THE LINGERING DEATH OF SEPARATIONISM

by Ira C. Lupu[1]

For the generations that came of age between World War II and the election of Ronald Reagan to the Presidency, separation of church and state was a stock phrase, an almost-hyphenated way of encapsuling an attitude toward a particular aspect of constitutional culture. Several linchpin propositions constituted the major components of this attitude. First, serious religion was not the business of government and its institutions; that is, religion should be private rather than public. That proposition had its most constitutional force in the setting of public elementary and secondary schools, in which students are present by government compulsion. Separation of church and state thus had its most concrete, operational meaning in the oft-repeated notion that the public schools should be kept free of religion. Second, separationism required the state to tolerate but not assist those persons -- in

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separationism's heyday, predominantly persons belonging to the Roman Catholic Church -- who chose parochial over public education.

I describe this attitude as an element of culture rather than law, because the phrase entered the culture before the legal regime that nurtured it fully ripened,[2] and the phrase remains in the political and social culture even as it fades from both the language and the conceptual structure of the law. In recent commentary about the retirement of Justice White and the nomination of Ruth Bader Ginsburg to be his successor, for example, journalists frequently referenced the potentially contrasting views of White and Ginsburg on the subject of the "separation of church and state."[3]

Separationism thrived best when white Protestants of low-level religious intensity composed the bulk of our cultural elite. For members of this group, separationism reflected an attractive mix of privatized (hence unobtrusive) religion, opposition to public subsidy of the educational mission of the Catholic Church, and support for the mission

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[2] For illustrations of anti-separationist results in this period, see Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program of released time from public school day for religious education off public premises); Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding program of textbook loans from public authorities to parochial schools).

[3] See, e.g., Joan Biskupic, Court's Conservatism Unlikely to be Shifted by a New Justice, Washington Post, June 30, 1993, at A1 (reflecting on Ruth Bader Ginsburg's views on the "separation of church and state"); Neil Lewis, Ginsburg Gets Set for Her Most Public Law Exam, New York Times, July 15, 1993, at B9, col. 3.

of socializing Americans in what was perceived by these leaders as the common American culture. Hence, separationism required reduction in public celebration of sectarian religion, stringent limits on public aid to parochial schools, and religiously "neutral" public schools.

Many of the cultural and political conditions that sustained the concept of separationism, however, have eroded considerably in the past twenty years. The hegemony of White Anglo-Saxon Protestants in American leadership has ended. America has experienced a religious awakening,[4] in which high-intensity, publicly oriented religion has expanded dramatically. The public schools have declined in their capacity to warrant a good education, and are no longer considered the uncontroversial home of common culture. The rise of private parochial schools among many sects and denominations has been one result of these phenomena, as has intensified combat about the place of religious thought and practice in the public schools and in public life generally.[5]

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[4] This is not the first awakening in what is now the United States. Religious revivalism swept the colonies in the middle of the 18th century. See generally Edwin Scott Gaustad, The Great Awakening in New England. 1957. (Reprint, Chicago: Quadrangle Books, 1968); Alan Heimert & Perry Miller, eds., The Great Awakening: Documents Illustrating the Crisis and Its Consequences (Indianapolis: Bobbs-Merrill, 1967). For a variety of analyses of our current religious condition, see the collection of essays in Wade Clark Roof, ed., Religion in the Nineties (Annals of the American Academy of Political and Social Science, Vol. 527, May 1993).

[5] For important recent accounts of the schoolbook wars waged by fundamentalist parents against public schools, see Stephen Bates, (continued...)

Predictably, the Supreme Court has both led and followed these trends. As in the political culture itself, a set of themes compete within the Court for recognition as the successor to separationism. Chief among these themes, explored in further detail below, are neutrality and accommodation, although it is increasingly evident that some version of neutrality is winning out. As one would expect from an institution committed in some strong yet incomplete respect to stare decisis, however, religion clause law remains encrusted with significant aspects of the separationist motif. Like Captain Ahab at the climactic moment in Moby Dick, separationism beckons as it perishes.

In what follows, I chart chronologically and thematically the ways in which the law of the religion clauses has been transformed. Part I briefly describes and characterizes the law of both religion clauses as it developed in the post-War period until about 1980. Part II charts thematically the major developments of the Reagan-Bush years, setting

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Battleground: One Mother's Crusade, The Religious Right, and the Struggle for Control of Our Classrooms (Poseidon Press, 1993) (recounting and analyzing and analyzing the conflict over textbooks in Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988); Nomi Maya Stolzenberg, "He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 Harv. L. Rev. 581 (1993); George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 Case West. Res. L. Rev. xxx (1993); Nadine Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 Ohio St. L. J. 333 (1986).

the stage for Part III, which analyzes last Term's three religion clause decisions -- Lamb's Chapel v. Center Moriches School District,[6] Zobrest v. Catalina Foothills School District,[7] and Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah[8] -- in the evolutionary terms developed in Parts I and II. Finally, Part IV offers my views on the consequences of these developments. My conclusion is that separationism is dying slowly, and that we should endeavor to extract its best lessons before committing it to the grave.

I. The Dominant Era of Separationism (1947-1980)

Any thematic account of a 35-year period in constitutional law necessarily runs a substantial risk of oversimplification. Nevertheless, of all the judgments one might make about interpretation of the religion clauses in the Supreme Court, the most supportable is that in this period the roots of separationism grew and spread.

Three primary elements constituted the decisional law backbone of separationism. The first of these is the version of Establishment Clause history articulated in 1947 in Everson v. Board of Education of

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[6] 113 S. Ct. 2141 (1993).

[7] 113 S. Ct. 2462 (1993).

[8] 113 S. Ct. 2217 (1993).

Ewing Township.[9] In Everson, the Court considered the constitutionality of a local community's decision to subsidize the costs of public transportation to and from parochial as well as public schools. Although a narrow majority upheld the scheme, Everson is best and most importantly remembered for its broad separationist dicta,[10] and for the Court's unanimous "adoption" of the Virginia history of religious liberty as the key to the meaning of the first amendment's establishment clause. Indeed, on the latter point, the Rutledge dissent went one better than Justice Black's Court opinion; the dissent further emphasized the Virginia history, and insisted that the Ewing Township unconstitutionally aided the parochial schools. This historical account, which placed James Madison and his justly famed (and staunchly separationist) "Memorial

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[9] 330 U.S. 1 (1947).

[10] 330 U.S. at 15-16:

"The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' Reynolds v. United States, supra at 164."

and Remonstrance Against Religious Assessments" at the heart of meaning of the Establishment Clause, became the "official" history of the Clause until challenged by scholars and Justices in the early 1980's.[11]

The second crucial gesture in the Court's embrace of the separationist ethos occurred in The School Prayer Cases.[12] As a matter of injecting the ethos powerfully into the political culture, these decisions were far more important than the history-building efforts in Everson. The School Prayer Cases particularized the doctrine of church-state separation by applying it to a widespread, highly symbolic, often popular, and crisply defined practice. These decisions made church-state questions the stuff of political campaigns, and were among the causes of widespread discontent with the "liberal elitism" of the Warren Court.

Third, as an essential step in the maintenance of separationism, in 1971 the Court in Lemon v. Kurtzman[13] erected a general doctrinal framework for implementing the separationist vision. Lemon served the functions of abstracting from and universalizing both the historicism of Everson and the practice-particularity of The School Prayer Cases. By purporting to capture the establishment clause in a three-part test for all

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[11] See TAN 22-26, infra, for discussion of that challenge.

[12] Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[13] 403 U.S. 602 (1971).

seasons[14] -- including a prohibition on government practices that advance religion or interact significantly with religious institutions -- Lemon appeared to promise that separationism would be the guiding force of religion clause adjudication. And, indeed, for the rest of the 1970's, a separationist majority (whether driven by anti-Catholic sentiment or something more principled) kept that promise.[15]

What, during this period, of the free exercise clause? The problem in relating free exercise developments to the overarching themes of this essay is the uneasy relationship between that clause and the meaning of separationism. On the one hand, a strong doctrine of free exercise rights involves the state (and its courts) in aiding religion by recognizing and implementing those rights, in apparent contradiction of the separationist prohibition of state aid to religion.[16] Alternatively (the better view in my opinion) a strong doctrine of free exercise rights is consistent with separationism, because such a doctrine empowers

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[14] "Three [Establishment Clause] . . . tests may be gleaned from our cases. First, the statute must have a secular legislative purpose.; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citations omitted).

[15] See, e.g., Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

[16] For elaboration of this view, see Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 91980); Suzanna Sherry, Lee v. Weisman: Paradox Redux, 1992 Sup. Ct. Rev. 123.

religion and its adherents to resist state regulation and therefore to remain removed from it.

However one resolves this conundrum, it is clear that the era of strong separationism under the establishment clause also represents the high-water mark in our history for rights under the free exercise clause. Sherbert v. Verner[17] -- decided contemporaneously with The School Prayer Cases -- held that a state may not condition unemployment benefits upon a person's willingness to work on her Sabbath. At the more general, doctrinal level, Sherbert imported the tests of compelling state interest and least restrictive means from speech cases into free exercise cases.[18] Then, in 1972 -- soon after Lemon v. Kurtzman -- Wisconsin v. Yoder[19] appeared to solidify the grip of that test on free exercise law in its holding that the Old Order Amish were entitled to a free exercise exemption for their adolescents from Wisconsin's compulsory education law. Strangely, however, the rest of the 1970's produced only one free exercise decision -- that in McDaniel v. Paty,[20] holding that a state could not bar clergy from serving in the state

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[17] 374 U.S. 398 (1963).

[18] For a more detailed account of this process of doctrinal assimilation, see Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 939-42 (1989).

[19] 406 U.S. 205 (1972). Chief Justice Burger authored both Lemon and Yoder.

[20] 435 U.S. 618 (1978).

legislature. Even McDaniel was not a case involving an attempt to secure a free exercise exemption from a law of general applicability; rather, it involved overt discrimination against religion. The jurisgenerative capacity one would expect from Sherbert and Yoder was never to materialize.[21]

When the 1970's concluded, separationism had stagnated. The School Prayer Cases had not produced a line of cases suggesting that separationism would move outside the schools into a general condemnation of publicly supported religious activity. Lemon had produced progeny,[22] but they were increasingly mechanical in their methodology, and their underpinnings in a coherent theory of the religion clauses seemed increasingly questionable. And stringent review under the free exercise clause had proven as fertile as a stone.

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[21] The proposed Religious Freedom Restoration Act, awaiting action in the Senate at the time of this writing, thus would codify the law of free exercise at its high water mark, and may prove generative in ways the cases themselves did not. For discussion, see Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 52-66 (1993); James E. Ryan, Note, Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407 (1992); Ira C. Lupu, Employment Division v. Smith and the Decline of Supreme Court-Centrism, 1993 BYU L. Rev. xxx (forthcoming, 1993).

[22] See cases cited in note 15, supra.

II. The Attack on Separationism (1980-92)

Understood institutionally, the religion clause developments of the Reagan-Bush years reflected a retreat from judicial policing of the boundaries between religion and government. This, of course, was part of the overall program of putting an end to "judicial activism." Understood thematically, these developments constituted an assault on separationism in every respect -- its history, doctrinal structure, and core premises concerning the role of religion in public life.

A. Establishment clause counter-history.

In Wallace v. Jaffree,[23] in which the Court invalidated an Alabama statute requiring that public schools open the day with a moment of silence for prayer or meditation, Justice Rehnquist directly attacked the separationist history at the center of Everson v. Bd. of Education.[24] Rehnquist strenuously contended that the Court in Everson had unjustifiably interpreted the first amendment in the provincial light of the history of church-state battles in Virginia.[25] He further argued that the correct history of the establishment clause supported a ban on a state church, and on sectarian discrimination, but did not support a ban on nonpreferential aid programs that included religion, or on programs

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[23] 472 U.S. 38 (1985).

[24] 330 U.S. 1, 8-14 (1947) and id. at 33-43 (Rutledge, J. dissenting).

[25] 472 U.S. at 91-114 (Rehnquist, J., dissenting).

that preferred religion generally.[26] Rehnquist did not persuade a majority in Wallace, but he succeeded in casting doubt on what had been the official history of the establishment clause and suggested that an alternative possessed a respectable historical pedigree.[27]

B. Government Sponsorship of Religious Exercises and Symbols

In the years in which separationism represented the dominant ethos, the Supreme Court decided no cases involving government sponsored religious displays, or government sponsored prayer outside the school context. In 1983, however, the Court signalled the beginning of a new regime in Marsh v. Chambers[28], which upheld the practice of opening legislative sessions in Nebraska with prayer. Although the opinion purported to rest on narrow historical grounds -- the First Congress had approved an appropriation for a congressional chaplain in the same week as its affirmative vote on the establishment clause -- it is plain that Marsh repudiated separationist premises. The merger of official prayer and political life which the legislative prayer represented cannot be squared with separationism's insistence on a religion-sanitary

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[26] Id.

[27] The Rehnquist dissent prompted a book in refutation, The Establishment Clause, from noted constitutional historian Leonard Levy. See also Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986).

[28] 463 U.S. 783 (1983).

public square, and the fact that the Nebraska chaplain had long been a Presbyterian only aggravated the sense that religion clause law was bending.

Following soon upon Marsh, in what now seems a true turning point, the Court in Lynch v. Donnelly[29] upheld the publicly-sponsored display of a Nativity scene at Christmastime. Without relying on any specific constitutional history of the sort which had influenced the outcome in Marsh, Lynch pushed Lemon to one side. The Lynch opinion did not suggest a general alternative other than the notion that Christmas was a cultural as well as a religious holiday, and that a Nativity scene could be absorbed in its cultural dimensions. In what has become a focal point for emerging establishment clause principles, Justice O'Connor's concurring opinion suggested that the key question was one of government endorsement of religion, but concluded that the scene in question did not do so.[30]

The no-endorsement principle quickly caught fire as the leading candidate to replace separationism.[31] In 1989, a five-Justice majority

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[29] 465 U.S. 668 (1984).

[30] Id. at 688-90.

[31] Compare Beschle, The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor,: 62 Notre Dame L. Rev. 151 (1987) (approving the endorsement approach) and Marshall, We Know it When We See It: The Supreme Court and Establishment, 59 S.Cal. L. Rev. 495 (1986) with Smith, Symbols, Perceptions, and Doctrinal

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accepted a version of the "no endorsement" view, at least in cases involving public sponsorship of religious symbols, in deciding a set of cases involving government support for a Christmas tree, a Chanukah menorah, and a Nativity Scene in Allegheny County, Pennsylvania.[32]

The replacement of Justices Brennan, Marshall, and White with Souter, Thomas, and Ginsburg of course complicates the question whether the "no endorsement" principle will continue to command a majority.[33] My concern here is not with the hazards of such prediction, but with the substantive question of the survival of separationism. Many of the premises of the "no endorsement" principle are not consistent with those of separationism. The anti-endorsement principle tolerates substantial government use of religious symbols; separationism as a coherent philosophy did not. The no-endorsement principle substitutes for the bright line one associates with separationism an uncertain screen,

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[31](...continued)
Illusions: Establishment Neutrality and the No Endorsement Test, 86 Mich. L. Rev. 266 (1987) (criticizing the test as indeterminate).

[32] Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

[33] The votes of Justices Souter and Thomas in the graduation prayer case (Lee v. Weisman) and Zobrest suggest that the former is a separationist, for whom "no endorsement" may be too weak as a governing principle, and that the latter is an anti-separationist, for whom "no endorsement" may be too strong.

through which many symbols and practices of obvious religious character will pass.[34]

More fundamentally, the anti-endorsement principle rests on a foundation profoundly different from that of separationism. The former is concerned with the individual alienation, or feelings of exclusion, that an observer of a government sponsored symbol might experience; the latter is focussed upon the social, rather than individual, harms that church-state merger may create. Similarly, the attention paid in anti-endorsement writing to "insiders" and "outsiders" rings with equal protection considerations, as does the entire post-separationist program. Separationism, though it achieves minority-protecting functions, reflects the broader social purpose of secularizing the public arena and discouraging the sectarian rivalries more likely to occur under the emerging regime.

C. Religious Exercises in Schools

Separationism has survived best in the context in which it has always had the most persuasive power -- the permissibility of religious exercises in the public schools. This setting combines many of separationism's core concerns, including the privatization of religion, the dangers of a divisive local politics of religion, the role of common

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[34] See, e.g., ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986); ACLU v. Wilkinson, 895 F.2d 1098 (6th Cir. 1990); Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990).

schools as unifying carriers of shared aspirations and culture, and the threat to individual religious liberty created by the compulsory character of education of the young.

In light of the presence of these features, the judicial results with cases of this character are sobering. Several Justices were quite prepared to uphold Alabama's statute requiring a moment of silence for "meditation or voluntary prayer,"[35] and a majority of the Court in that case seemingly would have upheld a moment-of-silence scheme that made no reference to prayer. More recently, in the graduation prayer decision,[36] a narrow majority struck down the prayer, and that result came about only because Justice Kennedy took an expansive view of his otherwise quite narrow establishment clause theory that coercion is a necessary element of an establishment clause violation.[37]

Significantly for the story of separationism, Justice Kennedy's view requiring coercion in establishment clause cases resonates with Justice

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[35] Wallace v. Jaffree, 478 U.S. 38 (1985).

[36] Lee v. Weisman, 112 S. Ct. 2649 (1992).

[37] 112 S. Ct. at 2655-61. For analysis of Lee's approach to coercion, see Michael Stokes Paulsen, Lemon is Dead, 43 Case West. L. Rev. 795 (1993). For a general defense of a limitation of establishment clause concerns to matters of coercion, see McConnell, Coercion: The Lost Element of Establishment, 27 William & Mary L. Rev. 933 (1986); for criticism, see Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 Val. U. L. Rev. 37 (1991); Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555, 576-580 (1991).

O'Connor's "no endorsement" principle, even though the two Justices (and the two theories) will frequently reach different results. (Most coercions will endorse, but many endorsements will not coerce in the conventional sense.) Both approaches treat the establishment clause as a source of individuated entitlements -- that is, claims by individuals to be free of a certain class of state-created harms (psychic, social, or otherwise). This approach to the clause will frequently invite standing problems, because it focuses attention on the question of who has been injured, and in what particular ways, by a policy or program beneficial to religion. Moreover, this approach is in significant tension with separationism, within which establishment clause claimants are not individuals advancing atomistic rights, but rather are surrogates seeking to defend a constitutionally specified social order.[38]

D. The Retreat from Lemon in Cases Involving Aid to Religious Education

The continued applications of Lemon through the 1970's generated significant judicial and scholarly critiques. In particular, Lemon's effects and entanglement elements were quite rightly castigated as creating a Catch-22 for aid programs; they either created a risk of

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[38] Compare Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayer has standing to complain of cash assistance by the federal government to religious schools) with Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (federal taxpayers lack standing to complain that property transfer from government to Christian college violates the Establishment Clause).

public subsidy of religion (a forbidden effect) or they too intrusively monitored the aid to ensure no such subsidy (an excessive entanglement).[39]

The 1980's presented three general developments which set the stage for a process of repudiation of Lemon in the very aid-to-parochial schools context in which it originated. First, in Mueller v. Allen[40], a narrow majority upheld a Minnesota state income tax deduction for tuition and other expenses associated with private elementary and secondary education. The record revealed that almost all tuition payments were to private schools, that most private schools in the state were religiously affiliated, and that the bulk of the state tax deduction therefore went to parents who chose parochial schools for their children. Nevertheless, the Court held that this program aided religious education only as a result of the intervening choices of families to educate their children privately and at religious schools, rather than as the result of explicit state direction. Deeming this sort of aid to religion indirect, and noting that such a program eliminated all need for the offensive

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[39] See, e.g., Aguilar v. Felton, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting). For a collection of sharp criticisms of Lemon, see Michael Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 331-50 (1986); Gary Simson, The Establishment Clause in the Supreme Court: Rethinking the Court's Approach, 72 Cornell L. Rev. 905 (1987).

[40] 463 U.S. 388 (1983).

monitoring associated with programs of direct aid, the five-Justice majority distinguished the Court's prior decisions on aid to parochial school and rejected altogether an approach based on the demographic composition of the benefitted schools.[41]

From Mueller it was but a short step to Witters v. Washington Department of Social Services[42], in which the Court ruled that the state was free to pay an education grant to Mr. Witters, who was blind, notwithstanding Mr. Witters' choice to use the grant at a Christian college for education in the ministry. Once again, the Court relied upon the private and independent choice of Mr. Witters -- not the state -- to use state assistance for a religious purpose. Here, unlike Mueller, the Court was unanimous as to the result, presumably because most blind students did not so use their state grants.

The similarities and differences between Mueller and Witters created acute problems for separationists, who dissented in the former and concurred in the latter. On what principles was it appropriate for the state to permit use of state aid to the blind at a religious institution, but not similarly appropriate to permit state tax deductions for expenditures at religious schools? One such principle was that of illicit purpose; i.e., that the Minnesota program upheld in Mueller was

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[41] 463 U.S. at 400-01.

[42] 474 U.S. 481 (1985).

unconstitutionally designed to circumvent limitations on aid to parochial schools. The evidence of such design was slender, however. The second such principle was that of primary effect, by which separationists always meant that any considerable, nonincidental flow of government assistance to parochial schools would doom the program. This approach, however, faced major problems of its own. How much religious benefit is too much, either as an absolute amount or as a percentage of the entire program? Here, as always, interventionist constitutional principles framed in arguably quantitative terms tended over time to produce seemingly arbitrary results.

In addition, Witters reflects a unique phenomenon of 1980's and 1990's religion clause adjudication. Separationism so penetrated much of the national political and bureaucratic consciousness that state agencies began to deny claims for assistance on establishment clause grounds even as the separationist premises of the law began to erode. The typical establishment clause claim in the 60's and 70's was raised by a plaintiff seeking to put a halt to some religion-favoring practice; in contrast, Mr. Witters was a benefits claimant who faced an establishment clause defense raised by the state. This difference in posture raises a distinct and important question in the post-separationist world

concerning whether state officials should possess a zone of establishment clause discretion protecting their judgments in cases like these.[43]

In cases involving direct assistance from the state to religiously oriented schools, the fight over the wisdom of separationism became increasingly bitter. In Aguilar v. Felton,[44] a 5-4 Supreme Court majority invalidated a federal program of remedial education for the disadvantaged, on the ground that some of the instruction took place on parochial school premises. A powerful dissent by Justice O'Connor assailed the majority's reasoning and result as 1) hypersensitive to the possibility of religious influence in the program, 2) insensitive to the secular, public good achieved by the program, and 3) riddled with internal contradiction.[45] On the facts of Aguilar -- the most important of which included the limitation of instructors to public employees, all of whom were professional teachers and many of whom did not share the religious affiliation of their remedial pupils[46] -- Justice O'Connor's objections have intuitive appeal, and therefore remind us of the prophylactic character of separationism. A separationist

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[43] For discussion of the concept of the zone of establishment clause discretion, see Ira C. Lupu, Which Old Witch?: A Comment on Professor Paulsen's Lemon Is Dead, 43 Case West. Res. L. Rev. 883, 899-902 (1993).

[44] 473 U.S. 402 (1985).

[45] Id. at 430.

[46] Id.

judge will habitually invalidate programs that present little risk of church-state union and that may contribute significantly to the public good. This quality has always been among separationism's strengths and weaknesses, and Justice O'Connor's view in Aguilar, like her no-endorsement approach in the symbols cases, tends to undercut separationism by its insistence on case-by-case, fact-sensitive adjudication.

This approach to the Establishment Clause, and the threat it presents to separationism, ripened in Bowen v. Kendrick.[47] The 1988 Bowen decision upheld against establishment clause challenge the required inclusion of religious institutions as grantees in aid programs administered pursuant to the Adolescent Family Life Act. The Act is the vehicle by which the federal government financially supports local programs of counseling for teenagers with respect to matters of sexuality and reproduction.[48]

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[47] 487 U.S. 589 (1988).

[48] A noteworthy feature of the Act is its treatment of abortion as an option available to pregnant teenagers; the Act is designed to promote adoption as an alternative to abortion, and prohibits organizations which counsel abortion from being Act grantees. See generally Benshoof, The Chastity Act: Government Manipulation of Abortion Information and the First Amendment, 101 Harv. L. Rev. 1916 (1988). As the Court has repeatedly held, government is free to finance alternatives to abortion without financing abortion itself, see Rust v. Sullivan, 500 U.S. ___, 111 S.Ct. 1759 (1991); Harris v. McRae, 448 U.S. 297 (1980), although the tilt such a policy creates when applied to religious institutions creates disturbing possibilities for government favoritism among various theological views.

In rejecting the challenge, the Supreme Court drew a distinction between establishment clause challenges to an aid program as a whole, and "as-applied" challenges to the behavior of particular grantees.[49] The Court concluded that this program as a whole did not present an excessive risk of advancing the interests of religious institutions, whose efforts toward adolescent counselees were presumed to be secular in orientation. The Court therefore reversed a judgment invalidating the program and remanded the case for adjudication of any remaining as-applied challenges to particular grants and their administration.

Bowen v. Kendrick suggests a significant shift in the law governing programs which include religious institutions among their grantees. Under Lemon's prophylactic pressure, aid programs were frequently challenged prior to the opportunity to create a factual record on their operation,[50] and the predominant analytic model focused on the probable effects (or aid monitoring to avoid such effects) of the program taken as a whole. Prior to Bowen, the Court had relied on a distinction between facial and as-applied attacks only in the context of aid to

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[49] 487 U.S. at 600-12.

[50] The challenge in Lemon itself came soon after the first disbursements under the Pennsylvania Act, Lemon v. Kurtzman, 403 U.S. 602, 609-11 (1971), and the Rhode Island Act challenged in Lemon's companion case from Rhode Island, Early v. Dicenso, 403 U.S. 602, 607-09 (1971).

religiously affiliated colleges, in which older and less impressionable college students were the intended beneficiaries.[51]

By extending the distinction between facial and as-applied attacks to programs affecting adolescents in the sensitive context of sexuality and reproduction, the Court altered the relevant Establishment Clause inquiry in ways that suggest significant changes in the constitutional dynamics associated with the Clause. Bowen v. Kendrick suggests that the Clause would not seriously limit government from financing only the "secular portion" of the activities of religious institutions, though the opinion hints at two caveats -- aid must be part of a larger program that includes non-religious grantees, and aid to "pervasively sectarian" institutions might not get the benefit of the presumption of constitutionality attached to the move to as-applied adjudication.[52]

As a matter of litigation consequences, the approach in Bowen may be more profound than the substantive changes worked by the decision. Bowen will substantially increase the burden on challengers to

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[51] Roemer v. Bd. of Public Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

[52] For discussion of the effect of Bowen on the course of the law, see Buchanan, Governmental Aid to Religious Entities: The Total Subsidy Position Prevails, 58 Ford. L. Rev. 53 (1989). For attempts to analyze the problem of separating religious and secular components of services delivered by religious institutions, see McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U.Chi. L. Rev. 1, 20-30 (1989); Choper, The Establishment Clause and Aid to Parochial Schools, 56 Cal. L. Rev. 260 (1968).

document the details of religious advancement achieved by whatever program they are questioning. This, in turn, will cause delay in the timing of litigation, both because of the need to await provable details and the time it will take to prove them. Such delay will inevitably add to the expense of this sort of litigation -- always commenced by ideological, not financially interested, plaintiffs. Moreover, the delay will extend the period of exposure of such plaintiffs, never popular in the community, to the hostility of others. This hostility is likely to be aggravated yet further by the fact of ongoing operation of the aid program; by the time a court has heard the full merits, beneficiaries of the program (both institutional and individual) will have begun to enjoy and depend upon its benefits.

All of these consequences are likely to contribute to the underenforcement of the Establishment Clause, even in its more restrained version, and are in serious tension with a separationist regime. Separationism demands that Establishment Clause doctrine be tilted toward overenforcement of the Clause, and that adjudication be quick, relatively cheap, and not highly fact-dependent. As separationism dies, so will these qualities of the constitutional system that nourished it.

E. Equal Access as a Rival to Separationism

As will be elaborated and analyzed in more detail below, the apparent successor to separationism is some version of religious

neutrality, or equal religious liberty. A key signal of the shift away from separationism toward these alternative conceptions came in a pair of decisions involving the right of access of student prayer groups to public school space for meetings on a basis equal to that afforded other student organizations.

Once separationism's bright lines began to dim, the perception that permitting student-initiated religious clubs to gather on a parity with other student groups might not constitute forbidden state sponsorship of religion became entirely reasonable. This chapter of the 80's revolution opened in Widmar v. Vincent[53]. In the setting of a state university which maintained an expansive policy of permitting student-initiated expression and association, the Court in Widmar held that religiously oriented student groups were entitled to access to university facilities equal to that provided to groups with a social, political, or other nonreligious character.

Nevertheless, even after Widmar, secondary school officials and the lower courts frequently excluded, on Establishment Clause grounds, student religious clubs and prayer groups from the status and opportunities otherwise afforded to permissible student organizations.[54]

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[53] 454 U.S. 263 (1981).

[54] Bender v. Williamsport Area School District, 741 F.2d 538 (3rd Cir. 1984) (holding that the school district acted consistently with the Establishment (continued...)

This series of decisions, in which Widmar was repeatedly distinguished on the grounds that it involved less impressionable college students, was entirely explicable on separationist grounds. A series of Supreme Court decisions involving public school prayer,[55] Bible reading,[56] and religious instruction on public school premises[57] had suggested the bright line rule that public schools could never be a home for religious activity.

Congress responded to complaints about these results by enacting the Equal Access Act of 1984,[58] which guarantees student-sponsored religion clubs in elementary and secondary schools rights to treatment

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[54](...continued)
Clause in barring a student prayer group from meeting on school premises), vacated on other grounds, 106 S. Ct. 1326 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School District, 669 F.2d 1038 (5th Cir. 1982) (holding that the Establishment Clause forbids the district from allowing a student religious group to hold meetings on school premises); accord, Bell v. Little Axe Indep. School District No. 70, 766 F.2d 1391 (10th Cir. 1985).

[55] Engel v. Vitale, 370 U.S. 421 (1962).

[56] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[57] McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[58] 20 U.S.C. secs. 4071-74. For discussion of the Act, see Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Northwestern Univ. L. Rev. 1 (1986); Ruti Teitel, When Separate is Equal: Why Organized Religious Exercise, Unlike Chess, Do Not Belong in the Public Schools, 81 Northwestern Univ. L. Rev. 174 (1986). I discuss the Act as part of a broader discussion of constitution-implementing enactments in Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Virginia L. Rev. 1 (1993).

equal to that of other non-curricular student organizations. The Act's triggering mechanism is the maintenance by the school of a "limited open forum."[59] The Act declares that a "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."[60] When the school creates such a forum, the Act forbids school authorities from discriminating based on the "religious, political, philosophical, or other content"[61] of the speech engaged in by the student organization.

In Board of Education of the Westside Community Schools v. Mergens,[62] an eight-Justice majority of the Supreme Court expansively construed the definition of "limited open forum." Focusing on the deep ambiguity of the phrase "noncurriculum related" in the statutory definition of what constituted a limited open forum,[63] the Court

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[59] Id.

[60] Id. sec. 4071(a) and (b).

[61] 20 U.S.C. sec. 4071(a).

[62] 496 U.S. 226 (1990).

[63] The problem presented by the phrase "noncurriculum related" is that the most obvious interpretations are either unacceptably broad or unreasonably narrow. If the phrase means "not perfectly coincidental with existing courses given for academic credit," every school would be covered, just by having a football team, a yearbook staff, service clubs, or any other of the kinds of groups typically found at high schools in America. At the other extreme, if "noncurriculum related" meant "having no nexus or bearing in

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reasoned that the question should be resolved in favor of the statute's broad purpose of stopping unreasonable discrimination against religious organizations. Accordingly, it construed the phrase "noncurriculum related" to exclude only those organizations " . . .directly relate[d] to the body of courses offered by the school."[64]

Applying this broad construction, the Mergens majority concluded that Westside High School had a limited open forum within the meaning of the Act. The school had approved, inter alia, a chess club, a photography club, a scuba diving club, and several service-oriented groups. Because these were non-curriculum related within the Court's construction of the Act, the school was statutorily obliged to accept the presence of a Christian club as well.[65] Finally, and crucially for the

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[63](...continued)
any respect to academic courses," no school would be covered, because every student organization can be understood in ways which relate back to some academic concern. The struggle was thus for a sensible middle ground. See generally Laycock, note 58 supra, at 36-45, and Note, Beyond Mergens: Ensuring Equality of Students' Religious Speech Under the Equal Access Act, 100 Yale L. J. 2149 (1991).

[64] 496 U.S. at 239-40. The Court expanded upon this definition: "[A] student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition . . . is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements."

[65] Id. at 243-47.

thesis of this paper, all eight Justices who agreed to this construction also agreed that equal access for student prayer groups in public schools did not violate the Establishment Clause.

The story of the Equal Access Act and Mergens reflects the increasing tension between the lower courts, where separationism continues to hold significant influence,[66] and the Supreme Court, where even the standard-bearers of the separationist tradition have been prepared to cede territory in the name of competing rights. And in the equal access context, which this Term's cases also address, the claims of constitutional rights competing with the premises of separationism are strong indeed. These include the rights to be free of official discrimination with respect to religious exercise, freedom of speech, and freedom of association. As will be developed further below, however, the claims of equality or state neutrality upon which the equal access decisions (and statute) depend are in significant tension with separationism. First, separationism has a doctrine of secular privilege at

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[66] The lower courts continue to rely on Lemon's three-part test long after the Supreme Court has signalled its retreat from that approach. See, e.g., Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1171 (7th Cir. 1993); Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991), cert. denied, 112 S. Ct. 3026 (1992); Roberts v. Madigan, 921 F.2d 1047, 1056 (10th Cir. 1991); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 832 (11th Cir.), cert. denied, 490 U.S. 1090 (1989); Doe v. Human, 725 F. Supp. 1503, 1506-07 (W.D. Ark. 1989); Lundberg v. West Monona Comm. Sch. Dist., 731 F. Supp. 331, 345 (N.D. Iowa 1989); but see Albright v. Bd. of Educ. of Granite School Dist., 765 F. Supp. 682, 689 (D. Utah 1991) (suggesting that the Supreme Court may be about to abandon Lemon).

its heart; the public arena is for secular argument only. The case for equal access for religious argument and practice challenges the hegemony of secular ideology in the public square.[67] Second, the argument for equal access turns on the distinction between official speech and that by private citizens, and asserts that the latter can be advanced on public property without it being attributed to the state. The separationist premise of thoroughly privatized religion is symbolically threatened when religionists occupy public space, particularly in the heretofore sacrosanct premises of public elementary and secondary schools.

F. The Collapse of Mandatory Accommodations Under the Free Exercise Clause -- The Road to and Including Employment Division v. Smith

The 1980's saw an explosion of free exercise litigation in the Supreme Court. Relying on considerations of institutional context and employing a steadily weakening standard of review, the Court began to signal the impending demise of the Sherbert-Yoder doctrine of presumptively mandatory relief for sincere religious claims for exemption from general laws. For a time, many observers tried to explain away this series of decisions as idiosyncratic; the Court's pre-Smith decisions had

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[67] See, e.g., Frederick Gedicks, Public Life and Hostility to Religion, 78 Va. L. Rev. 671 (1992).

involved the problems of religion and race,[68] religion and worker exploitation,[69] religion in prison,[70] religion in the military,[71] religion on the public lands,[72] and religion and taxes.[73] As this list makes evident, however, every case has a context, and a set of government concerns against which free exercise claims are asserted. As these cases progressed, it became increasingly plain that free exercise claims were simply never sufficient to defeat a state objective of any substantial weight.

In April of 1990, the Supreme Court announced its decision in Employment Division v. Smith.[74] The scope of the decision shocked

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[68] Bob Jones University v. United States, 461 U.S. 574 (1983).

[69] Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (rejecting free exercise claim for exemption from the wage and hour provisions of the Fair Labor Standards Act).

[70] O'Lone v. Estate of Shabazz,, 482 U.S. 342 (1987). See generally Note, Untangling First Amendment Values: The Prisoners' Dilemma, 59 Geo. Wash. L. Rev. 1614 (1991).

[71] Goldman v. Weinberger, 475 U.S. 503 (1986).

[72] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[73] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Hernandez v. Comm'r, 490 U.S. 680 (1989); United States v. Lee, 455 U.S. 252 (1982).

[74] 494 U.S. 872 (1990).

commentators,[75] and dramatically altered the set of principles against which the separationist debate is played out.

The case arose from the denial of unemployment compensation benefits to two members of the Native American Church. Because they had ingested peyote at a Church ceremony, the two had been dismissed from positions as rehabilitation counselors in a private entity devoted to rehabilitation of persons addicted to drugs or alcohol. The relevant state agency denied them benefits as a result of a state law provision disqualifying persons dismissed for work-related misconduct. The state Supreme Court overturned the agency, on the ground that the disqualification impermissibly burdened the petitioners' rights under the free exercise clause.

The state petitioned the U.S. Supreme Court for review. After an earlier remand for clarification of a question of state law,[76] the Supreme

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[75] For criticism of Smith, see McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990); Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1; Gordon, Free Exercise on the Mountaintop, 79 Cal. L. Rev. 91 (1991); Tepker, Hallucinations of Neutrality in the Oregon Peyote Case, 16 Am. Ind. L. Rev. 1 (1991); but see Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308 (1991) (defending Smith's outcome, but not the opinion itself); see also Hamburger, A Constitutional Right to Religious Exemptions: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992) (arguing that constitutional history does not support the concept of exemptions); Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case W. Res. L. Rev. 357 (1989); West, The Case Against a Right to Religion-Based Exemption, 4 Notre Dame J. Law, Ethics, & Pub. Pol. 591 (1990).

[76] 485 U.S. 660 (1988).

Court reversed, rejecting the free exercise claim. The Court announced a general principle that the free exercise clause standing alone would never entitle religiously motivated conduct to a judicially-created exemption from state criminal laws of general applicability. Thus, regardless of the degree of hardship a general law may impose upon religious practice, and regardless of how little an exemption might threaten state interests, courts are henceforth powerless to rely on the federal free exercise clause to provide relief in such circumstances.

Although written by Justice Scalia, the leading proponent on the Court of judicial reliance on the original meaning of the text,[77] the Smith opinion simply ignores the circumstances surrounding the adoption of the free exercise clause. Nor does the opinion even faintly attempt to parse the text of the free exercise clause.[78]

Instead, Smith's principle of formal free exercise neutrality apparently derives from two, related sources. The first is a substantive concern for legal stability and predictability -- the Court expressed fear of the "anarchy" that would be created by permitting religion-based exemptions from general laws. The second is institutional, and reflects

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[77] Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849 (1989).

[78] At the very least, the use of the word "exercise" should have occasioned a reflective pause. See Michael McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488-1500 (1990).

doctrines of judicial restraint -- the Smith opinion expresses horror at the prospect, implicit in the pre-Smith law, that "judges [will] weigh the social importance of all laws against the centrality of all religious beliefs."[79] Neither the substantive nor the institutional bases for Smith can be limited to the criminal law, and the Court has recently and unsurprisingly announced that no one should attempt to so confine it.[80]

Finally, the Court in Smith suggested that legislatures could, and perhaps should, do what courts were no longer to do -- that is, single out and especially protect religiously-motivated conduct. In particular, the Smith majority suggested the appropriateness and permissibility of a legislatively drawn exemption from the criminal prohibition on peyote use for members of the Native American Church.[81] Smith's institutional

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[79] 494 U.S. at xxx.

[80] The Court's recent restatement of Smith in the Church of the Lukumi decision abandons any pretense that a civil-criminal distinction is operating here. 113 S. Ct. at 2226. See also Salvation Army v. N.J. Dept. of Community Affairs, 919 F.2d 183 (3rd Cir. 1990); St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2nd Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990); United States v. Philadelphia Yearly Meeting of the Religious Society of Friends, 753 F. Supp. 1300, 1304 (E.D. Pa. 1990).

[81] For example, both federal law and the law of Texas exempt members of the Native American Church, but not others, from prohibitions on possession of peyote. See Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (upholding the constitutionality of the sect-specific exemption).

concerns thus may be paramount to its substantive ones.[82] In this view, special treatment for religion -- indeed, for particular, named sects -- is not a matter of particular concern; rather, it is judicially mandated special treatment that the constitution forbids.[83]

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[82] That is, Smith has officially announced, that henceforth, courts should underenforce the free exercise clause, and leave most of the implementation of religion clause norms to the political branches. For exploration of the notion that Smith can be fit into general notions of nonjusticiability, i.e., that issues arising the free exercise clause will henceforth present "political questions," see Lupu, The Trouble With Accommodation, 60 Geo. Wash. L. Rev. 743 (1992); for discussion of the relationship between this view of Smith and the proposed Religious Freedom Restoration Act, see Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 59-62 (1993). For a general discussion of the legitimacy, propriety, and significance of judicial underenforcement, see Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

[83] 494 U.S. at 890. Smith leaves open so-called "hybrid right" claims -- that is, claims based upon the conjunction of free exercise and other constitutionally significant rights, like free speech or parental control over the rearing of children. However unpersuasive it may be to be more receptive to Free Exercise plus than Free Exercise pure, a great many Free Exercise claims might be recast to take advantage of this construct. Many free exercise claims indeed involve expression, association, or parental concern for the religious upbringing of their children. The last of these is of course the most important; it is both the foundation of Wisconsin v. Yoder, 406 U.S. 205 (1972), and the most controversial member of the hybrid rights set, because it depends upon the nonenumerated right of parental control as a boost to the enumerated right of free exercise. Moreover, a great many free exercise claims involve the parent-child-state triangle, see, e.g., Walker v. Superior Court, 763 F.2d 852 (Cal.), cert. denied, 491 U.S. 905 (1989); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988). Yoder's fate is therefore of crucial significance to the development of the law in the field.

G. The Continuing Dilemma of Permissive Accommodations

Permissive accommodations, by which I mean policies designed to relieve religion of state-imposed burdens in the absence of constitutional compulsion for such relief, present another test of the durability of the separationist ethos. Such accommodations, by definition, prefer religion to their nonreligious counterparts,[84] and sometimes prefer named sects to others.[85] It has always been difficult to square separationist premises, requiring maximum distance between government and religion, with the sort of voluntary sensitivity to religion associated with the pro-accommodationist stance.[86] As one would expect, the Supreme Court's most recent decisions concerning true accommodation schemes reflect the same set of conflicts as that disclosed in the overarching struggle over the survival of separationism. As one might not so readily

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[84] See, e.g., 42 USC sec. 2000e-1, which exempts religious entities from Title VII's general ban on religious discrimination in employment. The Supreme Court upheld the provision against establishment clause attack in Corp. of Presiding Bishops v. Amos, 483 U.S. 327 (1987).

[85] See note 81 supra.

[86] For the view that the Constitution should be generously construed to permit accommodations, see Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685 (1992). For a contrary view, see Steven G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75 (1990); Lupu, The Trouble With Accommodation, 60 Geo. Wash. L. Rev. 743 (1992); Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555 (1991).

anticipate, however, given the anti-separationist drift in the Supreme Court, pure accommodations have not fared very well.

The post-separationist Supreme Court had its initial encounter with such policies in Estate of Thornton v. Caldor, Inc.[87] In Caldor, the Court invalidated a Connecticut statute that permitted all employees, public and private, to designate a Sabbath day, and obliged their respective employers not to schedule them for work on the day designated. The opinion is thin in its explanation of the constitutional vice worked by the scheme; the majority emphasizes the forced subsidy of religion imposed on employers and co-workers,[88] and a more persuasive concurrence by Justice O'Connor focuses upon the discriminatory favoring of Sabbatarian over other religious traditions.[89]

Permissive accommodation hit its high-water mark in 1987 in Corporation of Presiding Bishop v. Amos,[90] in which a Court unanimous as to result upheld the statutory exemption for religious organizations from the federal prohibition on religious discrimination in employment. Most of the Justices appeared to believe that the free exercise clause strongly supported an exemption for at least some hiring

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[87] 472 U.S. 703 (1985).

[88] Id. at 709-10.

[89] Id. at 711-12 (O'Connor, J., concurring).

[90] 483 U.S. 327 (1987).

by religious entities, the hiring of clergy being the most obvious and strongest case. The key question in Amos therefore was the scope of the exemption rather than its existence vel non; that is, whether Congress had gone so far beyond what courts on their own might have done in protecting religious institutions as to constitute an unreasonable favoring (rather than a reasonable accommodation) of religion.[91] The surprising unanimity displayed in Amos, however, collapsed two years later in Texas Monthly, Inc. v. Bullock,[92] in which a divided (6-3) Court invalidated on establishment clause grounds an exemption from a state sales tax scheme for religious periodicals "published or distributed by a religious faith." The grounds of invalidation in Texas Monthly are highly significant to the melding of the law of permissive accommodations with emerging, post-separationist premises. The Court viewed the Texas tax exemption as impermissible sponsorship of religion; the exemption was limited to writing that promulgate (rather than attack) the teachings of particular faiths, and it imposed a burden on other payors of the tax,

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[91] After Smith, however, it can no longer be comfortably asserted that the free exercise clause would require any exemption from the generally applicable requirement that employers not discriminate on the basis of religion. It may be, however, that such a requirement is not "neutral" in the sense required to trigger the rule in Smith. See the discussion of neutrality in the section on Church of the Lukumi, infra.

[92] 489 U.S. 1 (1989).

including purveyors of nonreligious periodicals.[93] In these respects, the exemption offended notions of formal equality -- increasingly crucial in religion clause jurisprudence -- between religion and nonreligion.

No doubt, the law concerning permissive accommodations is unsettled, perhaps to a degree greater than the rest of the matters in the post-separationist period.[94] This should come as no surprise, because permissive accommodations are at the crossroads of two competing

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[93] Over Justice Scalia's strenuous protest in dissent, Justice Brennan in Texas Monthly distinguished the sales tax from the occupational or license tax which the Court had long ago held could not be applied to the activity of itinerant preachers. Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943). In addition, Texas Monthly relied in part on the Press Clause and its implicit prohibition of content discrimination in the dispensing of tax exemptions relating to reading materials. Justices White, Blackmun, and O'Connor all concurred in the Texas Monthly decision, and all relied on Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) (invalidating on Press Clause grounds a sales tax exemption for trade publications, sports magazines, religious periodicals and sacred writings). See also Grosjean v. American Press Co., 297 U.S. 233 (1936) (invalidating tax targeted on state's largest newspaper, which had been critical of the state's Governor).

[94] The Members of the Court appear deeply divided over the question of voluntary accommodations of religion alone. Justices Scalia and Kennedy, as well as the Chief Justice, seem prepared to move in a highly deferential direction in establishment clause adjudication, and permissive accommodations would be swept into this move. Justices Blackmun and Stevens are still rather staunchly separationist, unlikely to accept most permissive accommodations. The center will be controlled by Justices Ginsburg, Souter, and Thomas, whose views on permissive accommodations remain unknown, and Justice O'Connor, who is not yet prepared to extend to religion-specific policies her tolerance for financial aid to beneficiary classes broad enough to include religious institutions.

themes of that period -- deference to political branches as an institutional matter, and the presumptive equality of religion and nonreligion as a substantive matter. When that equality is violated by the disadvantaging of religion, as in the Church of the Lukumi decision, discussed below, the Court has protected religion under the free exercise clause. When that equality is violated by preferring religion, however, as is the case in permissive accommodations, the institutional and substantive norms conflict in ways that the 90's Court has not begun to sort out. In the religion-preferring context, both separationism and formal neutrality push one way, and only institutional restraint pulls in the opposite direction. And because Smith makes all accommodations of religion permissive, the validity of such religion-favoring devices may become an issue of increasing importance.

III. Affirmations in the 1992 Term -- Lamb's Chapel, Zobrest, and Church of the Lukumi

The Supreme Court's three religion clause decisions of the 1992-93 Term reinforce the strong trend away from the ethos of religion-state relations that has prevailed in the liberal culture since the end of the second World War. In these three decisions, two involving Establishment Clause claims[95] (at least on their surface) and the third

[95] Zobrest v. Catalina Foothills School District, 113 S. Ct. 2462 (1993); Lamb's Chapel v. Center Moriches School District, 113 S. Ct. 2141 (1993).

involving the Free Exercise Clause,[96] the Court committed itself to an equality-based view of both religion clauses. That is, notwithstanding the Establishment Clause, the Court held the state to be obliged to provide aid or assistance to religious groups and individuals in like kind to that provided to analogous non-religious institutions, and it reaffirmed its highly controversial position that the free exercise clause requires no more and no less than formal neutrality between religion and non-religion. When these developments are viewed as a piece, and when they are understood against the backdrop of developments of the last dozen years of religion clause adjudication, the near-fatal assault on the concept of church-state separation becomes unmistakable.

A. Lamb's Chapel v. Center Moriches School District[97]

The Term's "easiest" religion clause case was Lamb's Chapel, which involved a combination of state law and school district restrictions on use of school buildings by religious groups outside of school hours. These rules in combination permitted "social, civic or recreational" uses of school property by community groups, but excluded "religious" uses.[98]

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[96] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

[97] 113 S. Ct. 2141 (1993).

[98] State law permitted "social, civic, and recreational meetings and entertainments" in public school buildings during non-school hours, but (continued...)

As the facts of the case made plain, however, the categories of permitted and forbidden uses were overlapping rather than mutually exclusive. The school district had denied a request from Lamb's Chapel, an evangelical church in the community, to use the school auditorium in the evening for a series of religiously-oriented films and lectures on the subject of the family, even though the district had permitted secular organizations to use the facilities for similar purposes.

At initial glance, the case appeared to be purely about free speech and equal access, and not to present an issue of any appreciable difficulty. On what basis, after all, could the district exclude only the religious perspective on family life and include all other views on the subject?

The school board offered an establishment clause defense for its policy, but did not argue its position effectively or persuasively. Given the decisions in Widmar and Mergens, the equal access cases of the 80's, the board's argument was not an easy one to make. Those decisions had involved student prayer groups seeking to meet in public

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[98](...continued)
required that these uses be "non-exclusive and open to the general public." N.Y. Educ. Law sec. 414 (McKinney 1988 and Supp. 1993). As described in the Supreme Court's opinion in Lamb's Chapel, 112 S. Ct. at 2143-44, a state appellate court had construed this section to exclude religious uses, Trietley v. Bd. of Ed. of Buffalo, 409 N.Y.S. 2d 912, 915 (App. Div. 1978), and the Second Circuit had accepted Trietley as authoritative. Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 83-94 (2d Cir. 1991).

institutions, one in college and the other in secondary school. If the establishment clause did not forbid such groups from holding meetings in public schools, how could the Clause justify the Center Moriches School District in excluding from school premises, after school hours, a religiously oriented film series about the family?

From a separationist perspective, the case had a dimension which the Court's rather perfunctory opinion did not explore. One rough cut at defending the New York policy involves physical separationism in its strongest form; religion, religious meetings, religious worship and religious discussion should be kept out of public facilities, including most especially the schools. This has a mindlessly separationist cast to it, unless one adds a second, and somewhat more subtle step. Perhaps religious worship gatherings should be excluded from public buildings, on the theory that the polity might be perceived as endorsing that brand of worship, or the alternative theory that an absolute ban would serve the prophylactic purpose of avoiding official discrimination among sects. From such an exclusion principle, grounded in separationist concerns, might come a corollary exclusion of all gatherings or meetings by religious groups, on the theory that such gatherings might be or become worship meetings, and that officials should not monitor such gatherings to make sure that they did not have a worship character.

To be sure, this argument is built on a series of speculative assumptions. Why not, one might reply, wait until a worship service occurs before banning a group of citizens from making use of public facilities otherwise open to others? The separationist's response is that prophylaxis has always been a crucial element of the creed. If the wall is to remain high and impregnable, we should not permit practices which might evolve ultimately into breaches. Moreover, administrators must have a zone of establishment clause discretion in which to operate if prophylaxis of this sort is to work.

On the facts of Lamb's Chapel, this argument was unlikely to convince even the most ardent separationist.[99] First, the film series the group wanted to show was to be open to all in the public, and showed no signs of being a front for a religious service. Indeed, Lamb's Chapel had made a separate request to hold services in the school on Sunday mornings. The school district had denied that request, and the church did not contest the denial. Second, the School District policy was not a discretionary one, permitting judgment on when the risk of community endorsement of a mode of worship became too high. Rather, the policy reflected a bright line exclusion of all "religious uses." Although such a bright line rule reduces the risk of invidious discrimination among

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[99] It is revealing that the Americans United for Separation of Church & State, arguably the most ardently separationist group in the country, filed an amicus brief in the Supreme Court on the side of Lamb's Chapel.

religions, it increases the danger that the authorities will do precisely what they did in Center Moriches School District -- exclude the religious perspective on a variety of subjects which is otherwise addressed from a secular perspective. This is most assuredly a species of viewpoint discrimination in a discretionary public forum, and -- unless the most stringent form of separationism were to prevail -- such a discrimination cannot survive.

In yet another way, Lamb's Chapel casts doubt on a central premise of separationism. Separationism assumed a sharp distinction between the private and public sphere, and committed religion to the former. Were this distinction to reflect social reality, religion could be excluded from public life with little or no social cost. What the facts of Lamb's Chapel reveal, however, even more than the equal access stories of Widmar and Mergens, is the way in which religious perspectives have come to (re)present a valid approach to problems which the society defines in public policy terms. However private the family is -- and it is assuredly less so as a matter of policy than it was twenty years ago -- we recognize that its problems create externalities with which we all must cope, and we recognize further that religion is a source of longstanding insight on the structure and function of families.

One more observation about Lamb's Chapel and the struggle over separationism seems appropriate. Justice White's opinion for the Court

allocated a superficial paragraph to the question of whether permitting Lamb's Chapel to hold its film series would violate the Establishment Clause as construed in Lemon v. Kurtzman. On the basis of the most cursory analysis, he concluded that such permission would not violate the strictures of Lemon.[100] This, in turn, prompted an attention-getting concurrence from Justice Scalia in which he carried on about Lemon as a harmless movie monster, dragged out to alarm the timid and fearful despite its toothless character.[101] This exchange reveals the degree of commitment on the part of a number of Justices to eviscerate Lemon, however weak and gasping,[102] as a symbol of the separationist era.

B. Zobrest v. Catalina Foothills School District[103]

Of the three religion clause cases of the 1992 Term, this was without question the hardest to predict and the most difficult to decide. Both Lamb's Chapel and Church of the Lukumi were unanimous as to result. In Zobrest, only five Justices approved the result expressed in the Court's opinion.

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[100] 113 S. Ct. at 2148.

[101] Id. at 2149-51 (Scalia, J., concurring).

[102] See Michael Paulsen, The Ghost of Lemon, 44 Case West. Res. L. Rev. (forthcoming, 1994).

[103] 113 S. Ct. 2462 (1993).

Zobrest involved a state's Establishment Clause-based denial of the services of a public employee to function as a sign interpreter in a parochial school for a boy with a severe hearing impairment. Had the student attended public school or a private nonreligious school, the state would have supplied the interpreter, pursuant to the federal Individuals with Disabilities Education Act and accompanying state legislation.[104] Because the Zobrest family chose to send their son James to a pervasively sectarian Catholic school, in which students studied Catholic theology and frequently attended Mass immediately before school in the school's own chapel, the Ninth Circuit ruled that the state had correctly determined that the Establishment Clause forbade state support for the hearing interpreter.[105]

Zobrest presented a problem exquisitely poised among 1) the equal access doctrines employed in Widmar, Mergens, and Lamb's Chapel; 2) the neutrality doctrines reflected in the line of cases permitting aid to individuals and families that they might then use in religious institutions; and 3) the still-vital separationist doctrines designed to prevent unrestricted state aid to religious institutions and to avoid symbolic church-state union. It was easy to conceptualize Zobrest

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[104] The Individuals with Disabilities Education Act is codified at 20 U.S.C. sec. 1400 et seq.. The implementing Arizona legislation is Ariz. Rev. Stat. Ann. sec. 15-761 et seq.

[105] 963 F.2d 1190 (9th Cir. 1992).

as an equal access case, like Lamb's Chapel; the state made hearing interpreters available to all hearing-impaired schoolchildren except those who wished to attend parochial school. Was this not much like a policy that permitted civic, but not religious, use of public property, the difference being that the property in Zobrest was use of a public employee's assistance rather than the public's real property? Moreover, the themes of private choice and state neutrality, evident from Mueller v. Allen and Witters v. Dep't of Social Services, also pressed toward reversal of the Ninth Circuit; the state's policy created an obvious financial incentive to the Zobrests to choose a nonreligious educational setting for their son rather than the parochial school they preferred.

Nevertheless, those elements of separationism that lived on in Lemon's more recent progeny -- in particular, Grand Rapids School Dist v. Ball[106] -- pushed hard the other way. A hearing interpreter who accompanied James Zobrest to a traditional Catholic school would be involved in translating the Mass and the discussion in religion class,[107] not to mention whatever religious content might pervade other subjects.

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[106] 473 U.S. 373 (1985) (invalidating program of providing publicly employed teachers to provide supplemental, nonreligious instruction in parochial schools).

[107] The Supreme Court noted that the professional ethics of the interpreters required them to transmit everything said precisely as intended by the speaker. 113 S. Ct. at 2469. On this view of the interpretive function, the interpreters operated more like hearing aids than like teachers with independent judgment concerning the material transmitted.

In prior efforts to funnel state aid to parochial schools, government programs had always been strictly limited to secular (or at least secularizable) subjects. No such limitation existed here.

The strongest distinction between this case and those which had forbidden aids of money and materials to parochial schools was the intrinsic restriction on the Zobrest facts to one student alone; unlike maps or buses for fields trips, these were not resources that the school might capture and use for the religious education of its general student population. Yet even this feature could not erase the overpowering symbolism of a public employee translating the Mass to an attendant student in full view of all of his schoolmates.

In an opinion notable primarily for its brevity and refusal to confront the trilemma of equal access, neutrality, and separationism, a five-Justice majority reversed the 9th Circuit. Relying heavily on its decisions permitting aid to families and individuals who chose to put the aid to religious uses,[108] the Court ruled that the state would not act in violation of the establishment clause if it placed a hearing interpreter in a pervasively religious school. The operative principle, in the Court's view, is that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not

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[108] See id. at 2466-69, relying on Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). See TAN 39-43 supra for discussion of those decisions.

readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[109] Zobrest involved just such a program in the Court's view; the hearing interpreter was present in the parochial school solely as a result of a decision by the Zobrest family. So long as the interpreter could accompany James to any accredited school, the state would have created no incentive or disincentive for James to obtain a religious education. Moreover, in the majority's view, the fact that the school could not capture or divert the aid to James to more general use sufficed to distinguish this case from the Court's separationist precedents involving money, materials, and other goods of general utility in the educational process.[110]

All four dissenters agreed that the case presented substantial nonconstitutional grounds for decision, which the parties had not adequately raised, briefed, or argued, and which should form the basis for a remand.[111] Two of the four dissenters -- Justices Blackmun and

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[109] 113 S. Ct. at 2466.

[110] See Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977) (state may not provide maps, or buses for field trips, to parochial schools); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (state may not supply public employees to teach supplemental, nonreligious subjects after regular school hours in the parochial school).

[111] Three such grounds were suggested (113 S. Ct. at 2465, 2469-70). The weakest among them rested upon the argument that the federal statute did not require the provision of services in private schools at all. Whatever the (continued...)

Souter -- took on the constitutional merits, and took the separationist tack. Relying primarily on Lemon's separationist progeny, they argued that the establishment clause forbade active state involvement in the teaching or inculcation of religion. Because the provision of a hearing interpreter to James Zobrest constituted a joint venture in religious teaching between a state employee and parochial school teachers, the dissenters concluded that it constituted a prohibited act of church-state union.

It is still too early to know if Zobrest will be a watershed case of the post-separationist period. Viewed modestly, the Court's opinion

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[111](...continued)
force of that in a state which provided aid in public schools only, Arizona was not such a state. It did provide disability assistance to students in private schools, and excluded pervasively sectarian schools only because the state Attorney General concluded that the federal constitution so required. Second, the state constitution provides that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Arizona Const., Art. II. The Attorney General had also rested his conclusion on this provision, but the parties had not litigated its validity. Had they done so, and had the Attorney General's interpretation held up, there would have been state law grounds sufficiently independent of the federal constitution to preclude Supreme Court review. Herb v. Pitcairn, 324 U.S. 117 (1945). Third, and to my mind the most compelling ground to support the Zobrest dissenters call for a remand to consider nonconstitutional issues, federal regulations adopted pursuant to the disability assistance statute prohibited the use of federal funds to pay for "religious worship, instruction, or proselytization." 34 CFR sec. 76.532 (a)(1) (1992). This regulation arguably goes beyond the demands of the Establishment Clause -- especially in the post-separationist period -- and might well have supported the 9th Circuit's result in Zobrest. The dissenters thus seem quite right that the majority had zealously reached for the merits without a full exploration at earlier litigation stages of nonconstitutional issues.

breaks little ground. It does not purport to overrule Lemon, though it hardly takes Lemon's separationism seriously. The Act under which James Zobrest sought aid does appear to be a general welfare program, designed to help the disabled achieve educational opportunity, and not in any way a covert effort to sneak aid to church schools. In that sense, Zobrest is easily assimilated with the Court's rather uncontroversial opinion in Witters. Moreover, aid to the disabled is a far cry from tuition vouchers or other schemes designed to empower families generally to choose parochial education at public expense.

A more radical view of Zobrest, however, would emphasize different features of the case. The anti-separationist would emphasize the Court's unwillingness to attend to the symbolism of the public employee translating the Mass or the theology lesson. Bowen v. Kendrick insisted that as-applied adjudication was appropriate to challenge aid to parochial institutions, but such application was nowhere to be seen in Zobrest, despite the "pervasively sectarian" atmosphere of the school. Furthermore, and of utmost importance to the anti-separationists, it may prove to be extremely difficult to distinguish in principle aid to the families of disabled students from financial aid, via vouchers or otherwise, to all families.

What may distinguish vouchers from aid to the disabled is the complete equality of treatment now available to the disabled (post-

Zobrest), without regard to whether their families choose parochial education, and the differential treatment which any partial voucher system will afford to private schools as compared to the public financing of public schools. In a system in which public schools continue to operate out of general revenues rather than on the basis of family-submitted vouchers, the educational system will not be one of equal treatment for the religious and nonreligious options. Religious schools, like other private schools, would be partly subsidized by a voucher system; public schools, under most forms of partial voucher systems, would continue to be wholly subsidized by tax revenues. This inequality, however, cuts in favor of either more aid to private schools, including those with religious affiliation, or less aid to public schools. In this context, the idea of religious neutrality, which requires that public subsidies not influence the choice between religious education and other options, ultimately will swallow the idea of separationism.[112] Whether public schools as we know them can survive this sort of leveling of the field of public support is an open question.

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[112] The best work on the general idea of religious neutrality is Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). The leading work on application of this idea to school financing is Michael McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989 (1991).

C. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah[113]

The Church of the Lukumi case involved the religion of Santeria, and its practices of ritual animal sacrifice. The City of Hialeah, Florida -- once better known for its classy thoroughbred racetrack than its repression of religion -- responded to this particular church in its midst by enacting a series of overlapping ordinances designed to prohibit ritual sacrifice of animals. The ordinances were heavily gerrymandered so as to disturb the animal treatment practices of the Santerians alone. The ordinances prohibited the sacrifice of animals, defined as "to unnecessarily kill, torment, torture or mutilate in a public or private ritual or ceremony not for the primary purpose of food consumption."[114] Their language, structure and enactment history made clear that "suppression of the central element of the Santeria worship service was the object of the ordinances."[115] As Professor Laycock put it in his argument in the Supreme Court, one could kill an animal in Hialeah for sport, convenience, mercy, food, or any reason at all so long as it was not religiously inspired sacrifice.

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[113] 113 S. Ct. 2217 (1993)

[114] Hialeah Ordinances 87-52, 87-72. These are set out in the Court's opinion at 113 S. Ct. 2223-24.

[115] Id. at 2227.

The district court upheld the ordinances against a free exercise clause attack, and the Eleventh Circuit affirmed in a one paragraph per curiam opinion.[116] The Supreme Court unanimously reversed. All the Justices agreed that the Hialeah ordinances were not neutral with respect to religion, nor were they generally applicable to all matters involving the killing or disposal of animals. Rather, the ordinances had been carefully packaged to burden the Santerians and only the Santerians.

Even viewing the ordinances this way, the Court did not hold the ordinances automatically unconstitutional. Rather, it asserted that the "compelling interest" test of Sherbert-Yoder applied to a law which singled out religion, or a particular sect, for disfavored treatment. Here, all Members of the Court concluded, the City of Hialeah could not meet this test; the lack of even-handed regulation of animal killing practices undercut any claim that the City's interest in the subject was especially important. On other doctrinal matters, however, the Court divided. Justice Kennedy's opinion for the Court expressly reaffirmed Employment Division v. Smith's general principle that the free exercise clause did not require exemptions for religion from neutral, generally applicable laws.[117] All five of the Justices who had participated in the

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[116] 936 F.2d 586 (11th Cir.), aff'g 723 F. Supp. 1467 (S.D. Fla. 1989).

[117] "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of (continued...)

Smith majority, which included Justice White, signed on to this reaffirmation, and Justice Thomas joined it. Thus, even if Justice Ginsburg is anti-Smith,[118] there remains a five-Justice majority committed to Smith principles.

The most hopeful sign for foes of Smith was the concurrence of Justice Souter, who launched a serious attack on that decision and seems prepared to fight for its overruling.[119] When one combines Justice Souter's concurrence in this case with his concurrence in Lee v. Weisman,[120] he is revealed to be a jurist of strong separationist leanings.

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[117](...continued)
general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." 113 S. Ct. 2226. The Court spoke dishonestly, I believe, when it claimed that its "cases" establish this general proposition; only Smith, which is the only decision the Court cited, stands for this proposition, and Smith is in tension with all the other free exercise decisions of the past thirty years. Justice Souter's concurring opinion in Church of the Lukumi made this point forcefully. Id. at 2240-50.

[118] See Goldman v. Weinberger, 739 F.2d 657, 660 (D.C. Cir. 1984) (Judge Ruth Bader Ginsburg, dissenting from a denial of rehearing en banc of a panel opinion rejecting the claim of an Orthodox Jew to be exempt from an Air Force regulation outlawing the wearing of headgear while indoors), aff'd, 475 U.S. 503 (1986). Then-Circuit Judge Scalia joined this dissent by then-Circuit Judge Ginsburg, which suggests that behavior on the Court of Appeals is not a very good predictor of Supreme Court behavior.

[119] 113 S. Ct. at 2240-50.

[120] 112 S. Ct. 2649, 2667-68 (Souter, J., concurring).

Despite the prospect of continued struggle within the Court about the vitality of Smith, Church of the Lukumi provides significant signals that free exercise adjudication is moving in the same equality-oriented direction as establishment clause adjudication. Its holding that the Constitution presumptively prohibits religious gerrymanders, structured to the detriment of a particular faith, reaffirms Larson v. Valente[121], a decision centrally about religious equality. Much turns, of course, on the approach the Court takes to the question of when a law has departed from the qualities of general applicability and religion-neutrality. Church of the Lukumi was too easy a case on this score to be very revealing on the subject; the language, history, structure of inclusions and exclusions, and inevitable operation of the Hialeah ordinances taken together convinced all nine Justices quite readily that they were confronting a blatant example of religious gerrymander. Other situations, however, may present more subtle problems in the definition of religious neutrality. Consider a pair of examples drawn from employment discrimination law. Would a law barring all gender

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[121] 456 U.S. 228 (1982) (holding that state may not legislate reporting requirements for religious fundraising that are designed to regulate "street religion" like the Unification Church while exempting mainstream religion). For an Establishment Clause variation on the anti-gerrymander theme, see Grumet v. Bd. of Educ. of Kiryas Joel Village School District, 61 USLW 2428 (1/26/93) (NY Sup. Ct. App. Div., No. 65398, 12/31/92) (school district gerrymander designed to benefit religious community that will not send its children out of the community for special educational services violates the Establishment Clause).

discrimination in employment, including the ministry, be a law of general applicability and formal neutrality? Presumably so, because it states a general norm and is not designed to single out religious employers for disfavored treatment (however much it might disturb them). By contrast, would a law forbidding all religious discrimination in employment similarly constitute a formally neutral, generally applicable law to which no judicially mandated free exercise exemption would be allowed? Can it be that the Constitution provides no relief for sects forbidden by law from preferring their own for religiously significant positions, including those in the clergy. This example involves a regulatory exertion which touches explicitly on the subject of religion; for reasons that sound in principles of freedom of association, as well as free exercise of religion, barring religious entities from excluding non-adherents from key positions does not have the same air of neutrality as would application of other antidiscrimination norms.[122]

However neutrality comes to be defined, a religion clause punch driven by that ideal will tend to be far lighter than a punch driven by a separationist philosophy. The religion clause cases of the 1992 Term without question reaffirm the prevailing trends in religion clause law. The state may -- sometimes must -- aid religious institutions as it aids

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[122] Because such a prohibition would implicate rights in addition to free exercise, it may be exempt from the Smith rule by force of Smith's reference to "hybrid rights." See note 83, supra.

others. The state may not ordinarily single out religion for disadvantageous treatment, although it may burden religion considerably through enforcement of laws that are formally religion-neutral. Whether the state may single out religion for advantageous treatment is one question upon which the Term's decisions shed no light. Such treatment would not be explicable in separationist or neutrality terms; rather, such treatment would have to reflect a substantive state policy to favor religion, or a response to Smith's invitation to the political branches to lift a state-imposed burden on religion and thereby to affirm religion's constitutionally special and positive character. If there is to be a defining religion clause question for the 90's, it may well be that of the permissibility of politically enacted, religion-specific accommodations.

IV. The Religion Clauses Shorn of Separationism

A regime of equality is different from a regime of separationism and substantive rights, but is not necessarily bad for religion or for the state. After all, separationism had within it a powerful equality component; discrimination among sects was always among its concerns, and a secular state is theoretically equidistant from all religions. Moreover, a regime of religious (or associational) equality will result -- at least as a formal matter -- in the least favored religion getting exactly as

much protection as the most favored religion.[123] A community that sponsors a Christmas display should be constitutionally obliged, for example, to devote equal time and resources to the holy days of Eastern religions to which some of its residents adhere.

Nor is it any longer even theoretically the case that a regime of equal religious liberty might permit, as Professor Laycock once suggested,[124] the evenhanded suppression of all religion. The elaboration in Church of the Lukumi of what is required for a regulation to be generally applicable makes it clear that any state suppression of religion alone, even if nonsectarian on its face -- say, by a prohibition on all worship services, or a prohibition on use of wine or animals in all religious rituals -- would not qualify for Smith's insulation from stringent review. And, most assuredly after Church of the Lukumi, unpopular and strange-sounding religious practices cannot be targeted for regulation simply because there is community hostility to the religious differences they represent.[125]

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[123] The constitutional strategy of tying the interests of the least influential to those of the most powerful and well-represented has functioned effectively in other areas of our constitutional law, see generally J. Ely, Democracy and Distrust, and may well be salutary here.

[124] Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 13-14.

[125] Cf. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (government policy may not rest on irrational prejudice); Palmore v. Sidoti, 466 U.S. 429 (1984) (same),; but cf. Bowers v. Hardwick, 478 U.S. 186 (continued...)

Will the replacement of Justice White by Justice Ginsburg lead to any appreciable change in the direction of religion clause law? I doubt it. Then-Judge Ginsburg, and then-Professor Ginsburg before her, gave us little to go on in predicting her establishment clause views.[126] What we do know is that in areas of constitutional law in which others have emphasized substantive rights, Justice Ginsburg has emphasized the theme of equality.[127] That theme would of course put her right in line with the decisional trends of the 80's and early 90's in religion clause law. And, although it is true that American Jews have traditionally been separationist in inclination, there are signs that significant aspects of that community are becoming pluralist and accommodationist in their stance.

How should religious institutions respond to the state of affairs in the post-separationist world? On matters of taxation, zoning, lobbying, and regulation of fundraising, for example, are such institutions better or worse off than they were when separationism ruled the day? In many respects, such institutions are in an improved position than they were twenty years ago. Government is freer to aid them, whether or not the aid is funneled through private choice, so long as nonreligious

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[125](...continued)
(1986) (majority disapproval of homosexuality is sufficient constitutional warrant to prohibit homosexual acts).

[126] See note 118, supra.

[127] Ruth Bader Ginsburg, TITLE, ___ NYU L. Rev. ___, ___ (1993).

institutions are beneficiaries as well. Whether government can single religious institutions out for favored treatment is less clear; the law on this is no less favorable than it once was, but neither Justice Souter nor Justice Ginsburg seems to me likely to be the fifth vote such efforts would need to survive systematically. So the validity of permissive accommodations is likely to be determined, as before, on a case-by-case basis with little predictability.

On the free exercise side -- that is, on claims that churches and religious institutions might make for mandatory accommodations -- things may seem the worse as compared to twenty years ago. When one recalls how little force Sherbert and Yoder had in their heyday, however, it is not evident that churches and religious institutions were ever well empowered by activist free exercise principles.[128]

Still, those principles offered rhetorical, political, litigational, and bargaining advantages, so it has to hurt that Smith has erased them.

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[128] Occasionally, free exercise principles have influenced statutory interpretations in favor of churches. See, e.g., NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (construing NLRA to exclude schools owned and operated by religious entities); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (construing Title VII, 42 U.S.C. sec. 2000e, of the 1964 Civil Rights Act to exclude religious bodies, hiring for positions of religious significance, from the statutory prohibition on gender discrimination), cert. denied, 409 U.S.896 91972). This sort of interpretive device is not necessarily inconsistent with Smith's transfer of authority to political branches, because it leaves them the option of correcting the interpretation by legislation with virtually no risk of being overturned subsequently on free exercise grounds.

Overruling of Smith is not immediately likely, and enactment of the Religious Freedom Restoration Act is still hanging as a close call as of this writing. If either of those two legal events occurs, churches and religious institutions would be in the enviable position of having the advantages of special protection from state harm without the disabilities long associated with separationism.[129]

If the constitutional culture is rejecting for good the regime of church-state separation, what will be forsaken? First, separationism has a side, rarely evident in the case law, that is quite protective of religion and its institutions.[130] The image of religion apart from ordinary culture, tending its special garden, represents a positive spin on the

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[129] Whether that state of affairs could long survive is another matter. As several commentators have argued, the law of the religion clauses may tend toward a balance or equilibrium. See Dallin Oaks, Separation, Accommodation, and the Future of Church and State, 35 DePaul L. Rev. 1 (1985); Abner Greene, The Political Balance of the Religion Clauses, 102 Yale L. J. 1611 (1993). And the Religious Freedom Restoration Act may do less than many expect. See Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 52-66 (1993); Ira C. Lupu, Employment Division v. Smith and the Decline of Supreme Court-Centrism, 1993 BYU L. Rev. xxx, xxx (forthcoming, 1993).

[130] For exploration of this theme, see Steven D. Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 Tex. L. Rev. 955 (1989); Carl Esbeck, Establishment Clause Limits on Governmental Interference with Religious Organizations, 41 Wash & Lee L. Rev. 347 (1984); but see Marshall & Blomgren, Regulating Religious Organizations Under the Establishment Clause, 47 Ohio St. L. J. 293 (1986).

privatization theme.[131] A regime of religious pluralism and equality, with religious institutions seen as full and equal partners with other intermediate associations in the nurturing of public life, is attractive in its own way; but in such a regime religion will no longer bear the marks of constitutional "specialness" that it once had. At the doctrinal level, the strength of an equality-based regime is also its weakness. Aiding religion as part of a program of general aid for a particular purpose will be a safe harbor, and therefore will be a device to avoid constitutional strictures on promoting religion or sectarian discrimination. No-endorsement principles, as noted above, will invite case-by-case application, leading to uncertain and unpredictable results. The result may be a pattern of uncorrected and minimally checked sectarian discrimination, as the symbols and practices of some religions find public support and judicial approval far more readily than others. Strong separationism, honestly employed, favored no religious sect.

Of course, strong separationism may well have favored irreligion, because it lined up state power with secular rationality. One of the powerful lessons of the past twenty years of American law and history is that an ideology of secular rationality is not objective or neutral, but is

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[131] For elaboration, see Mark Dewolfe Howe, The Garden and the Wilderness; Michael McConnell, Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence, 42 DePaul L. Rev. 191, 194-98 (1992); Timothy L Hall, Roger Williams and the Foundation of Religious Liberty, 71 B.U. L. Rev. 455 (1991).

partial to a particular set of institutions, science and markets most notably. Nor is secular rationality particularly conducive to the life of the spirit, without which it may not be possible for a nation to thrive. The challenge in the post-separationist period is for state and society to harness the forces that lead to religious awakening and pluralism without (re)kindling a religious war of all against all. Whether the Idea of America retains enough shared content to hold the center against the tendency of our many pluralisms to pull us apart remains an open question; whether a judicially enforced church-state separation might contribute to the maintenance of that Idea seems, for now, to be almost entirely an academic inquiry. Though it may linger in the political and legal culture of constitutionalism, the image of separation of church and state is fading out.