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Neutrality under the Religion Clauses

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NEUTRALITY UNDER THE RELIGION CLAUSES

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I. INTRODUCTION

In a curious example of doctrinal imperialism, the "equal protection mode of analysis"[1] has come to dominate the interpretation of many other clauses of the Constitution. This extends even to those, like the religion clauses, that appear from their language to denote specific substantive liberties and institutional arrangements.[2] Thus, the question becomes not "what interpretation will best foster religious liberty?" or "what interpretation will best achieve the institutional relationship between church and state intended by the establishment clause?," but rather "how do we remain neutral between religion and nonreligion?"

Professor Laycock's article is an excellent example of the equal protection mode of analysis. He defends properly drafted and implemented equal access and moment-of-silence policies on the ground that they are "strictly neutral" with respect to religion.[3] And so, for all practical pur-

* Assistant Professor of Law, The University of Chicago Law School. As a matter of full disclosure, I point out that I helped draft the briefs for the United States in a number of the cases discussed in this Article: Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986); Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (brief in opposition to petition for certiorari); Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986). This Article originally was delivered at the Symposium on Associational Freedom and Private Discrimination, Northwestern University School of Law (Oct. 14, 1985), as a response to Professor Laycock. I expanded the Article after the close of the Supreme Court's 1985 Term to include discussion of recent decisions.

[1] So called by Justice Harlan in Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970).

[2] A striking recent example is Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984), which interprets "the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses" as essentially equivalent to an unrestrained version of equal protection rationality review. In the religion context, see Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193; Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

[3] Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 3 (1986). Throughout this Article I will use the term "neutrality" in the way it is used by the Court: a government action is "neutral" if it "neither advances nor inhibits religion." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); *see also* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963). Professor Laycock apparently uses the term the same way. *See* Laycock, *supra*, at 2 n.6. *But see infra* note 17. Neutrality among religions presents wholly different issues.

poses, they are. There is no need to repeat his arguments; I strongly agree with most of them. The question I propose to explore, instead, is whether neutrality toward religious expression exhausts the protections of religious liberty the Constitution provides. In short, is neutrality enough?

Critics of neutrality as the governing principle under the religion clauses form two opposing camps: Those who posit separation of church and state as the controlling principle[4] and those who instead give controlling weight to considerations of liberty and its concomitants—pluralism and diversity.[5] It is a mistake to assume that these opposing views are unprincipled or simply ill-considered. It is not correct, for example, that separationists "who oppose equal access and moments of silence do so in the name of neutrality."[6] To the true separationist, religious institutions must be treated differently from other comparable institutions precisely because the government must remain separate from religion in a way that it need not be from other institutions. This may harm religion,[7] or it may help it,[8] but it is not neutral.

More serious, in my view, is the common misunderstanding and disparagement of those who believe that religious liberty—the freedom to choose and practice one's own religion, or none at all—is of greater importance than neutrality, when the two values clash. Professor Laycock, for example, states that "[i]t is generally the religious right that demands government support for religion and denies that the establishment clause requires neutrality."[9] This, I take it, is not an endorsement of the view he describes. Yet one need look no further than the last Term of the Supreme Court to see that this unsympathetic generalization is not accurate.

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[4] *See, e.g.*, A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES (1964); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN L. REV. 561 (1980); Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985); Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 175 (1986); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 24 (1973).

[5] *See, e.g.*, M. HOWE, THE GARDEN AND THE WILDERNESS (1965); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

[6] Laycock, *supra* note 3, at 7.

[7] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

[8] *See, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490 (1979). Probably the best discussion of this aspect of separationism is Professor Laycock's *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 (1981).

[9] Laycock, *supra* note 3, at 6-7.

Captain Simcha Goldman, an Orthodox Jew and a rabbi, came before the Supreme Court seeking an exemption, on religious grounds, from Air Force uniform regulations that prevented him from wearing the traditional skullcap, or yarmulke, while on duty.[10] The regulations are wholly "neutral." Neither Jews nor Gentiles are permitted to wear a skullcap or otherwise deviate from the uniform. Is that the end of the matter? If the American military fails to make an accommodation for the skullcap, it will be impossible for observant Orthodox Jews to serve. While this is a possible construction of the first amendment religion clauses, it strikes me as neither attractive nor compelling.

The other individual before the Court last Term "demand[ing] government support for religion and den[ying] that the establishment clause requires neutrality" was Stephen J. Roy, an Abenaki Indian who asserted a religious objection to using a Social Security number.[11] If he is a member of the "religious right," it has not come to my attention. Nonetheless, Mr. Roy and Captain Goldman are typical of the free exercise plaintiffs who have come before the Court in the past: an Amish employer objecting to mandatory participation in the Social Security system,[12] a Jehovah's Witness objecting to working on armaments,[13] Amish parents objecting to compulsory schooling for their teenage children,[14] a Seventh Day Adventist objecting to being required to work on Saturday,[15] and Jewish shopkeepers objecting to being required to close their business on Sunday when they observe their Sabbath on Saturday.[16] The common element is that, as adherents of minority faiths, these individuals' beliefs came into conflict with the facially neutral rules and practices of society, which are geared to the interests of the majority. And as society becomes ever more secular, many more persons of varying religious persuasions (even the "religious right") will require "special treatment" in order to remain faithful to their religious tenets.

To insist on strict neutrality in all cases arising under the religion clauses would be wholly inconsistent with the demands of free exercise and, as the separationists would emphasize, nonestablishment as well. Protections for religious liberty are no more "neutral" toward religion than freedom of the press is "neutral" toward the press. But this is not to deny that neutrality, properly understood, is a major element in the analysis. My intention here is to justify reliance on neutrality in most cases as a means of guaranteeing the more important objective, religious

10 Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

11 Bowen v. Roy, 106 S. Ct. 2147 (1986).

12 United States v. Lee, 455 U.S. 252 (1982).

13 Thomas v. Review Bd., 450 U.S. 707 (1981).

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

15 Sherbert v. Verner, 374 U.S. 398 (1963).

16 Braunfeld v. Brown, 366 U.S. 599 (1961).

liberty, and to suggest an analysis for determining when departures from religious neutrality are either permissible or constitutionally required.

II. Neutrality as a Starting Point

Neutrality among religions and, when appropriate, between religion and nonreligion, is a sound starting point for analyzing religious freedom issues. Neutrality is usually the course most consistent with religious liberty because, ideally, government action should leave untouched the preexisting religious mix in the community. A liberal regime should leave decisions about religious practice to the independent judgment of the people.[17]

There are times when neutrality is sufficient to protect religious liberty; *Niemotko v. Maryland*[18] is such a case. In *Niemotko*, religious speakers needed access to the public parks in order to fulfill their religious duty to proselytize, but they needed no more access than was accorded any other speaker. All they asked was that religion not be disfavored.[19] *Witters v. Washington Department of Services for the Blind*,[20] decided last Term, is also such a case. Witters, a blind man who was entitled to a state tuition grant to pursue any course of study that would lead to a career, asked only that the state not treat his chosen career—the ministry—differently from careers not involving religion.

Bender v. Williamsport Area School District[21]—part of the "equal access" controversy discussed by Professor Laycock—is almost such a case. The high school students in *Bender* asked that they be permitted to meet at the school on essentially the same terms as all other voluntary, student-initiated extracurricular groups. They asked that religion not be disfavored; they sought no special privileges. Their claim can be supported on the ground that it is neutral, but the deeper reason why their claim is meritorious is that allowing them to meet promotes religious liberty.

We should not lose sight of the human element in *Bender*. Equal

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17 I therefore commend Professor Laycock's somewhat heterodox formulation of neutrality: "I do not mean neutrality in the sense of a ban on religious classifications. Instead, I mean neutrality in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice. This requires identification of a base line from which to measure encouragement and discouragement." Laycock, *supra* note 3, at 3 (footnote omitted). If this definition of neutrality were employed by the Court, we would come a lot closer to a liberty-oriented understanding of the religion clauses.

18 340 U.S. 268 (1951).

19 *See also, e.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953); Fowler v. Rhode Island, 345 U.S. 67 (1953); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979); *cf.* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding time, place, and manner restrictions when applied neutrally to religious and nonreligious groups).

20 106 S. Ct. 748 (1986).

21 106 S. Ct. 1326 (1986). This case was not resolved on the merits because the Court concluded that the court of appeals lacked jurisdiction.

access protects a liberty of incalculable value to the high school students involved, who needed the rights of speech and association to maintain their religious identity. The religious sensibility of these students easily could have been overwhelmed by the secular environment of the Williamsport Area High School. The ideals of popularity, worldly success, and materialism—not to mention the realities of sex, drugs, and violence—are surely more prominent features of modern high school life than faith and good works. Lisa Bender explained the impulse behind the meetings well:

> We recognized the need to have a fellowship with other Christians in the school, to be able to encourage one another, and also to make Christianity more a part of our everyday lives and not just a . . . Sunday type of thing. . . . I was really encouraged by the fact that I was not alone in my beliefs and that I could share my problems and my prayer requests with other students who were concerned.[22]

Allowing the students to meet together does not impose religion on anyone; it merely enables those who wish to do so to engage in religious expression.

In fact, if one wanted to be a stickler, the students' claim in *Bender* was not precisely for neutral treatment. They, unlike all other student groups, would meet without the active participation of a faculty sponsor. To me, this departure is not troubling. Whether from the perspective of separation or of liberty, agents of the state ought not assume a leadership role in religious groups.[23] The departure, however, is not neutral.

The students' claim is less than neutral in another respect: the students voluntarily declined use of the school's public address system, bulletin board, and newspaper to publicize their meetings. This nonneutral treatment is presumably because of the competing claims to religious liberty by other students. Other students have a right, when attending school under the compulsion of the state, not to be compelled to listen to the efforts of religious groups to drum up attendance.[24] If one were to apply a rigid "strict neutrality" principle here, without considering the possibility that deviations from neutrality may sometimes enhance reli-

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22 *Religious Speech Protection Act: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 55-56 (1984) (statement of Lisa Bender Parker).

23 Professor Laycock apparently agrees that this difference between the religious group and other student groups is required. Laycock, *supra* note 3, at 29.

24 Thus, not allowing the religious group to use the public address system is justified. But preventing it from using bulletin boards and newspapers goes too far. Other students are not captive audiences for these messages. *Cf.* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 971 n.8 (5th Cir. 1972) (distribution of newspapers not "method of expression that materially and substantially interferes with the rights of others"); Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 735-36 (E.D. Va.) (public school students not "captive audience" of school newspapers), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974) (school newspaper did not violate religious freedom of those who disagreed with it), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

gious liberty, the equal access policy would be significantly more problematic.[25]

Thus, when we move beyond the surface of *Bender*, we see that the mere invocation of neutrality does not resolve the problem. We need a theory to account for when other considerations, such as liberty, dictate a departure from strict neutrality.

The real question is whether governmental action, taken as a whole, distorts religious choice—not whether the action makes explicit or implicit reference to religion. There are occasions when applying facially neutral rules to religious organizations or activities throws the weight of the government against religious practices, especially minority religious practices. There are also occasions when no truly neutral course is available. In such instances, the government may appropriately recognize and make adjustments for the special needs of religion. There are three major contexts in which neutrality either may or must be subordinated to religious liberty: (1) When religious practice is suppressed or inhibited as an incidental consequence of facially neutral governmental action; (2) when enforcement of a neutral regulatory scheme would interfere with a religious organization's internal structure and doctrine; and (3) when the governmental presence is so pervasive that religious exercise would be impossible in the absence of affirmative accommodation. I will discuss each of these in turn.

III. Suppression or Inhibition of Religion as an Incidental Consequence of Neutral Governmental Action

The most familiar example of constitutionally justified departures from religious neutrality occurs when facially neutral rules come into conflict with religious observances or scruples. Deeply rooted in our history,[26] these exceptions for religious conscience stem from the understanding that governmental and religious authorities have different

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[25] Professor Laycock apparently concludes that student religious groups should have been permitted to use the public address system on equal terms with other student groups—which presumably would include forceful attempts at persuasion. Laycock, *supra* note 3, at 35. His somewhat inconsistent suggestion that these announcements would have to be kept "brief and factual" would require censorship and at the same time depart from neutrality. This is a telling example of how a focus on neutrality instead of liberty can lead to an incorrect result.

[26] As long ago as the seventeenth century, the colonial governments made explicit "Indulgences and Dispensations" from their laws to avoid conflict with religious scruples. *See* T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 56 (1986). By the time the first amendment was proposed, 12 of the 13 states (Connecticut was the exception) had guarantees of religious liberty in their state constitutions, many of them using the term "free exercise." The language of these provisions demonstrates that they contemplated religiously based exemptions from facially neutral legislation, provided they would not disrupt the peace and safety of the state. *See, e.g.*, B. Poore, Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 383 (1877) (Georgia); *id.* at 1281 (New Hampshire); *id.* at 1338 (New York); *id.* at 1909 (Virginia).

functions, each of which is legitimate and must be respected by the other. The government cannot dictate the forms of worship, and the church cannot control the affairs of state.[27] Free exercise cases arise when an obligation or prohibition seen by the government as secular, such as serving in the military, is seen by the believer as violating a tenet of his faith. The function of the free exercise clause is to designate an independent third party, the judiciary, to decide whether religion or state must give way when these conflicts arise and to set a general rule of decision.

Religious conscience thus stands on a different constitutional footing than other moral or political disagreements with governmental policy. The special obligations, positive and negative, faced by the religious believer are outside the competence of governmental institutions to accept or reject, weigh or evaluate. This distinguishes the believer from his fellow citizens who may have disagreements with the state over issues of secular moral judgment. On secular moral issues, the government can and does take sides: against racism, for patriotism, against pacifism, for family planning, against smoking. On religious issues the government may not seek to sway public or private opinion. It cannot dispute, much less reject in principle, the claims of faith.

The free exercise clause is a reflection of the reality that the believer stands in a unique position with respect to secular government: he is vulnerable to inconsistent obligations that cannot be reconciled in purely secular terms. If, for example, Prohibition had been applied, neutrally and without religious exception, to all consumption of alcohol, then the central sacrament of the Roman Catholic faith would have been outlawed.[28] The believer's sacred obligation to partake of the eucharist would have been in conflict with his duty to obey the law of the land. Similarly, if Jehovah's Witnesses were required to serve on juries, they would be forced to violate a tenet of their faith.[29] In each instance, a neutral law, which may be of slight inconvenience to most people, puts the believer to the painful choice of disobeying the law or violating the tenets of his faith.[30]

Neutrality, in such a circumstance, is skewed in favor of either the majority religious faction or nonreligion. Rarely will a neutral rule be passed or enforced that conflicts with the religious beliefs of the majority. Minority faiths are not so fortunate. Requiring strict neutrality is there-

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[27] *See, e.g.*, J. LOCKE, A LETTER CONCERNING TOLERATION (Bobbs-Merrill ed. 1955); Madison, Memorial and Remonstrance Against Religious Assessments 1, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 64 (app.) (1947).

[28] Congress enacted an exception to Prohibition for use of sacramental wine. 27 U.S.C. § 16 (1925); *cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (peyote permitted to be used in religious ceremonies of Native American Church).

[29] *See* United States v. Hillyard, 52 F. Supp. 612 (E.D. Wash. 1943); *see also In re* Jenison, 375 U.S. 14 (1963) (Biblical literalist may be excused from jury duty).

[30] *See* Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 792-801 (1986); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14-20, 26-27 (1985).

fore tantamount to requiring minorities to conform to majoritarian practices, even when those practices are in conflict with their religious obligations.

But to state that religious objections should sometimes be accorded special protection does not mean that they must automatically take precedence over conflicting governmental interests. Sometimes the governmental interest must override even sincere and fundamental religious beliefs. Supreme Court doctrine states that when a governmental rule or practice burdens the exercise of religion, the objector should be exempted unless there is a "compelling" or "overriding" governmental interest to the contrary.[31] This formulation is similar to the "strict scrutiny" applied to legislation that discriminates on the basis of race, or perhaps to the level of scrutiny applied to sex classifications. It suggests that religious exemptions (that is, departures from religious neutrality) should be the rule; only when governmental interests are especially strong should these exemptions be refused.

I believe this "strict scrutiny" model for free exercise cases is misleading, at least as a description of the Court's decisions. The Court frequently (especially recently) rejects free exercise challenges even when the government's secular programmatic interest is relatively weak. The reason is that some members of the Court are reluctant, in the free exercise context, to approve of any departures from facially neutral rules. The combination of the government's secular programmatic interests and the judicial commitment to facial neutrality tends to defeat claims for religious exemption except when the governmental interest is exceptionally weak.

Two recent decisions, *United States v. Lee*[32] *and Goldman v. Weinberger*,[33] illustrate the point. In both cases, the Court rejected free exercise challenges to neutral governmental rules even though the government's programmatic interest was far less than "compelling." In *Lee*, the Court rejected the claim of an Amish employer, on behalf of himself and his small, all-Amish work force, to exemption from Social Security taxation. The majority analogized the Social Security tax to other taxes, and concluded that "the broad public interest in maintaining a sound tax system is of such a high order"[34] that it justified interference with what the Court expressly conceded to be tenets of the Amish faith.[35]

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31 *E.g.*, Goldman v. Weinberger, 106 S. Ct. 1310, 1324-25 (1986) (O'Connor, J., dissenting); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981). The recent plurality opinion in Bowen v. Roy, 106 S. Ct. 2147 (1986), purports to modify free exercise doctrine by distinguishing between "direct" and "indirect" burdens on religious exercise. Five Justices expressly repudiate this suggestion in *Roy*. This is not the occasion to show why the plurality is mistaken.

32 455 U.S. 252 (1982).

33 106 S. Ct. 1310 (1986).

34 *Lee*, 455 U.S. at 260.

35 *See id.* at 257.

The Court's approach is not persuasive. Exemption of religious objectors from the Social Security system—unlike exemption from other taxes—relieves the government of a liability as well as a source of revenue. The net impact on the Social Security Trust Fund might well be positive.

A better explanation for the Court's conclusion is found in Justice Stevens' concurrence, in which he stated that the "principal reason" for rejecting the plaintiff's claim was the "overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims."[36] If the government grants religious exemptions from its laws it inevitably will be forced to draw lines that require judgments about religious beliefs. The long-term effect of repeated judgments by government officials about the nature and weight of religious beliefs might well be to interfere with the autonomy of religious life.

Similarly, in *Goldman* the Court rejected the claim of an Orthodox Jewish Air Force officer that he be allowed to wear a skullcap while in uniform. As in *Lee*, the majority relied on the government's interest in enforcing rules without exceptions—here, the importance of standardized uniforms to military morale and discipline. Also as in *Lee*, this governmental interest is (as seven Justices concluded[37]) significantly less than compelling. The military already permits some deviations from the standard uniform, and it is unlikely that unobtrusive accommodations to religious practices would undermine military effectiveness in any way.[38]

Justice Stevens again supplied a more plausible rationale for the Court's result. Enforcement of a neutral rule, he said, serves the government's "interest in uniform treatment for the members of all religious faiths."[39] Although accommodation might be made for skullcaps without serious detriment to the appearance of uniformity, the demands of other religions, such as turbans for Sikhs or dreadlocks for Rastafarians, would not be so easily accommodated. It may be better, Justice Stevens opined, to make no accommodation at all rather than to accommodate the practices of some religions but not others.[40]

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[36] *Id.* at 263 n.2 (Stevens, J., concurring).

[37] *See Goldman*, 106 S. Ct. at 1315 (Stevens, J., joined by White and Powell, JJ., concurring) ("a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission"); *id.* at 1318 (Brennan, J., joined by Marshall, J., dissenting) ("The contention that the discipline of the armed forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief."); *id.* at 1323 (Blackmun, J., dissenting) ("Goldman's modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness."); *id.* at 1326 (O'Connor, J., joined by Marshall, J., dissenting) ("The Government can present no sufficiently convincing proof in *this* case . . . that granting an exemption . . . would do substantial harm to military discipline and esprit de corps.") (emphasis in original).

[38] Justice Brennan's dissenting opinion makes this point persuasively. *See id.* at 1318-21 (Brennan, J., dissenting).

[39] *Id.* at 1316 (Stevens, J., concurring).

[40] Still another interpretation of *Goldman* is that it was a "military case," and that ordinary constitutional principles do not apply, or apply with less force, in that context. *See id.* at 1313

Even if Justice Stevens more plausibly explains the results in these cases, his approach is more disturbing as a general principle for interpreting the religion clauses. Justice Stevens acknowledges that his position leaves "virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application."[41] It also would invalidate legislation expressly accommodating religion except in those rare instances in which the free exercise clause would require accommodation.[42] This is because legislative accommodations, no less than court-ordered accommodations, often require religion-specific exemptions from facially neutral laws. If "strict neutrality" is the dispositive principle, it should govern establishment clause challenges to legislative accommodations as well as free exercise cases. For reasons already discussed,[43] this return to "strict neutrality" would be inconsistent with the purposes of the free exercise clause.

This is not to say that Justice Stevens' arguments are without force. I agree that special accommodation of religious needs can threaten religious autonomy. Requiring the government to interject religious considerations into an otherwise objective decisionmaking process multiplies the occasions for governmental (including judicial) inquiry into the strength, sincerity, and importance of various religious claims. Although these inquiries are not unconstitutional in themselves,[44] they are better kept to a minimum. There is but a fine line between government determinations on religiously relevant legal issues and government pronouncements on religious questions themselves. And I agree that accommodating some religious practices but not others creates the potential for governmental (including judicial) favoritism.[45] But I cannot agree that these dangers, although serious, outweigh the arguments for accommodation in every case.

Is there any way to identify the occasions when the dangers entailed by explicit departures from religious neutrality are especially serious and should outweigh claims for accommodation? I believe there is. In essence, the problems just discussed are procedural. They have to do with how the government goes about the task of accommodating religion and when the accommodation itself infringes on religious liberty. The objec-

(majority opinion). Under this interpretation, *Goldman* means little to the development of free exercise doctrine.

41 *Lee*, 455 U.S. at 263 (Stevens, J., concurring).

42 This is one interpretation of a cryptic footnote in Justice Stevens' opinion for the Court in Wallace v. Jaffree, 105 S. Ct. 2479, 2491 n.45 (1985). I have criticized this view elsewhere. *See* McConnell, *supra* note 30, at 29-34. It becomes even more objectionable if coupled with a hyper-restrictive approach to the free exercise clause.

43 *See supra* text accompanying notes 26-31.

44 *See* Thomas v. Review Bd., 450 U.S. 707, 713-16 (1981); United States v. Seeger, 380 U.S. 163 (1965); United States v. Ballard, 322 U.S. 78 (1944); *see also* Braunfeld v. Brown, 366 U.S. 599, 615 (1961) (Brennan, J., dissenting).

45 For an elaboration of this point, see McConnell, *supra* note 30, at 39-41.

tive is to ensure that decisions about religious accommodations be made in such a forum, and under such procedures, as will make nonarbitrary, evenhanded results most likely. An accommodation is suspect if it requires officials who otherwise would exercise little discretion to make ad hoc judgments. Such judgments would likely be the product of highly subjective perceptions, and unlikely to be sufficiently sensitive to the needs and practices of unfamiliar religious faiths. If, however, procedures already exist for case-by-case determinations of a subjective nature by responsible officials, or if the religious accommodation can be reduced to a simple objective rule that can be administered at the operational level, the dangers of arbitrariness are somewhat diminished.

Under this approach, the government's secular, programmatic interest in enforcing neutral standards without religious exceptions should be viewed in a new light. The court should consider not just the substantive impact of the accommodation, but also its procedural impact. When decisions must be made quickly, authoritatively, and evenhandedly by operational personnel, the government may be entitled to resist interposing requirements of religious accommodation. But when decisions already involve case-by-case, subjective considerations, there should be little procedural objection to requiring the government to take religion into account as well.

This helps to explain why the free exercise claims in *Sherbert v. Verner*[46] and *Thomas v. Review Board*[47] prevailed over religiously neutral unemployment compensation criteria. In these cases, the statutes in question permitted compensation to persons who either left their work or refused to accept certain types of work for "good cause" related to the work; the issue was whether religious scruples constituted "good cause." No additional procedural element was introduced into the unemployment compensation scheme as a result of the free exercise accommodation.

The Court explicitly recognized these procedural considerations for the first time in *Bowen v. Roy*.[48] There, a three-Justice plurality stated:

> Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference.[49]

The Court did not state, but I think it should be inferred, that when the

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[46] 374 U.S. 398 (1963).

[47] 450 U.S. 707 (1981).

[48] 106 S. Ct. 2147 (1986).

[49] *Id.* at 2156 (plurality opinion). Justice Blackmun made a similar point in *Goldman*, with the useful caveat that the procedural problems invoked by the government must be substantiated and not merely assumed. Goldman v. Weinberger, 106 S. Ct. 1310, 1323 (1986) (Blackmun, J., dissenting).

government already is involved in case-by-case determinations, this argument provides no basis for refusing to accommodate legitimate religious needs. And the Court did state, but I think it should be emphasized, that in some instances the religious claim for exemption will be so strong that the government may be required to establish procedures for its protection.[50] The procedural argument, while meriting "substantial deference,"[51] must not be treated as an excuse for denying all free exercise claims.

How should this approach be applied in practice? In *Lee*, the procedural mechanism already existed for administering religious objections to Social Security taxation: Congress had adopted such procedures for self-employed persons.[52] That strongly suggests that the accommodation could be extended without seriously threatening religious autonomy. In *Lee*, then, the procedural objections to accommodation were minimal, and in light of the exiguous substantive impact on the government's programmatic interests, the free exercise claim should have been granted.

By contrast, in *Goldman*, procedural considerations may reinforce the government's position. Upon initial study, Captain Goldman's claim seems to be as strong as any free exercise claim ever to reach the Supreme Court. His religious interest is obvious and important. The government's countervailing interest in uniformity of dress seems less weighty; indeed, Captain Goldman had been permitted to wear his yarmulke for three years, without incident, prior to the lawsuit.[53] Nonetheless, the procedural aspects of the *Goldman* claim are somewhat troubling. Presumably, uniform regulations are enforced on a decentralized basis, on the spot, largely by noncommissioned officers. It is not implausible to argue that asking noncommissioned officers to weigh the need for religious accommodations would result in arbitrary decisions. Moreover, to establish a board of review for objections to uniform requirements might well create the disciplinary problems and confusion the military has stated that it fears. These concerns may be sufficiently serious to make *Goldman* a close case—and plaintiffs lose in close cases in the military. On the other hand, it is possible to imagine ways in which military dress regulations could be modified to permit certain easily identifiable and understood deviations. This has, indeed, already been done to a certain extent.[54]

As an institutional matter, the courts are not well equipped to devise

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50 *Roy*, 106 S. Ct. at 2156.

51 *Id.*

52 26 U.S.C. § 1402(g) (1982). Thus, "[a]s a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case." *Lee*, 455 U.S. at 262 (Stevens, J., concurring).

53 *Goldman*, 106 S. Ct. at 1312.

54 Air Force uniform regulations permit the wearing of up to three rings and one identification bracelet of "neat and conservative design"; of headgear during indoor religious ceremonies; of nonvisible religious garb, in the discretion of the base commander; and of visible religious garb in

or require changes of a systemic nature. It may well be, therefore, that accommodations to military uniform requirements are better fashioned by Congress and the military authorities rather than in lawsuits under the free exercise clause. This is not merely a forlorn hope; Congress already has passed legislation to prod the military in the direction of accommodating minority religious practices.[55] But such an accommodation, to be valid under the establishment clause, must pass judicial scrutiny. It cannot do so unless departures from neutrality, for the purpose of fostering religious liberty, are permitted. A doctrine of strict neutrality would be no less fatal to a legislative accommodation than it proved to be to Captain Goldman's constitutional claim.

In summary, the most common reason for departing from religiously neutral governmental standards is that an incidental consequence of the standards is to prevent (or impose substantial costs on) religiously motivated practices. In such instances, the appropriate course is to create a religious exception, unless the government's secular, programmatic interest would be thwarted by the exception, or unless the procedures for administering the exception would introduce serious dangers of arbitrary determinations of relevant religious questions.

IV. Interference with a Religious Organization's Internal Structure and Doctrine

A second reason for departing from neutrality is that regulation of religious institutions on the same basis as secular institutions would interfere with the right of the church[56] to organize its internal affairs in accord with its own doctrine.[57] Examples are the church property cases,[58] the application of labor laws to church organizations,[59] and (in inverted fashion) the "entanglement" analysis of *Lemon v. Kurtzman*.[60] This potential for interference presents the strongest possible case for departure from religious neutrality, for three reasons.

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designated living quarters, in the discretion of the base commander. *See id.* at 1314; *id.* at 1319 (Brennan, J., dissenting).

55 Department of Defense Authorization Act for 1985, Pub. L. No. 98-525, § 554, 98 Stat. 2492, 2532 (1984).

56 Here, as elsewhere, I use the term "church" to denote any religious organization.

57 *See generally* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984).

58 *E.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

59 NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

60 403 U.S. 602, 612-13 (1971). The "entanglement" notion is inverted because the interest protected—the right of the church to be free of excessive governmental interference with its religious mission—is in this context asserted by the church's opponents in the litigation. There may be standing problems here, as Professor Laycock has pointed out. *See* Laycock, *supra* note 3, at 27; *see also* Gaffney, *The Religion Clauses: Disentangling Entanglement and Relieving the Tension*, 75 CALIF. L. REV. — (1987) (forthcoming).

First, the importance to free exercise of the church's right to organize its internal affairs is exceptionally high. Religious experience typically is communal and institutional, not individualistic. Freedom of religion demands that believers be able to organize themselves and that religious organizations be autonomous. For religious institutions to fulfill their role, they must be permitted to control their own organization; to formulate and enforce their own doctrine; to choose their own structure; to select their own officials; to recognize their own criteria for membership; and to adopt their own set of relationships between believer and institution and between hierarchy (if any) and subordinate. If the government assumes control over these matters, then the church loses its independent existence. Free exercise cannot survive if the internal affairs of religious institutions are subject to governmental control.

Second, the government's programmatic interest is exceptionally weak. The doctrine and internal organization of a religious institution should be of no concern to the government unless it somehow affects outsiders. Governmental regulation that is either paternalistic (assuming that the individual is not capable of judging his own interests) or protective (assuming that the individual will be exploited by powerful institutions) has little place in the religion context. The premise of the religion clauses is that individuals are capable of choice in the religious realm and the government is not.[61] And if believers choose to subordinate their material interests to the religious body, the government is not free—absent extraordinary circumstances—to label the relation "exploitation" or to protect the individual from the consequences of his religious convictions. To be sure, this may mean that the church will adopt policies that seem to the outsider unjust, unwise, or exploitative. For better or worse, the church may not always conform to the outside world. But it is of no concern of the government to reform the church. The government's legitimate interest extends no further than the material sphere.[62]

Third, in contrast to religious exceptions for individual believers, departures from neutrality in order to preserve the internal autonomy of religious organizations reduce the need for procedural or administrative involvement by the government in matters of religious belief.[63] That is why separationists often join with those principally concerned with religious liberty in support of religious exemptions in this area. Just as exclusion from government aid programs can reduce "entanglement"

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[61] The concept of "choice" in this context is merely a secular interpretation of the religious experience. In some traditions, the believer is understood to have been chosen, rather than as having done the choosing. For elaboration of this point, see Garvey, *supra* note 30, at 791-92.

[62] This is not the occasion for an extended treatment of the exceptions to this principle. I would not go much further than immediate threats to health. *See, e.g.*, State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (snake handling as part of worship service prohibited by law).

[63] *See* NLRB v. Catholic Bishop, 440 U.S. 490, 496 (1979); Walz v. Tax Comm'n, 397 U.S. 664, 669-70 (1970).

between religious institutions and the state, so also can exemption from governmental regulation. Indeed, the central insight of the Court's "entanglement" notion under the establishment clause is that churches should be free from the control that comes along with the aid. When regulation is imposed in the absence of aid, there is no less need to avoid "entanglement." The establishment clause contemplates a mutual independence of the institutional structures of religion and government. Neither is permitted to control the other. Separation of church and state therefore cannot be understood as a requirement that churches be denied "aid" or "benefits"; it means that they should be independent of the state. Religious organizations must be exempt from the heavy hand of governmental regulation when that regulation impinges upon their internal organization.

The *Dayton Christian Schools* case[64] is an excellent example. In that case, a pervasively religious private school (that is, a school that integrates religious teaching into the entire curriculum) challenged the authority of a state civil rights commission to investigate its decision to discharge one of its teachers on religious grounds when she became pregnant. The teacher complained to the commission that her discharge violated two state laws, one requiring employers to treat men and women equally, the other prohibiting employers from retaliating against employees who allege violations before the commission. The school contended that enforcement of these laws would interfere with matters of internal organization governed by religious doctrine. According to the school's sincerely held religious belief, scripture demands that women with young children stay at home to rear them; moreover, disputes within the religious community must be resolved internally rather than by resort to secular authorities.[65] For the teacher to continue to teach at the school would thus be in violation of two of the school's religious tenets. At stake in the case, therefore, was whether a religious institution can maintain its identity by confining its teaching to those who adhere to its doctrines. If the state can compel a religious institution to rehire a person to a teaching position despite that person's departure from religious doctrine, then the church loses the ability to control its voice.

Although the Court held that the school's federal court challenge to the state law was barred by either the abstention doctrine or the ripeness doctrine, it seems evident that the school's claims should ultimately be vindicated on the merits. There is little substance to the constitutional right to operate or attend a religious private school[66] if the school cannot

64 Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 106 S. Ct. 2718 (1986).

65 *Cf.* Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872):

> All who unite themselves to [a voluntary religious organization] do so with the implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

66 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

insist that its teachers conform to church doctrine.[67]

A second major justification for departing from religious neutrality, then, is to preserve the autonomy of religious organizations. The government has broad powers to regulate the internal governance of many forms of association, from business corporations to social clubs. But the internal organization and doctrine of religious organizations are beyond the government's authority. To treat religious organizations "neutrally" would be to neglect this important difference.

V. The Effect of a Pervasive Governmental Presence

The third circumstance in which departure from religious neutrality is justified is the most relevant to this Symposium, and it is where I most differ from the common contemporary understanding of neutrality under the religion clauses. I believe that when the government so dominates and controls a particular area that private activity and initiative are crowded out, a course of true neutrality is not available. If there are to be religious elements, they must deliberately be introduced by the government; if the government does not take affirmative steps to make room for religious elements, the environment will be wholly secular. Secularism is not neutrality.

The classic example of this is the prison. If an inmate is locked up, away from his books and his minister, a government practice of "strict neutrality"—meaning refusal to purchase Bibles for the prison library or to provide prison chaplains—is not truly neutral.[68] To refuse special treatment for religion in this context is to stifle religious expression and practice. Neutrality, properly understood, requires an examination of the totality of governmental action rather than a focus on the particular religious element in controversy.[69] It would be mistaken to ask whether the government's appointment of a prison chaplain "advances" religion in the abstract, without recognizing first that the government has taken away the inmate's right to worship with the minister of his own choosing. I do not contend that hiring a prison chaplain is "neutral"; I merely note that failing to hire a chaplain is not neutral either.

The public schools are a less extreme example of this point. The compulsory education laws, combined with the government's refusal (or

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[67] *Cf.* Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979) (control over curriculum; interpreting Kentucky Constitution).

[68] *See* Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972); *see also* Quick Bear v. Leupp, 210 U.S. 50 (1908) (when Secretary of Interior controls financial resources of Indian tribe, it does not violate establishment clause for him to enter into contracts with religious organization for parochial education); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) (upholding government placement and support of children in foster homes run by their parents' religious denomination).

[69] *See* Laycock, *supra* note 3, at 21 (footnote omitted) ("State efforts to alleviate discriminatory or state-imposed burdens on religious exercise are consistent with neutrality, even though any such effort, considered in isolation, will appear as an aid to religion.").

supposed constitutional incapacity) to fund private alternatives to public education, have the effect of removing children from their homes for six to eight hours a day and channeling them into the public schools. The public school dominates the education of the children who attend it; it provides, or at least purports to provide, a comprehensive education. Whatever one's religious beliefs may be, it is impossible to deny that religion plays and has played a major role in shaping the realities of life, culture, and politics, or that religious thought is an important strand in philosophy and the history of ideas generally. Yet the public schools in recent years have chosen to pretend that religion does not exist, at least in any serious or relevant way. Even the separationist, antifundamentalist organization People for the American Way recently has announced the results of a study showing that references to religion have been removed from public school history textbooks:

> While history textbooks talk about the existence of religious diversity in America, they do not show it: Jews exist only as objects of discrimination; Catholics exist to be discriminated against and to ask for government money for their own schools; there is no reflection of the diversity within American Protestantism—it is difficult to find Evangelicals, Fundamentalists, Episcopalians, Lutherans, or Methodists; the Quakers are shown giving us religious freedom and abolition, and then apparently disappear off the face of the earth.[70]

The secularization of public education—the systematic avoidance of reference to religious matters—ought therefore to be troubling not just to those whose beliefs are thereby denigrated, but also to those who wish history, social studies, humanities, and like subjects to be taught straight. But the impact of this artificial secularization on the children in the classroom—especially the religious children—is even more serious. If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not "neutral." Studious silence on a subject that parents may say touches all of life is an eloquent refutation.

A proper recognition of the place of religion within such subjects as history, social studies, and humanities would be a major step toward rectifying the public school's implicit denigration of religion. Students of a religious persuasion would learn that their way of thinking, no less than that of others, is relevant and even important to the world. Moreover, so long as the teaching is substantively valid and handled in a professional

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70 *Quoted in* 3 RELIGION & SOC'Y REPORT, No. 11, at 8 (Nov. 1986). Two other recent studies, one by Professor Paul Vitz under the auspices of the Department of Education, the other by Americans United for Separation of Church and State, corroborate the conclusion that references to religion have been removed systematically from public school education. *See* C. HAYNES, TEACHING ABOUT RELIGIOUS FREEDOM (1985); P. VITZ, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY (1985).

way, the rights of other students will not be infringed. But it should not be thought that objective teaching about religion can entirely satisfy the religious element in education. An objective teaching is quite different from the understanding of religion as truth, and can even appear to be hostile to religious faith. It is easy to imagine how teaching about a student's religion from the perspective of sociology or anthropology, for example, might import a subjectivism and skepticism that would be profoundly disquieting.

On the other hand, including explicit religious teaching or religious exercises in public school is not "neutral" either, for students of other faiths or no faith at all will be captive to the religious teaching. Teaching religion is far more problematic that teaching about religion. The public schools unavoidably must choose between maintaining a secular posture, which in most contexts is artificial and nonneutral, and subjecting nonbelievers and other believers to the possibility of governmental coercion or indoctrination.

While I do not think the problem should be oversimplified by acting as if secularism were the same thing as neutrality, I nonetheless believe, for two reasons, that there should be no government-sponsored religious exercises (vocal prayers, Bible study as scripture) in the public schools. First, as a practical matter, it is probably easier for parents to supplement the public school curriculum with a religious element than for parents who oppose such an element to eradicate its effects. More important, a government-prescribed religious element in the schools must inevitably favor not just religion over nonreligion, but one religion or group of religions—probably the majority's—over the others. This is true even of "lowest common denominator" religion such as that reflected in the Regent's Prayer in *Engel v. Vitale*.[71] In short, overt religious exercises in the public schools create more serious constitutional problems than they solve.

I do conclude, however, that the public schools should seek out ways to accommodate religious practice. If the students are able to bring their religion with them into the schools, the schools' pervasive secularism can be tempered without government initiative or involvement. Such accommodations are acceptable only if they involve no pressure upon unwilling students to participate, and if they are genuinely neutral among the beliefs present in the school population, including atheism and agnosticism.[72] For this reason, I would uphold released-time programs,[73] mo-

[71] 370 U.S. 421, 422 (1962) ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.").

[72] I have explained the reasons for these limitations in McConnell, *supra* note 30, at 34-41.

[73] I agree with Professor Laycock that the distinction between on-premises and off-premises released time should not be decisive, *see* Laycock, *supra* note 3, at 33, but I disagree with him that Zorach v. Clauson, 343 U.S. 306 (1952), which upheld off-premises released time, is "utterly indefensible." Laycock, *supra* note 3, at 33. The dispositive factor is whether alternative uses of the time

ment-of-silence laws, and open forums for extracurricular activities, including religious group meetings—not because they are neutral (though they can be neutral), but because they create an opportunity for religious exercise in what otherwise would be a wholly secular environment.

Even among supporters of these policies, it is common to disagree with this approach. It is assumed that the public school can be entirely neutral, throwing its weight neither for nor against religion. Professor Laycock, for example, states that the "religious right" and "secular left" share the common "fallacy" that neutrality in the public schools is impossible.[74] The "religious right" argues that an entirely secular public school will be perceived by students as hostile toward religion, while the "secular left" argues that tolerating religion in the public schools will be perceived as support for religion. He goes on to say that these groups "can both be wrong, but they cannot both be correct."[75] I am not so sure. I think that both may be correct. I would agree with the "secular left" that any deliberate introduction of religious elements into public education, such as released-time programs or moments of silence, is in a sense nonneutral. And I would agree with the "religious right" that a systematic exclusion of all religious elements from public education is likewise nonneutral. In an environment pervasively controlled by the government, it is pointless to seek a strictly neutral position. It does not exist.[76]

The advocates of neutrality treat the public school as if it were identical to society at large, in which governmental intervention is the exception rather than the rule. Freedom in society at large is mostly negative—the freedom to be left alone.[77] But in a school there is little room for autonomous conduct, and the autonomy that exists is generally created deliberately by school officials. Freedom in school generally requires the administration to create an opportunity for free conduct—to start a school newspaper, to set up an extracurricular activities period, to

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are sufficiently attractive that there is no coercion to attend the religious classes. Whether study hall suffices is an empirical question. I could imagine that the opportunity to get one's homework done at school would be highly regarded. The opposite might also be true. The reason that religion may be "single[d] out" in this context, *see* Laycock, *supra* note 3, at 33, is that it is the only important area of learning that may not be taught by the public school teachers themselves.

74 Laycock, *supra* note 3, at 19-20. Professor Laycock has labelled this observation his "most important new argument" in defense of equal access policies. *Id.* at 4 n.12.

75 *Id.* at 19.

76 Professor Laycock briefly addresses the argument that "the refusal to teach religion in the public schools is also nonneutral." *Id.* at 30. His "answer" is that "that is the cost of committing religion to private choice and avoiding the dangers associated with governments that take positions on religion." *Id.* This answer is revealing because it is not an argument that failing to teach religion is neutral, but that there are good reasons, grounded in religious autonomy, for treating religion in this nonneutral way. That is precisely my point.

77 *See* Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864 (1986).

permit student government.[78] The school is likely only to create the freedom to engage in activities that are, generally speaking, wholesome or worthwhile. In Williamsport High School, for example, only groups that will contribute to the "intellectual, physical or social development of the students"[79] can meet during the activities period. Toleration of religion in the public school, since it generally requires affirmative accommodation, is thus difficult (if not theoretically impossible) to distinguish from endorsement, just as exclusion of religion is indistinguishable from hostility to religion.

Public schools thus present vexing constitutional problems. How can the government offer a comprehensive education without crossing the fine line into indoctrination? How can it teach one proposition without disparaging propositions inconsistent with it? How can it choose not to teach a doctrine without creating an impression of disapproval? When a controversial volume is added to the library, does that constitute approval? When it is removed, does that constitute censorship?[80] When the school declines to teach evolution, does it favor religion? When it teaches evolution without creationism, does it favor nonreligion?[81] Should religious themes, persons, or motivations be included in class readings? Should there be moral education? Should there be sex education? How can all this be accomplished "neutrally"?

I do not believe that answers to these questions can be based on a dogma of neutrality. If perfect neutrality is what we want, we must eliminate public schools.[82] The best we can do, in my view, is to foster pluralism and diversity—to encourage as wide a range of views to be presented and expounded as is practical, and to avoid when possible an authoritative position on issues known to be controversial. That is not the same thing as secularism. But neither is it necessarily the same thing as neutrality. It requires the public schools to seek out ways to make room for religious elements by means that do not compel religious observances by students who are unwilling or indifferent.

The equal access policy in *Bender* raises no conflict between liberty and neutrality because the decision to allow students to meet on school property for extracurricular activities of their choice enhanced religious

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78 There is a sense in which all liberty depends upon governmental action for its protection. This has caused some to argue that there is no genuine governmental neutrality in any sphere. *See, e.g.*, Frug, *Why Neutrality?*, 92 YALE L.J. 1591, 1592-96 (1983). It suffices for present purposes to note that the differences in degree of governmental pervasiveness between, say, a prison or a public school and the marketplace or a voluntary association are large and justify differences in treatment.

79 Bender v. Williamsport Area School Dist., 741 F.2d 538, 548 (3d Cir. 1984) (quoting statement by school official), *rev'd*, 106 S. Ct. 1326 (1986).

80 Board of Educ. v. Pico, 457 U.S. 853 (1982).

81 *See* Epperson v. Arkansas, 393 U.S. 97 (1968); *see also* Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 1946 (1986).

82 *See* J.S. MILL, ON LIBERTY 104-05 (E. Rapaport ed. 1978) (expounding version of what is now called "voucher" plan).

liberty (once religion was given equal access) and at the same time was essentially neutral both in purpose and effect.

Critics sometimes suggest that equal access imposes religion on other students because it enables students to "proselytize."[83] But the right to proselytize, a.k.a. freedom of speech, is constitutionally protected, whether or not religious groups have the right to meet on school premises. It is evident, therefore, that these critics' complaint goes far beyond equal access: they must equally object to uncensored conversation in the halls, cafeteria, and anywhere students might discuss their ideas and concerns. It would take full-time thought police to ensure that students are protected from the opinions of their peers. Ironically, these critics should welcome equal access, since during the time religious believers are gathered together they will not be engaged in spreading the faith to others. Equal access itself has nothing to do with the right to proselytize; equal access merely ensures the right of willing students to gather together to talk about matters of common concern.

The moment-of-silence policy of *Wallace v. Jaffree*[84] is somewhat more problematic. Although the effect of the policy, properly administered, is neutral (students being free to use the time for whatever silent purposes they may choose), the purpose of providing the opportunity was to facilitate private prayer. It was as if, in *Bender*, the school had set up the extracurricular activities period in the hope that religious student groups would be formed.

I do not believe that this departure from neutrality (of purpose) is troublesome. On the contrary, I believe that in the context of the public school the government should seek out ways to allow students who wish to recognize a religious element in their education to do so. I take some comfort from the fact that no less a separationist than Thomas Jefferson thought so too.[85] While deliberate government introduction of religious elements into most situations would be inappropriate, doing so when government control is so pervasive that there can be no religious element in the absence of government accommodation is a different matter.[86]

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[83] *See generally* Teitel, *supra* note 4.

[84] 105 S. Ct. 2479 (1985).

[85] *See* 19 WRITINGS OF THOMAS JEFFERSON 413-16 (1905) (Report of the Rector and Visitors of the University of Virginia, Oct. 7, 1822); 7 WORKS OF THOMAS JEFFERSON 266-67 (1861) (Letter to Dr. Cooper, Nov. 2, 1822).

[86] I do not believe that the constitutionality of moment-of-silence laws should turn on their particular phrasing, so long as they do not purport to require students to pray. Professor Laycock's contrary argument is based on the proposition that the term "contemplation" in the statutes "takes on religious coloration" because it is used in conjunction (more precisely, disjunction) with the terms "meditation" and "prayer." Laycock, *supra* note 3, at 60. The opposite conclusion is linguistically more plausible: when the legislature uses the phrase "meditation or prayer" it suggests that there is a difference between the two. But in any event, the statute presumably is not read to the students. The constitutionality of moment-of-silence laws should turn on whether, in fact, the statute is properly administered.

Equal access policies and moments of silence present the easy case. They enable the government to accommodate serious and substantial religious needs without departing significantly from the ideal of neutrality and without invading the religious liberty of nonbelievers and other believers. I do not quarrel, therefore, with defending these policies on the ground that they are neutral. But if this argument implies that neutrality alone suffices as a full embodiment of the principles of religious freedom in the first amendment, I think it is mistaken. Neutrality often, indeed usually, serves the cause of religious liberty; but when it does not, a proper appreciation for the needs of religious practitioners requires something more.