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John H. Garvey

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All Things Being Equal . . .

John H. Garvey[*]

I will discuss the effect that the proposed Religious Equality Amendment might have on existing First Amendment law. Let me begin with the text of the proposed amendment. There are actually two versions in circulation. The first version (the "Hyde-Hatch Amendment") is set forth identically in House Joint Resolution 121, sponsored by Mr. Hyde, and Senate Joint Resolution 45, sponsored by Mr. Hatch. It reads as follows:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.[1]

The other proposed amendment, sometimes bracketed with this one but actually quite different in its intent, is House Joint Resolution 127, proposed by Mr. Istook (the "Istook Amendment"):

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.[2]

I will confine my attention chiefly to the Hyde-Hatch Amendment, which I view as a more interesting and plausible proposal. To anticipate just briefly, my chief observation is that it would not effect much change in existing law, except perhaps in the area of aid to parochial schools.

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* Professor of Law, Notre Dame Law School. This article is based on a presentation given at a conference entitled "A Religious Equality Amendment?" held at Brigham Young University on February 12, 1996.

1. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995) (enacting clause omitted); S.J. Res. 45, 104th Cong., 1st Sess. (1995) (same).

2. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995) (enacting clause omitted).

I will divide my remarks into three parts. The Hyde-Hatch Amendment forbids the government to "deny benefits . . . or . . . otherwise discriminate . . . on account of religious expression, belief, or identity." In the first portion I will concentrate on forms of discrimination against expression, belief, or identity. The second portion of my remarks will focus specifically on benefits. In the concluding section I will briefly remark about the rule of equality (or neutrality) which the amendment espouses.

I. EQUAL FREEDOM OF EXPRESSION

A. Content Control

The most important substantive rule in free speech law is that the government may not discriminate against speech on account of its content.[3] This goes for religious speech too. So far as the Supreme Court is concerned, there is no need for correction on this point. The settled rule, consistently applied, is that regulations of speech must be content-neutral. This is what I understand the Hyde-Hatch Amendment to mean when it says the government may not "discriminate . . . on account of religious expression."

The lower federal courts, the state courts, and state officials—public school officials in particular—have not been as faithful to this rule. A good example of the kind of violation that motivates the sponsors of the Hyde-Hatch Amendment is *Guidry v. Calcasieu Parish School Board*.[4] There a high school principal ordered the class valedictorian to remove from her graduation speech a section devoted to the importance of Jesus Christ in her life. When she refused, she was stricken from the graduation program. The district court sided with the principal; the court of appeals affirmed without addressing the merits. If you want to test your instincts on the case, imagine what the result would have been if the speaker had talked instead about her admiration for Abraham Lincoln or Martin Luther King.

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3. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

4. 9 Religious Freedom Rptr. (Church-State Resource Ctr., Norman Adrian Wiggins School of Law, Campbell Univ.) at 118 (E.D. La. 1989), *aff'd on jurisdictional grounds*, 897 F.2d 181 (5th Cir. 1990).

There are plenty of cases like *Guidry*.[5] A constitutional amendment would not change the law that the Supreme Court applies to them, but it might bring the rules to other people's attention.

B. Public Forum

It is sometimes suggested that there should be an exception to the rule of content neutrality when people want to speak on government property—that the government, like the owner of private property, should be able to prefer its friends.[6] The Supreme Court rejected this suggestion fifty years ago insofar as it applied to traditional public forums—streets, sidewalks, and parks. Many of these cases were brought by or against religious speakers.[7] What usually happened was that popular groups (mainline religions, the Elks, the VFW) would be allowed to hold rallies and services in the city park; unpopular groups (often Jehovah's Witnesses) would then be forbidden to do the same thing. This is how the Court described the case of *Capitol Square Review & Advisory Board v. Pinette*,[8] decided last term. The board denied permission to the Ku Klux Klan to put a cross on the plaza outside the statehouse where other private parties had put a menorah, a United Way display, and various art exhibits. The Supreme Court held that the cross was entitled to protection under the Free Speech Clause. The Court also held that allowing the cross did not violate the Establishment Clause.

In addition to the rule of content neutrality, traditional public forum law provides a right of guaranteed access that is good even against *nondiscriminatory* controls. The Klan must be

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5. *See, e.g.*, Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir.), *cert. denied*, 116 S. Ct. 518 (1995); Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992); Perumal v. Saddleback Valley Sch. Dist., 243 Cal. Rptr. 545 (Ct. App.), *cert. denied*, 488 U.S. 933 (1988); *cf.* Hedges v. Wauconda Community Sch. Dist., 9 F.3d 1295 (7th Cir. 1993); Garnett v. Renton Sch. Dist., 987 F.2d 641 (9th Cir.), *cert. denied*, 114 S. Ct. 72 (1993); and Johnson-Loehner v. O'Brien, 859 F. Supp. 575 (M.D. Fla. 1994), where the school boards engaged in content control but the courts got it right.

6. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) (Holmes, J.), *aff'd*, 167 U.S. 43 (1897).

7. *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).

8. 115 S. Ct. 2440 (1995).

treated like the United Way; but both of them could complain if the government tried to close the park to all speakers.[9]

Recently the Court has refined its thinking about forums. We still have the traditional kind, but now we also have designated and nonpublic forums. A designated public forum is property that the government voluntarily makes available for speakers. Once it does, the requirement of nondiscrimination attaches. But until it does, there is no guaranteed right of access, as there is to traditional public forums. This is not a very large category. It does not include airports, for example, where religious groups have (along with others) been denied the right to solicit funds.[10] It probably does include college campuses. This is how the Court described the University of Missouri at Kansas City ("UMKC") in *Widmar v. Vincent*.[11] UMKC opened its facilities generally to student groups but closed them to a religious group, Cornerstone, that wanted to engage in religious worship and discussion. The Court's holding in *Widmar* prefigured its decision in *Pinette*: it decided that the students had rights under the Free Speech Clause and that allowing them to use the forum did not violate the Establishment Clause. Congress extended this principle to secondary schools in the Equal Access Act, a law which the Supreme Court later upheld.[12]

Government property that does not fall into either of these two categories is a nonpublic forum. Here the government is allowed to engage in some content discrimination: it can favor some subject matters over others, but it cannot distinguish among viewpoints. For example, a city might decide to open public school gymnasiums in the evenings for basketball or Boy

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9. Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 108-09.

10. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

11. 454 U.S. 263, 267-70 (1981).

12. Board of Educ. v. Mergens, 496 U.S. 226 (1990). The Equal Access Act provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1994).

Scout meetings. It would not thereby be obliged to let religious groups meet. But suppose the city allowed the gym to be used for lectures about family issues and child-rearing, but not for lectures on those subjects from a religious perspective. That was the issue in *Lamb's Chapel v. Center Moriches Union Free School District*, which held that the school district had engaged in improper viewpoint discrimination.[13]

Notice that all three public forum rules embody a requirement of nondiscrimination—or as we say in speech cases, of content neutrality. Traditional and designated public forums forbid all kinds of content control. Nonpublic forums forbid viewpoint regulation, though not subject matter regulation. It is also settled that the Establishment Clause poses no obstacle to protecting religious speakers under these rules. Thus, ratification of the Hyde-Hatch Amendment would make little difference in this corner of the law.

I must qualify this conclusion in two ways. First, the amendment might forbid subject matter discrimination, now unlawful, in nonpublic forums open to the public for limited purposes. A school that opened its gym at night to adult groups for physical fitness might have to schedule time for religious groups to do Bible readings. This could be a bigger change than it appears to be. It would apply to a broad range of government property whose use is now restricted—jails, libraries, post offices, army bases, train stations, etc. It would also have some effects on government employees. Here are two examples: (1) The United Way (or the Combined Federal Campaign) is allowed into the workplace to solicit annual contributions from employees. A rule protecting religious groups against subject matter discrimination would allow them to solicit contributions in the workplace too.[14] (2) Government offices have internal mail systems—boxes, phones, e-mail, etc. If some people, (unions, say) are allowed to use these systems to communicate with employees, then maybe religious speakers would be entitled under the amendment to do so as a matter of right.[15] These are open questions because we cannot be sure at this point what the proposed amendment

13. 508 U.S. 384 (1993).
14. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985).
15. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

means by the phrase "discriminate . . . on account of religious expression."

The second qualification is this: the Free Speech rule about traditional public forums (enforced in *Pinette*) is in some tension with the Establishment Clause rule about holiday displays (made in *County of Allegheny v. ACLU*[16] and *Lynch v. Donnelly*[17]). *Pinette* held that it was constitutionally permissible to put up a privately owned religious symbol (a cross) near the Ohio statehouse. *Allegheny* held that it was constitutionally permissible to put a privately owned religious symbol (a menorah) near the city-county building, but not to put a different private symbol (a creche) in the county courthouse. The message is that there are at least some occasions when the no-establishment rule trumps the no-discrimination rule. Four members of the Court (led by Justice Scalia in *Pinette*) would not have it so. They would prefer a clear rule that private religious speech in a traditional public forum is protected by the Free Speech Clause and not forbidden by the Establishment Clause. Two members (Justices Stevens and Ginsburg) would apply just the opposite rule: the Establishment Clause requires a secular public order. The swing votes (led by Justice O'Connor) would engage in ad hoc balancing in these cases to determine whether there is an Establishment Clause violation.

The Hyde-Hatch Amendment sides with Justice Scalia in this debate. It is clear that private religious speech is treated worse in some of these cases than other kinds of private speech. The only justification offered for that difference is that the Establishment Clause requires different treatment. The Hyde-Hatch Amendment would make it clear that it does not. It says that a state cannot "discriminate against any private person or group on account of religious expression . . . ; nor shall the [Establishment Clause] be construed to require such discrimination."

C. Government Speech

Discussion in the popular press is often careless about distinguishing between student prayer and "school prayer," which are legally very different. Public school students have a constitutional right under existing law to pray in school. What they

16. 492 U.S. 573 (1989).
17. 465 U.S. 668 (1984).

sometimes lack is the opportunity. To remedy that deficiency, some states have passed laws requiring a moment of silence. These laws are constitutionally permissible if they are truly neutral. (They can make space; they cannot stimulate the activity.)[18]

On the other hand, school prayer—prayer composed or conducted by a public school—is unconstitutional. There is no free speech right at stake here because the First Amendment does not protect the government as speaker, and the Establishment Clause actively forbids it to engage in this kind of speech. That is the holding of the School Prayer Cases.[19] The Court has extended this principle, though only slightly, to cover the case where a school invites a minister or rabbi to offer a prayer, as schools often do at graduations.[20]

The Hyde-Hatch Amendment would not change this law. Its protection extends only to "private person[s]." It does nothing to increase the government's own authority to conduct religious services. The Istook Amendment, on the other hand, would work a change. It states: "Neither the United States nor any State shall *compose* any official prayer or *compel* joining in prayer."[21] It does not preclude school teachers from leading students in prayers composed by someone else. Indeed it suggests the contrary when it states that the Constitution does not "prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people." Here it refers to government acknowledgments, not private ones. It takes those up in the next phrase, which says that "student-sponsored prayer" is also permissible. If I read it right, the Hyde-Hatch Amendment would leave *Engel* (a case where New York composed its own school prayer) standing but would overturn *Schempp* (a case in which Pennsylvania had students read from the Bible and recite the Lord's Prayer).

I would make the same observations about the other kinds of government speech that are litigated in Establishment Clause cases, the rituals of American civil religion. Outside the public schools the courts have generally been willing to uphold them. These include such institutions as legislative chaplains, blue laws, religious place names (San Francisco) and mottos ("In God

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18. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

19. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

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

21. H.R.J. Res. 127, *supra* note 2 (emphasis added).

We Trust"), the display of religious artifacts owned by the government, and so on.[22] The Supreme Court has tended to side with the government in these cases, so there is not much work for the amendments to do. The exceptions are the cases coming from the public schools. For example, the Court has held that the government cannot have the Ten Commandments posted in classrooms or teach creation science alongside evolution.[23] The Hyde-Hatch Amendment would work no change in these cases because they involve government, not private, speech. The Istook Amendment would overturn them all. I think it is just this kind of observance Mr. Istook has in mind when he includes the phrase, "Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people."

D. Groups

So far I have discussed speech of by private individuals and by government actors. I want to conclude this section with a brief discussion of private *groups*. The Hyde-Hatch Amendment would prevent the government from "discriminat[ing] against any private . . . group on account of religious . . . belief, or identity." Here are a few examples of how this might happen. Suppose two factions of the local Orthodox Church are at war over whether to ordain women. If they decide they cannot live together they may (like the partners to a dissolving marriage) ask a court to divide their property. The court might award the church to the feminist faction because it finds that group's beliefs more enlightened than its rival's. Or consider a simpler version of the same problem. The Catholic Church is less ambivalent about the ordination of women—it cannot be done. Suppose Utah passes a law condemning this as employment discrimination. In each of these cases the losing religious group could claim that the government was discriminating against *it* because of its beliefs. Whether the Hyde-Hatch Amendment would change the

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22. Lynch v. Donnelly, 465 U.S. 668 (1984) (creche owned by city); Marsh v. Chambers, 463 U.S. 783 (1983) (chaplain); McGowan v. Maryland, 366 U.S. 420 (1961) (blue laws). *See generally* Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

23. Edwards v. Aguillard, 482 U.S. 578 (1987) (creation science); Stone v. Graham, 449 U.S. 39 (1980) (Ten Commandments).

law on this subject depends once again on what the proposed amendment means by "discriminate."

I can imagine three solutions to this problem, each nondiscriminatory, or neutral, in a different way. First, we might say that the government acts neutrally in siding with the feminists because it takes the same position when dealing with nonreligious groups. Churches are treated like the Rotary Club and United Airlines. This is the brand of neutrality approved by the Supreme Court in *Employment Division v. Smith*.[24] As Professor Douglas Laycock has pointed out, rules like this are neutral in the formal sense that they do not talk about religion. (Laws forbidding all people to sleep under bridges are formally neutral in this sense.) They are not neutral in their substantive effect on religious observance. If our objective is to minimize the extent to which the law affects people's religious practices, the neutral solution is to leave both groups alone.

I doubt, though, that *Smith* governs these cases. *Smith* itself made an exception for intra-church "controversies over religious authority or dogma."[25] Even if it had not, the Religious Freedom Restoration Act would have reinstated prior law on this subject.[26] Under that law there are two ways of leaving religious groups alone. One is to leave religious disputes up to church authorities. (Call this the rule of deference.) If the Orthodox Synod of Bishops rules that the traditionalists should have the property, that is the end of it. The other way is to let courts settle disputes by applying the usual rules of property, trust, and contract law to documents like the deed to the church, the church's corporate charter, etc. (The Court calls this the "neutral principles" rule.[27]) If the deed favors the feminist faction, the court can side with them and against the church hierarchy. Although the government here is taking sides, the rule is neutral in the sense that the parties are free to arrange any solution they like, so long as they write it down before the dispute arises. Current law allows a state to use either the rule of deference or the rule of neutral principles. I have argued that the latter actually favors a particular form of religious organization, by employing a default

24. 494 U.S. 872 (1990).
25. *Id.* at 877.
26. 42 U.S.C. § 2000bb (1994).
27. Jones v. Wolf, 443 U.S. 595 (1979).

rule that undermines church hierarchies.[28] But I doubt that the Hyde-Hatch Amendment is designed to change existing law on this point. Whether it does so inadvertently depends again on how we interpret the term "discriminate."

II. EQUAL BENEFITS

A. The Trend Toward Neutrality

We are accustomed by our casebooks to think that *Lemon v. Kurtzman*[29] laid down an omnibus rule useful for solving all kinds of Establishment Clause problems. In fact the rule was formulated in a case about parochial school aid, and it is doubtful that it ever made much sense outside that context. Indeed I doubt that it was coherent within that context. Be that as it may, there is a discernible trend in aid cases away from *Lemon* and toward a rule of neutrality. The stronger this trend is, the less effect the Hyde-Hatch Amendment will have on the law in this area. Let me review briefly two steps on the path toward neutrality. The first was taken by cases holding that neutrality is a *permissible* solution to aid problems. The second, taken in *Rosenberger v. Rector & Visitors of the University of Virginia* last term, holds that neutrality may occasionally be *required*.[30]

The idea that the government might give benefits to religious groups so long as it acted in a neutral fashion is first discernible in tax cases. *Walz v. Tax Commission of New York*[31] held that the government could give property tax exemptions to religious organizations, so long as they were included in a larger class of nonprofit corporations. Although a large class of beneficiaries seems to make the law neutral in the sense that it is religion-blind, just as a college scholarship program for economically disadvantaged students is colorblind, that is not what the Court had in mind. The tax law explicitly mentioned property used for "*religious*, educational or charitable purposes,"[32] so we cannot pretend that the state just paid no attention to religion. What the Court really had in mind was what Professor Laycock calls

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28. John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567 (1990).

29. 403 U.S. 602 (1971).

30. 115 S. Ct. 2510 (1995).

31. 397 U.S. 664 (1970).

32. *Id.* at 666-67 (emphasis added).

substantive, rather than formal, neutrality—an attempt to minimize government influence one way or the other on people's religious belief or practice.[33] The Court explains that it must walk a "tight rope" between establishing religion and restricting religious freedom.[34] Tax exemptions are a form of aid, but so too are taxes a form of constraint.

The *Walz* neutrality principle was extended to school aid in *Mueller v. Allen* in 1983.[35] In that case the state allowed tax deductions for certain school expenses—tuition, transportation, and textbooks. The Court stressed two features that made this a neutral tax break. First, this was just "one among many deductions"—there were others for medical expenses and charitable contributions.[36] Second, the deduction was "available for educational expenses incurred by all parents," no matter whether their children were in public or private school.[37] Unlike the law in *Walz*, this one was formally neutral (it did not mention religion), and the Court seemed to stress that view of neutrality in upholding it.

Three years later in *Witters v. Washington Department of Services for the Blind*, the Court upheld an outright grant of education assistance to a student attending a Bible school under a state law designed to aid the visually handicapped.[38] *Witters* returned to the more sensible neutrality theory of *Walz*. It stressed the fact that the state made funds available to all blind people, and that the choice to apply the funds toward religious education lay with the recipient. The law, the court said, "creates no financial incentive for students to undertake sectarian education."[39]

Up to this point the Court had only allowed the government (sometimes) to enact neutral aid programs,[40] but it had never required the government to do so. In fact, the State of Washing-

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33. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-06 (1990).

34. *Walz*, 397 U.S. at 672.

35. 463 U.S. 388 (1983).

36. *Id.* at 396.

37. *Id.* at 397.

38. 474 U.S. 481 (1986).

39. *Id.* at 488.

40. Additional evidence on the same point is provided in Bowen v. Kendrick, 487 U.S. 589 (1988), which allowed grants under the Adolescent Family Life Act to religious (and other) organizations that gave teenagers counseling and education about sex and pregnancy.

ton, on remand in *Witters,* declined for reasons of state law to give money to blind students at Bible schools. Last term, however, the Court held in *Rosenberger* that the government was sometimes required to give financial aid to religious students if it gave aid to similarly situated nonreligious students.[41] *Rosenberger* is a case about speech, so I do not want to overstate its importance for school aid generally. The Court held that if Virginia was going to pay student fees for the printing of student publications, it could not exclude a publication that took a Christian point of view. The Establishment Clause permitted and the Free Speech Clause required the school to distribute aid in a way that was viewpoint neutral. Consider this analogy: suppose that instead of paying a printer to publish student work, Virginia had set up its own laser printer and allowed student organizations to use it. The two cases are hard to distinguish, but the hypothetical resembles *Lamb's Chapel v. Center Moriches Union Free School District,*[42] where the government allowed some viewpoints but not others to be heard in a nonpublic forum.

I do not want to overstate the trend toward a rule of neutrality. I will qualify it in the next section. But I think there is an observable tendency outside the area of parochial school aid to uphold laws that distribute benefits in a way that is substantively neutral, i.e., that moves the needle as little as possible toward or away from religion. Where this rule is applied, the Hyde-Hatch Amendment will not do much to change existing law.

B. Parochial School Aid

I wish I could say that the whole corpus of law about benefits was being ironed out in this way, but that would be wishful thinking. It is still probably true that the government may not pay tuition for parochial school students, though it pays tuition for public school students,[43] nor may it pay the salaries of parochial school teachers—even teachers of secular subjects—though

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41. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2523 (1995).

42. 508 U.S. 384 (1993).

43. Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

it pays the salaries of public school teachers.[44] These rules are a residue of the *Lemon* test, which exalted separation above neutrality as the key to interpreting the Establishment Clause. These rules maintain that the government should not fund programs that will inevitably be used to defray the costs of religious activities.[45] (In the case of teachers of secular subjects, the Court adds the plausible assumption that religion pervades the curriculum in parochial schools.)

These rules are still standing, but they are deteriorating. The separationist principle at the heart of *Lemon* is at odds with the Court's more recent jurisprudence about benefits. School aid—even tuition grants—is defensible under almost any version of neutrality. A voucher program, or a program that paid the salaries of all math teachers, would be formally neutral in the sense that it need not mention religion. Neither would undermine the principle that the government should not pay for religion because (to use Jesse Choper's phrase) the government gets "full secular value for its money."[46] Both programs would be substantively neutral in the sense that they would not influence the direction of people's religious choices. In this regard both are more neutral than the current system, in which the government (by offering free secular education) makes religion a relatively less attractive option than it would otherwise be. As a doctrinal matter I would argue that *Witters* settles the constitutionality of vouchers.

So *Lemon* is decayed at the core, though the Court has not yet admitted it. It is also peeling away at the edges, and this is something the Court has acknowledged. I have in mind not the big things like tuition and salaries but the little things like therapeutic services, counseling, and remedial instruction. The rule has been that the government cannot provide these services on parochial school premises.[47] This was the farthest reach of the *Lemon* doctrine, resting as it did on some highly implausible assumptions about how the government's aid provides collateral support to religious activities. But in *Zobrest v. Catalina Foot-*

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44. Lemon v. Kurtzman, 403 U.S. 602 (1971).

45. For a more detailed explanation of how this principle is worked out, see John H. Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61.

46. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 177 (1995).

47. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975).

hills School District,[48] the Court allowed the government to provide a sign-language interpreter for a student at a Catholic high school, even in religion classes and at mass. The program, the Court said, was constitutional because it provided benefits in a neutral way to all handicapped children. This meant that the government exerted no influence on the choice to attend public or parochial school; that was left to the parents. Though the Court purported to distinguish the earlier cases about on-premises services,[49] I think they are inconsistent with a faithful application of the neutrality principle.

Given the unsettled state of the law here, this is an area where the Hyde-Hatch Amendment would likely have an impact. To begin with the most obvious point, the second clause of the amendment states that the Establishment Clause shall not be "construed to require" discrimination against religious groups in the apportionment of benefits. This pretty clearly means that *Lemon* is out and *Mueller*, *Witters*, and *Zobrest* are in. Thus, it ought to be *permissible* under the proposed amendment to give neutral aid to parochial schools.

The first clause of the amendment may say more than that. It declares that the government "shall [not] deny benefits" to religious groups on account of their "expression, belief, or identity." This seems to mean that aid to parochial schools is *required* if the government is going to give aid to other schools.

There is another possible reading, however. One could plausibly argue that when the government funds public but not parochial education, it does so not on account of the latter's religious nature but for unrelated reasons. Some say, for example, that we should pay for public schools because they are more economically and racially diverse than private schools, and thus prepare students better for citizenship in a heterogeneous society.[50] I doubt the factual premise of this argument. But if we assume that it is correct, it is fair to say that parochial schools are not left off the gravy train on account of their religious character. This does not affect my first point, that under the Hyde-Hatch Amendment aid

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48. 509 U.S. 1 (1993).

49. *Id.* at 11-13.

50. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1013 (1991).

should be *permissible*. It only undermines the argument that aid is *required*.

III. IS EQUALITY DESIRABLE?

I have already considered the effect the proposed amendment would have on current doctrine. I will close by considering a broader question. The First Amendment already gives us a guarantee of religious freedom. Do we need a new guarantee of religious equality?

In one respect, religious equality is a more modest ambition than religious freedom. In *Employment Division v. Smith* the Supreme Court held that the Free Exercise Clause did not protect religious actors against "neutral, generally applicable . . . law[s]."[51] This was a departure from the old doctrine, which Congress quickly moved to reinstate in the Religious Freedom Restoration Act ("RFRA").[52] According to the old doctrine, religious freedom exempted people from neutral, generally applicable laws which truly burdened religious practice, unless the government had a compelling reason to insist on conformity.[53] This was the reading of the First Amendment favored by the supporters of religious rights six years ago.

There is an apparent inconsistency between that argument for freedom and the current argument for equality. Supporters of RFRA object to neutral laws and ask for special treatment; supporters of the Hyde-Hatch Amendment want neutral laws and equal treatment. But at a deeper level both may be pursuing the same objective. A rule cannot be formally neutral if it makes an exemption for religious actors, but it may be substantively neutral if it is the best way to minimize the law's effect on people's religious choices. For example, a law forbidding the consumption of wine, though it is formally neutral, criminalizes the performance of certain important religious rituals. This is a powerful force against religion. An exemption for wine drunk in religious ceremonies is not formally neutral, but it is not a very strong force pulling people toward religion. As Professor Laycock says, only a law professor or an economist would argue that "the pros-

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51. 494 U.S. 872, 881 (1990).

52. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

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

pect of a tiny nip would encourage some desperate folks to join a church that uses real wine."[54] It may be, then, that freedom and equality are not inconsistent claims but are actually tied together. Real freedom means substantive neutrality, or treating all choices equally.

I now want to consider the point at a still deeper level. The idea that we should treat all choices equally is what I might call the standard liberal account of freedom. In this account, freedom is a bilateral right: if we are free to do x, we are also and necessarily free not to do x. The freedom of speech lets us say what we want. It also lets us remain silent—it protects the right not to salute the flag,[55] not to display government slogans,[56] and not to support causes we dislike.[57] Freedom of the press works the same way—it protects the right not to publish opposing points of view.[58] Reproductive freedom allows us to have children—it protects us against compulsory sterilization and limits (like the Chinese have) on the number of offspring we may have. But it also, and more prominently, is said to guarantee the right not to have children—to prevent their conception in the first instance and, failing that, to abort them.[59] Liberals take the same view of religious freedom. It obviously protects my right to worship God according to the dictates of my own conscience. But it has also been used to protect atheists and agnostics, not just believers: a state cannot require officeholders to declare that they believe in God.[60]

Liberal theory offers a number of reasons why freedoms should have this bilateral character. One is political; it helps to keep the peace if the Constitution shows equal respect for people on both sides of hot issues. This neutralizes claims of favoritism and feelings of envy and resentment. By refusing to play favorites, the government signals culturally ascendent groups that

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54. Laycock, *supra* note 33, at 1003.

55. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

56. Wooley v. Maynard, 430 U.S. 705 (1977).

57. Hurlay v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338 (1995); Keller v. State Bar, 496 U.S. 1 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

58. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

59. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

60. Torcaso v. Watkins, 367 U.S. 488 (1961); *cf.* Welsh v. United States, 398 U.S. 333 (1970) (protecting the right of a conscientious objector to object on nonreligious grounds).

they cannot hope for domination. Accomplishing this ambition would be no small thing. Hobbes says that "the first, and fundamental law of nature . . . is, *to seek peace, and follow it.*"[61]

A second argument for the bilateral character of freedoms in liberal theory is moral rather than political. It says that the government should not interfere with the choices we make because it is good for us to live autonomous lives. To be autonomous is to make rules for oneself. This is not possible if the government can prescribe what is orthodox in religion, politics, or family planning.

There are still other justifications that we might consider,[62] but I think I have said enough to show that there is, in liberal theory, a deep connection between freedom and equality. The conventional right to freedom is, as John Rawls says, a right to equal freedom.[63] And reasons like the ones I have mentioned help to explain the appeal of Professor Laycock's principle of substantive neutrality. The government should not make laws that affect the outcome of our religious choices; or if that is impossible, it should make laws that affect our choices as little as possible. By following this injunction the government shows respect for our autonomy and helps us to live together in peace.

This is an appealing picture. It seems to assemble all the pieces in a coherent way, show the direction the Supreme Court is heading, and be fair and open-minded while still giving a good deal of protection to religious liberty. Nevertheless, it has real problems. The idea of equality or neutrality as a rule of thumb is useful for solving many First Amendment problems, but it is nothing more than that. It is not a fundamental value that precedes, encompasses, or explains religious activity. Rather, insofar as neutrality makes sense in this context, it *follows* from our religious commitments and serves them.

The most obvious problem with the ideal of neutrality is that it is not neutral all the way down. As Steven Smith has observed, behind Professor Laycock's vision of neutrality lie "a set of controversial beliefs about the nature and value of religion,

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61. THOMAS HOBBES, LEVIATHAN 85 (Michael Oakeshott ed., Basil Blackwell 1947) (1651).

62. I discuss these issues at some length in my forthcoming book: JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (forthcoming Fall 1996).

63. JOHN RAWLS, A THEORY OF JUSTICE ch. 4 (1971).

the proper function of government, and human psychology."[64] These

> include the premises (a) that religious beliefs and practices are valuable and deserving of greater respect than many other kinds of beliefs and practices toward which governmental "neutrality" is *not* required (b) but only if religious beliefs and practices are voluntarily chosen—in a very strong (and somewhat underspecified) sense of "voluntariness."[65]

A really neutral theory would require that the government show equal respect for all our choices, so that we could be completely autonomous. Of course this would cover choices for and against religion, but it would give the same kind of consideration to choices about automobile design, bass fishing, and lawn care. The Bill of Rights is silent about those activities, and proponents of neutrality are understandably reluctant to extend their theory that far. In order to explain why the government must be neutral about religion and not lawn care, however, we must suppose that there is something special about religion.

It is easy to imagine what that something might be. The people most responsible for adding the guarantee of religious freedom to the Constitution wanted it because they thought that serving God was the most important thing they did—much more important than fishing or lawn care.[66] For them the real point of religious freedom was to protect actions rather than choices. The focus was on doing, not choosing. The First Amendment is not part of an integrated system for promoting human autonomy. It protects certain kinds of activities because those are especially good things to do.

This seems a bit naive[67] and old-fashioned. It is also inconsistent with the liberal assumption that freedoms are bilateral. If religion is a good thing, blasphemy is not. We ought to protect one and stamp out the other. It seems to follow from my argument that neutrality is a pact with the devil. The government

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64. STEVEN D. SMITH, FOREORDAINED FAILURE 81 (1995).

65. *Id.*

66. I have in mind the evangelical supporters of the First Amendment, whose role Professor McConnell describes in Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

67. The word is Michael Sandel's. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

should discriminate in favor of religion and against the alternatives. Shouldn't it?

Not exactly. I argue that the First Amendment is concerned with doing, not choosing, but I also think that (1) the doing must be voluntary, and (2) we have a certain range of action. Let me begin with the first of these qualifications—that religious actions must be done voluntarily. This is not just a restatement of the liberal argument that we must be left free to make choices. The goal of the liberal approach is to foster individual autonomy, because "autonomy . . . [is] the best thing that there is."[68] I maintain instead that actions must be voluntary in order to be religiously efficacious. The need to make choices thus follows from the goodness of religion, rather than the other way around. Locke makes this point in his *Letter Concerning Toleration*: "[T]rue and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force."[69] Or to take a more modern statement, consider the observation of the Second Vatican Council: "God willed that man should be 'left in the hand of his own counsel,' so that he might of his own accord seek his Creator and freely attain his full and blessed perfection by cleaving to him."[70]

The doctrinal implications of this point are familiar and comfortable. It follows from the goodness of religious practice that the government may not regulate religious expression because of its content.[71] And it follows from the qualification that practice must be voluntary that the government may also not compel religious expression. *Torcaso v. Watkins* is right: the state should not require officeholders to believe in God.[72] The School Prayer Cases are also right: the state should not make children pray.[73]

Let me turn now to my second qualification—that our freedom protects a certain range of action. I have said that I dispute

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68. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 368 (1980).

69. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 129 (J.W. Gough ed., MacMillan Co. 1956) (1690).

70. GAUDIUM ET SPES 17 (quoting *Sirach* 15:14).

71. *See supra* parts I.A-B.

72. *See* 367 U.S. 488 (1961); *see also supra* text accompanying note 60.

73. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); *see also supra* text accompanying notes 19-20.

the liberal assumption that freedoms are necessarily bilateral, like a two-way street on which people must be allowed to travel east or west. I think religious freedom protects the right to religiously motivated actions because they are inherently good. The point of freedom is to let us travel in just one direction (west, let us say). Still, there are a lot of ways to go west from here. This is what I mean by a range of action. This qualification too has fairly familiar doctrinal implications. It explains why, though eastward travel is not an activity we value highly, the government should be careful about regulating it, lest it obstruct the meanderings of people taking a circuitous route west. Take, for example, laws against blasphemy. I would not say, as liberal theory might, that blasphemy and prayer are equally eligible choices. But I would oppose the regulation of blasphemy, because it could be a stop on somebody's route west. Deifying Jesus will offend Jews and criticizing Muhammad will anger Muslims, yet Christians may do these things in their efforts to find God.

In all these examples, my anti-liberal theory of freedom produces results basically similar to the results of liberal theory (though I would say that it gives more convincing reasons for them). It lets people act voluntarily and gives them room to maneuver. But what about the case of benefits (which I consider above[74])? Benefits do not inhibit voluntary action nor limit our room to maneuver, so they present a different kind of problem.

Here too a rule of neutrality works fairly well. It would be bizarre to hold that the government could discriminate *against* religion in handing out benefits. Such a holding might not limit religious freedom, but it would hurt the cause of religion; and my theory begins with the assumption that religion is a good thing. It would be perverse to run a program designed to discourage people from doing a good thing. *Rosenberger* reaches the right conclusion about this. As for parochial school funding, I hesitate to say that the Constitution requires aid. As I noted above,[75] the government might withhold aid not because it wished to discourage religious practice, but because it wished to encourage some other good which, it claimed, only public schools could provide. This would be permissible. Governments often have to make hard choices about where to spend money—on NASA or funding

74. *See supra* part II.
75. *See supra* part II.B.

for the arts—and it is not perverse to favor one over the other. By the same token, it is always an option to give some to everyone. This is the situation with parochial school funding. Though it may not be required, it is certainly permissible.

The Constitution allows equal benefits (a rule of neutrality). Might it allow more? If the government can lean either way in funding good things, might it discriminate *in favor of* religion? Might it, for example, prefer parochial schools over other schools because they teach religion, and religion is good for kids? Might it not sponsor churches on the same theory? My theory is in real trouble if the answer is yes. This was, after all, what Patrick Henry proposed in his Bill Establishing a Provision for Teachers of the Christian Religion, and its defeat figures prominently in the history of our own Establishment Clause. But we must not forget that it was chiefly a religious coalition that defeated Henry's Bill, and that there are compelling religious reasons for rejecting government patronage. Madison offers several in his *Memorial and Remonstrance*.[76] First, government patronage will make government the judge of religious truth, as government sponsorship of the arts makes it the judge of beauty. That is a very bad thing from a religious point of view, because there is no reason to think that government officials know or care more about religious truth than the rest of us. Indeed there is reason to fear that they care less. They are especially subject to the temptation, as Madison said, to "employ Religion as an engine of Civil policy."[77] The Secretary of Education, for example, would naturally prefer to fund parochial schools that teach the kind of religion most compatible with his ideal of citizenship. I do not trust the Secretary of Education to be a faithful guide to finding God. I prefer the guidance of revelation, tradition, grace, and religious authority.[78]

Second, we may lose interest in our own religious affairs if we turn over to the government the job of supporting them. I

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76. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS paras. 5-7 (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 301 (Robert A. Rutland & William M.E. Rachal eds., 1973).

77. *Id.* para. 5.

78. This is an argument that applies not just to funding, *see supra* part II, but also to some kinds of government speech, *see supra* part I.C. I do not want the Secretary of Education composing prayers even if children are excused from saying them, because I have no special faith in the Secretary's wisdom or holiness. (Of course, I have in mind the ideal type. I do not mean to cast aspersions on the incumbent.)

send my children to Catholic schools, and I periodically serve on boards and committees concerned with the religious curriculum. Participants in these discussions, especially teachers, often lament that parents want to turn over to the school the entire job of religious formation. Parents seem to forget, teachers say, that they are themselves primarily responsible for educating their children in the faith.[79] Madison makes this kind of claim about aid to religion: "During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."[80] Thus a rule of neutrality in regard to benefits may also be desirable from a religious point of view. The government should not discriminate either against or in favor of religion.

Let me add one final point on this subject before passing on to my last observation. What I have just said about the dangers of government patronage could be turned into an argument against even neutral support for religion. Might not evenhanded financial support lead to heresy and indolence as easily as favoritism would? I confess to certain misgivings on this point. The problem has not arisen to date in school aid cases because the programs always give the state "full secular value for its money."[81] The government never pays for religious instruction; it pays for subjects taught in public schools or books, equipment, and other services offered there. So the issue of heresy, or government deciding questions of religious truth, does not arise. As to indolence, the government does help religious groups with their fundraising when it pays them for providing education or social services. These are costs they would have to cover in any event, so public aid frees up money for other uses and enlarges the group's budget. But why use as our standard the budget the group would have in a world where everything was the same except for this grant program? In a world where there were no school taxes at all, parents would have a lot more money to spend on religious education. Maybe more of them would do so.

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79. I sometimes think that the Social Security system has had a similar side effect; it has made us forget our own role in caring for the aged.

80. MADISON, *supra* note 76, para. 7.

81. CHOPER, *supra* note 46, at 177; *see also supra* text accompanying note 46.

In that case too, religious groups would be richer. It may be that equal funding more closely approximates the state of affairs where people most earnestly support religion than any of the alternatives.

Now for my last word. The anti-liberal theory of freedom is fairly well served by rules of neutrality in cases involving religious expression, government speech, and benefits. I would not say this about the problem of exemptions. *Employment Division v. Smith* held that religious actors have to obey "neutral, generally applicable . . . law[s]" just like everyone else.[82] My theory provides a very straightforward reason for treating them differently: they are doing a good thing and the government should not interfere with them. This is why the Constitution guarantees religious freedom. Recall that liberal theory has a hard time explaining why we should exempt people who were making religious choices, but not people who were pursuing other kinds of personal interests. Since all choices are equal in the eyes of the law, we should not show special consideration to one set. My theory does not face this conflict. It argues that the point of the First Amendment is to promote the good of religion, and we should use whatever rule—neutrality or freedom—best serves that purpose.

82. 494 U.S. 872, 880 (1990).