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THE IMPROBABILITY OF RELIGION CLAUSE THEORY

*Frederick Mark Gedicks**

Recent scholarship on the religion clauses has displayed a persistent preoccupation with the obvious lack of coherence in the Supreme Court's decisions in this area.¹ Coherence is much overrated, as any parent knows. Most parents are delighted if their children just tell what they are thinking and doing; coherence in their thought and action is an unexpected bonus. In the case of the religion clauses, however, the urgent search for coherence could have a salutary consequence: the longer it goes on, the more clearly it demonstrates that coherence is not likely to be found in this area of constitutional law. Rather than striving to solve the puzzles of incoherence, perhaps, like parents, we should turn our attention simply to coping with them.

I will begin by relating two conceptual histories. The first recounts the recent evolution of religion clause doctrine from a body of unique and distinctive rules to one that bears increasing resemblance to the doctrines of other individual rights clauses of the Constitution.² The second is a more dated shift in normative conceptions of church-state relations, from one that considered Protestantism an indispensable foundation of American society, to one that sees religion as a matter of private choice with no necessary connection to the good life.³ Because the consequences of this second history are considerably more complicated and controversial than those of the first, I will show how they are reflected in two lines of religion clause decisions involving governmental use of aid to private re-

* Professor of Law, Brigham Young University. This essay is based upon a paper I delivered at the Oliver Wendell Holmes Lecture at Seton Hall University School of Law on October 29, 1996. Parts II and III are drawn from FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (Duke Univ. Press 1995). Sharlene Gilmor provided excellent research assistance.

¹ See, e.g., Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997); *Religion Symposium*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996); Annual Meeting of the Association of American Law Schools, Panel Discussion of the Section on Law & Religion, *Is a Coherent Theory of Religious Freedom Impossible?* (Jan. 6, 1997).

² See Part I.

³ See Part II.

ligious schools under the Establishment Clauses and exemptions under the Free Exercise Clause.⁴ I will conclude by explaining how the intersection of these two histories illustrates the improbability of coherent religion clause theories.⁵

I.

The religion clause doctrine of the 1960s and 1970s had a distinctive shape. Under the Establishment Clause, the participation of religion in public life was subject to numerous obstacles. For example, religious teaching and worship in public schools had been declared unconstitutional under the Establishment Clause,⁶ as had most forms of financial aid to parochial and other private religious schools.⁷ (For brevity I will refer to these schools as "parochial" even though many of their sponsors are not Roman Catholic). Under the Free Exercise Clause, however, religion was given special protection. The Supreme Court had held that whenever government imposed a burden on religious practice, even inadvertently, it was required to show that the burden advances a "compelling" interest that would be threatened if the burden were lifted from adversely affected believers.⁸

Religion clause doctrine at this point in time reflected the view that religion was a constitutionally distinct activity. Any government action that concerned religion was closely scrutinized, and a variety of doctrinal tests made it likely that government action that impacted religion would be judged unconstitutional.⁹ For example, government action that helped or encouraged religion was usually found to violate the Establishment Clause under the *Lemon* test,¹⁰ while government action that burdened

⁴ See Part III.

⁵ See Part IV.

⁶ See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

⁷ See *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But see *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding state program that supplied free textbooks to public and parochial school students); *Eversen v. Board of Educ.*, 330 U.S. 1 (1947) (upholding free municipal bus transportation for public and parochial school students).

⁸ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁹ See Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 83.

¹⁰ See *Lemon*, 403 U.S. at 612-13 (holding that to withstand scrutiny under the Establishment Clause, government action must have a secular purpose, a primarily secular effect, and not entangle religion and government in each other's affairs).

religion was vulnerable under the free exercise exemption doctrine of *Sherbert v. Verner* and *Wisconsin v. Yoder*.¹¹

By holding government action that assists religion to more stringent standards of constitutionality than were applied to action in aid of secular activities, establishment clause doctrine implied that religion presented unique constitutional dangers and, therefore, was properly subjected to special constitutional constraints that did not reach analogous secular activities.¹² At the same time, by extending special protection to religious practice that did not generally protect secular activities, free exercise doctrine suggested that religion was a particularly important human activity.¹³ Some commentators rationalized this peculiar doctrinal situation as a theoretical quid pro quo—that is, precisely *because* religion was subject to special constitutional scrutiny under the Establishment Clause, it was disabled from protecting itself against adverse legislation and other government action, and thus was entitled to extraordinary protection under the Free Exercise Clause.¹⁴

All this began to change in the 1980s. Since then, government assistance to religion has increasingly been analyzed under the content-neutral criteria of public forum speech doctrine, with the result that religious activity in public life has been upheld under the speech clause even when such activity seems problematic under the Establishment Clause.¹⁵ There has been a parallel development in free exercise doc-

¹¹ 374 U.S. 398 (1963) (denial of unemployment benefits to Adventist who was terminated for refusing to work on Saturday violated Free Exercise Clause because the denial was not narrowly drawn to implement a compelling interest); 406 U.S. 205 (1972) (denial of exemption from school attendance law to Amish parents violated free exercise clause because the denial was not justified by a compelling interest).

¹² Compare *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding public school flag salute ceremony constitutional so long as conscientious objectors are excused from participating) (by implication) with *School Dist. v. Schempp*, 374 U.S. 203 (1963) (holding public school prayer and Bible reading unconstitutional even though conscientious objectors are excused from participating). See generally William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993); Kathleen Sullivan, *Religion and Liberal Democracy*, 59 CHI. L. REV. 195 (1992).

¹³ Cf. *Sherbert*, 374 U.S. at 414-15 (observing that if "appellant's refusal to work on Saturdays were based on indolence, or on a compulsive desire to watch the Saturday television programs," rather than on religious conviction, she would not have been entitled to an exemption from statutory unemployment compensation eligibility requirements).

¹⁴ This thesis is argued most clearly by Abner Greene. See Abner Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

¹⁵ See, e.g., *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); see also *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that discrimination by public school on basis of religious orientation of extracurricular club violates Equal Access Act, 20 U.S.C. §§ 4071-74 (1984)).

trine. A steady erosion of the compelling interest test during the 1980s¹⁶ culminated in *Employment Division v. Smith*, which held that the Free Exercise Clause gives no relief to religious practice that is incidentally burdened by generally applicable law.¹⁷ After *Smith*, religion is treated no better than any other constitutionally protected activity, which is to say that if government prevents or burdens religious practice inadvertently as an incident to otherwise valid, generally applicable law, that is just too bad for the religious practitioner.¹⁸

At present, the Supreme Court has largely reversed the religion clause doctrine of the 1970s. Instead of being subject to special restrictions in competing for government recognition and financial assistance, religious individuals and groups (with the important exception of parochial schools) are increasingly treated like their secular counterparts, constitutionally entitled to receive the same recognition and assistance as is available to secular organizations. Instead of being uniquely exempt from the obligation to obey the law, religious practice receives only what other constitutionally protected freedoms receive—the promise that government cannot consciously discriminate against it.¹⁹ In other words, current religion clause doctrine is being “normalized.” No longer constitutionally distinct, the doctrines that govern church-state relations now bear increasing resemblance to, and yield the same results as, the free speech and equal protection doctrines that have long governed analogous secular activities.

¹⁶ See *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (denying television ministry exemption from general tax on sales of Bibles); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (ruling that Free Exercise Clause does not prevent federal government from implementing land use plan that would destroy the Native American religion); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying prison inmates exemption from policy that prevented them from attending religious worship services); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying Orthodox Jewish serviceman exemption from uniform regulation that prevented his wearing a yarmulke); *Jensen v. Quaring*, 472 U.S. 478 (1985) (affirming by equally divided Court denial of exemption from driver's license photograph requirement to person who believed photographs were “graven images” in violation of the Ten Commandments); *United States v. Lee*, 455 U.S. 252 (1982) (denying Amish employer exemption from Social Security taxes).

¹⁷ 494 U.S. 872 (1990).

¹⁸ The compelling interest test was briefly reinstated by the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993), but RFRA itself was invalidated last term by *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

¹⁹ See *Smith*, 494 U.S. at 877-78; e.g., *Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

II.

I have argued elsewhere that the Supreme Court's religion clause doctrine can be understood as the complex interaction of two normative conceptions of church and state, "religious communitarianism" and "secular individualism."²⁰ Religious communitarianism presumes a society in which church and state are institutionally but not politically or culturally separated. Religious communitarianism understands religion to be the principal, if not the exclusive, source of certain values and practices that lie at the base of civilized society. These values include support for the traditional nuclear family (manifesting itself in opposition to abortion, sex education in public schools, and the feminist and gay rights movements) and public acknowledgement of the pre-eminence of the biblical God (manifesting itself in general support for public prayer and other public religious observances). In addition, religious communitarianism presupposes a faith that relies primarily on tradition and authority, and only secondarily on reason, to articulate and defend these values and practices, as some intellectual historians have suggested that religious authority and tradition marked the limit on reason prior to the Enlightenment.²¹ Finally, while the ideological premises of religious communitarianism require that government refrain from coercing belief and that it tolerate nonbelievers and dissenters to some extent, these premises do not require that government remain religiously neutral. Rather, religious communitarianism permits and even demands that government exercise its power to influence citizens to adopt the foundational morality of conservative religion to guide their choices in private life.²²

Under the premises of religious communitarianism, government may act to encourage religious traditions that nurture and reinforce conservative cultural values, and it need protect nonbelievers and dissenters only from the deprivation of classical conceptions of life, liberty, and property.²³ Religious communitarians learned the lesson of the Reformation

²⁰ See generally FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995).

²¹ See, e.g., ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 158-59, 167-77 (1951); PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION—THE RISE OF MODERN PAGANISM* 237, 254, 330, 376-77 (1966).

²² Cf. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 104 (1995) (describing the "civic virtue rationale" for government support of religious institutions: "If a particular institution is essential to society, it seems to follow that government should use its powers to foster or promote that institution, instead of simply leaving the institution to fend for itself (much less excluding it from benefits, such as public subsidies, for which other institutions *are* eligible).").

²³ Cf. *id.* at 66 (noting that from a communitarian standpoint, "the dissenter's obnoxious views may not immediately threaten the property or bodily integrity of others, but they surely do influence the nature of the community that the citizens share").

Wars, that religious belief cannot be coerced. Nevertheless, it remains important to them that the right kind of beliefs be encouraged, and that religious practices that threaten social order be suppressed.

Religious communitarianism dominated normative conceptions of church and state during the American nineteenth century. Think, for example, of the *Mormon Polygamy Cases*.²⁴ These decisions were rendered towards the end of the nineteenth century, when American public culture still operated on the belief that Protestant Christianity is one of the pillars of a well-ordered society, and that government properly may act to encourage belief in this version of Christianity.²⁵

At the time, the Court characterized polygamy as a violation of natural law that attacks the moral foundation of civilized society. Polygamy is described as "a crime against the laws and abhorrent to the sentiments and feelings of the civilized world," a "barbarous practice . . . contrary to the spirit of Christianity and of the civilization which Christianity has produced in the West."²⁶ In contrast, monogamous marriage is described as "the sure foundation of all that is stable and noble in our civilization; the last guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."²⁷ Because they threaten this relationship, "bigamy and polygamy are crimes by the laws of all civilized and Christian countries," tending "to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man."²⁸ According to the nineteenth century Court, it was constitutionally proper for government to prohibit and to punish even sincerely held religious practices like polygamy when they threaten the "peace, good order, and morals of society."²⁹

In contrast, secular individualism holds that knowledge about the world is discovered by the rigorous application of critical reason, and never by mere appeal to religious authority or tradition. Secular individualism considers religion to be an irrational and regressive anti-social force that must be strictly confined to private life to avoid social division,

²⁴ *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878).

²⁵ *See, e.g.*, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (maintaining that Americans "are a Christian people" whose morality "is deeply engrafted upon Christianity," and that Christianity is part of the common law).

²⁶ *Late Corp.*, 136 U.S. at 50.

²⁷ *Murphy*, 114 U.S. at 45.

²⁸ *Davis*, 133 U.S. at 341.

²⁹ *Id.* at 342; *accord Late Corp.*, 136 U.S. at 50; *Murphy*, 114 U.S. at 45; *Reynolds*, 98 U.S. at 164.

violence, and anarchy. Secular individualism requires that government remain neutral between religious sects and between religion and nonreligion generally. Under this philosophy, religious belief is a subjective choice in private life that is insulated from government influence or control, while public life is the realm of objective, secular discourse protected from the irrationality and subjectivity of faith.³⁰

In secular individualist discourse, in contrast to religious communitarian discourse, it is never acceptable for government to defend its actions with a religious justification.³¹ On the contrary, this is precisely the evil to be avoided. Permitting government to legislate on the basis of religious belief imposes upon public life serious social conflict that cannot be resolved by the application of reason.³² In the post-Enlightenment West, it is precisely the disconnection of religion from public life that is thought by secular individualists to have pointed Western culture toward individual freedom and political stability and made possible the progress of the last three centuries.³³ Thus, public religion is acceptable to secular individualism only to the extent that it falls within broader secular categories of public life.³⁴

³⁰ See GEDICKS, *supra* note 20, at 29-32.

³¹ Cf. Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989) (arguing that religious citizens must have secular motivations for their political views and actions).

³² See, e.g., Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 3 (1984) ("the alliance between religion and government had always resulted in bloody divisiveness within a nation and bloody wars between nations"); see also John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUDIES 1, 4 (1987) (noting that the social and historical conditions, including the "Wars of Religion," which gave birth to modern liberal democracy, suggest that any conception of justice "must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value, and purpose of human life").

³³ See, e.g., Richard Rorty, *The Priority of Democracy to Philosophy in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVALUATION AND CONSEQUENCES IN AMERICAN HISTORY* 257 (Merrill D. Peterson & Robert C. Vaughn eds., 1988) (arguing that efforts to establish the "truth" of religious belief is an obstacle to political and social progress); see also HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 361-62 (1976) (observing that one of the differences between the historical Enlightenment and the elaboration of its principles in the United States was the latter's association of Enlightenment principles with democracy); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 428 (describing May's view that religion is "an important co-founder of law . . . but one whose contribution can be dispensed with once a more advanced stage of civilization is attained"); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 495 (1991) (describing the belief of "enlightenment separationists" that only by removing religion from politics "could society achieve a properly focused and properly restricted political process").

³⁴ Cf. PHILIP B. KURLAND, *RELIGION AND THE LAW* (1961) (arguing that religion should not be used as a basis for government classifications); MARK V. TUSHNET, *RED,*

Modern religion clause jurisprudence is largely informed by secular individualism. Consider, for example, *Everson v. Board of Education*.³⁵ In *Everson*, the Supreme Court considered whether a city could pay for the bus transportation of school-aged children to parochial as well as to public schools. Prefacing its holding that such funding was constitutionally permissible, the Court summarized what it saw as the principal force behind the drafting of the Establishment Clause: the desire of the Framers to eliminate the civil disorder and violent persecution that had historically accompanied government establishment of a single sect in Europe:

The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.³⁶

Observing that early American colonials had brought with them the European tradition of the established church, the Court stressed the insult and indignity entailed in compelling religious dissenters in America "to pay tithes and taxes to support government sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."³⁷ After a review of Virginia's 1785 rejection of general taxation for the support of ministers and churches (in which Madison and Jefferson are somewhat misleadingly portrayed as having played the decisive roles)³⁸, the Court stated in clear and unequivocal terms that the Establishment Clause required an absolute neutrality on the part of government, both as between particular religions and as between religion and nonreligion:

WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW ch. 8 (1988) (arguing that the Supreme Court only protects religious exercise when such protection would be available under some other provisions of the Constitution); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983) (arguing that religious expression should receive constitutional protection under the Free Exercise Clause only if analogous secular expression would be protected by the speech clause).

³⁵ 330 U.S. 1 (1947).

³⁶ *Id.* at 8-9.

³⁷ *Id.* at 10; *accord id.* at 40, 53-54 (Rutledge, J., dissenting) ("Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share [] The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.").

³⁸ *See id.* at 11-13; *id.* at 33-41 (Rutledge, J., dissenting).

Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence anyone to go or to remain away from church against his will or force him to profess belief or disbelief in any religion. No person can be punished for entertaining or professing attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*.³⁹

The decision closed with a flourish, quoting the now-famous phrase from Jefferson's letter to the Danbury Baptists that the Establishment Clause "was intended to erect a 'wall of separation' between Church and State."⁴⁰

With *Everson*, the Supreme Court abandoned religious communitarianism as a normative guide to church-state relations, in favor of secular individualism. Although governmental neutrality among particular Protestant sects was consistent with religious communitarianism, such neutrality between Protestants and non-Protestants and between believers and nonbelievers was antithetical to it. Likewise, although the institutional separation of church and state was consistent with the religious communitarianism, the more decisive cultural and political division implied by the "wall of separation" was not.

Perhaps most importantly, neutrality implies a radically different public role for religion, one unconnected to government or to public life, as prescribed by secular individualism. Whereas religious communitarianism presumes that religion is essential to civilized society, the modern requirement that government remain detached and neutral with respect to the religious choices of its citizens suggests that a wholly secular society is possible and perhaps even preferable. In David Smolin's words, "the concept of government neutrality represents a change in the self-identity of the nation, because it renders the previously dominant concept of a 'Christian America' heretical and repugnant."⁴¹ After *Everson*, it was

³⁹ *Id.* at 15-16. Justice Rutledge, writing in dissent for four Justices, seemed to go even further, arguing that the purpose of the Establishment Clause "was broader than separating church and state in this narrow sense [i.e., of prohibiting established churches]. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31-32 (Rutledge, J., dissenting).

⁴⁰ *Everson*, 330 U.S. at 16.

⁴¹ David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1072 (1991) (book review); see also Witte, *supra* note 33, at 501 ("In determining the intent of the framers [in

thought that government can and should remain indifferent about how religious choice is exercised.

III.

My contention is that secular individualism has largely captured religion clause doctrine. This is true in virtually all doctrinal areas, including those relating to equal access of religious individuals and groups to government facilities, to the secularization of public schools, to government use of religious symbols, and to religious tax exemptions. The Court's decisions involving parochial school aid under the Establishment Clause and exemptions from general laws under the Free Exercise Clause will suffice to illustrate the phenomenon. The parochial school aid cases show the depth of the Court's commitment to secular individualism by demonstrating that the Court has manipulated the concept of neutrality based on implausible assumptions about contemporary government in order to keep its decisions consistent with secular individualism.⁴² The free exercise exemption cases demonstrate that given the commitment of the Court to secular individualism, the demise of the exemption doctrine was inevitable, because secular individualism lacks the rhetorical resources to justify exemptions.⁴³

A.

The Court's decisions generally hold that financial aid programs designed to benefit parochial schools are constitutional under the Establishment Clause only if the aid is given directly to parochial school students or their parents, rather than to the school itself.⁴⁴ The importance of this distinction was evident in *Board of Education v. Allen*, in which the Court reviewed a textbook loan program pursuant to which the state supplied secular books free of charge to students in both public and private schools.⁴⁵ A divided Court upheld the program under the Establishment Clause, but both the majority and the dissenters agreed that the crucial determination was whether the aid was properly characterized as flowing to the students or to the parochial schools. The majority empha-

Everson and other early Establishment Clause cases], the Justices turned principally to the writings of the enlightenment political separatists . . . and largely ignored the equally prominent writings of the evangelical theological separationists.").

⁴² See Part III.A.

⁴³ See Part III.B.

⁴⁴ See Jesse Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 313 (1968); Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 576 (1968).

⁴⁵ 392 U.S. 236 (1968).

sized that "books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."⁴⁶ In contrast, the dissenters characterized the program as supplying particular textbooks for the benefit of the parochial school, books presumably approved by the state on the basis of sectarian considerations.⁴⁷

In the years since *Allen*, the Court has repeatedly affirmed the importance of the individual-institutional distinction to the constitutionality of parochial school aid programs.⁴⁸ In only two decisions, *Committee for Public Education & Religious Liberty v. Regan* and *Wolman v. Walter*, has the Court found direct aid to parochial schools constitutional under the Establishment Clause,⁴⁹ and then only because the Justices were convinced that the aid could not under any circumstances be diverted to the schools' religious mission.⁵⁰

One corollary to the requirement that parochial school aid be channeled to students rather than to schools is that the class of individuals benefited by the aid program be broadly and secularly defined. For example, the Court distinguished the aid programs struck down in *Committee for Public Education v. Nyquist* from those in *Everson* and *Allen* by emphasizing that in the latter cases, the aid was supplied "in common

⁴⁶ *Id.* at 243-44.

⁴⁷ See *id.* at 252 (characterizing the law as "using tax-raised funds to buy school books for a religious school") (Black, J., dissenting); *id.* at 254, 265 ("The statute on its face empowers each parochial school to determine for itself which textbooks will be eligible for loans to its students. [] The initiative to select and requisition 'the books desired' is with the parochial school.") (Douglas, J., dissenting); *id.* at 270, 271 ("despite the transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities . . . for use in their sectarian schools") (Fortas, J., dissenting).

⁴⁸ See, e.g., *Agostini v. Felton*, 117 S. Ct. 1997, 2013 (1997); *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971).

⁴⁹ See *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977) (plurality opinion).

⁵⁰ See *Regan*, 444 U.S. at 654-57; *Wolman*, 433 U.S. at 240. In these decisions, which involved the preparation, administration, and scoring of state-mandated standardized tests, the Court determined that the parochial schools' lack of control over the preparation of the tests guaranteed that religious beliefs would not be tested. Although the *Regan* program provided for grading of some of the exams by parochial school teachers, as well as for cash reimbursements to the schools for expenses incurred in administering the tests, the Court found that the standardized, objective nature of the test questions ensured that religious considerations would not influence the grades, 444 U.S. at 654-56, and further found that a required state audit of the reimbursement funds required by the program was sufficient to verify that the funds were not used for religious purposes, *id.* at 659-61. In *Wolman*, these issues did not arise because the testing program was wholly administered by the state. See 433 U.S. at 438-39 (plurality opinion).

to all citizens,” so that “the class of beneficiaries included *all* schoolchildren, those in public as well as private school,” whereas the programs in *Nyquist* were by their terms available only to parochial school students and their parents.⁵¹ Similarly, in upholding a personal tax deduction for certain expenses of public and private education in *Mueller v. Allen*, the Court emphasized that the deduction was available to “*all* parents,” regardless of where their children went to school.⁵² Whereas the Court generally strikes down aid programs that define the beneficiaries narrowly in terms of attendance at parochial or private schools, most aid programs upheld by the Court have merely included parochial school students with public school students in a secularly defined class of beneficiaries.⁵³

Secular individualist discourse assumes that, although individuals may choose to be religious in private life, there is no public role for religion beyond the effect of private choice. Government and other social institutions are to be constituted by private preferences, not vice versa. The Supreme Court’s decisions holding that parochial school aid programs are constitutional only when the aid is channeled to individuals pursuant to a broad, secularly defined beneficiary class are thus a perfect reflection of secular individualist ideology. This rule ensures that whatever religious institutions exist in American society exist as the consequence of the undistorted private choices of religious Americans.

Aid to individuals pursuant to narrow, religiously defined beneficiary classes, which the Court has generally struck down, is inconsistent with secular individualist discourse. Such aid skews individual choice toward parochial schools by providing financial incentives to parochial school attendance that do not exist for public school attendance. The number and vitality of parochial schools under such circumstances are not arguably the result of private choice, but rather of some combination of private choice and the distorting effects of government aid. Likewise, channeling aid to parochial schools directly, which the Court also generally refuses to permit, bypasses individual choice, and presents the possibility that parochial schools receive more government aid than they would if the aid were first given to individuals who could then choose between parochial schools, secular private schools, and public schools. Again, the popularity of parochial schools under such circumstances can-

⁵¹ 413 U.S. 756, 781-82 & n.38 (1973).

⁵² 463 U.S. 388, 397, 398 (1983).

⁵³ See, e.g., *Agostini*, 117 S. Ct. at 2014 (support services for educationally disadvantaged schoolchildren); *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction for educational expenses); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbook loan program); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (public transportation to and from school).

not be argued to be the result of private choice, but rather the consequence of government aid.

This private choice analysis is explicit in *Mueller*. Conceding that a tax deduction given to the parents of parochial school students "ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children,"⁵⁴ the Court nevertheless held that the deduction did not violate the Establishment Clause. Because the deduction was available to the parents of public as well as parochial school students, it did not skew parental choice in favor of parochial schools. Thus, whatever financial assistance parochial schools received from the deduction can be considered the result of private rather than governmental choice:

The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.⁵⁵

In these circumstances, financial aid funds the private choices of individuals (including religious individuals), and only incidentally the educational institutions (including parochial schools) that are the beneficiaries of these choices.⁵⁶

⁵⁴ *Mueller*, 463 U.S. at 399.

⁵⁵ *Id.* at 400; accord *Agostini*, 117 S. Ct. at 2014 (upholding provision of federally-funded support services to disadvantaged parochial school students in part because the services "are available to all children who meet the [federal] eligibility requirements, no matter what their religious beliefs or where they go to school"); *Zobrist v. Catalina Foothills Sch. Dist.*, 503 U.S. 1, 3, 12-13 (1993) (holding that supplying statutorily mandated sign-language interpreter to deaf student attending Roman Catholic high school did not violate the Establishment Clause because interpreters are supplied pursuant to "a general government program that distributes benefits neutrally . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends," and any such interpreter "will be present in a sectarian school only as a result of the private decision of individual parents"); *Witters v. Department of Serv. for the Blind*, 474 U.S. 481, 487-88 (1986) (holding that vocational rehabilitation grant used by recipient to study for ministry at sectarian college did not violate Establishment Clause because the grant "is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").

⁵⁶ See *Gianella*, *supra* note 44, at 585; see also *id.* at 581 ("If the state directly or indirectly supports [free and open] inquiry [into religion by college students] it is not providing unconstitutional aid to religion; rather the gain of renewed interest in religion flows from a secular order characterized by academic freedom."). But see John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 72, 85 (arguing that the real justification for *Mueller* is not private choice, but a functional rule that prohibits religious instruction by recipients of government assistance in the same way that Title IX prohibits gender discrimination by recipients of federal funds).

The parochial school aid cases coincide in almost every respect with the norms of secular individualism. Nevertheless, they are ultimately unpersuasive even on secular individualist grounds. The difficulty with these cases is rhetorical incredibility. Although the Court insists that its decisions in this area are "neutral" as between religion and non-religion,⁵⁷ it is impossible to demonstrate the neutrality of the Court's holdings except by making implausible assumptions about the role and behavior of contemporary government.

The parochial school aid cases provide a particular example of a general problem that haunts the Supreme Court's decisions under the Establishment Clause: how does one identify the baseline measure of religious neutrality? Or, as Michael McConnell and Richard Posner have succinctly summarized the point, "To determine whether religion has been 'aided' or 'penalized' . . . one needs a baseline: 'aid' or 'penalty' as compared to what?"⁵⁸ To measure whether government has violated the neutrality principle, one must have a starting point that defines neu-

For a time, the Court maintained that mere government association with religion distorted private choice. In *School District of Grand Rapids v. Ball*, for example, the Court found that institutional aid violated the Establishment Clause, not because it bypassed individual choice, but in part because the direct financial assistance of parochial schools by government would be widely perceived as a government "endorsement" or "encouragement" of parochial schools. 473 U.S. 373, 389, 392 (1985), *overruled by Agostini*, 117 S. Ct. at 2011, 2017 (discussing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)); *see also Ball*, 473 U.S. at 390:

[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Thus, even if the financial distortions exerted on individual choice by an aid program were insignificant, the Court determined that the alignment of government power for or against religion that is implied by direct aid to parochial schools is itself a distortion of such choice and, as such, violates the primary effect prong of *Lemon*. *See id.* at 390-92. *Compare Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment) (opining that because financial aid flowing to sectarian institution is the result of private choice, no inference of government endorsement of such institution can be drawn) *with Mueller*, 463 U.S. at 399 ("Where, as here, aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion.") (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The Court abandoned this analysis in *Agostini*, 117 S. Ct. at 2011.

⁵⁷ *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 414 (1985) *overruled on other grounds, Agostini*, 117 S. Ct. at 2017; *Ball*, 473 U.S. at 382, *overruled on other grounds, Agostini*, 117 S. Ct. at 2017; *Mueller*, 463 U.S. at 397-98; *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745 (1976).

⁵⁸ Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 6 (1989).

trality. Departure from this point would therefore constitute a violation of the principle.⁵⁹

With respect to direct financial aid, Donald Gianella suggested that in a world in which no individuals or organizations receive any governmental aid whatsoever, any aid to religion, whether to religious individuals or to religious organizations, would depart from the baseline of no-aid and violate the neutrality principle.⁶⁰ By contrast, the neutrality principle would require a wholly collectivized state that subscribed to the principle of church-state separation to extend to religious organizations aid comparable to that generally given to nonreligious organizations, "in order that they might have appropriate and substantially equal opportunities for self-development."⁶¹ In the modern welfare state that the contemporary United States has become, government aid to both individuals and organizations is widespread and pervasive. Because in the United States most persons and entities are entitled to some kind of government aid, religious neutrality would generally seem to require that this aid not be denied to otherwise qualified recipients simply because they are religious. Indeed, to deny aid to such persons and entities constitutes a tax on religious exercise that skews private choice away from religion.⁶²

The parochial school aid cases, then, suggest that the Court does not consistently use the same baseline when it measures the religious neutral-

⁵⁹ See, e.g., Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 216, 289 ("neutrality is in itself an equivocal standard"); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 828 (1984) ("The notion that it is wrong for the legislature to have the purpose or effect of assisting religion only makes sense in terms of an assumed 'neutral' starting point that defines what advantages or disadvantages religion ought to have."); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1005 (1990) ("substantive neutrality requires a baseline from which to measure encouragement or discouragement" of religion); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) ("A statement such as 'the state should be neutral' is completely vacuous; it says nothing about that with respect to which the state is supposed to be neutral.").

⁶⁰ Gianella, *supra* note 44, at 522.

⁶¹ *Id.* at 523; accord Laycock, *supra* note 59, at 1001.

⁶² See Galanter, *supra* note 59, at 268 ("Older views stressed governmental abstention as a condition (if not the substance) of freedom. But increasingly, affirmative governmental intervention is invoked to provide resources and opportunities for desired freedoms"); Gianella, *supra* note 44, at 526 ("the continually expanding public sector acquires many of the attributes of a collectivized society, so that unqualified adherence to the no-aid principal will tend to have a destructive impact on voluntarism"); Paulsen, *supra* note 59, at 355 ("In this age of the affirmative state and 'unconstitutional conditions,' unemployment compensation, tax exemption, and scores of other policies of the fiscal are now, for better or worse, *quasi-entitlements*, the deprivation of which for reasons of religious belief, affiliation, or profession is the functional equivalent of a tax imposed on the free exercise of religion.").

ity of parochial school aid under the *Lemon* test. It generally uses a baseline of pervasive aid when it measures the neutrality of financial aid to religious individuals, which leads easily to the conclusion that such individuals must be granted access to such aid if religious neutrality is to be maintained. When measuring direct financial aid to parochial schools, however, the Court generally reasons from a baseline of no-aid, which leads just as easily in the opposite direction—to the conclusion that religious schools must be denied access to preserve religious neutrality.

The problem is that in the late twentieth century the no-aid baseline is implausible as a measure of the neutrality of government action. Stephen Carter accurately describes our world as one “in which regulation is everywhere,” and sharply criticizes as a “fantasy” the suggestion that careful religious citizens can escape government regulation.⁶³ This is especially true of financial aid to elementary and secondary education. Public schools are supported by local tax dollars supplemented, in most cases substantially, by state and federal grants. Parents of parochial school students are not permitted to opt out of paying these taxes, and in very few states are they entitled to any tax relief, despite the fact that they save local, state, and federal governments thousands of dollars by educating their children privately.⁶⁴

If one focuses on the entire educational system, including parochial as well as public schools, aid to parochial schools can be understood as an attempt to equalize the tax burden of education costs between those parents who desire a secular education for their children and those who wish a religious education.⁶⁵ By this argument, neutrality between parochial schools and public schools clearly requires that parochial schools be apportioned a share of these tax dollars; if most schools receive government aid, then religiously neutral funding requires that parochial schools be eligible to receive it, too.⁶⁶

⁶³ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN POLITICS AND LAW TRIVIALIZE RELIGIOUS DEVOTION* 144 (1993).

⁶⁴ Choper, *supra* note 44, at 285; Johnson, *supra* note 59, at 844; McConnell & Posner, *supra* note 58, at 24; Paulsen, *supra* note 59, at 359.

⁶⁵ Johnson, *supra* note 59, at 822; Paulsen, *supra* note 59, at 356, 358 & n.210.

⁶⁶ See Giannella, *supra* note 44, at 572, 575; see also KURLAND, *supra* note 34, at 9 (“aid to parochial schools is not unconstitutional, so long as it takes a nondiscriminatory form”); Choper, *supra* note 44, at 270 (observing that under Professor Kurland’s doctrine prohibiting the use of religion as a legislative classification, “government could constitutionally finance the entire operational costs of all state-accredited educational institutions, including those controlled by a religious organization, because the classification—state-accredited educational institutions—which includes most parochial schools, is not in the religious terms his doctrine prohibits”); Johnson, *supra* note 59, at 845 (“To the extent that programs of aid to private education are seen as meeting a widespread desire for alternatives to publicly administered education, permitting religious schools to participate

Let me emphasize that I am not making a normative policy argument. I do not suggest that parochial schools "ought" to receive public tax dollars to fund their operations. This is a controversial and complicated question that I will not attempt to address. When parochial schools are denied tax dollars, however, it must be for a reason other than *Everson's* requirement of neutrality between religion and nonreligion. Not only does religious neutrality fail to justify the constitutional denial of direct government aid under the Establishment Clause, it can be used to suggest the opposite result. Denying government aid to parochial schools is neutral only if one assumes that government funding of elementary and secondary education is insignificant. This has not been the situation in the United States for many years.

B.

The doctrinal narrative of free exercise jurisprudence is circular. The Court began in the nineteenth century with the belief action doctrine articulated in the *Mormon Polygamy Cases*. In *Reynolds v. United States*, for example, the Court held that while "Congress was deprived of all legislative power over mere opinion" by the Free Exercise Clause, it was "left free to reach actions which were in violation of social duties or subversive of good order."⁶⁷ This doctrine, of course, left religious free exercise largely unprotected. Although the belief-action doctrine survived into the nineteenth century,⁶⁸ in the 1960s and 1970s the Court moved to the compelling interest test of *Sherbert v. Verner* and *Wisconsin v. Yoder*.⁶⁹ Read together, *Sherbert* and *Yoder* required that, when a law inadvertently prevented or burdened a religious practice, the government must demonstrate that it has a compelling regulatory interest that justifies applying the law uniformly, even to adversely affected believers.⁷⁰

Although the *Sherbert-Yoder* test appeared highly protective of religion, in practice it provided only marginally greater protection for religious exercise than the belief-action doctrine.⁷¹ In 1990, the Court for-

may seem more like avoiding discrimination against religion, rather than creating a religious establishment.").

⁶⁷ *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁶⁸ See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 601-02 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

⁶⁹ 374 U.S. 398 (1963); 406 U.S. 205 (1972).

⁷⁰ See *Sherbert*, 406 U.S. at 221, 226-27; *Yoder*, 374 U.S. at 403, 406-09.

⁷¹ Most free exercise claimants who appeared before the Court while the *Sherbert-Yoder* test was in effect were denied relief. Compare *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Indiana Employment Sec. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that unemployment benefits cannot be denied a person who leaves or loses employment for reasons of religious con-

mally abandoned the *Sherbert-Yoder* doctrine and largely returned to the belief-action doctrine, holding in *Employment Division v. Smith* that the Free Exercise Clause affords no special protection to religious exercise that is incidentally prevented or burdened by a generally applicable law.⁷² *Sherbert* was confined strictly to its unemployment compensation facts,⁷³ and *Yoder* was recast from a free exercise opinion that protected religious liberty to a substantive due process opinion that protected parental authority and family autonomy.⁷⁴

In one sense, the *Sherbert-Yoder* test seemed perfectly consistent with the secular individualist discourse. Indeed, Gerard Bradley suggests that the doctrine was simply "one aspect of the post-World War II take-over of our civil liberties corpus by the political morality of liberal individualism."⁷⁵ Whereas the belief-action doctrine of *Reynolds* clearly assumes that society is more important than the individual, the *Sherbert-*

science); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (ruling that Amish parents cannot be prosecuted for violation of compulsory school attendance statute) with *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (denying television ministry exemption from general tax on sales of Bibles); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (Free Exercise Clause does not prevent federal government from implementing land use plan that would destroy Native American religion); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying prison inmates exemption from policy that prevented them from attending Muslim worship services); *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that the Free Exercise Clause does not prevent government from assigning and using social security number to Native American child in violation of parent's religious beliefs); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying Orthodox Jewish serviceman exemption from uniform regulation that prevented his wearing a yarmulke); *Jensen v. Quaring*, 472 U.S. 478 (1985) (affirming by equally divided Court denial of exemption from driver's license photograph requirement to person who believed photographs were "graven images" in violation of the Ten Commandments); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (denying religious foundation exemption from federal labor regulations); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (denying religious university exemption from regulation that denies tax exemption to racially discriminatory educational institutions); *United States v. Lee*, 455 U.S. 252 (1982) (denying Amish employer exemption from payment of Social Security taxes). See also *Braunfeld v. Brown*, 366 U.S. 599 (1961) (denying Orthodox Jewish merchant exemption from Sunday closing law) (decided before *Sherbert*).

Nevertheless, some commentators have argued that even though the *Sherbert-Yoder* test provided little protection for free exercise claims before the Supreme Court, it resulted in the vindication of numerous claims by state and lower federal courts, and deterred administrative and elected governmental officials from exercising discretion in favor of encroachments on religious exercise. See, e.g., Durham & Dushku, *supra* note 33, at 451.

⁷² 494 U.S. 872, 877-78 (1990).

⁷³ See *id.* at 884.

⁷⁴ See *id.* at 881.

⁷⁵ Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991).

Yoder test reflected the view that individual rights are prior to any claims that society as a whole may make on individual conduct.

In nineteenth century America, as I have related, traditional Protestant values were thought to form the basis of society. Those who refused to conform to these values, like polygamous Mormons, were challenging the very foundations on which society was thought to be organized, and thus did not deserve any relief from laws that burdened their subversive religious practices. In contrast, a regime of neutrality within secular individualist discourse purports to remain aloof from the choices that religious Americans make in their private lives. In this view, the government has no business telling people how to live their moral and religious lives. Even idiosyncratic religious practices that would have been considered subversive under the religious communitarian assumptions of the nineteenth century may properly be protected by neutrality unless they threaten important state interests, such as protecting the rights or property of others.⁷⁶ In the absence of such threats, the coercive imposition of a particular morality upon consenting adults distorts individual religious choice, and is therefore inconsistent with secular individualist premises.

In the contemporary United States, purposeful discrimination by the government on the basis of religion is rare. When it does occur, the Court has not hesitated to strike it down.⁷⁷ In most situations in which government action burdens religious belief and practice, government has not undertaken to prohibit or to penalize conduct *because* it is religious. Rather, the federal government pursuant to constitutionally delegated powers, or a state or local government pursuant to the police power, has taken action to protect the health, safety, and welfare of those within its jurisdiction, religious and non-religious. As an incident to such action some people are burdened in the practice of their religion. For example, government-imposed vaccination requirements have clear and demonstrable public health benefits; although submitting to vaccinations conflicts with the beliefs of certain religious groups, it is difficult to maintain that

⁷⁶ See Kent Greenawalt, *Religious Convictions and Political Choice* 94 (1988); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'") (quoting *Thomas v. Indiana Employment Sec. Review Bd.*, 450 U.S. 707, 714 (1981)). But see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (declining to declare state anti-sodomy law unconstitutional as violation of constitutional privacy rights of homosexuals).

⁷⁷ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982); *McDaniel v. Paty*, 435 U.S. 618 (1978).

those who enacted these requirements intended to persecute members of these groups. In this kind of situation, government has not engineered a religious gerrymander or otherwise singled out certain religious groups for adverse treatment, but has simply acted according to its perception of the public interest, which has the unfortunate and (usually) unintended side effect of burdening certain religious beliefs and practices.

The real difficulty for the *Sherbert-Yoder* test under this analysis is that secular individualism does not provide a basis for relieving burdens on religious practice caused by government action that is fully justified on secular grounds. Secular individualist discourse permits religion to manifest itself in public life only as the effect of private choice. For example, under a secular individualist interpretation of the Establishment Clause, government can maintain a position of neutrality with respect to, and thus avoid constitutional responsibility for, financial aid to religion so long as the aid is funneled to individuals pursuant to broad, secularly defined beneficiary categories. Under these circumstances, the government has not distorted the "natural" pattern of private choice by creating a special benefit available only to religious institutions. The fact that some, or even most, of such aid ultimately ends up in the coffers of religious institutions is not chargeable to the government because the decision to spend the aid to benefit religion is made by the individual recipient and not the government itself.⁷⁸

This private choice analysis has permitted the Court to uphold against Establishment Clause challenges a variety of government actions that assist religion.⁷⁹ But the same analysis that permits aid to religion under the Establishment Clause cuts in a different direction under the Free Exercise Clause. To excuse religious individuals from compliance with generally applicable law, solely because of religious belief, distorts the pattern of private religious choice by creating an advantage available only to believers.⁸⁰ Put another way, if under secular individualist

⁷⁸ See *supra* Part III.A and accompanying footnotes.

⁷⁹ See, e.g., *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 395 (1993); *Zobrist v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-10, 13 (1993); *Westside. Board of Educ. v. Mergens*, 496 U.S. 226, 250, 252 (1990) (plurality opinion); *Witters v. Department of Services. for the Blind*, 474 U.S. 481, 482-83, 487-88 (1986); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983); *Widmar v. Vincent*, 454 U.S. 263, 270-72, 273-74 (1981).

⁸⁰ See KURLAND, *supra* note 34, at 41. Professor McConnell concedes that exemptions benefit only believers, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 11, but argues that this does not distort the pre-existing pattern of religious choice because the decisions to engage in religious conduct is always made independent of whether such conduct is exempt from government regulation or prohibition, Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686, 688, 716-17 (1992). It seems intuitively im-

premises the Establishment Clause does not require that religious individuals be uniquely deprived of public welfare benefits otherwise generally available to all, then under the same premises the Free Exercise Clause does not require that religious individuals be uniquely relieved of legal burdens otherwise generally imposed upon all.⁸¹

This general principle is familiar to other areas of constitutional law. For example, not even so weighty a constitutional principle as freedom of the press justifies exempting news reporters and their institutional employers from generally applicable laws that incidentally burden the process of gathering and disseminating information.⁸² As Justice Scalia suggested in *Employment Division v. Smith*,

[i]t is no more necessary to retard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business.⁸³

To the contrary, secular individualist discourse seems to foreclose the possibility of *religious* exemptions from generally applicable laws precisely because such exemptions distort private religious choice.⁸⁴ Analogous to situations in which financial aid to religious individuals under the Establishment Clause is justified by secular individualism, ex-

plausible, however, that criminal prohibition of a religious practice would have *no* effect on decisions by believers whether to engage in the practice; the opposite would seem to be the most common reaction. For example, nineteenth-century Mormons engaged in the practice of the polygamy at declining rates as federal persecution increased. Indeed, such persecution eventually forced the Mormons to abandon the practice as the price of survival. See generally Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

⁸¹ See Ferdinand F. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 589 (1963); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 618 (1964); see also KURLAND, *supra* note 34, at 22 ("To permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs."); Weiss, *supra*, at 623:

The task is to discern whether religion forms a variable in the statute's formulation or application by seeing whether an assumption or decision on a perspective of belief is called for. If so, then the statute is unconstitutional. If not, then religion can form neither a defense to its application nor a justification after application for calling the statute unconstitutional.

⁸² See, e.g., *Branzberg v. Hayes*, 408 U.S. 665 (1972) (holding that reporter does not have constitutional privilege to refuse to reveal news sources when testifying before a grand jury).

⁸³ *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (quoting the text of the freedom of religion and press clauses of the First Amendment).

⁸⁴ *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981).

emptions from the unintended burdens of generally applicable laws can be consistently defended by secular individualist discourse only if they are not defined in terms of religion.⁸⁵ In this instance, conduct would be protected (or not) based upon whether it fell within the secularly defined boundaries of the exemption, regardless of any religious motivation for the conduct. Thus, decisions like *Wooley v. Maynard*⁸⁶ and *West Virginia Board of Education v. Barnett*,⁸⁷ which relieve individuals of the obligation to engage in expression with which they disagree on religious grounds, are correct on secular individualist premises because the state's effort to compel expression violates rights to freedom of speech (secularly defined), and not because the compulsion infringes rights to the free exercise of religion.⁸⁸

Similarly, the *Smith* Court's reformulation of *Yoder* as a "hybrid rights" decision is really a thinly disguised judgment that this decision should not have been tied to the Free Exercise Clause in the first place. Parental rights to control the education of their children under the Due Process Clause were a sufficient secular basis for exempting the Amish from compulsory school attendance laws.⁸⁹ To say that the Free Exercise Clause mandates exemptions from generally applicable law only when another part of the constitutional text also mandates such an exemption is to say that the Free Exercise Clause does not mandate exemptions.

The problem that religious exemptions pose for secular individualist discourse is exemplified by *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, in which an em-

⁸⁵ Compare *Walz v. Tax Comm'n*, 397 U.S. 664, 687-89, 693 (1970) (Brennan, J., concurring) (ruling that religious property tax exemption does not violate the Establishment Clause when comparable exemptions are also granted to secular nonprofit organizations) with *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (sales tax exemption granted only to religious magazines violates the Establishment Clause); see also Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 592 (1991) ("The Court tends to uphold [programs of aid to religious organizations] only if they exhibit a breadth of coverage sufficient to include nonreligious organizations."). But see *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that exemption of nonprofit activities of churches and other religious organizations from the Civil Rights Act of 1964 does not violate the Establishment Clause). The Court's upholding a religiously defined exemption in *Amos* can be understood as its acquiescence in Congress's perception that such an exemption was constitutionally required under the *Sherbert-Yoder* doctrine, which was the constitutional law of free exercise both at the time the Act was passed and when *Amos* was decided.

⁸⁶ 430 U.S. 705 (1977).

⁸⁷ 319 U.S. 624 (1943).

⁸⁸ See Marshall, *supra* note 34, at 560 (1983); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 307-08.

⁸⁹ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

ployee of the Mormon church was terminated for failing to comply with certain religious standards of conduct that were not related to performance of his job.⁹⁰ The employee had no action against the church for religious discrimination because section 702 of the Civil Rights Act of 1964 exempts religious groups from anti-discrimination provisions that burden religious belief and practice.⁹¹ Accordingly, the employee challenged this exemption as an unconstitutional establishment of religion, arguing that it constituted government action that advanced religion. The Supreme Court unanimously held that the provision did not violate the Establishment Clause, although the Justices differed among themselves on why.

The majority admitted that religion was advanced as a consequence of the exemption, but maintained that this advancement was attributable to the church's decision to avail itself of the exemption and to discriminate on the basis of religion, and not to any action of the government.⁹² As Justice O'Connor pointed out, this proves too much; *any* government benefit to religion, including the direct financial grants to religious institutions that the Court has generally refused to allow, will advance religion only if the recipient accepts the benefit.⁹³ Obviously, benefits are made available by government with the full expectation that those eligible will make use of them, and it was precisely the Mormon church's reliance on section 702 that enabled it to discriminate religiously without violating the Civil Rights Act. It is, therefore, disingenuous to suggest that the government is somehow not responsible for the natural and foreseeable consequences of having enacted the exemption (or, for that matter, of having provided any other benefit that assists religion).

Recognizing this, secular individualist discourse absolves government of responsibility for the religious effects of having granted a benefit only when the benefit is made available to a broad, secularly defined beneficiary class, and the religious effect of the benefit is mediated by individual choice. Section 702 fails on both counts. The exemption is worded in terms of religion, so that only religious groups can take advantage of it, and by its terms it is granted directly to religious groups rather than received by them as the result of the choices of religious individuals.⁹⁴ Indeed, the *Amos* majority explicitly admitted that section 702

⁹⁰ 483 U.S. 327 (1987).

⁹¹ See 42 U.S.C. § 2000e-1 (1972).

⁹² See *Amos*, 483 U.S. at 337.

⁹³ *Id.* at 347 (O'Connor, J., concurring in the judgment).

⁹⁴ The exemption provides that Title VII of the Civil Rights Act of 1964 shall not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with

skews individual religious choice.⁹⁵ Under these circumstances, the fact that the immediate cause of the discrimination was the church and not the government is at best insufficient for, and at worst irrelevant to, justification of the decision by secular individualist ideology.⁹⁶

The real ground for the exemption, as Justice Brennan made clear, is the recognition that religious groups make important contributions to individuals and society that might be lost without an exemption.⁹⁷ But this is not a position that can be justified by secular individualist discourse. Because it characterizes the value of the religious group expressly in terms of its religiosity,⁹⁸ Brennan's opinion can only be defended with religious communitarian discourse.

the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1 (1972).

⁹⁵ See *Amos*, 483 U.S. at 337 n.15 ("Undoubtedly, [the employee]'s freedom of choice in religious matters was impinged upon.").

⁹⁶ Cf. *id.* at 340 n.1 (Brennan, J., concurring in the judgment) (citation omitted):

The fact that a religious organization is permitted, rather than required, to impose this burden is irrelevant; what is significant is that the burden is the effect of the exemption. An exemption by its nature merely permits certain behavior, but that has never stopped this Court from examining the *effect* of exemptions that would free religion from regulation placed on others.

⁹⁷ See *id.* at 341-43 (Brennan, J., concurring in the judgment). Justice Brennan observed that, under this rationale, a religious group should be able to discriminate only with respect to its *religious* activities. See *id.* However, the Justice believed that forcing a church to defend itself in litigation by proving that a particular activity is religious would have had an unacceptable chilling effect on the religious group's self-definition. See *id.* Accordingly, Justice Brennan determined that a rule that the nonprofit activities of religious groups be considered per se religious would be the better resolution of the conflict. See *id.* at 343-46 (Brennan, J., concurring in the judgment); see also *id.* at 336:

[I]t 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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

I explored this argument in detail in Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

⁹⁸ See *Amos*, 483 U.S. at 342:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic activity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

IV.

I began by describing the constitutional normalization of the religion clauses. The once distinct religion clause doctrine that imposed special constraints on government assistance to religion and afforded special protection for religious practice is being transformed; church-state relations are increasingly governed by doctrines that resemble the equal protection and free speech doctrines that have long governed secular activities.

I have also argued that religion clause doctrine is controlled by the Supreme Court's underlying commitment to secular individualism as the normative ideal of church-state relations. The depth of the Court's commitment to this ideological discourse is evident both in its disingenuous manipulation of the concept of neutrality in the parochial school aid cases, and its abandonment of the *Sherbert-Yoder* exemption doctrine in *Smith*.

The recent phenomenon of normalization is an unremarkable consequence of the Court's normative commitment to secular individualism, though not necessarily an inevitable one. Certainly one way to ensure that the government is genuinely neutral as between religion and non-religion—to ensure, that is, that the level of religious activity in American society is the result of individual choices unaffected by governmental encouragement or discouragement—is precisely to normalize the constitutional law of religion. Normalization is achieved by requiring constraints on religion under the Establishment Clause only when such constraints would also be imposed on analogous secular activities, and by affording protection to religious practice under the Free Exercise Clause only when such protection is given to analogous secular activities. Normalization is a natural doctrinal manifestation of the Court's commitment to secular individualism.

The commitment of the Court to secular individualism presents a perplexing theoretical problem on both sides of the political spectrum. Political liberals generally proceed on the assumption that religion is a mixed blessing in society, dangerous in some contexts and valuable in others. Liberals thus prefer a religion clause doctrine like the constitutionally distinctive doctrine of the 1960s and 1970s, with special restraints on and special protections for religion. Political conservatives, on the other hand, generally view religion as especially valuable to society, a uniquely worthy activity, the practice of which should receive special constitutional protection under the Free Exercise Clause and be free of special disincentives under the Establishment Clause. Although political liberals generally lament the recent erosion of separationist Establishment Clause doctrine while political conservatives mostly applaud it,

both groups were united in their opposition to the demise of special protection for religious practice; indeed, it was an extraordinarily broad coalition of liberals and conservatives that enabled the passage of the ill-fated RFRA.⁹⁹

Both liberals and conservatives need a theory that explains why religion is entitled to special constitutional protection—special protection that is not generally granted to other constitutionally preferred activities. Professor Angela Carmella illustrates the problem well in her paper.¹⁰⁰ Professor Carmella highlights the difficulties experienced by a religious order prohibited by historic preservation laws from moving the altar in its sanctuary; she argues that the order should be exempted from these laws so that it can practice its religion in the manner it sees fit.¹⁰¹ Suppose that the building at issue is not a religious sanctuary, but the meeting house of a fraternal organization. No constitutional provision is likely to exempt the fraternal organization from historic preservation laws¹⁰²; why, then, is the religious order entitled to exemption?¹⁰³

To justify granting an exemption from religiously neutral laws to adversely affected religious believers, one needs a theory that explains why religion is a uniquely valuable human activity entitled to uniquely strong constitutional protection. Such a theory, however, would fly directly in the face of the normative presuppositions of secular individualism. That such theories can be formulated is undeniable; that they can be made to coincide with the secular individualism to which the Supreme Court is so deeply committed is unlikely. Theories of special protection of religion will almost certainly remain voices crying in the wilderness, like parents lamenting that their children do not act like adults. And like parents, religion clause theorists might do better to deal with what is, rather than searching for what is unlikely ever to be found.

⁹⁹ See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210-11 (1995).

¹⁰⁰ See generally Angela C. Carmella, *Religion as Public Resource*, 27 SETON HALL L. REV. 1225 (1997).

¹⁰¹ See generally *id.*

¹⁰² Cf. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (upholding application of anti-discrimination ordinance against private clubs of a certain size and character); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (upholding application of anti-discrimination ordinance to nonadvocacy service organization); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (same). But cf. *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972) (enjoining liquor control board from revoking liquor license of racially exclusive fraternal organization).

¹⁰³ I explore the weak theoretical justifications for religious exemptions in Frederick Mark Gedicks, *An Unfirm Foundation*, ARK. L. REV. (forthcoming 1998).