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Religious Freedom and “Accommodationist Neutrality”: A Non-Neutral Critique

The patterns of social life that support liberal democratic forms of civic flourishing embody definite rankings of competing human goods, which will be associated with some versions of religious truth and not others. In this sense, the project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.

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¹ Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 *FORDHAM L. REV.* 1573, 1593 (2001).

The reigning metaphor in Establishment Clause cases for decades was Jefferson's "wall of separation" between church and state. Yet the theoretical bulwark and the separationist approach it implied encountered severe criticism from the start. The most serious of the indictments was, and remains, that government "separationist neutrality" toward religion denies the explicitly religious heritage of the nation and results in a callous society in which religious perspectives are selectively and unfairly muted.² Case law that enforces separationist neutrality is condemned as a Court-created misreading of the proper constitutional relationship between religion and the state.³

In many respects, of course, the wall metaphor was always more myth than fact. The Court has long allowed government to accommodate religion in various ways, including practices like Sunday closing laws,⁴ providing textbooks to parochial schools,⁵ tax exemptions,⁶ and transportation to and from religious schools.⁷ Today, however, separationist neutrality has been replaced by a radically different neutrality, which I call "accommodationist neutrality." Under this new approach, government has significant opportunities to provide support of religion, on the theory that the First Amendment requires that religious and secular views receive "neutral" treatment within the public sphere,⁸ and that the Establishment Clause allows official support of religion, within certain parameters.⁹ Tracking the rhetoric, legal strategies, and remarkable advances of post-1960s civil rights and liberties doctrine, religious advocates have made successful claims for nondiscriminatory access to government forums, have overcome Establishment Clause obstacles to government funding of religion, and have even prevailed in argu-

² See *infra* text accompanying notes 42-47, 157-82.

³ See *infra* text accompanying notes 157-82.

⁴ *McGowan v. Maryland*, 366 U.S. 420, 452 (1961) (upholding Sunday closing law).

⁵ *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (upholding various forms of aid to religious schools, including lending textbooks), *overruled in part on other grounds*, *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (plurality opinion); *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (upholding program that loaned textbooks to parochial school students).

⁶ *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding grant of property tax exemptions to churches).

⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (upholding reimbursement of parents for cost of children's bus transportation to public or private school).

⁸ See *infra* text accompanying notes 42-96.

⁹ See *infra* text accompanying notes 97-156.

ments for accommodation of religion that goes well beyond neutral treatment.

Despite these impressive advances, many conservative religious and political leaders still maintain that American constitutional law, and especially the unelected judiciary that interprets it, remain woodenly insensitive to religious values. The cases that limit government power to erect religious symbols in official settings and that deny public schools power to infuse religious perspectives into the public school curriculum through prayer and other expressly inculcative means strike them as particularly egregious.¹⁰

Many of these advocates viewed the 2000 and 2004 national elections as political mandates against liberalism’s excesses, including its emphasis on secularism. Increasingly vocal and emboldened by the nation’s perceived turn to the political right, religious conservative groups now call for a judiciary that will not interfere with the expression of religious values through democratic processes.¹¹ In particular, they seek a “non-activist” Court

¹⁰ These critics urge that the current Court has not abandoned its activist ways, but continues to reach decisions that lack historical or textual justification. As evidence, they cite Establishment Clause case law that prevents government from honoring God through public prayers, directly funding sectarian ends, and venerating religious texts. They also cite decisions outside the Establishment Clause arena, especially privacy cases, in support of rhetoric that the Supreme Court has foisted elite, secularist values upon the American people rather than enforcing only literal constitutional commands.

¹¹ Many of these religious conservatives were outraged when, in the spring of 2005, judges refused to interfere with a husband’s decision to remove the feeding tube of his brain-damaged wife. See Debra Rosenberg, *The War on Judges*, NEWSWEEK, Apr. 25, 2005, at 23. In response to their outcry over the rulings, federal legislators quickly crafted a bill that was signed into law with great fanfare by President Bush. See Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). When the courts refused to enforce this new measure, House Majority Leader Tom DeLay grimly warned that the judiciary would face legislative retaliation. See Tim Harper, *Republican Leader Warns Judges: You Will Answer for This*, TORONTO STAR, Apr. 1, 2005, at A4 (quoting DeLay’s statement that “[t]he time will come for the men responsible for [the death of Terri Schiavo] to answer for their behaviour”). He was joined by other conservatives in agitated calls for greater judicial restraint and accountability to majority will. See Hon. F. James Sensenbrenner, Jr., *Zale Lecture in Public Policy*, Stanford University (May 9, 2005), <http://judiciary.house.gov/media/pdfs/stanfordjudgesspeechpressversion505.pdf> (noting that Congress is considering creation of an Inspector General for the federal judiciary); see also Mark Lilla, *Church Meets State*, N.Y. TIMES BOOK REV., May 15, 2005, at 39 (“The leading thinkers of the British and American Enlightenments hoped that life in a modern democratic order would shift the focus of Christianity from a faith-based reality to a reality-based faith. American religion is moving in the opposite direction No one can know how long this dumbing-down of American religion

that will, by their lights, enforce literal constitutional commands rather than foist elitist liberal predilections on the American people. They also believe far more work remains to assure that American constitutional law and American popular culture better respect the salience of religion and permit government to take a positive stand in favor of religion over irreligion.

I respond to these doctrinal and sociopolitical developments with three basic assertions. The first is a factual assertion: popular indictments that cast the Court as a group of wide-eyed liberals who are hostile to religion are entirely misplaced. The Justices are centrist-to-deeply conservative people who have done precious little to deserve such rebukes.¹² The Rehnquist Court in particular moved First Amendment law steadily and decisively toward assuring that government can accommodate relig-

will persist. But so long as it does, citizens should probably be more vigilant about policing the public square, not less so. If there is anything David Hume and John Adams understood, it is that you cannot sustain liberal democracy without cultivating liberal habits of mind among religious believers.”); Doug Martin, Op-Ed., *Gay Marriage Ban Safe Only in Constitution*, ARIZ. DAILY STAR (Tucson), May 1, 2005, at H2 (arguing that “[t]he push for allowing homosexual couples the trappings of marriage is the work of activist judges, not the will of the people or the people’s elected representatives. . . . The only protection against an activist state court judge redefining marriage for Arizona is an amendment to the Arizona Constitution defining marriage as the union of one man and one woman”); cf. Dick Polman, *Separation of Church, State Attacked*, ARIZ. DAILY STAR (Tucson), May 1, 2005, at A14 (reporting that religious right lawyers’ “desire to breach the church-state wall—coupled with their incessant attacks on ‘liberal activist’ judges and their success in prodding Republicans to intervene in the Terri Schiavo case—is sparking a backlash that threatens to sow new divisions”).

The ABA has responded to these attacks on the judiciary by creating a “toolkit” with information and resources for responding to the attacks. See Am. Bar Ass’n, Supporting America’s Judiciary, <http://www.abanet.org/barserv/attacksonthejudiciary.html> (last visited Feb. 21, 2006); see also Allan D. Sobel, *Political Assault on the Justice System*, 88 JUDICATURE 197, 197 (2005) (arguing that current events represent an “alarming affront against the delicate balance of power that sustains our democracy”). A few weeks later, evangelical religious leaders organized a nationwide ninety-minute simulcast event from a church in Louisville, Kentucky, in support of the candidacy of conservative judges and against what they termed a judicial assault on people of faith. See Peter Wallsten, *Battle Over Benches Spills Across Pews*, L.A. TIMES, Apr. 25, 2005, at A10.

¹² Jeffrey Rosen argues that the “unelected Supreme Court justices are expressing the views of popular majorities more faithfully than the people’s elected representatives.” Jeffrey Rosen, *Center Court*, N.Y. TIMES, June 12, 2005, (Magazine) at 17; cf. Toni M. Massaro, *Constitutional Law as “Normal Science,”* 21 CONST. COMMENT. 547, 547 (2004) (arguing that left and right wing claims of activist courts overwhelming democratic impulses are belied by most equal protection and due process case law, which typically upholds government power).

ious views in profound new ways,¹³ and the relationship between church and state today is much warmer than it was only a decade ago. This intimacy has been fostered not only by the Court, but also by state and federal legislatures, and by Democratic President Bill Clinton and Republican President George W. Bush alike.¹⁴ When measured against the actual gains of the past several years, recurring charges of judicial instatement of a "brooding secularism"¹⁵ ring utterly hollow.

As I show in Part I, federal constitutional law plainly allows for support of even pervasively sectarian ends, provided it is properly structured. The residual case law that suggests a contrary view has been fatally undermined by recent decisions.¹⁶ Moreover, the Court is very unlikely to reverse its pattern of upending most of the separationist case law and rhetoric—both because of the Court's composition and because the most serious threats against judicial independence today are being made by those who seek a more sectarian and politically conservative world.¹⁷ Supreme Court nominations and appointments processes are sensitive to political trends, as presidents and senators seek to seat Justices who will promote their values. At present, the United States Congress, the federal executive branch, and most state governments are dominated by representatives who gravitate to "traditional values" appeals, including religious values, and all have ample authority to instate these values without violating the Establishment Clause. Indeed, the doctrinal and the political tides have turned so decisively and pervasively in favor of conservatism that the "victim" vocabulary of some contemporary religious leaders is wholly out of sync with prevalent socio-legal conditions.¹⁸

¹³ See *infra* text accompanying notes 157-82.

¹⁴ Charitable choice, also known as "faith-based" charity, legislation began with President Clinton, not President Bush. See 42 U.S.C. §§ 604a(c), 9858 (2000).

¹⁵ See *Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

¹⁶ See *infra* text accompanying notes 42-156.

¹⁷ One cannot, of course, assume that the latter forces will influence judicial outcomes. Nevertheless, the Justices can never take lightly vigorous efforts to strip federal courts of jurisdiction or to otherwise undermine judicial authority. See, e.g., H.R. 3799, 108th Cong. (2004) (proposing to limit federal court jurisdiction and to prevent federal courts from relying on foreign law in interpreting the U.S. Constitution); H.R. 3893, 108th Cong. (2004) (proposing to limit federal court jurisdiction).

¹⁸ Conservative columnist George Will likewise has concluded that the victim language is overheated. See George Will, Op-Ed., *GOP Goes a Bit Too Far With Faith*, ARIZ. DAILY STAR (Tucson), May 8, 2005, at H2 ("Christians are indeed experiencing some petty insults and indignities concerning such things as restrictions on school

Court critics are correct in arguing that the Justices have protected—critics say invented—important constitutional rights that violate the deepest sensibilities of some religious citizens. The limited right to abortion¹⁹ and the invalidation of criminal prohibitions on same-sex sodomy²⁰ have been particularly divisive developments.²¹ The Court also concluded in 1990—over howls of disapproval from all political corridors—that general laws that run against the grain of religious observance do not violate the Free Exercise Clause, absent exceptional circumstances.²² This opinion, however, was authored by Justice Antonin Scalia, who is widely embraced by conservatives as an exemplary Justice who understands the heart of their concerns. The case also sets forth three significant exceptions to the holding and has been undermined significantly by federal and state legislation.

Moreover, these culturally polarizing, media-riveting opinions must be read in a wider doctrinal context that is rarely mentioned from pulpits, political podiums, or talk show microphones. The Rehnquist Court simultaneously closed off most viable Establishment Clause claims, absent evidence of persecution of a particular religion, explicit endorsement of an official religious creed, isolated displays of sectarian imagery, or overtly discriminatory or improper structuring of support that flows to religious institutions.²³ Consequently, modern times are comparatively excellent

Christmas observances. But their persecution complex is unbecoming because it is unrealistic.”); see also John C. Danforth, Op-Ed., *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A23 (“[C]onservative Christians have presented themselves as representing the one authentic Christian perspective on politics. With due respect for our conservative friends, equally devout Christians come to very different conclusions.”).

¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

²¹ I have argued elsewhere that so-called gay rights may warrant constitutional protection despite the alleged harms to others that such rights may imply, based primarily on the premise that liberalism so requires. See Toni M. Massaro, *History Unbecoming, Becoming History*, 98 MICH. L. REV. 1564 (2000) (arguing in favor of a “rational basis” approach to judicial review of laws against same-sex relations that compels courts to answer whether restricting such rights in a given context is rational); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).

²² See *Employment Div. v. Smith*, 494 U.S. 872 (1990). The significance of *Smith* to religious freedom is not as powerful as it first appears, given the passage of legislation that restores strict scrutiny in some contexts. See *infra* text accompanying notes 72-75.

²³ See *infra* text accompanying notes 213-15. I address here only federal Estab-

for religion in the United States, thanks to the very Court that the critics condemn.

In Part II, I make two normative assertions. The first is that these doctrinal and political turns in favor of government support of religious ends are a decidedly mixed blessing. Religion’s vitality and free exercise surely are something to celebrate and protect vigorously in a liberal democratic order, but not without limits that are mindful of other unifying values and constitutional liberties. I caution that the Court’s refashioning of separationist neutrality into accommodationist neutrality neglects these other values in several important respects.

For one thing, the Court’s shift has obviously not quelled political strife. Religious advocates today express increasingly high-pitched distrust of the judiciary, despite their formidable legal victories, and cling to the claim that the minority of Americans who are not religious, or whose lives depart from particular religious teachings, exert excessive clout over the judiciary. Victory in the eyes of such Court critics will apparently not be complete until constitutional law allows government to enforce sectarian ends far more comprehensively than the law does today—an outcome that could render the Establishment Clause, as it was once understood, a constitutional cipher.

Indeed, the Court is already far down this path. Substantial government support now may flow to religious ends as long as it also flows to secular ones, or is directed to these religious destinations through independent, private choices. The new accommodationist neutrality may even imply that governmental financial support of pervasively sectarian ends is required, provided there is a secular purpose also served by such support.²⁴ I argue that this is a worrisome development for liberalism.

In the current political climate, all elected officials, including elected judges, must be exquisitely aware of, if not acutely responsive to, their politically active conservative constituents, some of whom seek to reify scripture-driven accounts of morality, civic virtue, and social legitimacy.²⁵ Legislators who express doubts about the wisdom of infusing conservative Judeo-Chris-

lishment Clause barriers. State constitutional barriers may also exist but these obviously are not defined by the United States Supreme Court.

²⁴ See *infra* text accompanying notes 216-25.

²⁵ Consider, for example, Texas Governor Rick Perry’s decision to sign bills against abortion and same-sex marriage in the gymnasium of Calvary Christian Academy in order to celebrate “with pro-family Christian friends.” Ralph Blumen-

tian symbols or teachings into official government policies risk political backlash and may find that their fortune hinges not only on fidelity to religious norms, but on fidelity to conservative Christian religious norms. Attempts to impose even weak versions of separationist neutrality, as recent Ten Commandments controversies show,²⁶ may result in shrill attacks on judicial independence.

My second normative assertion is that the Court should adjust its First Amendment course in a manner that will better preserve liberal values. At the least, the Court should resist further expansion of constitutional doctrine that would compel government funding of religion.²⁷ Public funding of religious entities is currently allowed, but not required, when a religious entity is otherwise qualified to participate in a government funding program that serves secular ends and is open to adherents and non-adherents alike.²⁸ I argue against extending that doctrine in such a way that funding must occur whenever religious and secular entities provide comparable secular benefits.²⁹

I acknowledge that popular sentiment and the internal logic of one line of case law³⁰ run against this recommendation. According to this opposing view, for government to deny equal funding to religion is a form of discrimination, not respect for religion's unique role in society. Yet there is a competing line of cases, as well as overwhelming policy reasons, that point in favor of this recommendation. Most notable of the cases is *Locke v. Davey*, which upheld a state's statutory exclusion of scholarship funding when that funding would be applied to religious training.³¹

I defend *Davey* on analytical and policy grounds and argue that the Roberts Court should follow its lead. Government should be permitted to exercise its funding discretion in a manner that avoids support of religious ends. To the extent that doctrine implies that *Davey* was wrongly decided, this doctrine, not

thal, *Texas Governor Draws Criticism for a Bill-Signing Event at an Evangelical School*, N.Y. TIMES, June 6, 2005, at A12.

²⁶ See *infra* text accompanying notes 108-33.

²⁷ See *infra* text accompanying notes 242-59.

²⁸ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

²⁹ See *infra* text accompanying notes 242-59.

³⁰ See *infra* text accompanying notes 213-15.

³¹ 540 U.S. 712, 725 (2004).

Davey, should be reexamined.³²

In particular, the Court should acknowledge that neutrality, whether in a separationist or accommodationist formulation, is an analytically unsound baseline for freedom of religion problems. Although neutrality is a useful tool for selected religious freedom issues, especially those involving private religious speech in public forums, it fails to capture the fundamental ways in which religious commitments both stand apart from and are embedded in other ideological commitments. Among its flaws is that neutrality ignores the ways in which religious freedoms derive from multiple constitutional sources that proceed from different, though overlapping, theoretical bases.³³

Standing alone, neutrality principles offer religious adherents too few opportunities for departures from common rules and thus offend robust conceptions of religious liberty. Neutrality principles also offer no means of reconciling religious autonomy with other liberal concerns. That is, they lack substantive guideposts for distinguishing between public support for religious conduct that is reasonably compatible with liberal democratic values and conduct that is not. They therefore fail to grapple with two profoundly important features of religious convictions: some religious faiths reject secular reason and pluralism outright as proper cultural baselines; and fidelity to most religious faiths implies conduct, not just belief or expression. Official support of religion therefore can mean reinforcement of conduct that undermines foundational liberal principles of critical inquiry, religious and ideological pluralism, and secular reason.³⁴

Anxiety about using neutrality as a construct for defining religious freedoms occasionally surfaces in the case law, even as many of the Justices continue to invoke neutrality as a theoretical baseline. The result is analytically fractured doctrine in which the Court seems to say one thing while doing another. Indeed, this

³² See *infra* text accompanying notes 226-67.

³³ The primary, though not exclusive, sources of religious freedoms are the religion clauses of the First Amendment. These reflect an original and abiding understanding that tensions between individual religious commitments and collective commitments raise distinctive legal and social problems. See, e.g., U.S. CONST. art VI, cl. 3 (stating that no religious test may be required as a condition of federal office). See generally Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002).

³⁴ See *infra* text accompanying notes 260-62.

underlying tension is reflected in the ultimately oxymoronic term that best describes its decisions—accommodationist neutrality.

The constitutional balance between religious autonomy and other liberal values simply cannot be effected by a demand that government act neutrally. Rather, as chronic past and present battles over the content of an iconic measure of American identity—the American public school curriculum—illustrate, tensions between our *unum* and our *plures* cannot be resolved with neutral principles alone. Demands of neutral inclusion of religious viewpoints in these common lessons often are intended to dislodge or contradict other lessons that seek to inculcate liberal habits of mind and respect for pluralism as civic baselines. Efforts to find a satisfactory-to-all model for resolving these controversies inevitably fail because the poles of the debate want mutually exclusive outcomes. A neutrality mantle is ill-suited to the task of balancing the relevant interests because *both* sides can—and do—seize this mantle with equal force.

To find a place at the public table for citizens who reject liberal democracy and pluralism as starting points for our public values is a wildly complicated balancing process. Assuring that these illiberal viewpoints and practices are protected, but do not trump liberal values, is an inherently value laden and politically charged endeavor. The Court thus should reject any theory that assumes otherwise because the theory cannot possibly answer many, likely most, of the difficult religious freedom questions that the Court confronts.

In sum, modern discussions about freedom of religion in the United States need to be redirected. They must first proceed from accurate accounts of contemporary doctrine, not hyperbolic or misleading versions of the case law. This step is more formidable than it may appear. Discussions then should proceed to thoughtful examination of the strengths and weaknesses of current doctrine in light of the overarching liberal democratic principles that undergird our constitutional commitments. I attempt to do both in this piece. I begin with a description of the Court's shift from separationist to accommodationist neutrality as the prevailing analytical model.

I

NEUTRALITY'S ABOUT FACE

The Court in past eras sought to respect religious freedom and

maintain a “wholesome ‘neutrality’”³⁵ by preventing government from funding religion directly³⁶ and denying requests for accommodation of religious practices that ran afoul of important general laws.³⁷ The theory was that the Establishment Clause requires government to refuse to advance or inhibit religion because this best protects the state from religion, protects religion from government, and is perceived by reasonable citizens as embodying neutral respect for the Constitution rather than disrespect for religious commitments.³⁸

A dwindling number of the current Supreme Court Justices adhere to this separationist theory of neutrality.³⁹ The ascending view questions the historical integrity and sociopolitical value of separationism and insists that separationism drains the public sphere of religious perspectives. Several Justices, along with many commentators, now argue for a very different construction of government neutrality, a construction that is inspired by freedom of speech cases.

A. *Neutrality and Religious Speech and Worship*

When the government provides speech opportunities to some speakers (e.g., by opening up government-owned property to the community at large or by funding private expressive activity), it must offer these opportunities to other speakers on equal terms. Even in a so-called “limited” or “nonpublic” forum, where the government can constitutionally limit access to specific subject matter, freedom of speech principles require the government to be even-handed in choosing these topics.⁴⁰ Excluding only some speakers on the same topic because of their perspective is impermissible viewpoint discrimination.⁴¹

³⁵ *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

³⁶ *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

³⁷ *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

³⁸ *See Van Orden v. Perry*, 125 S. Ct. 2854, 2873–77 (2005) (Stevens, J., dissenting) (describing the earlier understanding of the principle of neutrality and concluding that “governmental promotion of orthodoxy is not saved by the aggregation of several orthodoxies under the State’s banner”).

³⁹ *See, e.g., id.* at 2873–76 (expressing sympathy for separationism).

⁴⁰ *See Perry Educators Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

⁴¹ *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 384–85 (1993).

Applying this principle to religious speech implies that excluding religious speakers from a public or limited public forum while allowing others to speak freely from non-religious perspectives violates freedom of speech principles. Beginning with *Widmar v. Vincent*⁴² in 1981, and carrying the theme forward in *Lamb's Chapel v. Center Moriches Union Free School District*,⁴³ *Good News Club v. Milford Central School*,⁴⁴ and *Rosenberger v. Rector & Visitors of the University of Virginia*,⁴⁵ religious groups have successfully challenged the efforts of particular public schools to avoid Establishment Clause violations by excluding religion from campuses or refusing to fund religious expressive activities. The advocates recast the schools' efforts to avoid endorsement of religion as viewpoint discrimination, and ultimately prevailed.⁴⁶

This move was a brilliant and elegant one. It simply required the Court to redefine its baseline assumption about religion as a categorically unique activity that receives distinctive treatment and relocate the analysis in the familiar territory of free speech. Moreover, the shift brought religious speech into full alignment with other constitutional doctrine, which has long treated religious speakers such as Jehovah's Witnesses the same, for First Amendment purposes, as it does political speakers.⁴⁷ If protecting the right of a citizen to lambaste an official on the street corner for being a godless communist is on a par with the right to call her a fascist—and it is—then religious speech must be entitled to comparable First Amendment protection even when it moves into less open public spaces.

The obvious obstacle to this parity was the Establishment Clause, which had been interpreted to block religious speech from more confined publicly controlled venues because citizens might misinterpret the provision of the public space as a form of endorsement, or as akin to financial support of religion that violated *Everson v. Board of Education*'s “[n]o tax in any amount,

⁴² 454 U.S. 263 (1981).

⁴³ 508 U.S. 384.

⁴⁴ 533 U.S. 98 (2001).

⁴⁵ 515 U.S. 819 (1995).

⁴⁶ See *Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 839-41; *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 276.

⁴⁷ See, e.g., *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

large or small”⁴⁸ prohibition. *Widmar* began the erosion of this Establishment Clause defense to access, which eventually collapsed the government’s main shelter from the freedom of speech neutral treatment argument in favor of religious groups’ right to equal access. In *Widmar*, the Court determined that a public university that allowed some student organizations to meet on campus could not deny meeting room space to student religious organizations.⁴⁹ University-level adults were not likely to misperceive accommodation of religious student organizations as government endorsement of religion.⁵⁰ Consequently, the University had no Establishment Clause basis for denying them access.⁵¹

Later, the Court vaulted the second significant barrier to equal access demands by religious speakers—the government’s right to bar certain topics or “subject matter” from a limited public forum. The Court in *Lamb’s Chapel* concluded that excluding the subject matter of religion from a limited forum actually constitutes the narrower and impermissible form of speech exclusion, namely, viewpoint discrimination.⁵² It also revisited the assumption that to accommodate religious speech in a limited public forum would be misconstrued as government endorsement of religion under the Establishment Clause.⁵³ Rather, it would be seen as government accommodation of all voices *on the same theme*.⁵⁴ Consequently, instead of respecting neutrality by excluding all religious speakers from a limited forum, the government would violate neutrality by excluding religious speakers.⁵⁵

In the 2001 *Good News Club* decision, the Court added the third and most powerful dimension to this equal access line of cases when it allowed religious speech to include the singing of hymns and uttering of prayers in a government forum while elementary school children were present.⁵⁶ The public school in question opened school facilities to after-school extracurricular

⁴⁸ 330 U.S. 1, 16 (1947).

⁴⁹ *Widmar*, 454 U.S. at 277.

⁵⁰ *Id.* at 274.

⁵¹ *Id.* at 273, 277.

⁵² See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

⁵³ *Id.* at 395.

⁵⁴ See *id.* at 394.

⁵⁵ See *id.* at 393-94.

⁵⁶ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001).

programs and community groups.⁵⁷ One of the groups was a Christian organization that sought participation, with parental consent only, from the elementary school children.⁵⁸ Even this explicitly sectarian activity, located in such a constitutionally delicate terrain, was permitted absent more powerful evidence that the reasonable observer would see this activity as government-sponsored religion rather than government accommodation of multiple community activities and voices on school property.⁵⁹

The final layer of equal access arguments was added in *Rosenberger*, which required the University of Virginia to provide equal access to funding for a student Christian organization's publication.⁶⁰ The government funding program in question supported student expressive activities.⁶¹ As such, it could not engage in viewpoint discrimination among the student applicants.⁶² If university students could write on the same topics from a non-religious perspective and receive public funding, then denying funding only to those students who wrote from religious perspectives was unconstitutional discrimination against religious viewpoints.⁶³

Taken together, these four equal access cases provide a powerful strategy for pursuing quite adventuresome claims that government must accommodate religion as a matter of neutrality, even in contexts beyond free speech, such as equal access to public funding and other opportunities. The strategy denies the distinctiveness of religion and treats governmental attention to religion as a category, as well as governmental discrimination *among* religions, as presumptively impermissible. The theory is that religion is one point of view among many, not a unique practice that triggers unique constitutional analysis. The legal strategy founded in the freedom of religious speech cases also supports efforts by other groups to obtain equal access to government funds, because nothing about the structure of this strategy confines its application to religious groups or causes, or to freedom of expression cases. For example, advocates of gay and lesbian rights also have extolled freedom of expression principles as a

⁵⁷ *Id.* at 102.

⁵⁸ *Id.* at 103.

⁵⁹ *Id.* at 112-13.

⁶⁰ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

⁶¹ *See id.* at 822, 824.

⁶² *Id.* at 829.

⁶³ *See id.* at 845.

promising platform for novel equal access rights.⁶⁴

I conclude that using neutrality as a baseline does make practical and constitutional sense in the context of pure religious expression. As I will show, however, the extension of freedom-of-speech-based neutrality principles to other contexts, especially the context of government funding, raises profound analytical and policy concerns.

B. Accommodationist Neutrality and Free Exercise of Religion

One of many problems with a neutrality approach to religious freedom is that it translates into very weak protection of Free Exercise Clause rights. In *Employment Division v. Smith*, the Court held that a facially neutral law of general applicability can be applied against religious dissenters if the law is rational.⁶⁵ The 1990 opinion stunned observers who believed that significant government-imposed burdens on religious belief and conduct should trigger a much higher standard of judicial review. Neutrality, in their view, should not be the full measure of government respect for religious autonomy.

The Court itself seemed to recognize the downsides of its approach about the consequences of neutrality, because it carved out three potentially important exceptions to the ruling that favor religious autonomy. Exclusion of religious groups from a public program or significant burdens placed on religious actors by public laws still triggers strict scrutiny in the following situations: (1) when a law singles out religion for adverse treatment on its face;⁶⁶ (2) in "hybrid" cases, where the law burdens both free exercise of religion and another constitutional right;⁶⁷ and (3) when a law anticipates in its design that government will make individualized assessments of eligibility for public benefits, such as workers' compensation programs.⁶⁸

The first exception covers cases in which government is transparently hostile to religion. This exception applies most obvi-

⁶⁴ See, e.g., David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325-30 (1994); Nan Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993).

⁶⁵ See 494 U.S. 872, 885-90 (1990).

⁶⁶ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

⁶⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁶⁸ See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

ously in the rare occasions when the government acts in a manner that signals its intent to disfavor a particular religious sect. Yet, it also casts constitutional doubt on a measure that avoids support of religion by facially excluding all religious adherents or religious entities as such from a government program.⁶⁹ The difficult question in the latter cases is whether such exclusions of religion should be allowed as a permissible, if not mandatory, effort to avoid Establishment Clause concerns or to promote some other legitimate purpose, versus gratuitous discrimination. The freedom of religious expression cases loom large in arguments that this is rank discrimination.

The second, “hybrid” exception theoretically requires ramping up the standard of review to strict scrutiny, rather than rational basis, when two constitutional rights are burdened by a general law. Lower courts have resisted applying this exception broadly because of analytical discomfort with declaring that the free exercise right can somehow be combined with another constitutional right to make it a more powerful right, rather than assessing the strength of each independently.⁷⁰ Yet the exception arguably remains sound, at least until the Court indicates that it shares this analytical discomfort and rejects the exception.

The third exception has likewise been read quite narrowly. It applies only to situations like eligibility for unemployment benefits, where the system is expressly designed to make case-by-case determinations.⁷¹ Again, however, the exception has not been

⁶⁹ See *infra* text accompanying note 215.

⁷⁰ See, e.g., *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (requiring that the companion claim has a “‘fair probability’ or a ‘likelihood,’ but not a certitude, of success on the merits” (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 703, 707 (9th Cir. 1999))); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (acknowledging the hybrid-right theory but stating that “[i]t is difficult to delineate [its] exact contours”); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (describing the hybrid-right theory as “completely illogical”); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (noting that if the Court intended *Smith*’s hybrid-right theory to be construed broadly, it would have invoked it in *Smith* itself).

⁷¹ See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-98 (10th Cir. 2004) (noting that the “Court has never explained with specificity what constitutes a ‘system’ of individualized exceptions, and . . . courts and commentators are divided on the question,” but concluding that the “exception is limited . . . to systems that are designed to make case-by-case determinations. The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons”).

construed this narrowly by the Court itself, and so remains theoretically viable in other contexts.

Despite the uncertainties that surround all three exceptions to *Smith*, they remain avenues that litigants may pursue. The result is that the Court has established a neutrality baseline, but government must exceed this baseline, in certain situations, to allow for accommodation of religion. Neutrality thus does not fully capture the meaning of free exercise rights despite *Smith*'s language to the contrary.

A fourth path, this one statutory, also demands accommodation of religion in significant instances. Public dismay over *Smith*'s weak version of free exercise rights was palpable, and led to the almost immediate adoption of the federal Religious Freedom Restoration Act (RFRA) of 1993.⁷² Although RFRA was overturned by the Court as applied to the states,⁷³ several states since have adopted their own versions of RFRA,⁷⁴ and Congress has drafted more narrowly tailored laws that impose strict scrutiny in selected federal contexts.⁷⁵

Moreover, the Court's rejection of RFRA turned in part on the Act's blunderbuss quality. National legislation that is more narrowly tailored may require states to show a compelling reason for acts that burden religious freedom if there is context-specific proof of pervasive state discrimination against religion. Where such discrimination can be demonstrated, Congress may legislate strict scrutiny, and has done so. If such discrimination cannot be demonstrated, of course, no significant problem of government hostility to religion likely exists, and *Smith*'s weak construction of free exercise rights is less problematic.

Taken together, *Smith* and its progeny set forth a highly qualified, odd version of neutrality. The combined effect is a form of accommodationist neutrality, rather than separationist neutrality, which offers a one-way ratchet in favor of religion: neutrality is

⁷² 42 U.S.C. §§ 2000bb-2000bb-4 (1996), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷³ *City of Boerne*, 521 U.S. 507.

⁷⁴ *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1493 to -1493.02 (2004).

⁷⁵ *See, e.g.*, American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a (2000) (allowing religious use of peyote); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-2 (revising RFRA as applying to the federal government); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc-2000cc-5. The Court unanimously upheld the constitutionality of RLUIPA on a facial challenge in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). *See infra* text accompanying notes 142-56.

the least, but not the most, that may be required of government. The baseline can be exceeded where doing so promotes religious freedom. Where government laws display no purpose that is hostile to religion, the neutrality demand is satisfied and religious adherents are entitled to no exemption from the laws' demands. Yet a competing, non-neutral desire to preserve religious autonomy has led the Court and state and federal legislatures to counterbalance this flat neutrality with important exemptions. That is, although the Court sets forth neutrality as its new baseline, it already has moderated this approach because it offers too little protection for religious dissent.

It is worth underscoring here that *Smith* clearly was not the handiwork of an activist left-wing court. Rather, the neutrality theory set forth in *Smith* was coined by Justice Scalia, not by Justice Ginsburg or even Justice Souter. Moreover, the net effect of the spate of post-*Smith* state and federal legislation is that protection of religious conduct has grown in recent years, not withered. The popularity and the prevalence of these measures are powerful evidence that religion remains well respected in, and protected by, American law and politics, not persecuted or repressed.

C. *Accommodation and Religious "Expressive Association"*

The modern Court likewise requires "neutral plus" treatment of religion in a second context of potentially huge significance to religious groups: freedom of expressive association. Here too, the analytical structure is not premised on religion's exceptionalism—the rights are available to religious and nonreligious groups alike.

The Court has long recognized that freedom of association has two dimensions, one of which is the freedom to associate for expressive purposes.⁷⁶ When a law substantially burdens that expressive autonomy, the Court has held that the law must yield if compliance with the law would transform the message of the group so fundamentally that the group would be forced to embrace values that are anathema to it, and if no compelling government purpose justifies that burden.⁷⁷ The most difficult of these cases deal with government efforts to enforce nondiscrimi-

⁷⁶ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁷⁷ *Dale*, 530 U.S. at 648.

nation mandates on private associations that discriminate as a matter of faithful observance of the association’s rules or creed. Like the Free Exercise Clause cases, the expressive association cases confront the most intractable conflicts between autonomy and collective interests. From a liberal perspective, threats lie on *both* sides of the struggle: denial of associational expressive autonomy is potentially illiberal, but some associations seek in particular excusal from liberalism’s dictates. The cases likewise pose a double threat to principles of equality. Insofar as the government passes general laws that promote equality, any exemptions from these laws compromise the equality goal. Of course, general laws may also repress or fail to consider the interests of minority groups, so that granting exemptions in some cases may better promote equality than disallowing them.

The notable example of this conundrum is *Boy Scouts of America v. Dale*, in which the Scouts sought to expel from membership an openly gay scoutmaster, despite laws that prohibited discrimination based upon sexual orientation in public accommodations.⁷⁸ The Scouts argued that their compelled association with an openly gay scoutmaster would impermissibly transform the Scouts’ message that a Boy Scout is “morally straight” and “clean.”⁷⁹

The Court sided with the Scouts,⁸⁰ which was a fairly remarkable result given how reluctant the Court has been to permit exemptions from antidiscrimination laws. The Court in this case focused on the private association’s expressive rights with little analysis of how respect for those rights might itself be illiberal or destructive of the government’s right to advance equality goals by its lights.⁸¹ Relying on a conceptual framework drawn from pure speech cases, the Court downplayed the conduct aspects of expressive association to establish a potentially powerful right to challenge general laws.⁸² Other private associations, especially ones with religious identities, thus have relied heavily upon *Dale* in seeking exemptions to government policies that prohibit various forms of discrimination.⁸³ The Court has yet to clarify what the full reach of *Dale* may be.

⁷⁸ *Id.* at 645.

⁷⁹ *Id.* at 649-54.

⁸⁰ *Id.* at 656.

⁸¹ *See id.* at 655-59.

⁸² *See id.* at 656-59.

⁸³ *See infra* note 207.

The most ambitious of the cases that rely upon *Dale* go beyond challenges to direct regulation of private expressive autonomy to arguments that public funding likewise cannot be conditioned on compliance with regulations that unduly burden expressive association. A notorious recent illustration concerned federal regulations that require schools receiving federal funds to either affirmatively assist military recruiters or allow military recruiters on campus as a condition of receiving federal funding.⁸⁴ The Third Circuit Court of Appeals concluded, based upon the record before it in a preliminary injunction posture, that this condition on funding violated the recipients' freedom of expressive autonomy.⁸⁵

The Supreme Court unanimously reversed the lower court.⁸⁶ In the Court's view, compliance with the funding conditions does not constitute forced affirmation of ideas because schools can refuse the money, and are free to post signs that renounce discrimination and otherwise disentangle themselves from the government's message.⁸⁷ Moreover, the government could have directly required the recipients to allow equal access to military recruiters; thus, there was no "unconstitutional condition" imposed on funding recipients.⁸⁸ The Court also flatly rejected the *Dale*-based argument that the law schools' associational rights were violated on the ground that any "association" between the law schools and the military recruiters was not close enough to trigger expressive association concerns. Rather, "[r]ecruiters are . . . outsiders who come onto campus for the limited purpose of trying to hire students."⁸⁹

Despite the Court's refusal to extend *Dale* to the campus recruitment context, however, the invocation of the case in this scenario indicates just how significant a breakthrough *Dale* may be. An expressive autonomy argument was theoretically available to private associations seeking exemptions from government regulations and even funding conditions before *Dale*, but it was a quite weak one because the Court had tended to side with the

⁸⁴ See 10 U.S.C.A. § 983 (Supp. 2005).

⁸⁵ *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004).

⁸⁶ *Rumsfeld v. Forum for Academic & Institutional Rights*, No. 04-1152, 2006 WL 521237 (U.S. Mar. 6, 2006).

⁸⁷ *Id.* at *13-*14.

⁸⁸ *Id.* at *8.

⁸⁹ *Id.* at *14.

government in the inevitable collisions between majoritarian commands and private commitments.⁹⁰ Absent a pure form of private speech (e.g., a parade⁹¹), an entirely private gathering (e.g., a meeting on private property with no appeal to public membership or participation), or an activity that went to the heart of a religious order (e.g., selection of individuals as religious leaders or teachers⁹²), courts were disinclined to hold that private groups had a *constitutional right* to exclude individuals where public laws banned such discrimination.⁹³ Groups with as public a profile as the Boy Scouts could not avoid the force of these laws while also engaging in public outreach and otherwise participating in public funding and community life.⁹⁴ Post-*Dale*, private expressive associations have a much stronger basis for challenging general laws that prohibit discrimination, and for asserting that they can engage in other prohibited conduct.⁹⁵

Here again, the doctrine reveals two things that contradict persistent charges that the Court is unsympathetic to religion and maintains a high “wall” between church and state. First, the Court in recent decades has been the guardian of religious beliefs and religious expression. Most remarkably, it has protected not

⁹⁰ See, e.g., *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

⁹¹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

⁹² The “clergy exception” prevents courts from intervening in employment disputes that involve religious leaders. See, e.g., *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000).

⁹³ Consider, for example, *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (holding that Congress had power to compel private schools to refrain from discrimination on the basis of race, relying on the Thirteenth Amendment).

⁹⁴ Among other things, the lingering shadow of Jim Crow contributed to the Court’s reluctance to protect these private, but socially and politically powerful, associations’ right to engage in membership discrimination, especially along the racial lines that equal protection principles traditionally and explicitly condemn. As that shadow has receded, however, and as the Court has become more skeptical of claims that private groups acting with even substantial government support thereby become state actors, the argument in favor of private associational autonomy has grown stronger. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (refusing to find that a private school was a state actor, despite receiving over ninety percent of its funding from government sources). This is especially so when an association challenges laws that prohibit discrimination on the basis of sexual orientation or other grounds that are not suspect classifications under the Equal Protection Clause.

⁹⁵ See Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 *LAW & CONTEMP. PROBS.* 27, 30 (2004) (noting the “potentially broad implications [of *Dale*] and lower courts’ reluctance to follow out those implications”).

just belief or pure speech about the belief, but also some actions premised on those beliefs,⁹⁶ even when the actions violated important public laws designed to promote principles of equality and liberty.⁹⁷ This is a quite stunning development.

Second, the cases show that neutrality principles do not solve the most difficult questions within these expressive association cases. One can view the expressive autonomy cases as a triumph of liberal values, or as a worrisome erosion of these values, depending on one's perspective about the proper balance between public laws that seek to enforce liberal toleration norms and the interests of dissenting citizens who assert sincere objections to these norms. However one views this clash, it is not resolvable by demanding government neutrality.

A final aspect of these recent developments is worth noting. If, as logically should be the case, *Dale*'s holding is applied neutrally across the spectrum of associations that seek excusal from general laws, then many groups with anti-equality or illiberal ends should be entitled to comparable victories. Consequently, the victory for the Boy Scouts, a familiar group admired by most Americans, may lead to victories by other private associations that are far less popular or benign. A neutrality approach offers no obvious means of distinguishing among these groups, or their ends.

D. Accommodationist Neutrality and Affirmative Action for Religion: Religious Symbols and Ceremonies, Government Benefits, and Government Exemptions

The fourth zone in which the Court has been increasingly respectful of religious interests involves government practices that reflect religious messages or images. In these cases, government practices are challenged as an impermissible government endorsement of religion under the Establishment Clause.

1. Religious Symbols and Ceremonies

Religious themes make countless incursions into public spaces when government affirmatively acknowledges that ours is a "re-

⁹⁶ Contrast this protection of conduct with the much weaker protection of expressive conduct under freedom of expression. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that regulation of expressive conduct triggers only intermediate scrutiny, not strict scrutiny).

⁹⁷ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

ligious people.”⁹⁸ When citizens—often through the American Civil Liberties Union—raise objections to these publicly authorized religious symbols, displays, incantations, prayers, pledges, songs, ceremonies, or imprints on official objects such as currency, the government often claims that such “ceremonial deism” is allowed by the Constitution.⁹⁹ Indeed, exclusion of such images or rituals is antithetical to our constitutional history and the original intent of the Framers.

In this one area, a bare majority of the Court has clung to the separationist neutrality model. Because cases in this area tend to be highly visible and emotional, however, these decisions tend to overshadow other cases that reject separationism principles. The major lightning rod decisions concern prayer in public schools, where the Court’s response has been a fairly consistent one: elementary and high school public students may pray privately or in after-school gatherings, but the public schools may not directly or indirectly sanction prayer, whether during the school day or at official school functions.¹⁰⁰

Lost in the debates over the religion-in-schools cases is that even in this last vestige of separationist doctrine, separationism is subject to very substantial qualifications. The Pledge of Allegiance now contains the words “under God,” yet many public schools still recite the Pledge, provided that students who wish not to participate may decline to do so without official repercussions. Although the Ninth Circuit Court of Appeals concluded that the words “under God” make recitation of the Pledge a religious exercise,¹⁰¹ this case is of dubious provenance. The Supreme Court agreed to review this decision, but did not resolve the case on the merits.¹⁰² Instead, it concluded that the non-custodial father in the Ninth Circuit Court of Appeals case lacked standing to challenge the Pledge recited in his daughter’s school.¹⁰³ If the Supreme Court had reached the merits, however, a majority of the Justices would have allowed recitation of

⁹⁸ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

⁹⁹ See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

¹⁰⁰ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000); *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

¹⁰¹ See *Newdow v. U.S. Cong.*, 328 F.3d 466, 487-88 (9th Cir. 2003), *rev’d on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

¹⁰² See *Elk Grove Unified Sch. Dist.*, 542 U.S. 1.

¹⁰³ *Id.* at 17-18.

the Pledge in public schools.¹⁰⁴

Moreover, as both sides of this acrimonious debate are quick to point out, religion is already a prominent and traditionally accepted part of many other official ceremonies, displays, and behaviors. A state legislature can begin its session with an official prayer.¹⁰⁵ The Court begins its session with the incantation “God save the United States and this Honorable Court.” United States currency bears the words “In God We Trust.” The United States observes a National Day of Prayer by congressional enactment and presidential proclamation. The American flag is flown at half-mast after the death of the Catholic Pope. And American presidents and legislators continue to invoke their God (and no others’) in speeches and other communications with the American people. The *only* zone in which the Establishment Clause arguably still asserts a significant “wall” against official religious affirmations is in public elementary and high school curricular and other school-sponsored programs.¹⁰⁶ Even here, however, the message must be indisputably religious, not embedded in longer political creeds, and indisputably the government’s message.¹⁰⁷

In other arenas, government can support even explicitly religious symbols and messages, provided it observes the Court’s non-endorsement and secular purpose criteria for such displays. These criteria were revisited in 2005, in two prominent cases involving displays of the Ten Commandments on public property. The Court split the decisions, and split bitterly within itself, based upon subtle differences between the legislative history and political context of the displays.

In *McCreary County v. ACLU of Kentucky*, the Court considered whether the Establishment Clause was violated by a display of the Ten Commandments placed inside two county courthouses.¹⁰⁸ In addition to the Ten Commandments, the displays included eight other historical documents and symbols that were secular in nature and which played a role in the development of

¹⁰⁴ Chief Justice Rehnquist and Justices O’Connor and Thomas disagreed with the decision not to reach the merits and wrote opinions that rejected the challenge to the Pledge on the merits. *See id.* at 18 (Rehnquist, C.J., concurring); *id.* at 33 (O’Connor, J., concurring); *id.* at 46 (Thomas, J., concurring).

¹⁰⁵ *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

¹⁰⁶ *See cases cited supra* note 100.

¹⁰⁷ *See supra* text accompanying notes 102-04.

¹⁰⁸ 125 S. Ct. 2722, 2728 (2005).

American law and government.¹⁰⁹ Despite the accompanying secular messages, five Justices concluded that the Ten Commandments displays violated the Establishment Clause, given the history of the displays.¹¹⁰ The fact that this history revealed an expressly religious purpose in erecting the displays proved to be dispositive.¹¹¹ A key factor was that the Commandments were originally displayed in isolation, rather than as part of a montage, and public officials made statements clearly showing that the officials intended that the displays communicate a religious message.¹¹² For example, the officials made statements in support of former Alabama Judge Roy Moore’s defiant display of the Ten Commandments in his courtroom, described God as “the source of America’s strength and direction,” and gave homage to “Jesus Christ, the Prince of Ethics.”¹¹³ After the displays were challenged in court, they went through several transfigurations until the Commandments finally became one display among many.¹¹⁴ Even then, however, these earlier official proclamations about the religious meaning of the Commandments were not renounced: only the displays themselves were modified.

Writing for a five-Justice majority, Justice Souter noted that the First Amendment requires “neutrality between religion and religion, and between religion and nonreligion.”¹¹⁵ He also observed that whether government has a secular purpose is rarely determinative in Establishment Clause cases, but cannot be ignored.¹¹⁶ Moreover, a secular purpose must be “genuine, not a sham, and not merely secondary to a religious objective.”¹¹⁷ To ignore purpose would be as “seismic” as it would be “unconvincing.”¹¹⁸ The Court thus refused to ignore the religious purpose behind the displays, despite the subsequent efforts to elide Establishment Clause objections by modifying the presentation.¹¹⁹ In her concurring opinion, Justice O’Connor recognized that “many Americans find the Commandments in accord with their

¹⁰⁹ *Id.* at 2728-32.

¹¹⁰ *Id.* at 2737-41.

¹¹¹ *Id.*

¹¹² *Id.* at 2738-39.

¹¹³ *Id.* at 2729.

¹¹⁴ *Id.* at 2729-31.

¹¹⁵ *Id.* at 2733 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2735.

¹¹⁸ *Id.* at 2734.

¹¹⁹ *Id.* at 2738-40.

personal beliefs. But we do not count heads before enforcing the First Amendment.”¹²⁰

Justice Scalia wrote a blistering dissent, arguing that “there is a distance between the acknowledgement of a single Creator and the establishment of a religion,”¹²¹ and that the majority’s approach “manipulated [doctrine] to fit whatever result the Court aimed to achieve” and “ratchet[ed] up the Court’s hostility to religion.”¹²² He accused the Court of acting out of self-preservation rather than principle in splitting the results in the two Ten Commandments decisions.¹²³ Further, he condemned the Justices for not delimiting government power to sponsor religious messages in a manner that would guide policy makers, rather than foster future litigation over murky legislative intentions and subtle contextual differences between displays.¹²⁴

This last criticism of the outcomes is plainly correct. The differences between the Ten Commandments displays before the Court, as is clear by an examination of the companion cases, were entirely contextual, and even temporal, in ways that likely will lead to further disputes over what, exactly, a particular government-sponsored display conveys to the reasonable observer and what, precisely, the government officials meant to achieve in approving such displays. The facts of the second case decided in 2005, *Van Orden v. Perry*,¹²⁵ thus will loom large for those public officials who seek to acknowledge religion through new public displays without violating the Constitution.

In *Van Orden*, a six-foot high Ten Commandments display was located outside the Texas government buildings among seventeen other displays and twenty-one historical markers, all within a twenty-two-acre park.¹²⁶ This display of the Commandments was one of many erected around the country by the Fraternal Order of Eagles during the 1950s and 1960s.¹²⁷ Writing for a plurality of the Court, Chief Justice Rehnquist acknowledged that the Ten Commandments are undeniably religious, but noted that they also hold secular meaning that the government can recog-

¹²⁰ *Id.* at 2747 (O’Connor, J., concurring).

¹²¹ *Id.* at 2753 (Scalia, J., dissenting).

¹²² *Id.* at 2757.

¹²³ *Id.* at 2752.

¹²⁴ *Id.* at 2758-61.

¹²⁵ 125 S. Ct. 2854 (2005) (plurality opinion).

¹²⁶ *Id.* at 2858.

¹²⁷ *Id.*

nize in a passive manner.¹²⁸ The display satisfied the latter criteria.¹²⁹ Consequently, the Ten Commandments can be displayed on government property if officials track closely the design and context of the display in *Van Orden*, and avoid the "in your face" religious explanations for erecting them that led a majority of the Court in *McCreary* to strike down the Ten Commandments displays in the courthouses.

Navigating these shoals, however, will not be easy. As dissenters in *Van Orden* pointed out, the origins of the Texas display were hardly different, for Establishment Clause purposes, from the origins of the displays struck down in *McCreary*.¹³⁰ In both cases, the original intention of those erecting the monuments likely was a religious one. In both cases, the displays began in isolation, rather than as part of a more complex array of public monuments. In both cases, reasonable observers could construe the displays as state endorsement of "the divine code of the 'Judeo-Christian' God."¹³¹

Both outcomes also hinged on a bare majority of a Court that is, and may remain, internally divided by deep philosophical differences about the role of such religious affirmations in official contexts. Chief Justice Rehnquist and Justice Kennedy would have approved both displays. Justices Scalia and Thomas not only would have allowed both displays, but believe government can affirm religion over irreligion. Chief Justice Rehnquist likewise held to this view, though not as strongly, but it remains to be seen what view his successor, Chief Justice John Roberts, will do. Justices Stevens, O'Connor, Souter, and Ginsburg found both displays to be an unacceptable endorsement of religion. Justice Breyer approved the monument in *Van Orden* but not in *McCreary*. New appointees to the Court thus could alter these outcomes in the very near future, given Justice O'Connor's recent retirement, Chief Justice Rehnquist's passing, and retirement rumors surrounding Justice Stevens and others. In the meantime, very slight differences in the settings, histories, and other contextual aspects of religious displays across the country will continue to determine their constitutionality.

Of course, governments can easily avoid such litigation by

¹²⁸ *Id.* at 2861.

¹²⁹ *Id.* at 2862.

¹³⁰ *Id.* at 2877-78 (Stevens, J., dissenting).

¹³¹ *Id.* at 2874.

choosing not to erect religious monuments of this kind, reserving them for other settings such as public museums, or tracking more closely the non-endorsement secular purposes cases. The transformation of the displays in *McCreary* occurred only after new lawyers were engaged to advise the officials.¹³² Had they been present from the onset, and had the officials heeded their advice, the case might have turned out differently. That is, despite the subjectivity and highly context-dependent nature of the non-endorsement purpose factors, there is a “there, there” that lawyers and officials can identify and follow rather easily. The likelihood is, however, that citizen groups and sympathetic government actors will install more such displays, building on the positive outcome in *Van Orden*. They likewise will insist that statements reflecting a religious purpose should be immaterial in such cases, and that separationist neutrality is an outpost of older, mistaken conceptions of the Establishment Clause, bespeaking “brooding and pervasive devotion to the secular,”¹³³ rather than justifiable noninterference and noninvolvement with the religious. In their view, government should be allowed to affirm religion over irreligion, and should not be required to muzzle its support, or embed it, code-like, within more general messages about American history. This particular Establishment Clause battle thus is clearly not over.

The frenzied response to public religious displays, though, tends to obscure key facts relevant to the claim that the Court is stripping the public arena of religious messages. Whether or not it is internally coherent for the Constitution to allow prayer or other recognition of religious heritage in some official places but not in others, it *has* been allowed in many of them—*by the unelected judiciary*. The desire for *additional* opportunities for religion to surface in prominent official contexts must be considered in light of existing government support of religion in many public arenas, which has been upheld even when religion is endorsed by the most powerful, even iconic, figures in American government, and even when the religious images are posted on public grounds in prominent and monolithic fashion. Also important to the debate about official acknowledgement of our religious heritage is that these doctrinal remnants of neutral separationism hang by a fraying thread. The *only* areas where

¹³² *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2723 (2005).

¹³³ *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (Goldberg, J., concurring).

separationist principles seem reasonably stable concern prayer and creationism in official public school programs. In all other areas that involve religious symbols or affirmations, signs point toward increasing accommodation of religion, rather than separationist neutrality. In other words, these are not hard times for religion.

2. *Government Benefits*

The government also may choose to support religion without a judicial mandate in another important arena by providing financial and other benefits to religion, and by building religious exemptions into general laws. When this happens, the challengers become citizens who object to such accommodation of, or affirmative public support for, religious ends. Here again, the Rehnquist Court liberalized older conceptions of the Establishment Clause. Indeed, these cases represent the high water mark of accommodationist neutrality.

The Court veered sharply away from its past practice of disallowing government financial support of pervasively sectarian ends, toward allowing such support if the aid first passes through private hands and is secular in context and aim. The Court even approved direct support of sectarian institutions, though with substantially greater qualifications. For example, the government now can provide on-site sign language interpreters,¹³⁴ vouchers,¹³⁵ computers,¹³⁶ and on-site remedial instruction¹³⁷ to students attending parochial schools, provided the aid is secular in terms of its content, the religious destination of the service or funds is one choice among many, and the structure of the aid can be characterized as "indirect"¹³⁸ because it is directed to religious ends by private parties, not by government itself. Aid to religion that does not flow first through private hands or otherwise arrive there through private choices is also allowed if it satisfies Justice O'Connor's additional condition, as expressed in *Mitchell v. Helms*, that the government must provide adequate safeguards against the diversion of government aid to inculcation of religion.¹³⁹

¹³⁴ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

¹³⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹³⁶ *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

¹³⁷ *Agostini v. Felton*, 521 U.S. 203 (1997).

¹³⁸ *Zelman*, 536 U.S. at 652-53.

¹³⁹ 530 U.S. at 859-61 (O'Connor, J., concurring). Justice O'Connor is willing to

The upshot of these aid-to-religion cases is that government clearly can boost parochial schools, faith-based charities, and a wide range of other sectarian ends, provided it observes the structural and substantive rules set forth by the Court for providing this support (i.e., the aid must be secular in content and have a secular purpose). Direct aid still poses the most serious Establishment Clause anxieties, but even these can be overcome. Indeed, Justice O'Connor's retirement could mean that this fragile remaining brigade against direct aid too will be short-lived.

3. *Statutory Exemptions*

Establishment Clause barriers also have been substantially lowered in cases where government *chooses* to exempt religious actors from laws that apply to other citizens who may also object to the laws, but for non-religious reasons.¹⁴⁰ As the earlier discussion of post-*Smith* statutory developments indicates,¹⁴¹ government sometimes grants exemptions when no religious observer has requested, and the Constitution does not demand, such an exception. The Court has rejected the argument that these voluntary accommodations impermissibly advance religion by giving religious rights stronger protection than other constitutionally protected rights.¹⁴² Religious rights can be "more than equal" in some contexts, without violating the accommodationist version of neutrality, and without violating the Establishment Clause.¹⁴³

The constitutional limits of this "play in the joints" between

assume good faith on the part of religious grantees of government funds, and courts may presume that grantees will respect "secular restrictions placed on the government assistance." *Id.* at 860. Of course, any funds that support a religious entity's secular activities free up other funds to support sectarian activities. This displacement boon, however, does not render the government program unconstitutional.

¹⁴⁰ See, e.g., *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion) (determining that permissible accommodation is not limited to what is required by the Free Exercise Clause); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it allows churches to advance religion . . ."); *Walz v. Tax Comm'n*, 397 U.S. 664, 673, 676, 680 (1970) (upholding a property tax exemption granted for church property because it is "simply sparing the exercise of religion from the burden of property taxation"); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (upholding a program allowing public schools to release students during the school day for outside religious instruction).

¹⁴¹ See *supra* text accompanying notes 72-75.

¹⁴² *Cutter*, 125 S. Ct. at 2120.

¹⁴³ *Id.* at 2121.

Establishment and Free Exercise principles were reinforced during the Court’s past Term, in *Cutter v. Wilkinson*.¹⁴⁴ The Court addressed challenges by prison inmates—including a Wiccan witch, a Satanist, and a member of the Church of Jesus Christ Christian who was a racial separatist—to burdens placed on their religious activities by state prison officials.¹⁴⁵ The prisoners sued for injunctive and other relief under the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.¹⁴⁶ The Sixth Circuit Court of Appeals had concluded that RLUIPA was facially unconstitutional under the Establishment Clause because it impermissibly advanced religion by giving greater protection to prisoners’ religious rights than other constitutional rights.¹⁴⁷ The Act provides that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless . . . the burden . . . is in furtherance of a compelling governmental interest” and is “the least restrictive means of furthering that compelling governmental interest.”¹⁴⁸

A unanimous Supreme Court reversed the lower court, concluding that the Act was not facially unconstitutional.¹⁴⁹ Writing for the Court, Justice Ginsburg noted that there is space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.¹⁵⁰ RLUIPA fits between these poles “because it alleviates exceptional government-created burdens on private religious exercise.”¹⁵¹ RLUIPA also applies to government institutions where citizens are under such extraordinary control (e.g., prisons) that their ability to practice their faith may be exceptionally constrained.¹⁵² The government’s interests in order and safety must be given proper consid-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2116-17.

¹⁴⁶ 42 U.S.C. §§ 2000cc-2000cc-5 (2000) (amending 42 U.S.C. §§ 2000bb-2 to 2000bb-3).

¹⁴⁷ *Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2003), *rev’d*, 125 S. Ct. 2113 (2005). For an interesting argument that RLUIPA is unconstitutional for the alternative reason that it exceeds congressional spending power, see Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L.J.* 459, 495-99 (2003).

¹⁴⁸ 42 U.S.C. § 2000cc-1(a)(1)-(2).

¹⁴⁹ *Cutter*, 125 S. Ct. at 2123-25.

¹⁵⁰ *Id.* at 2121.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2121-22.

eration in the application of RLUIPA, but this did not make the statute facially unconstitutional.¹⁵³ Moreover, RLUIPA treats all religions equally, such that no particular religious sect gets preferential treatment.¹⁵⁴ Finally, that only religious inmates are entitled to these accommodations did not produce an Establishment Clause violation, because if it did, “all manner of religious accommodations would fall,”¹⁵⁵ a result not required by the Constitution.¹⁵⁶

4. Summary

Recent statutory and constitutional developments afford government robust power to favor religious adherents in two important ways: by providing them with financial benefits and by excusing them from general laws. Moreover, the current political climate strongly supports the exercise of this power, as evidenced by the rapid growth of state and federal laws that offer funding to religious entities and laws that offer protection for religious autonomy that exceeds the federal constitutional protections of the

¹⁵³ *Id.* at 2122-23.

¹⁵⁴ *Id.* at 2123.

¹⁵⁵ *Id.* at 2124.

¹⁵⁶ That the government can accommodate religious actors by exempting them from general laws was reinforced by the Supreme Court most recently in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006). The Supreme Court reviewed a Tenth Circuit en banc opinion, which had affirmed a lower court order prohibiting the federal government from enforcing controlled substance laws against religious use of the hallucinogenic *hoasca*. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 974-76 (10th Cir. 2004) (en banc). A panel of the Tenth Circuit previously had concluded that the religious exemption was required by the Religious Freedom Restoration Act because no compelling reason supported the ban on the hallucinogenic tea, which is a central part of the religious ritual of a Brazilian-based religion. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1174, 1187 (10th Cir. 2003). Sitting en banc, the Tenth Circuit affirmed the panel opinion in 2004. *Espirita*, 389 F.3d 973. Judge Michael McConnell wrote an opinion concurring with the en banc decision in which he noted that there was no evidence that Congress or the Executive branch analyzed the religious use of *hoasca* before determining that the health risks of the substance outweighed the free exercise rights of the church members. *Id.* at 1020-21 (McConnell, J., concurring). In February of 2006, the United States Supreme Court in a unanimous opinion authored by Chief Justice Roberts affirmed the appellate court decision and remanded the case for further proceedings. *Gonzales*, 126 S. Ct. 1211. The Court made clear that the RFRA “strict scrutiny” test “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 1220. It is not enough for the government to invoke more generally the harms of a practice it seeks to prohibit.

Free Exercise Clause. Once again, the unelected Court has enabled these popular measures, rather than thwarted popular will. Claims that an activist Court is blocking expression of religious values and perspectives in public contexts are wholly inconsistent with this growing, formidable body of constitutional law.

E. Separationist Neutrality Upended: “Disestablishment” of Secular Humanism as Accommodationist Neutrality

The Court’s rejection of separationist neutrality, its wider protection of religious freedom, and its erosion of the Establishment Clause restraint on government endorsement of religion all provide analytical support to another, very worrisome claim: that official exclusion of religion, as such, from public venues or discourse and the burdens placed upon adherents by this official secularism have so escalated in American life that religious adherents face intentional hostility that violates the Establishment Clause. In essence, the claim holds that governments have established “secular humanism,” which, if true, is an impermissible preference for irreligion over religion.

Although this Establishment Clause argument is seldom advanced in the courts, and has never prevailed there, I describe it in some detail because it best describes what animates the most energetic modern efforts to reclaim the public sphere for religious messages and purposes, and illustrates the depth of the divide among citizens over religion in public life. It also displays the most fundamental flaw in neutrality-based theories of religious freedom.

At its root, the current culture war is between citizens who believe American society has undergone a dire social transformation that has carried us far beyond our religious roots and into the abyss of moral and cultural relativism, and those who believe that secularism is the proper public ethic, given our religious heterogeneity. The latter group believes that an official embrace of secular humanism is warranted, even dictated by our constitutional commitments. The former group disagrees, of course, and defines secular humanism as “the prevailing, overarching intellectual system in which ‘Man’ instead of God has become ‘the measure of all things.’”¹⁵⁷ This account views secular humanism

¹⁵⁷ Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 621 (1993). See also *infra* text accompanying note 199.

as a corrosive development:

[A]n indifference to biblical absolutes has been engendered over the centuries by such diverse media as modern science, Enlightenment philosophy, and Nietzschean nihilism, and, more recently, hallucinogenic drugs, surrealist art, and rock music. The result was Communism and Nazism in Europe, and the culture of drugs, abortion, homosexuality, and non-traditional sex roles in the United States. . . . [T]he most powerful vehicle of secular humanism today is the public school.¹⁵⁸

These anti-secularists argue in particular that a separationism approach wrongly permits American public schools—important sites of cultural values transmission—to inculcate any values *except* religious values. Court doctrine reinforces that bias, insofar as it demands exclusion of religious perspectives and practices from the official curriculum. This discriminates against Christian fundamentalism in a manner that is just as arbitrary and destructive of sub-cultural autonomy and cultural pluralism as is official race discrimination.

Indeed, the parallel between the arguments of some modern conservative Christians and those of multiculturalists in past decades is quite striking.¹⁵⁹ Multiculturalists in the period from the late 1970s to the 1990s likewise condemned the public sphere and the public school curriculum as painfully dismissive of their identities and differences.¹⁶⁰ They too challenged public school texts because the texts marginalized their cultures and identities.¹⁶¹ They also demanded responses that ranged from reformation to separatism, in the form of public Afro-centric schools and curric-

¹⁵⁸ Stolzenberg, *supra* note 157, at 622. Interest in overcoming secularism in the United States apparently is growing. Ira Lupu and Robert Tuttle recently argued that “[t]he religious wars in the United States in the early twenty-first century are not Protestant vs. Catholic, or Christian vs. Jew, or even the more plausible Islam vs. all others. They are instead the wars of the deeply religious against the forces of a relentlessly secular commercial culture.” Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 954-55 (2003); *see also* Stolzenberg, *supra* note 157, at 621-22.

¹⁵⁹ I have written at length about the conflicts over the public school curriculum and noted the parallels between the claims of Protestant fundamentalists and modern multiculturalists. TONI MARIE MASSARO, *CONSTITUTIONAL LITERACY* 17, 82-87 (1993). Parts of this section are drawn from that earlier work and used with permission.

¹⁶⁰ MASSARO, *supra* note 159, at 48-51.

¹⁶¹ *Id.* 48-55.

ula.¹⁶² These activists were joined by others who voiced related concerns that women and sexual minorities play a subordinate or non-existent role in the public school curricula.¹⁶³ In some school districts, alternative texts, "magnet schools," and other curricular experiments emerged in response to these challenges.¹⁶⁴ In so many ways, both the rhetorical and the legal strategies of multiculturalists and religious reformers remain mutually reinforcing: legal gains by the one tend to support legal gains by the other, especially when advanced under the mantle of neutrality.

The religious reformers, however, insist that public school teachers are far more welcoming of multiculturalist reforms than of Christian reforms.¹⁶⁵ They further maintain that the excision of Christian viewpoints from the curriculum by teachers and other school authorities is at least partially reinforced by judges who have misread the Establishment Clause.¹⁶⁶ In their view, many elected officials, if not public school teachers, would be far more likely to respond to the appeals from Christian activists were it not for the Court's hostile readings of the Establishment Clause.¹⁶⁷

For example, some state legislators would readily pass laws that would prevent science teachers from teaching Darwin's theory of evolution,¹⁶⁸ or that would require so-called equal time for the account of man's evolution contained in the Book of Genesis whenever Darwinism is discussed.¹⁶⁹ The primary obstacle to these measures remains the Court's past decisions striking down bans on the teaching of Darwinism because the sole justification for the bans was that Darwinism conflicts with "a particular interpretation of the Book of Genesis by a particular religious group."¹⁷⁰ When a curricular decision is based solely on one sect's convictions, it cannot stand.¹⁷¹

Religious parents object vehemently to such cases and believe

¹⁶² *Id.*

¹⁶³ *Id.* at 116-21, 123-24.

¹⁶⁴ *Id.* at 42-43, 49, 55, 114.

¹⁶⁵ *Id.* at 84.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 98-99 (1968).

¹⁶⁹ *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 580-81 (1987).

¹⁷⁰ *Epperson*, 393 U.S. at 103.

¹⁷¹ *See id.*

that equal time for creationism¹⁷²—or, in emerging modern disputes, intelligent or divine design¹⁷³—is an entirely appropriate exercise of curricular power because it maintains government neutrality with respect to unresolved matters of vital importance. Refusal to allow the Biblical accounts or other religious theories about the beginnings of life to be discussed in public schools alongside scientific accounts is both intellectually biased and constitutionally unwarranted. In fact, these religious parents argue that “voluntary governmental accommodation of religion is not only permissible, but desirable,”¹⁷⁴ and claim that all of the Court’s decisions on religion in public schools, with the exception of the cases that permit student prayer groups to meet on school property,¹⁷⁵ are contradictory to the original spirit of the Constitution. That original spirit is tolerant of official endorsement of religion, short of direct coercion of religious belief or conduct.

Building on such sentiments, litigation emerged in the 1980s premised on the provocative claim that public schools today proselytize their own brand of religion—secular humanism.¹⁷⁶ Invoking neutrality principles, the litigants argued that if Christian concepts can be excised from the curriculum because they are inspired by a particular sectarian belief, then secular humanist concepts also should be excised from the curriculum on the same ground.¹⁷⁷ Governmental preference for secular humanist values or teachings in public schools violates both the free exercise rights of Christian students and the Establishment Clause because that clause bars government endorsement of religion *or irreligion*.

Two cases that advanced such a claim are especially instructive. In the first, *Mozert v. Hawkins County Board of Education*, Mrs. Vicki Frost requested that her children be excused from a read-

¹⁷² See *Edwards*, 482 U.S. at 588.

¹⁷³ See Cornelia Dean, *Opting Out in the Debate on Evolution*, N.Y. TIMES, June 21, 2005, at F1 (reporting on Kansas State Board of Education hearings on state policy on evolution instruction); H. Allen Orr, *Devolution*, NEW YORKER, May 30, 2005, at 40 (discussing national developments regarding instruction in intelligent design and requirements that public schools teach that Darwinism is only one possible explanation of life).

¹⁷⁴ *Edwards*, 482 U.S. at 618 (Scalia, J., dissenting).

¹⁷⁵ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (plurality opinion).

¹⁷⁶ See, e.g., *Smith v. Bd. of Sch. Comm’rs*, 827 F.2d 684 (11th Cir. 1987); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

¹⁷⁷ See, e.g., *Smith*, 827 F.2d at 688.

ing program that involved exposure to the Holt, Rinehart, and Winston basic reading series.¹⁷⁸ Mrs. Frost’s objections to the Holt reading series were that it contained passages that concerned secular humanism, futuristic supernaturalism, pacifism, magic, false views of death, and other themes inconsistent with her religious beliefs.¹⁷⁹ She testified that “many political issues have theological roots and that there would be ‘no way’ certain themes could be presented without violating her religious beliefs.”¹⁸⁰ Themes she identified as satisfying this test included evolution, feminism, false supernaturalism, magic, and telepathy.¹⁸¹ She therefore asked that the public schools eliminate all references to these subjects in order to avoid a conflict with her religion.¹⁸²

The Sixth Circuit Court of Appeals refused her request on the ground that if the school were to accommodate her sweeping free exercise demand it would violate the Establishment Clause principle, set as precedent in the creationism cases, that public

¹⁷⁸ 827 F.2d at 1060. For a full account of the factual backdrop to *Mozert*, see JOAN DELFATTORE, WHAT JOHNNY SHOULDN’T READ 13-75 (1992). An excerpt of the author’s account of Mrs. Frost’s beliefs is as follows:

[A]ll decisions should be based solely on the Word of God; using reason or imagination to solve problems is a [sic] act of rebellion. Everyone should live in traditional, nuclear families structured on stereotyped gender roles. Wives should obey their husbands, and children their parents, without argument or question. . . .

. . . [T]he United States has, since its inception, been the greatest nation on earth. Any criticism of its founders, policies, or history offends God and promotes a Communist invasion by discouraging boys from growing up to fight for their country. Since war is God’s way of vindicating the righteous and punishing the wicked, anti-war material—and, by extension, criticism of hunting or gun ownership—is unpatriotic, disrespectful to God, and detrimental to the moral fiber of American youth.

Pollution and other environmental concerns are humanist propaganda designed to provide an excuse for government interference in big business and for international cooperation, either of which is capable of destroying this country. . . . International cooperation might lead to a one-world government, which would be the reign of the Antichrist and bring about the end of the world. . . .

. . . Christianity—that is, Protestant fundamentalism—is the one true religion and the religion on which the United States was founded.

Id. at 36-37. The author concludes that the objections to the public school curriculum in *Mozert* were bound by the protestors’ “total commitment to one religious and cultural group, to the exclusion of globalism and multiculturalism.” *Id.* at 37.

¹⁷⁹ *Mozert*, 827 F.2d at 1062.

¹⁸⁰ *Id.* at 1064.

¹⁸¹ *Id.*

¹⁸² *Id.*

schools cannot tailor curricula to satisfy a particular religion.¹⁸³ The court held that mere exposure to the themes contained in the Holt series was not an undue burden on the plaintiff's free exercise of religion, given that the students were not required to affirm any belief or to engage in a practice prohibited by their religion.¹⁸⁴ Moreover, Tennessee law permitted Mrs. Frost to send her children to a private sectarian school or to teach them at home.¹⁸⁵ Having elected to send her children to public school, she could not excise all portions of the curriculum that she found offensive.¹⁸⁶

In the second case of relevance, *Smith v. Board of Commissioners*, Ishmael Jaffree sued the Mobile County School Board on the ground that certain prayer activity in the public schools violated the Establishment Clause.¹⁸⁷ Douglas Smith and others intervened in the case and argued that if Jaffree were to win his case then the court would be violating their free exercise rights.¹⁸⁸ In the alternative, the intervenors argued that the Alabama public schools had established the religions of "secularism, humanism, evolution, materialism, agnosticism, atheism and others."¹⁸⁹ As in *Mozert*, the objections to the public school curriculum included the value relativism built into the textbooks.¹⁹⁰ The intervenors also complained that the history and social studies textbooks downplayed the importance of religion in history and American society.¹⁹¹ The intentional omission of these facts, they argued, should be just as offensive to First Amendment values as was the mandated omission of discussion of evolution in

¹⁸³ *Id.* For thoughtful discussions of whether granting an exemption from a general law, including a compulsory education law, to a religious minority constitutes impermissible endorsement of religion rather than constitutional respect for pluralism, see generally, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985 (1986); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

¹⁸⁴ *Mozert*, 827 F.2d at 1065.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1064.

¹⁸⁷ 827 F.2d 684, 686 (11th Cir. 1987).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 690-91.

¹⁹¹ *Id.* at 693.

earlier Court decisions.¹⁹²

The appellate court disagreed, noting that “[s]electing a textbook that omits a particular topic for nonreligious reasons is significantly different from requiring the omission of material because it conflicts with a particular religious belief.”¹⁹³ Although the curriculum may have contained ideas that were consistent with secular humanism, it also contained information consistent with theistic religion.¹⁹⁴ The principal purpose in using the textbooks, despite the omissions and coincidences with secular humanism beliefs contained in the texts, was not to establish the religion of secular humanism, but rather to advance the legitimate secular purpose of “attempt[ing] to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making.”¹⁹⁵

Had the courts in *Mozert* or *Smith* ruled otherwise, of course, virtually all curricular decisions would have become potential constitutional land mines. Much secular material has theological resonance, as Mrs. Frost herself noted. If either court had characterized the secular materials in question as antireligious, and thus a violation of the Establishment Clause, it could have left “public education in shreds.”¹⁹⁶ Yet, the claim that the public school curriculum cannot be cleansed of religion without establishing secular humanism, or that establishing an irreligious environment that for devout students is alien, even hostile, is hardly frivolous. Rather, like the Catholics of the 1840s who objected to the strongly Protestant and overtly anti-Catholic bias of northeastern urban schools,¹⁹⁷ Christian fundamentalists of the late twentieth and early twenty-first centuries, as well as members of some

¹⁹² *Id.*

¹⁹³ *Id.* at 694.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at 692.

¹⁹⁶ *People ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) (“If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.”).

¹⁹⁷ See Diane Ravitch’s compelling account of these schisms in *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973* (1974). She describes the “open slurs” against Catholicism in textbooks of the mid-1800s and the objections of nineteenth-century Catholics that public schools were imposing an alien culture on their children. *Id.* at 35. The ultimate compromise, if it can be called that, was secession of Catholics to parochial schools where they could teach their version of the Bible, though without public funding.

other religious and cultural minorities, clearly do have reason to feel that modern public schools' emphasis on value relativism and tolerance of differences—including different religions, cultures, sexual practices and other mores—is antagonistic toward their religious tenets. By failing to see that this is the root of many adherents' objections to modern society, as well as to modern law, critics miss the magnitude of the cultural divide we currently face and avoid confrontation with a difficult truth: no resolution of this impasse will satisfy all sides.

The cases also demonstrate why some religious reformers ask too much of our constitutional order. Just as similar efforts of the nineteenth-century Catholics to tailor the public school curriculum to their parochial preferences failed,¹⁹⁸ modern evangelical Christians' attempts to tailor public institutions to their parochial preferences must also fail if we are to remain culturally and constitutionally committed to liberal values. For American public institutions to substitute religious faith for secular reason, or even to place religious faith in a coequal position with secular reason, would cut too deeply against these liberal democratic values.

It also would ask the impossible. Public institutions, especially public schools, cannot affirm all religions neutrally or equally, given their expressly inculcative roles, the vast range of religious beliefs in the United States, and the pervasiveness of some religions' indictments of modern public values. Public schools are engaged in a form of government speech that is inescapably didactic, which means they can and must choose value-laden messages. These substantive curricular decisions are subject to scant judicial oversight, not because the Supreme Court is hostile to religion, or even because it is committed to a liberal, secular humanist agenda, but because the Court is unwilling to supervise local curricular choices short of powerful evidence of systematic abuse of First Amendment values.¹⁹⁹ Providing religious parents with vouchers to pursue alternative curricula for their children

¹⁹⁸ They have continued to be unsuccessful in the lower courts in similar cases. *See, e.g., Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998) (refusing home-schooled student the right to pick and choose classes to attend at public school); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (refusing students the right to be excused from a student assembly because of its "sexy" content).

¹⁹⁹ *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

may ease the tension produced by schools’ embrace of secular humanism and other liberal values, but it in no way implies that government cannot pursue these ideals in its own schools.

Yet, the curriculum debates illustrate a much deeper dilemma of a liberal democratic order that religious freedom doctrine must acknowledge. Neither deeply religious citizens like Vicki Frost or Douglas Smith *nor* strongly secularist citizens like Ishmael Jaffree will be, or *should* be, satisfied by the government’s ongoing balance of cultural assimilation and religious pluralism interests. Each wants the courts to enforce a constitutional right to a *polar* version of religious freedom and government neutrality. Frost and Smith believe in strong versions of accommodationist neutrality: the government should acknowledge and reinforce religious values as powerfully as it does secular values and should give curricular space to religious doctrine. At the very least, they want a virtually unchecked right to opt out of common commitments that conflict with their religious values—to be let alone by the secular world, unmolested, for free religious inquiry and practice. At the very most, however, they demand transformation of public culture to match their religious values and government support of their religious ends. To them, neutrality requires a radical readjustment of the cultural baseline to embrace religion.

Jaffree, in contrast, believes in strong versions of separationist neutrality: public schools should give no curricular space to teaching religious values, though they can teach about religions when it is relevant to secular courses. He, too, seeks to be left alone, but in a more pervasive sense. To him, neutrality means that religion must be absent from the public sphere or, at most, must assume a muted, non-aspirational, and above all, non-inculcative role.

Neutrality is unworkable at *both* of these poles, for a non-neutral reason: both produce results that undermine liberal values, and both strike most of us as a perversion of the complex balance between democracy and dissent. As I have demonstrated, strong separationist neutrality has always been controversial because it affords too little voice to religious perspectives. Over forty years ago, Justice Goldberg first warned that neutrality of this sort can produce “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”²⁰⁰ The Court

²⁰⁰ Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

has never yielded to such strong separationist desires.

The Rehnquist Court, of course, went even farther to prevent the potential extremes of separationism. It allowed government accommodation of sectarian beliefs through tax credits,²⁰¹ exemptions from federal discrimination laws,²⁰² policies that permit prayer groups to meet on public school property,²⁰³ federal grants awarded to organizations tied to religious denominations that promote abstinence and adoption as alternatives to abortion,²⁰⁴ and rules that bar health care providers who are recipients of federal funds from discussing abortion as an option with patients.²⁰⁵ As such, religion today is hardly cleansed from the American public sphere,²⁰⁶ Ten Commandments and school prayer controversies notwithstanding.

These developments do not mean, however, that Mrs. Frost's extreme version of accommodationist neutrality would have prevailed before the Rehnquist Court. It surely would not have. The Court doubtless would have rejected her claims as too intrusive on government power to craft common standards, including ones that promote liberal and secular values. Yet, this outcome no longer is as doctrinally evident or defensible as it once was, or should be. Rather, the Establishment Clause defense against Mrs. Frost's claims is far weaker than in the 1980s, which makes her basic theory—that hostility to religion, not the Constitution, is the real basis for its pervasive exclusion from public school curricula—doctrinally plausible.

The reason is that the Court has sanctioned religious exemptions in many other contexts where the public stakes were at least as high as they were in *Mozert* and *Smith*. Indeed, in *Dale*, the stakes clearly were much higher because the requested exemption was not a matter of mere administrative inconvenience. The

²⁰¹ *Mueller v. Allen*, 463 U.S. 388 (1983).

²⁰² *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *cf. Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (noting that exemptions must not impose serious burdens on non-beneficiaries, and must “alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause”).

²⁰³ See *supra* text accompanying notes 56-59.

²⁰⁴ See *ACLU Challenges Abstinence Program*, USA TODAY, May 17, 2005, at 3A.

²⁰⁵ *Rust v. Sullivan*, 500 U.S. 173 (1991).

²⁰⁶ Thus, the powerful imagery of Richard John Neuhaus' influential book, *THE NAKED PUBLIC SQUARE* (1984), is no longer so compelling.

Boy Scouts sought excusal from laws that protect other citizens from discrimination—laws supported by reasons that clearly qualify as important, if not compelling government interests. If imposition of important secular standards no longer is permissible when the standards conflict with religious standards, then laws that facially exclude religion to avoid appearing to endorse it (e.g., a school rule that removes only religious messages from the curriculum), or even facially neutral policies that are drafted without the interests of religious groups in mind (e.g., a rule that requires that all student groups observe nondiscrimination mandates with respect to student membership)²⁰⁷ may also violate the Establishment Clause. No compelling constitutional reason arguably supports these failures to accommodate religious interests.

Requests that children be excused from parts of the curriculum that parents regard as hostile to their religion, such as instruction in Darwin’s theory of evolution, also become more powerful. Only a lingering misperception about the “wall” between church and state, now itself viewed as hostile to religion by some members of the Court, arguably remains as a basis for the exclusion of religion from these curricular contexts.

Even the argument that science texts that stress secular concepts and omit religious alternative theories about life’s begin-

²⁰⁷ This issue has arisen, though not always couched as an Establishment Clause problem, at several law schools across the country. The Christian Legal Society Chapter at several law schools challenged the schools’ non-discrimination policies as applied to religious student organizations. The society argues that a religious student organization may require that its leaders conform to its religious creed. In one of these cases, brought against Hastings Law School, the law school prevailed on the Establishment Clause, due process, and equal protection claims. *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. C 04-4484 JSW, 2005 WL 850864 (N.D. Cal. Apr. 12, 2005). Still unresolved are the free exercise and freedom of association claims.

The school’s non-discrimination rule applies across the board and currently makes no exceptions for religious groups. *See id.* at *2. The religious society argues, among other things, that failure to exempt religious groups from the nondiscrimination requirement violates the freedom of expressive association principles of *Dale* because it entails forced association with ideas that the members find repugnant, and may also violate the freedom of speech prohibition against forced affirmation of belief set forth in cases like *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *See Christian Legal Soc’y*, 2005 WL 850864, at *2. *See generally* Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882 (2005) (arguing that the antidiscrimination policies are unconstitutional as applied to dissenting expressive religious student organizations).

nings thereby establish “anti-religion,” in violation of the Establishment Clause, becomes plausible. Schools’ attempts to avoid religion as a category may be seen as invidious viewpoint discrimination in a setting dedicated to critical inquiry rather than as legitimate governmental control over the content of its curriculum. Advocates can remind courts that even elementary school children do not “shed their constitutional rights . . . at the schoolhouse gate”²⁰⁸ and demand that public curricula must not suppress religious perspectives on the themes it presents. Again, absent an Establishment Clause explanation for excising religious perspectives, the viewpoint discrimination argument gains considerable force.

The fundamental problem with this narrow interpretation of public schools’ power to control the curriculum, as well as with strong versions of accommodationist neutrality, is the problem identified in *Mozert*: it equates “secular” with “anti-religious,” and “non-neutral” with “failure to accommodate” in ways that cannot be sustained and grants adherents undue power to object to common laws and baseline liberal principles.²⁰⁹ To weaken the Establishment Clause this much ignores the distinctive dangers of placing responsibility for crafting religious messages in government hands.

It also could leave the entire public arena, not just the public school curriculum, in shreds. To pursue accommodationist neutrality to its logical conclusion denies the possibility of common secular space that is not viewpoint discriminatory or hostile to religion. The Rehnquist Court recognized this, because it adhered to separationist principles in the curricular arena. As Justice Scalia has observed, democracy is compromised to an unacceptable degree if religious adherents can pick and choose which common rules to observe.²¹⁰ The burden on citizens who object to general laws is a “consequence of democratic government [that] 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.”²¹¹ Public schools, of course, are not religious parents’ only

²⁰⁸ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁰⁹ To do so violates the principle set forth a decade ago by Eisgruber and Sager, which is to protect rather than privilege religion. Christopher L. Eisgruber & Lawrence G. Sager, 74 *TEX. L. REV.* 577, 613 (1996) (book review).

²¹⁰ *Employment Div. v. Smith*, 494 U.S. 872, 878-80 (1990).

²¹¹ *Id.* at 890.

option. They can home-school, send their children to parochial school, or supplement public school curricula with family- and religion-centered alternative materials. None of these is a wholly satisfactory alternative, of course. Many multiculturalists too find these options to be suboptimal, if not insulting. But turning public school curricula choices or an individual student’s right to tailor her schooling to her religious needs into a judicially monitored first amendment exercise is likewise suboptimal, to say the least.

Obviously, there is no one line, no Archimedean point, where all can agree to separate our collective will from the individual religious liberty of dissenting citizens in pursuit of worthy liberal democratic principles. Nor is there any *a priori* baseline for government policy decisions, including public school curricular choices, that is religion-neutral in a way that will satisfy all constituents or promote ideological pluralism optimally across all contexts, whether the context is the public school curriculum or any other government-supported expression of common values.²¹²

Yet several points are worth underscoring. First is that the farthest extremes of the secular-religious balance have not been endorsed by the Court at any point in its history. Second is that the Court in recent years has moved very decisively toward allowing much greater government support of religion than it allowed decades earlier. Third is that these recent developments lend analytical support to a legal theory that should sound far-fetched: that the Establishment Clause *requires* official support for religion in public arenas because modern versions of secular principles constitute *anti*-religion. I argue that this doctrinal march to the cliffs needs to be noted, and halted. Although the Court, at times, seems to recognize both the limits and the perils of its accommodationist neutrality and abandons this rhetoric in some cases, it does so without abandoning the underlying logic and holdings of other cases that make these radical arguments plausible.

For example, in the realm of public funding for religious ends,

²¹² An especially illuminating attempt to manage this conflict in the public school setting can be found in Amy Gutmann’s superb book, *DEMOCRATIC EDUCATION* (1987). Schools have always been the most active battlegrounds in the wars between secularists and religious people seeking to forge a common *paideia*, by their lights. The advent of vouchers may ease some of these strains, but is unlikely to end them.

the Court has pulled back from the farthest, logical extentions of its accommodationist neutrality approach, but has not renounced that approach. The result is fractured doctrine that is difficult to apply or to justify analytically. I turn now to recent developments in this arena.

II

WAY BEYOND SEPARATIONIST NEUTRALITY: MANDATORY GOVERNMENT FUNDING?

One of the far-reaching and disturbing implications of the accommodationist neutrality principle reached the Supreme Court in 2004. The Court rejected the proposed application of the principle in this case, but it did so on fairly narrow and somewhat unconvincing grounds.

The claim before the Court was that government today not only may add religious recipients to its funding opportunities without violating the Establishment Clause, but that it *must* do so as a matter of neutral principles. The argument for this result goes as follows: providing equal access to public space opportunities for religious speakers is now required, even though this is a direct, financially significant benefit to religion. Providing funding for religion likewise is now *allowed* where religious destinations are one of many that can be selected by private party recipients of the funds and all destinations serve a secular purpose. In some circumstances, funding is allowed *without* the intervention of a private party break in the funding chain.²¹³ Denying equal access to funding is unconstitutional where the denial is viewpoint sensitive,²¹⁴ and religion can be characterized as a viewpoint.

Indeed, refusal to fund only religious groups *as such*, where

²¹³ Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion). Four Justices in *Mitchell* were satisfied that direct aid (in this case, computers) was constitutional whenever the content of the aid is secular and the structure of the aid program is neutral as to all applicants. *Id.* at 820. Two Justices concluded that direct aid is permissible only if a program is neutral and has safeguards to prevent the diversion of the aid to explicitly sectarian ends. *Id.* at 865-66 (O'Connor, J., concurring, joined by Breyer, J.). Thus, six Justices would allow direct aid to religious institutions. It remains to be seen whether the "divertibility" caveat of the two concurring Justices will hold or eventually fall. Indirect aid, of course, was approved by a majority of the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²¹⁴ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (requiring the University of Virginia to fund a campus religious magazine on equal terms with its subsidization of other student publications).

this exclusion appears on the face of the funding rules, arguably is a presumptive violation of recipients’ free exercise rights under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.²¹⁵ The facial exclusion of religious beneficiaries is, on this account, overt discrimination that triggers strict scrutiny of the measure. Mere desire to ease the stress on already strapped state or federal coffers is not a compelling reason to single out one subcategory of potential recipients simply because they are religious or would apply their public funds to sectarian ends. In the new world of constitutional law, selective funding that excludes only religion from a funding program, where religious entities also serve the secular purposes of the funding program, constitutes intolerable discrimination against religion, not respect for religious pluralism or legitimate government funding discretion.

This argument competes with another line of cases that allows subject-matter-specific and, in some contexts, even viewpoint-specific restrictions on government spending. In cases involving abortion services,²¹⁶ funding for the arts,²¹⁷ and government-supported programs to promote access to the Internet,²¹⁸ government has reserved the right to define the scope of its programs and to determine what ideas to advance with its funds. Although the Court has not always been consistent in applying these principles,²¹⁹ the case law observes a plain difference between direct government regulation of people’s private behaviors “off the funded job” and governmental financial incentives for particular behaviors “on the funded job.”²²⁰ It also recognizes that government itself has the right to express its own views, even at taxpayer expense, without violating dissenting citizens’ right not to be compelled to speak.²²¹

The distinction between private expressive autonomy and government regulatory expressive power also has been important in the Free Exercise Clause cases, which permit substantial burdens on religious freedom before demanding exemptions from general

²¹⁵ 508 U.S. 520 (1993).

²¹⁶ *Rust v. Sullivan*, 500 U.S. 173 (1991).

²¹⁷ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

²¹⁸ *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (plurality opinion).

²¹⁹ *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) (striking down condition on legal aid funding that prohibited lawyers from seeking to reform federal or state welfare laws).

²²⁰ *See Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173.

²²¹ *See Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055 (2005).

laws.²²² Here, too, the failure to *fund* one's religious conduct typically has not been viewed as the same type of government burden as has a direct prohibition on that conduct.

More generally, constitutional law has long observed a distinction between expression and conduct that gives government much greater ability to regulate the latter. Consequently, to extend liberty of religious expression principles to require that religious expression, through conduct, must be *funded* is to ramp it up far beyond what is normally deemed necessary for other forms of individual expression.

Finally, the argument that religion is a viewpoint and not a subject potentially collides with a primary strategy of advocates in the religious exemption cases. When such advocates seek governmental accommodations for religious beliefs they often confront the claim that accommodation is favoritism in violation of the Establishment Clause. In response, they maintain that the Constitution permits "'nondiscriminatory religious-practice exemption[s],' not sectarian ones."²²³ That is, they observe that there is a distinction between an exemption for religion *as a category* and the narrower treatment of religion *as a point of view*, and believe distinctive treatment of the former, *as such*, may be permissible where the latter is not.²²⁴ Unless this is a one-way ratchet that only works when it affords religion greater protection, it makes sense to observe the distinction in both contexts. For all of these reasons, governmental discretion not to fund religion as a category seems constitutionally defensible, though it is not without powerful counterarguments. The recent case of *Locke v. Davey*²²⁵ is a superb illustration of the tension between these competing doctrinal lines.

A. *Locke v. Davey*

The Court in *Davey* addressed the State of Washington's Promise Scholarship Program, under which recipients were allowed to use state funds to support college education in any pri-

²²² See *Employment Div. v. Smith*, 494 U.S. 872, 878-80 (1990).

²²³ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 714-16 (1994) (O'Connor, J., concurring) (quoting *Employment Div.*, 494 U.S. at 890).

²²⁴ This very distinction was emphasized anew by the Court in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), in support of RLUIPA, which affords greater protection to religious rights than other constitutionally protected rights. See *supra* text accompanying notes 142-56.

²²⁵ 540 U.S. 712 (2004).

vate or public state institution, except if the student was pursuing a degree in devotional theology while receiving the scholarship.²²⁶ Joshua Davey challenged this exception on multiple constitutional grounds.²²⁷ Despite the complexities of the case, and the view of some commentators that Davey’s case “appeared to be a slam dunk under *Lukumi*,”²²⁸ six members of the Court rejected Davey’s claims. In a somewhat terse opinion, Chief Justice Rehnquist noted that the exception from the Program was a valid attempt to avoid a state constitutional violation, and did not violate the Free Exercise Clause of the Federal Constitution.²²⁹ The statute’s facial reference to degrees that are “devotional in nature or designed to induce religious faith”²³⁰ did not render the act presumptively unconstitutional, because:

[T]he State’s disfavor of religion (if it can be called that) . . . imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.²³¹

Chief Justice Rehnquist also rejected the argument that if the state funds training for all secular programs it must also fund training for religious professions because these “are not fungible” categories.²³² Rather, religion is unique because both the federal and state constitutions favor free exercise and oppose establishment.²³³ There is “no counterpart with respect to other callings or professions.”²³⁴ Thus, the different treatment of education for the ministry “is a product of [those] views, not evidence of hostility toward religion.”²³⁵ Finally, Chief Justice

²²⁶ *Id.* at 715-16.

²²⁷ *Id.* at 718.

²²⁸ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 173 (2004).

²²⁹ *Davey*, 540 U.S. at 724-25.

²³⁰ *Id.* at 716.

²³¹ *Id.* at 720-21 (citations omitted). The opinion in *Davey* tracks similar language in *Rust v. Sullivan*, also authored by Chief Justice Rehnquist. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (noting that the government had merely made a decision “to fund one activity to the exclusion of another,” which was not viewpoint discrimination).

²³² *Davey*, 540 U.S. at 721.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

Rehnquist concluded that the exclusion of students majoring in theology from the scholarship program was not a violation of freedom of speech or equal protection.²³⁶

Justice Scalia dissented—predictably and vigorously—from these views, and took issue in particular with the claim that the discrimination against religion here imposed only a slight burden on Mr. Davey.²³⁷ On the contrary, Justice Scalia observed, a statute’s facial discrimination against religion is “so profound that the concrete harm produced can never be dismissed as insubstantial.”²³⁸ Moreover, the state’s motivations were not, in Justice Scalia’s view, benign.²³⁹ Washingtonians accepted the exclusion of citizens pursuing theology degrees from scholarship eligibility because they are:

[P]ractitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction.²⁴⁰

In this same passage, Justice Scalia sarcastically noted that the Court had been “so quick to come to the aid of other disfavored groups,” citing case law that prevented discrimination on the basis of sexual orientation, whereas here it refused to prevent “a form of discrimination to which the Constitution actually speaks.”²⁴¹

B. *Defending Davey*

Davey was not an analytically satisfying decision, given the many competing arguments to the outcome that the opinion ignored or glossed over quickly. Moreover, Justice Scalia’s insistence that the discrimination in *Davey* was indistinguishable from discrimination against other disfavored groups has force. Equal protection law treats intentional discrimination against a suspect class as presumptively unconstitutional, whereas facially

²³⁶ *Id.* at 725. According to Chief Justice Rehnquist, the funding of education is not comparable to the funding of a public forum under *Rosenberger*. *Id.* at 720 n.3. As for the equal protection claim, the state measure need only be “rational.” *Id.*

²³⁷ *Id.* at 731 (Scalia, J., dissenting).

²³⁸ *Id.*

²³⁹ *Id.* at 733.

²⁴⁰ *Id.*

²⁴¹ *Id.* (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

neutral laws that produce the same impact against the same class trigger only rational basis review, absent other proof of intent.²⁴² If one reads these areas of law as synergistic and aimed at a common target, a statute that facially excludes only sectarian uses of public funds does appear problematic.

Yet, there is no obvious reason why the law of religion must be read in synergy with equal protection law, and there are many good reasons *not* to do so. For one thing, the clauses serve different purposes, were adopted at different times, and presuppose different things. The statutory inclusion of peyote among the state's controlled substance prohibitions in *Employment Division v. Smith*²⁴³ surely appeared facially hostile to Native American Church members who regard peyote as an important part of their religious rituals. Although expressed differently, the burdens placed on religious minorities in both situations were equally profound to the sincere religious observers who were affected. In fact, the impact on religious observers in *Smith* was forceful and direct: ingestion of peyote was prohibited. In *Davey*, the impact was indirect: Washington State college students can still pursue theological training, just not with state scholarship support.

In any event, Justice Scalia's primary objection to the requested accommodation in *Smith* was not focused on the intent of legislators in drafting the legislation in question or even on the burden it placed upon religious adherents. Rather, he worried about the *consequences for democracy* of permitting religious dissenters to follow their own course rather than the rules set down by the majority.²⁴⁴ That is, Justice Scalia did not view failure to accommodate religion in *Smith* as perforce hostile to religion, given the necessary limits of religious autonomy within a plural society.²⁴⁵ It is, thus, arguably inconsistent to embrace *Smith* but not *Davey*.

To require states to fund religious ends whenever they fund comparable secular ones that offer similar benefits would also violate many conservatives' notions of judicial restraint. For example, support for majoritarian moral values explains much (though surely not all) of many conservatives' objections to fed-

²⁴² See e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

²⁴³ 494 U.S. 872 (1990).

²⁴⁴ *Id.* at 878-80.

²⁴⁵ *Id.*

eral constitutional protection of gay rights. Such conservatives argue that the constitutional right, such as it is, supplants majority conceptions of morality, in deference to elitist liberal pressures to expand the Constitution beyond textual authority.²⁴⁶ Yet, to respect legislative power in one context and not others²⁴⁷ makes little sense. In both, this respect *logically* should be one value to be weighed among several others, though it may be overcome by other legitimate concerns.

Another potentially worrisome upshot of imposing a mandatory equal funding rule is that non-mainstream religions—for example, the white supremacist religion seeking accommodation in *Cutter*²⁴⁸—should be entitled to support along with the more influential, well-accepted, and socially prominent religions.²⁴⁹ Religion comes in many forms, as do ideas that surely will be motivated to seek equal treatment when it comes with government funds.²⁵⁰ A neutrality umbrella is especially useful

²⁴⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

²⁴⁷ Obviously, Justice Scalia is pursuing a larger goal here, as to which he is consistent: judicial protection of religious minorities as against majoritarian forces is constitutionally required. Judicial protection of sexual minorities as against such forces is not. My point is that it is not obvious why democratic outcomes as such are condemned as “trendy” in one context and not in the other. Responsiveness to cultural transformation and social trends presumably is the province of the legislative branch, according to Scalia’s accounts of the separation of powers.

²⁴⁸ See *supra* text accompanying note 145.

²⁴⁹ One important distinction among religions, drawn from Robert D. Putnam’s work on democracy, is between “bonding” and “bridging” religions, “with the latter being the more inclusive, civic, and liberal democratic in orientation.” Macedo, *supra* note 1, at 1586.

²⁵⁰ The potential financial gains for religious applicants are significant. See Laura Meckler, “Faith-Based” Groups Got \$1B in 2003, *ARIZ. DAILY STAR* (Tucson), Jan. 3, 2005, at A4 (reporting that the “government gave more than \$1 billion in 2003 to organizations it considers ‘faith-based,’ with some going to programs where prayer and spiritual guidance are central and some to organizations that do not consider themselves religious at all”). The federal government has granted more than \$1 million to fund a nationwide program called the Silver Ring Thing, which is an offshoot of the John Guest Evangelistic Team, a Pennsylvania-based ministry. The program promotes premarital abstinence through musical comedy and skits. See *ACLU Challenges Abstinence Program*, *USA TODAY*, May 17, 2005, at 3A; cf. MARK CHAVES, *CONGREGATIONS IN AMERICA* 44-93 (2004) [hereinafter CHAVES, *CONGREGATIONS*] (describing the involvement of congregations in provision of social services, including access to government funding for these programs, and noting that assumptions about the distinctive, holistic nature of faith-based provision of social services is belied by substantial evidence about actual delivery of services); Mark Chaves, *Debunking Charitable Choice: The Evidence Does Not Support the Political Left or Right*, *STAN. SOC. INNOVATION REV.*, Summer 2003, at 28, 32 (“[T]here is no substantial discrimination against religious organizations in public funding streams. Isolated instances . . . should be placed in the larger context of extensive and effec-

for minority or fringe religious groups seeking public funds because their interests are most likely to be overlooked by legislatures.

From a liberalism perspective, of course, this leveling effect of a strict neutrality approach to funding is a positive feature because it allows courts to monitor discriminatory distributions of public funds and may maximize pluralism outcomes by compelling government agnosticism toward substantive ends embraced by various religions. Examined more closely, however, this potential upside does not outweigh the countless downsides of mandating equal funding for religion, even from a liberalism perspective.

First, the potential sociopolitical impacts of constitutionally mandated funding of viewpoints that are anathema to a vast majority of citizens, including Satanism and white supremacist religions, are difficult to measure, to say the least. One of these potential impacts might be the erosion of government power to sustain liberal democratic values, rather than promotion of worthy pluralism. In the speech realm, liberal neutrality means we should just avert our eyes²⁵¹ or engage in counter speech²⁵² when confronted with speech that violates liberal democratic values. When speech becomes too threatening to public order, it can be controlled. There is a significant difference, though, between government neutrality vis-à-vis viewpoints expressed in traditional public fora and mandating neutral public funding of messages, especially when the messages are brigaded with conduct and evangelist methods.²⁵³

Consequently, asking citizens to respect adherents’ right to undergo religious training regardless of the religion’s credo is fairly easy. Asking citizens to pay for this training is not. The practical

tive cooperation.”). See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX 63-80, 104-05 (1996) (discussing substantial government support of religious charities).

²⁵¹ Cohen v. California, 403 U.S. 15, 21 (1971).

²⁵² See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[T]he fitting remedy for evil counsels is good ones.”), overruled in part by Brandenburg v. Ohio, 395 U.S. 444 (1969).

²⁵³ Lower courts have respected this distinction in cases challenging government refusals to grant public benefits to groups that discriminate in membership such as the Boy Scouts. See, e.g., Evans v. City of Berkeley, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), petition for review granted, 131 Cal. Rptr. 2d 910 (2003); Boy Scouts of Am. v. Wyman, 213 F. Supp. 2d 159 (D. Conn. 2002), aff’d, 335 F.3d 80 (2d Cir. 2003).

and constitutional difficulties with the latter mandate become especially grave when citizens are asked to underwrite religious instruction that teaches the moral justifiability of refusing to employ, rent apartments to, or grant other basic rights to non-adherents. A tepid, civic version of faith that does not make these demands on adherents thus is easier to accommodate than a passionate version of faith, because the latter may clash more violently with the civic values at stake in the inevitable balance between individual and collective will,²⁵⁴ not because of hostility to sincere religious devotion. Constitutionally mandated neutrality offers no evaluative mechanism for choosing among these recipients of government support.

Constitutionally mandated funding of religious entities based upon neutrality principles also would invigorate challenges to other government funding programs. For example, government funding rules bar providing abortion services for poor women, which currently is permitted under federal conditional spending case law.²⁵⁵ Yet, these restrictions are surely ideologically specific and viewpoint-based. Strictly enforced, government neutrality in funding could compromise government's ability to endorse many non-neutral ends, such as sexual abstinence, tolerance, decency standards, or liberalism itself, without also funding diametrically opposed ideas. Because the religion cases that require equal access and, by extension, equal funding rely upon freedom of expression neutrality principles, they should apply equally to *all* value-laden government programs, not just ones that express values that have religious resonance. Unless neutrality in public funding applies with special force in religious/secular contexts, which would be an exceedingly odd outcome given the Establishment Clause, then insisting on it there could have profound and

²⁵⁴ See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 201 (1992) ("If the baseline from which to measure establishment or free exercise violations is the exercise of religious liberty insofar as compatible with the establishment of the secular public order, the secularization of the public order is not 'discrimination' against religion. . . . But the Court should also take a broader view of free exercise so long as religion does not genuinely threaten to undermine the secular welfare state."); cf. Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1011 (noting that "the religious framework is peculiarly unsuited to the quest for [national] unity because the very design of that framework is configured around notions of inclusion and exclusion").

²⁵⁵ *Maier v. Roe*, 432 U.S. 464 (1977); see also *Harris v. McRae*, 448 U.S. 297 (1980) (upholding prohibition of use of Medicaid funds to perform abortions, except in very narrow circumstances).

undesirable implications for the structure of all government funding programs. Courts also would be obliged to umpire far more of these funding disputes than they already do, which is an outcome that should worry those who fear judicial interference with popular will generally and who worry in particular about judicial oversight of the highly political process of crafting government budget priorities and spending policies.

We already know from experiences with neutrality-based equal access demands in public schools and other public fora that these demands can lead to politically fraught collisions. Pursuit of neutrality in the face of deep-seated hostility toward disfavored perspectives can have powerful boomerang effects that undermine tolerance and pluralism. Mandatory access for student religious groups led to similar access demands by gay student groups, among others,²⁵⁶ which could not be denied without violating neutrality. In some schools, this prompted a “spite your face” response: officials closed the forum down altogether, rather than allow access to unpopular student groups.²⁵⁷ This outcome may be acceptable to those who believe strict neutrality is the proper baseline no matter *what* follows, but others, myself included, worry about the real world implications of imposing this commitment on an unwilling public as a matter of constitutional law. Closing down public schools as venues for all extracurricular activities is a significant hardship for student activities and community groups, to be sure. But closing down government-funded programs, which include public K-12 education, to avoid funding disfavored ends would be devastating. Federal and state funding programs are an essential part of the operating budgets for many worthy recipients, especially public schools, such that ending or limiting public funding to avoid controversy over disfavored programs could have cataclysmic consequences. The risk of these responses is especially grave in difficult economic times, like the present, when state and federal legislators are scrambling to ad-

²⁵⁶ Karen Diegmüller, *Salt Lake City Prepares List of Banned Clubs*, EDUC. WK., May 1, 1996, at 3 (reporting on various student groups that sought to use school facilities on an equal basis under a 1984 law).

²⁵⁷ E.g., Mark Walsh, *Gay Students' Request Spurs Board to Cut Clubs*, EDUC. WK., Feb. 28, 1996, at 6 (reporting that a Salt Lake City school board voted to eliminate all extracurricular clubs rather than allow formation of a high school gay student support group). The efforts to keep gay student groups from meeting have not abated. See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18 (reporting on challenges to school activities aimed at promoting acceptance of gays and lesbians).

dress a wide range of unmet funding needs, including some that are essentially nondiscretionary under prevailing law. Legislators who are opposed to public education or government programs for ideological reasons will have a much easier time cutting them off if they can argue that the Constitution requires all-or-nothing funding responses across like programs. Even when law prohibits legislators from cutting off funds for a particular public program, however, a mandatory funding principle dilutes available funds for other preferred ends and interposes judicial authority in a zone that is inherently political and local.

If equal funding does become mandatory as a matter of constitutional law, then government also will become far more interested in attaching conditions on its spending to prevent the promotion of ends with which it disagrees. Consider, in this regard, the conditions that were placed on the vouchers approved by the Court in *Zelman v. Simmons-Harris*, which (ironically) included a prohibition on discrimination in admissions on the basis of religion.²⁵⁸ Attaching such conditions will become the only way for government to prevent diversion of public funds to ends with which it disagrees, if equal funding becomes a constitutional command.

Consequently, unless religious groups win on *all* counts—mandatory entitlement to public funding *and* mandatory exemption from any conditions on the funding that conflict with the religion's beliefs—then a funding entitlement victory may prove, over time, to be a hollow one. Adherents not only will see government support flowing to the secular ends with which they disagree, but also to other religious ends that are directly antithetical to Judeo-Christian values. Alternatively, they may find themselves accepting funds conditioned on compromising their religious sensibilities and autonomy. Although they can “just say no” to the money, they may find it difficult to forgo significant government resources, especially after they have become accustomed to them. The result may be that they secularize or otherwise adjust their religious conduct in order to qualify for public funds. Consider, in this regard, how major research universities have found it impossible to refuse government funding that is conditioned on allowing access to military recruiters. The siren call of funding subject to conditions that recipients find odious can be a powerful one indeed, particularly in an era of

²⁵⁸ 536 U.S. 639 (2002).

dwindling resources for entities historically dependent upon public funds for survival.²⁵⁹

Yet to deny government the right to impose value-laden conditions on its funding would be absurd. The power of the purse exists to enable government to deploy collective resources for collective ends. For religious groups to demand the money minus the conditions is a “heads we win, tails you lose” strategy that runs afoul of countless other collective interests and principles of government funding. It also paves the way for other groups to follow suit if the new neutrality principles truly apply across the board.

For all these reasons, neutrality is an inappropriate baseline for funding cases. Government spending policies are inescapably and importantly non-neutral. As Stephen Macedo has said, “liberal democratic values such as inclusion, equality, and individual freedom will often support regulations and conditions on public funding schemes that have the effect of bridging associations across the spectrum.”²⁶⁰ For example, government preference for “bridging associations” (i.e., ones that emphasize the civic value of inclusion) over “bonding associations” (i.e., ones that are insular and critical of inclusion, equality, and individual freedom) is plainly *not* a neutral government end, and rightly so. Unless we wish to strip government of the power to encourage bridging across citizens through funding programs and otherwise, then neutrality is the wrong tack.

Risking all of these untoward effects of constitutional doctrine that makes neutral funding mandatory still might be plausible, though problematic, if religious groups today lacked reasonable alternatives to achieve their goals, or were experiencing widespread discrimination by private and public forces. Neither problem, however, exists. On the contrary, American law and politics incentivize state and federal legislators to fund mainstream religions beyond what is required by the Constitution. Voting in favor of faith-based charities, vouchers, and other funding op-

²⁵⁹ I am hardly the first person to worry about these potential boomerang effects of mandatory or even permissive funding of religion, but they bear repeating. For a concise rehearsal of these issues, see David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353 (2003).

²⁶⁰ Macedo, *supra* note 1, at 1589; *cf.* Sullivan, *supra* note 254, at 201 (arguing that “liberal democracy is the overarching belief system for politics, if not for knowledge,” and should inform the constitutional meaning of religious freedoms).

tions satisfies more political pressure than it inspires in many cases, and places the politicians on the side of the religious community in any litigation that might ensue. Judges must then conclude that the funding is a legitimate expression of the will of the people, or risk being cast as anti-religious and obstructionist of legitimate legislative will.

There also is no compelling evidence that American religious groups, as such, currently are suffering from such pervasive discrimination. We have a federal White House Office of Faith-Based and Community Initiatives, with a welcoming website that makes the funding applications process as transparent and user friendly as possible.²⁶¹ Moreover, scholars who have investigated the issue have found no systematic evidence to support the generally assumed claim that faith-based providers of social services typically and actually are more effective and holistic than secular ones.²⁶² These particular bases for public support of religion thus are infirm. They surely do not support the far more adventurous claim that *mandatory* public support for religion is a necessary step toward protecting religious freedom.

One thing is clear. The political and legal strife that government funding of religion inspires will not ease if courts demand that funding occur as a matter of constitutional law. Indeed, the strife may escalate. A constitutional mandate could alter the tone of debates over the pros and cons of government support of religious ends. Government officials once could say, credibly, that decisions not to fund religion were required by the Constitution. Today, that response is doctrinally dubious and politically unpopular.

Of course some officials still might refuse to vote for funding of religion because they believe that separation of church and state is a sensible policy, even when not required. Alternatively, they may worry about the dissipation of scarce public resources to these private ends, may object to the practices of some religions that would benefit from mandatory, neutrality-driven funding, or may be concerned about state restrictions on funding of religion that are stricter than federal law. All of these arguments should stand or fall on their own merits.

²⁶¹ White House Office of Faith-Based & Community Initiatives, Charitable Choice: The Facts, <http://www.whitehouse.gov/government/fbci/guidance/charitable.html> (last visited Feb. 21, 2006).

²⁶² CHAVES, CONGREGATIONS, *supra* note 250, at 61-93.

If, however, the Court *compels* funding of religious ends whenever they match up with comparable secular endeavors *as a matter of constitutional law*, then these policy objections to public support for religion change character. They can be recast as discriminatory and hostile attempts to deny religious citizens their constitutionally protected share of the public pie, rather than as appeals to alternative visions of the public interest and the confounding balance between religion and state.

This is hardly a far-fetched or abstract concern. Recall that Justice Scalia already accused the Washington legislature of "trendy disdain for deep religious conviction,"²⁶³ rather than seeking a balance between religion and state interests in good faith. Scalia's dark construction of the Washington State legislature's motives sounds unduly harsh to some ears, almost as though he too "has mistaken a Kulturkampf for a fit of spite."²⁶⁴ But if funding is a matter of constitutional equity or neutrality, then non-funding of religion does appear sinister. Further vitalization of free exercise, freedom of expression, and freedom of expressive association rights thus not only would cut off valuable state and federal legislative discretion. A mandatory constitutional rule in this area also would sharpen the rhetorical knives in an already exceptionally intense and abrasive cultural conflict.

Advocates of mandatory funding may counter all of these arguments with the following, increasingly powerful claim: the substantive good in preserving government discretion over funding depends entirely on the principles and values of the government currently in power. Citizens who pay taxes faithfully and disagree strongly with state or federal policy are attracted in particular to arguments against giving any political regime broad discretion to determine the ideological context and scope of funding programs.

The argument has considerable force when, as now, one political party controls all branches of the federal government and of many state governments. If the federal and state governments already are aligned to support quite conservative religious ends, then why not demand, as a matter of balance, that all religious ends receive the same treatment? Likewise, when religious actors pursue secular ends that government deems worthy, why should they be denied funding for these secular ends simply be-

²⁶³ *Locke v. Davey*, 540 U.S. 712, 733 (2004).

²⁶⁴ *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

cause they happen to be religious entities that also pursue sectarian ends? The spending power of modern government wields awesome force over citizen behaviors. If one cares about the non-coercive and ideologically neutral exercise of that power, doesn't imposing neutrality constraints on government spending make good, liberal sense?

These concerns about potentially unwise, discriminatory, or illiberal government funding choices are extremely important ones, but even these do not warrant the radical step of constitutionally mandated funding of religion. Again, the government constantly makes intensely value-laden funding choices—including viewpoint-specific ones. The boundaries of the political process and the judicially enforced unconstitutional conditions doctrine already prevent the government from conditioning access to public benefits on the forfeiture of constitutional rights. The latter restraint is murky, to say the least, but remains available as a means of policing the worst-case constitutional abuses of government spending power, while giving the legislature ample room to express its often messy and controversial preferences through spending without judicial interference. Moreover, discrimination *among* religious supplicants is already unlawful. The Establishment Clause still imposes this much restraint on government power, by anyone's account of neutrality. In my view, we do not need to add another layer of constitutional protection to assure these results.

As for the argument that excluding all religious entities from public funding programs when they perform the secular functions of a particular program is senseless hostility to religion, I believe that Chief Justice Rehnquist's response in *Davey* remains the best one, and should be given greater attention in *all* religious freedom cases. Religion *alone* triggers Establishment Clause-type anxieties. Thus, government actors should be allowed to respect the lingering and quite powerful sense that separationism has value, and that a prophylactic approach to lurking Establishment Clause problems may be sound government policy. The "play in the joints" that allows government to grant non-mandatory concessions to religion, out of respect for free exercise concerns, should be matched by sufficient "play" that maintains non-mandatory boundaries between religion and government, out of respect for Establishment Clause concerns.

Finally, the failure to publicly fund a worthy end is not, by it-

self, equivalent to proscribing or developing that end. In every budget cycle, government actors must make agonizing choices among vying, important purposes, many of which would further constitutional values if funded. Funding some of these to the exclusion of others is not, by itself, convincing evidence of antagonism toward the unsuccessful applicants, or even of a lack of commitment to their programs.

For all of these reasons, *Davey* was a prudent, if analytically imperfect, outcome with ample doctrinal support. It evidenced a Court aware of the zero-sum nature of public funds, and wary of stepping out too far beyond the intuition expressed in 1947 that, “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from [sic] they may adopt to teach or practice religion.”²⁶⁵ Naturally, this intuition must be balanced against the rest of the equation, also expressed in 1947, that individuals cannot be excluded “because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”²⁶⁶ That balance requires that when religion is excluded from a funding program there must be a good secular reason for the exclusion. Reasonably well-developed case law recognizes that government choices *not* to fund certain programs are inevitable, and that efficiency and democratic principles require that government be allowed to make these decisions without constant or exacting scrutiny by the courts. The exclusion of religion from a funding opportunity *as a category*, versus an exclusion aimed *at a particular sect*, is a rational government spending choice, subject to sensible judicially enforced limits on abuse of that choice.

Most importantly, for purposes of this Article, *Davey* essentially rejected the viewpoint neutrality analogy to freedom of expression cases in the funding context. Instead, the Court tracked back to the more familiar understanding that religion is a distinctive practice that *cannot* be equated with all other activities that might garner government support. This understanding, I submit, is both correct and needs to be reinforced rather than weakened as the Court moves forward. Absent the rare showing that a government spending program is itself expressly designed to create a public forum for private expressive activity,²⁶⁷ the neutrality

²⁶⁵ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819

principles of *Widmar*, et al., should not apply to funding cases. A

(1995). I thus must disagree with the ever-insightful Professor Doug Laycock, who describes the Court's ruling in *Davey* as creating "the worst of all worlds" because the "current doctrinal combination—few limits on funding, few limits on discrimination in funding programs, and few limits on conditions attached to funding—maximizes government power over religion." Laycock, *supra* note 228, at 196, 199. In Laycock's view, for government to fund secular but not religious programs that provide the same secular benefits "is rank discrimination, with the immediate and obvious effect of discouraging or penalizing the free exercise of religion." *Id.* at 199. If non-funding discourages or penalizes religion, however, it does so in ways that come with the funding territory, which include government-funded abstinence programs, among other viewpoint sensitive measures. All distinctions among government-funded ideas are not discrimination in a sinister sense, and non-funding is rarely, by itself, coercive enough to violate the constitutional conditions doctrine. Moreover, to call non-funding of religion "rank discrimination" is to stand at least one admittedly passé but still powerful chapter of Establishment Clause case law, separationism, on its head.

Laycock's argument also presupposes religion's exceptionalism in a context where it should not be assumed—government funding—and underplays why religion's exceptionalism makes funding problems *especially* problematic. Again, funding is different from freedom to believe or act on one's religious convictions. Government noninterference with these liberties, insofar as possible in a democratic order, is a worthy goal. In the funding context, however, any exceptionalism of religion points against religion rather than for it. Asking Americans to tolerate religious pluralism, to accommodate religious workers, and to embrace religious symbolism in the mosaic of our collective identity is one thing. Requiring us to fund these activities, whether directly or indirectly, is quite another. We should not underestimate our deep differences at this level, or assume that our hard-earned civic virtue of tolerance at these other levels is unshakable.

Finally, Laycock's argument accepts the neutrality principle (which he defines as "substantive neutrality") as the overarching baseline for religious freedom problems. He insists that this is why litigants can challenge government-endorsed religious symbols, even absent a substantial burden. *Id.* at 177. If one accepts his account of the baseline meaning of the religious clauses—which both demand that government maintain neutrality in this unique domain—then *Davey* probably was wrongly decided and mandatory funding should be the Court's next step toward protecting this guarantee. Laycock also argues that government need not be neutral vis-à-vis abortion funding. *Id.* at 176-77. The reason why government can refuse to fund abortions for indigent women is because abortion rights are defined as freedom from substantial government burdens on the right, not a positive right to neutrality. See also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (discussing his theory of "substantive neutrality" toward religion).

Laycock is hardly alone in embracing the neutrality framework for religious freedoms. Many of these works build from the seminal scholarship of Philip Kurland. See Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); see also Ira C. Lupu and Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002) (discussing the competing paradigms of separationism and neutralism and concluding that courts should require neutrality unless the distinctive characteristics of religious entities require different treatment). But see Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 12 (1994) (arguing that "religions are not

neutrality baseline only makes sense where freedom of expression features predominate.²⁶⁸

Indeed, the Court’s recent experiment of allowing substantial government funding to flow to explicitly religious ends if directed there by private hands, and to flow to religious entities directly if it meets the Court’s criteria for direct aid, is already fraught. As it moves forward, the Court should resist the far more perilous step of requiring government funding of religion whenever the government funds comparably situated non-religious entities. At the very least, it should require convincing evidence that the current state of affairs actually produces harms to religious freedoms that outweigh the many practical and theoretical risks of such a dramatic shift in constitutional law. At the most, however, it should reconsider the aspects of current doctrine that brought us to this awkward moment, where neutrality logically implies affirmative support for sectarian ends, rather than separation between government and religious activities.

CONCLUSION

The following doctrinal moves have occurred under the mantle of accommodationist neutrality:

- The First Amendment requires accommodation of speech about religion, accommodation of religious speech, and even religious worship.
- Religion no longer is categorically distinct from all other forms of personal belief and action; under freedom of expression it is one viewpoint among many.
- The Constitution allows and sometimes requires government to exempt religious people and associations from general laws.
- The Constitution does not demand strict separation of church and state in funding cases; it allows neutral assistance that may include substantial funding, and logically may even require funding.

If this sounds like a litigation blueprint for Mrs. Vicki Frost, it *is*. This is significant for at least three reasons.

First, it proves that the Court has been deeply respectful of

generic, and their differences may significantly affect the value of their contributions to America’s public life”).

²⁶⁸ Freedom of speech doctrine did, after all, give us the memorable phrase “one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971).

religion and has created many new constitutional opportunities for its expression by government and private citizens. High-pitched claims of judicial “hostility to religion” are utterly belied by the Court’s actual practices. Second, an accommodationist neutrality approach to religious freedom creates a profound fissure within constitutional doctrine that suggests that funding religion should be required whenever secular entities are funded for similar activities and the funding serves an ostensibly neutral purpose. The many untoward consequences of a constitutionally mandated neutral funding principle outweigh the potential benefits of such a mandate. Finally and most fundamentally, neutrality is an inappropriate, pervasive baseline for religious freedoms. Neutrality works well as applied to freedom of religious expression problems, but it is not an analytically sound baseline in most other arenas where government inevitably and properly must impose non-neutral values. It also denies religion’s exceptionalism in ways that conflict with constitutional text and with popular and judicially enforced intuitions to the contrary. Most importantly, neutrality could undermine government’s ability to further non-neutral liberal democratic ends.

Thus, the proper course is for the Roberts Court to maintain the sensible line between religion and state drawn in *Davey*, and to construe narrowly, if not overrule, doctrine that implies *Davey* was wrongly decided. I also believe that the Court should acknowledge that a neutrality principle—separationist or accommodationist—is not sufficiently nuanced or substantively robust to capture the complex balance between secularism and religion, and should abandon that rubric.

I say this mindful of the powerful desire to embrace a straightforward and elegant framework for religious freedom problems. The dreadful mess of older Establishment Clause case law, which could only be mastered by memorizing results about maps, globes, textbooks, and fields trips, clearly cried out for a better model. As Justice Souter recently noted, however, there is no single, analytically pure principle or metaphor that is adequate to govern the unruly terrain of incommensurable values at stake in this realm.²⁶⁹ The Court’s accommodationist neutrality principle

²⁶⁹ See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2742 (2005) (noting that “an elegant interpretative rule to draw the line in all the multifarious situations [to which the religion clauses apply] is not to be had”). For an excellent recent expression of the multiple values at stake, see Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004).

is no exception.²⁷⁰

The reason for this is that the Constitution protects religious liberty as only one part of an overarching commitment to a liberal democratic order. This is an inherently dynamic commitment that entails an ongoing complex and pragmatic balance of incommensurables. Consequently, constitutional doctrine in the realm of individual rights, perhaps especially in the realm of religious freedom, will continue to produce nonlinear, sometimes untidy compromises, as judges seek to achieve this larger balance. Neutrality should remain an important analytical tool in this process,²⁷¹ but cannot be the whole kit,²⁷² or even the base from which the balance proceeds. This is because neutrality has nothing to say about the non-neutral *boundaries* that liberal democratic commitments impose on individual rights,²⁷³ and cannot account for the constitutionally and politically distinctive aspects of religion. Again, religious commitments are uniquely powerful drivers of human conduct that must be accommodated and respected by a liberal democratic government, but only within the substantive boundaries imposed by a non-neutral commitment to liberal democratic values. This paradox is as well known as it is confounding. Doctrine that downplays or ignores this paradox inevitably falters because it emphasizes abstractions over practical consequences and analytical symmetry over the tapestry of incommensurable constitutional values.

²⁷⁰ Our experience with other constitutional freedoms supports this conclusion. "Equality" wears multiple faces under the Equal Protection Cause. "Freedom of speech" emerges in a dizzying array of doctrinal scenarios that belie the utterly misleading bromide that all government content-based discrimination triggers strict scrutiny. The constitutional command to create space for religion without allowing it to dominate all else likewise cannot be achieved by drawing one straight line across the constitutional case law and decreeing that the answer to all of these dilemmas is to respect neutrality.

²⁷¹ As Justice Souter has noted, "invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important." *McCreary*, 125 S. Ct. at 2743.

²⁷² In this respect, I resonate to Martha Minow's call for a new metaphor in the realm of public-private relations that can "promote a kind of political pluralism that makes the state simply one of many sources of normative affiliation and association." Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1094 (2000). I would pluralize this, though, and call for new metaphors. One metaphor is unlikely to achieve the complex goals she admires.

²⁷³ See Macedo, *supra* note 1, at 1593 (arguing that ideals of a civil society based upon liberal democracy cannot remain neutral toward private associative choices, including choices among religious associations); see also Sullivan, *supra* note 254, at 201.

This does not mean the Court should engage in ad hoc, willy-nilly reliance on personal predilections. It means that religious freedom issues require pragmatic evaluations of the likely consequences of government policies for religious autonomy and genuine respect for the competing interests. They also require a kind of faith that seems to be falling rapidly out of fashion—faith in a civic order bound by liberal democratic principles. Many adherents to this civic faith, myself among them, favor support for these principles even when they conflict with our personal religious values, though we also believe that government and the courts should first seek ways to accommodate both positions. Such an approach is not hostile to religion. It is an attempt to respect religion as a fundamental individual liberty, while also recognizing the fact that religion can present unique and deeply distressing challenges to liberalism. It is also based on the notion that genuine respect for religious devotion means respect for this devotion's awesome power, especially when it is channeled through the formidable power of government.

The Rehnquist Court solidified government power to respect religious perspectives, contrary to popular claims to the contrary. The Roberts Court must now be equally attentive to the importance of boundaries on that power, and on religious autonomy itself, in the interest of liberal democratic principles. It must also embrace its unique role in policing these boundaries, regardless of the political heat it may incur for performing this crucial constitutional function.