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Of God and Caesar: The Free Exercise Rights of Public School Students

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ARTICLES

OF GOD AND CAESAR: THE FREE EXERCISE RIGHTS OF PUBLIC SCHOOL STUDENTS

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> Then saith [Jesus] unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.[1]

When the Pharisees tried to "entangle" Jesus by asking "Is it lawful to give tribute unto Caesar, or not," He avoided the trap by distinguishing the sacred from the secular.[2] When Caesar imposes on children an education that offends their belief in God, however, it may be impossible to satisfy both injunctions. Many religious people today feel that government is hostile to their religion, especially in the public schools. They seek relief from classes that offend their faith so that they can "[r]ender . . . unto God the things that are God's" without disobeying Caesar. Schools often grant these requests voluntarily. When there is litigation, the results are mixed, but parents win often enough to suggest that there are some free exercise rights in these situations.

I will briefly describe these controversies and then analyze the impact of recent Supreme Court decisions on these issues and sug-

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1. *Matthew*: 22:21.
2. *Id.* at 22:15-22.

gest how they should be resolved.

I. BACKGROUND: TYPICAL RELIGIOUS COMPLAINTS ABOUT SCHOOL INSTRUCTION

Most religious objections to public education come from religious traditionalists—primarily fundamentalist Protestants, but also traditional Catholics, Orthodox Jews, and smaller sects. The objections vary.[3] Some would seem strange, even incomprehensible to most Americans, but others are intelligible and more appealing to the mainstream. One study of several widely used textbooks[4] found that "[p]atriotism is close to nonexistent"[5] and the role of business in American life is "ignored."[6] Traditional family values and sex roles are slighted: The family is defined as just "a group of people,"[7] marriage is ignored,[8] and divorce is pronounced acceptable or "a neutral event."[9] The one-parent family is condoned.[10] Women are never portrayed as homemakers, and motherhood and marriage are rarely depicted positively—the words "marriage," "wedding," "husband" and "wife" were not mentioned once in sixty social studies textbooks surveyed.[11]

The teaching of ethics also draws protest. Many public schools preach a moral relativism that rejects any notion of enduring values.[12] Self-actualization is treated as the highest goal.[13] Sex education, including instruction about AIDS, is a fertile source of trouble. Parents have objected to a pamphlet that advised "'use latex

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3. *See generally* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 865-73 (1988).

4. PAUL C. VITZ, CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS (1986).

5. *Id.* at 75 (conclusion as to textbooks used to teach reading).

6. *Id.* at 3 (conclusion as to textbooks used to teach reading).

7. *Id.* at 37 (quoting FREDERICK M. KING ET AL., UNDERSTANDING FAMILIES 6 (1983)).

8. *Id.* at 38 (discussing the bias found in social studies textbooks).

9. Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 1008 (S.D. Ala.) (quoting CONNIE R. SASSE, PERSON TO PERSON 300 (1981)) (addressing whether textbooks used in public schools promoted the religion of secular humanism and violated the Establishment Clause), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

10. *See* FRANCES B. PARNELL, HOMEMAKING SKILLS FOR EVERYDAY LIVING 88 (1984) (saying that the one-parent family is not "inferior").

11. VITZ, *supra* note 4, at 2.

12. *See* Fred M. Hechinger, *A Matter of Censorship*, N.Y. TIMES, Mar. 10, 1987, at C11 (discussing the controversy over secular humanism in the *Smith* decision).

13. *See Smith*, 655 F. Supp. at 1000 ("Self-actualization is the highest level of human need.") (quoting VERDENE RYDER, CONTEMPORARY LIVING 20 (1981)).

condoms plus spermicide . . . if you can't be sure your partner is not infected with the [AIDS] virus,' and to 'limit the number of sexual partners to reduce your chance of exposure to the virus.'"[14] A curriculum guide for New York City public schools comments on masturbation: "Do it, it's fun."[15]

Finally, the historical role of religion is slighted except in its relation to non-Western societies and among American minorities.[16] Thus "Protestantism is almost entirely excluded, at least for whites."[17] For example, the religious motives of the Pilgrims have been extirpated,[18] and in a story by Isaac Singer, references to God were deleted.[19]

Perhaps in theory it should not matter whether these complaints are plausible to most Americans—the First Amendment protects unusual as well as commonplace religious beliefs. In practice, however, it does make a difference, as evidenced by an editorial in the *New York Times* that ridiculed certain religious objections as "know-nothing-alarmism."[20] Obviously, one's view of the plausibility of a complaint influences one's views about its legal validity.

Public education is often portrayed as value neutral.[21] Traditional religionists reject the idea of value neutral education—they want their children educated in the values of their religion.[22]

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14. Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 423 (N.Y. 1989) (quoting THE WELLNESS WAY: UNDERSTANDING AND PREVENTING AIDS).

15. *Quoted in* Richard Vigilante, *Winning in New York*, NAT'L REV., Jan. 18, 1993, at 18.

16. VITZ, *supra* note 4, at 16-18 (finding occasional references to Jewish, Mormon, and other minority religions and a greater emphasis on religion in other cultures in social studies textbooks).

17. *Id.* at 75 (conclusion as to textbooks used to teach reading). *See generally* ROBERT BRYAN, HISTORY, PSEUDO-HISTORY, ANTI-HISTORY: HOW PUBLIC SCHOOL TEXTBOOKS TREAT RELIGION (1983) (giving examples of the ignoring of, and distorting of, the role of religion in textbooks); William R. Marty, *To Favor Neither Religion Nor Nonreligion: Schools in a Pluralist Society*, *in* EQUAL SEPARATION 95, 99 (Paul J. Weber ed., 1990) ("[T]he thrust in the public schools is to treat religion not at all, or as irrelevant, or as superstition.").

18. *See* VITZ, *supra* note 4, at 3, 18 (examples in social studies textbooks).

19. *Id.* at 3-4 (changes made in a sixth grade reader). *See also id.* at 79 (attempt by publisher to remove religious references from another story).

20. *See Jim and Pat Cook. Jim Cooks First*, N.Y. TIMES, Mar. 13, 1986, at A26.

21. Rosemary C. Salome, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 257 (1992) (asserting that our society has become more diverse, challenging the "myth" that public education is value neutral).

22. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clause*, 41 STAN. L. REV. 233, 234-35 (1989) (asserting that fundamentalists feel threatened by the influence of "secular humanism" in school curriculum).

More importantly, education can never be value neutral — inevitably, education promotes some values and belittles others.[23] Moreover, in many cases public schools make no effort to be neutral or even-handed; it is in these cases that traditional religionists often complain. For example, considerable controversy now swirls around the treatment of homosexuality in the public schools.[24] Although many parents would resist a treatment that gave all points of view, it is important to note that most disputes have arisen in schools that do not pursue even-handedness. Many public schools now portray homosexuality as normal and acceptable.[25] These schools give children no other side of the issue; they do not mention that our main religious traditions (not just fundamentalists) regard homosexuality as a sin and an abomination in the eyes of God.[26] Thus, it should be kept in mind that the teaching to which religious traditionalists object is not value neutral and often does not even try to be so.

II. THE CURRENT STATE OF THE LAW

The law on the free exercise rights of public school students is jumbled. Students are often accommodated without litigation. Many state education laws exempt religious objectors from physical education, sex and AIDS education, and other instruction.[27] Absent statutory exemptions, local school districts, principals, or teachers may grant them.[28] Sometimes accommodation includes substitute instruction.[29]

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23. *See id.* at 238-39 (1989) (arguing that value-free education is impossible for several reasons).

24. *See* Josh Barbanel, *Under "Rainbow," a War: When Politics, Morals and Learning Mix*, N.Y. TIMES, Dec. 27, 1992, at 34 (describing the controversy surrounding the "Children of the Rainbow" curriculum in New York City); Maria E. Odum, *Topic of Homosexuality Shows Diversity in Sex Education*, WASH. POST, Dec. 27, 1992, at B1 (discussing the treatment of the topic of homosexuality in sex education classes in area schools).

25. *See* William Celis, III, *Schools Across U.S. Cautiously Adding Lessons on Gay Life*, N.Y. TIMES, Jan. 6, 1993, at A7.

26. *See* Sam Roberts, *Politics and the Curriculum Fight*, N.Y. TIMES, Dec. 15, 1992, at B1 (defending the different objections to the Rainbow Curriculum in New York City).

27. *See* Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 422-23 (N.Y. 1989) (describing New York laws on religious exemptions in public schools); MARTHA M. MCCARTHY, A DELICATE BALANCE: CHURCH, STATE AND THE SCHOOLS 59-60 (1983) (describing statutory religious exemptions from sex education classes).

28. MCCARTHY, *supra* note 27, at 60 (noting that litigation can arise when school officials do not grant an exception not provided for by statute or administrative regulation). Furthermore, requests for excused absences based on religious reasons are also most often handled by the school and do not require litigation. *Id.* at 69.

29. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1073-74 (6th Cir.

When accommodation is denied, some parents sue. Reported opinions in these cases are few and the results are inconsistent. Parents usually (though not always) win an exemption from offensive instruction, but rarely gain any further relief.[30]

III. FREE EXERCISE IN THE PUBLIC SCHOOLS: THE IMPACT OF RECENT SUPREME COURT DECISIONS

After *Wisconsin v. Yoder*,[31] the standard for free exercise claims seemed clear: a government act that substantially infringes a sincerely held religious belief is unconstitutional unless justified by a compelling state interest pursued by the least restrictive means.[32] Unfortunately, that standard was called into question by *Em-*

1987) (suit ensued when school stopped giving children alternative texts), *cert. denied*, 484 U.S. 1066 (1988); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533 (9th Cir.) (school excused child from a class using religiously offensive book and assigned child an alternative book), *cert. denied*, 474 U.S. 826 (1985).

30. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children granted exemption from attending school past eighth grade); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (exemption granted from participation in ROTC); Church of God v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613 (N.D. Tex. 1981) (school policy limiting absences for religious holidays violated free exercise), *aff'd*, 670 F.2d 46 (5th Cir. 1982); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (exemption granted from coeducational physical education classes); Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1211-12 & n.7 (S.D. Tex. 1972) (child excused from classes on evolution; the state educational code provided exemption for students from classes where subject matter conflicts with religious beliefs), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974). *Cf.* Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533 (9th Cir.) (further relief denied where school excused child from class using religiously offensive book and assigned child an alternative book), *cert. denied*, 474 U.S. 826 (1985); Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030 (7th Cir. 1982) (case remanded for determination of whether plaintiffs' religious obligation to wear yarmulkes could be accommodated while still meeting safety concerns underlying rule against basketball players wearing headgear that might fall off), *cert. denied*, 459 U.S. 1156 (1983); Davis v. Page, 385 F. Supp. 395, 406 (D.N.H. 1974) (child exempted from audio-visual programs intended for entertainment, but not those intended for education, and not from health education program); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420 (N.Y. 1989) (suit remanded for determination of burden on plaintiffs' religious exercise and whether state had compelling interest in requiring AIDS education). *But see* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (all relief denied), *cert. denied*, 484 U.S. 1066 (1988); Keller v. Gardner Community Consol. Grade Sch. Dist., 552 F. Supp. 512 (N.D. Ill. 1982) (school athlete denied exemption for missing practice to take Catholic catechism which he could have taken on another day).

31. 406 U.S. 205 (1972).

32. *See* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (holding that contributions for church training courses are not deductible as charitable contributions under § 170 of the Internal Revenue Code); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 1068-69 (3d ed. 1986) (stating the balancing test used by the Court to determine whether an exemption can be granted from a law burdening a religious practice).

ployment Division v. Smith,[33] where the Supreme Court held that the Free Exercise Clause did not exempt religious use of peyote by American Indians from a state antidrug law.[34] More importantly, without warning, and without the parties' having raised or argued the issue, *Employment Division v. Smith* announced a new standard of free exercise jurisprudence that distinguishes between belief and conduct:

> [T]he First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.[35]
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> [But] 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)."[36]

Most commentators treated this statement as the death knell of free exercise.[37] They reasoned that government rarely controls expression of religious belief;[38] laws limiting religious freedom almost always regulate conduct, which *Employment Division v. Smith* permits.[39] Thus, even such venerable practices as the use of wine in the Eucharist or the Passover seder could be forbidden so long

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33. 494 U.S. 872 (1990).

34. *Id.* at 890.

35. *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

36. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

37. *See, e.g.*, Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 755-59 (1992). Lupu refers to *Employment Division v. Smith* as having "closed the modern era of free exercise adjudication." *Id.* at 757. *See also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1144-45 (1990) (criticizing the *Employment Division v. Smith* decision for "eliminating the doctrine of free exercise exemptions 'instead of' contributing to the development of a more principled approach").

38. McConnell, *supra* note 37, at 1145 (asserting that the history of permissible government intervention into religious exercise extends only to instances needed to protect the public or children).

39. *Employment Div. v. Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

as the prohibition were general.[40]

Although the standard announced in *Employment Division v. Smith* is distressing, it does not necessarily doom free exercise claims by public school students. First, although attendance and participation in school are conduct, they involve belief in ways that most activities do not. The most common religious objection to public schooling is that it subjects students to indoctrination hostile to their faith.[41] In some situations students are even compelled or forbidden to express beliefs. Such a situation occurs when students who believe the Biblical account of creation are required to treat evolution as true.[42] In this type of case government directly "compel[s] affirmation" or "punish[es] the expression of religious doctrines," which *Employment Division v. Smith* forbids.[43]

Usually indoctrination is less blunt. For instance, a more subtle indoctrination occurs where stories or discussions portray homosexuality or illegitimacy as normal and acceptable. This could be forbidden by *Employment Division v. Smith* as "lend[ing government's] power to one or the other side in controversies over religious authority or dogma."[44] Moreover, the impact of government indoctrination is likely to be greater when its objects are impressionable children.[45] Thus school instruction could also be

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40. Michael McConnell lists several commonly accepted activities that might be forbidden if *Employment Division v. Smith* were so construed. McConnell, *supra* note 37, at 1142-43 (examples include requiring the Catholic Church to hire female priests, no longer requiring prisons to observe dietary laws of Jewish or Muslim inmates, and desegregating the sexes at Orthodox Jewish services).

41. *See* Ingber, *supra* note 22, at 235-37. Ingber discusses Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987); and Edwards v. Aguillard, 482 U.S. 578 (1987), and concludes that "the recurring underlying theme was the fear held by some that public education might influence or even 'indoctrinate' children in directions contrary to fundamental religious perspectives." Ingber, *supra* note 22, at 237.

42. The Louisiana statute that required equal treatment for creationism if evolution were taught in a public school, which was struck down by the Supreme Court in *Edwards*, 482 U.S. at 593, was triggered by such an event. A legislator's son recited in school that "God created the World, and God created man." The teacher graded this answer "unsatisfactory." *See* Alan Freeman & Betty Mensch, *Religion as Science/Science as Religion: Constitutional Law and the Fundamentalist Challenge*, 2 TIKKUN 64, 64-65 (1987).

43. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

44. *Id.*

45. The *Weisman* Court also makes this distinction between children and adults as to the impact of government indoctrination. Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992) (noting that a particular danger of coercion exists with prayer at public schools). The Court further makes this point by differentiating prayer at a graduation ceremony from the

deemed "governmental regulation of religious *beliefs* as such."[46] On these grounds alone, *Employment Division v. Smith* might validate some free exercise claims of public school children.

Second, *Employment Division v. Smith* states that the First Amendment sometimes

> bars application of a neutral, generally applicable law to religiously motivated action [that] involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters* . . . to direct the education of their children, see *Wisconsin v. Yoder* . . . .[47]

The specific citation of public school cases shows that *Employment Division v. Smith* does not preclude free exercise claims by students. *Pierce* recognized a constitutional right to send one's children to private rather than public schools.[48] *Yoder* upheld a right of parents to remove their children from school altogether after the eighth grade.[49] However, that decision applied only to the Amish sect which, the Court carefully noted, provides its children effective vocational training.[50] Moreover, *Yoder* and *Pierce* permit parents only to remove children from public schools completely.[51]

Total removal may be less problematic than withdrawing children from particular classes or demanding alternative instruction, as

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situation in Marsh v. Chambers, 463 U.S. 783, 782 (1983), where prayer beginning a state legislative session was held not to violate the Establishment Clause because adults were involved. *Weisman*, 112 S. Ct. at 2660-61. *See also Developments in the Law — Religion and the State*, 100 HARV. L. REV. 1606, 1659-60 (1987) (asserting that a "paramount concern" of the Court in Establishment Clause violations in the public school setting "is the particular vulnerability of school children to indoctrination and coercion").

46. Employment Div. v. Smith, 494 U.S. at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

47. *Id.* at 872, 881 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972)). *See also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Prince*, the Court stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ." *Id.* However, the Court upheld a statute forbidding children to sell goods on public streets against the parents' claim that their faith required the children to sell religious tracts. *Id.* at 170.

48. *Pierce*, 268 U.S. at 534-35 (holding that an Oregon statute requiring that a child be sent to public school interferes with the parents' and guardians' right to choose the child's education).

49. *Yoder*, 406 U.S. at 234.

50. *Id.* at 228-29, 234-36.

51. *Id.* at 234; *Pierce*, 268 U.S. at 234-35.

some parents have done.[52] Thus *Employment Division v. Smith*'s reference to a "right to direct the education of [one's] children"[53] is cryptic. It may be no more than a shorthand for the rights recognized in *Pierce* and *Yoder*; or it may presage broader parents' rights, partly under the Free Exercise Clause.

The more recent decision in *Lee v. Weisman*[54] construes the Establishment Clause, but it may also be important to free exercise issues. The majority framed the issue there as whether a prayer at a public school graduation subjects citizens to compulsion.[55] Although a compulsion test might suggest a narrow definition for the Establishment Clause, the majority concluded that the prayer did exert compulsion because graduates and their families are pressured to attend the ceremony and to participate to some extent in the prayer.[56]

Weisman's result is commendable but its reasoning is dubious. It strains the idea of compulsion to say that children and parents are compelled to attend commencement at all, and strains it further to say that they are compelled to participate in the prayer merely by observing the respectful silence that minimal courtesy demands. The Court would have done better to forbid the prayer because it endorsed religion.[57] Nonetheless, the broad definition of compulsion is significant, especially because the context is a public school graduation. Attendance at graduation is not legally mandated; attendance at regular classes is. Participation in the prayer was not required; participation in many other aspects of public schooling is. It should follow, then, that virtually all activity in public schools involves compulsion.[58]

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52. *See supra* notes 29-30 and accompanying text.

53. Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

54. 112 S. Ct. 2649 (1992).

55. *Id.* at 2652.

56. *Id.* at 2658-59.

57. Support for a "no endorsement" test has been advanced by Justice O'Connor. For a discussion of this test, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 270-74 (1987) (criticizing the "no endorsement" test as defective and unable to provide consistency and clarity to establishment clause doctrine). As recently as *Smith* the Court stated that "[t]he government may not . . . lend its power to one or the other side in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877.

58. The Court referred to graduation as "the one school event most important for the student to attend," *Weisman*, 112 S. Ct. at 2660, and "one of life's most significant occasions." *Id.* at 2559. Presumably this hyperbole has little or no legal relevance. It is doubtful, for example, that the Court would permit similar prayers during daily assemblies on the grounds that such assemblies are less "important" or "significant" than graduation.

When is compulsion unconstitutional? *Weisman* says: "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . . . [The Religion] Clauses exist to protect religion from government interference."[59] Although this passage preserves the belief/conduct dichotomy laid down in *Employment Division v. Smith*,[60] it suggests an expansive definition of the scope of belief: not only belief itself, but the "preservation and transmission" of beliefs are protected, and the regulation of belief that is prohibited encompasses *any* "government interference."[61] Although instruction inconsistent with a child's faith may not directly regulate belief, it does seem to interfere with the preservation and transmission of belief and thus appears to be forbidden.

Employment Division v. Smith is arguably distinguishable from the public school cases because this case involved the use of hallucinogens.[62] American law has long frowned on the use of these drugs, and public concern about drug abuse was especially intense when *Employment Division v. Smith* was decided. Christian and Jewish rituals eschew narcotics,[63] so the narrow holding of that case does not threaten our major religions. By contrast, many large sects object to certain practices of the public schools. It is regrettable that the Court was not more sympathetic to the minority religious practices at issue in *Employment Division v. Smith*, but that insensitivity will not necessarily extend to the claims of more traditional sects.[64]

The significance of the public school setting is highlighted by comparing *Marsh v. Chambers*,[65] which involved prayer in state

59. *Id.* at 2656-57.

60. *See supra* note 36 and accompanying text.

61. *Weisman*, 112 S. Ct. at 2656-57.

62. Employment Div. v. Smith, 494 U.S. 872, 874 (1990) (ingesting peyote at a Native American Church ceremony).

63. The use of wine in Christian and Jewish rituals is too minimal to have a narcotic effect. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1003 (1990) (describing the amount of wine consumed during a Catholic ceremony as a "tiny nip").

64. *Cf.* McConnell, *supra* note 37, at 1135 (noting that any distinction made between wine used in a sacrament and peyote used in a Native American ceremony is "not based on any objective differences between the effects of the two substances" but instead is based on familiarity and prejudice).

65. 463 U.S. 783 (1983) (holding that prayer opening state legislative sessions does not violate the Establishment Clause).

legislative sessions, with *Weisman*. *Weisman* dwells upon "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[66] By contrast, the *Marsh* Court deemed the pressures on adults to participate in a legislature's prayers to be much weaker.[67]

This distinction helps refute the common argument[68] that "mere exposure" to ideas hostile to one's religion does not violate free exercise. *Weisman* distinguishes between free speech claims and religion clause claims. The theory of the former is that debate should be open and robust. Although government's discretion to take sides is limited even in nonreligious debates, it can and often must take sides in these disputes.[69] However:

> The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant . . . . [T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.[70]

Although the Court never states that mere exposure to government speech that offends one's religion is invariably unconstitution-

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66. *Weisman*, 112 S. Ct. at 2658.

67. The *Weisman* Court stated:

> The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.

Id. at 2660.

68. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (holding that requiring students to use the school's reader series does not violate the Establishment Clause), *cert. denied*, 484 U.S. 1066 (1988); Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 374-75 (1986) (proposing a standard to provide more protection for religious beliefs of public school students).

69. *Compare* Rust v. Sullivan, 111 S. Ct. 1759 (1991) (government may favor childbirth over abortion) *and* Regan v. Taxation with Representation, 461 U.S. 540, 550-51 (1983) (government may subsidize some lobbying organizations and not others) *and* Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (government may fund some candidates for public office and not others) *with* Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (invalidating tax that discriminated between magazines on the basis of their content because it violated freedom of the press).

70. *Weisman*, 112 S. Ct. at 2657-58.

al, the Court recognizes that the coercive atmosphere of public schools makes "exposure" especially dangerous there.[71] Also, the Court has held, in *Yoder* and in *Pierce*, that compelled exposure to religiously offensive teaching can violate the Constitution.[72] *Weisman* does not decide whether the option of protesting neutralizes the offense "if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."[73]

This discussion illustrates a second problem that arises when students are subjected to doctrine that is offensive to their religion: not only may it improperly influence their beliefs, but their very presence and respectful silence may be taken as assent to that doctrine. This problem feeds on itself. The endorsement of an idea by the teacher—a government official and an authority figure—may torment a student to whom the idea is religiously offensive. If her peers fail to protest, she assumes that they agree with the teacher, which makes the student feel like even more of a misfit or pariah. Given students' reluctance to dissent,[74] this silent torment could arise even if most students in fact disagree with the teacher.

Although *Weisman* deals with the Establishment Clause, "mere exposure" should be treated similarly under the Free Exercise Clause. The statement in *Weisman* that religion is "committed to the private sphere,"[75] free from "government interference,"[76] applies equally to government actions that denigrate some sect, or religion generally, as well as to government actions that endorse religion. Indeed, the offense in free exercise cases is often worse than the offense in *Weisman*. In *Weisman*, the plaintiffs were mere-

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71. The *Weisman* Court suggested that a graduation ceremony atmosphere:

> places public pressure, as well as peer pressure, on attending students to . . . , at least, maintain respectful silence . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view . . . . [G]iven our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Id. at 2658.

72. Wisconsin v. Yoder, 406 U.S. 205, 231 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

73. *Weisman*, 112 S. Ct. at 2658-59.

74. This reluctance was recognized in *Weisman*. There, the Court stated that it was an "unacceptable constraint" in violation of the Establishment Clause to impose a choice of whether or not to dissent upon children, who are assumably susceptible to peer pressure "in matters of social convention." *Id.* at 2659.

75. *Id.* at 2656.

76. *Id.*

ly expected to maintain respectful silence during the offensive prayer.[77] In cases like *Mozert v. Hawkins County Board of Education*,[78] though, children are expected to pay attention to and absorb teaching that offends their religion. One can justify a greater sensitivity to establishment claims than to free exercise claims only if the religion clauses are viewed as promoting secularism. *Weisman*, however, confirms the Supreme Court's frequent assertion that the religion clauses demand governmental neutrality not only among different religions, but also between religion and secularism.[79] The goal of neutrality dictates equal sensitivity to both types of claims.[80]

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77. *Id.* at 2653.

78. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

79. *See Weisman*, 112 S. Ct. at 2656-57 and *supra* text accompanying note 71; County of Allegheny v. ACLU, 492 U.S. 573, 588 (1989) (indicating that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief"); Aguilar v. Felton, 473 U.S. 402, 414 (1985) (invoking the constitutional principles emphasizing that government shall not "promote or hinder a particular faith or faith generally"); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 382 (1985) (stating that the government is required "to maintain a course of neutrality among religions, and between religion and non-religion"); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (stating that "the government must pursue a course of complete neutrality toward religion"); Roemer v. Board of Pub. Works, 426 U.S. 736, 747-48 (1976) ("Neutrality is what is required"); Gillette v. United States, 401 U.S. 437, 449 (1971) (positing that the central purpose of the Establishment Clause is to "[ensure] governmental neutrality in matters of religion"); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (stating that "[t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion"); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (stating that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (indicating that the government's position of neutrality means that it may neither support the tenets of any or all religions, nor exhibit hostility to religion in general); Zorach v. Clauson, 343 U.S. 306, 313 (1952) (supporting "an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma"); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (emphasizing that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"). *See also* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 409 (1986) (indicating a belief that the two religion clauses merit "equal seriousness," and therefore, "that government neutrality towards religion is a good first approximation for the meaning of the clauses"). Various versions of the Religion Clauses were rejected by the framers to assuage the fears that the proposed amendments might disfavor religion generally or even favor atheism. *See* CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 137-38 (1964) (indicating that the first Congress considered multiple versions of the Religion Clauses); Laycock, *supra*, at 412-13 (quoting individuals among the framers who feared that the clauses would abolish religion or favor atheists).

80. It is no answer that free exercise claims are different from Establishment Clause

Applying *Weisman*, an Establishment Clause case, to free exercise issues is somewhat controversial[81] since the religion clauses of the First Amendment are often treated as embracing separate, even contradictory principles. The distinction made is that the Free Exercise Clause confers benefits on religion, while the Establishment Clause imposes burdens on religion. This, however, is a false dichotomy — the principles protected by the two clauses are not antipodal, but are remarkably similar. Establishments of religion are offensive because they force people to submit to or subsidize a faith they do not espouse, or to suffer the indignity of seeing their government endorse such a faith. To the irreligious, however, the injury caused by religion is no worse than injury caused by governmental adoption of a nonreligious doctrine that they reject. Establishments of particular religions, as opposed to nonreligious doctrines, are therefore distinctly repugnant primarily to those who espouse other religions.[82] Religion cannot be singled out as divi-

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claims because offense to one's religion cannot be avoided without gutting education, while endorsement of religion can always be avoided. Perceptions of government endorsement of religion can never be fully avoided. In a society like ours, religion is a ubiquitous and integral part of life. VITZ, *supra* note 4, at 80 ("religion, especially Christianity, has played and continues to play a central role in American life"). Thus, a good education will frequently deal with religion in ways that some might interpret as endorsements. A positive treatment of the Reverend Martin Luther King, for example, might be seen by some as endorsing his religious views. Many public schools have tried to eliminate all references to religion. For example, one social studies book instructed children that at the First Thanksgiving the Pilgrims gave thanks to the Indians. *See id.* at 3. Not only are these pathetic efforts doomed to failure, but the goal of avoiding all references to religion is undesirable since it inevitably distorts students' understanding of our society by ripping an important part of our cultural heritage from the curriculum. *See id.* at 80 ("To neglect to report . . . [religion's role in American life] is simply to fail to carry out the major duty of any textbook writer—the duty to tell the truth.").

81. *See* John Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 761 (1993) (pointing out that issues in *Weisman*, an Establishment Clause case, and those of various free exercise cases are doctrinally different). *But see infra* note 93 and accompanying text.

82. Although believers are most often offended by the establishment of another's religion, many are also offended by the establishment of their own faith. For example, many Anabaptists believe that an establishment of their own faith would violate their principle of free will in religious matters. *See generally* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991). Professor Smith argues persuasively that the traditional justifications for religious freedom were themselves based on religion. *Id.* at 149. Commentators and the Supreme Court have eschewed these explanations in favor of secular justifications. *Id.* at 197 (describing the most common secular justifications as: the "civic virtue" rationale, the "personal autonomy" rationale, the "pluralism" rationale, the "civic strife" rationale, and the "nonalienation" rationale). The secular justifications are unsatisfactory, however, and reliance on them will generate confusion. *See id.* at 198 (stating that the secular rationales are "probably too weak and vulnerable to sustain a strong constitutional commitment to religious liberty").

sive. Although religious conflict has caused much strife, nonreligious disputes have been even more deadly both in this country and in the rest of the world.[83] The principle function, then, of the two religion clauses is the same—to eliminate or minimize government offense to citizens' religious beliefs.

Although *Weisman* holds promise for free exercise claims, Professor Lupu has argued that the First Amendment discussion in *Rust v. Sullivan*[84] points the other way.[85] In *Rust*, the Supreme Court held that, while government cannot prohibit abortions, it may forbid federally funded counseling services to give advice about abortions.[86] Professor Lupu says: "If the government may impose benefit conditions that expressly limit protected speech, benefit conditions that are generally reasonable but unintentionally affect religion are presumably valid *a fortiori*."[87]

Rust has little relevance to free exercise claims of public school children. The rule in *Rust* forbids government agents to make certain statements that their clients want to hear.[88] A proper analogy to *Rust* would be a situation in which a teacher desires to teach something that the government excludes from the curriculum. Consistent with *Rust*, the government may generally dictate a curriculum and expect the teachers to conform with it.[89] Most free

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83. *See id.* at 207-10 (stating that "religion is only one of a number of sources of civil strife"). In the World Wars and the American Civil War, religion played a small role. The mass killings by Communists in the Soviet Union and China and by the National Socialists in Germany were carried out by governments officially committed to atheism. *See id.* at 208 n.236 ("'Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery.'" (quoting Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 413)).

84. 111 S. Ct. 1759, 1771-76 (1991).

85. *See* Lupu, *supra* note 37, at 752 n.36.

86. *Rust*, 111 S. Ct. at 1777 (rejecting petitioners' contention that the regulations prohibiting any discussion of abortion by recipient organizations of federal family planning funds violated the First Amendment).

87. Lupu, *supra* note 37, at 752 n.36. Regarding Sherbert v. Verner, 374 U.S. 398 (1963), and other Supreme Court cases holding that states may not deny unemployment benefits to people who leave or refuse jobs for religious reasons, Lupu says that "[o]ne might therefore expect the entire *Sherbert* line to disappear sometime soon." Lupu, *supra* note 37, at 752 n.36.

88. *See Rust*, 111 S. Ct. at 1777.

89. *See, e.g.*, Roberts v. Madigan, 702 F. Supp. 1505, 1515 (D. Colo. 1989) (holding that State authorities could regulate a teacher's classroom conduct, and thus forbid both the teacher from silently reading the Bible during the students' independent reading period, and direct the teacher to teach students actively during that time), *aff'd*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

Even the evolution cases are not really exceptions. In those cases, the Court forbade

exercise claims by school children, however, seek not to silence government agents, but to avoid messages that these agents would otherwise force them to hear.[90] The state's power to prescribe the scope of teachers' speech while on the job does not imply a power to require children to hear that speech.

A further difference is the cost of obtaining private substitutes. Both the rule in *Rust* and religiously offensive public schooling may force citizens to buy substitutes. Yet whereas private abortion counseling is too expensive only for the poorest of Americans, private schooling is unattainable for most Americans.[91] Thus, the burden that religiously offensive public education inflicts on free exercise far exceeds the burden that the rule in *Rust* imposes on abortion rights.

In sum, there is good reason to think that the traditional standard of free exercise review prevails, at least for claims by public school students. Although *Employment Division v. Smith* raises fears about the vitality of the Free Exercise Clause, statements in

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state legislatures to prohibit by statute the teaching of evolution or to require equal time for instruction about evolution and creationism. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (holding that a state law requiring either that the theory of evolution be banished from public schools' curriculum or that it be taught in conjunction with "creation science," violates the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding unconstitutional a state statute prohibiting instruction on the theory of evolution). The Court has never ruled, however, that individual teachers have a right to teach evolution or not to teach creationism. Arguably then, local school boards may still omit instruction on evolution or treat it equally with creationism.

Courts have occasionally voided the firing of public school teachers whose instruction was unacceptable to school authorities, but the cases are inconsistent and the scope of the teacher's discretion is unclear. *See* WILLIAM D. VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE § 13.8 (1985) ("[T]he fact remains that the courts have not developed any consensus on the limits of academic freedom."). For a discussion of *Rust*'s impact on claims for substitute instruction, see *infra* text accompanying notes 184-90.

90. *See* Grove v. Mead Sch. Dist., 753 F.2d 1528, 1531 (9th Cir.) (plaintiffs sued as a result of the school board's refusal to remove a book that was religiously offensive), *cert. denied*, 474 U.S. 826 (1985); Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1208 (S.D. Tex. 1972) (plaintiffs sought to enjoin instruction on the theory of evolution which did not include instruction on other human origin theories), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1975).

91. The Court in *Rust* conceded that the situation might be different if "the doctor-patient relationship established by the Title X program [were] sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991). In contrast, public schooling is about as "all-encompassing" as a government program can be: it occupies more time in the lives of most citizens than any other government program. Even if a family is able to pay for a religiously inoffensive private education, no school offering such an education may be locally available.

both that case as well as in the later decision of *Lee v. Weisman* indicate that the Supreme Court has not diluted the standards for free exercise claims, at least in the context of public schools. *Rust* does not undermine this conclusion. Hopefully the traditional standard will survive. Government should not tell people, especially young children, that their religion is wrong.

IV. ELEMENTS OF THE FREE EXERCISE STANDARD

A. Overview

The Free Exercise Clause should be viewed as embracing two complementary principles.[92] First, government should be as neutral as possible about religion in the sense of neither promoting nor hindering any particular religion or religion in general.[93] Second, government should aim to maximize religious freedom. The Supreme Court seems to embrace this principle in *Weisman* when it says that religion is "committed to the private sphere" and should be "free from governmental interference."[94]

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92. Acceptance of this view has grown among scholars. *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 541 (1991) ("If the two religion provisions are read together in the light of an overarching purpose to protect freedom of religion, most of the tension between them disappears.").

93. Thus I largely embrace the definition of substantive neutrality offered by Douglas Laycock. *See* Laycock, *supra* note 63, at 1001-02 (elaborating upon his basic formulation of substantive neutrality, which is the constitutional requirement that government "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"). The Supreme Court has frequently stated that the Religion Clauses require governmental neutrality toward religion. *See supra* note 79 and accompanying text.

Neutrality has been attacked as "inherently indeterminate." Smith, *supra* note 57, at 315. *See also* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94-104 (1986) (discussing and illustrating the complexity and ambiguity of neutrality, a concept having two components: noninvolvement and impartiality). While no concept of neutrality can generate basic, substantive norms, more modest conceptions of neutrality are possible. *See* Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 50 (1992) (providing illustrations of less ambitious goals of neutrality). By defining neutrality as neither promoting nor hindering religion, one admittedly accepts, to some extent, a non-neutral status quo in the sense that some religious groups are more influential than others in American society. Under Sunstein's approach, if the existing distribution of religious influence is not unjust, there should be no objection to a neutrality in which government neither alters nor affirmatively maintains the status quo, but instead leaves the distribution to be determined by non-governmental forces. *See id.* at 52.

94. Lee v. Weisman, 112 S. Ct. 2649, 2656-57 (1992). In making such an assertion, the Supreme Court seems to have adopted the position of Michael McConnell: "The principal purpose of the Religion Clauses is to ensure that decisions about religious practice, including education, are reserved to the private realm of individual conscience." Michael

Neutrality is not mathematically determinable, but a term of art.[95] For instance, a public museum that exhibits religious works of art gives unequal treatment to religions like Islam that forbid art with religious content.[96] This form of inequality is inevitable. Consider, for example, if publicly subsidized museums excluded works solely because of their religious content. That kind of separationism would unnecessarily hinder religion. Such a position cannot be squared with the principle of religious freedom. The Supreme Court, however, has not always pursued this principle: "Separationism and antimajoritarianism, rather than religious freedom, became central to the Warren Court's approach in Religion Clause cases."[97]

One problem in defining neutrality is to determine the context in which to analyze government acts and the baseline from which neutrality must be maintained.[98] For example, accommodation of

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W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 145. *See also* Laycock, *supra* note 64, at 1002 ("What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government.").

95. A neutrality standard still "requires judgments about the relative significance of various encouragements and discouragements to religion." Laycock, *supra* note 63, at 1004. Thus, it is a valid criticism that a neutrality standard does not automatically resolve all Religion Clause questions. *See* Smith, *supra* note 57, at 313-16 (discussing the absence of any coherent, clear neutrality doctrine and the inherently indeterminable nature of the concept of neutrality itself); Valauri, *supra* note 93, at 85 ("Because of the equivocal nature of neutrality, its adoption and use mask, even exacerbate, doctrinal disagreement and conflict.").

96. *See* Laycock, *supra* note 63, at 1003 (illustrating that total neutrality is not always possible since "a standard of minimizing both encouragement and discouragement [often means] that religion [is] singled out for special treatment").

97. Glendon & Yanes, *supra* note 92, at 493 (discussing the need for the Court to take a structural approach in its interpretation of the Religion Clauses in order to develop a "workable, coherent, church-state jurisprudence" in the pluralistic American society).

98. *See* Laycock, *supra* note 63, at 1005 (explaining that the neutrality standard requires the determination of a proper baseline from which encouragement and discouragement are to be measured). If care is not taken, the status quo can be unthinkingly used as the baseline. Then, maintenance of the status quo is deemed neutral and any departure from it is non-neutral. For example, the Supreme Court has often treated government funding of secular public schools as a religiously neutral baseline and has held that any state aid to parochial school children constitutes a non-neutral subsidy of religion that violated the Establishment Clause. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 409 (1985) ("Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid."). This status quo is hardly neutral, however, because it confers an expensive benefit on those who attend public (secular) schools, while denying that benefit to those

religious children in public schools is often opposed as an advancement of religion.[99] This argument makes sense only if the instruction from which accommodation is sought is religiously neutral. Often, however, it is not. In fact, instruction often disparages children's religious beliefs even if there is no intent to disparage.[100] In such circumstances, accommodation is neutral if it merely seeks to free the children from such disparagement and, from a secular perspective, does not leave them in a better position than other children.[101]

Although accommodation increases the religious freedom of those accommodated, overbroad accommodation limits the freedom of others in two ways. First, when accommodation is expensive, taxpayers are forced to subsidize the religious observance of those accommodated. Also, excessive accommodation prefers those accommodated. This could occur if certain sects were given wholesale exemptions from drug use restrictions or other burdensome laws. Thus, accommodation should be granted only when it imposes no substantial costs on others through government and does not privilege those accommodated.

B. Substantial Infringement of a Sincere Belief

Establishing a *prima facie* violation of free exercise requires showing an infringement of a sincere religious belief or practice.[102] The infringement must be substantial; *de minimis* infringements do not suffice.[103] *Weisman* makes clear that arguments of

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who attend religious schools. True neutrality would extend equal aid to children in both secular and religious schools.

99. *See* Mozert v. Hawkin County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (rejecting request for accommodation).

100. *See* Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992) (stating that "the religious exercise" caused "embarrassment and . . . intrusion" and "[a]ssuming . . . that the prayers were offensive to the student"); Edwards v. Aguillard, 482 U.S. 578, 624 (1986) (Scalia, J., dissenting) (indicating that the censorship of creation science may incorrectly teach students that science has definitely falsified their religious beliefs).

101. A policy of no aid to any private school treats religious schools equally with nonsectarian private schools. From the perspective of religious freedom, however, this policy is not neutral because public schools, which do receive government aid, are secular. Thus, the no-aid policy discriminates against religion. *See* Valauri, *supra* note 93, at 103 (emphasizing that a no aid principle is not a neutral principle since it does not meet the requirement of impartiality).

102. Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426 (N.Y. 1989) (stating that in order for the claimant to receive an exemption, she "must show a sincerely held religious belief that is burdened by a State requirement").

103. *See* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (stating that "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental");

insubstantiality will face skepticism in the Supreme Court.[104] In that case, the Supreme Court conceded that the commencement prayer in issue was "a brief exercise" which the individual was free to ignore.[105] Yet "the embarrassment and the intrusion" of the prayer could not be dismissed as "*de minimis*."[106] The Court stated that the school authorities' effort "to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst [it] increases their sense of isolation and affront."[107] One could infer from this statement that rarely can a religious affront be excused as *de minimis*.

The belief infringed must be religious.[108] Sometimes free exercise claims encounter the defense that the challenged practice is inherently nonreligious. An objective standard of what is religiously significant is inevitably discriminatory since every sect has its own idea of what is religiously relevant. An objective standard discriminates against minority sects because the attitudes of their members often appear odd or irrational to the majority. An objective standard also discriminates against traditional or fundamentalist sects because, for members of these sects, religion is pervasive—everything in their lives is religiously significant.[109] Under an objective standard, modernist sectarians and secularists, who have a narrower concept of what is religious, could restrict the religious freedom of others by classifying many activities as objec-

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Marsh v. Chambers, 463 U.S. 783, 795 (1983) ("'distinguish[ing] between real threat and mere shadow'" and characterizing legislative prayer as "no real threat") (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)); Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961) (indicating that laws prohibiting retail sales on Sundays imposed "only an indirect burden" on Orthodox Jewish businessmen).

104. *See* Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).

105. *Id.* (noting that during the prayer "the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander").

106. *Id.* ("[W]e think that the intrusion is greater than the two minutes or so of time consumed for prayers like these.").

107. *Id.*

108. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief."); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426 (N.Y. 1989) (burdened belief must be a "sincerely held religious" one).

109. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 997 (1989) (emphasizing that "[f]or many religious persons, religious and secular beliefs and values are not nicely compartmentalized[;] religious beliefs and values may permeate a religious person's world view") and authorities cited therein.

tively nonreligious.

For example, in a free exercise challenge to the teaching of evolution, a federal judge failed to recognize this potentially adverse impact of an objective standard.[110] He proclaimed that "the offending material is peripheral to the matter of religion"![111] Consider, also, such issues as the consumption of pork, the covering of one's head, and the style of one's undergarments. To modernist sects and nonreligious persons, these issues have no religious significance, but to Muslims, observant Jews and Mormons, they are very significant. The determination of what is religiously important should be left to the individual claiming a free exercise violation and not to some objective criterion dictated by the state.[112]

C. Free Exercise Claims and Government Benefits

The argument that government need not adjust its benefits to suit the religion of each citizen[113] often makes sense. For example, a citizen cannot require the government to remove a globe from a post office or to provide an alternative post office just because the globe offends the individual's religious belief that the world is flat. The Court in *Employment Division v. Smith* seemed to expand this principle by holding that government can withhold a benefit (unemployment compensation) because of a person's crimi-

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110. *See* Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972) (denying plaintiffs' request that "all theories regarding human origins" receive "equal time"), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

111. *Wright*, 366 F. Supp. at 1211 (further stating that "[s]cience and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers [, but t]eachers of science in the public schools should not be expected to avoid" discussions of science that conflict with religion).

112. This issue is different from the question of what constitutes a religion for purposes of the First Amendment. An objective standard must be used to determine what is a religion under the Establishment Clause. Otherwise, a citizen could overturn any government activity simply by declaring that she considers the attitude promoted by the activity "religious." This mode of attack was attempted in Smith v. Board of School Commissioners, in which the plaintiffs alleged that public schools had established the religion of secular humanism through the use of particular textbooks. The attempt failed because the court, referring to the requirements of the three-factored test from Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), denied that any doctrines being promoted by the public schools through their textbooks amounted to the establishment of a religion of secular humanism. Smith v. Board of Sch. Comm'rs, 827 F.2d 684, 688 (11th Cir. 1987).

113. *See* Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 427 (N.Y. 1989) (stating that "parents have no constitutional right to tailor public school programs to individual preferences, including religious preferences").

nal use of drugs in a religious ceremony.[114]

Lee v. Weisman suggests a very different attitude. The prayer in *Weisman* was defended on the ground that attendance at commencement was voluntary.[115] This argument emphasized, in effect, that attendance was a government benefit that objectors were free to forego.[116] The Court dismissed this argument as

> formalistic in the extreme . . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions . . . . [I]t is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," . . . The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.[117]

This statement at least lays to rest the argument that anyone religiously offended by public education should simply attend a private school. Education is not only crucial in modern life, but is also legally obligatory.[118] The alternative of a religiously acceptable private school is cost prohibitive for many individuals and, furthermore, is unavailable at any price for small sects who have not established religious schools. For many individuals, then, public education is not "in any real sense of the term 'voluntary.'"[119] Arguments to the contrary are "formalistic in the extreme."[120]

However, the Court in *Weisman* also cautioned that not "every state action implicating religion is invalid if one or a few citizens find it offensive . . . . [O]ffense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."[121] The Court's statement makes sense if the goal of free exercise claimants is to invalidate government acts that offend them. This is because an invalidation or prohibition would deprive other

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114. 494 U.S. 872, 890 (1990). For a discussion of *Employment Division v. Smith*, see *supra* notes 37-54 and accompanying text.

115. Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992).

116. *See id.*

117. *Id.* at 2659-60.

118. *See, e.g.*, OHIO REV. CODE ANN. § 3321.04 (Baldwin 1988); N.Y. COMP. CODES R. & REGS. tit. 8, § 101.2 (1987).

119. *Weisman*, 112 S. Ct. at 2659.

120. *Id.*

121. *Id.* at 2661.

citizens, who are not offended, of the benefits of those acts. In general, though, free exercise claimants do not seek to invalidate government action, but instead only seek some accommodation for themselves.[122] Thus, the Court's warning of a limit to relief from an offensive government action seems less appropriate when the relief sought is not invalidation, but accommodation.

The Religion Clauses also raise more general questions about the form of government benefits. Government generally provides benefits in three ways. First, it furnishes some benefits as cash benefits, like Aid to Families with Dependent Children[123] and agricultural price supports.[124] Second, it provides vouchers, as in food stamps[125] and college tuition under the GI bill.[126] Third, it provides some benefits in kind, through services, as in the case of public schools and hospitals.

The choice among these forms in a particular case generally depends on administrative convenience, effectiveness in achieving policy objectives, and the dignity of the beneficiaries; the impact on religious freedom is rarely considered at all. The choice, however, may determine the constitutionality of the plan. For example, welfare recipients are free to donate part of their benefits to a church; indeed, it would be unconstitutional to forbid such donations with welfare grants. Yet if a state decided to cease cash payments and to provide benefits in kind, some taxpayers would undoubtedly complain if the state agreed to pay state funds directly to a beneficiary's church, even if this method of direct payment by the state produced the same result as a system of cash grants. The beneficiary's freedom to make donations would be lost. In this way, the growth of the welfare state can diminish religious freedom.[127]

This danger should alert us to interpret the Free Exercise Clause broadly enough and the Establishment Clause narrowly enough to preserve religious freedom. Consider, for example, a

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122. *See supra* note 31 and accompanying text (cases where individual accommodation sought).

123. 42 U.S.C. §§ 601-617 (1988) (aid program for families with dependent children).

124. 7 U.S.C. § 1421 (1988) (agricultural price support program).

125. *Id.* §§ 2011-2030 (1988) (food stamp program).

126. 38 U.S.C. § 1411 (1988) (education assistance program for "service on active duty").

127. *See* Glendon & Yanes, *supra* note 92, at 486 (stating that the growth of the regulatory and welfare state exacerbated the problems created by the Supreme Court's adoption of separationism).

patient who requests kosher meals in a public hospital. If this accommodation be deemed an unconstitutional establishment of religion, the patient must either forego hospitalization that may be crucial to her survival or violate her religious beliefs. On the other hand, if free exercise required that she be accommodated, she would be freed from making this painful choice. The situation of religious school children is often quite similar.

D. Overriding Governmental Interest in Education

As noted earlier, *Employment Division v. Smith* raises doubt as to whether infringements of free exercise can be justified only by a compelling state interest.[128] If only a rational basis for government action were necessary, all free exercise claims would be doomed. The special concern expressed in *Employment Division v. Smith* about government actions affecting belief and about parental control of children,[129] in addition to the greater sensitivity to religious freedom evinced in *Lee v. Weisman*,[130] raise hope that more than a rational basis is necessary. Whether that standard is a "compelling interest" test or some intermediate test is an important question, but one that we cannot yet answer.

Another important question is whether the state has a strong interest in requiring anything more than the minimum education necessary to avoid indigence. In *Wisconsin v. Yoder*, the Supreme Court found no compelling need to require Amish children to attend high school at all.[131] The Court stressed that Amish children receive on-the-job vocational training and, thus, are unlikely to become indigent wards of the state.[132] Yet *Yoder*, then, would not excuse from school attendance children of a sect preaching illiteracy or mendicancy. The state may have a compelling interest in ensuring that some citizens obtain the higher education needed to maintain a modern society. There is, however, no shortage of volunteers for higher education. What then, should be required of all citizens?

The state of New York recently claimed a compelling interest

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128. *See supra* text accompanying notes 22-26.

129. Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

130. *See* Lee v. Weisman, 112 S. Ct. 2649, 2659 (1992) (stating "that the government may no more use social pressure to enforce orthodoxy than it may use more direct means").

131. Wisconsin v. Yoder, 406 U.S. 205, 228-29 (1972).

132. *Id.* at 224-25.

in subjecting children of the fundamentalist Plymouth Brethren sect to school instruction about AIDS.[133] Even assuming that this instruction reduces the incidence of AIDS, which is doubtful, how much would that effect be impaired by excusing the Plymouth children? The state argued that some children might leave the sect and pursue "alternative life-styles," and for lack of state instruction, these individuals might contract and spread AIDS.[134] This argument is speculative. It is troubling that religious freedom could be curtailed by mere speculation. Assume, however, that the state could show a statistical probability that one or two cases of AIDS would be prevented by subjecting the Plymouth children to AIDS instruction. That evidence clinches the case for the state *only* if religious freedom carries little or no weight as a constitutional value.[135] If we take religious freedom seriously, though, we must accept certain risks and costs as the price of that freedom. In this case, preserving the integrity of the Plymouth Brethren justifies the cost of foregoing the uncertain temporal benefit sought by the state.

The argument against requiring most academic instruction is even stronger. It simply is not necessary that one know theories of evolution or learn reading from particular texts in order to avoid poverty or to have a meaningful and rewarding life. What about ethics and values? The Supreme Court sometimes suggests that the state has a compelling interest in teaching children the values of democracy and can further this interest through public education.[136] The Court, however, also has severely limited, if not utterly rejected, these dicta by statements and holdings in other cases. Thus, the Court has held that children may reject public schools and attend private schools,[137] or even eschew formal schooling

133. Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 429-30 (N.Y. 1989).

134. *See id.* at 423.

135. If certain religious sects devalue healthful exercise and diet, would the state be warranted in teaching children of these sects that their lifestyle is unwise?

136. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (indicating that the purpose of public education is the inculcation of values necessary to self-governance); Board of Educ. v. Pico, 457 U.S. 853, 864, 876 (1982) (plurality opinion) (emphasizing the vital importance of public schools in the preparation and socialization of future citizens); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (stating that "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions").

137. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (holding that states do not have the power "to standardize its children by forcing them to accept instruction from

beyond the eighth grade.[138] These results are consistent with the Court's oft-stated view that government may not compel expression[139] or mandate the imposition of certain values or opinions in public schools.[140]

The latter view against compelling expression and imposing certain values is the better view. Every polity necessarily embraces and tries to promote certain principles. Since the state can reward certain actions and punish others, it should also be permitted to exhort citizens to take or not take such actions. Public schools should be an acceptable means for this purpose.[141] Citizens

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public teachers only"). The Court also asserted, however, that states may require that "certain studies plainly essential to good citizenship . . . be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Id.* at 534.

138. Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

139. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 4, 20 (1986) (holding that a state regulatory commission could not require a private utility to include advertising fliers, with which the utility disagreed, in its bills); Herbert v. Lando, 441 U.S. 153, 178 n.1 (1979) (Powell, J., concurring) (indicating that "the coerced publication of particular views . . . violates the freedom of speech"); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (indicating that a state may not compel public employees to make contributions to unions for political purposes without infringing on the employees' constitutional rights); Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that a state may not compel drivers to display the state motto on their license plates); Elrod v. Burns, 427 U.S. 347, 353, 373 (1976) (holding that the government practice of dismissing employees on a partisan basis is unconstitutional); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974) (holding that a state statute that grants a political candidate a right to equal space in a newspaper to reply to personal criticism, thus forcing the newspaper to publish the replies, violates the guarantees of a free press). *See generally* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995 (1982) (discussing the Court's failure to articulate a consistent approach to negative First Amendment cases, or cases of compelled instruction).

140. Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972) ("There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'"); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969) ("The classroom is peculiarly the 'marketplace of ideas.'") (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the state may not constitutionally compel students to salute the flag and recite a pledge).

141. Some, including J. S. Mill, disagree with this proposition and would forbid public schools altogether. *See* JOHN S. MILL, ON LIBERTY 148-49 (The Atlantic Monthly Press 1921) (1859) ("A general State education is a mere contrivance for molding people to be exactly like one another . . . ."). Even without public schools, however, the state promotes certain values if it subsidizes education at all. Even a voucher system that permits individuals to choose their schools still promotes education as a value. One who accepts public educational subsidies could reject public schools, then, only on a theory that public schools are particularly coercive. The ability of public schools to inculcate values is limited, though. *See infra* text accompanying notes 147-54. Thus, such a theory seems hard to maintain.

should, however, be allowed to shun instruction that offends them. In a liberal democracy, this right is not an exception to the state's power to promote values but, rather, an expression of the values it promotes. We value freedom of conscience and a right of parents to guide the moral and religious education of their children.[142] The state observes these values when it excuses children from indoctrination that offends their religion.

The problem of the government's imposing values is illustrated and underscored by asking which values public schools should inculcate. Nadine Strossen argues that "among the most important" values that schools can teach are "(1) a tolerance for diversity of religious, political and other beliefs and ideas, and (2) a belief that every individual should have equal rights and opportunities, regardless of such factors beyond the individual's control as race, sex, religion, or national origin."[143] These vague generalities appeal to most Americans, but any effort to give them real content would be controversial. For example, does an emphasis on equal rights mean opposition to racial preferences? Does tolerance for religious and political diversity mean not criticizing Pat Robertson and Jesse Jackson?

Many people, including many born-again Christians, would be offended by Strossen's statement that religion is "beyond the individual's control."[144] Even when people agree upon on a value, they may disagree about its source. For example, is stealing wrong because the Bible says that it is wrong, or because, as Richard Posner says, it circumvents the market?[145] More important, how can public schools preach tolerance if they practice intolerance toward religious minorities? What kind of tolerance do children learn when students, like those in *Mozert*, who refuse instruction hostile to their religion are punished rather than accommodated?[146]

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142. *Yoder*, 406 U.S. at 213-14 ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.").

143. Strossen, *supra* note 68, at 376-77 (discussing challenges to "secular humanism" and "scientific creationism" in the curricula of public schools and proposing standards for the resolution of these challenges).

144. *Id.*

145. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 208, 220-21 (4th ed. 1992) (stating that stealing is inefficient and should be discouraged).

146. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1060 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Some students in *Mozert* were suspended. *Id.*

Another objection to ethical indoctrination in public schools is that there exists little evidence that public schools can actually instill moral values or that particular values are "necessary to the maintenance of a democratic political system."[147] Critics long charged that Catholic schools teach authoritarian, anti-democratic values and loyalty to Church rather than to nation.[148] Today, few would claim that parochial school graduates are less patriotic or democratic than public school graduates.[149] Thus, whatever the public schools did differently seems not to have been too important, and it is highly unlikely that accommodating religious children who object to certain values education will weaken the national commitment to democratic values.

Indeed, I doubt that those who trumpet the importance of teaching democratic values take their own rhetoric very seriously. If they did, they would also try to make acceptance of these values a condition of receiving government benefits or exercising certain rights, such as voting. In fact, there is no such effort. Advocates may believe that teaching democratic values in public schools is necessary and mild.[150] The evidence shows, however, that such

147. Ambach v. Norwick, 441 U.S. 68, 77 (1979). *Accord* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (public school can properly forbid offensive language because the use of such language is contrary to necessary values in a democratic society). For critiques of this position, see Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 *passim* (1983). "It is doubtful that value inculcation in the schools reduces political violence, effectively prepares students for citizenship, or produces loyal and patriotic citizens." *Id.* at 288-89. *See also* Fred M. Hechinger, *Defining Values*, N.Y. TIMES, Oct. 21, 1986, at C9 ("The track record of teaching values through formal instruction is not encouraging.").

148. *See* Philip E. Johnson, *Concepts and Compromise in First Amendment Religion Doctrine*, 72 CAL. L. REV. 817, 843-44 (1984) (stating that American courts and commentators of the 1940's viewed the Catholic Church and its schools as "primarily concerned with indoctrinating the children to be obedient to the Church and its priests"); Laycock, *supra* note 79, at 417-18 (explaining that as late as 1962 the Catholic Church was being described as a totalitarian system that threatened American freedoms). *See also* Jeremy Rabkin, *Disestablished Religion in America*, 86 PUB. INTEREST 124, 133-34 (1987) (stating that the belief that the Catholic hierarchy taught undemocratic values led to an opposition to state funding for Catholic schools in the Nineteenth Century).

149. *See* ANDREW M. GREELEY & PETER H. ROSSI, THE EDUCATION OF CATHOLIC AMERICANS 114-36 (1966) (asserting that parochial and public school graduates do not differ in their political attitudes).

150. *See* Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 792 (1993). Ingber claims that "[s]chools cannot avoid instilling values." *Id.* Ingber also minimizes the affront the teaching of such values will have on religious children and their parents: exposure to "objectionable ideas" in public schools "is to be expected." *Id.* at 787. Religious children, Ingber argues, have no greater claim to be free from exposure to objectionable beliefs than anyone else. *Id.*

teaching is unnecessary, and the complaints of the religious indicate that, at least in their eyes, it is not mild.[151]

Professor Ingber counters that if public schools cannot effectively inculcate democratic values, then they also cannot lure children from their faith, as religious parents fear.[152] This argument misconstrues the critique of public school indoctrination of values. One part of the critique is that democratic values may be instilled in ways other than public school instruction, as evidenced by the support of democracy among parochial school graduates.[153] A second part is that widespread acceptance of these values may be unnecessary to preserve democracy.[154] Neither of these criticisms suggests that public schools can never inculcate values.

Further, even if schools cannot instill values, they may still undermine values that children learn elsewhere. Children who are confronted with conflicting instruction from school on one hand, and from church and parents on the other, may react by rejecting both. Faith is threatened even more when the school's opposition to it is bolstered by values of the broader society. Even if public schools cannot inculcate certain values, they may, by acting in concert with radio, television, movies, magazines, and the attitudes and behavior of a child's peers, be able to erode religious belief.

Once again, this does not mean that public schools must not teach values at all; education inevitably bolsters some values and weakens others. Public schools can promote certain values over the objection of a substantial minority or even a majority. When the instruction clashes with religious belief, however, it violates the free exercise rights of the objectors, who may be entitled to some accommodation.

E. Corrosive Secularism and Excessive Entanglement

The Supreme Court has often stated that prohibiting government aid to religion not only protects the freedom of citizens who do not want their taxes so used, but also protects religious organizations against "corrosive secularism."[155] No doubt, government

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151. *See supra* notes 3-19 and accompanying text. Religious parents can hardly be blamed for vehemently objecting to some of the affronts to their beliefs espoused in our public schools.

152. Ingber, *supra* note 150, at 784 n.55.

153. *See* GREELEY & ROSSI, *supra* note 149, at 125-27 (showing that Catholic school graduates are no more intolerant of freedom of speech and religion than their public school counterparts).

154. *See* van Geel, *supra* note 147, at 263.

155. *See* Lee v. Weisman, 112 S. Ct. 2649, 2666 (1992) (stating that even a

aid can have that effect. One should not be surprised, then, that religion remains more vibrant in America than in many nations with established churches. To avoid this corrosion, however, requires not a blanket condemnation of any aid that reaches a religious organization, but a more nuanced concern about the kind of aid and its likely effects.

For example, state funding for ecclesiastical salaries may influence who is chosen to be a cleric. Even if the state plays no apparent role in the choice, fear of reduction or elimination of funding may influence a sect's choice of clergy and also intimidate incumbent clerics. Many existing aid programs do not seem to have corroded religion,[156] however, and it is unlikely that many proposed programs would do so, either. As government increased aid to higher education after World War II, some colleges became less distinctively sectarian.[157] Government aid, however, probably did not cause these changes. Although some religious colleges became less sectarian, so did many parochial schools that receive no government aid. The changes seem to result from forces far broader than government aid programs. Moreover, government aid to college students helped to spawn colleges that are more deeply religious. Thus, government aid to higher education has neither promoted nor corroded religion. It simply increased religious freedom by giving students choices they would not have had if aid were limited to public or nondenominational colleges. Similarly, enacting voucher programs for primary and secondary school children more than likely would *not* promote or corrode either religion in general, or the religious mission of parochial schools.

Opposition to government aid because of its corrosive secularism is never made by the recipient sect; if the sect perceives such a threat, it simply rejects the aid.[158] Thus, opposition always co-

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governmentally favored religion may be "compromised as political figures reshape the religion's beliefs for their own purposes"); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985) (stating that state sponsored religious indoctrination, if allowed to occur, would "taint" the religious beliefs with a "corrosive secularism").

156. Indeed, the Supreme Court has upheld certain aid programs and thus did not find that they corroded religion. *See, e.g.*, Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 482 (1986) (upholding a state provision of aid to students attending religious schools); Roemer v. Board of Pub. Works, 426 U.S. 736, 767 (1976) (upholding direct state subsidies to colleges affiliated with the Catholic Church); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (permitting a state to pay for the bus transportation of parochial school students).

157. At many sectarian colleges, mandatory religious instruction and chapel attendance have ended and enrollment of students of other faiths has increased.

158. In theory, objection could be filed by dissident members of a sect. In practice, this

mes from non-members of the recipient sect, often from groups and judges who seem hostile to traditional religions or religion generally. This gives reason to doubt the sincerity of the opposition's concern about corrosive secularism.

A related issue is the excessive entanglement between church and state that may occur when government monitors a religious organization's compliance with the constitutional requirements of an aid program. The Supreme Court has struck down some aid programs because they provided no monitoring to prevent the use of government money to promote religion.[159] Where monitoring is provided, however, the Court bans the program for creating excessive entanglement between church and state.[160] Moreover, where a program lacks monitoring, the Court sometimes declares that, if monitoring were introduced, it would create excessive entanglement.[161] Critics on and off the Court have called this a Catch-22 argument: "the very supervision of the aid to assure that it does not further religion renders the statute invalid."[162]

The concept of excessive entanglement between church and state is not helpful. The goal of the religion clauses is to enhance religious freedom without promoting or hindering religion. So long as government activity does not promote religion (or favor one sect over another), the concerns of society generally are satisfied; concerns about hindering religion should be raised by the church or its members.[163] The concept of excessive entanglement obscures rather than illuminates the proper analysis of these issues.

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almost never happens.

159. *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 386 (1985) (without proper monitoring, a state program where private school teachers were paid with public funds to teach after-school classes to private school students creates "too great a risk of state-sponsored indoctrination"); Meek v. Pittenger, 421 U.S. 349, 372 (1975) (to ensure publicly supported "auxiliary teachers remain religiously neutral" while teaching in nonpublic schools, state would have to engage in "continued surveillance" of these teachers).

160. *See* Aguilar v. Felton, 473 U.S. 402, 413 (1985) (requiring city agents to visit and inspect a religious school for evidence of religious matter in Title I classes constituted excessive government entanglement with religion).

161. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) (stating that state surveillance of state subsidized religious school teachers "will involve excessive and enduring entanglement between state and church").

162. Bowen v. Kendrick, 487 U.S. 589, 615 (1988).

163. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1383 (1981).

E. Student, Parental and Group Rights

Professor Ingber and others have objected that free exercise claims against public schools reflect the faith of the parents but not necessarily the faith of the children.[164] The usual retort is that our law recognizes "the right of parents . . . to direct the education of their children."[165] Although this answer is sufficient, the objection invites a deeper answer. Both the objection and the reply treat free exercise claims as raising only issues of individual rights; the two views differ only about whether to prefer the rights of the parent or the child. However, religious freedom also entails a right of religious communities not to be overwhelmed by the power of the state. The Court in *Yoder* recognized this by stressing the survival of the Amish community and not just the individual rights of the claimants. Legal scholarship has paid more attention recently to group rights and the idea of community. Akhil Amar has shown that this interest is not new, but revives a tradition even older than the tradition of individual rights.[166]

The communitarian tradition is especially relevant to the religion clauses because the survival of religious communities is necessary to make the religious freedom of individuals "both possible and meaningful."[167] The education of children is crucial to this survival. People are mortal, but humanity (we hope) is not. To survive, religious groups depend on raising their members' children within the faith. Although government may not act affirmatively to preserve any particular religious group or religion generally, religious freedom permits, and to some extent requires, government to forbear from unnecessarily weakening religious communities. When public schools undermine a sect without a compelling need to do so, the state should offer reasonable accommodation to children of the sect.

This problem of religion and education is well illustrated by

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164. *See* Ingber, *supra* note 150, at notes 70, 71 and accompanying text.

165. Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

166. Akhil R. Amar, Note, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132-33 (1991) (suggesting that the drafters of the Bill of Rights intended to protect groups, majority as well as minority, from government).

167. Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1475 (1984) (asserting that the Free Exercise Clause and Establishment Clause complement each other in protecting religious choice). *See also* Glendon & Yanes, *supra* note 92, at 544 ("[I]ndividual free exercise cannot be treated in isolation from the need for religious associations.").

the quandary of the Zobrest family, the plaintiffs in a case now before the Supreme Court.[168] Jim Zobrest, who is deaf, was attending a public school which, by federal law, had to provide him with a sign-language interpreter. His mother took Jim to Mass and in her own words:

> I tried signing what they were saying, but I spent most of my time answering questions like, "How long before we can go home?" and "why do we have to come here?"
>
> I thought the only way he would learn the basics of Christianity was to be at a [Catholic School], where it's part of the atmosphere.[169]

At least in some cases, children may need more than a formal, doctrinal exposure to religion; to appreciate their religion, they may need to live it. The monadic view of rights taken by some civil libertarians ignores this need, but anyone who values religious freedom cannot ignore it.

V. REMEDIES

A. Accommodation of Religion

Two scholars connected with this symposium have stated antipodal views on the question of how much government may or must accommodate religion. Professor Marshall argues that courts should almost never require accommodation, but that the political branches of government may grant discretionary (or permissive) accommodation.[170] Professor Lupu, by contrast, opposes discretionary accommodation by the political branches, but construes the Free Exercise Clause to require accommodation in some cases.[171]

Although Professor Marshall is correct in saying that judges in accommodation cases are likely to favor sects that are large and familiar,[172] that problem is likely to be much greater with discre-

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168. Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir.), *cert. granted*, 113 S. Ct. 52 (1992).

169. Tamar Lewin, *A Test of Church-State Relations in a Deaf Student's Need*, N.Y. TIMES, Feb. 22, 1993, at A10.

170. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 324 (1991).

171. Lupu, *supra* note 37, at 743; Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 582-87 (1991) (suggesting that legislative accommodation will result in prejudice and inequality).

172. Marshall, *supra* note 170, at 311.

tionary accommodation by the political branches. Given Professor Marshall's position, how should courts respond to unequal accommodation of different sects? If they demand equal accommodation for disfavored sects, not much remains of Professor Marshall's position, because nearly every claim for accommodation can be framed as seeking what another sect already has.[173] Alternatively, courts could do nothing. In his majority opinion in *Employment Division v. Smith*, Justice Scalia recognized and accepted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[174] This is precisely what the government should not do — the purpose of the Religion Clauses is to demand government neutrality toward religion. Favoritism in accommodation by the political branches would also undoubtedly generate pressure on the courts to declare various accommodations violative of the Establishment Clause, thus narrowing the scope of accommodation.

Many legislative accommodations are adopted out of concern that they are constitutionally required, either standing alone or because similar accommodations have been granted to other sects.[175] Eliminating judicial accommodations would remove this concern and therefore decrease legislative accommodation and reduce religious freedom.

Professor Lupu's position is harder to weigh because he would allow some discretionary accommodation, but how much is unclear.[176] The disposition of a free exercise claim depends on at least three factors: whether there is a burden on free exercise;[177] whether granting relief would violate the Establishment Clause by promoting religion;[178] and whether granting relief would interfere

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173. For example, fundamentalist children could argue that they do not object to having public school texts inimical to their beliefs so long as other children have texts inimical to their beliefs; they seek texts consistent with their beliefs only because other children have already been granted that accommodation.

174. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

175. *See* Glendon & Yanes, *supra* note 92, at 532 (asserting that pre-*Smith* decisions indicated that accommodation was required unless government interests were unduly burdened).

176. Lupu refers to leaving "little room." Lupu, *supra* note 37, at 772. Lupu "would assign strong, judicially enforceable content to both the Free Exercise Clause as a platform for mandatory accommodations and the Establishment Clause as a barrier to permissive accommodations, and leave little room between them for the exercise of political discretion." *Id.*

177. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (if state action does not deny free exercise, no accommodation is required).

178. As determined by applying the three part test found in Lemon v. Kurtzman, 403

with significant governmental objectives.[179] Especially concerning the last factor, the government should be able to decide *ab initio* that accommodation would not unduly hinder significant objectives, and courts should not lightly overturn this decision.

Discretionary accommodation is desirable because it avoids litigation. Constitutional litigation is particularly divisive because it involves issues of principle. This divisiveness can sometimes be mitigated or avoided by legislative or administrative action. Since avoidance of strife is arguably one function of the Religion Clauses,[180] this mitigation is beneficial. The cost of litigation also means that many free exercise (and other constitutional) claims are never pressed if litigation is necessary to vindicate them. Discretionary accommodation is desirable to make sure that these claims do not go unsatisfied.

To illustrate these last two points, consider the request of a school child for religious accommodation. If only courts can grant accommodation, expense will probably prevent the claim from ever being made. If the claim is made it will be divisive because it will pit the child and parents against school officials who might otherwise have worked things out amicably. Under Professor Lupu's approach, when political branches are unable to grant accommodations without court involvement, the litigation necessary to authorize the accommodation will often degenerate into a charade. If government officials support an accommodation, a court has no controversy to decide. If the officials merely pretend to

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U.S. 602, 612-13 (1971).

179. *See, e.g., Yoder*, 406 U.S. at 214 (in order for a state to deny a free exercise claim, there must be "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.").

180. The Supreme Court has sometimes forbidden aid to religious schools on the ground that such aid is politically divisive. In Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), the Court suggested that: "'What is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'" *Id.* at 796 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., in a separate opinion)).

See id. at 795-97 (finding that a New York law providing maintenance grants, tuition reimbursement grants and income tax relief to nonpublic schools creates the potential for political divisiveness); Meek v. Pittenger, 421 U.S. 349, 365 n.15 (1975) (suggesting that a Pennsylvania act allowing for the loan of materials and equipment to nonpublic schools could have politically divisive effects); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971) (asserting that the political divisiveness caused by granting aid to parochial schools would shift the focus of the community away from more important issues). *See also* Engel v. Vitale, 370 U.S. 421, 429-30 (1962) (holding that prayer recommended by the state to be recited every morning in school violates the Establishment Clause).

oppose the accommodation in order to facilitate the necessary litigation, they are unlikely to litigate with much zeal. This ineffectual opposition will have regrettable effects on adjudication in an adversarial judicial system. Professor Lupu's position also raises difficult questions about what is an accommodation. For example, is a rule that certain government employees cannot be compelled to work on Sundays an accommodation or a neutral general rule?

Problems with Professor Lupu's position may be better understood by applying the same argument to other constitutional rights. For example, should the state deny all due process rights of notice and hearing or reject all free speech claims unless ordered by a court? I think those who care about constitutional rights would say not. Limiting these rights to what is mandated by the courts would cause uncertainty, impose unnecessary expense, provoke needless disputes, and spawn spurious litigation. The same is true in the free exercise area.[181]

Accommodation is neutral when it frees its beneficiaries from a burden to which others are not subject or confers a benefit that others already enjoy. Accommodation, however, is not neutral when it prefers its beneficiaries over others from a temporal or secular perspective. A religious objector to public schooling could not, for example, demand a private tutor.[182] That kind of accommodation would reduce religious freedom by preferring some religionists over other citizens and by forcing some to subsidize the religion of others.

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181. A possible argument for Professor Lupu's position is that accommodation of free exercise claims could violate the Establishment Clause. However, the danger of such violations is small enough that government officials should be able to decide in the first instance how to reconcile the two clauses. Courts can hear challenges in the rare cases where objections arise.

182. Exemptions from some general legal obligations are unappealing to most non-members of the exempted sect and, therefore, do not favor the exempted sect from a secular viewpoint. Accommodation by exemption is intended to relieve religionists of a special burden they would suffer from compliance with a law. Because of this special burden, the withholding of exemptions cannot be treated as a neutral baseline. If the temporal advantages of an exemption are slight, the benefit to the religious freedom of the exempted sect may outweigh the disadvantages to non-members of being denied the exemption. *Compare* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (state may not exempt religious literature sold by religious organizations from sales tax) *and* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (state may not require employers to excuse employees from work on their Sabbath) *with* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (government may exempt religious organizations from ban on religious discrimination in employment).

B. Exemptions from Instruction and Substitute Instruction

Exemption from religiously offensive instruction should be granted unless government has a compelling reason for requiring all children to receive the instruction.[183] Such grounds exist only if the exemption would leave a child without some basic knowledge or skill.[184] By this standard, most requests for exemption should be granted.

Must government offer religious objectors substitute instruction? A positive answer could be based on the principle that, even when government has a compelling reason for acting, it must pursue its end through the means least restrictive of constitutional rights.[185] In *Rust*, however, the Supreme Court held that "Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."[186] In so doing, though, it cannot establish religion or impair its free exercise. For example, a state university cannot furnish space for use by secular groups while denying space for religious groups.[187] Similarly, a state that grants benefits to the involuntarily unemployed cannot withhold them from persons unemployed because of religious convictions.[188]

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183. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that the state had no compelling reason to require Amish children to attend high school since such children received sufficient vocational training at home).

184. *See supra* notes 72-74 and accompanying text.

185. Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Elrod v. Burns, 427 U.S. 347, 363 (1976); Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* NOWAK, *supra* note 32 at 1069 ("[I]f the state could achieve its goal as well by a means which would not burden the religious practice, it will be required to adopt the alternative means.").

186. Rust v. Sullivan, 111 S. Ct. 1759, 1772 (1991).

187. Widmar v. Vincent, 454 U.S. 263, 277 (1981).

188. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (state's refusal to pay unemployment benefits to worker fired for refusal to work on Sabbath, in accordance with religious beliefs, violates the Free Exercise Clause); Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (state's denial of unemployment compensation to Jehovah's Witness who quit defense-related employment due to religious beliefs violated Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (state may not use eligibility requirements of unemployment compensation law "so as to constrain a worker to abandon his religious convictions respecting the [Sabbath]"). *See also* Dent, *supra* note 3, at 881 n.98 (discussing Bowen v. Roy, 476 U.S. 693 (1986), in which a majority of the Supreme Court opined that the government could not condition receipt of Social Security benefits on the recipient's providing a Social Security number if so doing violated the recipient's religious beliefs). *But cf.* Employment Div. v. Smith, 494 U.S. 872, 890 (1990)

Rust also says that "'[a] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'"[189] Thus, parents who reject all theories of evolution cannot demand instruction in a different theory, such as creationism. However, claims for substitute instruction rarely seek an objective different from the school's. Children who request substitute readers, for example, accept the government's secular objective to teach reading and ask only that it be done without disparaging their religion. By contrast, the plaintiffs in *Rust* tried to compel the government to subsidize new and additional messages.[190] That is a different and much broader claim.

There are constitutional limits on alternative instruction, though. The principle of religious neutrality forbids schools to give religious objectors a substitute that is, from a secular perspective, superior to what other children get. Admittedly, this obligation poses hard line-drawing problems. For example, if a child objects to a reading program, the school can furnish an alternative reader, but how much time should the teacher spend with that child? If the answer is, no more than with each other child, the objector suffers from having neither group instruction nor special individual attention. That consequence seems inevitable, however, because the alternative of providing special individual instruction would improperly prefer that child over others.

Some argue that the state has a compelling interest in avoiding the administrative burden of giving exemptions and alternative instruction.[191] The Supreme Court has never held that this interest overrides a free exercise claim. In *Sherbert v. Verner*, the Court said that to be compelling, an administrative burden must be so great as to render an "entire statutory scheme unworkable."[192] This view mirrors the attitude behind much recent legislation re-

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(state may withhold unemployment benefits from those unemployed because of criminal use of drugs during religious ceremony) (discussed *supra* at notes 35-54 and accompanying text).

189. *Rust*, 111 S. Ct. at 1772 (quoting Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983)).

190. *Id.* (rejecting claim that Federal Government's refusal to permit abortion counseling in Title X funded clinics violates the First Amendment).

191. Thus Professor Ingber fears that accommodation will leave "public education in shreds." Ingber, *supra* note 150, at 791 (quoting McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring)).

192. Sherbert v. Verner, 374 U.S. 398, 409 (1963). *See generally* Dent, *supra* note 3, at 903-05.

quiring both public and private institutions to accommodate citizens with special needs, such as the disabled and non-English speaking students.[193] Administrative costs confer no benefit on those accommodated that might influence a citizen's religious choices. Nor do they create an appearance of government endorsement. A more difficult question is whether the cost of compliance can negate an otherwise valid free exercise claim to accommodation. A negative answer could be premised on Supreme Court decisions that cost and convenience cannot justify burdens on constitutional rights.[194]

Discussion at gatherings like this symposium tends to be technical and lawyerly, but I hope that the accommodation of religious children will not turn into an exercise in hypertechnical line-drawing. It is not in anyone's interest to litigate every detail of accommodation, or to monitor with a stopwatch the time a teacher spends on each child. If everyone acts in good faith and with tolerance, problems should be manageable. Recall that in *Mozert* the religious children were accommodated without incident for some time, until the school board stepped in and forbade any accommodation.[195] That attitude is unnecessarily cruel, divisive and insensitive to religious freedom.

C. Group Prayer and Moments of Silence

Requests for accommodations generally seek exemptions or substitute instruction,[196] but they could seek other relief, including accommodation for prayer. Thirty-one years ago the Supreme Court correctly held mandatory school prayer unconstitutional.[197] No official school-sanctioned prayer can be neutral. No matter how it is

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193. *See, e.g.*, Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327. In passing the Americans with Disabilities Act, Congress understood that requiring private and public institutions to accommodate the disabled would be costly. Senator Hatch, while supporting the bill, noted "this bill will prove very expensive to implement." 136 CONG. REC. S9685 (daily ed. July 13, 1990) (statement of Sen. Hatch). Nevertheless, Senator Hatch was willing to incur this burden in order to bring the disabled into the economic mainstream. *Id.* Similarly, the Court is willing to sacrifice higher administrative costs in order to safeguard constitutional protections.

194. *See* Craig v. Boren, 429 U.S. 190, 198 (1976) (administrative ease and convenience insufficient to justify gender based classifications); Bullock v. Carter, 405 U.S. 134, 149 (1972) (cost insufficient to support state practice of charging fees for entry into primary election); Shapiro v. Thompson, 394 U.S. 618, 633-34 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification.").

195. *See* Brief for Petitioners at 5-6, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (No. 87-1100), *cert. denied*, 484 U.S. 1066 (1988).

196. *See supra* notes 31-32 and accompanying text.

197. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).

worded, any prayer will offend atheists, and some religious sects will inevitably object to the content of any prayer or to the very idea of state recitation of a prayer. Moments of silence may be different. Since the moment can be used for any kind of prayer, meditation or contemplation, or simply for relaxation, a moment of silence does not seem to promote religion in general or any religion in particular. Thus a moment of silence should rankle only those who believe that children should make noise all the time.

It is argued, however, that in practice moments of silence pose the same problems as an official prayer.[198] If the teacher and several students pull out rosary beads or yarmulkes, other students will feel pressure to pray or pretend to pray, and in either case will feel alienated. One answer to this fear is that it is far-fetched—it is highly unlikely that enough students will engage in sectarian behavior so as to pressure others to pray. A second answer is that this parade of horrors is not so horrid—if several students do engage in distinctively sectarian behavior, the class may learn greater appreciation of religious pluralism. That some students may feel discomfort because others use the moment to pray is insufficient reason to forbid moments of silence.[199]

Moreover, excluding moments of silence is hardly neutral. School occupies children for about half of the waking day on half the days of the year. To preclude even a moment of silence during the school day sends the non-neutral message that prayer is at best something to keep hidden. This attitude supports the privatization thesis—that religion is acceptable only if it is kept out of sight, out of the public square.[200] It indicates that prayer should be kept

198. *See* David Z. Seide, Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 406 (1983) (stating that moments of silence are "no different for analytical purposes than sectarian, nondenominational, or voluntary prayers").

199. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) ("[T]o justify prohibition of a particular expression or opinion, [the state] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

200. *See* RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA *passim* (reprinted 1991); Gerard V. Bradley, *Dogmatomachy — A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986) (asserting that decisions since Everson v. Board of Educ., 330 U.S. 1 (1947), are "judicial attempts to move religion into the realm of subjective preference by eliminating religious consciousness"); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 22 (1991) (discussing the privatization thesis in the context of the Establishment Clause and substantive due process). Professor Myers suggests that privatization of religion is a theme "common in our legal discourse." *Id.* at 21.

even more private than urination and defecation, for which schools at least designate private spaces. It also suggests, contrary to the beliefs of most religious people, that religion can and should be kept separate, isolated from the rest of human existence.

Designating a moment when prayer is allowed may be not only permitted but mandated by the Constitution. Suppose that some students want a moment to pray together. To minimize disruption they ask the school to pick the moment. Could their request be denied? No one argues that a child in public school can be forbidden to pray alone, silently. As a corollary, if a child informs a teacher that she says a brief silent prayer at a particular time each day, the teacher could not interrupt the prayer. As the Supreme Court has said: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[201]

The situation is no different if several students want to pray silently together. To permit individual prayer but not group prayer would deny "the associational aspects of free exercise."[202] A group prayer need not be so disruptive that denial would be justified as a compelling state interest. At the least, opponents of moments of silence should have to show clearly that group prayer had been tried and had proved disruptive; important constitutional rights should not be denied on the basis of unconfirmed fears.[203] In other words, the burden should be on the state to prove a compelling state interest, not on citizens to disprove it. The state need not permit a moment of silence if nobody requests one. However, the state could and perhaps should designate such a moment voluntarily.[204] Otherwise, the burden is placed on religious students to

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201. *Tinker*, 393 U.S. at 511 (striking down a school rule forbidding the wearing of black armbands to show opposition to the Vietnam War). However, conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513.

202. Glendon & Yanes, *supra* note 92, at 495-96 (asserting that the Court has ignored the Free Exercise Clause as it applies to groups).

203. *See Tinker*, 393 U.S. at 508 (unsubstantiated fear of disruption did not justify school rule against wearing of armbands to protest war in Vietnam).

204. The situation is different from that in *Lee v. Weisman* where the Court found that expecting students and parents to remain silent during an official prayer constituted a form of compulsion. *Weisman*, 112 S. Ct. 2649, 2658 (1992). The Court found that because the silence was expected during a particular prayer, the silence constituted a degree of endorsement of the religious views reflected in the prayer. *Id.* By contrast, remaining silent

take the awkward step of requesting accommodation.

Of course, moments of silence could be abused. For example, a teacher could encourage students during the moment of silence to pray to Jesus to end abortion. Public schools can discourage abuses by training and by punishing infractions. Courts can intervene if a school fails to curb abuses. Improper promotion of, or opposition to, religion is possible in virtually any classroom situation. A lesson on slavery or a discussion of ethics could permit a teacher to praise or to criticize a particular faith or even religion in general. The Supreme Court has sometimes ignored this fact and selectively used the mere risk of promotion of religion to forbid public school contacts with religion.[205] An approach that resolves all uncertainty against any contact with religion is not neutral toward religion but denigrates and stigmatizes it. That is not an appropriate attitude for a government committed to religious freedom.

The foregoing discussion also helps to resolve the closely related question of "symbolic links." It is often argued that moments of silence or equal access for religious extracurricular activities create or might create a perception that public schools endorse religion.[206] This alleged problem is also far-fetched and in any case

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during a moment of silence does not endorse any particular religion or religion generally; it merely endorses the freedom of students to pray, meditate, or relax in silence.

205. For example, the mere possibility that a teacher might improperly advance religion has been held sufficient to invalidate programs where public school teachers provided special education classes to parochial students, even though long experience with the programs disclosed not a single incident of proselytizing. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384-85 (1985). The Court reasoned that if inappropriate behavior did occur in a parochial school it would probably not be reported. *Id.* Yet, when officials monitored a similar program to determine whether such behavior had occurred, the Court held that such monitoring created excessive entanglement with religion. Aguilar v. Felton, 473 U.S. 402, 413 (1985). In contrast to the *Grand Rapids* reasoning, the Court in *Bowen v. Kendrick* held that the mere possibility that grants under the Adolescent Family Life Act might be used improperly by recipients to promote religion did not render the statute unconstitutional. Bowen v. Kendrick, 487 U.S. 589, 611-12 (1987). The Court stated that evidence that grants had been so used in some instances would warrant cancelling grants to those recipients but would not justify invalidating the entire program. *Id.* at 611.

206. *See* Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (petitioners argued that granting after-school religious groups equal access to school resources would lead an objective observer to believe that the school supported such religious meetings); Wallace v. Jaffree, 472 U.S. 38, 60 n.51 (1985) (moment of silence in public schools may indirectly coerce "religious minorities to conform to the prevailing officially approved religion") (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)); Robert C. Boisvert, Jr., *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. J. 373, 389 (1985) ("permitting religious groups to use public school facilities conveys a message of governmental endorsement of religion"); Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High*

correctable. Students are unlikely to perceive these activities as endorsing religion, and public schools can help make sure of that by stressing their neutrality toward every faith and toward religion in general. Even under an equal access approach, public schools do not subsidize religious extracurricular activities as they do secular activities, such as sports and music, with expensive equipment, instruction and facilities. Thus, that equal access creates a perception of governmental hostility to religion is at least a plausible proposition. Here again, though, the fear is far-fetched and can be negated by disclaimers.

D. Voucher Plans

Under the school choice (or voucher) programs, advocated by many, the state would pay a fixed amount of tuition for each school child to attend the school of the parents' choice, whether public, private nonsectarian, or parochial. Opponents call such programs unconstitutional because public money would be used, directly or indirectly, to promote religion.[207] Do choice programs favor religion, or merely treat it equally? The key questions here are context and characterization: that is, what is it that religion is like and with what must it be treated equally?

To separationists, the public school is no different from the post office: religion has no place in either one; if you want religion, go elsewhere. This analysis breaks down if we recognize that the two facilities are different and that the public school represents a somewhat arbitrary form of subsidy.

Education is more important than postal service, so that reli-

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Schools: A Proposal for a Unitary First Amendment Forum Analysis, 12 HASTINGS CONST. L.Q. 529, 566-71 (1985) ("A strong presumption of . . . government endorsement arises when [religious] clubs are organized in public high schools."); Leah G. Morgenstein, Note, Board of Education of Westside Community Schools v. Mergens: *Three "R's" + Religion* = Mergens, 41 AM. U. L. REV. 221, 239 (1991) ("When religious student groups meet on school premises in a school-sponsored activity forum, students may not be able to discern government neutrality towards religion."); Seide, *supra* note 199, at 401-03 (arguing that moments of silence in public schools are generally perceived as religiously oriented).

207. *See* Wolman v. Walter, 433 U.S. 229, 265 (1977) (Stevens, J., dissenting) (stating that "a state subsidy of sectarian schools is invalid regardless of the form it takes [because all forms of assistance] give aid to the school's educational mission, which at heart is religious"). These critics of school choice are correct in saying that, if there is a problem with the direct or indirect support of religion, segregation of public funds does not solve this problem. Even if public money is used strictly for nonsectarian purposes, it still frees up private money for religious purposes and thus facilitates the parochial school's promotion of religion. *See id.*

gious unacceptability in public schools is more onerous than religious unacceptability in post offices. Also, primary and secondary public schooling has traditionally been an in kind benefit. Educational benefits do not have to take that form, however. Federal subsidies for higher education are in the form of either vouchers or cash-like grants.[208] When subsidies take this form, they can be used at religious institutions, even "pervasively sectarian" institutions, without constitutional objection.[209] Prohibiting vouchers for primary and secondary schools is neutral only in the twisted sense that it maintains the status quo.[210]

It does not necessarily follow that educational vouchers are constitutionally required or even an advisable policy. We should recognize, however, that using public schools as the only form of education subsidy imposes a heavy burden on the religious freedom of many Americans. This burden arises because the subsidy is provided in kind rather than in another form that would permit citizens greater choice. We should be sensitive to and willing to alleviate this problem if we reasonably can.

Concededly, some money from vouchers might be used for purely religious activities. Such use would not necessarily be unconstitutional. Public schools fund many extracurricular activities that have little or no educational value. If one school spends public money on extracurricular activities such as music and sports, while a parochial school spends the same money on religious activities, the state is properly neutral in funding the two schools equally. If expenditures per pupil are the same, no one is subsidizing another's religion; the state is merely funding extracurricular activities, some of which are secular and some of which are religious. Put another way, voucher plans of this kind are neutral in that they would not influence citizens to choose religious schools if they were not already inclined to do so.[211]

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208. The Supreme Court has upheld several programs of grants that included religious colleges and their students. *See, e.g.*, Witters v. Washington Dep't of Pub. Servs. for the Blind, 474 U.S. 481, 482 (1986) (holding that the First Amendment does not prohibit a state from giving tuition aid to a student preparing for the priesthood at a sectarian college); Roemer v. Board of Pub. Works, 426 U.S. 736, 737 (1976) (state grants to religiously affiliated colleges); Hunt v. McNair, 413 U.S. 734, 749 (1973) (state revenue bonds); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (federal construction grants).

209. *See Witters*, 474 U.S. at 485-89.

210. *See* Sunstein, *supra* note 93, at 52 (denying that neutrality is truly neutral when the status quo is unjust).

211. Non-members might choose sectarian schools for nonreligious reasons, such as

Separationists may argue, however, that religion is different from these other activities. The Religion Clauses make clear that the founders did consider religion different from other activities: it is, after all, the only activity that the government cannot establish and the free exercise of which the government cannot prohibit. It does not follow, though, that the founders intended religious activity to be treated less favorably than music and sports. So long as the total funding for parochial and nonsectarian schools are equal, religion is not favored, the state is neutral, and religious freedom is not violated.

This does not mean that states must fund parochial and nonsectarian schools equally. A state could, for example, decide to subsidize the study of science. Although a parochial school might decide for religious reasons to reject that subsidy, it cannot then demand a subsidy for religious activities as an alternative. The state's decision to subsidize the study of science is different from a decision to subsidize glee clubs but not religious choirs because there are obvious temporal reasons for the former but not for the latter.

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better secular education, but that choice creates no constitutional problem. Professor Beschle, purporting to apply a neutrality standard, opposes "full funding of religious education" in order "[t]o guard against the possibility that a community might be deprived of a quality nonreligious education option." Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 185 (1987). I have a hard time seeing this as a neutral position. This position is no more neutral than one that opposes full funding of secular education in order to guard against the possibility that a community might be deprived of a quality religious educational option. *See* Jernigan v. State, 412 So. 2d 1242, 1247 (Ala. Crim. App. 1982) (upholding criminal conviction of Catholic parents who kept their child out of school because no Catholic school was available). The former position is no more persuasive than the latter unless one prefers secular education, which of course is not neutral.

Professor Choper would permit aid to religious schools "to the extent that it does not exceed the value of [the schools'] secular services." Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 340 (1968). This limitation is reasonable if secular services are defined narrowly. A religiously neutral government could decide to subsidize instruction in math, computers and American history without swaying citizens' choices between religious and nonreligious schools. But Choper's limitation should not be constitutionally mandated. A religiously neutral government could decide to subsidize extracurricular activities and leave it to each school to decide whether those activities should be secular or religious. Again, such a program would not pressure citizens to choose a religious school. Indeed, the limitation should be unconstitutional if not narrowly defined. For example, one would have difficulty seeing why a religiously neutral government would fund a glee club but not a religious choir, or subsidize sports but not Bible studies. Such a program could influence citizens' religious choices by forcing them to choose between a school with state subsidized, secular extracurricular activities (such as sports) and a school with no subsidized extracurricular activities.

The discussion of choice plans raises the question of whether it is important or even desirable to encourage children to attend public schools by making these schools free while private schools receive virtually no state subsidies. By favoring secular public schools we disfavor schools that would teach children a richer, deeper body of values. This should bother even those who generally applaud the liberal program for public schools. A common criticism from many points of the ideological spectrum is that contemporary American life is bland, shallow, materialistic, self-indulgent. Many Americans have become Nietzsche's "last man"—people with no commitment to anything deeper than their own creature comforts.[212] Perhaps that situation is not so bad. Maybe the atrocities perpetrated in this century by Marxist and National socialisms, by religious fundamentalism and by ethnic hatred, make petty self-gratification appealing by comparison. Most of us, though, would like to aspire to something better. Perhaps choice plans can help cultivate deeper values, whether religiously or secularly based.

One cannot say how much public schools have contributed to the current poverty of values. Television and radio, urbanization, the car and economic prosperity have also been contributing factors. It is plausible, though, that public schools have played an important role. If the public school program of teaching democratic values, and nothing more, is unsatisfactory not only to certain sects on religious grounds, but also to many ethnic and other groups on secular grounds, we should consider offering an alternative.

VI. CONCLUSION

Our nation is committed to giving every child a free education. This is one of the most valuable benefits our government provides. Traditionally, the form of this benefit has been the free public school. But public schools often denigrate religion, especially traditional religions, in ways that inflict pain on many religious people. If our constitutional commitment to religious freedom is serious, we should try to accommodate these people in order to ease the agonizing choice between education and faith.

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212. *See* FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 12-14 (Thomas Common trans. 1964). The last men "have their little pleasures" and all "wanteth the same; every one is equal." *Id.* at 13. They lack any nobility of soul and any noble aspirations.