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Articles

The Political Marketplace of Religion

CALVIN MASSEY*

INTRODUCTION

Fashions in constitutional law, like hemlines, rise and fall. One such fashion is the degree to which courts should defer to legislative judgments concerning religion in public life. There may be many reasons why the Religion Clauses seem to be particularly prone to the whims of constitutional fashion; indeed, the vast panoply of legal writing dissecting the doctrinal nuances of the Religion Clauses—a corpus that combines an enormous range of perspectives with a depth approaching that of the Marianas Trench—suggests that doctrinal analysis is slippery, treacherous, and ultimately unlikely to produce a satisfactory answer.¹ Some commentators suggest that a “political perspective,”² which analyzes “Establishment Clause decisions as if they were products of political contests among various interest groups, both religious and secular, with competing positions on the proper relation of church and state,”³ is preferable in that it “yields an explanatory and predictive account of Establishment Clause jurisprudence that is useful and informative.”⁴ Others offer metaphysical explanations of the jurisprudence of the Religion Clauses. Professor Frederick Mark Gedicks, for example, argues that the Religion Clauses doctrine, at least until the 1980s, was a product of Enlightenment modernity, and that with the replacement of modernity by post-modern skepticism of any account of truth, the Religion Clauses doctrine has assumed a new shape, one

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1. The literature is so voluminous that a complete summary would constitute a bibliography that would consume the paper. A useful and reasonably comprehensive bibliography of commentary and source materials germane to the Religion Clauses may be found in MICHAEL MCCONNELL, JOHN GARVEY & THOMAS BERG, *RELIGION AND THE CONSTITUTION* 917 (2002).

2. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 280 (2001).

3. *Id.*

4. *Id.* at 284.

focused more on preventing discrimination against religion or among religions rather than preserving separation of the secular and religious domains.⁵ Each of the political and metaphysical perspectives is useful and informative, but neither provides a complete account of the variable deference that the Supreme Court has paid to legislative judgments about the proper boundary between church and state.

I accept the validity of the metaphysical and political perspectives as relevant explanations of the underlying popular dynamic that has contributed to shifting judicial views of the force of the Religion Clauses, but I seek to go further. In this Article, I set forth a description of four doctrinal patterns that account for the total range of variance that can be observed in the Court's jurisprudence of the Religion Clauses; I identify the pattern in current fashion; I engage in a normative inquiry as to whether that pattern is either workable constitutional law or desirable public policy. Finally, I conclude with some predictions about the future shape of doctrine governing the Religion Clauses. In doing so, I discuss the forces—whether metaphysical, political, or cultural—that have influenced the creation and development of these patterns, and offer some predictions and prescriptions for future doctrine in light of these forces.

Part I identifies and discusses the four patterns behind the Court's jurisprudence of the Religion Clauses. Each describes an outcome in which the field of permissible legislative action to accommodate or restrict the role of religion in public life is significantly different from that in any of the other three outcomes. Part I also suggests that the currently fashionable outcome is what I call the "legislative primacy" pattern and offers some thoughts about the reasons for its ascendance. Part II addresses the questions of whether legislative primacy is either workable law or socially desirable, by identifying the implications of legislative primacy. Part II suggests that the legislative primacy pattern, at least in its present form, has a self-constraining quality seen in the Court's commitment to striking down public aid that prefers religion to secularism, or aid that prefers some sects over others. If that constraint should be jettisoned, however, more troubling implications and answers emerge.

I. THE FOUR PATTERNS OF THE RELIGION CLAUSES

A recurring, central problem presented by the Religion Clauses is the inherent tension between them. This is not fresh news; nevertheless, the problem loses none of its punch by virtue of its familiarity. While the Religion Clauses may be harmonized at a high level of generality—both

5. Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197 (2005) [hereinafter *Spirituality and Fundamentalism*].

concern preservation of religious liberty by creating separate spheres for government and religion—the harmony dissipates almost as soon as the task of application begins. For once the constitutional rubber hits the religious road, it becomes apparent that some accommodations of religion that facilitate its free exercise may offend the prohibition against governmental establishments of religion, and that some measures taken to prevent prohibited establishments might offend the guarantee of free exercise of religion.⁶

Constitutional law seeks to mediate this tension through familiar devices that chart the boundaries of the free exercise guarantee and the prohibition of religious establishments. *Any* doctrine that seeks to mediate the tension between the Religion Clauses, however, will result in one of four outcomes. Each of those outcomes will leave legislatures with a different field of action and oblige judges to act upon a separate domain.

First, judges can interpret the Free Exercise Clause generously by mandating governmental accommodation of religious conduct and simultaneously police the Establishment Clause vigorously by restricting the ability of governments to accommodate or aid religion. Such doctrine will leave to legislatures a relatively small zone of permitted action, whether to foster free exercise or to accommodate religious institutions. For the sake of discussion, I call this the “judicial primacy” outcome, and it is schematically depicted in Figure 1.

Second, the judiciary can interpret the free exercise guarantee narrowly by imposing on governments very few required accommodations of religious conduct and, at the same time, enforce the Establishment Clause prohibition lackadaisically by prohibiting very few governmental accommodations of or assistance to religion. This doctrinal result leaves to legislatures a large range of permitted action, whether to promote free exercise of religious belief or to accommodate religion. This is the “legislative primacy” outcome, depicted in Figure 2.

6. This is not the only possible manner in which to express the relationship between the Establishment and Free Exercise Clauses. Other possibilities include the following: (1) The clauses say the same thing in different locations; (2) The Establishment Clause only applies to government action that benefits religion and the Free Exercise Clause only applies to government action that burdens religion; (3) The Free Exercise Clause protects religious belief from government action that coerces expressions of belief or non-belief and the Establishment Clause protects the secular governance process from undue religious interference. *McCONNELL ET AL.*, *supra* note 1, at 3. The first possibility is belied by the case law; the second may be true but hides the tension implicit in identifying and separating benefits from burdens; and the third may also be true but operates as a method of mediating the tension between the two clauses. As seen by the discussion that accompanies notes 65–40, I view this final possibility as a variant of the legislative primacy pattern, though it could be subsumed under the judicial secularism pattern if courts invalidated most governmental extensions of benefits to religion as impermissible establishments of religion. See *infra* text accompanying notes 141–60.

Third, judicial doctrine can generally decline to require governments to accommodate religious conduct in the name of free exercise and simultaneously enforce the establishment prohibition robustly through a broad denial of governmental power to accommodate religion. This pattern will leave to legislatures limited freedom to assist religious exercise because any such legislative initiatives must occur only within the shadow of broad judicially created limits on government action in the name of enforcing the limits of the Establishment Clause. This is the “judicial secularism” outcome, which is represented in Figure 3.

Finally, the courts can aggressively require governments to accommodate religious conduct in order to facilitate free exercise and simultaneously permit governments broad latitude to accommodate or assist religion without running afoul of the Establishment Clause. Strict enforcement of the free exercise guarantee coupled with lax enforcement of the establishment prohibition will leave to legislatures considerable freedom to accommodate and aid religion, especially because the occasions for conflict between the requirements of Free Exercise and the limits of non-Establishment will be rare. This is the “judicial accommodation of religion” outcome set forth in Figure 4.

Each of these outcomes can be depicted graphically, as follows.

Figure 1: Judicial Primacy

Establishment		Free Exercise
Forbidden Accommodations	Permissible Accommodations	Required Accommodations

Figure 2: Legislative Primacy

Establishment		Free Exercise
Forbidden Accommodations	Permissible Accommodations	Required Accommodations

Figure 3: Judicial Secularism

Establishment		Free Exercise
Forbidden Accommodations	Permissible Accommodations	Required Accommodations

Figure 4: Judicial Accommodation of Religion

Establishment		Free Exercise
Forbidden Accommodations	Permissible Accommodations	Required Accommodations

A few preliminary comments on this taxonomy may be helpful. There is nothing rigid about these patterns. At some point, any given pattern can slide into one of the others by adjustments in doctrine that focus on one of the two poles. Moreover, even if the general outline of doctrine indicates an embrace of one of the patterns, there are likely to be some issues on which the doctrine is inconsistent with the overall pattern. This does not destroy the utility of the pattern taxonomy; it does suggest that the patterns are useful devices to capture the broad picture of the jurisprudence of the Religion Clauses. The following observations must be taken with these caveats in mind.

Judicial primacy, represented by Figure 1, was the position of the Supreme Court, roughly speaking, in the era of *Everson v. Board of Education*,⁷ *Engel v. Vitale*,⁸ *Abington School District v. Schempp*,⁹ and *Sherbert v. Verner*.¹⁰ More precisely, while the position of the Court vacillated during that era, judicial primacy emerges as the clear result after combining the views of the *Everson* dissenters (who agreed with the *Everson* majority as to the principles governing Establishment Clause claims, but disagreed as to the application of those principles to the facts in the case) and the Court's majority in *Engel*, *Schempp*, and *Sherbert*. It is my contention that Figure 2, legislative primacy, reflects the position of the Court today, following such cases as *Employment Division v. Smith*,¹¹ *Agostini v. Felton*,¹² *Mitchell v. Helms*,¹³ *Zelman v. Simmons-Harris*,¹⁴ and *Locke v. Davey*.¹⁵ The judicial secularism model depicted in Figure 3 has existed mostly in the minds of commentators. It is perhaps best captured by Philip Kurland's 1961 article, "Of Church and State and the Supreme Court,"¹⁶ in which he argued that the two Religion Clauses "should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit

7. 330 U.S. 1, 18 (1947). One might argue that the result of *Everson* belied its rhetoric, which was certainly the position of the dissenters.

8. 370 U.S. 421, 425 (1962).

9. 374 U.S. 203, 222 (1963).

10. 374 U.S. 398, 409 (1963).

11. 494 U.S. 872, 879 (1990).

12. 521 U.S. 203, 234 (1997).

13. 530 U.S. 793, 801 (2000).

14. 536 U.S. 639, 644 (2002).

15. 540 U.S. 712, 720-21 (2004).

16. Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

classification in terms of religion either to confer a benefit or to impose a burden.”¹⁷ Figure 4, the judicial accommodation of religion pattern, has also never existed in the collective judicial mind of the Supreme Court, but has managed to capture some individual legal minds. Perhaps the most well-known advocate of this model is Professor and Judge Michael McConnell, who argues that a principle of equality should mediate the Establishment and Free Exercise Clauses. As applied, McConnell’s equality principle would limit governmental assistance to religion by forbidding only preferential treatment of religion or of any particular sect; furthermore, in order to deliver on the promise of the free exercise guarantee, the principle would require governments to accommodate religious conduct, because the failure to do so would impose special and unequal burdens upon religion.¹⁸

A. JUDICIAL PRIMACY

The judicial primacy pattern stems from twin propositions. With respect to the Free Exercise Clause, proponents of judicial primacy contend that the clause protects not only religious belief itself but also some conduct that represents the manifestation of religious belief.¹⁹ With respect to the Establishment Clause, advocates of judicial primacy assert that it would be inconsistent with the non-Establishment principle to allow governments to use religion as a basis to confer special benefits upon religion or religious believers.²⁰ The Free Exercise Clause

17. *Id.*

18. See, e.g., Michael McConnell, *Equal Treatment and Religious Discrimination*, in *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* (Stephen V. Monsma & J. Christopher Soper eds., 1998); Michael McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639; Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia’s Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819 (1998); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681 (2001).

19. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402–04 (1963) (The Free Exercise Clause prohibits “any governmental regulation of religious beliefs as such” and governmental imposition of burdens upon “the practice of . . . religion,” unless the government justifies such burdens as necessary to accomplish a compelling government objective. (emphasis added)).

20. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 725 (1981) (Rehnquist, J., dissenting) (“[T]he Establishment Clause bespeaks a ‘government . . . stripped of all power . . . to support, or otherwise to assist any or all religions . . .’” (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947))). See also *Abington School District v. Schempp*, in which the Supreme Court reaffirmed its commitment to the proposition that the Establishment Clause “comprehensively forbid[s] every form of public aid or support for religion.” 374 U.S. 203, 217 (1963) (quoting *Everson*, 330 U.S. at 32 (Rutledge, J., dissenting)); see also *McCullum v. Bd. of Educ.*, 333 U.S. 203, 232 (1948) (Frankfurter, J. concurring) (“We renew our conviction that ‘we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.’” (quoting *Everson*, 330 U.S. at 59)).

proposition is partly founded upon a reading of the historical record²¹ and partly upon notions of equality.²² Similarly, the Establishment Clause proposition is grounded in history²³ and in practical considerations of separating secular life from religious life.

Sherbert v. Verner presents the exemplar of the Free Exercise half of the judicial primacy pattern.²⁴ South Carolina denied unemployment benefits to Sherbert because she refused to “accept available suitable work” when offered to her.²⁵ Sherbert refused to accept jobs that entailed working on Saturdays because the tenets of her Seventh Day Adventist faith forbade such labor. Because South Carolina’s law worked to “impede the observance of . . . religion[,]”²⁶ the Court found it “clear” that the law imposed “a burden on the free exercise of [Sherbert’s] religion.”²⁷ Such a burden could be justified only by South Carolina’s

21. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1459–61 (1990) (contending that the “federal Free Exercise Clause seems . . . to have followed the most expansive” (*id.* at 1460–61) state constitutional guarantees of free exercise, provisions that “protected all actions stemming from religious conviction, subject to certain limitations” (*id.* at 1459). But see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 932, 947 (1992) (arguing that the state constitutional guarantees relied upon by McConnell do not support the conclusion that they “provided a constitutional right of religious exemption from civil laws,” and that the attitudes of eighteenth-century Americans were not only inconsistent with such a reading of the Establishment Clause but also served as evidence of their concern that a “right of exemption for the religiously scrupulous could be considered a law respecting religion,” and thus an establishment of religion). By citing McConnell’s article, I do not mean to imply that McConnell falls into the judicial primacy camp; as will be clear to those familiar with his entire *oeuvre*, he is far better characterized as holding to the judicial accommodation pattern.

22. Justice Stevens, for example, has defended *Sherbert* by contending that its rule “is necessary to protect religious observers against unequal treatment.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring); see also Christopher Eisgruber & Lawrence Sager, *The Vulnerability of Conscience: The Constitutional Basis for Religious Conduct*, 61 U. CHI. L. REV. 1245, 1285, 1287 (1994) (The Free Exercise Clause requires governments to “treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally,” a principle that justifies *Sherbert* because South Carolina’s refusal of unemployment benefits to Sherbert, the appellant, “represent[ed] a failure of equal regard.”).

23. See Hamburger, *supra* note 21, at 947 (“A right of exemption for the religiously scrupulous could be considered a law respecting religion [that] could create unequal civil rights” tilted toward religion.). The 1786 Virginia Act for Establishing Religious Freedom—the culmination of the fight over continuation of mandatory public support of the Anglican church—provided that “all men shall be free to profess [and] maintain their opinions in matters of religion, and that the same shall in no [way] diminish, enlarge, or affect their civil capacities.” 12 Statutes at Large of Virginia 86 (W. W. Hening ed., 1823) (emphasis added). But see McConnell, *supra* note 21, at 1511–12 (Because there “is no substantial [historical] evidence that [religious] exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience . . . , [the] modern argument against religious exemptions, based on the Establishment Clause, is . . . historically unsupportable.”).

24. *Sherbert*, 374 U.S. at 409.

25. *Id.* at 401.

26. *Id.* at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

27. *Id.* at 403. Sherbert’s “ineligibility for benefits derives solely from the practice of her religion

proof that the burden placed upon Sherbert's religion was necessary to the achievement of a compelling interest, a standard that South Carolina was unable to meet. Nor was the extent of this protection to free exercise a forbidden establishment of religion; rather, it "reflect[ed] nothing more than the governmental obligation of neutrality in the face of religious differences."²⁸

The language, if not the result, of *Everson v. Board of Education*²⁹ represents the judicial primacy pattern at work with respect to the Establishment Clause. At issue was New Jersey's practice of permitting public school districts to reimburse parents for the cost of transporting their children to and from religious schools by means of the public bus system. The Court was unanimous that the Establishment Clause stripped governments "of all power . . . to support or otherwise to assist any or all religions," including the power to "pass laws which aid one religion, aid all religions, or prefer one religion over another."³⁰ The Court divided on the application of this principle. The majority thought that the reimbursement did not offend the Establishment Clause because the clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."³¹ To the dissenters, the majority's conclusion represented a "failure to apply the principles it avow[ed]."³² Justice Jackson noted that "[r]eligious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all."³³ The remaining dissenters, led by Justice Rutledge, argued that the purpose of the Establishment Clause "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"³⁴ and that this purpose was undermined by the majority's approval of the aid at issue in *Everson*.

The early school prayer cases, *Engel v. Vitale*³⁵ and *Abington School District v. Schempp*,³⁶ applied the *Everson* principle more stringently. It

[and] the pressure upon her to forego that practice is unmistakable. . . . Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404.

28. *Id.* at 409.

29. 330 U.S. 1, 11 (1947).

30. *Id.* at 11, 15.

31. *Id.* at 18.

32. *Id.* at 25 (Jackson, J., dissenting).

33. *Id.* at 27.

34. *Id.* at 31-32 (Rutledge, J., dissenting).

35. 370 U.S. 421, 425 (1962).

36. 374 U.S. 203, 222 (1963).

"is no part of the business of government," said the *Engel* majority, "to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."³⁷ The Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion,"³⁸ and thus "withdrew all legislative power respecting religious belief or the expression thereof."³⁹

In *Everson*, *Engel*, and *Schempp*, the Court relied heavily on its reading of history to divine the purposes of the Religion Clauses. The principles embodied in these cases and in *Sherbert*, however, also resulted from the coalescence of political factors and a cultural consciousness in mid-twentieth-century America. Dean Jeffries and Professor Ryan explain the separationist impulse of *Everson* as resulting from the demise of Protestant hegemony,⁴⁰ producing a concomitant Protestant fear of and opposition to growing Catholic political power focused on obtaining public aid to Catholic schools,⁴¹ an opposition that "was strongly supported by American Jewry."⁴² According to Jeffries and Ryan, the Court's "campaign to oust religion from the public schools was never as popular as its ban against aid to religious schools"⁴³ and succeeded partly because "America's Protestants were not united . . . on the issue."⁴⁴ Given this reading, *Sherbert* merely represents the other side of the neutrality coin; to paraphrase Justice Jackson, if aid to religious conduct is not a proper public affair then neither is it proper for the public to impede religious conduct. Professor Gedicks asserts that, because the Court during the *Everson* period was part of a society steeped in the metaphysical understanding of the western Enlightenment, the Court regarded religion as an "aberrant practice in a secular democracy"⁴⁵ that "needed to be constitutionally separated from public life,"⁴⁶ and justified "discriminatory burdens on religious beliefs and practices . . . in order to preserve political freedom."⁴⁷ This reading explains *Everson* and its progeny but does not account as well for *Sherbert*. Accordingly, some of Professor Gedicks's observations are

37. *Engel*, 370 U.S. at 425.

38. *Id.* at 431.

39. *Schempp*, 374 U.S. at 222.

40. Jeffries & Ryan, *supra* note 2, at 305-12.

41. *Id.* at 312-18.

42. *Id.* at 316.

43. *Id.* at 318.

44. *Id.* at 319.

45. *Spirituality and Fundamentalism*, *supra* note 5, at 1210.

46. *Id.*

47. *Id.*; see also FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 19-21 (1995) (describing a doctrinal regime of secular neutrality devoted to creating a "wholly secular society").

more germane to a discussion of the judicial secularism pattern,⁴⁸ but the gist of his argument is also highly pertinent to an adequate explanation of judicial primacy. Unlike Jeffries and Ryan, however, Gedicks explains this doctrine in metaphysical rather than political terms.

The “modern” world—the world ushered into the West by the Enlightenment—replaced the medieval fixation upon the Christian faith as the absolute and final explanation of reality with the notion that rational inquiry could provide true explanations for natural phenomena and the human condition alike.⁴⁹ In essence, the Enlightenment substituted rationality for faith as the basis for apprehending truth, but both the modern and the pre-modern ages were united in the pursuit of truth. However, the modern age’s reliance on rationality as the engine of truth “eventually came to signify a secular challenge to all of Christianity,”⁵⁰ a challenge that caused Christianity to fracture into two camps. One camp adapted to modernity “by discarding the doctrines and beliefs which modernity had discredited”⁵¹ and thus became reduced to offering the “‘God of the gaps,’” a God that could “explain only what science could not.”⁵² The other camp rejected modernity totally and either retreated to the shadows of public life or preserved its pre-modern faith as a purely private enterprise. Of course, this ceded public life to those with no faith at all or only a diluted faith in the puny “God of the gaps.”

Modernity did not deliver on its promise, however, and we now live in a post-modern world, one in which we lack “an account of the place and purpose of humanity that would infuse every life with the same ultimate meaning.”⁵³ We no longer believe in objectivity or universality. We reject the possibility of apprehending truth; we now live in an age of radical disengagement, for we no longer think that we can know anything for sure. All is unexplainable myth, for even the “ideal of the elimination of myth is a myth.”⁵⁴ The paradox of post-modernism is that because it “rejects all universal narratives,”⁵⁵ it opens the door to the return of religion, for if nothing is certain, there is no longer any reason to exclude

48. See *infra* text accompanying notes 138–64. As will be seen in this discussion of the judicial secularism pattern, Professor Gedicks’s characterization is a better, but still partial, account of the period from roughly 1947 until 1963, the date of the *Sherbert* decision. During that era the operative Free Exercise model held that generally applicable regulations of conduct could validly circumscribe religious conduct but that coercion of conduct inimical to religious belief was void. For the former proposition, see *Reynolds v. United States*, 98 U.S. 145, 167 (1878); for the latter proposition, see *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

49. *Spirituality and Fundamentalism*, *supra* note 5, at 1199–1203.

50. *Id.* at 1201–02.

51. *Id.* at 1202.

52. *Id.* at 1203.

53. *Id.* at 1197.

54. GIANNI VATTIMO, *AFTER CHRISTIANITY* 29 (Luca D’Isanto trans., Columbia Univ. Press 2002).

55. *Spirituality and Fundamentalism*, *supra* note 5, at 1207.

any narrative from the babble of post-modernist conversation. The consequences of this phenomenon on the development of Religion Clauses doctrine may be deferred until later;⁵⁶ for now we need only to focus on the effects of modernity on Religion Clauses doctrine.

Modernity replaced belief, the medieval universal account of existence, with rational inquiry, its own universal account of existence. Modernity simply substituted a new and competing meta-narrative for the medieval meta-narrative. As a result, the thoroughly modern mid-twentieth century justices of the United States Supreme Court could hardly be expected to tolerate religion and secular governance lying in the same bed. After all, the American nation was a brilliant experiment in modernity, and its maintenance depended partly on exclusion of the principal competing meta-narrative. A natural objection to this line of thought, however, is to note that until the mid-twentieth century, the Supreme Court took no notice of the existence of a *de facto* Protestant establishment. The explanation is partly doctrinal and partly political.

Until after the Civil War, the Religion Clauses did not apply to the states, and it was in the states where issues of government aid to or inhibition of religion were engaged.⁵⁷ For a good portion of the antebellum period, the issue was posed in the context of the elimination of officially established churches.⁵⁸ This represented a contest between modernity and a vestigial remnant of the medieval sensibility; until the contest reached a resolution in modernity's favor it is not surprising that the more general attributes of modernity's role with respect to religion remained absent in this era. Moreover, in the latter half of the nineteenth century, Protestant hegemony was preserved by using the political

56. See text accompanying notes 270–73.

57. See, e.g., Jeffries & Ryan, *supra* note 2, at 300–01 (discussing the 1840s clash between Catholics and Protestants in New York over public assistance to religious schools).

58. The classic and most influential of these contests was, of course, the struggle to disestablish the Anglican Church in Virginia. The 1776 Virginia Declaration of Rights declared that “all men are equally entitled to the free exercise of religion.” 7 *The Federal and State Constitutions, Colonial Charters, etc.* 3812–14 (Francis N. Thorpe ed., 1909). In 1776, the Virginia legislature abolished taxation of non-members of the Anglican Church for support of the Anglican Church. 9 *Virginia Statutes at Large* 164 (William W. Hening ed., 1776). In 1779, the legislature did the same for members of the Anglican Church, 10 *Virginia Statutes at Large* 197, *supra*, but in 1784, the Virginia legislature considered adoption of the Assessment Bill, which would have levied a property tax, the proceeds of which were to be paid over to the various Christian religious denominations in Virginia to support the clergy in the teaching of their respective faiths. Though the bill was couched in terms of aiding Christianity alone, it must be noted that, for all practical purposes, Virginia in 1784 did not contain any non-Christian clergy. See LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 109–10 (1967). The Assessment Bill sparked Madison's 1785 Memorial and Remonstrance Against Religious Assessments, 2 *WRITINGS OF JAMES MADISON* 183 (1900), and Jefferson's Bill for Establishing Religious Freedom, enacted by the Virginia legislature immediately after the defeat of the Assessment Bill. 12 *Virginia Statutes at Large* 84, *supra*. An account of the Assessment Bill controversy is contained in *Everson v. Board of Education*, 330 U.S. 1, 33–41 (1947) (Rutledge, J., dissenting). Madison's Memorial and Remonstrance and Jefferson's Bill Establishing Religious Freedom are appended. *Id.* at 63–74.

process to bar government aid to religious institutions regarded as mostly Catholic entities.⁵⁹ At the same time, there was a complacent acceptance of Protestant practices in public life; implicit in the ready characterization of America as a “Christian nation”⁶⁰ was the idea that the only acceptable form of Christianity was some version of Protestantism.⁶¹ Of course, this represented a certain cognitive dissonance within American modernity but it is the nature of cognitive dissonance to make it possible to live easily with contradiction. American modernists accepted the de facto Protestant establishment because it preserved a comfortable and familiar cultural norm. The stability of this contradiction existed because American elites were overwhelmingly Protestant, and for practical reasons, the growing Catholic presence contented itself with keeping its faith largely out of the public realm. But this was not viable half a century later, after two world wars, a world-wide economic depression, and the raw scars of religious hatred in the form of Nazi genocide. Religious hegemony was exposed as inconsistent with modernity’s values.

Another objection to this explanation is that, if the Court’s actions were based on modernity alone, we might have expected the Court to act in accordance with the judicial secularism pattern. Judicial secularism acts to keep the secular and the religious walled off by strict invocation of the Establishment Clause and by not requiring governments to accommodate religious conduct so long as such non-accommodation is not discriminatory toward religion. There is much force to this objection and this idea will be explored further in connection with judicial secularism, but for the moment, my concern is to understand why a modernist Court would simultaneously erect a wall of separation to enforce the Establishment Clause and require governments to accommodate religious conduct. It turns out that politics, not metaphysics, offers the better explanation. The increasing religious pluralism that eroded and ultimately toppled Protestant hegemony led the Court by the 1940s to increase protection for religious minorities. Such cases as *Cantwell v. Connecticut*,⁶² in which the Court overturned

59. Jeffries & Ryan, *supra* note 2, at 301–05.

60. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

61. It might not be too much to assert, as a tentative hypothesis, that the popular consciousness of American modernity in the nineteenth century regarded religion other than the various Protestant sects as the threat to the Enlightenment metaphysical account. Cf. Jeffries & Ryan, *supra* note 2, at 298 (“common-school advocates” in the nineteenth century kept “religion in the public schools but controversy out . . . by promoting least-common-denominator Protestantism and rejecting particularistic influences”). Though for very different reasons and in a much different culture, Henry VIII’s sixteenth-century destruction of the established Catholic church and substitution of an Anglican imitation under the thumb of the Crown may represent a rough analogue to this view of American modernity in the nineteenth century.

62. 310 U.S. 296, 307 (1940). While the Court stated that “freedom to believe” was “absolute,” it

the breach-of-peace conviction of a Jehovah's Witness for playing an anti-Catholic recording on the public streets, and *West Virginia State Board of Education v. Barnette*,⁶³ in which the Court struck down criminal penalties imposed on Jehovah's Witnesses for their refusal to salute the flag, illustrate this trend. Minority religions did not pose any threat of governmental capture, so extending constitutional protection to the religious conduct of minority religions did not implicate the Establishment Clause concerns of *Everson*. Ironically, once the principle of protecting religious minorities from governmental coercion (as in *Barnette*) or of suppressing them (as in *Cantwell*) took hold, it influenced the Court's Establishment Clause resolution of school prayer in *Engel* and *Schempp*. Because religious minorities did not threaten to create forbidden establishments, the Court could act on its burgeoning political sensitivity to the claims of equality and neutrality and create the other prong of judicial primacy, however theoretically inconsistent that result might be with Enlightenment metaphysics.

Thus, the full force of modernity was delayed until the political and social circumstances of mid-century America permitted modernity to exercise intellectual suzerainty over the Religion Clauses. Even then, judicial accommodation of religious minorities tempered modernity's claims, a bow to the political and social reality of a religious pluralism that seemed to pose no danger to modernity's essential concern about religion: government and religion must be cabined into separate compartments because they offered competing accounts of truth. Should government intrude upon religion, there was a danger that modernity would dictate its truth to the faithful; should religion seize government, there was a danger that religion would impose its truth on the rational secularists who eschew answers of religious faith. From this came the Court's view "that a union of government and religion tends to destroy government and to degrade religion."⁶⁴ American modernity's answer to the dilemma of the Religion Clauses consisted of squeezing room out of the constitutional system for legislative discretion to accommodate or burden religion, thereby producing judicial primacy in mediating the inherent conflict between the two Religion Clauses.

B. LEGISLATIVE PRIMACY

The legislative primacy pattern accommodates legislative discretion, but does not necessarily accommodate religion. This approach largely

noted that "freedom to act" for religious reasons could not, "in the nature of things," be absolute. According to the Court, the issue of religiously inspired action requires a "weighing of . . . conflicting interests," such that government regulation does not "unduly . . . infringe the protected freedom" of religious expression. *Id.* at 303, 304.

63. 319 U.S. 624, 642 (1943).

64. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

leaves to legislative judgment how many exemptions from generally applicable conduct regulations, if any, will be afforded to religious adherents and how much assistance, if any, government will provide to religious institutions in the course of seeking to achieve legitimate secular objectives. A notion of government neutrality toward religion constrains and informs legislative primacy. Two corollary propositions augment this neutrality principle: governments may not discriminate against religion (or among religions) and governments must treat religion equally with secular interests (and must treat all religions equally). The seeds of legislative primacy may be seen in the more limited principle of neutrality embraced by the Court in its early Free Exercise cases, such as *Cantwell* and *Barnette*, in which the Court applied its nominally rigid Establishment Clause approach to state aid to religion, and *Zorach v. Clauson*,⁶⁵ in which the Court approved a New York program that released public school students from mandatory attendance so that they might receive religious instruction at the church of their choice. In *Zorach*, the Court said that “school authorities are neutral . . . and do no more than release students whose parents so request.”⁶⁶ Invalidation of the released time program would require finding “in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.”⁶⁷ Thus, “government must be neutral when it comes to competition between sects.”⁶⁸ It may also be the case that the Free Speech principles of viewpoint and content neutrality bolstered the development of this notion of government neutrality toward religion. As governments began to close limited public fora on the basis of religious expression and sought to justify their selective viewpoint and content-based closures as necessary to avoid an Establishment Clause violation,⁶⁹ the Court imported these Free Speech principles into Religion Clauses jurisprudence.

Over the past fifteen to twenty years, the Supreme Court has

65. 343 U.S. 306, 311 (1952). But see *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948), in which the Court invalidated a release time program that permitted religion teachers of diverse sects, acting under the approval and supervision of public school officials, to teach their various religions to consenting elementary school children in their public school classrooms at the end of the day. The program required non-participating students to attend a study hall.

66. 343 U.S. at 311.

67. *Id.* at 314.

68. *Id.*

69. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (voiding a public school’s refusal to permit a religious group of students and adults to use school facilities after-hours for religious purposes when those facilities were opened to other similar civic and social organizations); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (same); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (voiding a university’s refusal to permit a religious student group access to a limited public forum open to all other student groups); see also *Spirituality and Fundamentalism*, *supra* note 5, at 17.

steadily proceeded to broaden the scope of legislative discretion to accommodate or burden religion by continued application of the neutrality principle, including its corollary propositions. With respect to the Free Exercise Clause, *Employment Division v. Smith*⁷⁰ marks the key development. On grounds of work-related misconduct, Oregon denied unemployment compensation to two Native-American drug counselors who were discharged from their employment because they had used peyote (a banned drug) in sacramental rites of the Native-American Church. In upholding the denial, the Court returned to such nineteenth-century precedents as *Reynolds v. United States*⁷¹ and concluded that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁷²

A cluster of Establishment Clause cases have more-or-less cemented in place the principle that the Establishment Clause is not violated when government “aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”⁷³ However, the neutrality principle does not mean that legislatures have *carte blanche* to accommodate religious practice. Governments may not, for example, endorse religious speech as their own,⁷⁴ delegate

70. 494 U.S. 872, 879 (1990).

71. 98 U.S. 145, 167 (1878) (upholding a federal prohibition of polygamy as applied to the then-prevailing Mormon religious duty to practice polygamy, on the ground that laws “made for the government of actions,” *id.* at 166, may interfere with religious practices, and that the contrary rule would “permit every citizen to become a law unto himself,” *id.* at 167).

72. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

73. *Agostini v. Felton*, 521 U.S. 203, 231 (1997); *see also* *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (upholding a publicly funded tuition voucher plan through which parents of Cleveland school children could redeem the vouchers at any participating public or private school, even though most of the schools that chose to participate were religious schools); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (upholding the loan of instructional hardware and software to public and religious schools alike to further secular educational goals); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1990) (upholding a public school district’s payment to a signer for a deaf student enrolled in a religious school because of the general availability of the benefit to all deaf students); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (upholding a state program granting scholarships to handicapped students, as applied to a blind student studying for the ministry at a religious college); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (upholding a generally available tax credit for educational expenses that, in practice, was overwhelmingly utilized by parents of children in religious schools); *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970) (upholding inclusion of church property in a general scheme of exemption from property taxes for non-profit public benefit corporations).

In *Helms*, a plurality of the Court stated that “if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.” 530 U.S. at 810.

74. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding that a never-

governmental power to religious institutions,⁷⁵ or resolve religious disputes that arise within religious sects.⁷⁶

The development of legislative primacy is also susceptible to political and metaphysical explanations. Jeffries and Ryan, for example, contend that “[f]or over three hundred years, Baptists and other Protestants insisted on strict separation of church and state [because they] shared a vision of church-state relations shaped not only by

implemented school district policy of permitting students to vote to have a student speaker “solemnize” high school football games was facially invalid as an impermissible endorsement of religion and a coercion of religious observance); *Lee v. Weisman*, 505 U.S. 577, 592–93 (1992) (invalidating a non-denominational invocation and benediction at a public middle school graduation ceremony); *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (invalidating as furthering only religious purposes a state law requiring the teaching in public schools of both creation science and evolution if either theory was taught); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (invalidating as an impermissible endorsement of religion a state law mandating a moment of silence at the beginning of each school day “for meditation or voluntary prayer”); *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (invalidating a state law requiring the posting of the Ten Commandments in every public school classroom); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (invalidating as furthering only religious purposes a state law forbidding the teaching of evolution); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (striking down the practice of reading Bible passages in public schools at the beginning of each day); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (invalidating the voluntary recitation of a non-denominational prayer at the beginning of each day in public schools); cf. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (finding that a government could not deny access to a public forum to a speaker wishing to exhibit a religious symbol—a cross—because the private exhibition of the cross in a public forum could not reasonably be thought to constitute government endorsement of the religious message).

75. See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (invalidating as an impermissible “fusion of governmental and religious functions” a state law that created as a separate school district a village populated entirely by adherents to a single religious sect); *Larkin v. Grendel’s Den*, 459 U.S. 116, 127 (1982) (voiding on the same grounds a state law that gave religious institutions a veto over liquor licenses sought by applicants located within five hundred feet of a church).

76. See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872) (holding that “whenever the questions of discipline, . . . faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and . . . binding”). The *Watson* principle was restated and qualified in *Gonzales v. Roman Catholic Archbishop*, in which the Court stated that in “the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.” 280 U.S. 1, 16 (1929). This principle was converted into a constitutional rule rooted in free exercise in *Kedroff v. St. Nicholas Cathedral* and *Kreshik v. St. Nicholas Cathedral*. In *Kedroff*, the Court voided a New York statute that declared the New York faction of the Russian Orthodox Church autonomous with the Moscow governing body of that church and thus entitled to use St. Nicholas Cathedral. 344 U.S. 94, 119 (1952). The Court stated that the statute “intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to” the Free Exercise Clause. *Id.* In *Kreshik*, the Court overturned a New York court judgment that transferred control of St. Nicholas Cathedral from the central governing authority of the Russian Orthodox Church to the independent Russian Church of America. 363 U.S. 190, 191 (1960). The constitutional rule has been applied ever since. See *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 724–25 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 451–52 (1969); cf. *Jones v. Wolf*, 443 U.S. 595, 609–10 (1979) (holding that intra-church disputes may be constitutionally adjudicated by civil courts if the dispute can be resolved by legal principles neutral as to religious matters).

Protestant traditions and principles, but also by mutual self-interest and a shared suspicion of Roman Catholics.”⁷⁷ However, “mainline Protestant denominations now take a consistently separationist stance,” while “[e]vangelical Christians take a consistently accommodationist position.”⁷⁸ This schism is noteworthy because “a dramatic shift in energy and political power from mainline denominations to evangelicals”⁷⁹ has occurred. Jeffries and Ryan attribute this shift to declining numbers of mainline parishioners and a corresponding loss of “political clout,”⁸⁰ coupled with the “explosive growth” of evangelical churches and the willingness of evangelical Christians to ally “with Catholics and Orthodox Jews in supporting aid to religious schools.”⁸¹ Jeffries and Ryan attribute this shift in the nature and force of evangelical Christian political power to the desegregation of public schools and the banishment of prayer and Bible readings from public schools.⁸²

A metaphysical account may also explain and reinforce this phenomenon. It should come as no surprise that as modernity matured and slouched towards the Bethlehem of post-modernism, the number of adherents to mainline denominations declined. After all, the God-of-the-gaps of the mainline denominations provided fewer answers as modernity’s rationality narrowed the gaps in which he operated and made him increasingly less relevant. Moreover, given the likely modernist sensibility of most of the mainline adherents, a gradual and natural disenchantment with God, in any form, was a predictable result. On the other hand, the decline of modernity and the rise of post-modernism opened “space for radical religious pluralism by denying the possibility of meta-narratives.”⁸³ Evangelical Christians moved into this vacated space, stepping out of the shadows where they had lurked during modernity’s reign. The irony of post-modernism is that it freed the medieval account to return in the form of fundamentalism of all kinds—whether that of evangelical Christians, ultra-Orthodox Jews, radically fundamentalist Muslims, or any other brand of religion that offers a single, universal, exclusive, and infallible account of existence. A post-modernist can choose which account he wishes to accept, but he cannot say that his chosen account is correct, in the sense of being universally true. Thus, the fundamentalist account of existence, even if rejected by post-modernists, cannot be labeled false by a post-modernist.

Post-modernists, however, do not face a choice confined to

77. Jeffries & Ryan, *supra* note 2, at 327.

78. *Id.* at 328.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 328–52.

83. *Spirituality and Fundamentalism*, *supra* note 5, at 1207.

fundamentalism and rationality, or even limited to fundamentalism, rationality, and agnosticism. As Professor Gedicks correctly observes, a distinct and separate religion for post-modernists exists.⁸⁴ Gedicks calls it spirituality, a quest for “revelation of the immanent, rather than the transcendent Spirituality casts religion less as the demand that believers fit themselves into God’s plan, than as the demand of believers for a fitting God and plan.”⁸⁵ Spirituality is self-centered, whereas fundamental Christianity is God-centered. For the fundamental Christian, man must conform to God’s will; his task consists of accepting and submitting to God’s will. For the spiritualist, man must discover his inner essence and meaning; his task entails coming to know himself and finding meaning in the voyage of self-discovery. It is no accident that spirituality is eclectic, combining widely disparate elements in any given person’s spiritual quest. One person may find inner meaning in zen meditation amidst the redwoods; another person may locate such meaning in a gospel of empathetic self-improvement; and yet another may discover personal meaning in aromatherapy and incense. Nor is it any accident that considerable overlap exists between spirituality and humanistic psychology. According to such humanists as the Jungians, life is a process of individuation, in which each person develops a larger and deeper consciousness that enables him to understand himself profoundly. Because this insight is related to such ancient eastern religious beliefs as the seven *chakras* of Kundalini Yoga, it is not surprising that as the metaphysical explanations of the western Enlightenment crumble, post-modern spiritualists often combine eastern metaphysics with western psychology to create an eclectic concoction unified only in its narcissism.

Legislative primacy reacts to these religious developments by leaving to our elected representatives the primary responsibility of deciding how to accommodate the stunning diversity of religious sentiment in a post-modern world. On this account, the practical justification for the rule of *Employment Division v. Smith* is the chaos that would result if every person could claim that his conduct was presumptively insulated from general rules of law as an expression of his deeply held quest for self-discovery. The Court decided *Reynolds* in 1878, when religion was characterized by the relatively simple diversity of different sects, each claiming to possess the truth. The *Reynolds* Court thought that constitutionally required religious exemptions would “permit every citizen to become a law unto himself.”⁸⁶ Imagine the anarchy that would result from accommodating the individually tailored spirituality of post-modernism. Similarly, because the fundamental tenet

84. *Id.* at 1219.

85. *Id.*

86. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

of post-modernism is our inability to find and deliver a universal and true account of existence, the Court is nudged metaphysically to embrace neutrality toward religion and its twin corollaries, equality and non-discrimination. If no account, including the secular, offers universal truth, the decision of to what extent government may accommodate religion in the form of aid is inherently contingent and unstable, and there is no reason to suppose that the Court has any more access to universal truths than any other post-modern institution. Legislative primacy provides the answer in the form of deference to legislative judgments about the appropriate degree of accommodating aid.

However, legislative primacy does not dissolve all the tension between Free Exercise and Establishment values. *Locke v. Davey*⁸⁷ presented just such a conflict within the context of the legislative primacy pattern. Washington's Constitution forbids the application of public funds "to any religious worship, exercise or instruction."⁸⁸ Using criteria wholly unrelated to religion, Washington provided scholarships to qualified low income students, but prohibited use of those scholarships to pursue a degree in theology.⁸⁹ The Court upheld the program against a Free Exercise challenge, reasoning that even though the program was not "facially neutral with respect to religion," it was not the product of "hostility toward religion," but was merely a refusal by Washington "to fund a distinct category of instruction."⁹⁰ Washington did not force "students to choose between their religious beliefs and receiving a government benefit"⁹¹ because they "may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology,"⁹² or use the scholarship "to attend pervasively religious schools"⁹³ at which they could even "take devotional theology courses,"⁹⁴ so long as they do not seek to obtain a degree in devotional theology. Though a state could validly decide to fund religious instruction,⁹⁵ a state constitutional prohibition of the use of public funds to support religious instruction was equally within the ambit of popular discretion, partly because of the long tradition of states

87. 540 U.S. 712, 720–21 (2004).

88. Washington Constitution Article I, section 11 provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

89. *Davey*, 540 U.S. at 715.

90. *Id.* at 720, 721.

91. *Id.*

92. *Id.* at 721 n.4.

93. *Id.* at 724.

94. *Id.* at 725.

95. *Id.* at 719 (stating that "there is no doubt that [Washington] could, consistent with the Federal Constitution, permit [scholarship recipients] to pursue a degree in devotional theology" (citing *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986))).

expressly denying support to the clergy.⁹⁶

After *Davey*, it is apparent that states are free to single out religion for exclusion from some benefits made available on a secular basis, so long as the purpose of the exclusion is not to exhibit animosity to religion. The doctrinal problem consists of identifying which benefits a state may selectively deny on the basis of religious conduct or belief. Nothing in *Davey* suggests that it disturbs the well-settled principle that states may not deny access to a limited public forum on the basis of the religious viewpoint of the speaker.⁹⁷ Perhaps *Davey* will be confined to its facts, but it may turn out to state the mediating principle for the pattern of legislative primacy. Judicial primacy tried to mediate the conflict between the Religion Clauses by seeking to avoid either special religious benefits or religious burdens. As with legislative primacy, this was a form of neutrality, but one highly colored by the fear of a union of government and religion, a fear that dissolved when courts were confronted with special burdens placed on minority religions. If *Davey* serves as our guide, the mediating principle for legislative primacy is whether the legislature departed from neutrality—meaning equal and non-discriminatory treatment of religion—by purposefully singling out religion for disfavored treatment. Because Washington's purpose was benign—it sought to impose a stronger barrier to the union of church and state than the federal Constitution requires, but did not totally disable religion from the benefits of its scholarship program—the Court deferred to Washington's choice of the level of accommodation it preferred to deliver.

Of course, judicial deference is not absolute. The principles of neutrality, equality, and non-discrimination provide an outer barrier to legislative discretion, as *Church of the Lukumi Babalu Aye v. City of Hialeah* makes clear in the context of the Free Exercise Clause.⁹⁸ The city of Hialeah, Florida enacted a series of ordinances proscribing the ritual slaughter of animals, but riddled with enough exemptions to make the ordinances applicable in practice almost exclusively to the sacramental rites of Santerians (a Caribbean religion rooted in African Yoruban beliefs and much despised in Cuba, the country from which many of the residents and legislators of Hialeah had emigrated).⁹⁹ The Court had little difficulty voiding the ordinances as violations of Free Exercise because their object was "suppression of the . . . Santeria worship service."¹⁰⁰ Both the purpose and effect of the ordinances violated the principles of

96. *Id.* at 722–23.

97. *See, e.g.,* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

98. 508 U.S. 520, 546–47 (1993).

99. *Id.*

100. *Id.* at 534.

neutrality, equality, and non-discrimination.

However, the scope of these principles, especially in the context of the Establishment Clause, was rendered caliginous as a result of three cases decided by the Supreme Court in its October 2004 Term, *Cutter v. Wilkinson*,¹⁰¹ *McCreary County v. American Civil Liberties Union of Kentucky*,¹⁰² and *Van Orden v. Perry*.¹⁰³ In *Cutter*, the Court concluded that section 3 of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA)¹⁰⁴ did not represent on its face a forbidden establishment of religion.¹⁰⁵ RLUIPA prohibits governments from imposing any "substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden imposed furthers "a compelling governmental interest" and is "the least restrictive means" of furthering that interest.¹⁰⁶ For purposes of RLUIPA, it does not matter whether the "religious exercise" at issue is "compelled by, or central to, a system of religious belief."¹⁰⁷ The Sixth Circuit concluded that RLUIPA constituted an invalid establishment of religion because its "primary effect is . . . to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners" and by "encouraging prisoners to become religious in order to enjoy greater rights."¹⁰⁸ The Sixth Circuit distinguished the RLUIPA exemption from the exemption that Title VII of the 1964 Civil Rights Act affords religious entities (which the Court upheld in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*)¹⁰⁹ on the ground that the latter exemption was "arguably necessary to avoid" violating the Establishment Clause.¹¹⁰ Without the exemption from Title VII's bar of religious discrimination in employment, government would necessarily significantly interfere "with the ability of religious organizations to define and carry out their religious missions."¹¹¹ RLUIPA, by contrast, lacks such a purpose and delivers quite different

101. 125 S. Ct. 2113, 2124–25 (2005).

102. 125 S. Ct. 2722, 2746 (2005).

103. 125 S. Ct. 2854, 2861 (2005).

104. 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

105. *Cutter*, 125 S. Ct. at 2124–25.

106. 42 U.S.C. § 2000cc-1(a) (2000). Because Congress acted under its spending and commerce powers in enacting RLUIPA, it does not face the same constitutional difficulties attendant to the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2000), which the Court voided as to the states because it was not a remedial statute within the limits of Congress's power to enforce the substantive provisions of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 532–35 (1997).

107. 42 U.S.C. § 2000cc-5(7)(A) (2000).

108. *Cutter v. Wilkinson*, 349 F.3d 257, 266 (6th Cir. 2003).

109. 483 U.S. 327, 339 (1987).

110. 349 F.3d at 263.

111. *Amos*, 483 U.S. at 335. After *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), it is also nearly certain that imposition of a requirement that religious entities refrain from discriminating on the basis of religion in employment would violate the right of free association.

effects.¹¹² The Sixth Circuit thought that RLUIPA sought to privilege religious conduct and resulted in the protection of religious conduct.¹¹³ The proof of this effect, according to the court of appeals, was twofold: (1) Identical conduct lacking an element of religious expression goes unprotected, and (2) RLUIPA protects religious conduct without any indication that religious conduct has been unfairly singled out for unfavorable treatment.¹¹⁴

None of this mattered to the Supreme Court. The Court unanimously held that section 3 constituted “a permissible legislative accommodation of religion.”¹¹⁵ RLUIPA did not “elevate accommodation of religious observances over an institution’s need to maintain order and safety” or “override other significant interests,” whether of government or non-believers.¹¹⁶ Section 3 did not facially “differentiate among bona fide faiths. . . . It confer[red] no privileged status on any particular religious sect, and single[d] out no bona fide faith for disadvantageous treatment.”¹¹⁷ Nor did the Court attribute any significance to the fact that only religious believers benefitted from section 3.¹¹⁸ Relying on *Amos*, the Court concluded that accommodations of religion “need not ‘come packaged with benefits to secular entities,’” because any other conclusion would cause “all manner of religious accommodations [to] fall.”¹¹⁹

Cutter represents a mirror image of *Davey*, at least with respect to the scope of legislative primacy. By upholding RLUIPA against a facial challenge, *Cutter* has extended legislative primacy to permit governments to prefer religion, just as *Davey* permitted governments to burden religion. The “play in the joints” between the two Religion Clauses has become greater and, depending on the resolution of the as-applied challenges to RLUIPA that may come in the wake of *Cutter*, judicial control of the actual manifestation of that play may wither a bit further. Indeed, the Court in *Cutter* provided a broad hint that further challenges to the application of RLUIPA, at least in prison settings, are not likely to prove fruitful.¹²⁰ According to the Court, Congress intended that RLUIPA’s strict scrutiny standard be applied with “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security

112. *Cutter*, 349 F.3d at 263.

113. *Id.*

114. *Id.*

115. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121 (2005).

116. *Id.* at 2122.

117. *Id.* at 2123.

118. *Id.* at 2124.

119. *Id.*

120. *See id.* at 2123.

and discipline.”¹²¹ Perhaps courts will exhibit less deference to government administrators in other settings. We shall see. If *Cutter* is taken to mean that courts should generally defer to government administrators, the case takes legislative primacy to a new level. Not only may Congress set the boundaries of religious accommodation, but the actual degree of accommodation will be left to bureaucrats, subject to correction by new legislation and not by courts. If courts defer only to prison administrators (out of security concerns) and not to other government administrators, the courts will simply enforce through strict scrutiny a legislatively directed heightened accommodation of religion. Thus, regardless of the degree of deference, the result of *Cutter* is enhanced legislative primacy.

Given their starkly different results and rationales, *Van Orden* and *McCreary County* raise additional questions of how much play the joint of the Religion Clauses can withstand without dislocation. In *Van Orden*, the Fifth Circuit upheld a district court judgment that the display of a six-foot-tall granite monument bearing a “nonsectarian version” of the Ten Commandments on the grounds of the Texas capitol did not violate the Establishment Clause.¹²² The Fifth Circuit reasoned that the “Ten Commandments have both a religious and secular message,” and identified the secular message, as did the Texas legislature, “as a common code of conduct.”¹²³ Because of the dual nature of the Ten Commandments, the court examined the “context of the display,” and, as in *Lynch v. Donnelly*¹²⁴ and *Allegheny County v. American Civil Liberties Union of Greater Pittsburgh*,¹²⁵ concluded that the inclusion of the monument along with sixteen other monuments celebrating “ideals and events that compose Texan identity” effectively negated any inference that Texas endorsed the religious message of the Ten Commandments.¹²⁶ The Supreme Court agreed with this reasoning. A plurality of four, in an opinion by Chief Justice Rehnquist, thought that *Lemon* was inapposite

121. *Id.* (quoting S. REP. NO. 103-11, at 10 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1899, 1900).

122. *Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003). There are three different versions of the Ten Commandments contained in the Bible. Compare *Exodus* 20:2-17, *Exodus* 34:12-26, and *Deuteronomy* 5:6-21. Moreover, versions differ among Jews, Catholics, and Protestants, and among the various Protestant sects. See generally ROBERT ALTER, *THE FIVE BOOKS OF MOSES: A TRANSLATION WITH COMMENTARY* (2004).

123. *Van Orden*, 351 F.3d at 179, 180.

124. 465 U.S. 668, 680-81 (1984) (finding that inclusion of a nativity scene in the city's annual Christmas display was not a purposeful effort to advocate a particular religious message and did not violate the Establishment Clause).

125. 492 U.S. 573, 620-22 (1989) (finding the unadorned display of a crèche in a courthouse to be an Establishment Clause violation, but upholding the display of a menorah, accompanied by a Christmas tree and a sign saluting liberty).

126. *Van Orden*, 351 F.3d at 180, 181 (quoting H.R. CON. RES. 38, 77th Leg., Reg. Sess. (Tex. 2001)).

and relied instead on a long and unbroken tradition of official acknowledgment of religion that supported the validity of the display.¹²⁷ The fact that the monument was a passive display, situated in a context of secular historical monuments, also served to render unlikely the possibility that a reasonable observer would see in it a governmental endorsement of religion.¹²⁸ Justice Breyer supplied the crucial fifth vote, via his opinion concurring in the judgment. Breyer agreed with the plurality that neither *Lemon* nor any other test was adequate to meet the decisional task:

I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather . . . it must reflect . . . the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes. While the Court's prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases.¹²⁹

Justice Breyer tossed these factors into the decisional hopper, turned the lever, and out came his considered judgment that the monument's location, provenance, and uncontroversial forty-year history conveyed a message sufficiently diluted to pass constitutional scrutiny. Of lesser significance to Breyer was the fear that a contrary decision would "exhibit a hostility toward religion that . . . might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . [and] thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."¹³⁰

In *McCreary County*, the Supreme Court reached the opposite conclusion with respect to the display of the Ten Commandments in Kentucky courthouses as part of a larger display of secular historical documents. The Sixth Circuit had upheld a preliminary injunction of the display on the grounds that it lacked a secular purpose and conveyed an endorsement of the religious message of the Ten Commandments.¹³¹ The Court concluded that the history of the event—a progression from a

127. *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005) ("[O]ur analysis is driven both by the nature of the monument and by our Nation's history. . . . 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984))).

128. *Id.* at 2864.

129. *Id.* at 2869 (Breyer, J., concurring) (citations omitted).

130. *Id.* at 2871 (citation omitted).

131. *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 443-44 (6th Cir. 2003) (the "displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments, [a] Kentucky statute regarding the posting of historical displays and a School Board Resolution" asserting that the displayed "documents positively contribute to the educational foundations and moral character of students" (footnote omitted)).

display of the Commandments alone, to a display that placed the Commandments among American historical documents edited to highlight their religious sentiments, to a final display in which the Commandments were exhibited along with the full text of legal and historical documents such as Magna Carta and the Declaration of Independence—belied an overwhelmingly religious purpose behind the display.¹³² The *McCreary County* majority applied *Lemon* but added two elements to its purpose prong.¹³³ First, the majority divined purpose primarily from the perception of the reasonable observer.¹³⁴ Second, the Court declared that while *Lemon* required only the existence of a genuine secular purpose, the secular purpose must predominate and not be “merely secondary to a religious objective.”¹³⁵

Central to the reasoning of the *McCreary County* majority and to Justice Breyer’s concurrence in *Van Orden* was the notion of neutrality, both as among religions and as between religion and disbelief. Indeed, the *Van Orden* plurality also endorsed neutrality when it declared that the “Januslike” quality of the Establishment Clause “requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”¹³⁶ Of course, neutrality is a value pitched at a high level of generality; in the application of this principle, the Court fractured badly. *Van Orden* and *McCreary* leave us with the vague and uncertain conclusion that when governments display religious imagery, on the one hand, their display will be forbidden when the context suggests to the mythical reasonable observer that the government’s secular purpose is not the dominant purpose. On the other hand, no constitutional infirmity exists when the display is consistent with our past cultural practices, has been uncontroversial for a number of years, and exists in a context that “has a dual significance, partaking of both religion and government.”¹³⁷ It is noteworthy that five justices united in *Van Orden* to jettison reliance upon the usual Establishment Clause tests, and that five justices united in *McCreary County* to apply *Lemon* and, indeed, tweaked *Lemon*’s purpose prong to include the core of the endorsement test.

This presents even more of a “split double header” than the *Grutter* and *Gratz* duo.¹³⁸ We know that half the Court maintains a deep

132. *Id.*

133. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2735 (2005).

134. *Id.*

135. *Id.*

136. *Van Orden v. Perry*, 125 S. Ct. 2854, 2859 (2005).

137. *Id.* at 2864.

138. *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting). See generally *id.* and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

commitment to legislative primacy, even when the subject is the volatile matter of governmental delivery of religious imagery or messages. In addition, half the Court maintains an equally deep commitment to opposition to that principle, at least when governments display religious messages. On the other hand, the entire Court unites in recognizing legislative primacy when it comes to tangible accommodation of religious conduct through RLUIPA. This is a very mixed message. We are left with the conclusion that a fair amount of legislative primacy will be countenanced, even when it comes to governmental display of religious imagery, but we are much less certain exactly when the Court will assert its check on this power. The frank admission by Justice Breyer—the Powell-in-*Bakke* of the Ten Commandments—that these cases turn on their facts and the application of “legal judgment” but no formulaic tests, does not augur much predictability in this area. It harkens back to the *Redrup*¹³⁹ era in obscenity law when the Court summarily affirmed or denied obscenity convictions whenever five members of the Court, applying their separate notions of obscenity, “knew it when they saw it.”¹⁴⁰ Sometimes they will see impermissible religious purpose; other times they will see acknowledgment of heritage in a fashion by which the secular and the religious are amalgamated. The very fact of such uncertainty will spur legislatures to experiment with such displays; the increase in such experimentation will produce a de facto trend toward enhanced legislative primacy.

C. JUDICIAL SECULARISM

This pattern may exist only in theory. It stems from the view, exemplified by the *Everson* dissenters, that the Religion Clauses aspire to secure religious liberty by strictly separating religion and government. The Establishment Clause offers the principal mechanism for doing so, because it most acutely addresses the union of government and religion. On this view, the Free Exercise Clause functions to ensure that government does not depart from strict abstention from religion by imposing undue burdens on religious belief or practice, but does compel very much accommodation of religious conduct. Years ago, Philip Kurland summed it up by arguing that the Religion Clauses state “a single precept: that government cannot utilize religion as a standard for action or inaction because [the clauses] prohibit classification in terms of religion either to confer a benefit or to impose a burden.”¹⁴¹ Of course, as Professor Kurland recognized, this is merely “a starting point . . . , not a mechanical answer”; had Professor Kurland held the power of the Court,

139. *Redrup v. New York*, 386 U.S. 767, 769–70 (1967).

140. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (of obscenity, “I know it when I see it”).

141. Kurland, *supra* note 16, at 96.

he may not have applied it to produce judicial secularism.¹⁴²

If this pattern existed at all in the Supreme Court, it would be seen in the period that runs roughly from the Mormon cases in the latter decades of the nineteenth century through 1961, the year in which the Court decided *McGowan v. Maryland*¹⁴³ and *Braunfeld v. Brown*.¹⁴⁴ The operative word, however, is “if.” While this period has elements of judicial secularism, in that it displays a clear tilt toward allowing legislatures extraordinary latitude to burden religion without running afoul of the Free Exercise Clause and shows somewhat more willingness to exert judicial control over the legislative accommodations that arguably offend the Establishment Clause, it does not represent a clear exemplar of judicial secularism. Judicial secularism may never have manifested itself strongly enough to place its distinctive stamp on the Court’s Religion Clauses jurisprudence.

Reynolds, the first of the Mormon cases, which upheld the application of a federal statute making polygamy a crime to a Mormon bigamist who was following the religious duty of his church, was decided amid widely-held “hostility to Mormonism [resulting from] the practice of polygamy [and] the notion that [the Mormon hierarchy] constituted a secret and tyrannical [threat] to the genius of democratic institutions.”¹⁴⁵ The Court unanimously concluded that while “Congress was deprived of all legislative power over mere [religious] opinion,” it remained “free to reach actions which were in violation of social duties or subversive of good order.”¹⁴⁶ The action-belief distinction is untenable, of course, for some religious actions are so entwined with belief that they cannot be separated. Although *Reynolds* spoke in terms of a distinction between protected belief and unprotected conduct, it actually did little more than recite the same principle more artfully declared by *Employment Division v. Smith*.¹⁴⁷ As Professor Kurland put it, “the wrong motivation does not rob the decision of its essential soundness.”¹⁴⁸

Davis v. Beason, however, was another matter.¹⁴⁹ An Idaho territorial statute required, as a precondition for voting, that a voter swear that he was “not a member” of any body that encourages polygamy “as a duty arising or resulting from membership” in such a body, “or which practises bigamy, polygamy or plural or celestial

142. *Id.*

143. 366 U.S. 420 (1961).

144. 366 U.S. 599 (1961).

145. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 699 (3d ed. 1903).

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

147. 494 U.S. 872 (1980).

148. Kurland, *supra* note 16, at 7–8.

149. 133 U.S. 333, 342 (1890).

marriage as a doctrinal rite.”¹⁵⁰ Davis, a Mormon who was convicted of falsely so swearing, appealed on the ground that the law denied him the free exercise of his religion.¹⁵¹ The Court upheld the law in an opinion that did not even discuss the fact that the statute imposed a legal disability couched in terms of belief, not action.¹⁵² Instead, the Court asserted that it “was never intended or supposed that the [Religion Clauses] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.”¹⁵³ And that was that. By 1961, when the Court in *Braunfeld* upheld a Sunday closing law against a free exercise challenge brought by an Orthodox Jew, judicial control of legislative discretion to accommodate or burden religious expression was not much greater. A four justice plurality said that the Sunday closing law did “not make unlawful any religious practices”; it merely made “the practice of . . . religious beliefs more expensive.”¹⁵⁴ The plurality declared that to strike down “legislation which does not make unlawful the religious practice itself[] would radically restrict the operating latitude of the legislature.”¹⁵⁵ *McGowan*, decided the same term as *Braunfeld*, upheld the validity of a Sunday closing law against an Establishment challenge, reasoning that Sunday closing laws furthered the secular purpose of mandating a “common day of rest . . . which most persons would select of their own accord.”¹⁵⁶

McGowan and *Braunfeld*, taken together, suggest a legislative primacy pattern at work on the issue of Sunday closing laws, but *Everson*, the most important Establishment Clause decision of this period, suggests in its analysis, if not its result, a more robust view of the Establishment Clause. Though the majority emphatically stated that no government “can pass laws which aid one religion, aid all religions, or prefer one religion over another,” or levy a “tax in any amount . . . to support any religious activities or institutions,” the Court concluded that New Jersey’s payment of the costs of transporting children to parochial schools was permissible because it served as “part of a general program under which it pays the fares of pupils attending public and other schools.”¹⁵⁷ While this rationale is the seed from which contemporary legislative primacy has grown, the *Everson* dissenters would never have planted it. To Justice Jackson, the “prohibition against establishment of

150. *Id.* at 334.

151. *Id.*

152. *Id.* at 342.

153. *Id.*

154. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

155. *Id.* at 606.

156. *McGowan v. Maryland*, 366 U.S. 420, 452 (1961).

157. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–17 (1947).

religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”¹⁵⁸ To Justice Rutledge, writing for all four dissenters, the establishment “prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree.”¹⁵⁹ Like Pickett’s Charge, the high water mark of judicial secularism may have crested just shy of success, and while the Establishment Clause principles championed by the *Everson* dissenters have partially succeeded in later years, those successes mostly came after *Sherbert* and thus provide better evidence for the judicial primacy pattern than for judicial secularism.¹⁶⁰

A mild puzzle that surfaces is why judicial secularism never took root. Politically, the 1940s and early 1950s might have seemed a propitious time for its development. As Jeffries and Ryan note, the *Everson* result “sparked alarm” among Protestants, who “issued dire warnings about Catholic inroads on the separation of church and state.”¹⁶¹ They were not alone. “Believing that Jewish freedom depended on a secular society, Jewish groups were even more adamant than Protestants in demanding separation of church and state.”¹⁶² Both groups “aligned themselves with public secularists of all persuasions.”¹⁶³ While this movement did result in the school prayer decisions, and a concomitant commitment in late mid-century America to erase religion as a substantial foundation for public culture, it never blossomed into true judicial secularism. Perhaps the American impulse for equal treatment checked judicial secularism, for as the commitment to a stronger establishment guarantee gained force, so did the Court’s willingness to expand judicial protection for religious conduct. Judicial primacy was the result.

Similarly, if mid-twentieth-century America (or at least its elite cadre of policy-makers) were staunchly modernist, one might have expected judicial secularism to receive a warmer reception than actually had occurred. Perhaps this suggests that America was not so modern as we suppose, but it may also reflect the fact that Enlightenment values in America almost always came filtered through an assumption of America’s cultural Protestantism.¹⁶⁴ But when that assumption broke

158. *Id.* at 24 (Jackson, J., dissenting).

159. *Id.* at 33 (Rutledge, J., dissenting).

160. *Engel* and *Schempp*, the school prayer and Bible reading cases, were decided in 1962 and 1963, respectively. *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963). *Sherbert* was also decided in 1963. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). It was not until 1971 that *Lemon v. Kurtzman*, 403 U.S. 602, 624–25 (1971), was decided, thus producing the test under which most Establishment Clause violations since then have been detected.

161. Jeffries & Ryan, *supra* note 2, at 315.

162. *Id.* at 316.

163. *Id.* at 317.

164. That assumption may be seen most clearly in *Reynolds* and *Beason*, the Mormon polygamy

down in the 1940s, the dominant Enlightenment impulse sought equality and non-discrimination rather than a strict version of neutrality. If so, that impulse accounts for the fact that the Court added judicial protection of free exercise at the very moment it began to enforce the Establishment Clause vigorously. On this reading, judicial secularism never had a chance in the peculiarly American version of modernism. Only in some other culture, more thoroughly committed to modernism's rationality and more deeply suspicious of religion as a competitor for the pursuit of truth, could judicial secularism have thrived. But that was not America.

D. JUDICIAL ACCOMMODATION OF RELIGION

This pattern may be developing, but it has not yet arrived. The Free Exercise prong of judicial accommodation would manifest itself in a reversal of *Employment Division v. Smith* and adoption of a more broadly applicable version of *Sherbert*. Manifest congressional desire exists to adopt this view of the Free Exercise Clause, as enactment of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act indicate. But RFRA fell victim to the Court's view of Congress's power to enforce the substantive provisions of the Fourteenth Amendment and, in *Cutter v. Wilkinson*, RLUIPA was upheld against an Establishment Clause challenge to its validity.¹⁶⁵ *Cutter* does not mean that the Court has embraced the Free Exercise prong of judicial accommodation; rather, it merely suggests the Court's willingness to extend the reach of the legislative primacy pattern.¹⁶⁶ On the other hand, as the earlier discussion of legislative primacy has indicated, the Court has given ample evidence of its willingness to relax its Establishment Clause scrutiny and thus permit legislative accommodation of religion.

Given the 5-4 division of the Court in *Employment Division v. Smith* on the question of whether, in essence, the Court should apply the *Reynolds* or *Sherbert* test, it is entirely possible that the Court could reverse direction, jettison *Smith*, and embrace *Sherbert* once again. With no other change in current Religion Clauses doctrine, this move would

cases. In *Reynolds*, the Court indulged in xenophobia by noting that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Reynolds v. United States*, 98 U.S. 145, 164 (1878). In *Beason*, the Court asserted that "bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . [because they] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community." *Davis v. Beason*, 133 U.S. 333, 341 (1890).

165. See *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2124-25 (2005).

166. See *id.*

shift the Court from legislative primacy to judicial accommodation. Such a move would be especially pronounced if the Court applied *Sherbert* strict scrutiny with the strictness with which it has traditionally been applied.¹⁶⁷

There are a number of political factors that suggest legislative primacy may evolve into judicial accommodation. Advocates of government assistance to religion, particularly in the context of education, are no longer conservative Catholics alone, but now include evangelical Christians, very Orthodox Jews, and African Americans.¹⁶⁸ Even public secularists have moderated their opposition to government assistance to religious schools, because many of the secularists have lost faith in public education and are willing to embrace voucher programs that include religious schools among the eligible recipients.¹⁶⁹ While I do not claim a causal relationship between these emergent political forces and *Zelman v. Simmons-Harris*, the result of the case surely accords with these political sentiments.¹⁷⁰

The cultural shift toward post-modernism both bolsters and hinders the prospects for judicial accommodation. As the dominant metaphysical understanding becomes ever more post-modernist, religious beliefs become just another contingent assertion, no better or worse than any other, because no explanation of existence can confidently be asserted as universally true. But because post-modernism does not deny the necessity of choice, even if we lack confidence in the abiding truth of our choices, there is no theoretical barrier to a thoroughly post-modern Court choosing to permit legislatures to burden religious conduct of all kinds, so long as they do so by laws of general applicability that do not single out religious conduct for special disabilities. Moreover, the emergence of self-regarding spirituality as a distinctively post-modern religion makes rejection of the *Employment Division v. Smith* rule highly impractical. The appeal of post-modernist spirituality is that it helps individuals "to understand and discover themselves in the midst of the demands of their everyday life, rather than whether its teachings and doctrines conform to an external and ultimate divine reality."¹⁷¹ Application of the *Sherbert* test in a post-modern world of religious pluralism would produce unworkable results, for the shoe of government

167. *But see* *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (where the Court applied strict scrutiny in upholding race as a factor in university admissions, and declared that it would presume the good faith of university officials in using race as a factor, despite statistical evidence that tended to show race as a powerful and possibly determinative factor). *See also* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

168. *See* Jeffries & Ryan, *supra* note 2, at 358–61.

169. *Id.* at 362–65.

170. 536 U.S. 639, 644 (2002).

171. *Spirituality and Fundamentalism*, *supra* note 5, at 1218.

would pinch someone's spiritual foot every time it was laced up. On the other hand, the same pluralist and post-modern forces suggest that a rigid exclusion of all the many varieties of religious experience from government assistance would compromise the principles of neutrality, equality, and non-discrimination, at least when such assistance is made generally available to secular institutions. The prognosis for judicial accommodation is not promising; legislative primacy may be the dominant pattern for some time to come. What are the implications of this development?

II. THE IMPLICATIONS OF LEGISLATIVE PRIMACY: A POLITICAL MARKETPLACE OF RELIGIONS

The legislative primacy position serves to convert the intersection of religion and government into a marketplace, but one in which the medium of exchange is political clout. The purpose of this Part of this Article is to assess whether the marketplace approach to adjustment of the relationship of government and religion is either workable constitutional law or desirable public policy. In order to do so, we must first canvass the marketplace effects of the legislative primacy approach in greater detail.

Markets exist, by and large, because they fulfill basic human needs for the exchange of goods and services. Their efficient functioning depends upon the independent, fully informed decisions of a host of private actors. Economic theory holds that in such perfectly competitive markets the relative supply of and demand for any given good or service will produce an equilibrium price at which the product will be exchanged in sufficient volume to exhaust both supply and demand.¹⁷² However, the market created by the legislative primacy pattern of the Religion Clauses is of a very different character.

Legislative primacy, as its name suggests, invests the legislatures of the nation with enormous discretion to confer benefits or impose burdens on religion. This power is, of course, not unbounded. As we observed earlier, governments may not impose burdens on religious conduct designed to fall upon religious conduct alone, nor may governments coerce or endorse religious conduct or belief or provide aid to religion on a basis that prefers religious to secular institutions or that

172. Numerous qualifications and assumptions exist that must be supplied to make this description of economic theory accurate. To mention only a very few, marketplace actors must be sufficiently numerous to deprive any one actor or group of actors from wielding monopoly or monopsony power; these actors must be accurately and thoroughly informed about the products and other conditions affecting supply and demand; and we must assume the non-existence of other goods or services that may be substituted for the given good or service. This footnote would assume treatise dimensions if I continued with a complete explanation of all the variables and factors that affect economic conceptions of market behavior.

prefers one religion to others. Yet, within these constraints legislatures are free to do pretty much what they please with respect to accommodation of or assistance to religion. This is not a competitive market. The legislature holds monopoly power, but unlike the usual monopolist, the legislature is politically accountable to the people. The result is a political marketplace in which private actors compete with one another to curry legislative favor in one form or another, and simultaneously seek to influence the legislature through ballot-box accountability. The private actors in this political marketplace are not likely to be exclusively religious institutions or persons of religious faith; it is just as probable that public secularists—private persons and affinity groups who care deeply about preventing a blending of state power and religious faith—will participate in this arena.

The creation of a political marketplace of religion will affect the behavior of governments and the various private actors that seek to influence governmental decision-making about the role of religion in public life, or the role of public life in religion. Behavioral effects are not the only effects, however, that the political marketplace will produce. The advent of a vigorous political marketplace of religion will likely affect the future development of the constitutional doctrines that, ironically, created the political marketplace. The nature of such doctrinal change is a bit speculative; thus, I confine my speculations to those based on the doctrinal strands that already exist as buttresses for either end of the spectrum defining the legislative primacy pattern. I first examine the probable behavioral effects of the political marketplace of religion and then the likely doctrinal effects.

A. BEHAVIORAL EFFECTS OF THE POLITICAL MARKETPLACE OF RELIGIONS

Religious institutions and many ordinary citizens are likely to react to the political marketplace outcome by engaging in aggressive rent-seeking. Such rent-seeking will indirectly result in the delivery of greater rewards to those religions that successfully proselytize. This effect, in turn, will likely lead to a heightened level of public debate and, perhaps, controversy concerning the role of religion in public life and the role of public institutions in religion. Each of these phenomena will be discussed below.

1. *Rent-seeking Behavior*

A staple observation of economists and public choice theorists is that people will engage in rent-seeking behavior whenever there is an opportunity to do so. In private bargaining, this usually takes the form of two parties, each seeking to extract the maximum premium theoretically available from any given exchange of rights. The holdout problem presents a classic example. Assume a real estate developer has acquired ownership of all the fee titles that compose a city block, save one.

Assume that his profit from the development (provided that it does not include the holdout's property), reduced to its present value, totals \$5 million. Assume that the developer's profit, including the final parcel, reduced to present value, totals \$10 million. Assume further that the fair market value of the holdout's property, considered in isolation without regard to the proposed development, amounts to \$1 million. The possible gains from trade, or the "rents" available to be captured, total \$4 million, represented by the difference between the marginal increase in the present value of the developer's profit with the holdout's parcel included and the fair market value of that parcel, considered without reference to the development. (Assume also that there are no other possible developers.) Of course, if each of these parties knows these facts, they will squabble over the division of the gain: The holdout will want to obtain a price as close to \$5 million as he can, and the developer will desire to pay little more than \$1 million. Each party will expend energy (and possibly money) on negotiations designed to capture the largest possible portion of the available surplus. The outcome of this bilateral rent-seeking is indeterminate, for any number of factors exogenous to this bare-bones analysis may influence the result.

In the public sphere, similar behavior is apt to occur, but the gains come in a different currency. Individuals and interest groups seek to obtain governmental largesse in many different forms: regulations favorable to the supplicant (or detrimental to the supplicant's rivals), assistance (whether financial or in-kind) to the supplicant's mission, or simply the absence of regulation and restriction from government. Public rent-seeking is also apt to involve large numbers of parties.¹⁷³ First, if the legislature is the only governmental unit that is capable of dispensing such favors, it enjoys monopoly power, but it exercises its power with at least one eye on the next election, thus making the legislative monopolist theoretically responsive to the dominant sentiment motivating the electorate to vote in a particular manner. Second, the number of persons and interest groups that might seek to obtain favors from the legislature probably exceeds the size of the polity itself, given the multiplicity of interests each person possesses.

173. Private rent-seeking can also, of course, involve large numbers. Assume that fifty businesses are concentrated geographically into a compact unit and that each emits noxious air pollution in varying amounts. Assume that downwind of these polluters live one hundred property owners and that no other people are affected by the pollution, thus permitting the assumption that no other negative external costs exist in association with the pollution. If the present value of the collective gains from continued pollution totals \$100 million and the collective present fair market value of the 100 affected properties totals \$10 million (calculated excluding reduction for the pollution and including the costs of relocation imposed on each of the property owners by a sale of their property), everyone concerned will be better off if the polluters pay in excess of \$10 million to the property owners in order to acquire their properties. The collective action problems posed to realization of this outcome, though, are significant—free-riders and holdouts.

As a likely effect of these conditions, each organized sect will seek to obtain public benefits. The probable result consists of two forms of rent-seeking. First, given the finite nature of the public pie, each sect will seek to maximize its share of the benefits, financial and otherwise, that government may permissibly bestow. Second, each sect will seek specific advantages from governments, relative to other sects, either in the form of preferences or disabilities imposed on other sects for ostensibly religiously neutral reasons.

The struggle for a disproportionate share of affirmative public benefits manifests itself most clearly when the public purse is opened to religious aid. Thus, when the Court upheld the validity of school vouchers redeemable at religious schools in *Zelman v. Simmons-Harris*,¹⁷⁴ it did so over the objections of the dissenters that the result would “tap sectarian religion’s capacity for discord. ‘Public money devoted to payment of religious costs . . . brings the quest for more [and] the struggle of sect against sect for the larger share or for any.’”¹⁷⁵ It would be naive to think that this contest will be fought on the basis of pure relative desert. To be sure, each sect will likely claim that its public service, whether it be education, drug counseling, welfare assistance, or something else, provides a better and more effective tool for achieving desired secular aims than that provided by their competitors. Some verifiable truth may dwell in such assertions, but it is equally likely that each sect will seek the termination or diminution of aid to one or more of their rival sects based on the incompatibility of the religious tenets of the rival sects with important secular objectives. As Justice Souter charged in his dissent in *Zelman*, “[r]eligious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition.”¹⁷⁶ It is simply not realistic to expect deeply conservative fundamental Protestants to “underwrite the teaching of the Roman Catholic Church condemning the death penalty,”¹⁷⁷ or to expect Muslims willingly to pay “for the endorsement of the religious Zionism taught in many religious Jewish schools.”¹⁷⁸ Even less realistic is to expect secular Americans blithely to pay for “Muslim views on the differential treatment of the sexes” or the Southern Baptist view “of a wife’s obligation of obedience to her husband.”¹⁷⁹

The struggle for money will inevitably encompass the second form of

174. 536 U.S. 639, 644 (2002).

175. 536 U.S. 639, 715 (2002) (Souter, J., dissenting) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting)).

176. *Id.* at 715–16.

177. *Id.* at 716.

178. *Id.*

179. *Id.*

benefit-seeking: imposition of disadvantages upon other sects for ostensibly religiously neutral reasons. Little imagination is necessary to conjure up the scene in some legislative committee when a secularist proposes to exclude schools that discriminate against women or sexual minorities from participation in a school voucher program, or conversely, when a fundamentalist proposes that school vouchers should not be redeemable at schools that employ homosexuals as teachers. Examples could continue, but I am confident that my readers possess sufficiently vivid imaginations to envision the seemingly endless possibilities of this sort. Nor will this contest be confined to simple exclusion of rival sects from public financial benefits. An equally probable result is that governments will attach conditions to the receipt of aid that will pinch religious expression. After all, the rationale for inclusion of religious institutions in aid programs generally available to secular and religious recipients alike is that such aid programs further secular objectives.¹⁸⁰ With the pursuit of secular ends comes the attachment of secular values to the aid designed to achieve those ends. A prohibition of religious discrimination by aid recipients, which the Cleveland voucher program in *Zelman* mandated, has the strong potential to interfere with religious values.¹⁸¹ However, if the operative pattern remains legislative primacy, this may well be seen as unobjectionable, a mere application of *Davey*, or the obverse of *Amos*. If so, Justice Souter's predictive jeremiad in *Zelman* may well come to pass: "When government aid goes up, so does reliance on it; the only thing likely to go down is independence. . . . A day will come when religious schools will learn what political leverage can do."¹⁸²

The struggle for relative advantage and preference will not be confined to the public treasury. In the name of non-discrimination and equality, religious adherents will seek access to public facilities for religious purposes—access that can hardly be denied.¹⁸³ However, in his dissent in *Widmar v. Vincent*, Justice White argued that a distinction should be drawn between religious worship and other religious speech,

180. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

181. See *id.*

182. *Id.* at 715.

183. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (voiding a public school's refusal to permit a religious group of students and adults to use school facilities after-hours for religious purposes when those facilities were opened to other similar civic and social organizations); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (finding impermissible viewpoint discrimination in public school's closure of its facilities to religious purposes when opened for other public purposes); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 248–49 (1990) (upholding—and rejecting an Establishment Clause challenge to—the federal Equal Access Act, 20 U.S.C. §§ 4071–4074, which requires public schools that make their facilities a limited public forum to open them to religious speech); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (voiding a university's refusal to permit a religious student group access to a limited public forum open to all other student groups).

and that governments may discriminate against religious worship without violating either the Free Speech or Free Exercise Clauses.¹⁸⁴ While this argument was rejected by the *Widmar* majority as “novel,” premised on an unintelligible distinction between worship and other religious speech, and nearly impossible to administer,¹⁸⁵ it surfaced again in the dissents in *Good News Club v. Milford Central School*.¹⁸⁶ Justice Stevens argued that a distinction can and should be made between speech with a “religious viewpoint, on the one hand, [and] religious proselytizing” on the other hand.¹⁸⁷ Justice Souter agreed, calling the speech at issue “an evangelical service of worship calling children to commit themselves in an act of Christian conversion.”¹⁸⁸ The distinction made by White, Stevens, and Souter is untenable in a post-modern world characterized by legislative primacy. Religious worship may qualify as a distinct form of speech when traditional pre-modern religious faith is expressed, although even then the line between worship and other religious speech will be thin and wavering at the margin, but the line entirely disappears when post-modern spirituality is at issue. How does one worship in the creed of self-discovery? While some find traditional worship personally meaningful, others find a stroll among the redwoods on the spine of Point Reyes equally meaningful. The task of labeling worship is Herculean and quite possibly incoherent.

Religious adherents of the sort that Professor Gedicks calls fundamentalists¹⁸⁹ will seek to obtain the public display of religious texts or symbols, either unadorned, as in *Stone v. Graham*¹⁹⁰ and *Glassroth v. Moore* (Alabama Chief Justice Roy Moore’s display of the Ten Commandments in the rotunda of the state’s supreme court),¹⁹¹ or in combination with secular texts and symbols.¹⁹² It is much less likely that post-modern spiritualists will seek the same benefits because it is the nature of spirituality to lack distinctive emblems and symbols indelibly associated with religion. For example, the yin-yang symbol, while

184. *Widmar*, 454 U.S. at 282–87 (White, J., dissenting).

185. *Id.* at 269–70 n.6.

186. See *Good News Club*, 533 U.S. at 130–34 (Stevens, J., dissenting); *id.* at 134–45 (Souter, J., dissenting).

187. *Id.* at 131 (Stevens, J., dissenting).

188. *Id.* at 138 (Souter, J., dissenting).

189. *Spirituality and Fundamentalism*, *supra* note 5, at 1223–24 (“Fundamentalism is everything that spirituality is not. The fundamentalist truth is hard, literal, and exclusive, what God has plainly revealed Fundamentalism presupposes a single, transcendent reality which does not change, and to which believers must consequently accommodate themselves . . .”).

190. *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (display of Ten Commandments alone in public school classrooms).

191. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1318–19 (M.D. Ala. 2003) (ordering monument removed), *aff’d*, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 540 U.S. 1000 (2003).

192. See, e.g., *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854, 2861 (2005).

associated with the I Ching and possibly of some personal meaning to many post-modern spiritualists as a symbol of the duality of existence, is hardly likely to inspire such feeling that spiritualists would seek its display as an aspect of government-sponsored public culture. Only the traditional religious symbols, those born into a pre-modern religious culture and cherished now by those who cling to this religious sensibility, are likely to be thrust into the public sphere. The question posed for Religion Clauses doctrine asks whether it will draw the legislative primacy line at the incorporation of religious symbols into public culture, especially those that convey the fundamentalist message of exclusive truth. While religious fundamentalism sends a message that is incompatible with post-modernist beliefs and directly competes with the Enlightenment paradigm, that paradigm is collapsing. The question is whether it has so collapsed that we are no longer able to see much of a difference between the symbols of pre-modern religion and the secular, particularly when the two are fused. The answer supplied by the Court's decisions in *McCreary County* and *Van Orden* is inconclusive. The *McCreary* majority evidences a passionate neo-Enlightenment sensibility coupled with tinges of post-modern value skepticism. The *Van Orden* plurality accommodates fundamentalist values, and Justice Breyer represents the thoroughly post-modern Millie in the middle.

Finally, it is not implausible to suppose that religious groups and public secularists will seek to impose a wide variety of disabilities on religious sects for ostensibly religiously neutral reasons. As discussed, some of this inevitably attends the structuring of government aid that is generally available to religious and secular entities for the purpose of attaining secular objectives, but this gambit will probably not be restricted simply to aid programs. Legislative primacy suggests that governments may legitimately refuse to accommodate religious practices such as the Islamic daily prayer cycle or observance of the Saturday Sabbath, so long as the non-accommodation is part of a generally applicable principle.¹⁹³ Were a government to forbid its employees from ceasing work for the purpose of facing Mecca and praying, it would no doubt offend the *Employment Division v. Smith* principle, as elaborated by *Lukumi Babalu Aye*.¹⁹⁴ But if the same government simply enforced a policy prohibiting its employees from taking breaks during work for personal reasons, the fact that such a policy would prevent a devout Muslim from performing a portion of his daily prayer ritual would not carry constitutional significance.

193. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

194. *Id.* at 537 ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1989))).

Rent-seeking will take many forms, most of them constitutionally acceptable in the pattern of legislative primacy. Public choice theory suggests at least some likely results from this rent-seeking. Because "interest group politics redistributes wealth and political power away from segments of the population that do not belong to any organized interest group,"¹⁹⁵ it is plausible to think that the well-organized and increasingly energetic adherents to traditional, often fundamentalist, religions are likely to be the principal beneficiaries of legislative primacy. Moreover, no interest "group can afford to drop out of the contest for government handouts"¹⁹⁶ because dropouts will be in the unenviable position of subsidizing those that persevere in rent-seeking, "thus redistributing income to the remaining contestants."¹⁹⁷ Finally, religious rent-seeking "foster[s] an atmosphere of cynicism that is incompatible with a healthy democracy."¹⁹⁸ The task for legislative primacy is to control rent-seeking at least to the point that it does not corrode the democratic process. It is hyperbolic but, perhaps, worthwhile to posit a possibility of competing theocracies battling for supremacy.

2. *Rewarding Successful Proselytizers*

A corollary proposition to the prior discussion of rent-seeking is the observation that legislative primacy delivers an incentive to proselytize. No doubt this is an unintended consequence of legislative primacy, but it is nonetheless a consequence. As religious groups come to understand the new terrain of legislative primacy and bend their efforts toward rent-seeking, they will quickly realize the competitive advantage to be gained by actively and successfully recruiting new adherents. Because legislative primacy gives to governments an enlarged ability to deliver benefits to religion, there is reason to think that legislators will respond to the wishes of their constituents. The effects of increased proselytizing would not necessarily be limited to obtaining partisan sectarian advantage, but may be expected to produce a general increase in the pace and volume of governmental benefits that aid religion, an effect that is likely to spur additional zeal to win converts. I take no position on whether increased religiosity of the people, assuming it should occur, is a good or bad development. Rather, I wish merely to point out the iterative effects on government and religion that may (I stress, *may*) flow from judicial adoption of the marketplace paradigm for the plaza that symbolically sits between the Capitol and the Cathedral.

Moreover, increased emphasis on proselytizing will likely harden

195. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 906 (1987).

196. *Id.*

197. *Id.*

198. *Id.* at 907.

differences between religious groups. Among those of a fundamentalist disposition, this is not likely to produce much incremental suspicion or dislike, for it is the nature of each version of fundamentalism to be certain that its faith alone possesses the universal, divine truth. Radical fundamentalist Muslims praise the greatness of God, just as do fundamentalist Christians, and each is equally certain that the other is an infidel.¹⁹⁹ Increased proselytizing activity is likely to occur mostly among the traditional religious faiths, but spiritualists and public secularists will feel pressure to gain new adherents, lest they be losers in the rent-seeking game permitted by legislative primacy. Of course, in a post-modern world characterized also by marketplace competition, one might simply observe that if there should be fewer public secularists and spiritualists than fundamentalists, the losers have nothing about which to complain. One must wonder, however, whether this result is fully consistent with the ideal of a polity in which faith is private. I do not mean to suggest that those of religious faith should check their faith at the Capitol steps; I simply wish to point out the overtly political nature of religious proselytizing in the scenario I have sketched. That sort of fusion of politics and religion is of a different quality than voting for candidates that adhere to public values consistent with one's religious beliefs and lobbying the legislature for secular policies that are consistent with one's religious values.

3. *Inflamed Debate About Religion in Public Life*

A final corollary to both the rent-seeking and proselytization hypotheses set forth above is to note that these developments will likely result in the injection of considerably more energy into political and civic debate about the relative size of the secular and religious dimensions of public life. Although our law of free speech gives governments considerably more latitude to advocate ideas when it acts as the speaker rather than when it regulates private speech,²⁰⁰ the law of the Religion Clauses treats government speech that advocates religion as presumptively void.²⁰¹ The endorsement test as a device to detect forbidden establishments of religion is founded upon that principle, but even when the endorsement test is not used, this idea has powerful force. In *Torcaso v. Watkins*, for example, the Court struck down a Maryland constitutional provision that made belief in God a requirement for holding public office, reasoning that the provision impermissibly invaded "freedom of belief and religion."²⁰² *West Virginia State Board of*

199. Cf. AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 93 (Oxford University Press 1999) (1911) ("infidel" is defined: "In New York, one who does not believe in the Christian religion; in Constantinople, one who does.").

200. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 203 (1991).

201. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

202. *Id.*

Education v. Barnette, which struck down a mandatory flag salute, was founded on the illegitimacy of coercing belief or speech.²⁰³ As the basis for voiding school prayer and Bible readings, *Engel* and *Schempp* relied on their indirectly coercive effect,²⁰⁴ their distinctively religious character,²⁰⁵ and the need for maintaining "strict neutrality,"²⁰⁶ in order to avoid any "union of government and religion."²⁰⁷ *Lee v. Weisman*, which voided prayers at a public school graduation ceremony, was premised upon the psychological coercion of such prayers in that setting.²⁰⁸ Of course, the Court has relied upon history and tradition to uphold prayers at the opening of a state legislative session²⁰⁹ and to uphold the public exhibition of a crèche along with secular symbols of the December holiday season,²¹⁰ but these apparent aberrations may amount to nothing more than a recognition that history and frequent repetition turn some nominally religious themes into a mere "ceremonial deism."²¹¹ Moreover, the Court has voided a law prohibiting the teaching of evolution in the public schools due to the law's premise that evolution was inconsistent with religion,²¹² and has struck down a law requiring the teaching of creation science and evolution if either theory was taught in the public schools, on the ground that the law lacked any secular purpose.²¹³

However, lower courts have held that Free Exercise rights were not offended when school districts used reading texts that parents and their children genuinely believed repeatedly presented and advocated ideas that were inimical to their religious beliefs,²¹⁴ nor was any forbidden endorsement of hostility to religion found when the San Francisco Board of Supervisors officially condemned "religious organizations" such as "the Religious Right," and characterized their views as "erroneous and full of lies."²¹⁵ The court of appeals concluded that no colorable claim was presented "so long as there is no actual or threatened imposition of

203. *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

204. *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

205. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (stating that Bible readings were a "religious ceremony . . . intended by the State to be so").

206. *Id.* at 225.

207. *Engel*, 370 U.S. at 431.

208. *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992).

209. *See Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

210. *See Lynch v. Donnelly*, 465 U.S. 668, 681, 687 (1984).

211. *Id.* at 716 (Brennan, J., dissenting) (quoting Arthur E. Sutherland, *Book Review*, 40 IND. L.J. 83, 86 (1964) (quoting from memory Eugene Rostow's unpublished 1962 Meiklejohn Lecture delivered at Brown University)).

212. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

213. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

214. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

215. *Am. Family Ass'n v. San Francisco*, 277 F.3d 1114, 1119, 1120 (9th Cir. 2002).

government power or sanction.”²¹⁶ Judge Noonan, in dissent, posed the following hypothetical:

Suppose a city council today, in the year 2002, adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and so, the resolution said, were “directly correlated” with the bombing of the World Trade Center. Plausibly the purpose might be to discourage terror bombings. Would any reasonable, informed observer doubt that the primary effect of such an action by a city could be the expression of official hostility to the religion practiced by a billion people?²¹⁷

Or, to reverse the pattern, one wonders if the Ninth Circuit would apply the same test to a resolution of the city council of Idaho Falls praising Jerry Falwell for his conviction that “the Bible is the revealed Word of God.”

In a world of legislative primacy, we can expect these clashes to become sharper. The asymmetry that permits San Francisco to condemn religion but forbids Idaho Falls from praising religion will provoke further and more vigorous battles in the legislative arena. Should the principles of neutrality, equality, and non-discrimination ultimately eliminate this asymmetry by broadening legislative primacy, the conflicts will only become more fierce. Moreover, relaxation on one front will invite relaxation on other fronts. If symmetry is achieved by rejecting endorsement as the operative test and relying solely upon coercion as the test of forbidden establishments, which is the only way in which symmetry and broadening of legislative primacy can simultaneously be achieved, we can envision a world in which rent-seeking takes the form of obtaining official pronouncements of jurisdictional loyalty to one religion or another. If that scenario seems farfetched or implausible, it is only because you do not think that legislative primacy will be taken to that extreme. To be sure, there is no indication that the will exists to repudiate the large body of law that prevents governments, in the main, from using religion as a device to shape public culture. Even so, it may pay to speculate a bit on the shape of an alternative future.

B. EFFECTS OF THE POLITICAL MARKETPLACE OF RELIGION ON CONSTITUTIONAL DOCTRINE

Thus far, I have offered speculation in places about the future nature of the patterns of Religion Clauses jurisprudence, and some of those musings include speculation concerning the probable effects of the marketplace approach on constitutional doctrine. I shall endeavor not to repeat what has gone before; in this section I shall try to summarize briefly some of the likely additional effects of that approach on the law

216. *Id.* at 1125.

217. *Id.* at 1127 (Noonan, J., dissenting).

of the Religion Clauses.

1. *The Terminal Irrelevance of Lemon v. Kurtzman*

Lemon v. Kurtzman may be both the Energizer Bunny™ and the Timex™ watch of the law of the Religion Clauses.²¹⁸ It “keeps on going and going” and while “it takes a beating, it keeps on ticking.” *Lemon*’s trilogy of secular purpose, neutral effect, and lack of excessive entanglement between church and state, while modified, attacked, ignored, and prematurely buried, is still around to bedevil us. Justice Scalia has derided *Lemon* as akin to a

ghoul . . . that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, . . .

[B]ut we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs “no more than helpful signposts.”²¹⁹

As we have seen in the prior discussion of legislative primacy, *Lemon* has already been effectively eclipsed by the principles of neutrality, equality, and non-discrimination. Government action, especially provision of aid, will survive Religion Clauses scrutiny if it (1) is facially neutral with respect to religious and secular beneficiaries, (2) uses private choice as the medium of selection of religious beneficiaries, and (3) does not discriminate among religious beneficiaries.²²⁰ While *Lemon* will likely continue to be cited and purportedly applied from time to time, it will be largely devoid of substance. Instead of a critical review of purpose and effect, the principles of neutrality, equality and non-discrimination will supply the analytical force with respect to governmental financial aid to religion (which is all that *Lemon* was supposed to be about, anyway). The judiciary will patrol the other frontiers of legislative primacy, using the tools of coercion and endorsement. Legislative primacy will make *Lemon* terminally irrelevant, if not dead. The ghost of *Lemon* will stalk the pages of the United States Reports for some time, but it is only “a docile and useful monster,” stripped of its vitality.²²¹

2. *Increased Emphasis on Non-discrimination Between Religious Groups*

Legislative primacy means an increased emphasis on non-discrimination as a sometimes determinative principle. If a significant

218. 403 U.S. 602, 624–25 (1971).

219. *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

220. See *id.* at 395 (citing the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 624–25 (1971)).

221. *Id.* at 399.

behavioral effect of legislative primacy is vastly increased religious rent-seeking, it is entirely predictable that the judiciary will be asked to decide when ostensibly neutral legislative actions between religious groups in fact embody impermissible discrimination against a particular minority religious group. The problem is hardly new; the leading case is *Larson v. Valente*.²²² Minnesota required charitable organizations that solicit donations to register and report periodically to the state, and stipulated that a charity's registration could be withdrawn for misconduct.²²³ Initially, Minnesota exempted all religious organizations from these requirements, but then changed the rule to exempt only those religious organizations that solicited more than half of their contributions from members of the organization.²²⁴ The Court concluded that the exemption, while facially neutral as to religion, "clearly grants [a] denominational preference"²²⁵ in favor of well-established religious groups with generous supporting members, and against new groups who solicit funds from the general public, either by inclination or religious duty.²²⁶ This preference, though not evident on the face of the law, was revealed by legislative history that disclosed one Minnesota legislator's desire to "deal with the religious organizations that are soliciting on the street," another's explanation that "what you're trying to get at here is the people who are running around airports and running around streets and soliciting people," and yet another legislator's puzzlement over "why we're so hot to regulate the Moonies."²²⁷ After detecting a legislative purpose to discriminate among religions, the Court applied strict scrutiny and found no justification for this offense against the "clearest command of the Establishment Clause[:] that one religious denomination cannot be officially preferred over another."²²⁸

By contrast to *Larson*, *Gillette v. United States* upheld an exemption from conscription for those possessing religious objection to participation in all wars, rather than those possessing a more selective religious objection to war.²²⁹ The effect, of course, was to favor Quakers and other sects opposed by religious faith to all war, and to disfavor Roman

222. 456 U.S. 228, 246 (1982). A precursor to *Larson* was *Murdock v. Pennsylvania*, in which the Court invalidated a municipal ordinance that required Jehovah's Witnesses who solicited donations in exchange for religious literature to pay a tax and obtain a license. The Court found this to be "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." 319 U.S. 105, 113 (1943).

223. *Larson*, 456 U.S. at 230-31.

224. *Id.* at 231-32.

225. *Id.* at 246.

226. For example, the International Society for Krishna Consciousness (more popularly known as the Hare Krishnas) practice Sankirtan, a religious ritual "which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 645 (1981).

227. *Larson*, 456 U.S. at 254-55.

228. *Id.* at 244.

229. 401 U.S. 437, 454 (1971).

Catholics and others who hold religious scruples against unjust wars. The Court in *Gillette* found no sectarian preference because the statute, “on its face, simply does not discriminate on the basis of religious affiliation or religious belief . . . [but] says that anyone who is conscientiously opposed to all war shall be relieved of military service,” and because “neutral and secular . . . reasons” for the selective exemption existed.²³⁰ The Court in *Larson* distinguished *Gillette* by noting that an individual Catholic who held a religious opposition to all wars could avail himself of the exemption; thus, the *Gillette* exemption did not, as in *Larson*, focus “precisely and solely upon religious organizations.”²³¹ Without proof of any discriminatory purpose, the Court held the statutory exemption valid, despite its disproportionately discriminatory impact.²³²

This emphasis upon discriminatory purpose can be seen in other cases as well. In *Board of Education of Kiryas Joel Village School District v. Grumet*,²³³ the Court invalidated New York’s attempt to create a public school district precisely drawn to include only members of the Satmar Hasidic sect of Jews. Because New York had delegated its authority “to a group defined by its character as a religious community,” it had violated the central command of religious neutrality that governments favor “neither one religion over others nor religious adherents collectively over nonadherents.”²³⁴ In *Kiryas Joel*, evidence of discriminatory purpose stemmed from the sharply discriminatory effects, just as an inference of racially discriminatory purpose arose from similarly discriminatory effects in the facts of *Gomillion v. Lightfoot*.²³⁵ The conclusion that a successful claim of religious discrimination requires proof of discriminatory purpose is further buttressed by *Heffron v. International Society for Krishna Consciousness, Inc.*²³⁶ Minnesota limited those who wished to distribute literature and solicit donations at the Minnesota State Fair to an assigned location within the fairgrounds.²³⁷ This rule had the effect of curtailing the Krishnas’ practice of Sankirtan, the religious ritual of distributing literature to and soliciting donations from the general public.²³⁸ The Court upheld the rule because it applied equally to all religious and non-religious groups and was supported by adequate

230. *Id.* at 450, 454.

231. *Larson*, 456 U.S. at 246–47 n.23.

232. *Id.*

233. 512 U.S. 687, 696 (1994).

234. *Id.* at 696.

235. 364 U.S. 339, 340 (1960) (finding intentional racial discrimination inferred from a change of municipal boundaries from a square to an “uncouth twenty-eight sided figure” with the effect of removing not one white voter but 99 percent of the black voters).

236. 452 U.S. 640, 654 (1981).

237. *Id.* at 643.

238. *Id.* at 645.

secular reasons of crowd control.²³⁹ Though the effect of the rule was undoubtedly more burdensome to the Krishnas than, say, Lutherans, there was no proof of discriminatory purpose.

Legislative primacy is apt to increase the number of such cases. As religious rent-seeking increases and legislators respond to these pressures, cases like *Larson* and *Kiryas Joel* are likely to proliferate. *Larson* provides a good example of sectarian rent-seeking in the form of imposition of disadvantage upon a rival, disfavored, minority sect. *Kiryas Joel* offers a good example of naked sectarian rent-seeking in the form of positive benefits to the supplicant sect. Moreover, legislatures learn from judicial experience. New York, for example, responded to *Kiryas Joel* by twice reenacting legislation to deliver the originally intended effects to the Satmar Hasidic community of Kiryas Joel, but employing more facially neutral means of doing so. The first attempt failed because only the Kiryas Joel community met the ostensibly neutral criteria.²⁴⁰ The second attempt, which permitted municipalities within an existing school district to form their own independent school district if they met certain wealth and population criteria designed to ensure the sustainability of each resulting school district, also failed because it had the "impermissible effect of advancing one religious sect."²⁴¹ Whether New York could devise any method of enabling Kiryas Joel to create its own school district, given this history, remains unsettled. No doubt the Minnesota legislature, in future attempts to deal with solicitation by religious organizations, will be far more circumspect in its floor colloquy. However, this only suggests that the Court will have a harder time detecting impermissible discriminatory purpose in the cases that arrive on the steps of its Greek Revival temple; it does not suggest that the problem will disappear.

To the extent that disadvantages are likely to be imposed in the form of facially neutral rules, the Court will face a choice between accepting such neutrality at its face value or inquiring into the purposes behind the legislation, the effects it produces, or both. The history of the *Lemon* test leaves little reason to suppose that such inquiry will be very searching (especially concerning the effects of governmental action), and, even if it is, one can expect the Court to quarrel over the issue of whether to look to actual purposes, stated purposes, or hypothetical purposes as the touchstone of decision on that point. The experience in Equal Protection doctrine with respect to this issue is not particularly encouraging. The Court says it accepts hypothetical purposes for minimal, or "rational basis," scrutiny, yet it looks to stated and actual purposes in a fair

239. *Id.* at 654.

240. See *Grumet v. Cuomo*, 681 N.E.2d 340, 348-49 (1997).

241. See *Grumet v. Pataki*, 720 N.E.2d 66, 67 (1999).

number of cases that purport to apply minimal scrutiny.²⁴² Perhaps the Court's resolution of this issue, in the context of claimed religious discrimination, will involve importing the disparate impact principles of *Washington v. Davis*²⁴³ and *Arlington Heights v. Metropolitan Housing Development Corp.*,²⁴⁴ which place upon the plaintiff the burden of proving intentional discrimination as a factor that motivated adoption of the challenged law in order to trigger strict scrutiny, but which leaves the government with an opportunity to rebut the prima facie case of intentional discrimination by proof that it would have taken the same course of action for non-discriminatory reasons.²⁴⁵ Legislative primacy suggests that the Court will need to develop some version of disparate impact analysis to deal with hidden instances of religious discrimination.

3. Sharpened Conflict Between "Endorsement" and "Coercion"

If, as I have supposed, *Lemon* becomes even more of a relic and less an all-purpose test for detecting Establishment Clause violations, the burden of that function will increasingly fall upon the endorsement and coercion tests. The endorsement test, in its modern form, was first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*.²⁴⁶ She noted that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community," and asserted that "government endorsement or disapproval of religion" would violate this principle: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."²⁴⁷

Coercion, as a distinct test for forbidden establishments, has a mixed and more controversial lineage. In the course of striking down voluntary prayer in the public schools in *Engel v. Vitale*, the Court declared that a

242. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (applying minimal scrutiny but concluding from the extremely broad legal disabilities imposed on homosexuals by the classification at issue that the actual purpose was to harm homosexuals as a class by making them "stranger[s] to [the] laws"); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (applying minimal scrutiny in concluding that the classification, as applied, "rest[s] on an irrational prejudice against the mentally retarded"); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179-80 (1980) (Applying minimal scrutiny, the Court divides over whether legislative purpose is to be determined from the face of the classification at issue, the hypothetical purpose, the stated purpose, or the actual purpose.); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (applying minimal scrutiny but concluding from the legislative history that the actual purpose of the classification was simply "to harm a politically unpopular group" (alternative holding)).

243. 426 U.S. 229, 252 (1976).

244. 429 U.S. 252, 270 (1977).

245. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

246. 465 U.S. 668, 687 (O'Connor, J., concurring).

247. *Id.* at 687, 688.

violation of the Establishment Clause “does not depend upon any showing of direct government compulsion.”²⁴⁸ Rather, the clause “is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”²⁴⁹ Judge McConnell has pointed out that precedent prior to *Engel* not only failed to support this assertion but also directly contradicted it.²⁵⁰ In any case, the comment was dictum; the Court expressly concluded that the prayers at issue involved coercive pressure upon religious minorities because they were backed by the considerable force of government.²⁵¹ Judge McConnell has also reminded us that at the center of the historical record upon which the Establishment Clause is built, one finds the concept that coercion of religious belief or observance is the “essence of an establishment” of religion.²⁵²

In *Lee v. Weisman*, the Court eschewed *Lemon* and applied coercion as the test for a claimed Establishment violation, but arguably stretched the concept beyond the breaking point, thus making the test nearly useless in application.²⁵³ At issue was the validity of bland, ecumenical prayers of invocation and benediction delivered at the graduation ceremony of a public middle school.²⁵⁴ The Court considered the prayers a forbidden establishment, finding “subtle coercive pressure” at work: the school’s “supervision and control” of the graduation ceremony placed “public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”²⁵⁵ Justice Scalia derided this “psychological coercion” argument as “incoherent,”²⁵⁶ noting that the coercion identified amounted to a compulsion to stand, at most, and a compulsion to maintain a respectful silence, at least.²⁵⁷ That subtle and indirect pressure to exhibit common courtesy to a public speaker becomes the sort of coercion that preoccupied men such as Madison involves a leap of logic that I find difficult to comprehend.²⁵⁸

248. 370 U.S. 421, 430 (1962).

249. *Id.*

250. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934-35 (1986).

251. *Engel*, 370 U.S. at 430-31.

252. McConnell, *supra* note 250, at 937. But see Douglas Laycock, “Non-Coercive” Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37 (1991).

253. 505 U.S. 577, 592-93 (1992).

254. *Id.* at 580.

255. *Id.* at 592, 593.

256. *Id.* at 636 (Scalia, J., dissenting).

257. *Id.* at 637.

258. In debate concerning the Establishment Clause in the First Congress, Madison declared that he “apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to

Whatever the current status of coercion as an independent test, it is foreseeable that coercion will play a larger role as the pattern of legislative primacy matures. Hard coercion—compulsion backed by force with real penalties attached to non-compliance—will appeal to those who seek to push the judicial boundaries of establishment further to the margins, particularly when the issue involves the degree to which religious ceremony should play a part in public culture. The endorsement test will no doubt serve as the preferred tool for those wishing to retain judicial control over the role of religious ceremony in the public weal. Thus, we can expect conflict concerning which test to deploy in any given instance to intensify. One could also predict that the version of coercion used in *Lee v. Weisman* may develop into a vehicle for mediating this conflict. Soft coercion—the subtle psychological pressure to refrain from manifesting one’s dissent by words or action—will enable those wishing to retain judicial control over the role of religious ceremony in public to chant the mantra of coercion while applying something much more akin to endorsement.

4. Heightened Judicial Focus on Legislative Purpose

Legislative primacy is also apt to heighten the focus on legislative purpose. Of course, inquiry into purpose is already integral to the *Lemon* test; my claim is not that examination of purpose is new, but that the importance of the inquiry may increase under legislative primacy. This magnified focus is already apparent with respect to putatively neutral laws that, in effect, disproportionately favor some religious groups over others and that are analyzed as possible impermissible establishments.²⁵⁹ The same phenomenon is likely to occur with respect to legislative action that treats religion unfavorably and that allegedly interferes impermissibly with free exercise. *Locke v. Davey* may supply an example of the future.²⁶⁰ Even though the Washington provision at issue in *Davey* was facially discriminatory against religion, the Court upheld its validity under Free Exercise analysis because:

[T]he subject of religion is one in which both the United States and [Washington] constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal

their conscience.” 1 ANNALS OF CONGRESS 758 (Joseph Gales ed., 1834). Madison’s Memorial and Remonstrance, penned during the Virginia Assessment Bill fight, amply displays his concern with a much harder-edged, backed-by-force-of-law sort of coercion. See McConnell, *supra* note 250, at 937–38.

259. See text accompanying notes 222–45; see also *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (voiding a requirement that both creation science and evolution be taught in the public schools if either theory was taught); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (striking down a ban on the teaching of evolution in the public schools on the basis of an impermissible purpose to advance religion).

260. 540 U.S. 712, 720–21 (2004).

differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.²⁶¹

To be sure, the Court also thought that the negative effects upon religion of Washington's open refusal to permit students to use its scholarship funds to pursue a degree in theology were less severe than in prior such cases. Unlike *Lukumi Babalu Aye*,²⁶² the Washington provision imposed "neither criminal nor civil sanctions on any type of religious service or rite."²⁶³ Unlike *McDaniel v. Paty*,²⁶⁴ it did "not deny to ministers the right to participate in the political affairs of the community."²⁶⁵ Nor did it force a choice between adherence to "religious beliefs and receiving a government benefit."²⁶⁶ Nonetheless, judicial examination of legislative purpose was a key factor in *Davey's* willingness to defer to Washington's judgment concerning naked discriminatory treatment of religion.²⁶⁷

Examining legislative purpose is a dicey business at best, but the law of the Religion Clauses demands that the judiciary do so. The inquiry under *Lemon*, and presumably elsewhere in the law of the Religion Clauses, focuses on "whether [the] government's actual purpose is to endorse or disapprove of religion."²⁶⁸ Yet the difficulty inherent in divining the actual purpose of a single person in connection with some action is nothing when compared with the difficulty of determining the actual purpose of a collective body engaged in legislating. Justice Scalia has illustrated many of these problems in his dissent in *Edwards v. Aguillard*.²⁶⁹ However, it is not only improbable that the inquiry will cease, but highly probable that the occasions for invocation will increase—even if *Lemon* shrivels into a jurisprudential raisin.

5. Some Final Post-Modern Speculations

Lest the reader think that legislative primacy supplies a recipe for endless sectarian strife, with little intervention from the courts, consider some final possibilities of the post-modern sensibility as manifested in religious belief and conduct. The basic religious divide in a post-modern world separates pre-modern fundamentalist religion and post-modern

261. *Id.* at 721.

262. 508 U.S. 520, 537 (1993).

263. *Davey*, 540 U.S. at 720.

264. 435 U.S. 618, 629 (1978).

265. *Davey*, 540 U.S. at 720.

266. *Id.* at 720–21; see also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145–46 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 719–20 (1981); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

267. See *id.*

268. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

269. 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting).

spirituality. Fundamentalism, of whatever brand, asserts a universal and exclusive truth. "Fundamentalism presupposes a single transcendent reality which does not change and to which believers must consequently accommodate themselves, rather than vice versa."²⁷⁰ Post-modernism, of course, denies any such possibility. As a result, the religious sensibilities of post-modernists tend toward the spiritual, focusing inward upon the contingent nature of ourselves, rather than outward upon the eternal, fixed message of a God beyond our knowledge and demanding fealty to his—and not our—standard.

A question that hovers over the metaphysical cusp in which we live is whether the post-modern understanding will displace pre-modern fundamentalism, or whether fundamentalism will triumph and displace post-modernism. I do not pretend to know the answer, but I do offer some preliminary thoughts, coupled with some observations about the probable related effects on the law of the Religion Clauses. Fundamentalism requires a sublimation of individual will to the demands of an eternal God. How does one apprehend the will of God? The truly pre-modern answer was to listen to the pronouncements of the priest and accept his intermediation between God and man as infallible. But as modernism flexed its metaphysical muscle, Christian fundamentalism took a new turn. The Reformation posited that the intermediary was unnecessary; man could divine God's will by reading His Word. Thus Protestant fundamentalism was born. But what is the meaning of God's Word? In a modern age, this could be settled within denominations by a shared understanding supplied by clergy, interpretive literature, and the communion of shared fellowship, but in a post-modern world in which experience is increasingly isolated or mediated through a seemingly infinite supply of informational sources, the possibility of a common understanding of the eternal truth upon which fundamentalism stands seems to fall into greater jeopardy. Thus, there is reason to suppose that the appeal of fundamentalism as a coherent, unified, universal truth will diminish. This has led some commentators to speculate that "[f]undamentalism will no doubt survive, but [only] as a niche product appealing to a narrow segment of the market for religious experience—perhaps dominant in its category, but lacking mass appeal."²⁷¹

By contrast, post-modern spirituality is inherently flexible and malleable. All avenues to self-discovery are equally valid. The post-modernist cleric offers what sells, and it comes in many more flavors than Baskin-Robbins ice cream. This does not mean that the post-modern spiritual product is any less religious; it does suggest that the climate of

270. Frederick Mark Gedicks & Roger Hendrix, *Religious Experience in the Age of Digital Reproduction*, 79 ST. JOHN'S L. REV. 127, 156 (2005).

271. *Id.* at 158.

post-modernism suits post-modernist spirituality. Post-modernist spirituality lacks judgment; it speaks not of sin but of self-harming behavior. It asks neither commitment to duty nor obligation of its adherents; it offers therapy by affirming the inherent value of each individual and the promise of discovering one's own self-worth. It offers not God's unconditional love obtained by an embrace of that which he freely offers to those who believe, but the promise of an unconditional love of each individual premised upon the inherent value of human experience. Thus, one would expect that post-modern spirituality would be a huge marketing success, and perhaps it is and will continue to be.

For the moment, assume the vast appeal of spirituality, an appeal so encompassing that it will eclipse fundamentalism, at least in America. Should that be so, the flaws (if so they be) in legislative primacy are not so much flaws as they are virtues. A nation overwhelmingly composed of a Panglossian²⁷² spirituality that caters to every individual need has little to fear from cession to the legislatures of the power to accommodate, or not accommodate, religion. Such a nation is not very likely to spawn organized religious groups that fervently believe their message must be enshrined in the public square.

But will spiritualism triumph? Perhaps, but it may be equally likely that the pursuit of self-directed spirituality will, in the end, leave its practitioners with a hollow and empty feeling. It is beyond my ken to say that post-modern spirituality supplies empty calories for the spirit, a sort of fast food for the soul, but that possibility exists. Perhaps the decline of modernism's faith in rational explanation will ultimately result in a popular embrace of that which is claimed to be eternal. If so, the demands placed upon legislative primacy will be large, the stress enormous. As William Butler Yeats put it, "Turning and turning in the widening gyre . . . , Things fall apart; the centre cannot hold."²⁷³

CONCLUSION

The law of the Religion Clauses presents primarily a judicial exercise in mediating the inherent conflict between the clauses, for the Free Exercise Clause requires some accommodations of religion and the Establishment Clause prohibits other accommodations of religion. Judicial mediation of this tension will produce one of four distinctive patterns, each characterized by the relative degree of deference the judiciary displays toward legislative judgments of appropriate accommodation that are claimed to offend the Free Exercise Clause, the Establishment Clause, or both. Judicial primacy is the pattern in which

272. Doctor Pangloss was, of course, the creation of Voltaire in his work, *Candide*.

273. WILLIAM BUTLER YEATS, *The Second Coming*, THE COLLECTED POEMS OF W. B. YEATS (Macmillan Co. 1933).

the Court displays the least deference toward legislative judgments of religious accommodation, by means of robust enforcement of both clauses. Legislative primacy is the polar opposite of judicial primacy. Under legislative primacy, the Court defers to legislative judgments of religious accommodation by lax enforcement of both clauses. Judicial secularism is a pattern by which the Court vigorously enforces the Establishment Clause and loosely enforces the Free Exercise Clause, thus restricting the ability of legislatures to decide when to accommodate religion without violating the Establishment Clause but leaving them with relatively greater freedom to decide whether or not to accommodate religious conduct. Judicial accommodation is a pattern by which the Court energetically enforces the Free Exercise Clause to require many accommodations of religious conduct, but evinces less willingness to strike down other types of accommodations that allegedly violate the Establishment Clause. Judicial accommodation gives legislatures considerable freedom to accommodate religion without violating the Establishment Clause, but requires them to accommodate religious conduct.

When the law of the Religion Clauses began to develop in earnest in the middle of the twentieth century, it developed toward the judicial primacy pattern, but as the century waned and turned the millennial milepost, the law of the Religion Clauses began to assume the shape of legislative primacy. Political and cultural changes have influenced this change. The *de facto* Protestant establishment that persisted from the nation's beginning to the twentieth century collapsed by mid-century; in its wake, a new coalition of religious and secular allies began to press for broader governmental assistance to religion. At the same time, the age of modernity—the Enlightenment commitment to rationalism as the avenue to truth, which had replaced the medieval commitment to religious faith—began to be undermined by post-modernism, the belief that there are no universal truths. Modernity posed a conflict between two competing explanations of truth; post-modernism accepts that no account can be known to be true. The paradoxical result is that religion has been freed from the margins to which modernity had consigned it. Moreover, much of traditional religion has been replaced by a distinctively post-modern spirituality, a preoccupation with self-understanding that borrows eclectically from many ways of apprehending transcendent reality, both religious and secular. The resulting religious pluralism has increased the pressure upon political actors to accommodate a variety of religions and, simultaneously, made imperative the need to avoid compelling governments to accommodate the limitless variety of conduct that may represent the product of religious belief.

Legislative primacy produces both behavioral and doctrinal effects. The principal behavioral effect consists of encouraging a political

marketplace of religion, in which religious and secular actors engage in rent-seeking in the form of government benefits to religion. Benefits, however, can come in the form of favors bestowed on any given rent-seeker or burdens placed on rival rent-seekers. By-products of religious rent-seeking include increased proselytizing, because successful proselytizers will secure an advantage in religious rent-seeking, and increased contentiousness concerning the proper role of religion in public life. The likely doctrinal effects of legislative primacy include the terminal irrelevance of *Lemon*, increased emphasis on non-discrimination between religious groups, a sharper conflict between the competing endorsement and coercion tests for detecting Establishment Clause violations, and a heightened judicial focus upon the legislative purpose underlying ostensibly neutral measures that deliver religious effects.

While it is too soon to know whether legislative primacy will ameliorate or exacerbate religious conflict, it is not too soon to declare our entrance into a new era of the law of the Religion Clauses. Perhaps the metaphysics of post-modernism will produce sufficient religious toleration that the political dynamic of religious rent-seeking will moderate, and will result in an increase in aggregate preference satisfaction without destabilizing side effects. But it is also possible that the mixture of extreme religious pluralism, post-modern uncertainty, and religious rent-seeking will prove to be volatile. Let us hope the Court will be attentive to the effects of legislative primacy and modify it as necessary to account for conditions as they develop.