treated in the Jewish tradition as binding on righteous Gentiles as well as Jews) "have been the bedrock of society from the dawn of civilization"; that "the citizens of this Nation [must not] lose sight of their responsibility to transmit these historical ethical values from our distinguished past to the generations of the future"; that "the Lubavitch movement has fostered and promoted these ethical values and principles throughout the world"; and that "Rabbi Menachem Schneerson, leader of the Lubavitch movement, is universally respected and revered."

Viewed by itself, this statute is an "endorsement" of a particular religion if ever there was one. But in the context of the hundreds of celebratory joint resolutions passed by Congress every year which "endorse" any number of individuals, groups, ideas, and things, who would say that the government has communicated a message that the Lubavitchers are "preferred" over everyone else? The statute is more like the monument in Nauvoo. I am grateful to Robert Katz for bringing this example to my attention.

¹⁹¹ For a summary of the evidence, see McConnell, 57 U Chi L Rev at 1130-32 (cited in note 107).

¹⁹² SC Const of 1778, Art XXXVIII, reprinted in Benjamin Perley Poore, ed, 2 *Federal and State Constitutions Colonial Charter, and Other Organic Laws of the United States* 16-26 (GPO, 2d ed 1878). The example is not conclusive; one suspects that the provision was understood to authorize legislation providing material benefits, as was the case in neighboring Georgia. Ga Const of 1777, Art LVI, reprinted in Poore, ed, 1 *Federal and State Constitutions* 383 (implying that the legislature has the power to require citizens to contribute to religious teachers "of their own profession").

Scalia, and Chief Justice Rehnquist,¹⁹³ and embraced by the Solicitor General in a case before the Supreme Court this Term.¹⁹⁴ As explained by Justice Kennedy, the Establishment Clause contains "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"¹⁹⁵ This approach has the considerable virtue of returning to the historical purposes of the Establishment Clause, and it would redirect attention toward the actual effects of governmental power, rather than toward mere appearances. Perhaps more importantly, it would restore the symmetry between the Religion Clauses that was broken when the Court declared that coercion was an element of the violation of the Free Exercise Clause but not of the Establishment Clause.

One of the first articles I wrote on the Religion Clauses criticized the Court for its unexplained dicta that coercion was *not* an element of an establishment violation.¹⁹⁶ I therefore take some satisfaction in seeing renewed interest in coercion as an aspect of the establishment analysis. But if I had it to do over again, I would take pains to emphasize that the concept of "coercion" cannot, in itself, supply a standard for distinguishing between establishments and nonestablishments, and that it is vital to understand the concept of coercion broadly and realistically. For example, the Court is now being urged to adopt the coercion test in a case involving a public prayer at a junior high school graduation ceremony.¹⁹⁷ I would have thought that gathering a captive audience is a classic example of coercion; participation is hardly voluntary if the cost of avoiding the prayer is to miss one's graduation.¹⁹⁸ Equally seriously, it appears that the content of the prayer was subject to indirect governmental control, which is a species of coercion.¹⁹⁹ For the

¹⁹³ *Allegheny*, 492 US at 659-62 (Kennedy, joined by Rehnquist, Scalia, and White, concurring in part and dissenting in part).

¹⁹⁴ Brief for the United States as amicus curiae, *Lee v Weisman*, No 90-1014, 15-19.

¹⁹⁵ *Allegheny*, 492 US at 659 (Kennedy concurring in part and dissenting in part) (quoting *Lynch*, 465 US at 678).

¹⁹⁶ McConnell, 27 Wm & Mary L Rev 933 (cited in note 180).

¹⁹⁷ *Weisman v Lee*, 908 F2d 1090 (1st Cir 1990), cert granted, 111 S Ct 1305 (1990).

¹⁹⁸ In defense of the invocation, one could argue that students could avoid participating in the prayer by simply ignoring it (respectfully). This argument may be more persuasive for adults.

¹⁹⁹ Although the clergyman delivering the invocation composed his own prayer, the school officials presented him a copy of guidelines for public prayer prepared by the National Conference of Christians and Jews and advised him that his prayer should be "non-

Court to embrace the coercion test in this form would be a small step back toward permitting the government to indoctrinate children in the favored civil religion of nondenominational theism.²⁰⁰

But it is too soon to tell how the Rehnquist Court will interpret the coercion test, or even if it will adopt the test. At this point, I am merely warning that an emphasis on coercion *could* tend toward acquiescence in more subtle forms of governmental power. It is one thing to say that the mere annoyance from seeing the government associate itself with a message of which one disapproves does not violate one's constitutional rights. It is something else to say that government pressure to conform to majoritarian beliefs does not give rise to a constitutional claim because the fist of coercion has been replaced by the subtle pressures and influences of the welfare-regulatory state. If interpreted strictly, the coercion test would increase the power and discretion of majoritarian institutions over matters of religion.

The concept of coercion is based on the distinction between persuasion and force. If a missionary comes to my door to proselytize, I might say that his actions are impertinent or annoying, but I would not say that they were coercive. In the marketplace of ideas, the consumer is assumed to be free. A strict version of the coercion test would apply the same understanding to governmental speech. John Locke, for example, maintained that the government's latitude to use persuasion in matters of religion is no more constricted than the private citizen's:

It may indeed be alleged, that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. . . . But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.²⁰¹

sectarian." *Weisman v Lee*, 728 F Supp 68, 69 (D RI 1990). It is not likely that a school would select a clergyman who would depart significantly from these guidelines.

²⁰⁰ A possible example of a noncoercive event is the separate baccalaureate service which some school systems sponsor. Not only can this event be genuinely noncoercive, but by allowing a number of different faiths and denominations to participate, it can avoid the pitfalls of civil religion. The analysis would be different if the school acted in such a way as to create a stigma for non-participation.

²⁰¹ John Locke, *A Letter Concerning Toleration*, in Locke, 5 *The Works of John Locke* 11 (Baldwin, 12th ed 1824). John Locke was enormously influential on the Americans' concept of religious liberty, especially on Jefferson's. See McConnell, 103 Harv L Rev at 1430-

Justice Kennedy explicitly rejects this Lockean position. He has stated that by "coercion" he does *not* mean "*direct* coercion in the classic sense of an establishment of religion that the Framers knew."²⁰² But having rejected the strict version of coercion, which produces results that are relatively clear but wrong, he must supply an alternative definition.

There are three ways in which Kennedy's conception of coercion seems to differ from the strict interpretation. The first is that he would include within the definition "indirect" as well as "direct" coercion.²⁰³ ("Direct" coercion is government action that forbids or compels certain behavior; "indirect" coercion is government action that merely makes noncompliance more difficult or expensive.) It took many years for the Supreme Court to recognize that so-called "indirect" burdens on the free exercise of religion, such as denying unemployment compensation benefits for claimants who refuse to accept employment for religious reasons, are unconstitutional.²⁰⁴ This development was one manifestation of the decline of the right-privilege distinction in constitutional law generally.²⁰⁵ Justice Kennedy's statement that the Establishment Clause is not limited to "direct coercion" suggests that he does not intend to resurrect the right-privilege distinction under the Establishment Clause. Evidently he agrees that the doctrine of unconstitutional conditions, in some form, should continue to apply to the Establishment Clause.

35 (cited in note 100). In the absence of conflicting evidence, it might be reasonable to impute Locke's understanding to the Framers. But see *id.* at 1443-49 (suggesting why the dominant understanding of religious freedom in America at the time of the adoption of the First Amendment may have been broader than Locke's).

Locke's language may lead some modern readers to think he is talking of the government official's right to speak in his private capacity (for example, a president referring to God in a speech). But in context it is plain that by "magistrate" Locke meant the government—not the government official. See John Locke, *The Second Treatise of Government* ch 18, ¶ 208, in Locke, *Two Treatises of Government* 307, 452 (Mentor, 1960).

²⁰² *Allegheny*, 492 US at 661 (Kennedy concurring in part and dissenting in part) (emphasis in original). Kennedy's originalist interpretation seems to unravel here. If we depart from coercion "in the classic sense of an establishment of religion that the Framers knew," why invoke the Framers' view that coercion was an element of establishment? To be complete, Kennedy's argument requires an intermediate step that translates the Framers' conception of coercion into a conception that is true to their purposes but usable today.

²⁰³ *Id.*

²⁰⁴ The shift came in *Sherbert v Verner*, 374 US 398 (1963) (Free Exercise Clause required South Carolina to give unemployment benefits to Seventh Day Adventists who refused to work on sabbath).

²⁰⁵ See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv L Rev 1439 (1968).

The second way in which Justice Kennedy's conception of coercion expands upon the classic conception is that it does not forbid all aid to religion using tax-generated resources.²⁰⁶ In this respect, the milder version of the coercion test gives more latitude to government action than the strict test. This seems right. There is coercion when the government taxes a citizen and uses the money to support a religious ministry. But when the government is funding a broad array of nonprofit social welfare organizations, secular as well as religious, the courts should not conclude that funding a religious social welfare ministry on equal terms is an establishment of religion, even though the coercion of the taxpayer is identical. The concept of coercion is simply not enough to distinguish between permitted and forbidden uses of tax resources.

While ruling out the extreme "no-aid" position, however, Justice Kennedy has supplied no alternative standard. He says, unhelpfully, that the Establishment Clause does not allow the government to "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"²⁰⁷ This leaves unanswered under what circumstances forms of government "benefit" or "tend" to establish a state religion. Indeed, Kennedy's statement implies that this is a question of "degree," turning on the amount of the aid, rather than a question of kind, turning on the structure of incentives created by government action. That cannot be right. Tax exemptions are worth billions of dollars, and do not violate the Establishment Clause so long as they do not favor religious over nonreligious charities. Yet a \$100 grant to a church for hiring the minister would almost certainly violate the Establishment Clause. Madison nipped this argument in the bud when he observed that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."²⁰⁸

Finally, in the sharpest break from the classic conception of coercion, Justice Kennedy maintains that "[s]peech may coerce in

²⁰⁶ See *Kendrick*, 487 US at 624 (Kennedy concurring).

²⁰⁷ *Allegheny*, 492 US at 659 (Kennedy concurring in part and dissenting in part) (brackets in original) (quoting *Lynch*, 465 US at 678). Does establishment encompass "indirect" coercion but only "direct" benefits? The Supreme Court in past establishment cases has been shamelessly inconsistent in its use of the terms "direct" and "indirect." See Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L Rev 405, 424 n 62. I hope that Justice Kennedy does not embark on a journey back into the morass.

²⁰⁸ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 US at 63, 65-66.

some circumstances.”²⁰⁹ He explains that “[s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case,”²¹⁰ and goes on to say that he would forbid symbolic government actions that “would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”²¹¹ This conclusion may be correct, but it has no logical connection to the coercion test. Speech is a necessary part of the coercion process; but as Locke argued, pure speech is not coercive, unless it is coupled with other interferences with liberty.²¹²

I agree that Locke was wrong to allow the government to promote orthodoxy through speech, but the weakness in Locke’s position is not that speech is “coercive.” The problem is that Locke overlooks crucial distinctions between governmental and private activity: First, that the state has far superior means by which to advocate its view of spiritual truth, which are not “in common with other men”; second, that those means are supplied by the citizens through other coercive powers including taxation, thus enabling the state, unlike the private citizen, to press its views on religion with the wherewithal of dissenters;²¹³ and third, that the state is limited to performing those functions authorized by the people, and there is no reason to suppose that a religiously pluralistic people—especially a religiously serious pluralistic people—would entrust the function of religious instruction to political authorities. For these reasons, Justice Kennedy is on solid ground in arguing that our government does not have free rein to proselytize.

After Kennedy has made this concession, however, scant difference remains between his coercion-proselytization test and O’Connor’s endorsement test (at least if the latter is given its “favoritism” interpretation). To be sure, in *Allegheny*, the creche-menorah case, the two Justices reached somewhat different conclusions with their dueling standards.²¹⁴ But the differences in result

²⁰⁹ *Allegheny*, 492 US at 661 (Kennedy concurring in part and dissenting in part).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See text accompanying note 201.

²¹³ I do not mean to imply that government speech always has these properties. Sometimes the means used by the government are similar to the means available to all citizens and sometimes the government speaks without marginal cost that must be borne by the taxpayers. In these instances, the argument against government speech is much weaker. For example, a state university press, which is otherwise indistinguishable from many private publishers, should be treated as a private speaker for Establishment Clause purposes.

²¹⁴ *Allegheny*, 492 US at 626-27 (O’Connor concurring), 664-65 (Kennedy concurring in part and dissenting in part). Compare *Mergens*, 110 S Ct 2356, in which the two Justices also applied their competing standards but reached the same conclusion.

had nothing to do with the differences in legal standard. O'Connor and Kennedy simply perceived the symbols in different ways.

Justice Kennedy began with the proposition that the government may participate in celebrations of religious holidays by "installing or permitting festive displays"²¹⁵ of some sort. While this proposition might well be challenged on a theoretical level (indeed, academics who oppose religious holiday displays typically reject it), all nine Justices seem to take this as a starting point, disagreeing only about whether specifically religious symbols may be included. Kennedy then reasoned that

[if] government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would . . . signal not neutrality but a pervasive intent to insulate government from all things religious.²¹⁶

This argument, as I understand it, does not focus on the lack of coercion, but on the meaning of neutrality in the context of a mixed religious-secular holiday.

Justice Kennedy's implied baseline for evaluating the neutrality of the display is the way in which the holiday is celebrated in the private sphere, presumably untainted by governmental involvement. There, we find a mixture of religious and nonreligious elements, nativity scenes as well as Santa Clauses. Implicitly, Kennedy suggests that a wholly secular governmental display would deviate from this baseline by emphasizing secular elements and extirpating religious elements. Secularism is not neutrality.²¹⁷

Justice O'Connor, while disapproving the nativity scene, voted to uphold the menorah. She explained that "[a] reasonable observer would . . . appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or non-belief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens."²¹⁸ Her position is not incompatible with Justice Kennedy's, since both recognize that religious symbols do not always have the effect of excluding or stigmatizing nonadherents; in some contexts they can "send[] a message of pluralism and freedom to choose one's own beliefs," to use Justice

²¹⁵ *Allegheny*, 492 US at 663 (Kennedy concurring in part and dissenting in part).

²¹⁶ *Id.* at 663-64.

²¹⁷ See text accompanying notes 320-27 for a further discussion of this point.

²¹⁸ *Allegheny*, 492 US at 635-36 (O'Connor concurring).

O'Connor's words.²¹⁹ A menorah on public property during the Hannukah season has much the same symbolic impact as a festival on Mexican Independence Day, a parade on St. Patrick's Day, or a solemn memorial on Martin Luther King's birthday. These displays *could* be seen as exclusionary by non-Mexicans, non-Irish, and non-African Americans, but they are not. These celebrations affirm that those whose symbols are displayed are a welcome and important part of the heritage of this pluralistic land, without implying that others are any less welcome or important.

Justice O'Connor's defense of the menorah display suggests, in common with Justice Kennedy's analysis of the nativity scene, that under some circumstances the inclusion of religious elements is actually preferable to a wholly secular display, since a secular display could not communicate the message of "tolerance of different choices in matters of religious belief."²²⁰ Just as Kennedy implicitly took issue with the proposition that secularism is equivalent to neutrality, O'Connor implicitly recognized that secularism is not equivalent to pluralism.

If there is a difference between the Justices, it seems that O'Connor is more concerned about neutrality among different religions,²²¹ while Kennedy is more concerned about neutrality between religion and nonreligion. As to that difference, a combination of their perspectives would be better than either view alone. The key issue is the social function that the challenged symbol serves in the life of the community. If the function is to promote a particular view by stigmatizing or excluding nonadherents, neither Kennedy nor O'Connor would permit the symbol. If the function is simply one of celebration, and if all significant elements in the community, including other religions, are welcome to use public property for appropriate celebrations of their own, both Kennedy and O'Connor would permit it.

To be sure, the coercion test (in contrast to the endorsement test) will eliminate claims by persons whose only complaint is that the government action irritates or offends them; being irritated is not the same as being influenced ("proselytized") by government action. Thus the coercion test is slightly narrower than the endorsement test. But the coercion test would treat such claims

²¹⁹ Id at 634.

²²⁰ Id at 636.

²²¹ See id at 627-28 (criticizing Justice Kennedy's coercion test on the ground that it "fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs").

under the Establishment Clause like claims of stigmatic injury under other provisions of the Constitution. Racial minorities who allege that they have been stigmatized by government action (but who suffer no other injury) cannot sue under the Equal Protection Clause;²²² religious individuals who allege that their faith has been denigrated by government action have no claim under the Free Exercise Clause.²²³ Indeed, the general rule is that plaintiffs who suffer no personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees" lack standing to sue.²²⁴ Justice O'Connor's explanation that citizens of a religious persuasion other than that endorsed by the government would perceive that they are "not full members of the political community"²²⁵ applies with equal strength to equal protection and free exercise claims, but the Court has recognized that the costs of recognizing such claims outweigh the benefit.²²⁶ There is no evident reason to treat establishment claims with greater solicitude.

Perhaps the most serious objection to both the coercion and the endorsement test is that they address cases of symbolic action only. Neither test provides reliable guidance for the vastly more important cases in which government action actually affects the practice of religion: cases involving government funding of social welfare and educational activities of religious and nonreligious private organizations; exceptions from generally applicable laws and other forms of accommodation of the religious needs of individuals and institutions; threats to the autonomy of religious organizations with respect to their structure, leadership, and members; discriminatory treatment of minority religions by regulators and common law courts; and so forth. The coercion test is useless in these cases, because they all involve government coercion of some sort. To the extent that the endorsement and coercion tests overemphasize the symbolic cases, they retard understanding and postpone doctrinal reform. The *Lemon* test is a serious problem, but not for reasons addressed by either of these most prominent alternatives.

²²² See *Allen v Wright*, 468 US 737, 755 (1984); *Moose Lodge No. 107 v Irvis*, 407 US 163, 166 (1972).

²²³ The requirement of a "burden" on the practice of religion as a predicate to a free exercise claim eliminates mere complaints of psychological discomfort. See text accompanying notes 67-70.

²²⁴ *Valley Forge College v Americans United*, 454 US 464, 485 (1982).

²²⁵ *Lynch*, 465 US at 688 (O'Connor concurring).

²²⁶ Interestingly, Justice O'Connor authored opinions rejecting claims of stigmatic injury in those contexts. *Allen*, 468 US 737; *Lyng*, 485 US 439.

6. Establishment implications of *Smith*.

The Rehnquist Court, with its respect for legal formalism, is unlikely to repeat the Warren and Burger Courts' mistake of reading the Religion Clauses as inconsistent principles,²²⁷ especially since the author of *Smith*, Justice Scalia, is the most systematic thinker on the Court. Scalia is not likely to remain content with a jurisprudence in which the Court, in his words, has "not yet come close to reconciling *Lemon* and our Free Exercise cases."²²⁸ Since *Smith* now represents the Court's interpretation of the Free Exercise Clause, it is to be expected that the Court will soon reinterpret the Establishment Clause in a manner consistent with *Smith*. What would that be?

The most logical step would be to read both clauses as embodying a formal neutrality toward religion. Under *Smith*, the Free Exercise Clause precludes government action that is "directed at," or "singles out," religion for unfavorable treatment. The Establishment Clause analog would be to preclude government action that singles out religion for favorable treatment. This position has long been advocated by Justice Scalia's sometime University of Chicago colleague, Philip Kurland. Kurland contends that the two Religion Clauses should be "read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."²²⁹ Until 1990, the Supreme Court had rejected this position as to both Clauses. In *Smith*, the Court adopted this position as to the Free Exercise Clause. Perhaps its extension to the Establishment Clause will be the next shoe to drop.

Logical though this move might be, it is highly unlikely. The formal neutrality position would make unconstitutional all legislation that explicitly exempts religious institutions or individuals from generally applicable burdens or obligations. Yet the theory of *Smith* is that exemptions are a form of beneficent legislation, left to the discretion of the political branches. The problem with requiring exemptions under the Free Exercise Clause is not that ex-

²²⁷ See Section I.

²²⁸ *Edwards*, 482 US at 617 (Scalia dissenting).

²²⁹ Philip B. Kurland, *Religion and the Law* 18 (Aldine, 1962); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill L Rev 3, 24 (1978). This position has recently been revived by Professor Mark Tushnet. See Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 S Ct Rev 373.

emptions violate the principle of neutrality, but that enforcement under the Constitution would give judges too much discretion: "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."²³⁰ Noting that "a number of States have made an exception to their drug laws for sacramental peyote use,"²³¹ the Court commented: "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required."²³²

Smith thus rejects the formal neutrality position under the Establishment Clause. This is not surprising. One of the positive developments in the Supreme Court over the past ten years has been its growing acceptance of the legitimacy of accommodation of religion. The Court has accepted special treatment of religion where it facilitates the free exercise of religion, even if it is not constitutionally compelled under the Free Exercise Clause.²³³ The conservatives on the Court have been the most enthusiastic supporters of this development. It would be most peculiar if the conservative wing of the Court were to repudiate the doctrine of accommodation now that it has achieved wide acceptance.

If *Smith* does not augur adoption of the formal neutrality interpretation, what does it mean for the Establishment Clause? The answer is not obvious. Other than his suggestion to eliminate the purpose prong of the *Lemon* test, Justice Scalia has not set forth a comprehensive theory of the Establishment Clause, even in his numerous separate dissents and concurrences. But while Scalia has not offered a comprehensive theory, his opinions do show a clear pattern. In each of them, Scalia suggests a modification of the *Lemon* test that is one step more deferential to the government than the *Lemon* test requires. In *Edwards*, he proposed eliminating the purpose prong.²³⁴ In *Kendrick*, he joined an opinion by Justice Kennedy suggesting elimination of the rule that direct government funding may not go to pervasively sectarian organizations.²³⁵ In *Texas Monthly*, he argued that tax exemptions could be skewed in favor of religious organizations.²³⁶ In each case, he

²³⁰ *Smith*, 110 S Ct at 1606 n 5.

²³¹ *Id* at 1606.

²³² *Id*.

²³³ See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, (Geo Wash L Rev, forthcoming 1992).

²³⁴ See notes 129-32 and accompanying text.

²³⁵ *Kendrick*, 487 US at 624-25 (Kennedy concurring).

²³⁶ *Texas Monthly*, 489 US at 29-44 (Scalia dissenting).

left in place the often unprincipled doctrinal categories of the *Lemon* test, modifying them only to the extent of easing the standard.²³⁷ This pattern suggests that Justice Scalia is more concerned about cabining the judicial role in cases involving religion than in developing a comprehensive substantive theory.

But as discussed above, deference to majoritarian decision-making is out of keeping with the spirit of the Religion Clauses. The great danger of revising Establishment Clause doctrine in light of *Smith* is replicating *Smith's* vices of excessive deference to governmental decisionmaking and bias in favor of mainstream religion. These vices may be preferable to the secularist bias of the Warren and Burger Courts, but not by much.

III. A RELIGION CLAUSE JURISPRUDENCE FOR A PLURALISTIC NATION

A jurisprudence of the Religion Clauses must begin with a proper understanding of the ideals of the Clauses and the evils against which they are directed. We can then formulate legal doctrine. The great mistake of the Warren and Burger Courts was to embrace the ideal of the secular state, with its corresponding tendencies toward indifference or hostility to religion. The mistake of the emerging jurisprudence of the Rehnquist Court is to defer to majoritarian decisionmaking. A better understanding of the ideal of the Religion Clauses, both normatively and historically, is that they guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state (unless necessary to important purposes of civil government), whether that hindrance is for or against religion.

The great evil against which the Religion Clauses are directed is government-induced homogeneity—the tendency of government action to discourage or suppress the expression of differences in matters of religion. As Madison explained to the First Congress, “the people feared one sect might obtain a preeminence, or two

²³⁷ The ensuing doctrinal confusion is especially conspicuous in *Kendrick*, in which Justices Scalia and Kennedy joined Chief Justice Rehnquist's opinion for a five-Justice majority. There the Court rejected a facial challenge to the Adolescent Family Life Act under the effects and entanglement prongs of the *Lemon* test, on the ground that the religiously affiliated grant recipients had not been found to be “pervasively sectarian.” *Kendrick*, 487 US at 612 (effects), 616 (entanglement). This was what distinguished *Kendrick* from cases like *Grand Rapids* and *Aguilar*. But in their concurring opinion, Scalia and Kennedy argued that the “juridical category” of “pervasively sectarian institutions” was not “well-founded.” *Id.* at 624. Thus, they vitiated the doctrinal argument for the majority, without substituting another.

combine together, and establish a religion to which they would compel others to conform."²³⁸ As such authorities of the day as Thomas Jefferson and Adam Smith argued, government-enforced uniformity in religion produced both "indolence" within the church and oppression outside the church.²³⁹ Diversity allows each religion to "flourish according to the zeal of its adherents and the appeal of its dogma,"²⁴⁰ without creating the danger that any particular religion will dominate the others. At some times in our history, and even in some isolated regions of the country today, the great threat to religious pluralism has been a triumphalist majority religion. The more serious threat to religious pluralism today is a combination of indifference to the plight of religious minorities and a preference for the secular in public affairs. This translates into an unwillingness to enforce the Free Exercise Clause when it matters, and a hypertrophic view of the Establishment Clause.

When scrutinizing a law or governmental practice under the Religion Clauses, the courts should ask the following question: is the purpose or probable effect to increase religious uniformity, either by inhibiting religious practice (a Free Exercise Clause violation) or by forcing or inducing a contrary religious practice (an Establishment Clause violation), without sufficient justification? The baseline for these judgments is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government. The underlying principle is that governmental action should have the minimum possible effect on religion, consistent with achievement of the government's legitimate purposes.

Virtually everything government does has *some* effect on religion, however indirect. No doctrinal formulation can eliminate the difficult questions of judgment in determining when the government's purpose is sufficiently important, when its chosen means are sufficiently tailored, or when the effect of the action on religious practice is sufficiently minor or indirect. But we *can* be clear about the ideal toward which a jurisprudence of the Religion Clauses should be directed.

²³⁸ Speech of James Madison (Aug 15, 1787), in Gales, ed, 1 *Annals of Congress* at 758 (cited in note 6).

²³⁹ See Thomas Jefferson, *Notes on the State of Virginia*, Query 17 at 214-20 (Trenton, 1784); Adam Smith, *The Wealth of Nations* 622-44 (Ward Lock, 1838).

²⁴⁰ *Zorach v Clausen*, 343 US 306, 313 (1952).

A. A Pluralist Approach to the Free Exercise Clause

In free exercise cases, the pluralist approach would be something like the approach of the Warren and Burger Courts—albeit with more vigorous and consistent enforcement. This is not to say that the “compelling interest test” was without problems. The test was excessively abstract and failed to define its key operative concepts. It provided little guidance to legislatures or lower courts about what burdens on religious practice triggered heightened scrutiny, or about how to evaluate the governmental interest. The first requirement for scholarship in this field, should *Smith* be overturned, is the development of more precise definitions of the elusive concepts of “burden” and “compelling governmental interest.”²⁴¹

Apart from the question of generally applicable laws, at issue in *Smith*, there are two other currents of change in free exercise jurisprudence, one from the right and one from the left. From the right comes the movement to resuscitate the right-privilege distinction by limiting the Free Exercise Clause to outright “prohibitions” of religious practice. From the left comes the movement to transform the free exercise right into a right of personal autonomy or self-definition. Both should be confronted and resisted.

1. “Prohibitions” of religious practice and conditions on government aid.

In *Lyng*, the Court emphasized that the “the crucial word in the constitutional text is ‘prohibit.’ ”²⁴² From this, the Court concluded that the Free Exercise Clause does not limit how the government controls its property, even when, as in *Lyng*, the government owns holy sites indispensable for religious worship.²⁴³ Thus the Forest Service could build a road over an American Indian holy site and “virtually destroy” the religion.²⁴⁴ By the same reasoning, the Free Exercise Clause would not limit the government’s exercise of other nonregulatory powers, even if the government’s action or inaction made the exercise of religion difficult or impossible. The Free Exercise Clause would apply only when the govern-

²⁴¹ For more extended discussion of this problem, with tentative suggestions for its solution, see McConnell, 57 U Chi L Rev at 1141-49 (cited in note 107); Michael W. McConnell and Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U Chi L Rev 1, 38-54 (1989).

²⁴² *Lyng*, 485 US at 451.

²⁴³ *Id.* at 451-52.

²⁴⁴ *Id.* at 451.

ment made religious practice unlawful (and even then, under *Smith*, the Clause would not apply if the prohibition were generally applicable and not directed at religion). Presumably, the government could draft men and women into the Army and send them to distant lands, and then refuse to provide for their religious worship needs; it could incarcerate prisoners without providing chapels or chaplains. The government could require all citizens to pay taxes to support welfare or educational programs, but then condition the benefits from the programs on rules which conflict with religious principles. These would not be "prohibitions" and so would not be coerced.

Lyng thus raises the central question surrounding the enforcement of constitutional rights under a welfare state: are the conditions which the government attaches to the use and distribution of resources subject to the same constitutional limitations as direct governmental legislation? Specifically, does the word "prohibit" in the First Amendment limit the Free Exercise Clause to "negative" legislation—direct prohibitions—aimed at religion? I am not persuaded that a 1791 audience necessarily would have understood the term "prohibitions" so narrowly;²⁴⁵ but even if it would have, we cannot fulfill the purposes of the Free Exercise Clause under modern conditions without adapting to the vastly expanded role that government now plays in our lives. Like every other constitutional protection, the Free Exercise Clause should be understood to be violated by unconstitutional conditions as well as by direct restraints.²⁴⁶

²⁴⁵ See McConnell, 103 Harv L Rev at 1486-88 (cited in note 100).

²⁴⁶ See Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4 (1988); Sullivan, 102 Harv L Rev 1413 (cited in note 94); *Unconstitutional Conditions Symposium*, 26 San Diego L Rev 175 (1989).

Professor Sullivan's excellent *Unconstitutional Conditions* article places her in the forefront of the academic movement to recognize the denial of government "benefits" as a form of coercion. She should therefore be in agreement with my position here, which is simply an application of unconstitutional conditions doctrine to the Religion Clauses. But her substantive commitment to ensuring a "secular public moral order," Sullivan, 59 U Chi L Rev at 198 (cited in note 5), overcomes her commitment to a consistent theory of constitutional rights. She argues that the exercise of religion may be subjected to financial "disincentives," *id* at 213, even though it may not be directly coerced. It is ironic that Sullivan criticizes both the Supreme Court and me for "head[ing] backward toward an eighteenth-century focus on intentional force and away from a twentieth-century understanding that the state has many subtler but equally effective means for controlling religious incentives." *Id* at 222. My position is precisely the opposite: I contend that the twentieth-century understanding should be applied in both free exercise and establishment contexts. See notes 193-206 and accompanying text (criticizing the narrow conception of coercion under the Establishment Clause); notes 242-46 and accompanying text (criticizing the narrow conception of

2. Free exercise and the rights of conscience.

On the other hand, some would expand the scope of the Free Exercise Clause by treating the free exercise right as a right of personal autonomy or self-definition. Rather than understanding religion as a matter over which we have no control—the demands of a transcendent authority—it has become common to regard religion as valuable and important only because it is *what we choose*. In the words of Justice Stevens, “religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.”²⁴⁷ This treats religion as an individualistic choice rather than as the irresistible conviction of the authority of God.²⁴⁸

The most obvious manifestation of this shift is the move to extend free exercise protections to any and all claims arising from “conscience,” understood as the reflective judgment of the individual. David A. J. Richards perhaps best exemplifies this move: he argues that constitutional protections for religious freedom are ultimately based on “respect for the person as an independent source of value.”²⁴⁹ Relying on this premise, Richards argues that it is illegitimate to distinguish between the free exercise of religion and the free exercise of any other personal belief or value. Free exercise becomes an undifferentiated right of personal autonomy.

This symposium is not the occasion for discussing whether some other provision of the Constitution might protect an undifferentiated right of personal autonomy. But if we are to understand the theory and principle of the Religion Clauses, we must know what differentiates “religion” from everything else. The essence of “religion” is that it acknowledges a normative authority independent of the judgment of the individual or of the society as

prohibition under the Free Exercise Clause). It is Professor Sullivan who advocates a freedom for “religious subcultures to withdraw from regulation” but *not* to be protected from the discriminatory administration of the welfare state. Sullivan, 59 U Chi L Rev at 222 (cited in note 5). She advocates a twentieth-century constitutionalism for most rights but an eighteenth-century constitutionalism for religion.

²⁴⁷ *Jaffree*, 472 US at 53 (footnote omitted).

²⁴⁸ For a thorough discussion of the Supreme Court’s tendency to view religion in terms of choice, see Williams and Williams, 76 Cornell L Rev 769 (cited in note 168). For purposes of the ensuing discussion, I will use the term “God” to denominate the ultimate object of religious devotion, since this is a familiar term. I do not mean to exclude nontheistic religions from the definition of “religion” for purposes of the First Amendment. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 Stan L Rev 233 (1989).

²⁴⁹ David A.J. Richards, *Toleration and the Constitution* 142 (Oxford, 1986).

a whole.²⁵⁰ Thus, the Virginia Declaration of Rights defined religion as the “duty which we owe to our Creator, and the manner of discharging it.”²⁵¹ Madison said that the law protects religious freedom because the duties arising from spiritual authority are “precedent both in order of time and degree of obligation, to the claims of Civil Society.”²⁵² The Free Exercise Clause does not protect autonomy; it protects obligation.²⁵³

Of course, the Free Exercise Clause protects religious “choice” in the sense that it recognizes the individual believer as the only legitimate judge of the dictates of conscience; authentic religion may not be coerced by human authority. But the theological concept of “soul liberty,” from which this principle derives, is not predicated on any belief in the intrinsic worthiness of individual judgment (which, after the fall and before the acceptance of God’s grace, is unregenerate). The concept is based on the view that the relations between God and Man are outside the authority of the state.

Thus, in early challenges to Sunday closing laws under state free exercise clauses, courts consistently rejected claims that it violated the right of conscience for the state to designate Sunday as the day of rest, even though plaintiffs persuasively argued that determining which day is the sabbath is a matter of religious conviction.

²⁵⁰ See *United States v. Macintosh*, 283 US 605, 633-34 (1931) (Chief Justice Hughes, joined by Justices Holmes, Brandeis, and Stone, dissenting) (“The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”).

There is an interesting and important parallel to the analysis of homosexual rights, reflected in the general shift from the term “sexual preference” to the term “sexual orientation.” It used to be thought that sexuality was entitled to constitutional protection because each person should be free to choose the objects of his or her affection. Now it is more often argued that sexuality is entitled to constitutional protection because it is *not* a choice, but something inherent in the person’s nature, which cannot be changed.

²⁵¹ Virginia Declaration of Rights of 1776, § 16, reprinted in Poore, ed, 2 *Federal and State Constitutions*, 1909 (cited in note 192).

²⁵² James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 US at 64.

²⁵³ The Establishment Clause is more a protection for personal autonomy, since it forbids the government to coerce or induce religious observance whether or not the complainant has religious belief to the contrary. It thus protects the right to choose, without regard to any spiritual obligation. But there is no sentiment among liberal commentators to broaden the definition of “religion” under the Establishment Clause, because this broader definition would disable the government from promoting desirable secular values. See Tribe, *American Constitutional Law* § 14-6 at 1185 (cited in note 8). Liberals thus typically treat secular humanism as a “religion” for purposes of free exercise claims (draft exemption, for example) but not for purposes of establishment claims. See id at 1187-88.

tion and conscience.²⁵⁴ But the same courts distinguished cases in which the plaintiff's own religious doctrine *required* him to work on Sunday.²⁵⁵ The distinction is subtle but important: free exercise does not give believers the right to choose for themselves to override the socially-prescribed decision; it allows them to obey spiritual rather than temporal authority.

A modern version of this debate is taking place over the claim of a free exercise right to obtain an abortion.²⁵⁶ In the Utah case now underway,²⁵⁷ plaintiffs claim that the decision whether to have an abortion is an issue of religiously-informed conscience, and that the state's prohibition of abortions is therefore a violation of free exercise. But plaintiffs do not allege that the law prevents them from complying with the dictates of their own religious persuasion, since their religions do not purport to lay down any such dictates. The plaintiffs assert the right to choose for themselves as autonomous individuals, not the right to conform their conduct to religious law.

This claim must be distinguished from a claim that, under some circumstances, the pregnant woman's religion *requires* her to get an abortion. (Orthodox Jews, for example, believe that an abortion is mandatory if necessary to save the mother's life.²⁵⁸) The latter claim, if sincere, is a legitimate free exercise claim, which the government must accommodate unless it has a sufficiently compelling interest in preventing abortion.²⁵⁹ The Free Exercise Clause does *not* protect the freedom of self-determination (with respect to abortion, working on Sunday, or anything else); it does protect the

²⁵⁴ See *Commonwealth v Wolf*, 3 Serg & Rawle 47 (Pa 1817); *Specht v Commonwealth*, 8 Pa 312 (1848).

²⁵⁵ *Wolf*, 3 Serg & Rawle at 50; *Specht*, 8 Pa at 326. Similarly, the claim in *Braunfeld* did not rest on the proposition that each individual is entitled to choose whether to work on Sunday, but on the fact that enforced closure on Sunday made it economically infeasible for Saturday sabbatarians to close on Saturday as well, as their religion dictates. *Braunfeld*, 366 US at 602.

²⁵⁶ See, for example, Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U Chi L Rev 381, 419 (1992) (arguing that the Free Exercise Clause protects the right to choose an abortion).

²⁵⁷ *Jane L. v Bangerter*, 91-C-345 G (D Utah).

²⁵⁸ David M. Feldman, *Marital Relations, Birth Control, and Abortion in Jewish Law* 275 (Schocken, 1968).

²⁵⁹ Whether the state's interest in protecting fetal life in cases in which the life of another human being would thereby be threatened is "compelling" is beyond the scope of this Article. On abortion and free exercise more generally, see W. Cole Durham, Jr., Edward McGlynn Gaffney, Douglas Laycock, and Michael W. McConnell, *For the Religious Freedom Restoration Act*, First Things 42, 43 (Mar 1992).

freedom to act in accordance with the dictates of religion, as the believer understands them.

B. A Pluralist Approach to the Establishment Clause

A pluralist approach to the Establishment Clause requires more explication, since the Supreme Court has never had a satisfactory Establishment Clause doctrine. The Court's first Establishment Clause case in this century was in 1947,²⁶⁰ and thereafter the Court fell quickly into the secularist interpretations that I have already criticized, most notably the three-pronged *Lemon* test.²⁶¹ Unlike the *Lemon* test, a pluralistic approach would not ask whether the purpose or effect of the challenged action is to "advance religion," but whether it is to foster religious uniformity or otherwise distort the process of reaching and practicing religious convictions. A governmental policy that gives free rein to individual decisions (secular *and* religious) does not offend the Establishment Clause, even if the effect is to increase the number of religious choices. The concern of the Establishment Clause is with governmental actions that constrain individual decisionmaking with respect to religion, by favoring one religion over others, or by favoring religion over nonreligion.

The modern welfare-regulatory state wields three forms of power that potentially threaten religious pluralism: the power to regulate religious institutions and conduct, the power to discriminate in distributing state resources, and control over institutions of culture and education. Each of these powers can, and frequently does, promote homogeneity of all kinds, and especially with regard to religion. Too often, however, the Court has interpreted the Establishment Clause to oppose pluralism rather than to foster it by treating as unconstitutional (1) efforts by the political branches to reduce the degree to which the regulatory power of the state interferes with the practice of religion, (2) decisions to include religious individuals and institutions within public programs on an equal and nondiscriminatory basis, and (3) manifestations of religion within the publicly-controlled cultural and educational sector, even in contexts where competitive secular ideologies are given an equal place. Thus, instead of protecting religious freedom from the incursions of the welfare-regulatory state, the Establishment Clause all too often was interpreted to exacerbate the problem.

²⁶⁰ *Everson*, 330 US 1.

²⁶¹ See Section I.

In these areas, the Supreme Court is moving in a generally positive direction, and it may not be long before the Establishment Clause is no longer a serious obstacle to either accommodation of religious exercise or the equal treatment of religious institutions. The precedential roots of this pluralistic approach, however, go back to the later years of the Burger Court, and especially to opinions by Justices Brennan and Powell in three important cases: *McDaniel v Paty*,²⁶² *Widmar v Vincent*,²⁶³ and *Witters v Department of Services*.²⁶⁴ In this section, I will discuss those decision and their importance to the development of the pluralist approach. I will then address the ways in which the Establishment Clause impeded solutions to the modern problems of control over religion through regulation, spending, and cultural influence, and describe the prospects for improvement in recent cases.

1. The roots of the pluralist approach: *McDaniel*, *Widmar*, and *Witters*.

a) *McDaniel v Paty*. In *McDaniel*, the Court struck down a provision of the Tennessee Constitution that disqualified clergymen from legislative office.²⁶⁵ The court below had upheld the provision because it would "prevent those most intensely involved in religion from injecting sectarian goals and policies into the law-making process, and thus [would] avoid fomenting religious strife or the fusing of church with state affairs."²⁶⁶ The plurality of the Supreme Court had no difficulty rejecting this theory on the ground that it lacked any "persuasive support."²⁶⁷

Justice Brennan, however, voted to invalidate the exclusion on more interesting and wide-ranging grounds. First, as a doctrinal matter, Justice Brennan maintained that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits" *except* when it does so "for pur-

²⁶² 435 US 618 (1978).

²⁶³ 454 US 263 (1981).

²⁶⁴ 474 US 481 (1985). While these opinions provide a firm and consistent basis for a revised jurisprudence for the Religion Clauses, they failed to gain widespread recognition, in part because Justices Brennan and Powell conspicuously failed to apply the approach in other cases. This gave the impression of confusion and inconsistency rather than of doctrinal advance.

²⁶⁵ *McDaniel*, 435 US at 627-29.

²⁶⁶ *Id* at 636 (Brennan concurring).

²⁶⁷ *McDaniel*, 435 US at 629.

poses of accommodating our traditions of religious liberty.”²⁶⁸ He further explained his idea of “accommodation”:

[G]overnment may take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.²⁶⁹

Under this conception, the government must be “religion-blind” *except* when it accommodates religion—i.e., removes burdens on independently adopted religious practice. Brennan’s was the first clear statement of the accommodation principle in any Supreme Court opinion.²⁷⁰

Second, the Brennan opinion was noteworthy for its treatment of the role of religion in public life. The Tennessee provision was based on the proposition that religion is an inherently sectarian and divisive influence, which must be radically privatized in order to protect the democratic process. This can be seen as a reflection of the Deweyite philosophy, discussed above,²⁷¹ which molded Supreme Court thinking during the Warren and Burger periods and underlay the movement to secularize the public sphere. Its principal doctrinal incarnation was the “political divisiveness” element of the entanglement test. The Court explained in *Lemon*:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. . . . The history of many countries attests to the hazards of religion’s intruding into the political arena.²⁷²

Without noting its roots in *Lemon*, Justice Brennan took sharp issue with this reasoning in *McDaniel*, stating that it “manifest[ed]

²⁶⁸ Id at 639 (Brennan concurring) (footnote omitted).

²⁶⁹ Id (footnote omitted).

²⁷⁰ In *Zorach v Clausen*, the Court upheld an accommodation of religion in the form of a “released time” program in the public schools. 343 US 306, 311-13 (1952). (A released time program permits public schools to release students during the school day so that they may leave the school grounds and go to religious centers for religious instruction or devotional exercises.) But the opinion did not outline a comprehensive accommodation doctrine.

²⁷¹ See notes 45-51 and accompanying text.

²⁷² *Lemon*, 403 US at 622-23 (citations omitted).

patent hostility toward, not neutrality respecting, religion.”²⁷³ He denied that the divisiveness of religious entry into political debate is a “threat” to the democratic process. Rather, he said that “religious ideas, no less than any other, may be the subject of debate which is ‘uninhibited, robust, and wide-open,’” reminding his readers that “church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education.”²⁷⁴ Brennan took the view that religions are among the many points of view held by people of the United States, and that all such points of view are entitled to equal respect and an equal place in the public councils. “Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.”²⁷⁵ He warned against using the Establishment Clause “as a sword to justify repression of religion or its adherents from any aspect of public life.”²⁷⁶ Brennan thus saw religion not as a threat to pluralism, but as an essential and legitimate part of it.

b) *Widmar v Vincent*. In *Widmar*, a public university banned religious student groups from meeting on campus—a privilege extended to all other student groups—on the theory that allowing them to meet would “advance religion” in violation of the Establishment Clause. The university also cited the state constitution’s policy of enforcing an even stricter separation of church and state than is required by the federal Constitution.²⁷⁷ In a sense, the university’s policy had some validity: it *does* advance religion to give religious groups free and convenient meeting space; presumably, universities provide facilities for student groups because this will advance the interchange of ideas at their meetings. But Justice Powell’s opinion for the majority of the Court recognized that this understanding of “advancement” would commit the government to a policy of discriminating against religion. Since the “forum is available to a broad class of nonreligious as well as religious speakers,” Powell noted, any benefit to religion is purely “incidental.”²⁷⁸ Like Brennan’s concurrence in *McDaniel*, the decision treated reli-

²⁷³ *McDaniel*, 435 US at 636 (Brennan concurring).

²⁷⁴ *Id* at 640, 641 n 25.

²⁷⁵ *Id* at 641.

²⁷⁶ *Id* (footnote omitted).

²⁷⁷ *Widmar*, 454 US at 270-72, 275.

²⁷⁸ *Id* at 274.

gion as an appropriate and legitimate element in the mix of ideas in American life.

c) *Witters v Department of Services*. In *Witters*, a blind man challenged the refusal of the Washington Department of Services for the Blind to pay for his program of vocational education, to which he was otherwise statutorily entitled. The State contended that to pay for his religious education would violate the Establishment Clause, because his chosen profession was the ministry and his course of study consisted of a degree program at a Bible college.²⁷⁹ But the Supreme Court unanimously rejected the state's argument. Although the Bible college at which Witters matriculated was a pervasively sectarian institution and many of the courses for which he was registered contained specifically religious content, the Court held that it would not violate the Establishment Clause for the state to pay the bill.²⁸⁰ Employing reasoning similar to that in *Widmar*, the opinion for the Court stressed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients" and "is in no way skewed towards religion."²⁸¹ Moreover, the Court noted that the program "creates no financial incentive for students to undertake sectarian education," since the benefits are the same no matter which educational path the student chooses.²⁸² In short, "the decision to support religious education is made by the individual, not by the State."²⁸³ On the other hand, the opinion for the Court implied that if "any significant portion of the aid expended under the Washington program as a whole [were to] end up flowing to religious education," the program might well be unconstitutional.²⁸⁴

Justice Powell, however—in an opinion apparently supported by four other Justices and hence commanding majority support²⁸⁵—argued that the decision should not turn on how many

²⁷⁹ *Witters*, 474 US at 483.

²⁸⁰ *Id* at 489.

²⁸¹ *Id* at 487-88 (footnote omitted).

²⁸² *Id* at 488.

²⁸³ *Id*.

²⁸⁴ *Id*.

²⁸⁵ Chief Justice Burger and Justice Rehnquist joined Powell's concurring opinion. *Id* at 490. Justice O'Connor quoted and endorsed the key passage in Powell's opinion. *Id* at 493 (O'Connor concurring). Justice White stated that he "agree[s] with most of Justice Powell's concurring opinion with respect to the relevance of *Mueller v Allen*, to this case," while hinting that he adheres to a still more expansive view of the right of the government to aid private schools. *Id* at 490 (White concurring) (citation omitted).

students choose religious or secular education. According to Powell, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the effects prong of the *Lemon* test.²⁸⁶ The difference between the two opinions is narrow but important. The opinion for the Court in *Witters* was willing to accept religion as one element in the public culture, on nondiscriminatory terms, but *only* when religion was an insignificant minority. Justice Powell, by contrast, was concerned only that the *terms* of the program be "wholly neutral";²⁸⁷ it did not matter what choices the recipients made.

This line of cases escapes the mistakes of both the emerging Rehnquist Court jurisprudence and that of the Warren and Burger Courts. The decisions did not defer to majoritarian decisionmaking. Indeed, in each of the three cases, the government lost. Justice White's plea in *Widmar* that the States should "be a good deal freer to formulate policies that affect religion in divergent ways"²⁸⁸ did not attract a single additional vote. Instead, the decisions uphold the principle—to use Madison's language—that religious citizens have "full and equal rights."²⁸⁹ The opinions also abjure the secularist orientation so common in the other opinions of the Warren and Burger Courts. Whether in the political sphere (Brennan in *McDaniel*), in the interchange of ideas exemplified by the university (*Widmar*), or in the area of government financial assistance (*Witters*), these opinions treat religious perspectives as welcome and legitimate parts of our pluralistic public culture. Although the opinion for the Court in *Witters* hinted that the government-supported sector must remain *predominantly* secular, the opinions were unanimous in rejecting the idea that it must be *entirely* secular. In these opinions, the Justices seem to be moving toward the salutary position that the degree of secularism and of religiosity must be left to the people, not dictated by the Constitution, and not subject to the influence or control of the legislature.

²⁸⁶ Id at 490-91 (Powell concurring).

²⁸⁷ Neutrality is a subtle and contested idea. For elaborations of this concept of neutrality, see Michael W. McConnell, *Neutrality Under The Religion Clauses*, 81 Nw U L Rev 146 (1986); Laycock, 39 DePaul L Rev 993 (cited in note 162).

²⁸⁸ *Widmar*, 454 US at 282 (White dissenting).

²⁸⁹ James Madison (speech of Jun 8, 1789), in Gales, ed, 1 *Annals of Congress* 451 (cited in note 6).

2. Coping with the regulatory state.

As Justice Brennan recognized in *McDaniel*, it is sometimes necessary for the government to “take religion into account” in order to ensure that government regulation does not infringe religious freedom.²⁹⁰ While always true to some extent, this has become far more important as government regulation has penetrated so much more deeply into both private life and the operations of the non-profit sector. As discussed above, the Rehnquist Court’s adoption of a formal neutrality approach to the Free Exercise Clause has eliminated constitutional protection for religious individuals and institutions whose practices run contrary to the secular rules of the modern state. But the Court’s more deferential approach to the Establishment Clause has the opposite effect: it permits the political branches wide latitude to soften the effect of regulation on religious practice through appropriate accommodations. Fortunately, the value of religious liberty is well recognized in the political sphere, and accommodations are not uncommon, even for the benefit of relatively small religious groups.

Under the Burger Court, legislative accommodations of religion were treated with suspicion, and not infrequently invalidated on flimsy pretexts. The Court never held that accommodation is unconstitutional in principle, but the *Lemon* test made accommodations difficult to defend. Accommodations of religion have no “secular purpose,” if “secular purpose” means a purpose solely relating to nonreligious concerns. The effect of accommodations is to make the practice of religion easier, and therefore, in all probability, more widespread. And some accommodations require the government to make judgments regarding religious beliefs and needs. This is easily characterized as “entanglement.”

Thus, in *Thornton v Caldor, Inc.*,²⁹¹ the Court overturned a Connecticut law accommodating the needs of sabbath-observing employees on the ground that the supposedly “absolute” language of the statute could lead to extreme and unconstitutional burdens on others. This deviated from the usual principles of constitutional adjudication, since on an “as applied” basis the burden was not unreasonable and on a “facial” basis the statute was plainly susceptible to constitutional applications. And in *Wallace v Jaffree*,²⁹² the Court overturned an Alabama statute accommodating the

²⁹⁰ *McDaniel*, 435 US at 639 (Brennan concurring).

²⁹¹ 472 US 703 (1985).

²⁹² 472 US 38 (1985).

needs of those public school students who wished to begin the school day with prayer by instituting a moment of silence. Although agreeing that a moment of silence is not generally unconstitutional, the Court overturned this particular statute on the basis of an out-of-context quotation from a single legislator, uttered after the statute had passed, that the statute was intended to restore "voluntary prayer" to the Alabama schools. Since the full context of the legislators' remarks indicated a legitimate purpose²⁹³ (and since there was no reason to impugn the intentions of the rest of the legislature), striking down the law was at best an overreaction. The message conveyed by these decisions was that accommodations would be evaluated with a critical eye.

More recent cases suggest a different posture. I have already discussed *Corporation of Presiding Bishop v Amos*, in which the Court unanimously upheld a statute exempting religious organizations from the religious nondiscrimination regulations of Title VII, which had been struck down by a lower court under *Lemon*. And in *Smith*, the Court stated in dictum that an exemption for the sacramental use of peyote would be permissible under the Establishment Clause. *Texas Monthly, Inc. v Bullock* presents a more ambiguous picture. A divided Court, issuing four inconsistent opinions, struck down a Texas law exempting religious publications from a sales tax. As Justice Scalia's dissenting opinion demonstrated, a court sympathetic to accommodations could have upheld the statute on the ground that it resembled what the Court had held to be constitutionally required in two cases in the 1930s. As even Justice Blackmun commented, the Court's approach appeared to elevate establishment concerns to the subordination of free exercise.²⁹⁴ But the opinion for the plurality—unlike the opinions in *Jaffree* and *Caldor*—took pains to emphasize that properly drafted accommodations are constitutionally permissible, even when they go beyond the dictates of the Free Exercise Clause.²⁹⁵ Thus, the combined effect of *Amos*, *Smith*, and *Texas Monthly* is to affirm the legitimacy of exemptions and accommodations designed to protect religious individuals or organizations from the infringements of the regulatory state.²⁹⁶

²⁹³ See *id.* at 86-87 (Burger dissenting).

²⁹⁴ *Texas Monthly*, 109 S Ct 890, 906 (1989) (Blackmun concurring).

²⁹⁵ *Id.* at 899-900.

²⁹⁶ For a more comprehensive analysis of the recent accommodation decisions and justification for the doctrine, see McConnell, (Geo Wash L Rev, forthcoming 1992) (cited in note 233).

3. Equal access to public resources.

One of the most important eighteenth-century abuses against which the no-establishment principle was directed was mandatory support for churches and ministers. This system was support for religion *qua* religion; it singled out religion as such for financial benefit. Secular institutions, activities, and ideologies received no comparable form of assistance. Religious assessments were eliminated in Virginia, Maryland, and most of the southern states by 1789, and in New England by 1834.²⁹⁷ As the Supreme Court has noted, the struggle against religious assessments was a central event in the development of the philosophy of the Religion Clauses of the First Amendment.²⁹⁸

In the ensuing 150 years, the government began to assist in a wide range of charitable and educational activities, formerly left to private (frequently religious) endeavor. Frequently, the government chose to enter these fields not by setting up its own agencies, but by making financial contributions to private institutions that supplied services to the public. Common examples included higher education, hospitals, and orphanages. An advantage of private administration over public was that it preserved diversity, since different institutions would bring a different perspective and approach to the activity. The ultimate beneficiaries thus had a degree of choice. A student interested in a Catholic education could go to a Catholic college; a patient needing to keep to a kosher diet could go to a Jewish hospital; a dying mother wanting her child to be raised as a Protestant could designate a Protestant orphanage. A citizen need not forfeit public benefits as a condition to exercising the religious option. In its only case involving government aid to a religious institution prior to 1947, *Bradfield v Roberts*, the Court held that the religious affiliation of a Catholic hospital was “wholly immaterial” to its right to receive government funds.²⁹⁹

When government funding of religiously-affiliated social and educational services became a constitutional issue in the late 1940s, the Court properly looked back at the religious assessment controversy. But it missed the point. The Court did not notice that the assessments against which the advocates of disestablishment inveighed were discriminatory in favor of religion. Instead, the Court concluded that taxpayers have a constitutionally protected

²⁹⁷ See McConnell, 103 Harv L Rev at 1436-37 (cited in note 100).

²⁹⁸ *Everson*, 330 US at 13.

²⁹⁹ 175 US 291, 298 (1899).

immunity against the use of their tax dollars for religious purposes.³⁰⁰ This immunity necessitated discrimination against religion, thus turning the neutrality principle of the assessment controversy on its head.

The Court's analysis failed to recognize the effect of the change in governmental roles. When the government provides no financial support to the nonprofit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion. It aids higher education, health care, or child care; it is neutral to religion. Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it conveys religious ideas is to penalize it for being religious. It is a penalty whether the government excludes the religious institution from the program altogether, as in *Lemon*,³⁰¹ *Nyquist*,³⁰² and *Grand Rapids*,³⁰³ or requires the institution to secularize a portion of its program, as in *Tilton v Richardson*,³⁰⁴ *Roemer*,³⁰⁵ or *Hunt v McNair*.³⁰⁶

The underlying issue is precisely the same as that in *Sherbert v Verner*. The question in *Sherbert* was whether the state could deny benefits to an individual otherwise eligible for unemployment compensation on the ground that she refused to make herself available for work on her sabbath day.³⁰⁷ The Court recognized that the denial of a benefit, under such circumstances, is equivalent to a "fine" for adhering to her religious convictions.³⁰⁸ Justice Douglas, a ferocious opponent of nondiscriminatory "aid" to religious institutions, well understood the point in *Sherbert*:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in

³⁰⁰ See *Everson*, 330 US at 16 ("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."). See also *Flast v Cohen*, 392 US 83, 103-04 (1968).

³⁰¹ 403 US at 606-07.

³⁰² 413 US at 761-69.

³⁰³ 473 US at 375-81.

³⁰⁴ 403 US 672, 676-84 (1971).

³⁰⁵ 426 US at 755-67.

³⁰⁶ 413 US 734, 736-49 (1973).

³⁰⁷ 374 US at 403.

³⁰⁸ *Id.* at 404.

terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

These considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. . . . Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization—matters relevant to the Establishment Clause, not in issue here.³⁰⁹

The same point applies to nondiscriminatory support for hospitals, colleges, orphanages, and schools. The government supports them not as religious institutions but as colleges, hospitals, orphanages, and schools. To deny benefits to an otherwise eligible institution “forces [it] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order [to obtain support], on the other hand.”³¹⁰ If the Court was correct to abandon the right-privilege distinction under the Free Exercise Clause, and I believe it was, the Court was illogical and inconsistent to hold to the right-privilege distinction under the Establishment Clause. Equal access to public resources is not a “privilege,” and it does not violate the Establishment Clause.

This inconsistent application of the right-privilege distinction is the most fundamental cause of the contradiction between the *Lemon* test and the Free Exercise Clause. *Lemon* assumes an outmoded conception of government aid, which treats equal access as “aid.” The Free Exercise Clause, at a minimum (that is, after *Smith*), prohibits discrimination against an institution solely on the ground that it is religious.³¹¹ The *Lemon* test outlaws nondiscriminatory treatment and the Free Exercise Clause requires it.

We must therefore reject the central animating idea of modern Establishment Clause analysis: that taxpayers have a constitutional right to insist that none of their taxes be used for religious purposes. Properly conceived, the taxpayer has a right to insist that the government not give tax dollars to religion *qua* religion, or in a way that favors religion over nonreligion, or one religion over another. But the taxpayer has no right to insist that the govern-

³⁰⁹ Id at 412-13 (Douglas concurring).

³¹⁰ *Sherbert*, 374 US at 404.

³¹¹ *Smith*, 110 S Ct at 1599.

ment discriminate against religion in the distribution of public funds. In this pluralistic country, taxpayers come in all varieties of belief and unbelief. To tax everyone, but to dispense money only to secular organizations, is to use government's coercive power to disadvantage religion.³¹²

Moreover, it follows that if religious organizations have a constitutional right to equal access to public programs, the government may not condition their access on rules which burden their practice of religion, unless the rules are closely related to the purposes of the program. For example, if the government made grants to organizations providing vocational training, the government could not, in effect, exclude Jewish organizations by requiring all recipients to remain open on Saturday, unless Saturday operations could be persuasively shown to be necessary to the successful conduct of the program. Similarly, if the government provided vouchers for education, the government could not exclude Catholic schools by requiring that recipient schools distribute birth control devices to the students, unless birth control distribution is necessary to education. The test is the same as in any other free exercise case. The threat of loss of funding is an "indirect" burden on the exercise of religion, and cannot be allowed unless there is an overriding governmental purpose. Conditions on spending are indistinguishable in principle from direct regulation.

This does not mean that all participants in government programs have an unlimited constitutional right to engage in religious speech in the context of the program. The test is whether participants have the right to engage in political or other controversial secular speech.³¹³ Religious speech rights are not superior; nor are they inferior. Thus, in government programs in which grantees are paid to convey a particular message to the public (and no other),

³¹² See Michael McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 San Diego L Rev 255 (1989). Professor Sullivan agrees that there "can be little doubt" that religious speech restrictions on recipients of public funds "would be a disincentive to the exercise of unfettered choice," Sullivan, 59 U Chi L Rev at 213 (cited in note 5), and thus would constitute an unconstitutional condition under free speech precedents. *Id.* She rescues the conditions from this conclusion on the ground that they are "necessitated by the Establishment Clause," which she reads as a "constitutional requirement not to support religious teaching with public funds." *Id.* at 212. But she never explains why she adopts a reading of the Establishment Clause that appears to violate fundamental principles of freedom of speech (let alone free exercise of religion), when it is possible to avoid this conflict by simply interpreting the Establishment Clause as forbidding government preference for religion over nonreligion (or one religion over another), as was done in *Everson*.

³¹³ In the context of public forum analysis, Justice Stevens advocates a similar position. See *Mergens*, 110 S Ct at 2384 (Stevens dissenting).

religious speech restrictions are permissible and may even be required. In *Bowen v Kendrick*,³¹⁴ for example, the federal government made grants to various public and private organizations, including some affiliated with religion, for the purpose of conducting programs to promote responsible attitudes toward sex among adolescents. The government forbade grantees to “teach or promote religion” in the course of the funded programs, and the Supreme Court held that this restriction is mandated by the Establishment Clause. Since this was not a program that permitted free speech about controversial topics of the grantees’ choice, but instead one based on structured curricula approved in advance by the federal agency, any claim of free speech rights was properly rejected.³¹⁵

By contrast, it would not be permissible to restrict the rights of artists receiving grants under the National Endowment for the Arts to produce art on religious themes. If artists can convey controversial messages about politics and culture without censorship, it would be unconstitutional to deny them a similar right when they convey messages about religion. Nor was it permissible for the Virginia Supreme Court to deny eligibility for tax-exempt bonds to Liberty Baptist College on the basis of its religious teaching.³¹⁶ If secular institutions enjoy the academic freedom to determine the content of their teaching, so should Liberty Baptist. Nor should a college professor be forbidden to discuss his religious beliefs in class or in after-class meetings, when other members of the faculty are free to discuss their personal and professional opinions.³¹⁷ Nor should a high school valedictorian’s speech be censored on account of its religious content when speakers in other years are permitted to address controversial issues of their choice.³¹⁸ That each of these examples has been resolved the other way by lower courts or administrators demonstrates how far we have to go before achieving genuine religious pluralism.

³¹⁴ 487 US 589 (1988).

³¹⁵ The case is similar to *Rust v Sullivan*, 111 S Ct 1759 (1991), in which the government provides grants to groups for the encouragement of pre-conception family planning, and bars speech encouraging abortion.

³¹⁶ *Phan v Commonwealth of Virginia*, 806 F2d 516 (4th Cir 1986).

³¹⁷ This is the issue in *Bishop v Aronov*, 926 F2d 1066 (11th Cir 1991), petition for cert pending, No 91-286. I am counsel for the petitioner.

³¹⁸ *Guidry v Calcasieu Parish School Bd*, 9 Religious Freedom Rptr 118 (E D La 1989), affirmed, 897 F2d 181 (5th Cir 1990).

4. Government influence over education and culture.

A final threat to religious autonomy arises from governmental control over many of the institutions of education and culture. In an earlier era, when these were under private control, the government's voice was far less prominent in the marketplace of ideas. The influence of government is likely to foster homogeneity with respect to religion, since it is likely to reflect a broadly acceptable, majoritarian view of religion—in short, to support a civil religion.

If it were possible to insist that government be “neutral” in its speech about religion, this would be highly desirable. Unfortunately, in the context of government speech—unlike regulation and spending—“neutrality” is an unattainable ideal.³¹⁹ Whenever the government communicates to the people, it will favor some ideas and oppose others. The only truly effective way to reduce government influence on our religious lives through its speech would be to reduce the governmental presence in our cultural and educational institutions. Requirements of accommodation and equal treatment can solve (or at least greatly mitigate) the problems created by the regulatory and spending powers, but there are no real solutions to the problems created by the government's vastly increased role in the culture.

There are three baselines from which the neutrality of government speech might theoretically be evaluated. The first is complete secularization of the public sphere. If the “neutral” position were one in which religion is completely relegated to the private sphere of family and the institutions of private choice, any reference to religion in the public sphere would be a departure from neutrality. This is the position advocated by Professor Sullivan, who says that the solution to the government speech problem is “simple” if we would only “[b]anish public sponsorship of religious symbols from the public square.”³²⁰

Serious enforcement of this position would bring about a radical change in the cultural fabric of the nation. Initial litigation has focused on what have been called “distinctively religious elements,”³²¹ such as creches, crosses, and menorahs. But multitudes of other symbols, deeply engrained in our public culture, are no less distinctively religious. Christmas trees are symbols of Christmas, too, and many non-Christians (not to mention some Chris-

³¹⁹ This is my principal area of disagreement with Professor Laycock. See Laycock, 39 DePaul L Rev 893 (cited in note 162).

³²⁰ Sullivan, 59 U Chi L Rev at 207 (cited in note 5).

³²¹ *Lynch*, 465 US at 711 (Brennan dissenting).

tians) consider them inappropriate for secular institutions.³²² Certainly the star on top of the tree is a religious symbol. And if the star is a religious symbol, so are the pretty lights along the sidewalks of Michigan Avenue in downtown Chicago. Although most of us do not recognize the symbolism, these lights signify the advent of what the gospel of John calls the “true light that enlightens every man.”³²³ Thanksgiving conveys a religious message, as do the speeches of Abraham Lincoln and the Reverend Martin Luther King, Jr.—which would have to be censored before they could be made a part of public celebrations. Many of our cities have religious names; many of our historic sites reflect religious aspects of the culture. To strip public property of all religious elements (when public property is used to convey secular messages of every kind and description) would have a profoundly secularizing effect on the culture.

The problem with the secularization baseline is that it is not neutral in any realistic sense. A small government could be entirely secular, and would have little impact on culture. But when the government owns the street and parks, which are the principal sites for public communication and community celebrations, the schools, which are a principal means for transmitting ideas and values to future generations, and many of the principal institutions of culture, exclusion of religious ideas, symbols, and voices marginalizes religion in much the same way that the neglect of the contributions of African American and other minority citizens, or of the viewpoints and contributions of women, once marginalized those segments of the society. Silence about a subject can convey a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, cultures, and ideological commitments, to exclude all those whose basis is “religious” would profoundly distort public culture.

A useful thought experiment is to imagine what a “neutral” policy toward religion would look like in a socialist state, where the government owned *all* the land and *all* the means of mass communication. In such a world, the government would be constitutionally *required* to erect and maintain churches, synagogues, temples, mosques; to hire priests, ministers, imans, and rabbis; to dissemi-

³²² Oddly, the Court has treated Christmas trees as such a “preeminently secular symbol” that they actually *drain* nearby religious symbols of their religious content. *Allegheny*, 492 US at 617, 634. Yet every year the Justices’ own law clerks raise an internal fuss over the Christmas tree in the Great Hall of the Supreme Court building.

³²³ John 1:9 (Revised Standard Version).

nate religious tracts and transmit religious programming; and to display religious symbols on public land at appropriate occasions. If it did not, there would be no opportunity for the practice of religion as traditionally understood. Indeed, a "neutral" state would attempt to replicate the mix of religious elements that one would expect to find if the institutions of culture were decentralized and private—much as the government must do today in the prisons and the military.³²⁴ No one would contend, in a socialist context, that a policy of total secularization would be neutral.

To be sure, we do not live in a socialist state. But we have socialized many of the important avenues for public interchange and the transmission of culture. Within that sphere, total secularization is not a "neutral" answer, either. Even Justice Brennan has warned that too zealous an elimination of religious symbols might appear as "a stilted indifference to the religious life of our people."³²⁵ Thus, there is a growing consensus that the public schools have erred in eliminating from the curriculum virtually all discussion of how religion has influenced history, culture, philosophy, and ordinary life.³²⁶ For the most part, this decision by the schools has reflected a cowardly tendency to avoid anything controversial, but the effect is to create a distorted impression about the place of religion in public and private life. As psychologist Paul Vitz has explained, excluding religious references biases the curriculum "because it makes only the liberal, secular positions familiar and plausible. [Other] positions are made to appear irrelevant, strange, on the fringe, old-fashioned, reactionary."³²⁷

Some argue for a totally secular public sphere not on the spurious ground that this would be "neutral," but on the ground that the First Amendment committed the United States to a certain public philosophy: a liberal, democratic, secular "civil religion," which is entitled to a preferred status—even a monopoly status—in our public culture.³²⁸ As an historical assertion about

³²⁴ Of course, any such attempt would surely fall short of a genuinely decentralized, private pluralism. That is one reason (of many) why liberty is best protected under a regime of limited government.

³²⁵ *Lynch*, 465 US at 714 (Brennan dissenting).

³²⁶ For a summary of research showing that public school curriculum systematically neglects the subject of religion, see McConnell, 1991 U Chi Legal F 123 (cited in note 33).

³²⁷ Paul C. Vitz, *Censorship: Evidence of Bias in Our Children's Textbooks* 77-78 (Servant Books, 1986).

³²⁸ This is the crux of my disagreement with Professor Kathleen Sullivan in this debate. See Sullivan, 59 U Chi L Rev at 198-201 (cited in note 5). See also John Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal L Rev 847 (1984), and Dworkin, 59 U Chi L Rev 381 (cited in note 256).

the meaning of the First Amendment, however, this position is plainly false. Virtually the entire spectrum of opinion at the time of the adoption of the First Amendment expected the citizens to draw upon religion as a principal source of moral guidance for both their private and their public lives.³²⁹ The Establishment Clause prevented the federal government from interfering with the process of opinion formation by privileging a particular institution or set of religious opinions,³³⁰ but it left the citizens free to seek guidance about contentious questions from whatever sources they might find persuasive, religious as well as secular.³³¹ As a normative proposition, the secularization position must depend on an argument that secular ideologies are superior to religious. But some secular ideologies are divisive, exclusionary, and evil; just as some religious ideologies are tolerant, open-minded, and beneficent (and vice-versa). The republican solution is to leave the choice of public philosophy to the people. There is a great irony in the claim that liberal, democratic, nonsectarian positions have a superior constitutional status to religious positions. Such a position is illiberal (since it denies the people's right to determine what will bring about the good life), undemocratic (since it conflicts with the dem-

³²⁹ A few statements from leading figures of the day will give a sense of their attitude. Madison thought that "belief in a God All Powerful wise & good, is so essential to the moral order of the World & to the happiness of man, that arguments which enforce it cannot be drawn from too many sources." Letter from James Madison to Frederick Beasley (Nov 20, 1825), in Gaillard Hunt, ed, 9 *The Writings of James Madison* 229, 230 (G. P. Putnam's Sons, 1910). Washington warned: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion." George Washington, Farewell Address (Sep 17, 1796), reprinted in Henry Commager, ed, *Documents of American History* 169, 173 (Prentice-Hall, 9th ed 1973). Adams maintained that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from John Adams to the officers of the First Brigade of the Third Division of the militia of Massachusetts (Oct 11, 1798), in Charles Francis Adams, ed, 9 *The Works of John Adams* 228, 229 (Little Brown, 1854).

³³⁰ Thus, Jefferson said that the national government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to the Reverend Mr. Millar (Jan 23, 1808), in H.A. Washington, ed, 5 *The Writings of Thomas Jefferson* 236, 236-37 (H.W. Derby, 1861). Said Madison: "Religion flourishes in greater purity, without than with the aid of Gov[ernment]." Letter from James Madison to Edward Livingston (Jul 10, 1822), in Hunt, ed, 9 *The Writings of James Madison* 98, 103 (cited in note 329). Oliver Ellsworth posited that "[c]ivil government has no business to meddle with the private opinions of the people." Oliver Ellsworth, *Landholder*, No. 7 (Dec 17, 1787), reprinted in Kurland and Lerner, eds, 4 *The Founders' Constitution* 639, 640 (cited in note 181).

³³¹ The prohibition on religious tests for office, US Const, Art VI, ensured that the public councils would be open to persons of all faiths. The government may no more extract a promise that officeholders will decide questions according to secular philosophies than it could extract a promise of adherence to a religious philosophy.

ocratic choices of the people), and sectarian (since it is based on a narrow point of view on religious issues).

A second possible baseline is the degree of religious expression that an "objective observer" would deem appropriate in the public sphere—Justice O'Connor's endorsement test. But this actually states no baseline at all; it is merely a restatement of the question. These issues are passionately contested within our culture. For example, to some (heavily represented in legal academia), inclusion of a nativity scene in a Christmas display on government property is an act of blatant intolerance. With equal sincerity, others (less well represented in legal academia), maintain that deliberate exclusion of a nativity scene from a Christmas display places the prestige and influence of the government in favor of materialism and against religion.³³² The "endorsement test" is justified on the ground that it will ensure that no class of citizens defined by religious perspective is made to feel like an "outsider" to the political community.³³³ If so, it is necessary to pay serious attention to both points of view. Both sides are sincere, and both consider themselves in danger of being marginalized. Unfortunately, it is not possible for both to prevail, and there is no objective standpoint for choosing one over the other (that is, no standpoint that both could, in principle, accept). The "objective observer" does not, therefore, offer even a theoretically possible baseline for the evaluation of neutrality.

The indeterminacy of this approach might not, in itself, be a sufficient basis for rejecting it. Other constitutional doctrines are almost equally indeterminate. The special problem of this approach is that it exacerbates religious division and discord by heightening the sense of grievance over symbolic injuries. When religious symbols are upheld, the judicial imprimatur adds to the injury (especially when the standard applied is that of the putative "objective observer"—implying that the losers are not "objective"). When religious symbols are driven from the public square, this alienates a different but equally sincere segment of the population.

³³² The record in *Lynch* shows that the mayor and many of the residents of Pawtucket felt this way. The mayor stated at the trial that "for him, as well as others in the city, the effort to eliminate the nativity scene from Pawtucket's Christmas celebration 'is a step towards establishing another religion, non-religion that it may be.'" 465 US at 700 (Brennan dissenting). The district court found that residents viewed the lawsuit against the creche as "'an attack on the presence of religion as part of the community's life.'" *Id.* at 700 n 6 (quoting 525 F Supp 1150, 1162 (D RI 1981)).

³³³ This is the justification offered by Justice O'Connor. *Lynch*, 465 US at 688 (O'Connor concurring).

Does anyone believe that the annual outbreak of lawsuits over the symbols of the December holidays advances the cause of religious harmony or civic understanding? When a constitutional doctrine aggravates the very problem it is supposed to solve, without offering hope for resolution, it should be replaced.³³⁴

The third possible baseline is the state of public culture in the non-government-controlled sector. If the aspects of culture controlled by the government (public spaces, public institutions) exactly mirrored the culture as a whole, then the influence and effect of government involvement would be nil: the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere. In a pluralistic culture, this is the best of the possible understandings of "neutrality," since it will lead to a broadly inclusive public sphere, in which the public is presented a wide variety of perspectives, religious ones included. If a city displays many different cultural symbols during the course of the year, a nativity scene at Christmas or a menorah at Hanukkah is likely to be perceived as an expression of pluralism rather than as an exercise in Christian or Jewish triumphalism. If the curriculum is genuinely diverse, exposing children to religious ideas will not have the effect of indoctrination. Individuals should be permitted to opt out of participating in those religious (or anti-religious) aspects of the program that are objectionable to them on grounds of conscience, but there is no reason to extirpate all religious elements from the entire curriculum. The same is true of the public culture: opt-out rights should be freely accorded, but the general norm should be one of openness, diversity, and pluralism.

If members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols. If a government refuses to cooperate with minority religious (and other cultural) groups within the community, there may be a basis for inferring that the choice of symbols was a deliberate attempt to use government influence to promote a particular religious position.

Courts should not encourage the proliferation of litigation by offering the false hope that perfect neutrality can be achieved through judicial fine-tuning. Judicial scrutiny should be reserved for cases in which a particular religious position is given such public prominence that the overall message becomes one of conformity

³³⁴ Thus, the best resolution of cases in which the plaintiff's claim of injury is weak is not to uphold religious symbols on the merits, but to deny standing to sue.

rather than pluralism. Certainly they should not allow official acts that declare one religion, or group of religions, superior to the rest, or give official sponsorship to symbols or ceremonies that are inherently exclusionary.³³⁵ Particular care should be taken where impressionable children are involved. But courts should be cautious about responding to particular contestable issues in isolation. It is impossible to tell whether a particular event, symbol, statement, or item is an indication of diversity or of favoritism if it is viewed without regard to wider context.³³⁶

CONCLUSION

The religious freedom cases under the First Amendment have been distorted by the false choice between secularism and majoritarianism, neither of which faithfully reflects the pluralistic philosophy of the Religion Clauses. Instead, the Free Exercise and Establishment Clauses should protect against government-induced uniformity in matters of religion. In the modern welfare-regulatory state, this means that the state must not favor religion over nonreligion, nonreligion over religion, or one religion over another in distributing financial resources; that the state must create exceptions to laws of general applicability when these laws threaten the religious convictions or practices of religious institutions or individuals; and that the state should eschew both religious favoritism and secular bias in its own participation in the formation of public culture. This interpretation will tolerate a more prominent place for religion in the public sphere, but will simultaneously guarantee religious freedom for faiths both large and small.

³³⁵ Thus, I agree with the Seventh Circuit's holding that a city may not sponsor a Roman Catholic mass as part of an Italian festival. See *Doe v Village of Crestwood*, 917 F2d 1476 (7th Cir 1990), petition for cert pending, no 1573. The same would not be true of the re-creation of an historic sermon in colonial Williamsburg.

³³⁶ For example, the depiction of a church among the aspects of community life in the city seal of Rolling Meadows, Illinois should not have been held unconstitutional. See *Harris v City of Zion*, 927 F2d 1401 (7th Cir 1991).