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Religion and the Rehnquist Court

Kent Greenawalt
Columbia Law School, kgreen@law.columbia.edu

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I. INTRODUCTION

The Rehnquist Court has turned the constitutional law of religion nearly upside down.

The legacy of the Warren Court, not much disturbed during Warren Burger's years as Chief Justice, was an expansive approach to both the Free Exercise and Establishment Clauses. The key to its generous reading of the Free Exercise Clause was its use of the compelling interest test when religiously-motivated persons sought exemptions from laws that were valid in their general applications. Perhaps the test used in this way never had widespread practical importance in litigated cases—courts quite willing to strike down laws that discriminated on grounds of race or that impinged directly on freedom of speech were understandably hesitant to exempt a small class of citizens from laws with which everyone else had to comply. But the Court's approach set a tone. It symbolized the preciousness of religious freedom and offered at least a modicum of protection for minority faiths with little clout among legislatures. The Supreme Court's most significant conferral of a free exercise exemption occurred in 1972, when Chief Justice Burger wrote that Wisconsin's law requiring children to stay in school up to the age of sixteen could not be applied past eighth grade to Amish citizens who rejected secondary schooling and wanted instead to engage their children in vocational education consonant with their community life.[1]

During the Burger years, the Court developed a threefold test to determine whether a law or practice violated the Establishment Clause. A law was constitutional only if it (1) had a secular purpose, (2) did not have a primary effect of advancing or inhibiting religion, and (3) did not unduly entangle the state with religion.[2] I will not pause here to describe various nuances and quirks in the application of this test,[3] except to mention that legislative efforts to accommodate religious exercise did not necessarily fail

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[*] University Professor, Columbia University School of Law. I am very grateful to Sachin Pandya for perceptive criticisms of a draft.

[1] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[2] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[3] I treat some of these in Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 361–69.

the effects test[4] and that undue entanglement could take the form of a kind of administrative intertwining between the state and religion or of religious bodies exercising power that properly belonged to the state,[5] or vice versa. Although the language of the Burger Court generally made separation of church and state sound less absolute than it had in a few earlier cases, nonetheless the threefold test first announced in *Lemon v. Kurtzman* was applied in separationist manner.[6] Most notably, substantial efforts to grant money for the benefit of religious schools, even when included in general programs of assistance, either failed the effects test or the undue entanglement test. Justice Rehnquist described this as a Catch-22: If a state instituted sufficient safeguards to avoid the untoward consequence of advancing religious education, it would set up an excessive administrative entanglement.[7]

In a brief decade and a half, we have moved from expansive readings of both of the religious clauses to narrow readings of the Free Exercise Clause and of very important aspects of the Establishment Clause. With limited qualifications, the Rehnquist Court has abandoned the possibility of constitutionally-required free exercise exemptions. And the *Lemon* test, not quite rejected but apparently on its last legs, has been largely transformed: Plaintiffs now find it harder to succeed with either a free exercise or an establishment claim. That means that legislatures have wider latitude to make choices about how the law will treat religious individuals and groups (although expanding constraints on "viewpoint" discrimination under the Free Speech Clause have undermined some legislative efforts to secure nonestablishment).

This summary Article pays predominant attention to what the Rehnquist Court has altered. It slights a significant range of continuity. That includes the Court's strong rejection of laws that discriminate among religions or that target religious practices and the Court's inhospitable response to religious exercises that are sponsored by public schools. Although "continuity" may be a misleading term for subjects a court has not addressed, the Supreme Court has not touched the law regarding judicial involvement in church property disputes since Rehnquist became Chief Justice,[8] and nothing it has decided presages an obvious shift in that jurisprudence.

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[4] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[5] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

[6] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).

[7] *Id.* at 420–21 (Rehnquist, J., dissenting).

[8] The last case with full opinions on that subject was *Jones v. Wolf*, 443 U.S. 595 (1979). My appraisal of this area of religion clause law is in Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998).

II. FREE EXERCISE

The central free exercise decision of the Rehnquist Court, *Employment Division v. Smith*,[9] deserves close analysis. But it helps to begin with two cases that, in retrospect, were evident precursors.

In *Goldman v. Weinberger*,[10] the Court passed on a U.S. Air Force regulation, replicated in the other services, that forbade personnel from wearing any headgear indoors. Dr. Goldman was a clinical psychologist who worked at a mental health clinic. An Orthodox Jew, he had worn a yarmulke on the base for some years before testifying for the defense in a court martial. After Goldman protested a subsequent instruction that he not wear the yarmulke except at the hospital, superiors told him to stop wearing it even there. Although the evidence suggested that a retaliatory motive underlay the effort to restrict Goldman, the Supreme Court treated the case as raising the direct question whether Goldman had a First Amendment right to wear his yarmulke in spite of the regulation.

The military's justification for its regulation was uniformity of appearance, which promotes a disciplined force and removes obvious signs of social status. The regulations were more flexible with respect to jewelry than they were about head coverings; allowing nonuniform items of a "neat and conservative" design, these regulations permitted most Christians to wear the signs of religious identification they would be likely to choose.

When the case came to the Supreme Court for decision, the compelling interest standard was the governing norm for most free exercise cases. The facts of *Goldman* raised two significant questions of nuance, one of which various Justices addressed. That question was how the Court should regard potential claims of members of other groups—persons like Sikhs, whose head coverings might cause more disruption than yarmulkes. Should Dr. Goldman's claim be denied, because it would be too difficult to accommodate other similar claims?[11]

The question on which the Justices did not focus was how exactly they should characterize the class of positions in the Air Force to which an exemption to wear a yarmulke indoors might be granted: all personnel; all noncombat personnel; all personnel not in combat zones; all doctors and other professionals? If a court asked whether applying the regulation to Goldman was necessary to achieve a compelling interest that could not be accomplished by less restrictive means, the categorization obviously could matter. Because Goldman was so far removed from being an "ordinary" military officer, the narrower the class into which he might fit, the stronger the argument that the Air Force could comfortably exempt him. On the

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[9] 494 U.S. 872 (1990).

[10] 475 U.S. 503 (1986).

[11] See concurring opinion of Justice Stevens, *id.* at 510–13, and dissenting opinions of Justice Brennan, *id.* at 521–22, and Justice Blackmun, *id.* at 526–28.

other hand, the broader the class, the more helpful for other Orthodox Jews would be a decision in his favor.

Because military life was involved, the government had a substantial argument that either the compelling interest test should not apply at all or that judges should give considerable deference to military judgment, or both.[12] Justice Rehnquist, months before he became Chief Justice, delivered an opinion for the Court that was both surprising and wholly unsatisfying from an intellectual point of view. It declined to state any standard of review but made clear that military judgments should be given an extraordinary degree of deference. A few general observations that military judgments supported the need for a uniform appearance sufficed to sustain the regulation's application to Goldman. Dissenting opinions pointed out that the Court's result could not be sustained under any serious standard of review—under a compelling interest test applied with substantial deference, or under some intermediate test, or under a rational basis approach that insisted on a plausible reason for denying the exemption.[13] At the time, *Goldman* seemed to carve out a special niche of very weak free exercise protection for military claimants.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[14] the Court addressed the claim that a government project to build a road and to allow timber harvesting in the Six Rivers National Forest would seriously disturb the peace and quiet of a location regarded as a sacred place of worship by three Native American tribes. Though the need for any road was far from urgent, the idea that courts might evaluate the government's choice to develop its own property was itself disquieting. Three dissenters thought the Native Americans should prevail; they responded to the concern that judges would have to resolve too many questions with the argument that those claiming a free exercise right to stop government development must surmount a threshold hurdle. Under the dissent's threshold test, claimants would need to show initially that the development would strike at a central aspect of their faith or constitute a "substantial and realistic threat of frustrating their religious practices."[15]

Justice O'Connor's opinion for the Court answered that courts could not reasonably make the determinations necessary to resolve cases like *Lyng*.[16] But her opinion also relied on a conceptual rationale. Governmental actions do not "prohibit" the free exercise of religion unless they directly

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[12] Justice O'Connor, dissenting, combined a compelling interest test with an extremely high degree of deference. *See id.* at 528–33.

[13] *See* dissenting opinions of Justice Brennan, *id.* at 513–22, and Justice O'Connor, *id.* at 528–33.

[14] 485 U.S. 439 (1988).

[15] *Id.* at 474–75 (Brennan, J., dissenting). These various formulations, which Justice Brennan apparently considered as amounting to the same thing, do not quite do so. I try to parse the slight differences in a book on free exercise law on which I am now working.

[16] *Id.* at 451–53.

or indirectly coerce people into acting contrary to their own religious beliefs.[17] Even if the road would "'virtually destroy the . . . Indians' ability to practice their religion,'" the Free Exercise Clause provides no remedy.[18] Justice Brennan strongly protested this formalistic division of free exercise territory, according to which the government cannot offer people incentives to deviate from their religious beliefs—as when it requires Sabbatarians to be willing to work on Saturday if they are to receive unemployment compensation[19]—but can totally destroy sacred sites by reserving the locations for bombing practice.

In retrospect, we can wonder how many Justices in *Lyng* were persuaded by this formalistic argument. Of the five Justices in the majority, only Justice O'Connor voted two years later to preserve any free exercise protection against government practices that were not directed at religion. We can imagine that other Justices in the *Lyng* majority, poised to reduce the Free Exercise Clause to insignificance across the board, were willing to start with government practices that did not "prohibit" in Justice O'Connor's sense.

This brings us to the key decision, *Employment Division v. Smith*. For more than two decades, courts other than the Supreme Court rendered the only constitutional decisions about free exercise rights to use drugs. The leading case was the California Supreme Court's determination that members of the Native American Church had a free exercise right to use peyote in worship unless the state had a compelling interest in enforcing the law against its members.[20] The court reasoned that "to forbid the use of peyote is to remove the theological heart of Peyotism."[21] Concluding that members did not suffer harmful effects from using peyote in worship, and finding no evidence that other enforcement efforts would be hampered by an exemption for the church,[22] the court dismissed assertions by the state about preventing those consequences. Finally, addressing the argument that peyote could be regarded as a symbol that "shackles the Indian to primitive conditions,"[23] the court responded that a state cannot deny the practice of a relig-

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[17] *Id.* at 450–51.

[18] *Id.* at 451–52.

[19] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[20] People v. Woody, 394 P.2d 813 (Cal. 1964). The court drew its compelling interest approach mainly from the United States Supreme Court's *Sherbert v. Verner*, 374 U.S. 398 (1963).

[21] *Woody*, 394 P.2d. at 818.

[22] On this point, the opinion relied partly on a Minnesota case involving a conscientious refusal to submit to jury service. After a remand from the Supreme Court, the Minnesota Supreme Court sustained the free exercise claim, rejecting the state's unsubstantiated argument that an exemption would encourage fraud. *In re* Jenison, 125 N.W.2d 588 (Minn. 1963). The court also noted that some other states had granted statutory exemptions for religious use of peyote.

[23] *Woody*, 394 P.2d at 818.

ion on grounds that it is unenlightened.[24] Thus, members had a free exercise right to ingest peyote during worship services.

Only in 1990 did the Supreme Court of the United States squarely face the religious use of drugs.[25] Two men had been dismissed from their jobs with a private drug rehabilitation organization because they had used peyote in services of the Native American Church. The state refused them unemployment compensation because they had been discharged for misconduct; they claimed that treating their religious use of peyote in this way violated their free exercise rights. The case eventually arrived at the U.S. Supreme Court to determine the same simple question decided by the California Supreme Court a quarter of a century earlier: whether members of the church had a free exercise right against criminal sanctions.[26]

Three Justices would have upheld the free exercise claim, on the basis that the state lacked a compelling interest in applying the law against members of the church.[27] Oregon had chosen not to enforce the criminal law against religious users of peyote, and the state had presented no evidence that peyote has harmful effects. Partly echoing the California Court in *Woody*, Justice Blackmun's opinion suggested that the unpleasantness of eating peyote discourages recreational use, that the Native American Church has helped combat alcoholism, and that any illegal traffic in peyote is slight.[28]

Justice O'Connor disagreed with the dissenters about the strength of the state's interest.[29] She urged that the criminal law represents the "State's judgment that possession and use of controlled substances, even by only one person, is inherently harmful and dangerous"[30] and that even religious use violates the purpose of the law.

The dissenters have the better of the argument regarding the strength of the state's interest. Justice O'Connor did not rely on the possibility of di-

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[24] In this comment, we can see shades of the Supreme Court's later judgment about the banning of animal sacrifice. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[25] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

[26] An initial decision by the Supreme Court established that Oregon could count religious use of peyote as misconduct if it constituted a criminal act. The state supreme court then said that Oregon law provided no exemption but that punishment would violate the federal Free Exercise Clause. The U.S. Supreme Court then addressed that issue.

[27] *Smith*, 494 U.S. at 907–21 (Blackmun, J., dissenting).

[28] Any worry that exempting religious use of peyote will produce a flood of other religious claims was largely met by the fact that no court had sustained a free exercise right to use any drug other than peyote. The opinion explicitly contrasted claims of members of the Ethiopian Zion Coptic Church, which does not restrict use of marijuana to a "limited ceremonial context," but asserts that marijuana is properly smoked all day. Further, the substantial illegal traffic in marijuana and heroin means that "it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts." *Id.* at 918.

[29] *Id.* at 905–06 (O'Connor, J., concurring).

[30] *Id.* at 905. She took the state's policy at face value, not considering the absence of enforcement against religious users of peyote.

minished enforcement against non-religious users, which Justice Blackmun effectively argued will be nonexistent or slight. So, the issue reduces to the harm of use by religious participants in worship ceremonies. On the one hand, that use is crucial for the religion of the Native American Church. In finding significant harm, Justice O'Connor neither relied on findings about adverse physical effects of using peyote, nor mentioned any connection between group members using peyote and using other drugs or alcohol. A legislative judgment that hallucinatory states are potentially harmful for individuals is a sufficient basis for a law against the use of peyote *in general.* But, absent a concrete analysis of what constitutes the harm, the legislative judgment hardly establishes a significant interest in stopping this religious use, much less a *compelling* interest. The state's consistent nonenforcement against religious users belied its claim that preventing use in isolated religious ceremonies constitutes a powerful state interest.[31]

The crucial point in the *Smith* decision is not this interesting division between Justice O'Connor and the three dissenters, but the majority's repudiation of the whole mode of analysis they shared. The Court held that people who have religious convictions that lead them to engage in forbidden acts have no constitutional claim to an exemption—none. An "individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[32] If a reasonable law is not directed against a religious practice and it does not discriminate among religious groups, it may be validly applied against people with religious objections, however powerful. The state need not satisfy any test beyond the easy task of showing that the law is otherwise valid. The claimants in *Smith*, therefore, lost without any evaluation of the strength of their religious claim as opposed to the state's interest in prohibiting their acts.

The Court, strikingly, abandoned the free exercise doctrine that prevailed during the previous quarter century. Justice Scalia's majority opinion struggled mightily to make the decision appear consistent with prior cases. Without evincing any attention to how other courts had applied the compelling interest approach, Justice Scalia noted that few religious claimants had actually won in the Supreme Court. He referred to older cases, including notably *Reynolds v. United States*,[33] a decision upholding a federal law against polygamy and drawing a sharp distinction between protected beliefs and unprotected practices. Although reading as if it marks no significant change, Justice Scalia's opinion fooled no one familiar with free exercise law.

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[31] The interest in preventing physical harm and use of other drugs cannot be compelling in the absence of some evidence of those effects.

[32] *Smith*, 494 U.S. at 878–79.

[33] *Id.* at 879 (referring to *Reynolds v. United States*, 98 U.S. 145 (1879)).

One would have expected the Court to support such a radical departure by claims of an obligation to be faithful to the constitutional text. However, the Court took a different tack, declaring: "As a textual matter, we do not think the words [of the Free Exercise Clause] must be given" the meaning that a general law not aimed at religion can prohibit free exercise.[34] "It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[35] These references to the import of the textual language, asserting only that the Court's reading is "permissible," are surprisingly modest.[36]

The heart of Justice Scalia's opinion is that courts should not have to decide when the force of religious claims to receive exemptions somehow outweighs state interests of varying importance. If the state really had to show a "compelling interest" in order to apply a law against religiously motivated conduct, we "would be courting anarchy."[37] Against the possibility that courts would invoke the compelling interest test only when the conduct prohibited is central to a religion, Justice Scalia responded that judges cannot appropriately determine how significant a particular belief or practice is within someone's religious outlook.[38]

Justice Scalia did not address the possibility that free exercise rights against neutral laws might extend only to worship (and perhaps other core activities of typical religious bodies), but not to various claims of conscience of a broader sort. Such an approach would not necessitate that courts evaluate centrality for any particular religion, but would depend on a basic sense of what is central for most religions.

Justice Scalia expected legislatures to be responsive to religious values to a degree that goes beyond what the Constitution requires, but he was aware that his approach could leave small religious groups vulnerable to legislative indifference:

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[34] *Id.* at 878.

[35] *Id.* I have deleted the words "of the tax" after "object." In many contexts, such an omission would unacceptably change the meaning of a sentence (in the manner in which advertisements for movies often distort reviews), but Justice Scalia's point here is just to generalize from his tax illustration to other kinds of provisions.

[36] However, Justice Scalia's historical claims are a bit more ambitious in his concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997).

[37] *Smith*, 494 U.S. at 888. Especially a society as diverse religiously as ours "cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id.*

[38] Interestingly, neither Justice O'Connor nor Justice Blackmun actually defended an inquiry into centrality, although Justice O'Connor would have required a claimant to show a "constitutionally significant" burden on the exercise of religion, *id.* at 899, and Justice Blackmun said that courts need not "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion," *id.* at 919. Justice Scalia argued that the inquiry about "constitutionally significant burden" is one about centrality, by another name. *Id.* at 887–88 & n.4.

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[39]

It is not difficult to see *Smith* as a reflection of Justice Scalia's strong aversion to flexible standards and balancing and of his preference for sharp lines that cabin (or give the appearance of cabining) judicial creativity.

Largely to accommodate the precedents that challenged his general approach, Justice Scalia elaborated two exceptions to his dominant principle. The first exception concerned a right to unemployment compensation for applicants with religious reasons not to work on Saturday or not to perform war-related work. The Court, thus, accepted free exercise rights to unemployment compensation created by earlier cases; it left unresolved whether the approach of those cases might be extended to other situations when eligibility for benefits depends on a system of individual exemptions.[40]

The second exception is more puzzling. Justice Scalia argued that most decisions sustaining free exercise claims were inextricably linked with other constitutional claims.[41] *Smith* does not preclude success for such "hybrid" claims.

For one kind of hybrid, this conclusion is easy to reach. Free exercise claims may be unnecessary or redundant because free speech claims are sufficient to warrant success. Cases of this variety are untouched by *Smith*'s narrowing of free exercise rights. But the opinion suggests another, stranger sort of hybrid, in which neither the free exercise claim nor the other constitutional claim would be sufficient alone for success, but together they are adequate. Justice Scalia implies that the Court's upholding of the Amish claim to withdraw children from school relied in this way on two relevant constitutional claims—free exercise and parental liberty.

Three aspects of this hybrid analysis are anomalous. First, claiming that two different constitutional claims might combine in strength to generate a defensible right, although neither claim alone would be powerful enough to sustain the right, is perfectly sensible. But if the two kinds of claims in combination can generate practical rights, how can we be sure that one of the kinds will *never* be strong enough by itself? Without surveying the wide domain of possible claims, a project well beyond Justice Scalia's ambitions, one cannot reasonably conclude that a single claim will never do the work by itself. Yet that is what Scalia asserted about free exercise claims.

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[39] *Id.* at 890.

[40] *Id.* at 884.

[41] *Id.* at 881–82.

The second anomaly is the arbitrariness of deciding when another constitutional claim is in play. *Smith* itself easily could have been viewed as a hybrid involving free exercise and free association (to worship). Justice Scalia says *Smith* is not a hybrid, but he does not go very far to explain how courts are to decide that preliminary issue.

The third anomaly is that if free exercise claims are to carry genuine weight in hybrid cases, when two claims are needed to sustain a result, *Yoder*, the crucial pre-*Smith* hybrid, apparently requires courts to evaluate the strength of free exercise claims and state interests in just the manner that Justice Scalia treats as unacceptable when free exercise claims stand alone. These various problems with combined claims suggest that the Court probably does not regard this second sort of hybrid situation seriously. Rather, the concept was artificially manufactured to accommodate the Amish situation.[42]

Employment Division v. Smith marks a crucial divide in free exercise law. The case sharply restricts the scope of the Free Exercise Clause.[43] It fails to safeguard even acts of worship central to a faith. It does not protect Roman Catholic use of wine in Mass any more than it protects use of peyote so long as the law that forbids drinking of wine is aimed at drinking of alcoholic beverages in general. This particular failing of constitutional protection has little practical significance because use of wine in Mass will never be forbidden.[44] Were a locality with few Catholics to adopt such a law, a state government would step in and override it. But to focus on the actual danger to Catholics is to miss the point that such a law is unthinkable because Roman Catholicism is now solidly established as a major American faith. Small minorities do not have that degree of comfort. Apart from genuinely neutral laws, we must worry that if the majority of the population is repelled by a religious faith, a legislature may cleverly adopt a law to discourage its exercise, but do so in an ostensibly neutral way that successfully disguises its real motivation.[45]

The more pervasive concerns are relative indifference to minorities and easy condemnation of what seems odd. The dangers of using alcohol are

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[42] Although a number of lower federal courts have assumed that certain cases fall within the relevant category of hybrids, they have been hesitant to make decisions on that basis and have (understandably) developed no clear principles to demarcate the category. The Second Circuit Court of Appeals, as well as the Sixth Circuit, have treated *Smith*'s "hybrid" language as dictum. *See* Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (summarizing developments in other circuits).

[43] The clause also protects religious belief and speech, but in this respect it is entirely redundant or almost so, since the Free Speech Clause provides the same protection. (The only possible exception is that in the absence of a Free Exercise Clause, perhaps the government could rely on someone's religious belief in a way that is not now permitted.)

[44] During Prohibition, Congress enacted an exemption for the shipment and use of wine for "sacramental purposes." *See, e.g.*, Act of February 4, 1917, ch. 53, § 8, 39 Stat. 903; Act of August 24, 1912, ch. 388, 37 Stat. 518, 519.

[45] For this purpose, a disguise is successful if courts cannot penetrate it by appropriate techniques of interpretation.

far better documented than the dangers of using peyote: Millions of American lives have been stunted by alcoholism, and alcohol continues to figure in many traffic deaths. Although a small sip of wine does not cause these harms, small sips during services might encourage some individuals to wider use. We can be sure that if members of an important church used peyote, legislatures would not forbid religious use. The rule of *Smith* risks legislative indifference to the plight of unfamiliar minority religions.[46] We should accept that approach only if the administrative problems with a more protective standard are truly overwhelming. Some state courts interpreting their own constitutions, free to follow *Smith* or employ a form of weighing that resembles pre-*Smith* constitutional law, have wisely chosen the latter course.[47]

Smith concerns the allocation of responsibility between courts and legislatures for creating exemptions from general laws; it does not undercut the appropriateness of legislative exemptions or address the fairness of particular kinds of categorizations. The opinion makes clear that a legislature may exempt members of the Native American Church from a ban on using peyote, and many state legislatures, including Oregon's, have adopted exemptions following *Smith*.

A legislature can create *an* exemption, but that does not mean it can create any exemption. The troublesome questions are whether it should be able to limit an exemption to religious individuals or to members of named religious groups. A legislature that exempts some religious use of drugs can definitely distinguish among drugs, deciding that use of peyote will not undermine general enforcement but that a similar exemption for marijuana would do so. Almost certainly, a legislature may require corporate membership (of some sort) and use within the group, barring individual use even for those who believe it has some religious significance. Based on the language of its opinions, the present Court would not require that an exemption for drug use be extended to nonreligious groups.

Exemptions like the present federal allowance of peyote use,[48] which is explicitly restricted to members of the Native American Church, are more vulnerable. Affording an exemption to members of one church and not to members of other similar religious groups is an unconstitutional establishment of religion, unless the government has a powerful basis to distinguish among the groups. Though naming only one such group may not generate a problem when the law is drafted, if no other similar group then exists, a similar group may subsequently form. An exemption should not be limited to groups that exist at a particular point in time. Since the Native American

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[46] The degree of risk is controversial. Legislatures have provided exemptions for various minorities, some in response to unfavorable judicial decisions.

[47] *See, e.g.*, Rupert v. City of Portland, 605 A.2d 63, 65–66 (Me. 1992); State v. Balzer, 954 P.2d 931, 935–36 (Wash. Ct. App. 1998).

[48] 21 C.F.R. § 1307.31 (2004).

Church is apparently the dominant group using peyote in worship, an exemption for it by name should not be declared invalid if executive officials or others challenge the classification; the proper relief is to extend the exemption to the members of any otherwise similar unnamed group.[49]

Two important decisions about free exercise have followed *Smith*. One of these was a response to the Religious Freedom Restoration Act of 1993 ("RFRA"),[50] adopted by overwhelming congressional majorities to reinstate the compelling interest test for claims of religiously based exemptions to general laws. The law applied to state and federal laws and practices. The Court declared in *City of Boerne v. Flores* that Congress, under its enforcement power, could not define Fourteenth Amendment rights more expansively than had the Court and that it could reach more broadly than what the amendment itself prohibits only upon a demonstration of a strong nexus between what its legislation covers and the prevention of constitutional violations.[51] Congress's effort to overturn *Smith* failed both as an exercise in definition and as a device to assure observance of constitutional rights the Court had declared.

Because the Court's rationale was a general one about federal relations and the Fourteenth Amendment, not peculiarly tied to the religion clauses, I shall not analyze it here; but we do need to recognize two significant points. First, the Court's opinion was murky about the scope of its coverage. The rationale of the majority did not directly touch RFRA's application to federal laws and practices; that application could be justified as a qualification upon the exercise of ordinary federal powers, not dependent upon the Fourteenth Amendment. Second, the opinion did not resolve the argument that such sweeping legislation, were it aimed directly at federal laws, would constitute an establishment of religion or violate principles of separation of powers. The case, thus, left the status of RFRA uncertain in its application to the federal government, and it also left states free to adopt their own RFRAs, a course some states have taken. Because this essay is mainly about what the Rehnquist Court has done, not what it might do, and because we have relatively little indication of the Court's likely response to such pieces of legislation, I shall not here defend my own opinion that state RFRAs should be, and probably will be, sustained.

The other important post-*Smith* decision is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[52] This case tells a good deal about what is

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[49] Employing the sort of analysis Justice Harlan uses in his concurring opinion in *Welsh v. United States*, 398 U.S. 333, 357–58 (1970), one can conclude that a legislature, having chosen to exempt the dominant group using peyote in worship, would choose a broader exemption over no exemption at all. I here pass over possible arguments that, given the history of relations between the federal government and Native Americans, and the semi-independent status of Indian tribes, an exemption might be limited to Native American groups.

[50] 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

[51] City of Boerne v. Flores, 521 U.S. 507 (1997).

[52] 508 U.S. 520 (1993).

left of the eviscerated Free Exercise Clause and raises the question whether *anything* that is not redundant remains.

The Court considered ordinances aimed at animal sacrifice by members of the Santería religion. That religion, practiced by members of the Yoruba people from Cuba, fuses elements of traditional African religion and Roman Catholicism. Its rituals include sacrifices of chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles, whose meat is typically eaten after a sacrifice. The City of Hialeah responded to plans to create a Santería house of worship by adopting ordinances that prohibited animal sacrifice,[53] while leaving unregulated kosher slaughtering, slaughtering a small number of hogs or cattle per week, hunting, and killing of animals not used for food.

According to Justice Kennedy for the Court, if a law's object is to "restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid [under the Free Exercise Clause] unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[54] Although noting that the words "ritual" and "sacrifice" now admit of secular meaning, Justice Kennedy said that the choice of words supports the conclusion that the legislative aim was to suppress the central element of Santería worship. Virtually the only conduct the ordinances covered was the religious exercise of Santería church members; killings no more necessary or humane went unpunished.[55] By devaluing religious reasons for killing, the city had singled out "religious practice[] for discriminating treatment."[56] Having determined that the ordinances were not neutral, Justice Kennedy further concluded that the laws were not of general applicability[57] because they did not treat similarly nonreligious conduct that

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[53] One of these made it unlawful to "sacrifice any animal," "sacrifice" being defined as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption . . . ." *Id.* at 527. Other ordinances prohibited owning animals intended to be used for food purposes and slaughtering of animals for food outside of areas zoned for slaughterhouse use. *Id.* at 527–28.

[54] *Id.* at 533.

[55] *Id.* at 536. In a part of the opinion joined only by Justice Stevens, Justice Kennedy relied on the history of adoption of the ordinances to bolster the conclusion that the ordinances were designed to suppress Santería practice because of its religious character. Justice Scalia, with Chief Justice Rehnquist, disagreed with Justice Kennedy's reference to the subjective motivations of lawmakers; they limited analysis to an objective evaluation of the laws. *Id.* at 558. This issue about subjective motivation is important in Establishment Clause cases.

[56] *Id.* at 557 (Scalia, J., concurring). A more general Florida statute prohibits "unnecessarily" killing any animal, but almost every other reason for killing animals, including using live rabbits to train greyhound racers, is regarded as necessary. *Id.* at 537.

[57] This point was developed further in Justice Scalia's opinion; he commented that the terms "neutrality" and "general applicability" substantially overlap. *Id.* at 557–59. A defect in neutrality arises when laws by their terms impose disabilities on the basis of religion; lack of general applicability occurs when laws, though neutral in their terms, "through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Id.* But laws that are nonneutral can be

endangers the interests in health and avoiding animal cruelty to the same degree.[58] Applying the compelling interest test, the Court found that the ordinances did not serve any compelling interest and, given their failure to prevent other extensive damage to the claimed interests, the ordinances were not drawn narrowly enough.[59]

Justice Blackmun, concurring, picked up on the last point; a law "that targets religious practice for disfavored treatment" will "by definition" not be "precisely tailored to a compelling governmental interest."[60] For most conceivable laws, Blackmun's position is correct. If a law legislates against certain conduct *because* of its religious motivations or forbids conduct engaged in as a religious practice,[61] while leaving unregulated similar conduct engaged in for nonreligious reasons, the state will *never* be able to show that the law is narrowly tailored to serve a compelling interest. However, one can imagine a state defending a law that covers only religious conduct on the ground that other conduct either does not present a similar threat or is justified by some strong necessity. These possibilities raise intriguing questions about just what it is to target conduct because it is religious and how religious activity must be valued by the state.

In respect to animal sacrifice, a legislature might think that hunting is useful and enriching, but that killing healthy animals under one's control as part of a religious practice lacks value. How should a legislature regard the value of religious sacrifice? Legislators know that the practitioners think the activity has substantial religious value. If the legislature implicitly decides that religious killing of animals has no value and that virtually every other killing of animals has substantial value, that should constitute unconstitutional targeting, regardless of whether the legislators actually abhor the religious practice. If an activity is engaged in for religious reasons, perhaps legislators must count it as having *at least as much* value as similar activities engaged in for pleasure, ordinary recreational benefit, and simple usefulness.[62]

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considered not to be of general applicability, and laws that are not of general applicability can be considered nonneutral.

[58] *Id.* at 543.

[59] As the briefs of animal rights organizations showed, one could reasonably think that the harms the ordinance sought to prevent were sufficiently grave to warrant a prohibition. *See, e.g.*, Brief for the Humane Society of the United States et al., as Amici Curiae in Support of Respondent at 20–29, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (No. 91-948). But even from the animal rights perspective, these ordinances were unfair to the practitioners of Santería, because they left unregulated more popular, widespread activities that are at least as harmful.

[60] *Id.* at 579.

[61] This part of the sentence assumes that either this rationale is evident from the face of the law, as in a preamble, *or* that the ground of the law can be established by appropriate techniques of interpretation.

[62] *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 626 (1999). I am putting aside here arguments that some dangerous activities have extraordinary value—polar exploration and mountain climbing may be examples—

For laws that target religious practices or discriminate among religions, the compelling interest test remains applicable—and it is the robust compelling interest test—the one employed for cases of racial discrimination and interferences with free speech—rather than the less stringent compelling interest approach of the earlier exemption cases. One might conclude that because of *City of Hialeah*, the Rehnquist Court has retained significant bite for the Free Exercise Clause, but that conclusion disregards the issue of overlap. Were there no Free Exercise Clause, targeting of religious practices and discrimination among religions might well violate the Establishment Clause, the Equal Protection Clause, and in some instances the Free Speech Clause. Perhaps the Free Exercise Clause helps a court to decide that targeting and religious discrimination are "suspect," but it hardly seems necessary for that purpose.

What, then, does the Free Exercise Clause do that would be left undone in its absence? Granted, it contributes to the "hands off" approach to civil court involvement in religious disputes, but that approach might well be justified exclusively on grounds of preventing an establishment of religion. I believe that the Free Exercise Clause does have a force that extends beyond the Establishment Clause and other constitutional guarantees[63] when it is applied to the treatment of religious practices that might bear on custody disputes and to laws that forbid various practices of discrimination by religious groups, as well as some other subjects. But I infer this mostly from what the Rehnquist Court has left unsaid, not from what it has actually resolved.

The Rehnquist Court opinions have not drawn back from earlier statements that religious belief is absolutely protected. However, that position is not reasonably defensible if one takes freedom of belief to include both expression of the belief *and* treats denial of office as a failure of protection.

Two examples help make this point. A mayor who is about to hire Hugh Barnett as Police Chief receives a recording of a sermon Barnett recently preached as an active lay member of a local church, in which he has urged that God intended a definite hierarchy of the races, that blacks are the condemned descendants of Ham, inferior and subordinate to whites, that members of all races should possess equal political rights, but that whites should never forget that they are superior in God's eyes. Barnett's sermon was an expression of religious belief, yet the mayor is doubly troubled about appointing him. Her first worry is that a person with these religious views may be unlikely to enforce policies of racial equality with appropriate sensitivity. Her second worry is that when non-whites learn about the sermon, they will lose confidence in Barnett's fairness. As a sensible mayor, she looks for other candidates.

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and arguments that some equally dangerous activities need not be regulated because so few people want to undertake them.

[63] I take up these topics in a longer work in progress on the Free Exercise Clause.

Second, consider a candidate for the head of the Environmental Protection Agency who has written in a church journal that a close comparison of the Book of Revelation against modern conditions shows that the world will end in twenty years. At confirmation hearings, she says this belief will have no effect on her performance in office, but senators are skeptical, fearing that a woman who is sure that the world will end in twenty years may have a limited concern with long term environmental policies, and that she will fail to inspire confidence in the public that cares about the environment.

No one should be refused a job because he or she does not believe in the Trinity, but people may use expressed religious views in judging a candidate's qualifications for a job when those views connect directly to the official role the candidate would fill. Thus, freedom to believe—understood to include any negative consequences because of religious expressions—is not absolute.[64] Conceivably, expressions of religious beliefs are *more* protected than expressions of other opinions covered by the Free Speech Clause, but if not, the Free Exercise Clause covers nothing in this respect that would not be covered by the Free Speech Clause.

The Free Exercise Clause may retain significance as a basis for legislative decisions to accommodate religious beliefs and practices in ways that would otherwise violate the Establishment Clause. It is at least doubtful whether the clause is necessary in this respect. Perhaps legislative efforts to make concessions to religious belief and practice could be seen as appropriate ways to promote individual freedom and public welfare even in the absence of a Free Exercise Clause. Even if the clause is not required to justify accommodations, it can bear on what classifications are permissible, supporting contentions that legislatures may cast an exemption in terms of religious grounds, rather than treating equally all persons with religious and non-religious reasons to engage in activity that would otherwise be illegal or disfavored.

It is pointless to try to resolve exactly how much the Free Exercise Clause now contributes to constitutional law. It is part of our history, and it does bear on the resolution of some complex issues. However, it now does little work that could not arguably be done by some other provision, and the Rehnquist Court opinions have not undertaken to explain what work it does do. Given *Smith*, its importance has diminished radically.

There is a paradox involving the Rehnquist Court opinions on free exercise. Most of the Justices in the *Smith* majority are among the more reli-

[64] Could one argue that these examples are irrelevant because no one has a right to an appointive position? Rejection of a candidate by those making the final decision might be analogized to rejection by voters. No one guarantees that voters will not take account of expressed religious views. Even if one concedes that voters may rely on whatever grounds they wish without acting unconstitutionally, the mayor and senators are government officials. Were freedom of expressed beliefs truly absolute, no government official should reach a negative conclusion about suitability for a government job because of a candidate's religious views.

gious of the members of the Court. Justice Scalia, the author of the Court's opinion, is also the Justice most vocal about his personal religious convictions. Why is it that religious Justices have ruled in a way that seems disadvantageous for religious practice? At least two reasons are: (1) those Justices happen to be strong believers in judicial restraint about individual rights and in laying down clear lines; and (2) the religions the Justices practice are not now at much risk from American legislatures. Were public attitudes like those in the middle of the nineteenth century, Roman Catholic Justices might hesitate to leave so much up to legislative choice.

This paradox of *Smith* carries with it an uncertainty about the future. If President George W. Bush makes appointments to the Supreme Court, we can be rather confident his appointees will continue the Court's relaxation of Establishment Clause restraints. But religiously devout political conservatives are not of one mind about the Free Exercise Clause. We need look no further than the much, and deservedly, admired writings of Michael McDonnell to imagine that someone who well fits most of the criteria President Bush would be likely to use for Supreme Court appointees might conceive a more vigorous Free Exercise Clause than the Rehnquist Court, up to 2004, has bequeathed us.[65]

III. NONESTABLISHMENT

The four major Establishment Clause issues with which the Rehnquist Court has dealt are prayer in public schools, organized private devotional practice within those schools, displays with religious components on government property, and aid that is given to religious schools and other religious organizations but according to neutral criteria which include similar nonreligious groups. During the last seventeen years, the Court has shifted from nearly uniform employment of the three-pronged *Lemon* test of unconstitutionality[66] to the use of two other tests in particular circumstances. I shall treat the first three major issues relatively briefly, and concentrate on problems arising from neutral aid.

A. School-Sponsored Devotion

Two of the Warren Court's most controversial decisions were its declarations that organized school prayer and Bible reading were unconstitutional. Although one can hardly believe that a few moments of routine

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[65] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Judge McConnell's appointment to the Tenth Circuit was controversial in part because he was regarded as a conservative and as taking a view of the Establishment Clause that was very permissive.

[66] Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court approved a state's paying a chaplain who opened legislative sessions with a prayer, without using the *Lemon* test, under which the practice would almost certainly have failed.

devotion at the beginning of the public school day carried much practical significance for children, *Engel v. Vitale*[67] and *School District of Abington Township v. Schempp*[68] have figured prominently in claims that the public schools have become godless.[69]

The recent Court has reinforced and expanded those decisions, striking down organized prayers at public school graduation ceremonies and football games. *Lee v. Weisman*,[70] the five-to-four 1992 decision about graduation prayers, was notable in its rationale. Four of the Justices would have been willing to rely on the *Lemon* test to hold the prayers unconstitutional on the ground that their effect was to promote a religious view.[71] Justice Kennedy was the fifth vote for the majority.[72] He had previously criticized some applications of the *Lemon* test and, judging partly from the harsh invective of Justice Scalia's dissent, the dissenters may have been surprised that Kennedy did not join them. The key to the prayers for Kennedy was coercion. Graduation ceremonies may not be formally mandatory, but in practical terms attendance is regarded as obligatory. Students who have to stand or bow their heads during a prayer might feel coerced into signaling acceptance of practices in which they do not believe.

Since the Free Exercise Clause is largely about coercion, one must understand Justice Kennedy as supposing that a form of pressure too weak to violate the Free Exercise Clause can nevertheless violate the Establishment Clause. Justice Scalia ridiculed the notion that students were coerced; he proposed that the fundamental standard for establishment cases should be whether a practice was a kind that has been accepted since the nation's origins.

When the Court considered prayers at football games, it reached the same conclusion it had for graduations, despite the efforts of school authorities to leave to students the decision whether to have prayers or not.[73]

In another decision reflecting the principle that states should not sponsor religious views, the Court struck down a Louisiana law that required schools to accompany any teaching of evolution with teaching of creation

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[67] 370 U.S. 421 (1962).

[68] 374 U.S. 203 (1963).

[69] I address a wide range of problems concerning religion in the public schools in KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (forthcoming 2005).

[70] 505 U.S. 577 (1992).

[71] *Id.* at 599–609 (Blackmun, J., concurring); *id.* at 609–31 (Souter, J., concurring). In his concurrence, Justice Souter offered a spirited defense of the Court's rule that nonpreferential, as well as preferential, promotion of religion was unacceptable.

[72] Chief Justice Rehnquist joined Justice Scalia and Justice Thomas, as well as Justice White, in dissent. During the time in which they have been sitting, I do not recall any case for which the Court has written full opinions in which Rehnquist, Scalia, and Thomas have found an unconstitutional establishment.

[73] Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

science.[74] Brennan wrote for the Court that the law had an impermissible purpose to promote a religious viewpoint. The Chief Justice joined Justice Scalia's dissent, which challenged both the Court's determination that the legislature obviously did not have a secular purpose and any reliance on subjective purpose whatsoever.[75] This dissent constituted one of a number of persistent, so far unavailing, sallies against inquiries into purpose.

B. Private Devotional Activities at Public Institutions

With respect to private religious clubs, the Court's basic stance has been that these religious clubs, so long as they are not sponsored by the school, must be treated like other voluntary clubs that are permitted to meet on school premises or use school facilities. To treat them less favorably is a violation of the equality aspect of the Free Speech Clause that states have not successfully justified as a means to avoid an establishment of religion. The Supreme Court's initial decision along these lines involved a state university.[76] Congress responded by requiring equal treatment for religious clubs within secondary schools, and the Rehnquist Court sustained that law against an establishment challenge.[77] It subsequently held that the Constitution requires a similar result for elementary schools.[78]

In the most difficult and controversial case involving equal treatment of religious speech, the Court ruled in *Rosenberger v. Rector of University of Virginia* that the university could not fund the publication of other student journals and refuse to finance publication of an evangelical Christian magazine.[79] Justice Kennedy's first step was to determine that a rule against funding material that promoted or manifested a particular belief about a deity or ultimate reality amounted to viewpoint discrimination. This determination has generated confusion that may well be irremediable about the distinctive feature of viewpoint discrimination, as compared with other content discrimination.

The basic significance of the differentiation is this: The government, when it opens up a forum, may screen messages according to some content classifications, for instance by allowing commercial advertising but not political advertising on its buses, or vice versa. It cannot, however, (without compelling reasons) screen messages according to viewpoint; for example, permitting messages that support the war in Iraq but not messages that oppose it. By this fundamental standard, refusing to fund religious, atheist, and agnostic messages while funding other messages is *not* viewpoint discrimination. However, it *is* viewpoint discrimination to fund nonreligious

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[74] Edwards v. Aguillard, 482 U.S. 578 (1987).

[75] *Id.* at 610–40 (Scalia, J., dissenting).

[76] Widmar v. Vincent, 454 U.S. 263 (1981).

[77] Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[78] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

[79] 515 U.S. 819 (1995).

commentary on moral and political problems and to refuse to fund religious commentary on those problems. None of the opinions in *Rosenberger* are clear on this point, and the result of the majority's stretching of the category of viewpoint discrimination is to destroy it as a coherent subcategory of content discrimination.

In any event, remarking that viewpoint discrimination is particularly suspect under free speech principles, the Court next turned to decide whether the university's policy could be supported on the basis of nonestablishment. Both Justice Kennedy's majority opinion and Justice O'Connor's concurrence noted special features of how the university raises and spends funds for student publications that limit the scope of the Court's decision, but in each opinion the bottom line is that funding of the evangelical journal is permissible under federal Establishment Clause law, and that the state of Virginia cannot pursue any extra degree of nonestablishment at the expense of the equality principle drawn from the Free Speech Clause.

Justice Souter's dissent begins, "The Court today, for the first time, approves direct funding of core religious activities by an arm of the State."[80] It is hard to imagine that the result would have been the same during the peak of the Court's nonestablishment jurisprudence.

C. Displays on Public Property

In its two key cases about displays with religious themes on government property, the Court was divided on result or rationale or both. In the first case, the Court passed on the presence of a crèche in a county courthouse, and of a menorah that was standing next to a Christmas tree and a sign saluting liberty outside the city-county building.[81] Four Justices thought both displays were a permissible accommodation to religion. Three Justices thought both displays involved an impermissible promotion of religion. Justices Blackmun and O'Connor decided that the first display was unconstitutional and the second constitutional, and even they disagreed in a subtle way about why the menorah in that context did not involve the state in promoting religion. Justice Blackmun thought that, situated next to the Christmas tree and sign about liberty, the menorah's secular aspect dominated;[82] Justice O'Connor believed the menorah remained a religious symbol, but that the state was not endorsing its religious message.[83]

Perhaps the main significance of the case is that a majority joined in accepting Justice O'Connor's proposal, offered originally in a concurring opinion in an earlier crèche case,[84] that the crucial inquiry was whether the displays had the purpose or effect of endorsing religious views. According

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[80] *Id.* at 863 (Souter, J., dissenting).

[81] County of Allegheny v. ACLU, 492 U.S. 573 (1989).

[82] *Id.* at 613–21.

[83] *Id.* at 632–37 (O'Connor, J., concurring).

[84] Lynch v. Donnelly, 465 U.S. 668, 688–92 (1984) (O'Connor, J., concurring).

to O'Connor, the government cannot take a position on questions of religious belief or make "adherence to a religion relevant in any way to a person's standing in the political community."[85] Justice O'Connor had first suggested "endorsement" as a desirable way to understand the purpose and effect prongs of the *Lemon* test.[86] But the endorsement test has often been spoken of as an alternative to *Lemon*. For Justice O'Connor, endorsement comes close to being an all-purpose approach to the Establishment Clause; a majority of the Court (a bare majority at that) has accepted it as *the test* only for cases involving displays on public property, although Justices other than O'Connor will consider endorsement as one relevant consideration in other sorts of cases.

In a subsequent controversy over whether a state that permitted other displays on its capitol grounds could deny a permit to the Ku Klux Klan to erect a cross, the Court ruled that the government could not reject a private display just because it was religious.[87] A plurality consisting of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas rejected use of an endorsement approach for circumstances when the government makes space available for private displays. For them, it was sufficient to meet any establishment concern that space be made available on a neutral basis. Justice O'Connor, joined by Justices Souter and Breyer, reached the same outcome on the basis that the state would typically not be endorsing religion if it made its space available generally.

As Justice O'Connor has elaborated the endorsement test, the question is whether a reasonable observer would discern an endorsement. The reasonable observer here is someone who is familiar with the particular history of the community and use of the square and is sensitive to constitutional values.[88] The reasonable observer is not of any particular religious persuasion. This method of evaluating endorsement allows a court to determine the issue without deferring to jury findings or assessing claims about people's actual appraisals within particular communities. But it purchases convenient judicial evaluation at more than one price.

First, a reasonable observer might find no endorsement although most actual people would perceive an endorsement, and vice versa. Second, positing a reasonable observer of no religious persuasion may be extremely artificial from a conceptual standpoint. People's actual perceptions depend considerably on their religious views. Third, the objective character of O'Connor's test detaches it to some degree from its rationale of protecting

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[85] *ACLU*, 492 U.S. at 625 (O'Connor, J., concurring).

[86] Although typically the question had been whether the state is endorsing a religion (or religion in general), it is clear that disapproval or condemnation is no more acceptable than endorsement.

[87] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

[88] Justice O'Connor does not mention awareness of constitutional values in the capitol grounds case, but in *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), she wrote in a concurring opinion that "courts should assume that the 'objective observer' . . . is acquainted with the Free Exercise Clause and the values it promotes." I have generalized this comment to a degree.

citizens from feeling they are outsiders, not full members of the political community. Her formulation downgrades the perceptions of reasonable members of minority religions, who may take as endorsements of Christianity what Christians pass off as insignificant. Were one to pay serious attention to the rationale of protecting citizens from feeling as outsiders, one might give special weight to the perceptions of reasonable members of the class that could feel symbolically excluded.

Two aspects of the particular relation between endorsement and the *Lemon* test are worth noting. First, although O'Connor's formulation of endorsement includes both purpose and effect, a reasonable observer with full knowledge will almost always conclude that the relevant effect will be the same as the relevant purpose. Second, despite occasional remarks by Justice O'Connor that may intimate the contrary, one should not imagine that endorsement could function as a potential full substitute for *Lemon*. If the government acted secretly to promote a religious group,[89] unacceptable promotion would still exist, without any perception of endorsement.

At one stage, it may have appeared that endorsement was the wave of the future. Although arguments about endorsement will figure in future cases, I suspect that problems with formulating the test, as well as its considerable flexibility, make it an unlikely candidate to dominate Establishment Clause analysis.

D. Aid on a Neutral Basis

The Rehnquist Court has worked its most significant revolution with respect to aid that goes to religious organizations, according to criteria of assistance that do not make reference to religion. For the most part, assistance to hospitals, adoption agencies, etc., with religious affiliations has been uncontroversial; the fundamental dispute has been over religious schools. In the specific case of religious schools, religious and secular functions often are significantly intertwined, and a tradition that public education is the core of common citizenship has generated resistance to substantial aid.

Prior to 1983, the Court had accepted financial benefits for religious schools when the benefits were clearly detached from the school's religious functions. Thus, it upheld a state's loaning textbooks and supplying standardized tests and scoring services that were used in public schools.[90] Aid that assisted religious teaching was treated as impermissibly advancing religion, and when a law required detailed supervision to prevent this effect, the Court responded that the administrative entanglement of state and relig-

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[89] For example, a small highway commission might, in secret deliberations, choose highway route A over route B only because route A was favorable for churches of a particular religious denomination. To the public, they might offer reasons that had nothing to do with religion, although within the deliberations among themselves, each had acknowledged that secular reason strongly favored route B.

[90] Wolman v. Walter, 433 U.S. 229 (1977).

ion was excessive.[91] A number of opinions relied on Roman Catholic sources for the proposition that religion was a pervasive element for Roman Catholic parochial schools, the primary beneficiaries under most schemes of aid. Although it would be difficult to defend the exact lines drawn by majority opinions that linked a few "centrist" Justices with colleagues on the left who would have disapproved virtually all assistance and colleagues on the right who would have accepted substantial aid, the cases together allowed marginal aid but no other.

In 1983, the tide seemed to have turned. Justice Rehnquist wrote for a majority of five in approving a state tax deduction for parental payments of tuition, textbooks, and transportation.[92] The overwhelming financial assistance went to parents paying tuition for private schools; in these, 96% of the children enrolled went to Roman Catholic schools. Justice Marshall vigorously dissented, emphasizing the effect of the deduction and pointing to the prior invalidation of a similar New York scheme for private schools.[93] Justice Rehnquist responded by urging that deductions were available for all parents, including those whose children attended public school; that any assistance for parochial schools resulted from the private choices of individual parents and that facial neutrality of criteria for the receipt of benefits matters more than evidence about which classes of citizens will predictably receive those benefits. Two related reasons for this stance were doubts that courts could develop principled standards for assessing statistical evidence and concern about the uncertainty introduced by making constitutionality turn on proportions of beneficiaries.

When in 1985 the Court considered two cases[94] involving state programs of aid—one financed by the national government—that paid public school teachers to teach remedial programs for private school students on the premises of private schools, many observers thought the time had arrived for a drastic reversal of the Court's resistance to educational aid, and perhaps for outright abandonment of the *Lemon* test. They were surprised by, and disappointed with, the Court's narrow rejection of the aid programs. Public school teachers teaching within sectarian schools might be influenced by the religious environment, Justice Brennan wrote in one of the cases, and might be inclined to conform their secular instruction to that environment.[95] The extensive monitoring system that was designed to save New York City's program from "effects" invalidation itself introduced excessive entanglement of church and state, as did the inevitable frequent contact between public school teachers and religious school teachers and

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[91] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).

[92] Mueller v. Allen, 463 U.S. 388 (1983).

[93] *Id.* at 404–17 (Marshall, J., dissenting).

[94] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); *Aguilar*, 473 U.S. at 402.

[95] *See Ball*, 473 U.S. at 387–88.

administrators. This is how things stood when Rehnquist became Chief Justice.

Four cases reveal both the extent to which the law has shifted since then and the ways it might shift further with Bush appointees. The first was a continuation of the New York case decided in 1985.[96] After the Supreme Court's ruling, the district court had enjoined New York City from sending its teachers into the parochial schools; the city responded by providing the remedial instruction in mobile units off school premises. According to one estimate, the costs of complying with the Supreme Court's decision produced a decline of about 35% in the number of private school children served. The City Board of Education in 1995 sought relief from the injunction, and the Supreme Court took the unusual step of altering its resolution of a decided case.

Justice O'Connor wrote for a majority of five. Subsequent decisions had, she said, eroded the rationales of the earlier ruling. According to O'Connor, one assumption of the earlier Court was that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work."[97] (I think that overstates what can fairly be drawn from Justice Brennan's opinion; a more accurate rendering is that he found a "substantial risk" that teachers might conform instruction to the schools' sectarian environment.)[98] A later case allowing the state to pay for a sign-language interpreter for a deaf student in a Catholic high school[99] undermined any presumption that state employees would inculcate religion in parochial schools.

Second, earlier cases had assumed that having public school employees teach in parochial schools would create a symbolic union of church and state. This assumption was implicitly repudiated by the decision involving the sign-language interpreter, which did not presuppose that a public employee's presence would create any unacceptable symbolic link.

The third assumption was that public aid directly financing the educational function of religious schools impermissibly supports religious indoctrination, even if the aid reaches the school through private decision-making. This assumption had been undermined by a decision allowing a person to use a state's vocational tuition grant to attend a Christian college to prepare to become a pastor, missionary, or youth director.[100]

In the earlier New York decision, the Court had also rested on a fourth assumption—that the extensive monitoring needed to ensure that the public school teachers did not inculcate religion would amount to an excessive en-

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[96] Agostini v. Felton, 521 U.S. 203 (1997).

[97] *Id.* at 222.

[98] *Id.* at 219.

[99] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[100] Witters v. Wash. Dep't. of Servs. for the Blind, 474 U.S. 481 (1986). The significance of private decision-making had earlier been emphasized in *Mueller v. Allen*, 463 U.S. 388 (1983).

tanglement. Once the assumption that most public school teachers would be inclined to inculcate religion was abandoned, the Court discerned no need for extensive monitoring of teachers and it concluded that the needed administrative cooperation of public school teachers and private school staff would not impermissibly entangle the state with religion.

In the course of her discussion of this entanglement issue, Justice O'Connor readjusted the relationship between entanglement and effect. Because the examination of entanglement involved many of the same factors as an inquiry about effect, entanglement would henceforth be treated as one aspect of effect—not an independent strand in a three-part test. Gauging the practical significance of this formal shift is difficult. A blatantly unacceptable kind of entanglement can invalidate, whether the locus of inquiry is separate or an aspect of effect. But we can imagine a circumstance in which a degree of entanglement, viewed by itself, would seem excessive, but would make a contribution to overall effects that would seem tolerable. To this extent, folding entanglement into effect could diminish its significance.[101]

Justice Souter's dissent, joined by Justices Stevens, Ginsburg, and Breyer, emphasized that the state should not subsidize religion and should not act in a way that people will perceive as endorsing religion.[102] Public school teachers teaching courses that are indispensable to the educational function of religious schools—and doing so inside the schools—inevitably leads to both consequences.

The second important case, *Mitchell v. Helms*,[103] is notable primarily for what its plurality opinion says. The case involved federal payments to state and local agencies to lend educational equipment to public and private schools. Six Justices voted to uphold the payments. Justice O'Connor, joined by Justice Breyer, thought that the case was controlled by the New York aid case, decided three years earlier.[104] Justice Thomas, joined by Justices Scalia and Kennedy and by the Chief Justice, cut with a much wider swath. So long as the services themselves are not religious and the criteria for receiving them are neutral, the assistance is permissible, even if the services have a potential to be diverted (and indeed are diverted) to religious uses. The crucial inquiry is whether religious indoctrination can be attributed to the government; religious use that occurs after a school receives benefits that are non-religious in content cannot be attributed to the government. Justice Thomas remarks on the principle of private choice—

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[101] It is also possible to conceive of an unlikely scenario in which a moderate degree of entanglement, not excessive in itself, becomes the straw that breaks the camel's back in terms of untoward effects of promoting religion. In this event, treating entanglement as a component of effect could actually increase its practical force.

[102] *Agostini*, 521 U.S. at 240–54 (Souter, J., dissenting).

[103] 530 U.S. 793 (2000).

[104] *Id.* at 836–67 (O'Connor, J., concurring).

namely, that when private choices determine how aid is given, that makes it less susceptible to invalidation—but he stretches the principle considerably in suggesting that it applies to the direct aid involved in *Mitchell*, which is given on a neutral basis and "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere. . . ."[105]

Were Justice Thomas's position to become the law, it would alter radically the ground rules for aid. All earlier cases had treated divertibility of assistance as a serious issue; programs had to assure that aid would not be put to religious use. Neutral criteria for aid was one, but only one, requirement for permissible aid. For example, in 1988 in *Bowen v. Kendrick*,[106] reviewing federal aid to private organizations providing services for premarital adolescent sexual relations and pregnancy, Chief Justice Rehnquist wrote for the Court that the funding of religiously affiliated organizations that were giving advice to adolescents about sex and family planning was valid on its face, but the opinion assumed that the government's assistance could not be used for religious purposes.

Although *Mitchell v. Helms* involves the provision of instructional materials such as computer software, one supposes that Justice Thomas would reach the same conclusion about direct financial assistance.[107] Money is no more religious in content than is computer software; under the Thomas approach, the diversion of money to religious use by a recipient would not be attributed to the government.

Justice O'Connor disagreed with Justice Thomas about the issue of diversion and about the distinction between direct and indirect aid.[108] She maintained that actual diversion could render aid invalid and that the adequacy of safeguards against diversion was relevant to whether a program passes the effects test. She also argued that a significant difference exists between programs that rely directly on private choices and those that provide direct assistance on a per capita basis. Justice O'Connor pointed out that the plurality's approach would appear to authorize direct payments to religious organizations, including churches, based on the number of their members. Justice Souter's dissent also complained about the plurality's use of neutrality, in the sense of evenhandedness, as the primary determinant of whether aid is permissible.[109]

In the course of *Mitchell v. Helms* and *Rosenberger*,[110] two significant disagreements opened up between Justices Thomas and Souter. Justice Souter has adhered to the traditional understanding of James Madison's

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105 *Id.* at 816.

106 487 U.S. 589 (1988).

107 A footnote by Justice Thomas, *Mitchell*, 530 U.S. at 819 n.8, intimates as much.

108 *Id.* at 837–44.

109 *Id.* at 877–85 (Souter, J., dissenting).

110 Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

Memorial and Remonstrance as opposing all government assistance to religious organizations.[111] Thomas has countered that Madison was really concerned about aid to religion *as such*, that aid given on a neutral basis was not rejected by him.[112] No doubt, Madison was focusing on aid to religion as such, but much of his language reads as if he also would have opposed aid given on a broader basis.

The second disagreement concerns earlier opinions of the Court suggesting that aid to religious schools is particularly inappropriate if their education is pervasively religious. The basic idea is that if religion pervades all aspects of a school's education, the state cannot assist parts of that education without assisting the religious elements. As I have said, the conclusion that much Roman Catholic parochial school education was pervasively religious was drawn from ideals for the schools set out in Church documents. Probably most Catholic education was never as pervasively religious as the ideals set for it; and with various openings of Vatican II to the modern world and a sharply declining number of priests and nuns, Catholic education, I am sure, is less pervasively religious now than it was some decades ago. But when one considers, for instance, some evangelical Christian schools and education by (a much smaller number of) militant Islamic groups, one cannot easily conclude that all questions about pervasively religious education are anachronistic. For Justice Souter, joined by Justices Stevens and Goldberg, these questions still matter.[113]

Justice Thomas, in *Mitchell*, joined by two Roman Catholic colleagues and by the Protestant Chief Justice, writes that whether the recipient of aid is "pervasively sectarian" should not matter to the constitutional analysis—something already implied by his neutrality approach—and he goes on to say that such an inquiry is "not only unnecessary but also offensive."[114] Courts should not troll through an institution's religious belief; continued "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[115] With one more vote, the Court would be ready to terminate inquiry into whether education is pervasively sectarian, characterizing it as a chapter in the law that not only involves courts in evaluations they should not make but that reflects a strong anti-Catholic bias.

The Rehnquist Court's most important establishment decision was handed down in 2002. In *Zelman v. Simmons-Harris*, the Court sustained a voucher program for low-income families in Cleveland.[116] Parents could receive a state tuition grant of up to $2250. In order to be eligible, schools

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111 *Id.* at 868–74 (Souter, J., dissenting).

112 *Id.* at 852–61 (Thomas, J., concurring).

113 *Mitchell*, 530 U.S. at 912–13 (Souter, J., dissenting).

114 *Id.* at 828.

115 *Id.*

116 536 U.S. 639 (2002).

could not discriminate on the basis of race, religion, or ethnic background, and they could not teach hatred of groups classifiable on any of these bases. Of the participating schools, 92% had a religious affiliation and more than 96% of the 3700 students involved attended those schools.

Chief Justice Rehnquist's opinion for the Court emphasized that the program provided aid indirectly and reached the schools only as a result of parents' choices. The standards for aid were neutral, and it was irrelevant that most aid flowed to religious schools. A reasonable observer, considering this neutral program, would not discern a state endorsement of religion.

Dissenting, Justice Souter argued that extensive public funding of religious education was unconstitutional. Earlier cases had rightly paid attention to whether aid could be diverted for religious education; not until this case had a majority ruled that purely formal criteria would determine whether aid was permissible. The manner in which the program operated in practice was hardly neutral, encouraging most parents using vouchers to send their children to religious schools for reasons other than the schools' religions.[117] The Chief Justice for the Court, and Justice O'Connor, concurring, responded that a fair evaluation of available options should take into account public school alternatives.[118] Justice Souter was concerned about the extensive regulation of religious schools that substantial funding might bring, already evidenced by the requirement that schools not teach hatred of groups. He also worried about the divisiveness of a scramble for public money. These were sound reasons not to allow significant public funding of religious schools that the majority was disregarding.

Were legislators widely to pick up on the shift in the law of the Establishment Clause that *Zelman* represents, the funding of private education would be drastically altered in this country. Thus far, legislatures have hesitated to enact voucher programs except solely to benefit lower income families. It remains to be seen whether that reluctance will diminish over time with the removal of a potential constitutional bar.

The rise of neutrality as evenhandedness and the Court's reliance on formal standards have made it clear that in most situations the government *need not* treat religious endeavors worse than comparable nonreligious ones. Combined with the free speech rule against viewpoint discrimination (as broadly understood by the Court) and the free exercise rule against discrimination aimed at religion, the neutrality approach raised a further question: May states restrict aid to religion and to religious education, in particular, in an effort to further principles of nonestablishment?

In the wake of the failed Blaine amendment to the U.S. Constitution in the late nineteenth century, many states adopted "baby Blaines" in their own constitutions. The wordings of these provisions differ, but a common

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[117] *Id.* at 703–07 (Souter, J., dissenting).

[118] *Id.* at 659–60; *id.* at 672–76 (O'Connor, J., concurring).

restriction is to forbid the use of public money for sectarian education.[119] If a state, in observance of such a restriction, allows assistance to private education but not to private religious education, does this violate the federal constitution—the Free Exercise Clause or the Free Speech Clause, or both?

After the earlier Supreme Court decision allowing state funds to go to a blind person for his use at a religious institution to prepare to become a pastor, the Washington Supreme Court decided that such a use of funds would violate the state constitution.[120] The U.S. Supreme Court's first engagement with such a state restriction occurred this term.

The state of Washington offered Promise Scholarships to students attending college within the state, but these were unavailable to those pursuing a "degree in theology," understood as a degree that is "devotional in nature or designed to induce religious faith."[121] Although someone could certainly become a minister without pursuing such an undergraduate degree, and someone could pursue such a degree without intending to become or becoming a minister, the Supreme Court reasonably regarded the restriction as aimed at avoiding the financing of education for the ministry.

The outcome of the case was highly unexpected, at least in the division of the Justices. Seven Justices voted to uphold the state's program, with Justice Rehnquist writing a fairly narrow opinion that states could, within "the play of the joints" of the federal religion clauses, choose not to finance ministerial education.[122] Justices Scalia and Thomas, dissenting, concluded that Washington's restriction discriminated against religion and, therefore, violated the Free Exercise Clause.[123]

For me, the biggest surprise was the Chief Justice's vote. Assuming that it reflected his convictions (not a wish to assign the Court's opinion to himself in order to narrow its scope),[124] that vote shows that Rehnquist deemed respect for state authority more important than any idea that the key to the religion clauses is evenhandedness. Because the opinion was written specifically in regard to financing ministerial education, it is difficult to predict whether the Court will also accede to other state restrictions on aid to sectarian education.

The Court is moving toward the position that all forms of evenhanded assistance are permitted under the Establishment Clause. We could expect any Bush appointees to push further in that direction; this, indeed, is one of

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[119] *See* Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 515–28 (2003).

[120] Witters v. Wash. Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).

[121] The Supreme Court's construal of exactly which programs of study were ineligible seems to be more precise in content than what one could fairly glean from administrative practices and the opinion of the Court of Appeals.

[122] Locke v. Davey, 124 S. Ct. 1307 (2004).

[123] *Id.* at 1315–20.

[124] The Chief Justice assigns the Court's opinion only if he votes with the majority.

the constitutional issues for which the November 2004 election is likely to have had powerful importance.

However many appointments to the Supreme Court President Bush makes, we can look for a further weakening of the *Lemon* test as the single standard for all establishment cases. The fate of particular rulings decided under that test is less certain and will probably be mixed. The idea that government, as such, should not actively sponsor religious beliefs and practices seems entrenched fairly firmly, although various religious references, such as "under God" in the Pledge of Allegiance, may be sustained as having civic and historical significance.[125] Various forms of assistance to religion that were precluded under *Lemon* may now be allowed.

There are deeper questions of history and doctrine for which a significant shift is possible. Since *Everson*, the prevailing metaphor in establishment cases has been "separation of church and state," and the views of Madison and Jefferson have been have been accorded great weight. In one dissent, Justice Rehnquist, as he then was, sharply challenged the heavy reliance on these two founders and the Court's separationist approach;[126] and Philip Hamburger has recently argued that "separation" became a dominant concept only in the nineteenth century, replacing an original idea of "disestablishment" that was much more modest in its implications.[127] We can imagine a Court that wants to cut back further on Establishment Clause restrictions latching on to Hamburger's controversial thesis and treating much of the law since *Everson* as a misguided deviation from the true constitutional understanding,[128] to be relegated to the trash heap of discarded doctrines along with *Lochner* substantive due process and "separate but equal."

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[125] During the 2003 term the Court failed to resolved the question whether "under God" may remain part of the Pledge of Allegiance. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

Five Justices held that the father of a public school child within whose school children said the pledge lacked standing because the mother had final decision-making authority about the child's upbringing. *Id.* at 2305–12. Chief Justice Rehnquist and Justice O'Connor regarded that aspect of the pledge as neither a religious exercise nor an endorsement of religion, but rather a patriotic exercise that acknowledges the role of religion in the country's history. *Id.* at 2316–20 (Rehnquist, C.J., concurring in judgment); 2321–27 (O'Connor, J., concurring in judgment). Justice Thomas urged that "under God" was religious but nevertheless acceptable and that the approach of the high school graduation prayer case should be overturned. *Id.* at 2328–33 (Thomas, J., concurring in judgment). It is virtually certain that Justice Scalia (who did not sit on this case) will find "under God" to be constitutionally permissible if he sits in subsequent cases raising that issue. Although it is hard not to regard "under God" as involving some degree of endorsement of the idea of a single Supreme Being, it seems likely that the theory of Justice O'Connor and Chief Justice Rehnquist will pick up at least the one further vote to make a majority that accepts that phrase.

[126] Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985).

[127] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

[128] Among my own objections to Hamburger's account are that he compares an eighteenth-century notion of disestablishment, one that would inevitably have evolved, with the most expansionist versions of separation; and he therefore attributes much more importance to the shift in dominant concepts than is

warranted. Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CAL. L. REV. (forthcoming 2005) (essay-review).