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What's Right and Wrong with "No Endorsement"

Thomas C. Berg*

It is a pleasure to be able to comment on Professor Jay Wexler's interesting and thought-provoking paper.¹ I must confess that when I read the title, *The Endorsement Court*, I expected a familiar thesis such as: "The Rehnquist Court on church-state relations has been defined by its embrace of the 'endorsement' test, and therefore it should be called 'the endorsement court.'" Then I began reading the paper and realized that Professor Wexler was actually proposing to create something called the "Endorsement Court" to hear cases involving challenges that government-sponsored symbols with religious content violate the Establishment Clause by endorsing religion. Having such a tribunal court replace the federal district and appellate courts, subject only to U.S. Supreme Court review, is an unusual idea that, like many such ideas, has the virtue of making one think outside the box. In the following Comment, I will briefly suggest why, unfortunately, the proposal seems to face crippling separation of powers objections.

The major subject of my comments, however, is not the Endorsement Court, but the underlying endorsement test for assessing symbolic government actions concerning religion. Contrary to Professor Wexler, I argue that unless the endorsement test is properly understood and limited, it has the critical flaw of putting the Establishment Clause at war with the other religion guarantee of the First Amendment, the Free Exercise Clause. If the Establishment Clause forbade government endorsement of religion in all contexts, it would undermine the government's ability to give

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1. Jay Wexler, *The Endorsement Court*, 21 WASH U. J.L. & POL'Y 263 (2006).

special accommodation to religious practice and thus would severely impair free exercise values. “No endorsement of religion” thus must function, not as the general requirement of the Establishment Clause, but only as a rule for the particular class of establishment cases involving government-sponsored religious symbols and expression. The no-endorsement test is legitimate for that category of cases, I argue, but only because in those cases it serves the more fundamental goal of protecting a voluntary religious sector independent of government.

I. ISSUES CONCERNING NON-ARTICLE III COURTS

As a decided non-expert on the constitutionality of Article I courts, I will say little about the constitutionality of Professor Wexler’s proposal. It seems to me quite unlike any existing tribunal, which gives me the sense that there must be something wrong with it.² As a general matter, the determinations of legislative courts must be subject to *de novo* review by Article III courts as to questions of law as well as of constitutional fact.³ I question whether it would be satisfactory for a court whose entire docket would consist of constitutional cases—because its jurisdiction is so defined—to be reviewed only on certiorari by a Supreme Court that accepts just a minute fraction of the petitions it receives.⁴ The vast majority of religious-symbol cases would be decided solely by this unusual new court.

Professor Wexler’s solution to this problem is to place the Endorsement Court outside the control of Congress or the executive branch, just like state courts that unquestionably can decide constitutional cases subject only to review by the Supreme Court.⁵ The Supreme Court, rather than Congress or the President, would

2. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (relying in part on “almost two centuries of apparent congressional avoidance of the practice” of directly commandeering state executive officials in holding such commandeering unconstitutional).

3. *Crowell v. Benson*, 285 U.S. 22, 60 (1932).

4. See, e.g., *The Supreme Court, 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 426 tbl. II(B) (2005) (noting that the Court granted only four percent of non-pauper petitions filed during the 2004 Term, and only 1.1% of petitions overall).

5. Wexler, *supra* note 1.

exercise control over the Endorsement Court by appointing and removing its judges.⁶ This would make it quite unlike the typical Article I court, and it would reduce or obviate the problem of interference by the other branches with judicial independence.

However, appointment by the Supreme Court creates its own set of problems. One is that the proposed Endorsement Court judges may be “principal officers” who can be appointed only by the President (with Senate consent) under Article II, section 2, rather than “inferior officers” whose appointment Congress can vest in “the courts of law” or in the President or cabinet members. Under the test of *Edmond v. United States*,⁷ the term “inferior” officer “connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”⁸ With its rulings reviewed only by the Supreme Court, the Endorsement Court would certainly have no superior in the Executive Branch—unlike the intermediate-level Coast Guard judges who were determined to be “inferior” in *Edmond* because they were supervised by the Coast Guard’s Judge Advocate General and their decisions were reviewed by the executive-branch Court of Appeals for the Armed Forces.⁹ *Edmond* distinguished the Coast Guard judges from Tax Court judges, who the majority implied were principal officers because their decisions were “appealable only to courts of the Third Branch” rather than to a higher executive tribunal.¹⁰ When the third-branch review lies only in the Supreme Court—who has entirely discretionary review and the entire nation’s docket of cases to consider—the inference seems even more powerful that the Endorsement Court judges would be principal rather than inferior officers. And the rationale set forth in *Edmond* for labeling certain judges “principal” officers—that the responsibility to nominate and approve them ought to lie in the politically accountable President and the Senate¹¹—would seem to

6. *Id.*

7. 520 U.S. 651 (1996). Professor Wexler notes the Appointment Clause issues in Wexler, *supra* note 1, at 296–99.

8. *Edmond*, 520 U.S. at 662.

9. *Id.* at 664–66.

10. *Id.* at 665–66.

11. *Id.* at 659–60.

apply forcefully here to condemn having the unaccountable members of the Supreme Court choosing the judges who alone would try a whole class of constitutional cases.

Moreover, appointment by the justices would create a new set of problems involving the compromise of judicial impartiality. A statute may infringe on the judicial branch's role in our system of divided powers not merely by taking power away from Article III judges, but also by assigning them responsibility that "undermines the integrity" and "essential impartiality of the Judicial Branch."¹² We might well be concerned that the Justices' view of Endorsement Court rulings would be, or would appear to be, colored by whether the Justice supported the appointment of the particular Endorsement Court judge. For similar reasons, the D.C. Circuit judges who served on the special court that appointed an independent counsel under the late, unlamented statute were barred from sitting in "any judicial proceeding concerning a matter . . . which involves the exercise of such independent counsel's official duties."¹³ This provision was central to the Supreme Court's conclusion that the special court was "sufficiently isolated . . . from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III."¹⁴ The appointment of Endorsement Court members by the Justices who would review them would not escape such a taint.¹⁵

In addition, removal and appointment seem disturbingly non-deliberative methods for the Justices to control a lower court when compared with the standard practice of hearing appeals from lower

12. *Mistretta v. United States*, 488 U.S. 361, 397 (1989).

13. *See, e.g.*, 28 U.S.C. § 49(f) (1994), *quoted in Morrison v. Olson*, 487 U.S. 654, 683 (1988).

14. *Morrison*, 487 U.S. at 684.

15. *See Wexler, supra* note 1, at 300 n.171 (noting this problem). These concerns do not apply to the instances in which the Chief Justice assigns sitting Article III judges to take on extra duties for a term on special courts, such as the Foreign Intelligence Surveillance Act (FISA) court. *See, e.g.*, 50 U.S.C. § 1803(a), (d) (2002). Judges on the FISA court and other such tribunals are Article III judges, with the protections of lifetime tenure and salary guarantees, who are merely assigned certain additional duties for no additional compensation. *United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982). For one Justice (as opposed to all of the reviewing Justices) to simply assign an already sitting lower-court judge to certain duties does not create the same actual or perceived threats to the independence and impartiality of either court.

courts and articulating principles in appellate opinions for lower courts to follow. If the majority of Justices select persons for the Endorsement Court who they are confident will approach religious-symbol cases a certain way (pro or con),¹⁶ they will seldom, if ever, have to review decisions to correct what they consider to be error. To use such a method as the dominant means of controlling a group of non-Article III judges who decide nothing but constitutional cases seems to stretch the bounds of the judicial power in several problematic ways.

II. THE MAKEUP OF AN ENDORSEMENT COURT

As to the substantive merits of the proposal, I sympathize with Professor Wexler's goal to have cases decided by judges who understand various religious traditions and their interactions. The need to understand religion—if religion is to be a significant feature in American public life—has been a recurring theme of Professor Wexler's scholarship.¹⁷ I agree with this emphasis, and have tried myself to bring knowledge about modern American religious history to bear on the application of constitutional principles.¹⁸

A specialized court for religious matters, however, sounds notes that are discordant with the main themes of the American tradition

16. It would likely be quite easy to predict how a potential member of the Endorsement Court will vote. Experts in a given area are far more likely to have expressed views on the matter than are the generalists who typically receive federal judicial appointments. For this reason, Richard Posner argues that specialist courts are likely to be particularly direct transmitters of the appointing person's ideological values. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 154–55 (1985).

17. See, e.g., Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 *VAND. L. REV.* 751 (2003); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 *WM. & MARY L. REV.* 1159 (2002).

18. See, e.g., Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001); Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 *WASH. U. L.Q.* 919 (2004) [hereinafter Berg, *Minority Religions*]; Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 *B.C. L. REV.* 1009 (2002).

It is not clear to what extent an increased knowledge of religion would come at the high price of a decreased knowledge of legal procedures—the sophisticated means that have evolved to ensure that both sides are given a full and fair hearing—compared with the general range of trial court judges. Professor Wexler does not indicate whether the Endorsement Court members would have to be lawyers. Of course, the more criteria there are in addition to knowledge of religious traditions, the harder it will be to get real experts in religious traditions.

concerning religion and government. Not only do we have a certain reluctance to create new specialized courts,¹⁹ but religion is just about the last subject matter one would expect for such a court. A government tribunal specializing in certain church-state questions bears resemblance to the religious-affairs agencies common in other nations. Often, these are designed as mechanisms for suppressing or restraining disfavored faiths, which one could not say of Professor Wexler's proposed court.²⁰ But even in highly religiously tolerant nations, such as several in western Europe, such agencies tend to be vestiges of establishment arrangements and can be used to attack unpopular faiths.²¹ And at the very least, they perpetuate the idea that the goals of government include to manage religious affairs, even if the specific goal is to manage religious diversity.²² Such an idea sits uneasily with the American notion that the government should generally keep its hands off of distinctively religious matters. American laws and judicial decisions may take religion into account, and long have done so, to preserve religious liberty.²³ However, that tradition of accommodation has never, so far as I know, extended to the creation of government bodies specifically charged with overseeing religious affairs.²⁴ Even if a specialized court were

19. See POSNER, *supra* note 16, at 148.

20. See, e.g., Howard L. Biddulph, *Religious Liberty and the Ukrainian State: Nationalism Versus Equal Protection*, 1995 BYU L. REV. 321, 334 (describing how post-Soviet Ukraine retained the Council for Religious Affairs, which "had been a Soviet device for state suppression of freedom of conscience"); Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117, 139-40 nn.165-66 (1999) (describing the role of Greece's Ministry of Education and Religious Affairs in withholding authorization for meetings of Jehovah's Witnesses).

21. See, e.g., Hannah Clayton Smith, Note & Comment, *Liberte, Egalite, et Fraternite at Risk for New Religious Movements in France*, 2000 BYU L. REV. 1099, 1142 (describing "mass distribution of anti-sect brochures by [Germany's] Ministries of Religious Affairs").

22. See, e.g., Biddulph, *supra* note 20, at 335 (noting that Ukraine retained the Council on Religious Affairs "no doubt because of the perceived need to monitor and ameliorate the conflicts which existed among major confessions").

23. See *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987))); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (noting that government "follows the best of our traditions [when it] respects the religious nature of our people and accommodates the public service to their spiritual needs").

24. Even the unusual office the Bush administration created to implement its so-called

intended to promote government non-involvement in religious matters (by striking down governmental endorsements of favored faiths), its very existence would contradict that goal.

One awkward feature of the court would be any statutory listing of the specified religious traditions in which members must have expertise. The problem here is an instructive one, however, and to that extent I agree with Professor Wexler that his proposal sheds light on Religion Clause issues, even if it does not offer a viable solution to them. One of Wexler's key arguments is that, compared with generalist federal judges, the Endorsement Court judges might be more familiar with and sympathetic to the outlooks of minority religions, and therefore might more vigorously protect them from government actions that relegate them to "outsider" status by endorsing a favored faith.²⁵ Consequently, the Endorsement Court would include members chosen specifically for their familiarity with Protestantism, Catholicism, Judaism, Islam, Eastern religions, other religions, or atheism.²⁶

Such a list, however, rests on one particular view of religious divides in America, and fails to reflect other divides that are relevant to disputes as to government religious symbols. In recent years, longstanding differences between traditional religious denominations have given way in importance—at least on many moral and political issues—to differences between "orthodox" believers and "progressive" believers that cut across the various faiths.²⁷ As sociologist James Hunter detailed, in many moral, cultural, and political disputes, traditionalist Catholics make common cause with evangelical Protestants and sometimes even with Orthodox Jews

faith-based initiative is charged with assisting both "faith-based and other [i.e., secular] community organizations," that is, all private organizations providing social services. *See* Establishment of White House Office of Faith-Based and Community Initiatives, 66 Fed. Reg. 8499 (Jan. 29, 2001).

25. *See* Wexler, *supra* note 1, at 303–05; *see also* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating that the purpose of the no-endorsement test is to prevent government from "send[ing] a message to nonadherents that they are outsiders, not full members of the political community").

26. Wexler, *supra* note 1, at 289–90.

27. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

against a coalition of liberals of these faiths joined with secularists.²⁸ The disputed issues include not only abortion and homosexuality, but also government-sponsored religious exercises and displays themselves. Progressives of varying faiths now tend to oppose such government religious messages, while traditionalists tend to support them. In the last two major disputes concerning state religious expression—the phrase “under God” in the Pledge of Allegiance²⁹ and the inclusion of the Ten Commandments on official displays³⁰—amici challenging the government actions included the Interfaith Alliance, the Baptist Joint Committee, and the Unitarian Universalist Alliance, while those supporting the actions included the (Catholic) Thomas More Law Center, the (Protestant) Wallbuilders Inc., and the (Orthodox) National Jewish Commission on Law and Public Affairs.³¹ Public religious displays also have the support of some other Orthodox groups, such as the Lubavitchers,³² and perhaps of many traditionalist Muslims as well.

Because these patterns of contending positions cut across familiar religious and denominational lines, a court membership chosen along those lines may fail to secure judges who understand the actual contenders. Neither is the orthodox-progressive divide the single relevant one; as I have argued elsewhere, in parts of America, the

28. *See id.*

29. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

30. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU*, 545 U.S. 844 (2005).

31. Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner, 2004 WL 2899175, *Van Orden*, 545 U.S. 677; Brief of Baptist Joint Committee et al. as Amici Curiae in Support of Respondents, 2005 WL 166927, *McCreary*, 545 U.S. 844; Brief of Amici Curiae American Humanist Association et al. in Support of Petitioner, 2004 WL 2911173, *McCreary*, 545 U.S. 844; Brief of the Catholic League for Religious and Civil Rights and the Thomas More Law Center as Amici Curiae in Support of Petitioners and Urging Reversal, 2003 WL 23051980, *Newdow*, 542 U.S. 1; Brief of Amicus Curiae Thomas More Law Center in Support of Respondents, 2005 WL 226922, *Van Orden*, 545 U.S. 677; Brief Amicus Curiae of Wallbuilders, Inc. in support of the Petitioner, 2003 WL 23112949, *Newdow*, 542 U.S. 1; Brief Amicus Curiae of Wallbuilders, Inc. in support of the Respondent, 2005 WL 273646, *Van Orden*, 545 U.S. 677; Brief of the National Jewish Commission on Law and Public Affairs (“COLPA”) as Amicus Curiae in Support of Petitioners, 2003 WL 23011476, *Newdow*, 542 U.S. 1; Brief of the National Jewish Commission on Law and Public Affairs (“COLPA”) as Amicus Curiae in Support of Respondents, 2005 WL 263786, *Van Orden*, 545 U.S. 677.

32. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 587 (1989); *Chabad-Lubavitch v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

longstanding organizational lines (Protestant-Catholic-Jewish) still play the dominant role, while in others, the orthodox-progressive divide now overshadows these traditional divisions.³³ This variety and complexity of “maps” for understanding American religion makes it difficult for the law both to categorize religious views in a single way and to define a certain view as “minority” or “majority.”³⁴ Professor Wexler ends by suggesting that if no particular religious lineup seems proper, members of the Endorsement Court should be chosen simply for their knowledge of American religion.³⁵ That fallback position is probably wise, for the reasons I have just given.

III. WHAT'S RIGHT AND WRONG WITH THE NO-ENDORSEMENT TEST

My chief substantive comment, however, concerns not Professor Wexler's proposed Endorsement Court itself, but rather the underlying constitutional test of “no endorsement of religion” that it would be designed to enforce. I am particularly concerned with one criticism of the no-endorsement test that Professor Wexler rejects. This is the criticism that to forbid government endorsement of religion is also to forbid government from making special accommodations for religious freedom under either the Free Exercise Clause or legislative exemptions—for example, when Native Americans who ingest sacramental peyote seek an exemption from the drug laws.³⁶ The criticism is that any special concern for the freedom of religious practice is an inherent endorsement of the special value or importance of religion, and therefore the no-endorsement test puts the Establishment Clause at war with free exercise.

Professor Wexler's response to this criticism is inadequate. He suggests that one can justify accommodating religion not because it is true or good or valuable, which would constitute an endorsement, but because it is important to many people and their feelings deserve respect.³⁷ However, this does not explain why similar

33. Berg, *Minority Religions*, *supra* note 18, at 951–60.

34. *Id.* at 961–64.

35. Wexler, *supra* note 1, at 290 n.138.

36. *Id.* at 272.

37. *Id.* at 279 (arguing that accommodation can be based on the recognition that “for

accommodations should not be given to a wide range of non-religious conscientious reasons for acting, which may also be very important to the people holding those reasons. Indeed, if, as Professor Wexler agrees, the purpose of the no-endorsement test is to prevent the government from sending the message that some citizens are second-class and others first-class,³⁸ this defense is especially troubling. What could be more objectionable than respecting the deep (religious) feelings of one citizen with special legal accommodation precisely because those (religious) feelings are deeply held, while denying that same respect to the deeply held feelings of others? If we accommodate *A*'s beliefs because they are deeply held, but deny accommodation of *B*'s beliefs although *B* also deeply holds them, we have, if anything, made more of a statement about the relative worth of *A* and *B* than if we accommodate *A*'s belief but not *B*'s because we think *A*'s belief alone is true or valuable. By contrast, differential accommodations based on something about the beliefs themselves—for example, that some are particularly valuable, or that they stand on a higher plane than do government's concerns—does not necessarily make any statement about the importance of, or the degree of deference owed to, persons who hold them.

Professor Wexler also suggests that even if the distinction between respecting a person's belief and endorsing its truth is problematic, the Supreme Court can forge ahead and accommodate religion anyway, "simply announcing (as it basically has) that accommodations otherwise meeting constitutional requirements will not be considered endorsements."³⁹ Similarly, Justice O'Connor once wrote that

[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the

many people, religious belief is an important basis for thought and behavior that deserves respect").

38. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 585 (1989); Wexler, *supra* note 1.

39. Wexler, *supra* note 1, at 279.

religious purpose of such a statute is legitimated by the Free Exercise Clause.⁴⁰

This kind of diktat, however, is not theoretically coherent. More importantly, it has contributed to the weakness of the accommodation doctrine, as shown in cases such as *Employment Division v. Smith*⁴¹ and *Texas Monthly, Inc. v. Bullock*.⁴² Steven Smith argued in a wonderful article several years ago that if courts do not have a reason for giving religion distinctive protection—or do not believe or think they are allowed to believe in the reasons for such protection—then, regardless of the doctrinal test utilized, the protection they give will be very weak.⁴³ Accommodation will be weak if it rests simply on the bare assertion that the Free Exercise Clause demands it and if there is no principle explaining why accommodation is *prima facie* good and consistent with the Establishment Clause.

Smith also argues, convincingly in my view, that any explanation as to why religious freedom should be specially protected will have to rely significantly on a religious argument.⁴⁴ The principal intellectual justification for religious freedom in the founding generation, Smith suggests, was a pair of religious propositions: first, that religious duties are more fundamental than the demands of government; and second, that “[i]t is futile, at least from a religious perspective, to force a person to profess a religious creed or conform to a religious practice because compulsory faith lacks religious efficacy.”⁴⁵ Both arguments are central to James Madison’s great set of arguments, entitled *Memorial and Remonstrance Against Religious Assessments*, which begins with the proposition that religious duties are “precedent both in order of time and degree of obligation, to the

40. Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O’Connor, J., concurring).

41. 494 U.S. 872 (1990) (holding that exemptions for religious practice from neutral, generally applicable laws are seldom required by the Free Exercise Clause).

42. 489 U.S. 1 (1989) (holding that a sales tax exemption limited to religious publications was unconstitutional).

43. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

44. *Id.* at 149 (describing religious arguments as both “the principal historical justification” and “the most satisfying, perhaps the only adequate justification for a special constitutional commitment to religious liberty”).

45. *Id.* at 154–55.

claims of Civil Society.”⁴⁶ Unquestionably, these arguments, and many others prevalent during the founding period, endorse certain religious propositions, even if those propositions are quite general.

Moreover, as both Smith and John Garvey detailed, many of the secular arguments for religious freedom, such as the ideal of autonomy in personal choice and the goal of avoiding social strife, fail to distinguish religion from other ideas, and therefore fail to justify its distinctive constitutional treatment.⁴⁷ Non-religious arguments are not irrelevant—a complex idea such as religious freedom typically rests on several overlapping grounds—but it is doubtful that a significant commitment to religious freedom can be sustained without endorsing some general propositions about the special importance and value of the human response to, or search for, the divine or ultimate. As Garvey puts it, “[i]t is possible to imagine a society of skeptics insisting on a free exercise clause, but the idea is far-fetched.”⁴⁸

Thus, Professor Wexler’s Article does not allay the concern that the no-endorsement test sets the Establishment Clause at war with the distinctive protection of religion reflected in the Free Exercise Clause. Any successful effort to resolve this conflict must start by recognizing that the no-endorsement test has not become the overarching approach for all Establishment Clause cases, despite Justice O’Connor’s early campaigns for it.⁴⁹ The permissibility of government financial aid to religious activities now turns largely on whether the program is one of “true private choice,” such as the school voucher program in *Zelman v. Simmons-Harris*,⁵⁰ in which individuals received the aid and then made the independent choice to use it in a religious setting.⁵¹ The test for legislative exemptions of

46. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1784), reprinted in MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 63 (2002).

47. Smith, *supra* note 43, at 196–223; see also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 42–49 (1996).

48. GARVEY, *supra* note 47, at 57.

49. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 68–70 (1985) (O’Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687–92 (1984) (O’Connor, J., concurring).

50. 536 U.S. 639 (2002).

51. *Id.* at 652 (signaling approval of any government aid program that “is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and

religious exercise, solidified last term by *Cutter v. Wilkinson*,⁵² looks not at endorsement, but rather at whether the exemption in question removes a significant burden from religion or imposes significant or disproportionate burdens on others.⁵³ O'Connor herself concluded that "[t]he Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches."⁵⁴

Endorsement plays a role only in cases involving governmental religious expression and acknowledgment—primarily, government-sponsored prayers or symbolic displays. These are the cases for which Justice O'Connor continued to propound the no-endorsement test.⁵⁵ Tellingly, these are also the only cases for which Professor Wexler proposes the Endorsement Court.

The no-endorsement test makes sense in government-expression cases, but not because no-endorsement is the proper test for the Establishment Clause in general. Rather, the test makes sense in this category only because it comports with a deeper value or principle that underlies all of these Religion Clause areas.⁵⁶ The no-endorsement test in symbol cases cannot rest simply on the goal of avoiding offense to non-adherents—it cannot rest on “no endorsement” for its own sake—without conflicting with the idea of special protection for religious freedom, because special protection for religious freedom can be just as offensive to those who do not adhere to any religion. Put differently, if the Establishment Clause is to work in harmony with the Free Exercise Clause, then something

independent private choice”). Justice O'Connor joined the majority opinion in full, with nary a mention of the no-endorsement test in her concurring opinion. *See id.* at 663–76 (O'Connor, J., concurring).

52. 544 U.S. 709 (2005).

53. *Id.* at 719–24. The same criteria is decisive in decisions such as *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–11 (1985).

54. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994).

55. *Id.*

56. As the text suggests, I also think that it was inadequate for Justice O'Connor in *Kiryas Joel* simply to suggest different tests for different Establishment Clause categories, without explaining the foundational principle or principles that underlay the selection of various tests. *See* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 696–700 (1997).

other than “no endorsement” must serve as the foundational axiom for establishment (and religion) cases in general. The no-endorsement test instead is a “middle axiom”: a principle that applies a general foundational axiom to the specific circumstances of a category of issues.⁵⁷

The no-endorsement test for religious symbol cases can be reconciled with distinctive protection of religious freedom only on the basis of a broader foundational principle. That principle—or at least, the best candidate for it—is what Douglas Laycock called “substantive neutrality” toward religion,⁵⁸ or what Michael McConnell called a “pluralistic approach”⁵⁹ and I call “voluntarism.”⁶⁰ It is the idea that government should, as much as possible, leave religious decisions and religious life to the choices of individuals and private groups, and to try to avoid affecting these choices, either by promoting or discouraging them. To protect such choices, government may and should accommodate voluntary religious practices, and should stay out of inherently religious matters such as doctrines or rituals.

I and others have defended this vision at length elsewhere,⁶¹ so I will not rehearse all the arguments here. However, the voluntarism or “religious choice” approach to the First Amendment rests on a cluster of ideas that drove the adoption of religious freedom during the founding generation and that still can be translated into doctrine today. One is the notion, already mentioned, that religious duties have a priority within civil society—they are “precedent both in order of time and degree of obligation”⁶²—and therefore the state should

57. I adapt this idea from theological ethics, in which middle axioms have been defined as rules that are “more concrete than a universal ethical principle and less specific than a program that includes legislation and political strategy.” JOHN COLEMAN BENNETT, *CHRISTIAN ETHICS AND SOCIAL POLICY* 77 (1946), quoted in Thomas C. Berg, *Natural Law and Christian Realism*, 3 J. CATHOLIC SOC. THOUGHT (forthcoming 2006).

58. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–03 (1990).

59. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168–70 (1992).

60. Berg, *supra* note 56, at 703–07.

61. See, e.g., *id.*; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385; Laycock, *supra* note 58; McConnell, *supra* note 59, at 168–94.

62. Madison, *supra* note 46, at 63.

keep its hands off of religious matters except as is necessary to protect the “private rights [of others] or the public peace.”⁶³ A second idea is that while religion is important to the health of a free society, it provides these benefits only when individuals and groups can pursue religious life free from the influence of government. This theme runs from Roger Williams through Madison: government involvement in core religious matters hurts not only those who dissent from the government’s favored position, but also the favored religion itself.⁶⁴

For cases involving government-sponsored prayers and religious displays, the no-endorsement principle roughly parallels the idea that government should stay out of inherently religious matters and leave religious life to the free activity of individuals and groups. Such displays do not promote the integrity of independent religious life and institutions. Rather, the government selects one or a few religious messages or symbols that it finds preferable or acceptable, often watered-down versions designed to avoid giving any offense to the broad majority.

At the same time, under the voluntarism approach, government can and should acknowledge in an objective way the influence religion has had on American life, just as it can and should acknowledge other such influences. Such objective acknowledgment does not intervene in religious life on the side of one view or another. Indeed, to refuse to recognize the role of religion in history and society would reflect not neutrality and non-involvement, but rather, in Justice Goldberg’s words, a “brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”⁶⁵ The no-endorsement test has likewise allowed such acknowledgments in holiday and Ten Commandments displays.⁶⁶

63. Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910).

64. *See, e.g.*, Timothy L. Hall, *Roger Williams and the Fountain of Religious Liberty*, 71 B.U. L. REV. 455 (1991); Madison, *supra* note 46, at 65.

65. *Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (“Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings.”).

66. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (upholding a Christmas display including crèche on the ground that the city “has principally taken note of a significant

Thus, the no-endorsement test for cases of government expression of religion is consistent with the underlying constitutional principle of voluntarism in religious matters. However, voluntarism is the foundational principle, and no-endorsement simply an application of it that is appropriate for only one category of cases. If no-endorsement becomes the foundational Establishment Clause principle, it will be conceptually difficult to justify any special accommodation of religious freedom. Thus, no-endorsement as a foundational principle puts the Establishment Clause at war with the Free Exercise Clause. Voluntarism as a foundational principle, however, can give significant content to both the Establishment and Free Exercise clauses. Under the voluntarism principle, accommodation of religious conduct in the face of general laws makes perfect sense, because otherwise, such laws could severely discourage the free exercise of religion.

historical religious event long celebrated in the Western World”); *see also* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a Ten Commandments display on state capitol grounds because it was part of a series of monuments depicting historical values of the state’s people).