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I. INTRODUCTION

A hallmark of religion clause scholarship is the complaint that the doctrine is a hopeless muddle. However, the Rehnquist Court brought a considerable amount of consistency—well, apparent consistency—to the doctrine. I say "apparent consistency" because, just as a paradox is only a seeming contradiction, so was the Rehnquist Court's religion clause jurisprudence only seemingly consistent. The doctrine focuses on whether the government singles out religion for special benefit (generally problematic under the Establishment Clause) or for special burden (generally problematic under the Free Exercise Clause). If, on the other hand, the government benefits religion as part of a more general category of benefits, or burdens religion as part of a more general category of burdens, neither clause is violated. Thus, religion clause doctrine seemingly fits together nicely, tracking a more general development in equality jurisprudence.[1] However, there are some outlier cases in which the Rehnquist Court upheld special benefits for or special burdens on religion. These outlier cases are a window into a deeper inconsistency in religion clause doctrine. The outlier cases—and a proper understanding of why and when the Court views religion as foregrounded, rather than backgrounded, in Establishment Clause cases—remind us of the ways in which religion is distinctive. That

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1. *See* Abner S. Greene, *The Incommensurability of Religion*, *in* LAW & RELIGION: A CRITICAL ANTHOLOGY 226, 228–29 (Stephen M. Feldman ed., 2000); *see also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 702 (2002) (connecting the rise of the endorsement test to the development of political equality as a constitutional value).

distinctiveness is not properly valued by a formal doctrine that matches general benefits (valid) against general burdens (valid), and special benefits (invalid) against special burdens (invalid). What we take away from religion by the cases that invalidate religion-favoring governmental action is not offset by those that invalidate religion-disfavoring governmental action. We need a broader conception of free exercise to compensate for the ways in which the doctrine (properly, in my judgment) treats religion as distinctive under the Establishment Clause.

This argument can be better understood by considering that the cornerstone of the Rehnquist Court's Establishment Clause jurisprudence was Justice O'Connor's endorsement test, which focuses on whether government action would be perceived by a reasonable observer as endorsing religion or a particular religion, i.e., whether it would be perceived as advancing a contested view of religious truth.[2] Such endorsement makes non-adherents to the government's position feel excluded as second-class citizens, unable to share the dominant doctrinal perspective and therefore shut out from full citizenship. Justice O'Connor never fully explained how government endorsement of religion works this harm, but here is one version of the argument: If the government endorses a contested version of religious truth and religion is generally understood to speak to ultimate, foundational truths,[3] those who do not share the government's perspective will reasonably feel disconnected from this truth (one type of harm) or from a full ability to influence the actions of their governmental agents (another type of harm). This is especially so because religion involves the belief in an extra-human source of normative authority, and reference to such authority in the governmental arena excludes non-believers from an equal ability to participate.[4] These are powerful concerns, and the Court has

2. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773–74 (1995) (O'Connor, J., concurring in part and concurring in the judgment); County of Allegheny v. ACLU, 492 U.S. 573, 627–32 (1989) (O'Connor, J., concurring in part and concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

3. *See* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 90 (2002).

4. *See* Greene, *supra* note 1, at 230–34; Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535 [hereinafter Greene, *Is Religion Special?*]; Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1614–25

appropriately invalidated laws that raise them. The Rehnquist Court's key contribution to Free Exercise Clause doctrine—its refusal to recognize a free exercise problem with laws that burden religion as part of a general category of burdened activity—appears to match its practice of upholding laws that benefit religion as part of a general category of benefited activity against Establishment Clause challenge. However, this weakened Free Exercise Clause is not the appropriate fit for an Establishment Clause that invalidates laws that harm one's ability to participate as a full citizen.[5] Such doctrine works a corresponding harm on those who would use the government to openly advance what they believe to be the ultimate, foundational truth, based in religion. The partial gag rule on religious speech resulting from an Establishment Clause doctrine that appropriately limits the role of the government in advancing religious ideas is not sufficiently remedied by a Free Exercise Clause doctrine that merely attends to intentional discrimination against religion. A more robust system of exemptions (and accommodations) is needed.[6]

(1993) [hereinafter Greene, *Political Balance*]; *see also* Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 FORDHAM L. REV. 2089, 2096–98 (2004) [hereinafter Greene, *Constitutional Reductionism*]; Abner S. Greene, *Uncommon Ground: A Review of* POLITICAL LIBERALISM *by John Rawls and* LIFE'S DOMINION *by Ronald Dworkin*, 62 GEO. WASH. L. REV. 646, 657–66 (1994) [hereinafter Greene, *Uncommon Ground*]; *cf.* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1546–49 (2000) (discussing the expressive theory of Establishment Clause harm).

5. *See* Greene, *supra* note 1, at 234–38; Greene, *Political Balance*, *supra* note 4, at 1633–40; *see also* Greene, *Constitutional Reductionism*, *supra* note 4, at 2098–103; Greene, *Uncommon Ground*, *supra* note 4, at 666–73.

6. To her credit, Justice O'Connor understood this—in addition to developing and applying the endorsement test, she supported the view that the Free Exercise Clause sometimes requires exemptions, even from generally applicable laws. *See* Employment Div. v. Smith, 494 U.S. 872, 892–903 (1990) (O'Connor, J., concurring in the judgment). Justice Souter also appears to share this set of views. *See infra* text accompanying notes 92–96, 144. For other views agreeing that formal equality fails to capture the way in which the religion clauses treat religion as distinctive, but without sharing my argument for a "political balance" to limit the role of expressly religious argumentation in lawmaking, offset by a robust system of judicial exemptions for religious practice, see Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433, 447 (1995); Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 3, 11 (2000).

II. THE APPARENTLY CONSISTENT DOCTRINE

If we focus, at least at first glance, on the generality/specificity criterion, the doctrine is surprisingly consistent. The main Rehnquist Court development for both religion clauses was to ascertain whether the law in question backgrounded or foregrounded religion. Backgrounding means that the government does not single out religion, and therefore its actions are constitutional; foregrounding means the opposite. Under one view of neutrality (and there are many), this is precisely the correct focus. Under this view—what one might call formal neutrality[7]—the political branches and the judiciary can best stay out of the way of religion by following a clear rule of formal equal treatment.[8] This theory is not the best for protecting minority religions, however, and this should give us initial pause as to whether generality (i.e., formal neutrality) really captures a core concern of the religion clauses.[9] Majorities will find it easy to include religious recipients in a larger class of beneficiaries—for example, a school vouchers program would likely not be enacted unless mainstream religious groups were supportive and significant beneficiaries. Also, when laws only incidentally burden religion, it is minorities, not majorities, who are most likely to be harmed because the regulated practices will rarely be those the majority religion holds

7. *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

8. Another version of neutrality—what we might call "substantive neutrality"—argues that government preserves religious freedom best by providing neither an incentive nor a deterrent to religious belief or practice. *See* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 694, 732 (1997); Berg, *supra* note 6, at 451; Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 156, 243 (2004); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 643; McConnell, *supra* note 6, at 38. This view looks beneath the formal surface of the government's action to its effects.

9. *See* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004). For another critique of the formal neutrality (or equality) view, see Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004) (arguing that formal equality cannot fully explain the doctrine because many values underlie both religion clauses).

dear.[10] Under the formal neutrality view, neither action—religious benefits that happen to offer significant help for religious majorities (as part of a secular plus religious beneficiary group and without formally excluding religious minorities), or religious burdens that happen to significantly burden religious minorities (as incidental burdens from generally applicable laws, thereby formally burdening both religious and secular practice and both majority and minority religions)—is unconstitutional.

A. Establishment Clause: Constitutional Because Part of a General Package

On the Establishment Clause side, the Rehnquist Court built on earlier opinions and developed the focus on whether benefits to religion are part of a more general benefits program. *Mueller v. Allen*[11] and *Witters v. Washington Department of Services for the Blind*[12] already started in this direction, but the Rehnquist Court cemented generality as the key to upholding benefits programs in *Bowen v. Kendrick*,[13] *Zobrest v. Catalina Foothills School District*,[14] *Agostini v. Felton*,[15] *Mitchell v. Helms*,[16] and *Zelman v. Simmons-Harris*.[17]

Kendrick upheld the Adolescent Family Life Act (AFLA) against a facial constitutional challenge.[18] The AFLA provided federal grants "to public or nonprofit private organizations or agencies 'for services and research in the area of premarital adolescent sexual relations and

10. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1133–36 (1990). *But cf.* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1542–44 (1999) (approving of laws that incidentally burden minority religions more than majority religions). Majorities will, though, sometimes burden majoritarian religious practice as part of a general law not directed at religion; this possibility becomes important for my "political balance" argument, as sketched below, *see infra* text accompanying note 179, and as detailed by Greene, *supra* note 1, at 235–37; Greene, *Political Balance*, *supra* note 4, at 1636–39.

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

12. Witters v. Wash. Dep't of Servs., 474 U.S. 481 (1986).

13. Bowen v. Kendrick, 487 U.S. 589 (1988).

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

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

16. Mitchell v. Helms, 530 U.S. 793 (2000).

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

18. *See Kendrick*, 487 U.S. at 589.

pregnancy.'"[19] The focus of the case was on abstinence-centered education services. Recipients expressly included religious organizations, as part of a wider ambit of public and private recipients.[20] Although leaving open the possibility of as-applied challenges to the use of such funds to advance religious doctrine regarding sexual behavior,[21] the Court, in an opinion by Chief Justice Rehnquist, held that "nothing on the face of the [AFLA] suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."[22]

Zobrest upheld the provision of a sign-language interpreter to accompany a deaf student to classes in a Roman Catholic high school.[23] The Individuals with Disabilities Education Act (IDEA) requires public and private (secular and religious) schools to provide such assistance. The Court held, in another opinion by Chief Justice Rehnquist, that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."[24] As an additional factor supporting the formal neutrality of the governmental aid, the IDEA accords "parents freedom to select a school of their choice."[25] Thus, the benefits are available generally, and whether they are used in a religious school depends on parental choice.

Aguilar v. Felton[26] involved a challenge to federal Title I funds, which go to public or private schools to support children who need remedial education, guidance, and job counseling. Although the law requires that the provided services be secular, New York City provided services at private schools, including religious schools, because of difficulties in providing services to private school children at public schools. The Court invalidated this practice, but it later

19. *Id.* at 593 (quoting S. REP. NO. 97–161, at 1 (1981)).
20. *See id.* at 604–05.
21. *See id.* at 618–22; *see also id.* at 622–24 (O'Connor, J., concurring).
22. *Id.* at 608 (majority opinion).
23. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993).
24. *Id.* at 10.
25. *Id.*
26. 473 U.S. 402 (1985).

overruled *Aguilar* in *Agostini*.[27] Justice O'Connor, writing for the majority, explained that the Court over the years had "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[28] Direct governmental aid to the educational function of religious schools was not invalid because the aid was given generally to underprivileged students, and the only reason it reached parochial schools was that the parents chose to send their children there rather than to public or secular, private schools.[29] According to the Court, such an aid program provides no incentive to "undertake religious indoctrination," because the "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[30]

The focus on the generality of the funding program was front and center in *Mitchell v. Helms*,[31] in which a plurality asserted that generality is sufficient to uphold such programs. Federal Chapter Two funds go to state and local government agencies for use in lending secular educational materials and equipment to public and private schools.[32] The *Mitchell* Court upheld this arrangement as applied to loans to private, religious schools. In so doing, the Court overruled precedent invalidating similar programs based on the risk that public funds would be diverted to religious use.[33] Although a majority reached this conclusion, the plurality, per Justice Thomas, focused on "the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[34] Private parental choice as to where to educate their children provides a means of "assuring neutrality."[35] Justice

27. *Id.*, *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
28. *Agostini*, 521 U.S. at 223.
29. *See id.* at 225–26, 228.
30. *Id.* at 231.
31. 530 U.S. 793 (2000).
32. *See id.* at 801–02.
33. *See id.* at 808, 835 (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)); *see also id.* at 837 (O'Connor, J., concurring in the judgment).
34. *Id.* at 809 (plurality opinion); *see also id.* at 829.
35. *Id.* at 810; *see also id.* at 829.

O'Connor's opinion concurring in the judgment, joined by Justice Breyer, refused to accept either neutrality or generality as dispositive in cases such as this; the three dissenters agreed with O'Connor on this point.[36] One should note, however, that Justice O'Connor never voted to invalidate a governmental funding program that provides support to religious schools as part of a larger category of schools.

The most recent—and arguably most important[37]—of the cases involving public funds running to religious schools is *Zelman v. Simmons-Harris*.[38] Ohio enacted the Pilot Project Scholarship Program, which provided tuition aid for students in kindergarten through eighth grade for use in secular or religious private schools in a school district under state control pursuant to a federal court order; Cleveland was the only such district. The aid could also be used in any public school in an adjacent school district. The Program also provided tutorial aid, in significantly lower amounts than the tuition aid, for use in public schools in a district under court order.[39] In determining the appropriate level of generality for examining the Program, the Court looked to other Ohio programs that help Cleveland's school children. The Court concluded that, following *Mueller*, *Witters*, and *Zobrest*, "the program challenged here is a program of true private choice," and that it is "neutral in all respects toward religion" because it is "part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district."[40] Justice O'Connor's concurrence—providing the fifth vote for Chief Justice Rehnquist's majority opinion—elaborated on the appropriate level of generality, supporting the Court's "conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents."[41]

The caselaw in this area leaves open as-applied challenges to the provision of public funds for religious indoctrination in religious

36. *See id*. at 837–40 (O'Connor, J., concurring in the judgment); *id*. at 878–84 (Souter, J., dissenting).
37. *See* Laycock, *supra* note 8, at 167.
38. 536 U.S. 639 (2002).
39. For a description of the facts, see *id*. at 644–48.
40. *Id.* at 653.
41. *Id.* at 663 (O'Connor, J., concurring).

schools or for social service programs run by religious institutions. Justice O'Connor, in particular, insisted that these challenges remain open; this was key to her *Kendrick* and *Mitchell* concurrences.[42] Although the aid is part of a general program that includes secular and religious recipients and it is, on its face, secular, any religious use of such aid would nonetheless violate the Establishment Clause's proscription against governmental religious indoctrination. But *Zelman*—and *Mueller* and *Witters* before it[43]—involved public funds flowing to both the secular and religious aspects of private, religious school education. So why do such funds not violate Justice O'Connor's *Kendrick*/*Mitchell* insistence against as-applied uses of otherwise general funds for religious indoctrination? This is where the parental choice aspect comes into play—the public funds in this trio of cases went to religious schools only because of parental choice, which could also channel the funds to non-religious schools. It's not clear how important the direct/indirect line is here—i.e., whether it matters that funds first pass through the parents' hands, and then benefit the schools. What is important is that the parental choice cuts the chain of causation, as it were, between the government's funds and the religious school's ability to convey religious teachings. This is why Justice O'Connor can say, in *Mitchell*, that even a general, neutral government funding program would be invalid if the funds are paid on a per capita basis from the government coffers to the schools without intervening parental choice directing the funds to one place or another. Such an arrangement raises endorsement concerns, says Justice O'Connor.[44] If this

42. *See Mitchell*, 530 U.S. at 840–41, 857 (O'Connor, J., concurring in the judgment); Bowen v. Kendrick, 487 U.S. 589, 622–24 (1988) (O'Connor, J., concurring); *see also* Agostini v. Felton, 521 U.S. 203, 226 (1997); *Kendrick*, 487 U.S. at 618–22.

43. *Zobrest* is often mentioned as part of this group, and indeed the sign language interpreter did interpret religion classes as well as secular classes; however, arguably this is not use of government funds for religious indoctrination because the sign language interpreter just conveyed what he was hearing. The money made available through the programs in *Mueller*, *Witters*, and *Zelman* was used by religious institutions to convey, *inter alia*, their religious doctrine because it is what they want to inculcate; the sign language interpreter, strictly speaking, wanted to inculcate nothing. Whether *Zobrest* is or is not properly grouped with these other cases is not, however, a matter of great importance.

44. *See Mitchell*, 530 U.S. at 842–44 (O'Connor, J., concurring in the judgment); *see also* Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1096 (2002); Laycock, *supra* note 8, at 166, 181.

distinction holds, it is again because we have reconfigured the appropriate level of generality—we see a general funding program when parents are choosers, whereas we see government sponsorship of religious indoctrination when the government pays per capita funds, even if such funds go to both religious and non-religious schools. For purposes of my argument in this Article, whether this distinction is analytically satisfying is less important than what it says about the Court's lingering concern over the perception that government is going beyond helping an array of children obtain a quality education (permissible), and instead is seeking to advance religious ideas (impermissible). This end is precisely what the Court deems the Establishment Clause to forbid in the cases that invalidated laws as insufficiently general. Also, this central concern of the Rehnquist Court—e.g., with laws that place or appear to place the government's imprimatur behind religious doctrine—helps reveal why the Court's apparently parallel Free Exercise Clause doctrine, which also focuses on whether laws affect religion as part of a general package or in a more targeted fashion, in fact fails to match properly with the way in which its Establishment Clause doctrine limits the role of government in advancing religion.

In addition to the parochial school funding cases, the Rehnquist Court also held that the government may provide either space or funds to religious speakers without violating the Establishment Clause, so long as the space or funds are provided more generally as well. The Rehnquist Court cases in this line[45] were *Board of Education v. Mergens*,[46] *Lamb's Chapel v. Center Moriches Union Free School District*,[47] *Rosenberger v. Rector and Visitors*,[48] and *Good News Club v. Milford Central School*.[49] These cases began as Free Speech Clause cases;[50] the Court held that once the government has created a forum for private speech and defined it sufficiently

45. The key pre-Rehnquist Court case in this line is *Widmar v. Vincent*, 454 U.S. 263 (1981).

46. Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

47. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

48. Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995).

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

50. Except *Mergens*, which held that a federal statute required equal access for religious groups to school facilities during non-instructional time. *See Mergens*, 496 U.S. at 234–37.

generally, it may not exclude religious speech because doing so would constitute discrimination based on speech content. Such discrimination is permissible only if it is supported by a compelling state interest; in these cases, the Court rejected the argument that the government has a compelling interest in avoiding an Establishment Clause violation. The Court reasoned that providing space or funds for religious or secular speech on an equal basis does not show governmental favoritism toward religion. Instead, it shows that the government plays by basic Free Speech Clause public forum rules. The generality of the benefit was key to these outcomes.[51]

One hard question posed by these cases is whether the government may define a speech forum (either space or funding) sufficiently narrowly so as to properly exclude religious speech. It's one thing for the government to open an auditorium for speech, subject only to content-neutral time, place, or manner restrictions—in this situation, there's no good reason to exclude religious speech, unless the Establishment Clause absolutely prohibits the use of government facilities or funds for religious speech. But it's another thing for the government to fund only student publications regarding (for example) music, art, sports, and the like, but to exclude political and religious publications[52] on the ground that such funding would entangle the government in partisan/sectarian controversies it wishes to avoid. The Rehnquist Court, however, did not distinguish the truly open public forum from the more limited forum; in both instances,

51. *See Good News Club*, 533 U.S. at 114 ("The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."); *Rosenberger*, 515 U.S. at 840 ("The governmental program here is neutral toward religion."); *id.* at 847 (O'Connor, J., concurring) (noting "neutrality" and "generally applicable program"); *id.* at 850 (noting that "widely divergent viewpoints" of the various funded student publications make "improbable any perception of government endorsement of the religious message"); *Lamb's Chapel*, 508 U.S. at 395 ("The District property has repeatedly been used by a wide variety of private organizations. Under these circumstances, . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed . . . ."); *Mergens*, 496 U.S. at 248 (plurality opinion) ("[M]essage is one of neutrality rather than endorsement. . . ."); *id.* at 250 (noting that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis"); *id.* at 252 (noting the "broad spectrum of officially recognized student clubs"); *id.* ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.").

52. *See Rosenberger*, 515 U.S. at 825.

the government may not exclude religious speech, and the Establishment Clause is no bar to its inclusion.[53]

Finally, the Rehnquist Court[54] twice upheld government religious displays as not unconstitutionally endorsing religion on the ground that the display would be perceived by a reasonable observer as part of a larger package of displays, and therefore that the religious message would be backgrounded, rather than foregrounded.[55] In *County of Allegheny v. ACLU*,[56] the Court upheld the display of a Chanukah menorah "placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty."[57] Four Justices would have adopted an approach that would almost never invalidate governmental religious displays,[58] so the case turned on the opinions of Justices Blackmun and O'Connor, who voted to uphold the

53. As in the public funding of religious schools cases, so here does the directness vel non of the funding seem to make a difference. In *Rosenberger*, the Court carefully explained—almost certainly to hold Justice O'Connor's vote, which was necessary to gain a majority—that the student activities fee, paid to private contractors to print the publications, was different from general tax funds that went directly to the coffers of the religious group. *See id*. at 840–42; *see also id.* at 848, 851–52 (O'Connor, J., concurring). As I suggest in the text above, *see supra* text accompanying notes 42–44, this distinction is awfully thin—if government spends general tax revenue on an array of student publications, why should it matter if the money goes directly to the student group, targeted for use in the publications, or to the printer of the publications? I wonder how long this direct/indirect line can withstand the pressure from the "generality/neutrality" motor at work in the caselaw.

54. For a prior case in this line, see *Lynch v. Donnelly*, 465 U.S. 668 (1984).

55. In a third case, *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), the Rehnquist Court upheld a privately sponsored, unattended display of a cross in a ten-acre, state-owned plaza surrounding the Ohio statehouse. *Id*. at 757–58, 770. Key to the decision was that the plaza was a public forum for speech, administered according to content-neutral time, place, and manner rules. A plurality upheld the display because it was privately sponsored. *See id.* at 763–69 (Scalia, J.). A separate group of three Justices, in an opinion by Justice O'Connor, also upheld the display, but stated that they would examine private displays in such settings under the endorsement test to ensure that the reasonable observer would not perceive the display as that of the government. *See id.* at 773–78 (O'Connor, J., concurring in part and concurring in the judgment).

56. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

57. *Id.* at 578.

58. *See id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part).

> Symbolic recognition . . . of religious faith may violate the [Establishment] Clause in an extreme case. . . . [T]he permanent erection of a large Latin cross on the roof of city hall [is invalid] . . . because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Id.

menorah, but on narrower grounds. Both applied the endorsement test. Justice Blackmun reasoned that "both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."[59] Justice O'Connor put it this way:

> [T]he relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.[60]

Her answer: the latter.

In one of the Rehnquist Court's final religion clause cases, *Van Orden v. Perry*,[61] a plurality of the Court, per Chief Justice Rehnquist, upheld "the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds."[62] The plurality deemed the display to be an acknowledgment of the Ten Commandments' role in U.S. history because of its religious, as well as secular, significance.[63] Justice Breyer, concurring in the judgment, provided the necessary fifth vote for the outcome. He focused on the context of the display, "a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time."[64] Moreover, a largely secular group erected the display forty years ago, and it went unchallenged during those forty years.[65] In sum, Justice Breyer believed that the display was fairly innocuous, part of a larger setting of monuments (the rest secular) with a secular founding and a significant history of a lack of divisiveness caused by the display. Although he did not specifically invoke the endorsement test, his reasoning was essentially that a reasonable observer would not conclude that the government endorsed religion with the display.

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59. *Id.* at 616.
60. *Id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment).
61. Van Orden v. Perry, 125 S. Ct. 2854 (2005).
62. *Id*. at 2858.
63. *See id.* at 2861–63.
64. *Id*. at 2870 (Breyer, J., concurring in the judgment).
65. *See id.*

These three areas of caselaw are of a piece:[66] the government may support religion, so long as its support is part of a larger package of support for the secular as well. The Rehnquist Court upheld cases involving funding religious schools along with non-religious schools, providing speech forums for religious as well as non-religious speech, and displaying religious symbols in a setting in which the religiosity would be backgrounded to a broader secular context because, in all of these cases, the government treated religion not as distinctive, but rather as part of a more general array of points of view.[67]

B. Establishment Clause: Unconstitutional Because Religion is Singled out

The Rehnquist Court (with the Chief Justice joining none of the opinions discussed in this subsection) invalidated legislation under the Establishment Clause when the state appeared to favor religion over non-religion or to endorse a religious perspective or message.[68] The analytic difficulty with most of these cases is that the Court could have seen religion as part of a larger package, as it did with the cases discussed in the prior section.[69] Justice O'Connor's endorsement test, or something very close to it, was dominant in most of the cases in which the Court invalidated laws under the Establishment Clause. This test sets the level of generality based on whether a reasonable observer, familiar with the relevant history (of the law or practice and of the setting), would view the challenged governmental action as endorsing religion.[70] The test is about foregrounding and backgrounding; there is no "natural" or

66. *See* Laycock, *supra* note 8, at 169 (discussing the connection between the *Zelman* and *Rosenberger* lines).

67. For a critique of the cases permitting government funding of religious institutions, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

68. Regarding the rule against governmental religious indoctrination, see Koppelman, *supra* note 3, at 88; Laycock, *supra* note 8, at 218–19.

69. *See* Berg, *supra* note 6, at 448–51; Gedicks, *supra* note 44, at 1099–100. *But see* Laycock, *supra* note 8, at 219.

70. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2736–37 (2005); Capitol Square Review & Advisory Bd., 515 U.S. 753, 773–78 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

analytically derivable appropriate level of generality. The caselaw distinguishes between situations in which the government appears to be advancing a general, secular endeavor, of which religion is a part, and situations in which the government appears to be advancing religion specially. The latter instances are especially troubling when the dominant religion or religions appear to be using governmental apparatus to advance their religious messages, viewpoints, or doctrine.

Let us start with the two school prayer cases. In *Lee v. Weisman*,[71] the Court invalidated a Providence, Rhode Island, practice of permitting public school principals to "invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools."[72] Four of the members of the majority would not have required proof of coercion; although they would deem coercion sufficient to invalidate the prayer practice,[73] they also supported a broader, jurisdictional rationale,[74] suggesting that it is inappropriate for government to bring religious worship into the public schools. Such a practice "conveys a message of exclusion to all those who do not adhere to the favored beliefs."[75] Justice Kennedy, writing for the Court and providing the critical fifth vote for the majority, nodded toward the jurisdictional rationale,[76] but focused his argument on what he saw as illegitimate psychological coercion—psychological because the students were not required to attend their graduation ceremonies.[77] Despite the fact that other, secular statements were also offered at the graduation ceremonies, the Court did not see the state-

71. Lee v. Weisman, 505 U.S. 577 (1992).

72. *Id.* at 580.

73. *See id.* at 604 (Blackmun, J., concurring) (joined by Stevens & O'Connor, JJ.); *id.* at 609 (Souter, J., concurring) (joined by Stevens & O'Conner, JJ.).

74. *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); *see also* Feldman, *supra* note 67, at 368 (describing the Lockeian roots of the jurisdictional theory).

75. *Weisman*, 505 U.S. at 606 (Blackmun, J., concurring); *see also id.* at 631 (Souter, J., concurring).

76. *See id.* at 589.

77. *See id.* at 586 (noting that attendance and participation at the graduation ceremony "are in a fair and real sense obligatory"); *id.* at 589–96, 599; *see also* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 451–52, 458–63 (1995).

initiated prayer as part of a larger package of speech activities, but rather as a distinctive government-sponsored religious activity.

The Court followed *Lee* in *Santa Fe Independent School District v. Doe*.[78] In *Santa Fe*, the Court confronted a public school district policy of permitting student-led and -initiated prayer at home football games. The senior class voted on whether to have such prayer and selected which student should deliver the prayer. The combination of local government control over and majority vote to implement the policy led the Court, in an opinion by Justice Stevens, to declare the prayer policy unconstitutional.[79] The opinion relied in part on an endorsement rationale[80]—i.e., that an objective observer would believe that the school sponsored a religious message, which is invalid because it sends a message to non-believers that they are not full members of the political community—and in part on a coercion rationale—focusing not on coercion to attend the games, but on the coercive effect on "those present to participate in an act of religious worship."[81] Again, the fact that prayer was only part of what was communicated from the public address system during the football games was irrelevant; state-sponsored prayer in this setting overwhelms any attempt at generalizing, and thus the prayer should be viewed by itself, rather than as part of a larger package.

Another major Rehnquist Court case invalidating government advancement of religious doctrine in public schools was *Edwards v. Aguillard*.[82] The Louisiana Creationism Act forbade "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'"[83] After a close look at the history behind the legislation, Justice Brennan, writing for a majority, concluded that there was "no clear secular purpose for the [Act]."[84] Rather, the "preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being

78. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
79. *See id.* at 301–10.
80. *See id.* at 309–10.
81. *Id.* at 312.
82. Edwards v. Aguillard, 482 U.S. 578 (1987).
83. *Id.* at 581.
84. *Id.* at 585.

created humankind."[85] This is invalid for the same reason that government-sponsored prayer in public schools is invalid—both involve the government in fostering religious doctrine or worship, and therefore both violate a jurisdictional line, at least in the public school setting. Thus, the fact that Louisiana public schools teach much that is secular, and therefore that the teaching of creationism could have been seen as part of a larger package of government-sponsored education, was irrelevant to the Court.[86]

The Rehnquist Court twice invalidated government-sponsored religious symbols. In *Allegheny*,[87] the Court invalidated a crèche display placed on the grand staircase of the county courthouse. An angel was at the apex of the display; no secular figures or decorations were placed on the staircase. A majority of the Court, with Justice Blackmun writing, said:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."[88]

The setting of the crèche display made this an easy case for the majority. It noted that "[n]o viewer could reasonably think that [the crèche] occupies this location without the support and approval of the government."[89] In response to Justice Kennedy's dissent, which referred in part to theistic references in the national motto and the pledge of allegiance, the Court wrote that "history cannot legitimate practices that demonstrate the government's allegiance to a particular

85. *Id.* at 591; *see also id.* at 603, 608 (Powell, J., concurring) (focusing on the Act's advancement of a particular religious belief).

86. A federal district judge recently applied the teachings of cases such as *Edwards* and its predecessor, *Epperson v. Arkansas*, 393 U.S. 97 (1968), in addition to endorsement test cases, in striking down an effort by the school board in Dover, Pennsylvania, to introduce "intelligent design" as an alternative to evolution. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

87. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

88. *Id.* at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

89. *Allegheny*, 492 U.S. at 599–600.

sect or creed."[90] Here, the absence of generality was critical—if the crèche were in a different location and were part of a larger holiday display (as in *Lynch v. Donnelly*[91]), the reasonable observer would not perceive the government as singling out religion for praise. In the school prayer and creationism cases, even though the prayer and creationism curricula were part of a broader set of government-sponsored recitations and curricula, the perception of government endorsement of religion dominated. In the symbols cases, if the reasonable observer saw the religious symbol as part of a broader set of secular symbols, there would be no perception of endorsement.

In *McCreary County v. ACLU*,[92] the Court paid close attention to the history of two prominent Ten Commandments displays in county courthouses. Whatever one thinks about the connection between the Ten Commandments and the secular legal tradition, the first four commandments are expressly religious.[93] Despite the counties' attempts to surround the displays with copies of other documents connected to our legal and political history, the Court, per Justice Souter, held that "reasonable observers have reasonable memories,"[94] and that such observers would understand that the counties endorsed the religious aspects of the posted Ten Commandments.[95] Justice Souter's opinion contains the clearest explanation from the Court to date as to how the Establishment Clause inquiry into whether the government acted with an inappropriately predominant religious purpose is intertwined with the reasonable observer perspective.

> [I]n some of the cases in which establishment complaints failed, savvy officials had disguised their religious intent so

90. *Id.* at 603.

91. *See Lynch*, 465 U.S. at 671.

92. McCreary County v. ACLU, 125 S. Ct. 2722 (2005).

93. *See id.* at 2728 ("Thou shalt have no other gods before me"; "Thou shalt not make unto thee any graven images"; "Thou shalt not take the name of the Lord thy God in vain"; "Remember the sabbath day, to keep it holy.").

94. *Id.* at 2737; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

95. *See McCreary*, 125 S. Ct. at 2738 ("Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.").

> cleverly that the objective observer just missed it. But that is no reason for great constitutional concern. If someone in the government hides religious motive so well that the "'objective observer, acquainted with the text, legislative history, and implementation of the statute,'" cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents . . . .[96]

In other words, in determining whether Establishment Clause harm exists, we must examine whether religion is perceived as the foregrounded, predominant purpose of the governmental action, or instead as part of a larger, secular background. The harm is the inability of the non-believers to share in what the dominant group says is ultimate truth, and the concomitant inability to participate fully in a government that claims a source of normative authority that is beyond the ability of the non-believers to grasp, at least from their different theistic, agnostic, or atheistic stance.

In a 1993 article in the *Yale Law Journal*, I made an argument quite similar to Justice Souter's in *McCreary*:

> Requiring that laws have an express secular purpose rather than merely a plausible one might transform the legislative process in a way consistent with the dictates of the Establishment Clause. In some cases, the same laws will be passed that otherwise would have been passed, but pursuant to secular rather than religious argument. In other cases, the unavailability of a strong secular argument will mean that a law will not be passed. This transformation of the legislative process will eliminate the Establishment Clause injury of excluding nonbelievers from meaningful participation in the political process. That we see so many laws passed on the basis of secular argumentation, when religious arguments no doubt are stronger in the souls and minds of many legislators, is testament not to the fact that the Establishment Clause

96. *Id.* at 2735 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment)).

proscription on enacting faith into law will have little real-world effect, but rather to the fact that it is already having such an effect.

Let me explain why I have not suggested forbidding laws based on an *underlying* religious purpose as well as those based on an *expressly* religious purpose. One can imagine four different situations: (1) a law is religious on its face; (2) a law not facially religious is enacted for an expressly religious purpose; (3) a law not facially religious is enacted for an expressly secular purpose that appears to be a pretext for the real purpose, which is religious; and (4) a law not facially religious is enacted for an expressly secular purpose that does not appear pretextual, but the real underlying purpose is religious. The first three types of law should be invalid under the Establishment Clause because they foreclose meaningful political participation by nonbelievers. All three laws are, in the terminology I am using in this Article, "expressly" religious. But if religious believers can translate their "true" religious reasons successfully enough to make it appear to nonbelievers that the secular reasons are the real ones, then from the nonbelievers' perspective, their political participation is meaningful. One might argue that to be consistent, I should condemn even type (4) laws in principle and then acknowledge that the judiciary can't enforce this condemnation because the true reasons behind the laws will be inaccessible to it. But my Establishment Clause argument does not condemn type (4) laws. It turns not on the underlying reasons for laws, but rather on the reasons that are apparent in the political process. Invalidating type (3) laws will cover all instances in which believers think they have successfully masked their true reasons, but have not. If a religious reason can be successfully translated into a secular one—if a nonbeliever sees the secular argument as one made in good faith, and finds the ensuing

> debate meaningful—then the concern with exclusion from political participation is eliminated.[97]

Two additional cases round out the Rehnquist Court's Establishment Clause invalidations, and they are both unusual. In *Board of Education v. Grumet*,[98] the state of New York had established a public school district at the behest of the parents of a group of handicapped children. The families lived in the Village of Kiryas Joel, "a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism."[99] Because *Aguilar* was still good law at the time, public funds to educate the handicapped children could not be used in private religious schools, and the children were doing poorly in the county schools.[100] So, the state constituted the Village as a separate public school district; the Village School District then established a special education program for handicapped children, and handicapped Hasidic children came to the program from both inside and outside of the Village.[101] There was no exclusion of other children by law, and there was no evidence (note that the case was decided on summary judgment) that the program was run in a religious fashion. Nonetheless, the Court struck down the law establishing the school district. Justice Souter, writing for a plurality, held that the district violated the principle that "a State may not delegate its civic authority to a group chosen according to a religious criterion."[102] The odd thing about this holding is that the delegated power went to the Village, not to the rabbis or synagogues,[103] and there was no evidence in the record that the District was run on religious terms.[104]

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97. Greene, *Political Balance*, *supra* note 4, at 1622–23 (citations omitted).
98. Bd. of Educ. v. Grumet, 512 U.S. 687 (1994).
99. *Id.* at 690.
100. *See id.* at 692.
101. *See id.* at 693–94.
102. *Id.* at 698.
103. Thus the Court should have distinguished, rather than followed, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which state law gave veto power to churches, synagogues, and schools located within 500 feet of the premises of an applicant for a liquor license. *See id.* at 117.
104. *See* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 19–20 (1996).

A majority of the Court also deemed the District invalid because it was a special accommodation for a single religious group, and there was "no assurance that the next similarly situated group seeking a school district of its own will receive one."[105] This holding was also odd because the Court has several times spoken approvingly of sect-specific accommodations,[106] because the Court's equal protection jurisprudence allows "one step at a time" legislative relief,[107] and because a future denial of a school district could be challenged at that point.[108] Justice Kennedy voted separately to invalidate the District on the ground that it constituted an act of religious gerrymandering. He wrote: "In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion."[109] The problem with this argument is that the state established the District at the behest of a small religious group that wanted to live separately; it did not separate the group from others against its will.[110] Despite the difficulties with the holding,[111] *Kiryas Joel* stands as a Rehnquist Court Establishment Clause invalidation, with five votes concerned with the sect-specificity of the state action, without a clear showing that the state lifted a governmentally imposed burden on religious practice.

Finally, based on a similar concern about special favoritism for religion, although here for religion generally rather than for a particular sect, the Court in *Texas Monthly, Inc. v. Bullock*[112] invalidated a Texas exemption from sales tax for religious periodicals. The primary concern of the Court—the majority consisted of three groups, comprising a total of six Justices—was the exemption's lack of generality. Justice Brennan, writing for a plurality of three, held that the exemption "lacks sufficient

105. *Grumet*, 512 U.S. at 703; *see also id.* at 712–18 (O'Connor, J., concurring in part and concurring in the judgment).

106. *See* Greene, *supra* note 104, at 78 n.315.

107. *See id.* at 61–63.

108. *See Grumet*, 512 U.S. at 722–27 (Kennedy, J., concurring in the judgment); Greene, *supra* note 104, at 60–61.

109. *Grumet*, 512 U.S. at 728.

110. *See* Greene, *supra* note 104, at 27–57.

111. *See* Berg, *supra* note 6.

112. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

breadth";[113] Justice White deemed the content-selectivity of the exemption a violation of the Free Press Clause;[114] and Justice Blackmun, writing for two, shared Justice Brennan's concern with the limited nature of the exemption, what he called the "preferential support for the communication of religious messages."[115] *Kiryas Joel* and *Texas Monthly* can both be read as straightforward Establishment Clause invalidations based on the lack of generality of the benefited group. The problem with this conclusion is that it rules out all religion-only accommodations. To combat that notion, Justice Brennan explained that a religion-only accommodation is permissible if it either lifts a burden on the free exercise of religion or does not impose a substantial burden on non-beneficiaries.[116] The former was necessary to make sense of *Corporation of the Presiding Bishop v. Amos*,[117] which upheld a religion-only statutory exception from Title VII. The latter was necessary to make sense of *Zorach v. Clauson*,[118] which upheld a religion-only accommodation for releasing children early from public school to attend after-school religion classes elsewhere.

I will not otherwise discuss *Zorach*, but *Amos* is an important Rehnquist Court religion clause case. It would make sense, in terms of my overall picture, if the Court construed the Free Exercise Clause to require religion-only exemptions from employment discrimination laws. However, *Amos* did not turn on what the Free Exercise Clause requires; this fact makes the religion-only accommodation upheld in *Amos* unusual, and it makes *Amos* one of the few cases during the Rehnquist Court era that doesn't fit the pattern of generality versus specificity. It is an outlier case, but cannot be ignored. Instead, as I will argue in Part III, it and a few other outlier cases help us better

113. *Id.* at 14.
114. *See id.* at 26.
115. *Id.* at 28.
116. *See id.* at 18 n.8.
117. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). *But cf.* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 455–56 (1994) (claiming that RFRA flunked Justice Brennan's *Texas Monthly* test).
118. Zorach v. Clauson, 343 U.S. 306 (1952). For an argument that the accommodation in *Kiryas Joel* satisfied Justice Brennan's *Texas Monthly* test, see Greene, *supra* note 104, at 76–82.

understand how religion is distinctive, and thus how the apparently consistent doctrine is, in fact, out of whack.

C. Free Exercise Clause: Constitutional Because Not a Targeted Burden

The most significant Rehnquist Court free exercise case was *Employment Division v. Smith*.[119] The question in *Smith* was whether Oregon could constitutionally apply its criminal prohibition against possession of a controlled substance to the religious use of a drug.[120] The Native American Church has a long-established practice of ingesting peyote, a hallucinogenic drug, for sacramental purposes. The Court reviewed its Free Exercise Clause cases and concluded that it had invalidated generally applicable laws that did not target religion in only two settings—unemployment benefits cases and cases in which the free exercise claim was packaged with another claim of constitutional right.[121] The latter cases involved free exercise claims brought "in conjunction with other constitutional protections"[122]—so-called "hybrid" claims—such as free speech or press or parental rights to direct the education of their children. In the former cases—*Sherbert v. Verner*,[123] *Thomas v. Review Board*,[124] *Hobbie v. Unemployment Appeals Commission*,[125] and *Frazee v. Illinois Department of Employment Security*[126]—the Court "invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work

119. Employment Div. v. Smith, 494 U.S. 872 (1990).

120. More precisely, the question was whether a State may deny unemployment compensation to workers fired from a drug rehabilitation organization on the ground that they had ingested an illegal drug, even though as part of a religious ceremony. *See id.* at 874.

121. *See id.* at 881–85.

122. *Id*. at 881.

123. Sherbert v. Verner, 374 U.S. 398 (1963).

124. Thomas v. Review Bd., 450 U.S. 707 (1981).

125. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

126. Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989). *Frazee* was similar in structure to the prior three cases, but the actual issue before the Court was whether the fact that Frazee was not a member of an established religious sect was a sufficient reason to distinguish the other cases. The Court, per Justice White, held unanimously that it was not. *See id.* at 832–35.

under conditions forbidden by his religion."[127] *Hobbie* and *Frazee* were Rehnquist Court decisions. However, these cases may not really involve generally applicable laws after all; the *Smith* Court hinted that it might take such a view by noting that the context of these cases "lent itself to individualized governmental assessment of the reasons for the relevant conduct."[128] In other words, the application of strict scrutiny in favor of the religious claimants in these cases might best be understood as a prophylactic device to prevent discrimination against religious reasons for being unable to work.[129]

The Court stated that, apart from these two sets of cases, it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[130] To ask judges on a case-by-case basis to weigh the government's interest in enforcing a generally applicable regulatory law against an individual's free exercise claim would be "courting anarchy,"[131] Justice Scalia wrote for the *Smith* majority. He added:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[132]

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127. *Smith*, 494 U.S. at 883.

128. *Id.* at 884.

129. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277–82 (1994); Laycock, *supra* note 8, at 204–05.

130. *Smith*, 494 U.S. at 878–79. The principal decision that seems inconsistent with this assertion is *Wisconsin v. Yoder*, 406 U.S. 205 (1972), "invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their [high-school age] children to school." 494 U.S. at 881 (footnote omitted). As Justice O'Connor's concurring opinion in *Smith* pointed out, *Yoder* expressly held that even regulatory laws of general applicability must give way to compelling free exercise claims, without limiting the holding or describing the claim as a "hybrid." *Id.* at 895–97 (O'Connor, J., concurring in the judgment).

131. *Id.* at 888 (majority opinion).

132. *Id.* at 890.

Smith is the perfect parallel, in terms of formal neutrality theory, to the Rehnquist Court cases upholding laws against Establishment Clause challenge. The focus in those cases was whether the benefit to religion was part of a larger package that could be described or reasonably perceived as secular. Just as a law that benefits religion as part of a more general category of benefits is valid, so is a law that burdens religion as part of a more general category of burdens.

Three other Rehnquist Court cases are consistent with the general logic of *Smith*, although all were decided before it. In *O'Lone v. Estate of Shabazz*,[133] the Court, per Chief Justice Rehnquist, refused to require an exemption from prison regulations that rendered some prisoners unable to attend weekly religious services.[134] In *Hernandez v. Commissioner*,[135] the Court, with Justice Marshall writing for the majority, interpreted certain payments to a church to not qualify as contributions or gifts for tax deduction purposes, and held that the law as interpreted violated neither religion clause because it did not formally differentiate among sects.[136] In *Jimmy Swaggart Ministries v. Board of Equalization*,[137] the Court, in an opinion by Justice O'Connor, upheld the application of a generally applicable sales and use tax on the distribution of religious materials by a religious organization.[138]

The other Rehnquist Court case denying a free exercise claim that fits with the rest of the caselaw, although somewhat uneasily, is *Lyng v. Northwest Indian Cemetary Protective Ass'n*.[139] At issue in *Lyng* was the U.S. Forest Service's plan to build a road through a portion of forest that had "traditionally been used for religious purposes by members of three American Indian tribes in northwestern California."[140] *Lyng* did not involve a generally applicable law, but neither did it involve intentional discrimination. The government had neutral, non-discriminatory reasons for building the road in the

133. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).
134. *See id.* at 349–53.
135. Hernandez v. Commissioner, 490 U.S. 680 (1989).
136. *See id.* at 695–700.
137. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990).
138. *See id.* at 384–97.
139. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
140. *Id.* at 441–42.

specific location, and Justice O'Connor, writing for the Court, focused on the difficulties that would ensue were the Court to subject governmental land use decisions to case-by-case Free Exercise Clause scrutiny.[141]

D. Free Exercise Clause: Unconstitutional Because a Targeted Burden

In addition to the Rehnquist Court cases that continued the Warren and Burger Courts' solicitude towards unemployment compensation claimants—cases that are best understood as protection against religious discrimination that can occur in a system of case-by-case determinations as to the validity of an unemployment compensation claim—the Rehnquist Court decided one significant case involving targeted religious discrimination. The City of Hialeah, Florida, enacted a set of ordinances and exemptions that could only be understood to be directed at the Santeria practice of religious animal sacrifice. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[142] the Court unanimously invalidated these ordinances, with Justice Kennedy writing for a majority for almost the entire opinion.[143] The Court reasoned that the Hialeah ordinances lacked the generality and neutrality required to avoid strict Free Exercise Clause scrutiny, and easily concluded that the ordinances flunked this standard of review. Although joining much of the majority opinion and concurring in the result, Justice Souter—who was not on the Court when it decided *Smith*—wrote a long opinion suggesting that "the Court should reexamine the rule *Smith* declared."[144] Justice Blackmun, joined by Justice O'Connor, also wrote separately to declare his continued opposition to the *Smith* rule barring stepped-up

141. *See id.* at 451–53.

142. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

143. Only Justice Stevens joined the portion of Justice Kennedy's opinion that examined specific statements of city council members and argued that such evidence pointed to a possible Equal Protection Clause violation, as well as the violation of free exercise that the entire Court found. *Id.* at 540–42.

144. *Id.* at 559 (Souter, J., concurring in part and concurring in the judgment); *see also* City of Boerne v. Flores, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting) (calling for the reexamination of *Smith*); *id.* at 565–66 (Souter, J., dissenting) (same); *id.* at 566 (Breyer, J., dissenting) (same).

scrutiny to laws of general applicability that burden the free exercise of religion.[145]

III. THE OUTLIER CASES

So, with a few tweaks here and there, the Rehnquist Court religion clause caselaw is of a piece. Generality versus specificity is critical—religion benefited or burdened as part of a more general class is permissible; religion targeted for (or seen as targeted for) a benefit or burden is impermissible. But three cases don't fit this pattern.

The Court in *Amos*[146] and *Cutter v. Wilkinson*[147] upheld statutes that benefited religion without including religion in a larger class of beneficiaries. The Court in *Locke v. Davey*[148] upheld a statute that disadvantaged religion without including religion in a larger burdened class. These are outlier cases, at least if one views the remaining Rehnquist Court religion clause doctrine, as I have, by focusing on whether the government packages religion within a more general category of government action. They are explicable only by understanding, beyond the stated doctrine, the way in which the religion clauses exert pressure that limits what the government may do. This point, in turn, will lead me to consider earlier observations as to why Justices O'Connor and Souter are correct to be concerned about the exclusionary effect of governmental action that appears to constitute an attempt at religious indoctrination, and to support their concomitant (though not explicitly linked) arguments for a broader conception of free exercise than *Smith* allows.

In *Amos*, the Court upheld an exception to Title VII's proscription against employment discrimination. The exception permits a religious institution to discriminate in hiring in favor of individuals who share its religious faith. The plaintiff worked for the Mormon Church for sixteen years as a building engineer. He was fired because he was not a member of the Church. A prior version of the exception covered only the religious activities of religious institutions, and the Court

145. *See Hialeah*, 508 U.S. at 577–78 (Blackmun, J., concurring in the judgment).
146. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).
147. Cutter v. Wilkinson, 544 U.S. 709 (2005).
148. Locke v. Davey, 540 U.S. 712 (2004).

assumed arguendo that the Free Exercise Clause required such an exception (there was no Supreme Court case directly on point), but no more.[149] (This latter point clearly fits with *Smith*—if the government insisted on applying a general anti-discrimination law to all employers, religious and otherwise, without exception for institutions to hire co-worshipers for non-clergy positions, there would be no strict scrutiny and no Free Exercise Clause violation under the *Smith* doctrine.) Nonetheless, even though the statute did not extend the broader exception to discriminate on the basis of religion to non-religious institutions, the Court upheld the exception as applied, reasoning that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[150] Although acknowledging that the Title VII provision at issue benefited only religious institutions, the Court allowed this because the government acted "with the proper purpose of lifting a regulation that burdens the exercise of religion,"[151] even though the Free Exercise Clause does not require such burden-lifting. In sum, according to Justice White, writing for the majority, there is some room between the two religion clauses for permissive accommodation, i.e., for laws that benefit religion specially but are not required by the Free Exercise Clause.[152]

Cutter basically followed *Amos*. Part of the Religious Land Use and Institutionalized Persons Act of 2000 forbids the government from imposing a substantial burden on the religious practice of prison inmates, unless it can satisfy strict scrutiny.[153] Even though the Free Exercise Clause does not require such an accommodation and the

149. *See Amos*, 483 U.S. at 336.

150. *Id.*

151. *Id.* at 338.

152. *See id.* at 334 (referring to and quoting from *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)). For opposition to legislative accommodations of religion, see Eisgruber & Sager, *supra* note 117, at 449, 455–56; Eisgruber & Sager, *supra* note 129; Gedicks, *supra* note 44, at 1073 n.7, 1106; Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991). For support, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Volokh, *supra* note 10 (with the understanding that the legislature reserves the power to override judicial precedent under such accommodation statutes).

153. *See* Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

accommodation runs to religious, not secular, practice, the Court, per Justice Ginsburg, once again held that there is a "corridor between the Religion Clauses."[154] In both the *Amos* and *Cutter* settings, the government created a burden on religious practice (without actually violating the Free Exercise Clause) by requiring religious organizations to ignore the religions of those they employ, and by depriving prisoners of liberty in a way that has a direct impact on the ability to practice their religion. Thus, in both settings, the government may lift such burdens—again, even though doing so is not required by the Free Exercise Clause and even though the government does not lift similar secular burdens.

Finally, the Court in *Davey*, in an opinion by Chief Justice Rehnquist, held:

> The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.[155]

The first thing to note is that, if Washington wanted to, it could include students of devotional theology[156] in a general post-secondary scholarship program without violating the Establishment Clause. This is clear from the caselaw up to and including *Zelman*, and Chief Justice Rehnquist said as much in his opinion.[157] Second, only devotional theology is omitted from the otherwise general scholarship program—thus, religion is singled out for disadvantage. This case is the inverse of *Amos* and *Cutter*. But why didn't the singling out of devotional theology violate the Free Exercise Clause, as the singling out of religious practice did in *Lukumi*? The Court reasoned that the Washington exclusion "imposes neither criminal nor civil sanctions

154. *Id.* at 720.
155. Locke v. Davey, 540 U.S. 712, 715 (2004).
156. *See* Laycock, *supra* note 8, at 168.
157. *See Locke*, 540 U.S. at 719.

on any type of religious service or rite";[158] i.e., "[t]he State has merely chosen not to fund a distinct category of instruction."[159] This distinction between a direct penalty and the refusal to fund is not new to *Davey*,[160] but it is not terribly satisfying. Would the Court invalidate a special tax on the study of devotional theology, but uphold an exception for the study of devotional theology from an otherwise general scholarship program?

The other difficulty with *Davey* is how it handled the *Rosenberger* caselaw. Recall that in a consistent line of cases, the Court held that if the government opens a forum for speech—either physical space or through funding—it may not then exclude religious speech from the forum. Such exclusion violates the content-neutrality principle of the Free Speech Clause; further, including religious speech in an open forum does not violate the Establishment Clause because a reasonable observer would not think that the government is endorsing the religious speech, but rather that it is simply opening a forum for various types of speech. So why did the Washington theology exclusion not violate the *Rosenberger* principle? Here is the Court's entire answer: "[T]he . . . Program is not a forum for speech. The purpose of the . . . Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to encourage a diversity of views from private speakers."[161] This would be a straightforward conclusion were the state program one by which to feed the hungry or tend to the sick. In such a case, the exclusion of religious programs would not violate the Free Speech Clause. However, education is all about speech—it's about reading, writing, speaking, listening, and learning. In fact, many First Amendment cases discuss the special role of academic institutions in advancing free speech values, and such cases often give special protection (albeit often in dicta) to such institutions.[162] The *Davey* holding limits the advance of the education vouchers movement—such vouchers, as applied to private, religious schools, are now

158. *Id.* at 720.
159. *Id.* at 721.
160. *See* Laycock, *supra* note 8, at 158, 171, 178, 193, 200, 214, 216.
161. *Locke*, 540 U.S. at 720 n.3 (quotation and citation omitted).
162. *See* Laycock, *supra* note 8, at 191 and n.221.

permissible under the Establishment Clause if part of a general program, but required by neither the Free Exercise Clause nor the Free Speech Clause.[163] But it's not clear that the *Rosenberger* case line and *Davey* can so easily coexist.[164]

Without suggesting that the Court will overrule the *Rosenberger* line of cases (it seems too well-established), consider how *Davey* went out of its way to discuss the distinctiveness of religion. The Court rejected the Free Exercise and Free Speech Clause arguments through formal maneuvers—e.g., funding denial doesn't equal a regulatory burden; a scholarship program doesn't assist speech. However, the Court said more: "training for religious professions and training for secular professions are not fungible";[165] "the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions";[166] "early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars";[167] and "religious instruction is of a different ilk."[168] These comments about the distinctiveness of religion suggest that *Davey* was decided under pressure from Establishment Clause values—pressure to protect against religious indoctrination via the government—just as *Amos* and *Cutter* were decided under pressure from Free Exercise Clause values—pressure to protect against the government's burdening of private religious practice. That is, these cases suggest the residual power of a broader conception of religion as distinctive, beyond those cases in which the Court invalidated state action that singled out religion for special burden or benefit. This leads me back, in the next section, to the endorsement test, and to why a reasonable perception of exclusion matters to an Establishment Clause analysis. The way in which religion is (properly, in my judgment) treated as distinctive when excluding it from being the express, predominant

163. *Cf. id.* at 172 (noting that Davey's argument was applicable to a program that chooses to fund private schools, but not if the state funds public schools only).
164. *See id.* at 194–95.
165. *Locke*, 540 U.S. at 721.
166. *Id.*
167. *Id.* at 723.
168. *Id.*

feature of government action for Establishment Clause purposes—in cases such as *Lee, Santa Fe, Edwards, Allegheny* (crèche), and *McCreary*—means that we should have a more robust Free Exercise Clause doctrine than *Smith* allows. The distinctiveness of religion—brought into sharp relief by *Amos*, *Cutter*, and *Davey*—cannot be sufficiently cashed out by a religion clause doctrine focused on whether the government's treatment of religion is properly part of a general package or improperly a targeted benefit or burden.

IV. CONCLUSION

Amos, *Cutter*, and *Davey* remind us that religion is distinctive—or at least is treated as such by our constitutional law—and help show that a doctrine focused on generality versus specificity cannot fully capture such distinctiveness. But how, precisely, is religion distinctive? We can start by taking another look at the public school prayer cases, the creationism in public schools case, and the cases involving government sponsorship of religious symbols in which the religiosity is foregrounded. In each of these cases, the Court recognized an Establishment Clause harm, but refused to recognize what would be the precisely parallel secular harm. We do not forbid public school teachers to lead secular recitations, but we forbid them to lead prayer; we do not forbid the teaching of evolution in public schools, but we forbid the teaching of creationism; we allow the government to sponsor all manner of secular symbols (and even religious symbols when the religiosity is backgrounded), but we invalidate government sponsorship of foregrounded religious symbols. In short, we have a robust commitment to secular government speech,[169] but an Establishment Clause doctrine that invalidates many instances of religious government speech. There is a good reason for this doctrinal divergence. Religion appeals to an extra-human source of normative authority, and those who don't share the dominant religion will reasonably believe themselves to be cut off from access to that ultimate truth and will, accordingly, reasonably feel excluded from fully participating in government

169. *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001).

when governing is based on express references to such authority.[170] This is, of course, a disputed matter. Some argue that if religion is based on faith, it is no more so than many secular beliefs. Others argue that religion is based just as much on reason as is much secular belief. I won't go through these debates here.[171] Our doctrine is based on treating religion as distinctive in Establishment Clause cases, and the distinction between an appeal to an extra-human authority and other appeals captures the way in which the Court—particularly Justices O'Connor and Souter—views the Establishment Clause harm in these key cases.[172]

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170. *See supra* note 4; *cf.* Feldman, *supra* note 1, at 704 (describing the political process theory behind the endorsement test: "Courts should overrule democratic enactments concerning religion when they would have the effect of disadvantaging citizens in their political participation by rendering their religious affiliation relevant to their political standing."). Sometimes scholars who do not agree that expressly religious arguments should be treated differently from secular ones in the lawmaking process nonetheless share my view that religious belief exists on a different plane from secular belief. *See, e.g.*, McConnell, *supra* note 6, at 18 ("I personally incline toward the essentialist explanation, believing that matters of the spirit are fundamentally outside the sphere of force and coercion, which is the province of the state."); *id.* at 24 ("The government cannot be a competent judge of religious truth because there is no reason to believe that religious understanding has been vouchsafed to the majority, or to any governmental elite.").

171. *See* Greene, *supra* note 1, at 229–32; Greene, *Is Religion Special?*, *supra* note 4; Greene, *Political Balance*, *supra* note 4, at 1614–20; *see also* Esbeck, *supra* note 74, at 67–68; Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEGAL THEORY 33, 35 (1996). *But see* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337; McConnell, *supra* note 8.

172. Noah Feldman contends that the endorsement test focuses on symbolic diminution of political equality and the identity of the religious minority, but not on substantive exclusion from politics. "It is perfectly common," Feldman argues, "for religious majorities to use substantive values to inform their political choices, and the endorsement test provides no protection against such an outcome." Feldman, *supra* note 1, at 712. "[P]olitical self-realization does not require special protection," he maintains. *Id.* at 709. You win some and you lose some in politics, implies Feldman, and if your losses are as a religious minority, that is no different from losing generally in the political/lawmaking process. My argument that there is a "political balance" to the religion clauses depends upon precisely the opposite contention: that expressly religious arguments in the lawmaking process appeal to an extra-human source of normative authority, rendering them different in kind from expressly secular arguments and producing a kind of exclusion of religious minorities to which political process theory properly pays attention. Indeed, my *Yale Law Journal* piece on this subject begins with the following observation: if religious arguments may properly play an equal role to secular arguments in the lawmaking process, then indeed religious "players" win some and lose some, and thus the predicate for judicially mandated exemptions—that the government may not fully bind those whose arguments have not been allowed full voice in lawmaking—would disappear. *See* Greene, *Political Balance*, *supra* note 4, at 1611. What both the purpose prong of the *Lemon*

This singling out of religious appeals in the government sector is not properly matched doctrinally by protecting against governmental singling out of religion for disfavor. When we—quite properly, in my judgment—treat religion as distinctive by excluding it from being the dominant force in the governmental arena, we simultaneously limit the ability of religious citizens to advance what they believe to be true. They can do so outside of government, of course, and can even do so in politics generally. However, they cannot do so if it will result in a law being seen as expressly and predominantly based on religious argumentation.[173] This is the lesson of *Epperson v. Arkansas*,[174] *Edwards*,[175] *Wallace v. Jaffree*,[176] and, most recently and most powerfully, *McCreary*.[177] In addition, they cannot do so through teacher-led religious recitation (i.e., prayer) in public schools, nor through advancement of their preferred religious doctrines (e.g., creationism) in such schools. However, reading the Establishment Clause in this fashion harms religious citizens. We have properly stripped down the governmental sector from religious indoctrination. The compensation would be to strip down religious practice from governmental regulation. Our Establishment Clause doctrine has limited religious citizens' speech and their input into the governmental sector, and, by any credible theory of political legitimacy, we have thus rendered governmental outputs over such citizens less than fully legitimate. In such a system, the government can no longer claim that neutral laws of general applicability must be followed by all. Exemptions for religious citizens—at least as a prima facie matter—are needed to offset the limits we have placed on

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test, *see* Lemon v. Kurtzman, 403 U.S. 602 (1971), and the endorsement test capture is the way in which religious majorities use the governmental sector—be it the lawmaking process or the expressive power of government speech—to foster doctrinal religious arguments, which, I contend, have no proper place in the governmental sector precisely because non-adherents to the dominant faith cannot participate equally and fully. *See supra* note 4.

173. *But see* Koppelman, *supra* note 3, at 89, 116 n.100 (focusing on a plausible secular purpose), 118; Shiffrin, *supra* note 9, at 40, 42; sources cited in Greene, *Political Balance*, *supra* note 4, at 1620 n.32.

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

175. Edwards v. Aguillard, 482 U.S. 578 (1987).

176. Wallace v. Jaffree, 472 U.S. 38 (1985).

177. McCreary County v. ACLU, 125 S. Ct. 2722 (2005).

religious argument in the lawmaking process and on religious proselytization in our public schools and in government speech.[178]

Smith, therefore, is a mistake. Its focus on generality—upholding laws of general applicability that only incidentally burden religion—is not a proper parallel to upholding laws of general applicability that only incidentally benefit religion. Rather, because we have limited the effect of religion on government, we need a doctrine that compensates by limiting the effect of government on religion. Elsewhere, I have detailed some objections and responses to this proposal[179]—the principal one being that our Establishment Clause limitation on religious inputs mostly harms adherents to dominant religions, while it is the adherents to minority religions who are most in need of exemptions from generally applicable laws, and therefore that the compensation is mismatched. This argument misses two key points—first, that our Establishment Clause doctrine prevents even adherents to minority religions from seeking to use the government to advance their doctrinal ideas, perhaps through coalitions with larger groups or perhaps as to items that escape broader majoritarian attention; and second, that even members of dominant religions might be burdened by the failure of generally applicable laws to create accommodations for aspects of religious practice.

The doctrine regarding the religion clauses of the First Amendment under the Rehnquist Court has a superficial consistency. At the same time, the development of Justice O'Connor's endorsement test, primarily in opinions by her and by Justice Souter, has revealed that the focus on whether the government benefits or burdens religion as part of a larger class or, rather, in a targeted fashion, does not properly grasp the way in which the doctrine treats religion as distinctive, at least for Establishment Clause purposes. We need a more robust commitment to judicially created exemptions under the Free Exercise Clause (in tandem with legislatively crafted accommodations) to offset the ways in which religious citizens are

178. *See supra* note 5. For other arguments supporting free exercise exemptions as of right, see McConnell, *supra* note 10; David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995). *But see* Eisgruber & Sager, *supra* note 117, at 449; Gedicks, *supra* note 44, at 1073 n.7; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

179. *See* Greene, *supra* note 1, at 236; Greene, *Political Balance*, *supra* note 4, at 1636–39.

asked to abstain from a full and express use of government to advance their theological ends.