DEMOCRACY'S RELIGION: RELIGIOUS LIBERTY IN THE REHNQUIST COURT AND INTO THE ROBERTS COURT

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This Article examines the development of the U.S. Supreme Court's free-exercise and anti-establishment jurisprudence in the Rehnquist Court and into the Roberts Court. It demonstrates the profound impact that Chief Justice William H. Rehnquist had on that jurisprudence, effectively leading the Court to adopt his previously expressed view that both the Free Exercise and Establishment Clauses had been construed too broadly in terms of restricting government action. Hence, the Rehnquist Court reversed years of precedent by holding that religious exemptions from general secular laws were not required as a matter of free exercise, and it cut back severely on anti-establishment precedent requiring the government to remain strictly neutral in matters of religious aid or sponsorship. These developments have meant that religious accommodations now depend principally on statutory rights granted by legislatures, and that government is now free to act more boldly in supporting or sponsoring religious endeavors. In short, the role of religion in the nation's public life will now be determined to a much greater extent by democratic choices than judicially-imposed mandates.

This Article also shows that the Roberts Court is extending these trends in significant ways. It will argue that construing religious exemptions as a matter of statutory intent rather than constitutional mandate has caused the Court, contrary to what might be expected, to read them much more expansively for both majority and minority faiths. This, in turn, will lead to a greater clash between free exercise and anti-discrimination rights, particularly in areas such as same-sex rights. But it will be contended that legislatures are better positioned

* Professor of Law, Pepperdine University School of Law. This Article is a substantial elaboration on remarks I delivered in February 2015 at the Rehnquist Center of the James E. Rogers College of Law at the University of Arizona. The conference, entitled *The Rehnquist Court—Ten Years Later*, was a retrospective on the jurisprudence of that Court. I wish to thank the participants at the conference for helpful insights into my subject, as well as comments I received from Professors Rick Garnett, Michael Helfand, Robert Pushaw, and participants at a Pepperdine University School of Law faculty workshop. I also wish to thank Matthew Sessions and Kyser Blakely for their invaluable research assistant contributions to this Article.

to adjust these conflicts than judges. It will also demonstrate that Rehnquist Court precedents have emboldened the Roberts Court to further loosen restrictions on government support or sponsorship of religion. At the same time, however, that Court has prohibited government monitoring of which benefits flow to what religious groups —resulting in de facto preferences flowing to majoritarian religious sects at various geo-political levels. It will conclude that this trend would likely trouble the generally anti-sectarian generation that adopted the Establishment Clause, threatening a de facto reestablishment of religion.

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I. INTRODUCTION

In his lone dissenting opinion in *Thomas v. Review Board of the Indiana Employment Security Division*,[1] then-Associate Justice William H. Rehnquist expressed dismay at the U.S. Supreme Court's prevailing Religion-Clause jurisprudence. Rehnquist argued the Court had interpreted both the individual protections provided by the Free Exercise Clause and the limitations on government action imposed by the Establishment Clause too broadly.[2] In particular, he contended the Free Exercise Clause did not require the government to provide exemptions to generally applicable laws for religiously-motivated conduct[3] (such as granting an exemption from a rule barring workers from receiving unemployment compensation if they voluntarily quit their job just because they did so for religiously motivated reasons—the issue at stake in the *Thomas* case itself), and the Establishment Clause did not bar the government from voluntarily providing financial assistance for such religiously-motivated conduct so long as the aid was not designed to further any particular beliefs or tenets.[4] In Rehnquist's view, the Court's broad rulings to the contrary not only violated the historical purpose and scope of those clauses, but also caused unnecessary tension between them by requiring religious

1. 450 U.S. 707 (1981).
2. *Id.* at 721–22, 727 (Rehnquist, J., dissenting).
3. *Id.* at 724.
4. *Id.* at 726–27.

accommodations by the government that arguably violated Establishment Clause precedent barring governmental support of religion.[5] In essence, he argued the Court was forcing the government to hazard a narrow channel between the Scylla and Charybdis of the clauses' competing demands.[6]

Part II of this Article demonstrates that during his nineteen–year tenure as Chief Justice, Rehnquist was remarkably successful in bringing the Court around to his views of the proper scope of both clauses.[7] On the free exercise side of things, the Court's decision in *Employment Division v. Smith*[8] implemented his judgment that secular laws which incidentally burden religious conduct do not generally merit free-exercise scrutiny[9]—prompting Congress to respond with the Religious Freedom Restoration Act of 1993 ("RFRA")[10] and the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[11] restoring such scrutiny as a matter of voluntary legislative accommodation. Many state legislatures have followed suit, enacting their own state RFRA laws.[12]

On the anti-establishment side of things, the Rehnquist Court effected a virtual revolution in cases involving government financial assistance to private religious organizations. For instance, it loosened the constraints on aid to religious schools to the point of permitting government dollars to be used for tuition where part of the funds would inevitably support instruction in sectarian beliefs.[13] It accomplished this principally by transforming the neutrality requirement of the Burger Court's seminal *Lemon v. Kurtzman*[14] decision—that government remain strictly neutral in all matters relating to religion, neither favoring or disfavoring it—into one of form versus substance.[15] So long as aid was made generally available to both religious and non-religious recipients (i.e., the law was facially neutral as to religion), that would suffice to cure the problem of aid flowing disproportionately to religious institutions even in cases where the non-religious institutions were unlikely to benefit from it.[16]

Moreover, in cases involving government sponsorship of religious expression, while not effecting as radical a change as in the financial-aid cases, the Rehnquist Court made significant headway in rolling back Establishment Clause limitations. For instance, relying on the facial-

5. *Id.* at 727.
6. *Id.* at 721.
7. For another lucid and insightful view regarding Rehnquist's impact on the Court's religious-liberty jurisprudence, see Richard W. Garnett, *Chief Justice Rehnquist, Religion, and the Constitution*, *in* THE CONSTITUTIONAL LEGACY OF WILLIAM H. REHNQUIST (Bradford P. Wilson, ed., 2015).
8. 494 U.S. 872 (1990).
9. *Id.* at 885–87.
10. 42 U.S.C. § 2000bb (2012).
11. *Id.* § 2000cc.
12. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).
13. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
14. 403 U.S. 602 (1971).
15. *Zelman*, 536 U.S. at 693–95 (Souter, J., dissenting).
16. *Id.* at 649–50.

neutrality principle, it virtually cemented the free-speech right of religionists to gain access to government facilities and funds for expressive activities on par with non-religious groups without simultaneously violating the Establishment Clause.[17] With respect to religious symbols (e.g., holiday displays, monuments, memorials, and plaques), the Rehnquist Court facilitated increased government sponsorship of them by broadening an exception to the *Lemon* neutrality requirement permitting such sponsorship for secular purposes.[18] In doing so, it laid the groundwork for the Roberts Court to eventually jettison the *Lemon* neutrality principle in favor of an approach permitting the government to acknowledge the religious significance of such symbols in a non-proselytizing manner so long as no one feels coerced into joining that acknowledgment.[19] And even in government-sponsored prayer cases, where the Court made the least headway in narrowing Establishment Clause constraints, its seminal decision in *Lee v. Weisman*,[20] which applied an anti-coercion approach to school-prayer cases, has provided expanded grounds for government involvement in prayer activities outside the public-school context—as evidenced by a recent decision of the Roberts Court upholding the delivery of highly sectarian Christian prayers in a town-council meeting.[21] On the whole, then, Rehnquist achieved remarkable success in leading his Court to adopt the view, outlined in his *Thomas* dissent, of a narrower scope of operation for both Religion Clauses—thus widening significantly the space between them in which the government can constitutionally act or decline to act in religious matters.

Part III of this Article examines the impact of these developments on the Roberts Court and their implications for religious liberty in America. The fact that religious exemptions to general, secular laws have largely become a matter of legislative accommodation through laws like RFRA, rather than constitutional obligation, will mean the bulk of the Roberts Court's free-exercise cases will likely involve statutory versus constitutional interpretation (as evidenced by the several free-exercise cases it has decided to date). Moreover, on the anti-establishment front, the Rehnquist Court rollbacks have provided the Roberts Court fodder to continue that trend in a remarkably bold way, as evidenced by the five

17. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that allowing groups to use government property (school facilities) for religious instruction would not be a violation of the Establishment Clause).

18. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (holding that the government display of a large Ten Commandments monument did not violate the Establishment Clause because, *inter alia*, the monument served as an acknowledgement of the commandments' historical role).

19. *See infra* text accompanying notes 191–96, 205–08 . It should be noted that I wrote this article well before Justice Antonin Scalia's death in February 2016. Given the Court's modern 5–4 partisan splits in many ideologically-charged areas of constitutional law, including religious liberty, it is impossible to predict how Scalia's eventual replacement will affect the trajectory of these areas of law in the Roberts Court. In the parts of this article that offer such predictions based on the now-dissolved 5–4 alignment, however, it continues to illustrate the direction the Court will likely take the law if a successor is appointed who fits the "traditional conservative mold," and how the law might develop much differently if Scalia's successor is more in the "traditional liberal mold."

20. 505 U.S. 577 (1992).

21. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

Establishment Clause–related decisions it has decided to date.[22] Both of these developments—religious exemptions as a matter of legislative grace and the substantial loosening of anti-establishment constraints on government action—mean that democratic-majoritarian preferences on religious matters will take center stage on matters of religious liberty and the role of religion in the nation's public life.

These developments raise the important question of what such an increased majoritarian say in the nation's public religious life will mean for religious liberty in our country. As to free exercise liberty, I contend that these developments will result in a more vibrant and expansive right to religious exemptions to general laws than existed even in the pre-*Smith* era of purported heightened-constitutional protection for them. Not only will I argue that the Roberts Court's decisions to date are establishing a remarkably robust free-exercise liberty as a natural outgrowth of statutory-versus-constitutional interpretation, but I will also contend that minority-faith, free-exercise rights will be adequately secured in the new era of majoritarian religious control. I do not contend, however, that this development will be good news to everyone, particularly to those who believe that religionists should not be excused from complying with laws designed to protect the rights of other groups of people. A poignant example is the increase in cases pitting the rights of gays and lesbians under anti-discrimination laws against the rights of religionists to act in accordance with their beliefs on certain matters.[23] I do contend, however, that the institutions writing both sets of laws—i.e., Congress and state legislatures—are in a better position to reconcile the difficult competing interests underlying such conflicts than a small number of unelected judges attempting to do so as a constitutional matter.

With respect to anti-establishment liberty, I argue that this is a more difficult area to assess due to the various conceptions of that liberty which might be posited. To greatly oversimplify for purposes of this analysis, one might conceive of anti-establishment liberty in three main ways—a broad view of it embodied in the *Lemon* neutrality principle that government should remain strictly neutral in matters of religion and not favor or disfavor any religions or religion in general; a moderate view that allows for religious support generally, but no sectarian preferences; and a narrow view (arguably one held by many of the early Americans who adopted the Establishment Clause and disestablished their state churches)[24] that allows for some form of official acknowledgement of Christianity generally (or at least a monotheistic Creator), but prohibits favoritism of particular Christian or other sects. However, I will contend that even on the narrowest view of anti-establishment liberty (and par-

22. *See infra* text accompanying notes 304–50. *See also supra* note 19 for a discussion of how Justice Scalia's death may affect these prognosticated trends in the religious liberty jurisprudence of the Roberts Court.

23. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–65 (2015) (collecting cases).

24. *See supra* text accompanying notes 283-84.

ticularly on the broad or moderate view), there is reason to be concerned about the trajectory of the Roberts Court's recent extensions of Rehnquist Court precedents in this area.

With respect to financial aid cases, the more conservative Roberts Court (with conservative Samuel Alito replacing the moderate Sandra Day O'Connor to give the Court a majority for a further narrowing of Establishment Clause constraints) has narrowed substantially, through the doctrine of standing, the number of plaintiffs eligible to challenge religious-assistance programs[25]—potentially allowing more aid to flow to majoritarian faiths even without adherence to the facial neutrality principle established by the Rehnquist Court. In the area of government-sponsored prayer, the Roberts Court has, for the first time in the Court's history, had a majority of justices coalescing on the anti-coercion test to reject a challenge to such prayers—even ones with highly sectarian content.[26] Additionally, the Roberts Court has decided two religious-symbol cases where the Court has suggested, though not decided, that it will either apply the secular purpose exception to *Lemon* neutrality liberally or supplant that approach entirely with an anti-coercion one to allow increased government sponsorship of highly sectarian symbols, such as the Christian crucifix or nativity scene.[27]

In these decisions, the Roberts Court, at least as a jurisprudential matter, seems headed towards jettisoning the *Lemon* neutrality principle embodied in the broad view of anti-establishment liberty and embracing the moderate view permitting government approval of religion in general so long as it is non-sectarian and non-proselytizing in nature. Yet, at the same time, the Court has disapproved any government monitoring and control over: 1) how many and which faiths might receive financial aid under a particular program; 2) the content of sponsored prayer to ensure its sectarian neutrality; or 3) the composition of faiths that participate in programs sponsoring religious expression to ensure a diversity of representation. This lack of oversight essentially results in the *de facto* religious demographics of a given geo-political community determining the sectarian participation in, or content of, such activities.

What this means is that while the Roberts Court seems to be pushing towards the moderate view in theory by accepting a governmental purpose of merely favoring non-proselytizing religion in general as being constitutional, it is moving towards a public square dominated by the participation and messages of majority sects in a given locale by prohibiting government control and monitoring of the effects of majoritarian choices regarding faith participation and expressive content. In other words, the Roberts Court appears to be on a trajectory of pushing past

25. *See, e.g.*, Ariz. Christian Scholarship Tuition Org. v. Winn, 563 U.S. 125 (2011) (rejecting, on grounds of standing, a state taxpayer challenge to indirect school aid program that included religious recipients).

26. *Galloway*, 134 S. Ct. at 1825, 1827–28.

27. *See* Salazar v. Buono, 559 U.S. 700 (2010); Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

the moderate view of anti-establishment liberty, and even beyond the narrow view, by permitting a public square dominated by the sectarian content of faiths that might happen to predominate in a particular geo-political community. I conclude that such displays of majoritarian sectarian preferences, and the resulting disfavoring of minority sects, might well trouble even the early generations of Americans who were predominantly Christian, but generally non-sectarian in church-state matters (as evidenced by the Establishment Clause itself and the early disestablishment of state churches). Indeed, the Court's current approach might be viewed as setting the country back on a path to the *de facto* establishment of religion at more local levels.

II. THE REHNQUIST COURT'S RELIGION CLAUSE REVOLUTION

When Associate Justice William H. Rehnquist was appointed by President Richard Nixon in 1972 to a Supreme Court headed by Warren Burger, he had previously served as head of the Office of Legal Counsel in the Nixon Justice Department.[28] Although he was a last-minute choice for the seat vacated by Justice John Harlan, Jr., and notoriously referred to by Nixon as "Renchburg" and the guy "dressed like a clown,"[29] Rehnquist came to the Court with a formidable intellect and conservative orientation forged, among other experiences, in his grass roots Arizona law practice.[30] At the time Rehnquist took his seat, working off Warren Court decisions, the Burger Court was defining both free exercise liberty and anti-establishment liberty expansively.[31]

On the free-exercise side of things, if a law was designed to burden religious beliefs, speech, or practice, it was fairly clear it would receive stringent scrutiny by the Court and generally be invalidated.[32] But even if a law only incidentally burdened religious exercise in attempting to achieve secular goals and a religious adherent sought an exemption for such conduct, the application of the law to the adherent was generally subjected to strict scrutiny, beginning with the Warren Court's decision

28. Linda Greenhouse, *William H. Rehnquist, Chief Justice of the Supreme Court, Is Dead at 80*, N.Y. TIMES, Sept. 4, 2005, http://www.nytimes.com/2005/09/04/politics/04rehnquist.html.

29. *Id.*

30. Mark Feeney, *Chief Justice Known for Potent Intellect*, BOSTON.COM (Sept. 4, 2005), http://archive.boston.com/nation/washington/articles/2005/09/04/chief_justice_known_for_potent_intellect.

31. *See infra* text accompanying notes 31–42.

32. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that Maryland's constitutional requirement to declare a belief in the existence of God in order to hold public office violated the First Amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that a Connecticut statute that prohibited solicitation of money for religious purposes without the approval of the secretary of the Public Welfare Council, and granted that secretary the power to determine whether such a purpose was a religious one, violated the First Amendment). This principle was not fully explicated until decisions such as *McDaniel* and *Church of the Lukumi*. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 534–35, 546 (1993) (stating that "a law targeting religious beliefs [e.g., in the instant case, animal sacrifice in Santeria worship] as such is never permissible" and is subject to strict scrutiny (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion); *Cantwell*, 310 U.S. at 303–04)).

in *Sherbert v. Verner*.[33] *Sherbert* involved the constitutionality of South Carolina's denial of unemployment compensation benefits to a Seventh Day Adventist on the grounds that refusing to work on her Sabbath day (Saturday) did not constitute good cause for declining proffered work.[34] Although the good-cause requirement was not designed to burden religious beliefs, but rather had the secular purpose of encouraging someone to work rather than take benefits, Justice William Brennan, writing for the Court, ruled that its application to the religious claims of the plaintiff had to be subjected to strict scrutiny.[35] Under this approach, the Court held that the denial of benefits violated the plaintiff's free exercise rights.[36] *Sherbert* thus ushered in an era of, at least as a doctrinal matter, scrutinizing denials of religious exemptions to secular laws in a strict manner.

With respect to Establishment Clause doctrine, the Burger Court had recently enunciated the controversial *Lemon v. Kurtzman*[37] test for evaluating claims that the government violated that clause—at least in the two major areas of Establishment Clause challenges dealing with financial aid to religious organizations and government sponsorship of religious expression (such as prayers or displays of religious symbols). The *Lemon* test proved controversial[38] because of the requirement of strict governmental neutrality towards all matters religious—i.e., a government action could have neither a purpose, nor a primary effect of advancing or inhibiting a particular religious sect or religion in general,[39] nor could it involve excessive entanglement between government and religion.[40] While more liberal members of the Court generally embraced the strict neutrality requirement, its more conservative members opposed it on the grounds, among other things, that the Establishment Clause was intended to prohibit sectarian preferences only and not even-handed governmental aid to, or promotion of, religion in general.[41] *Lemon* itself in-

33. 374 U.S. 398 (1963). *Sherbert* itself constituted a dramatic departure from the Court's early approach in the *Reynolds* polygamy case, where the Court held that a denial of a religious exemption to practice polygamy did not violate the Constitution. Reynolds v. United States, 98 U.S. 145 (1878). Writing for the majority, Chief Justice Morrison Waite stated that,

> it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen *to become a law unto himself*. Government could exist only in name under such circumstances.

Id. at 166–67 (emphasis added).

34. *Sherbert*, 374 U.S. at 400–01.

35. *Id.* at 403 (stating that to survive the constitutional challenge, "it must be because . . . any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest.'").

36. *Id.* at 409–10.

37. 403 U.S. 602 (1971).

38. *See* Keith O. McArtor, *A Conservative Struggles with* Lemon*: Justice Anthony M. Kennedy's Dissent in* Allegheny, 26 TULSA L.J. 107, 107–08, 107 n.4 (1990).

39. *Lemon*, 403 U.S. at 612.

40. *Id.* at 612–13.

41. *See* McArtor, *supra* note 38, at 112, 117 (citing then-Justice Rehnquist's dissent in Wallace v. Jaffree, 472 U.S. 38, 106, 113 (1985), stating that, "Justice Rehnquist wrote, the Establishment Clause did not require government to be strictly neutral between religion and irreligion, it did not prohibit

volved a challenge to state-aid programs designed to provide financial support to non-public schools that disparately benefited teachers in Roman Catholic schools because of the latter religion's prominent role in education.[42] The Court invalidated the aid programs on the principal grounds that they fostered an excessive entanglement between the government and religion given the monitoring that would be required to ensure that none of the aid was being used to promote religious beliefs.[43]

Sherbert and *Lemon*, then, respectively carved out a fairly broad range of constitutional protections requiring the government to accommodate individual religious beliefs and exercises as a free-exercise matter, while at the same time requiring the government to remain strictly neutral in matters of religion as an anti-establishment matter. In Rehnquist's view, these contending requirements put the government on the horns of a dilemma—if it went too far in accommodating religious exercise, it could be accused of violating the neutrality requirements of *Lemon*, but if it went too far in attempting to remain neutral in religious matters, it could be accused of violating an individual's *Sherbert* right to an exemption from compliance with general secular laws.[44]

Rehnquist viewed this tension as coming to a head in the case of *Thomas v. Review Board of the Indiana Employment Security Division*.[45] There, a Jehovah's Witness who had worked in the general sheet-metal division of a company refused to continue working after his division was shut down and he was transferred to one that produced steel tank parts—objecting that his religious beliefs prohibited him from working on weapons.[46] The State of Indiana refused to pay him unemployment benefits on the grounds that he had quit for personal reasons, and, as such, he did not have good cause for quitting as required by Indiana law.[47] Applying *Sherbert* strict scrutiny to Indiana's denial of benefits, the Court ruled that the action violated the plaintiff's free-exercise rights.[48] It also held that compelling Indiana to provide benefits for religious reasons would not implicate the State in an Establishment Clause violation on the nebulous reasoning that the State was simply fulfilling its obligation of neutrality "in the face of religious differences," and because it was not an "involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[49]

In his lone dissent, Rehnquist objected that this "bland[]" assertion that the Court was not compelling an Establishment Clause violation was

government from pursuing legitimate secular ends through nondiscriminatory sectarian means, and it did not prohibit the government from providing non-discriminatory aid to religion.") (internal quotations omitted).

42. *Lemon*, 403 at 608–09.
43. *Id.* at 619–20.
44. *See infra* text accompanying notes 49–60.
45. 450 U.S. 707 (1981).
46. *Id.* at 710.
47. *Id.* at 712.
48. *Id.* at 717–19.
49. *Id.* at 720.

"unsatisfying."[50] In his view, the Court was interpreting both of the Religion Clauses too broadly and well beyond what the drafters and ratifiers of the Bill of Rights envisioned—creating a treacherous "Scylla and Charybdis" between which the government had to carefully navigate in order to avoid constitutional violations in religious matters.[51] As to the Free Exercise Clause, Rehnquist argued that *Sherbert* had been wrongly decided and that the clause did not require the government to provide religious exemptions to secular laws simply because they might place an incidental burden on one's practice of religion.[52] In his view:

> Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert* . . . : "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between." . . . Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so.[53]

With respect to the Establishment Clause, he contended that requiring Indiana to pay money to the plaintiff solely on account of his religious beliefs violated the neutrality principle embodied in *Lemon* and other precedents applying it.[54] If, he argued, Indiana were to have passed an unemployment-compensation law containing a proviso permitting those who quit their jobs for religious reasons to obtain benefits, that proviso would have a religious purpose and effect and would improperly entangle the State in determinations about what sort of reasons met it.[55] Such a tension with these precedents would be unnecessary, Rehnquist claimed, if the Court would abandon the approach embodied in them and adopt a narrower reading of the Establishment Clause:

> I believe that Justice STEWART, dissenting in *Abington School District v. Schempp*, . . . accurately stated the reach of the Establishment Clause. He explained that the Establishment Clause is limited to "government support of proselytizing activities of religious sects by throwing the weight of secular authorit[ies] behind the dissemination of religious tenets." . . . See *McCollum v. Board of Education*, 333 U.S. 203, 248 . . . (1948) (Reed, J., dissenting) (impermissible aid is only "purposeful assistance directly to the church itself or to some religious group . . . performing ecclesiastical functions"). Conversely, governmental assistance which does not have the effect of "inducing" religious belief, but instead merely "accommodates"

50. *Id.* at 724 (Rehnquist, J., dissenting).
51. *Id.* at 721.
52. *Id.* at 722–23.
53. *Id.* at 723 (citations omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 423 (1963) (Harlan, J., dissenting)).
54. *Id.* at 724–25.
55. *Id.* at 726.

> or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause. . . . I would think that in this case, as in *Sherbert*, had the State voluntarily chosen to pay unemployment compensation benefits to persons who left their jobs for religious reasons, such aid would be constitutionally permissible because it redounds directly to the benefit of the individual.[56]

Hence, Rehnquist concluded, were the Court to narrow its reading of both Religion Clauses—to not require religious exemptions as a free exercise matter, and, as an anti-establishment matter, to allow voluntary government support of religious activities so long as it was not designed to promote particular religious beliefs—it would have the salutary effect of "restor[ing] what was surely intended to have been a greater degree of flexibility to the Federal and State Governments in legislating" in religious matters without violating the Constitution.[57]

Despite Rehnquist's arguments, however, the *Sherbert–Lemon* framework remained largely intact at the time he was appointed by President Ronald Reagan to assume the leadership of the Court in September 1986. However, under Rehnquist's leadership as Chief Justice, the landscape began to change. On the free exercise side, the Court's first major break with that framework occurred in its 1990 decision in *Employment Division v. Smith*.[58] In that case, the entitlement of the plaintiffs to unemployment benefits from the State of Oregon turned on the question of whether they were entitled to a religious exemption from Oregon's drug laws to use peyote as a sacrament in the Native American Church.[59] Otherwise, the plaintiffs were guilty of misconduct for violating those laws and disqualified from receiving benefits.[60] Under the *Sherbert* approach, the Court would have applied some version of strict scrutiny, asking, for instance, whether the application of Oregon's drug laws to the plaintiffs was justified by a compelling interest, and whether such application was necessary to achieve that interest.[61]

Writing for a bare majority of five justices, which included Rehnquist and two members of the Court who had joined the *Thomas* majority applying *Sherbert* in that case,[62] Justice Antonin Scalia essentially adopted Rehnquist's *Thomas* dissent and declared an end to religious

56. *Id.* at 726–27 (citations omitted).
57. *Id.* at 727.
58. 494 U.S. 872 (1990).
59. *Id.* at 874.
60. *Id.*
61. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981). When applying the *Sherbert* approach, the Court was inconsistent in formulating its test. At times, the Court only referred to the compelling-interest portion of strict scrutiny. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963) (limiting its inquiry to whether (1) the disqualification of benefits created a burden on religious belief and (2) whether the state had a compelling interest). At other times, the Court also required some form of narrow tailoring too. *See, e.g.*, *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").
62. These Justices were Justices White and Stevens.

exemptions from secular laws as a matter of constitutional right.[63] He first observed that most claims to such exemptions the Court had upheld in the past had been based not only on the Free Exercise Clause but also other constitutional rights such as freedom of speech—what he called "hybrid rights" claims.[64] Turning then to *Sherbert*, he asserted that, outside the context of claims to unemployment benefits, the strict scrutiny called for by that case had either never been applied seriously to uphold an exemption or had simply been ignored altogether.[65] And, he concluded, this latter approach made more sense in terms of claims for exemptions from general criminal laws:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"–permitting him, by virtue of his beliefs, "to become a law unto himself," . . . –contradicts both constitutional tradition and common sense.[66]

Thus, the *Smith* majority held that *Sherbert* strict scrutiny would no longer be applied to claims for a religious exemption from secular, religiously neutral criminal laws.[67] Subsequently, the Court would characterize *Smith* as applying to all such laws, whether of a criminal or civil nature.[68] Since the *Smith* majority did not overrule *Sherbert*, however, but simply declined to apply it outside of the area of unemployment benefit cases, lower courts have held that *Sherbert*'s approach is still valid in those types of cases and in other areas, like unemployment compensation, "where the State has in place a system of individual exemptions"[69] from a law's requirements but does not recognize an exemption for religious beliefs.[70] Lower courts have also continued to apply *Sherbert* strict scrutiny to claims involving the sort of "hybrid rights" discussed by Scalia where another constitutional right, such as free speech, would independently call for the application of heightened scrutiny to a claimed infringement.[71]

63. *See* Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990).
64. *Id.* at 881–82.
65. *Id.* at 883–85.
66. *Id.* at 885 (citations omitted).
67. *Id.* at 885–86.
68. *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 859 (2014).
69. *Smith*, 494 U.S. at 884.
70. *See, e.g.*, Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960–61 (9th Cir. 1991), *amended by* 961 F.2d 1405, 1408 (9th Cir. 1992) (quoting *Smith*, 494 U.S. at 884) (characterizing it as a "Smith exception").
71. *See, e.g.*, Tenafly Eruv Ass'n v. Tenafly, 309 F.3d 144, 165 n. 26 (3d Cir. 2002) (quoting *Smith*, 494 U.S. at 881) (recognizing "hybrid rights" from *Smith*).

Aside from these carve-outs from *Smith*, however, that decision put an end to a free-exercise right to an exemption from religiously–neutral secular laws. Rehnquist had, apparently, not only convinced Justices Scalia and Anthony Kennedy of the correctness of his general view of the Free Exercise Clause (two justices of the *Smith* majority who had joined the Court well after Rehnquist's dissent in *Thomas*), but also Justices Byron White and John Paul Stevens, who had been in the *Thomas* majority applying *Sherbert* strict scrutiny but who, nonetheless, provided the critical fourth and fifth votes for Scalia's majority opinion in *Smith*.[72] This accomplished a major shift in Free Exercise Clause jurisprudence given that this area of the law had been dominated by religious-exemption cases. As Justice Kennedy observed in a later decision, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[73] In other words, since government rarely intentionally targets religious exercise for suppression, incidental burden cases arising out of claims for religious exemptions from general laws had constituted the bulk of free exercise challenges—at least until Rehnquist had his way in *Smith*.

Yet in his *Thomas* dissent, Rehnquist also made clear his view that legislatures could voluntarily grant religious exemptions to general laws in most cases without constitutional difficulty—and particularly without violating the Establishment Clause.[74] In other words, such statutory exemptions would constitute permissible accommodations by the government of an individual's religious exercise. Perhaps taking Rehnquist too much at his word, shortly after *Smith*, Congress responded by passing the Religious Freedom Restoration Act of 1993, which purported to, according to its express terms, "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases

72. *See Smith*, 494 U.S. at 873.

73. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993). An exception to the fact that laws do not normally single out religious activities to impose special burdens on them has occurred where governments have denied generally available benefits to religionists out of concern that providing them to such groups would violate Establishment Clause principles. As will be discussed, under Rehnquist's leadership the Court has generally held that such denials are not required by the Establishment Clause, and indeed may violate other constitutional rights of religionists such as freedom of speech. *See supra* text accompanying notes 13–16*; infra* text accompanying notes 131–35. However, in an arguable exception to the *Lukumi* principle prohibiting targeted burdens on religion, Rehnquist writing for the Court upheld against a Free Exercise Clause challenge a provision of the State of Washington Constitution that prohibited the use of public funds for, among other things, religious instruction (there, a state scholarship the plaintiff wanted to use to pursue a theological degree). *See* Locke v. Davey, 540 U.S. 712 (2004). Even though the law singled out religion for a special burden, the Court thought it justified by the State's interest in avoiding a violation of its own establishment clause. *Id.* at 724. I view *Locke* as being consistent with the views Rehnquist expressed in *Thomas* that government should have ample leeway to make decisions regarding its support for religion without running afoul of either the Free Exercise or Establishment Clauses, regardless of whether it declines or grants an exemption or affirmative benefit. *See supra* text accompanying notes 49–56. Indeed, in *Locke* Rehnquist stressed that there was "room for play in the joints" between the two clauses. *See id.* at 718 (citation omitted).

74. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 724–25 (1981) ("I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons.").

where free exercise of religion is substantially burdened."[75] Given Rehnquist's pro-religious orientation, as evidenced by his Establishment Clause jurisprudence (discussed further below), he likely had little objection to RFRA's goal as a general matter. But Rehnquist was also a strong federalist who believed in a healthy divide between federal and state powers.[76] Therefore, when Congress made RFRA applicable not only to incidental burdens that federal laws placed on religious exercise, but also to state and local government burdens, it is not surprising that he joined the Court's majority opinion in *City of Boerne v. Flores*,[77] which invalidated RFRA's application to the latter governments.

City of Boerne involved a challenge to Congress' authority to apply RFRA to state and local governments as a matter of its power to enforce constitutional rights guaranteed by the Fourteenth Amendment—including rights of free exercise that the Court had previously incorporated against the states by virtue of the Due Process Clause of that amendment.[78] A 6–3 majority of the Court held Congress had exceeded that power by effectively redefining the scope of constitutional protection provided by the Free Exercise Clause[79]—a role it determined was reserved to the Court itself[80]—instead of confining itself to enforcing free-exercise rights as the Court had defined them in *Smith*. Under the Court's reasoning, however, RFRA would continue to apply to incidental burdens on religious exercise imposed by the federal government since that part of the law was not at issue in the case. Hence, Congress had successfully revived the *Sherbert* test with respect to alleged burdens imposed by federal laws in the sense that the Court subsequently has appeared to acquiesce to Congress' authority to pass that part of RFRA.[81]

Not to be deterred with respect to restoring *Sherbert* to state and local government burdens, however, Congress proceeded to pass a more limited version of RFRA applicable to those governments pursuant to its Commerce and Spending Clause powers, rather than the Fourteenth

75. 42 U.S.C. § 2000bb (2012). Additionally, the Act also noted that its purpose was not only to restore the compelling interest test as set forth in *Sherbert*, but also to restore the test "as set forth in . . . Wisconsin v. Yoder, 406 U.S. 205 (1972)." In *Yoder*, like in *Thomas*, and unlike in *Sherbert*, the Court noted that not only would the State need a compelling interest to survive a constitutional challenge, but that its actions would need to be narrowly tailored to achieve that interest. *See Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

76. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620 (2000) (discussing "the Framers' carefully crafted balance of power between the States and the National Government."); United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991)) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

77. 521 U.S. 507, 509 (1997).

78. *Id.* at 511–12.

79. *Id.* at 536.

80. *Id.*

81. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 & n.4 (2014) (discussing, without contesting, lower court rulings upholding RFRA as applying to the Federal Government).

Amendment.[82] Entitled the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), it restored *Sherbert* strict scrutiny to claims for exemptions in the areas of local land use decisions affecting religious organizations and religious exercise by incarcerated persons.[83] Hence, RFRA currently makes that test applicable to claims for exemptions from federal laws, while RLUIPA makes it applicable to state and local laws in the specified areas.

Moreover, according to a recent report,[84] twenty-one states have now passed their own state RFRA laws, for the most part applying *Sherbert* strict scrutiny to burdens on religious exercise imposed by their own laws.[85] And according to another report, at least eleven other states apply such heightened protection for free-exercise claims as a matter of their own constitutions.[86] It is thus fair to say that, despite the Court's ruling in *Smith*, the *Sherbert* approach to religious exemption claims has been restored in the United States to a substantial degree, but mostly as a matter of legislative accommodation rather than constitutional right—a development Rehnquist likely would have approved given his *Thomas* dissent and general support for religion evinced in his Establishment Clause jurisprudence.

In addition to having a profound impact on free exercise law, under Rehnquist's leadership his Court moved strongly towards the narrower view of Establishment Clause constraints on government action he argued for in his *Thomas* dissent. This movement occurred in both major areas of anti-establishment jurisprudence—cases involving governmental financial aid to religious institutions and governmental sponsorship of religious expression such as prayer and religious symbolism.[87] With respect to financial-aid cases, which have consisted primarily of challenges to the constitutionality of programs designed to aid ailing primary and secondary schools run by religious institutions, and particularly the Roman Catholic Church,[88] the Warren and Burger Courts frequently invoked the *Lemon* neutrality principles to invalidate them.[89] A typical example of such cases was *Committee for Public Education & Religious Liberty v.*

82. 42 U.S.C. § 2000cc (2012).

83. *Id.*

84. *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

85. Eugene Volokh, *A Brief Political History of Religious Exemptions*, WASH. POST: VOLOKH CONSPIRACY (Jan. 21, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/21/a-brief-political-history-of-religious-exemptions/.

86. *See* Eugene Volokh, *Religious Exemption Law Map of the United States*, VOLOKH CONSPIRACY (July 9, 2010, 5:36 PM), http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states/.

87. *See infra* text accompanying notes 88–209.

88. The Roman Catholic Church has particularly been involved in secular education because, according to scholars, the members of the church wanted their own schools as a matter of pride and to escape Protestant influence and teachings which at the time dominated public schools. *See* JAMES W. SANDERS, EDUCATION OF AN URBAN MINORITY: CATHOLICS IN CHICAGO, 1833–1965, at 21, 37 (1977).

89. *See, e.g.*, *infra* text accompanying notes 90–91.

Nyquist,[90] where a 6–3 majority of the Court struck down a series of maintenance and repair grants, parental tuition grants, and parental tax deductions designed to aid private religious schools and their students on the grounds that they had the impermissible effect of advancing religion under *Lemon*'s second prong.[91] While agreeing that the maintenance grants given directly to the schools were unconstitutional, the recently appointed Justice Rehnquist dissented as to the indirect assistance provided to parents through the tuition grants and tax deductions.[92]

Three years before Rehnquist became Chief Justice, however, this ground began to shift with the Court's decision in *Mueller v. Allen*.[93] There, writing for a 5–4 majority, Rehnquist upheld a Minnesota law designed to aid religious schools by providing parental tax deductions for tuition and other school costs.[94] He distinguished *Nyquist* principally on the grounds that there the tax deductions were provided solely to parents of private school students, while the Minnesota tax deductions were provided to both public and private school parents.[95] In response to the dissent's objection that this facially equal treatment was largely chimerical because most public school parents did not pay any tuition to deduct (unlike their religious school counterparts), Rehnquist ruled that the law's facially neutral treatment between public and private schools was all that was constitutionally required.[96] He justified this conclusion as follows:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. . . . [P]rivate educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools." . . . More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the state and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical in-

90. 413 U.S. 756 (1973).
91. *Id.* at 775–76.
92. *Id.* at 812–13 (Rehnquist, J., dissenting).
93. 463 U.S. 388 (1983).
94. *Id.* at 391–92, 404.
95. *Id.* at 398–400.
96. *Id.* at 400–01.

> quiry into those persons benefited by state law which petitioners urge.[97]

Hence, in the majority's view, the changing number of parents that might seek the pertinent tax deductions from year to year, the lack of expertise to evaluate such statistical data, and the "rough return" religious school parents were receiving for relieving the public school system of the cost of educating their children all justified the disparate benefit they were receiving from Minnesota's facially neutral law.[98] In addition to the facially neutral nature of the Minnesota tax deductions, the majority also thought it significant that the aid generated by them was indirect in nature and resulted from the private choices of the parents themselves.[99] Such choices, the majority reasoned, removed any imprimatur of government approval of particular religious sects or religion in general.[100]

Led by Justice Thurgood Marshall, the four dissenting members of the Court rejected the majority's reasoning, particularly its heavy reliance on the facially neutral nature of Minnesota's tuition tax deduction:

> That this deduction has a primary effect of promoting religion can easily be determined without any resort to the type of "statistical evidence" that the majority fears would lead to constitutional uncertainty. . . . The only factual inquiry necessary is the same as that employed in *Nyquist* . . . : whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. . . . Financial assistance for tuition payments has a consequence that "is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children." . . . [T]he assistance that flows to parochial schools as a result of the tax benefit is not restricted, and cannot be restricted, to the secular functions of those schools.[101]

In the dissenters' view, then, the majority was improperly employing a very formalistic concept of religious neutrality—looking solely to the facial neutrality of Minnesota's law—while ignoring its substantive effect of disparately benefiting religious schools.[102] In their judgment, the tax deductions had the unconstitutional effect of advancing religion, particularly because they acted as a tuition subsidy paid to the school in part to impart religious doctrine and tenets alongside the teaching of secular subjects.[103]

97. *Id.* at 401–02 (citations omitted).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 409–10, 413 (citations omitted).
102. *Id.*
103. *Id.* at 409–10.

Any hope Rehnquist might have harbored that *Mueller* would usher in a period of greater tolerance of financial aid to religious schools, however, likely dissipated with the Court's decisions two years later in *Aguilar v. Felton*[104] and *School District of the City of Grand Rapids v. Ball*.[105] There, Justice Lewis Powell, who had been in the *Mueller* majority, joined the four dissenters from that case to strike down programs that provided public school teachers in religious schools to teach remedial secular subjects to disadvantaged students.[106] The Court reasoned that the programs violated the *Lemon* neutrality principles constraining the government from impermissibly advancing religion, and from becoming excessively entangled with it—particularly since the teachers constituted special and direct aid to religious schools rather than aid of an indirect and evenhanded nature like the parental tax deductions in *Mueller*.[107]

When Rehnquist became Chief Justice in the fall of 1986, however, the ground began to shift more dramatically—particularly with the replacement of Justice Powell by Anthony Kennedy in February 1988.[108] Shortly after Kennedy joined the Court, Rehnquist wrote for a 5–4 majority in *Bowen v. Kendrick*[109] rejecting a facial challenge to a federal aid program designed to reduce premarital pregnancies that included "pervasively sectarian institutions" as direct aid recipients.[110] Although purporting to apply the *Lemon* neutrality principles, Rehnquist reasoned that even such direct aid would not have the impermissible effect of advancing religion mainly because of the facially neutral nature of the program making both religious and secular organizations eligible for funds.[111] Hence, with this opinion Rehnquist began nudging the Court away from one of *Aguilar*'s and *Ball*'s key principles—that the direct flow of aid to religious organizations was constitutionally problematic—just as he had nudged away the disparate benefit principle in *Mueller*.

Rehnquist succeeded in further cutting back on the direct aid factor in *Zobrest v. Catalina Foothills School District*.[112] Writing once again for a 5–4 majority, he held that the provision of sign-language interpreters for students attending religious schools and receiving religious instruction did not have the impermissible effect of advancing religion.[113] Once again, the Court relied on the facially neutral nature of the assistance program—the fact that interpreters were being equally made available to public and private school students[114]—and, as in *Mueller*, the fact that the

104. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203, 235 (1997).
105. 473 U.S. 373 (1985), *overruled in part by Agostini*, 521 U.S. at 235.
106. *Id.* at 395–98.
107. *Id.* at 382, 395–98.
108. One should also note that when Rehnquist became the Chief Justice, Justice Scalia subsequently replaced Chief Justice Burger. This did not cause any ideological shifts in these cases, however, due to their similar views.
109. 487 U.S. 589 (1988).
110. *Id.* at 610.
111. *Id.* at 610–13.
112. 509 U.S. 1 (1993).
113. *Id.* at 13–14.
114. *Id.* at 10.

assistance was directed to religious schools by parental choice[115] rather than government direction.

And then in *Agostini v. Felton*,[116] Rehnquist joined a 5–4 opinion authored by Justice Sandra Day-O'Connor to expressly overrule *Aguilar* and *Ball* and to uphold the teacher assistance programs struck down in those cases.[117] O'Connor explained that *Zobrest* and other decisions[118] handed down since *Aguilar* and *Ball* had altered the Court's understanding of the *Lemon* effects and entanglement criteria.[119] In the majority's view, even direct assistance to religious schools, such as the provision of teachers to provide instruction in supplemental subjects, did not have an impermissible effect of advancing religion so long as such assistance was facially neutral (i.e., made available to public and private schools alike), and did not result in indoctrination that could be attributed to the government.[120] Rehnquist must have been pleased since this position captured much of his view of the Establishment Clause expressed in his *Thomas* dissent sixteen years earlier.

Moreover, the *Agostini* majority handed Rehnquist another key victory. Rehnquist had long complained that the excessive entanglement criterion of *Lemon* created a Catch-22 situation for the government in providing aid to religious organizations—such aid could only be used for secular purposes, but if the government established a monitoring program to make sure of that, the Court would frequently strike it down on the grounds that it excessively entangled the government with the funded organizations.[121] In her *Agostini* opinion, Justice O'Connor eliminated

115. *Id.*

116. 521 U.S. 203 (1997).

117. *See id.* at 236, 239–40. In *Ball*, there were two programs at issue: (1) the "Shared Time Program," which was similar to the program at issue in *Agostini*, (*see* Agostini v. Felton, 521 U.S. 203, 218 (1997)); and (2) the "Community Education Program." Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985). Because the Common Education portion of *Ball* was not at issue in *Agostini*, it was not overruled.

118. *See, e.g.*, *Agostini*, 521 U.S. at 225 (citing Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986)). In *Witters*, the Court held that the Establishment Clause did not prohibit states from providing assistance to blind people under a state vocational rehabilitation program, when the recipient studied at a Christian college seeking a religious occupation. 474 U.S. at 485–90. The Court reasoned that it did not see any "aid ultimately flowing to the" religious school "as resulting from a *state* action sponsoring or subsidizing religion." *Id.* at 488. The Court stated:

> On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.

Id. Further, As Justice O'Connor explained in *Agostini*: "Even though the grant recipient clearly would use the money to obtain religious education, [the Court] observed that the tuition grants were 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" 521 U.S. at 225 (citations omitted) (quoting *Witter*, 474 U.S. at 487).

119. *Agostini*, 521 U.S. at 225–26.

120. *Id.* at 225–26, 230–32, 234–35.

121. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 420–21 (1985) (Rehnquist, J., dissenting) ("In this case the Court takes advantage of the 'Catch-22' paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."); Wallace v. Jaffree, 472 U.S. 38, 109–10 (1985) (Rehnquist, J., dissenting) ("One of the difficulties with the entanglement prong is that . . . it creates an 'insoluable paradox' in school aid cases: we have re-

this problem by essentially doing away with excessive entanglement as an independent criterion.[122] She wrote that the entanglement problem was better viewed as an aspect of the effects criterion of *Lemon*, and that even pervasive monitoring by the government to ensure aid was being put to secular purposes would not be deemed to impermissibly advance religion.[123]

The *Agostini* majority applied the foregoing principles in *Mitchell v. Helms*[124] to sustain a program of lending educational materials and equipment to both public and private schools, including religious ones, overruling two prior decisions that had held such programs impermissibly advanced the religious missions of sectarian schools.[125] However, this time the *Agostini* majority fractured on the details of their application. Writing for a plurality of four justices, including Rehnquist, Justice Clarence Thomas ruled that the facially neutral nature of the program, considered together with the private choice of a parent to send a child to a religious school, was sufficient to conclude that any religious indoctrination supported by the aid could not be attributed to the government.[126] This was so, he reasoned, even if there was evidence the aid was being diverted for the use of religious instruction.[127] Providing the critical fifth vote in the case, however, Justice O'Connor concurred only in the judgment,[128] reasoning that while facial neutrality was central to the attribution question, other factors were relevant as well.[129] Moreover, she rejected the notion that the actual diversion of secular aid for religious purposes was permissible, though not condoned, by the government.[130] On the whole, however, O'Connor adhered to the *Agostini* facial neutrality and non-governmental indoctrination principles for applying the *Lemon* effects test.[131]

In the Court's last major financial-aid case, *Zelman v. Simmons-Harris*,[132] Rehnquist, once again writing for a 5–4 majority, cemented his Establishment Clause vision for indirect-aid cases similar to how O'Connor had done for direct-aid cases in *Agostini*. At issue was the contentious question of Ohio's tuition-voucher program, which essentially

quired aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. . . . This type of self-defeating result is certainly not required to ensure that States do not establish religions.").

122. *See Agostini*, 521 U.S. at 232–33.

123. *Id.*

124. 530 U.S. 793 (2000).

125. *Id.* at 835 (overruling Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975)).

126. *Id.* at 820, 824.

127. *Id.* at 822–23, 833–34.

128. Justice O'Connor was also joined in her concurrence by Justice Breyer. *Id.* at 836 (O'Connor, J., concurring).

129. *Id.* at 837–40. These factors included whether (1) the aid freed up the school's own resources to use for indoctrination, (2) the school received direct funding as part of the program, and (3) the existence of restrictions on the use of aid for non-secular purposes. *See id.*

130. *Id.* at 840–42.

131. *Id.* at 857–60.

132. 536 U.S. 639 (2002).

provided funds to parents of disadvantaged students, which they could use to pay for their child's tuition at public or private sectarian or nonsectarian schools.[133] The issue was contentious because, when it came to sectarian schools, such tuition payments would inevitably be used to fund some amount of religious indoctrination alongside secular instruction (and because barring compelled financial support of religion by the new central government was at the heart of the Establishment Clause's original purpose).[134] Yet the majority upheld the program largely on the basis of the same principles used to uphold the tuition tax deductions in *Mueller*: the facial neutrality of the program combined with the private decision of parents receiving the aid as to what school they wanted to use it at.[135] Rehnquist also elaborated on his discussion in *Mueller* as to why the disparate receipt by religious schools of such tuition aid was not a problem. In the majority's view, the parental choice of where to use the funds created a sort of "circuit breaker" that insulated the government from claims it was supporting religious indoctrination activities.[136]

Hence, with respect to both direct and indirect aid programs, Rehnquist achieved remarkable success in leading the Court to narrow Establishment Clause limitations on providing such assistance to religious schools and other organizations. With respect to direct-aid programs, all that was now required was a facially neutral program and lack of government-sponsored indoctrination; and as to indirect programs, all that was now required was a facially neutral program and a private actor directing the aid. The main change Rehnquist was able to effect from earlier decisions striking down such programs was to shift the focus from their lack of substantive or operative neutrality—i.e., the fact that sectarian religious schools, and primarily Roman Catholic ones, were disproportionately benefiting from a given program—to a focus on a program's formal or facial neutrality between public and private recipients, despite the fact that most of the aid ended up benefiting private religious schools. And this shift in focus was accomplished by reasoning that such neutrality largely took care of the "government facilitating indoctrination" problem in the direct-aid cases, and that neutrality, in combination with private choice as to where to put the aid, largely took care of the same problem in the indirect-aid cases—even though, as a practical matter, substantially more aid would flow to schools that taught religious beliefs as part of their educational mission.

In the other major area of Establishment Clause decisions, those involving challenges to alleged government sponsorship of religious expression, while not achieving as stark a shift in the law as he did in the financial-aid cases, under Rehnquist's leadership, the Court significantly

133. *Id.* at 645–48.

134. *See id.* at 648–49.

135. *Id.* at 652–55.

136. *Id.* at 652 ("Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.").

broadened the grounds for permissible government involvement with such expression. Most dramatically, the Rehnquist Court virtually cemented the free-speech rights of religious groups to gain access to government-sponsored speech on par with secular groups free from Establishment Clause limitations.[137] Some five years before he took over leadership of the Court, Rehnquist joined the majority opinion in *Widmar v. Vincent*,[138] which held that a university violated the free-speech rights of a religious student group by denying it access to facilities available to other student groups because it planned to use them for religious discussion and worship.[139] The Court rejected the claim that the university had a compelling interest in denying such access to avoid an Establishment Clause violation, relying, as in the financial aid cases, on the facially neutral nature of the access policy to find that it did not violate *Lemon*'s effects test—at least, as the Court put it, "in the absence of empirical evidence that religious groups [would] dominate . . . [the] forum" (suggesting that an undue disparate benefit flowing to those groups could pose a problem).[140] Such facial neutrality, the Court reasoned, meant the government was only conferring an incidental benefit on religion as opposed to a purposeful one that might be problematic.[141]

After Rehnquist became Chief Justice, the Court decided a series of cases extending the *Widmar* ruling. In *Westside School District v. Mergens*,[142] the Court ruled that a federal law granting religious-high-school student groups equal access to facilities on par with other student groups did not violate the Establishment Clause despite claims that high-school students would be more likely to view such access as a government endorsement of religion than the university students in *Widmar*.[143] A plurality of four justices, including Rehnquist, rejected claims that the access had an impermissible effect of advancing religion under the endorsement test Justice O'Connor had articulated several years earlier, principally because of the facially neutral nature of the program.[144] In a concurrence in the judgment by the fairly new Justice Kennedy that was joined by Justice Scalia, Justice Kennedy objected to the application of the endorsement test and reasoned that the law should have been viewed as a permissible accommodation of religion because it did not coerce religious participation, nor did it provide benefits to religion that amounted to an establishment of it.[145]

Three years later, in *Lamb's Chapel v. Center Moriches Union Free School District*,[146] the Court gave short shrift to the notion that it violated

137. *See infra* text accompanying notes 138–55.
138. 454 U.S. 263 (1981).
139. *Id.* at 265, 277.
140. *Id.* at 275.
141. *Id.* at 273–74.
142. Bd. of Educ. of Westside Cmty. Sch. v. Mergens *ex rel.* Mergens, 496 U.S. 226 (1990).
143. *Id.* at 249–50, 253
144. *Id.* at 251–52 (citing *Widmar*, 454 U.S. at 274).
145. *Id.* at 260–62 (Kennedy, J., concurring in part and concurring in the judgment).
146. 508 U.S. 384 (1993).

the Establishment Clause to allow an evangelical church access to school facilities on par with other secular organizations to exhibit a film series on family issues from a religious perspective.[147] Although this time relying mainly on the *Lemon* test, the Court again relied on the facial neutrality of the access policy to sustain it.[148] And just a couple of years later, without mentioning a particular test but relying simply on *Widmar* and *Lamb's Chapel*, a plurality of the Court led by Justice Scalia again relied on the facial neutrality of an open-access policy to permit the temporary display of a large Latin cross on a square next to the Ohio state capitol building that had been dedicated to public-speech activities.[149] However, Scalia took the opportunity to reject any notion that the endorsement test applied in cases where the government had made available a forum for speech to private speakers on a religiously neutral basis.[150] Providing the critical fifth vote sustaining the plurality's judgment, however, Justice O'Connor wrote separately rejecting this part of Scalia's opinion, but she nonetheless concluded that the government had not impermissibly endorsed a religious message in the case.[151]

In the most recent case of this line, *Good News Club v. Milford Central School*,[152] a majority of the Court, without citing a specific test, once again relied on the facial neutrality principle of *Widmar* and *Lamb's Chapel* to hold that even the use of open public-school facilities by a private Christian club for religious instruction and worship as part of morals and character development did not violate the Establishment Clause.[153] The Court also rejected claims that permitting such after-hours use in a school that instructed elementary grade children would unduly pressure them to participate or create the perception of government endorsement.[154] And in the midst of the foregoing "access to forum" cases, a majority of the Court also relied on the facial neutrality principle to hold that compelling a state university to make funds available for the printing costs of an evangelical student publication on par with other student publications as a matter of free speech did not create an Establishment Clause problem.[155] Hence, as in the financial-aid cases, the Rehnquist Court was extremely successful in utilizing the facial neutrality

147. *Id.* at 395–97.

148. *Id.* In separate opinions, Justice Kennedy and Justices Scalia and Thomas complained about applying *Lemon* and endorsement tests because, among other things, under those tests even government support of religion in general was *verboten*. *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 398–400 (Scalia, J., concurring in the judgment).

149. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

150. *Id.* at 767–69.

151. *Id.* at 772–74 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor was joined by Justices Souter and Breyer in her concurrence; Justice O'Connor and Justice Breyer joined Justice Souter in his own concurrence in the judgment. *Id.* at 772, 783 (Souter, J., concurring in part and concurring in the judgment).

152. 533 U.S. 98 (2001).

153. *Id.* at 119–20.

154. *Id.* at 117–18.

155. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23, 845–46 (1995).

principle to ensure equal treatment of religious speakers regarding access to government facilities and funding.

While Rehnquist did not enjoy as much success moving the Court in his desired direction in areas of religious expression not involving equal access—i.e., in the key areas of government-sponsored prayer and religious symbolism—his opinions together with those of his more conservative colleagues on the Court, nonetheless, established certain doctrinal foundations upon which the Roberts Court is now building to effectively implement Rehnquist's vision in these areas.

With respect to prayer, the Warren Court had decided two important cases where it held that officially sponsored prayer in public schools violated the Establishment Clause.[156] In the first, the Court reasoned that a brief, optional, non-denominational, theistic prayer prescribed by school officials to begin the day violated a required "wall of separation" between church and state—relying predominantly upon the reasoning that government-authored prayer lay at the heart of establishing an official religion which the clause was designed to prevent.[157] In the second, which involved Bible readings selected by students and voluntary recitations of the Lord's Prayer, the Court mainly reasoned that these government-sponsored religious practices violated the requirement that the government remain neutral towards religious matters.[158]

Justice Potter Stewart filed a lone dissent in both cases, arguing in the first that the invocation invalidated in that case fell far short of an establishment of an official religion barred by the First Amendment and was well within the nation's history and traditions of sponsoring similar ones.[159] In the second, Stewart argued mainly that accommodating voluntary prayer choices of students was required in order to ensure true government neutrality towards religion, particularly in public schools where barring sponsored, prayer activities might be viewed by children as official endorsement of a secular worldview.[160] Rehnquist endorsed Stewart's view of the scope of the Establishment Clause in his seminal *Thomas* dissenting opinion discussed earlier.[161]

The next prayer case did not arise until Rehnquist was serving on the Court as an Associate Justice. In *Marsh v. Chambers*,[162] with Rehnquist joining Chief Justice Burger's 6–3 majority opinion, the Court upheld the Nebraska legislature's practice of electing and paying for a

156. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 425 (1962).

157. *Engel*, 370 U.S. at 425–27.

158. *Schempp*, 374 U.S. at 225–27. Both of these principles, the "wall of separation" metaphor and the neutrality principle, although in some tension with each other, were each derived from Justice Black's somewhat inconsistent opinion in the first Establishment Clause decision of *Everson*. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 16–18 (1947).

159. *Engel*, 370 U.S. at 444–50 (Stewart, J., dissenting).

160. *Schempp*, 374 U.S. at 312–13 (Stewart, J., dissenting).

161. *See supra* text accompanying notes 50–53.

162. 463 U.S. 783 (1983).

chaplain to deliver prayers to open daily legislative sessions.[163] Without discussing wall of separation or neutrality principles, including the then-reigning *Lemon* test, Burger relied solely on the "unique history" and practice of opening legislative sessions with prayer that extended from the First Congress (which had drafted the Establishment Clause and other provisions of the Bill of Rights) into modern times—thus evincing the framing generation's view that such practices did not constitute a constitutional problem.[164]

Just two years later, the Court revisited the issue of public school prayer in *Wallace v. Jaffree*.[165] There, a majority of the Court held that an Alabama law which basically prescribed a one-minute period during school days for "voluntary prayer" lacked a secular purpose and thus violated the purpose prong of *Lemon*.[166] In addition to two other justices, Rehnquist dissented. After a lengthy review of the history of the Establishment Clause, he concluded that it was only intended to prohibit the establishment of an official religion and other governmental preferences for one denomination or sect over others—not governmental support of religion in general, such as Alabama's effort to facilitate private student prayer.[167]

In *Lee v. Weisman*,[168] the first prayer case to come before the Court after Rehnquist's elevation to Chief Justice, a school district's policy of sponsoring non-denominational prayers to commence and conclude middle- and high-school graduation ceremonies was at issue.[169] Writing for a majority of five justices, Justice Kennedy invalidated the policy on the grounds that it effectively compelled students to participate in a government-sponsored religious exercise considering that attendance was practically obligatory and they would feel psychological pressure to participate in the invocation and benediction.[170] Although they joined Kennedy's opinion, in separate opinions Justices O'Connor, Blackmun, Souter and Stevens made clear their view that, while the coercion principle was sufficient to decide the case, they were not abandoning the *Lemon* neutrality requirements in cases where coercion might not be present.[171] Writing a dissent for four justices, including Rehnquist, Justice Scalia argued that coercion was an acceptable Establishment Clause test but that it should have been confined to actual legal coercion backed by force of law, rather than any notion of psychological coercion.[172] The most significant aspect of *Lee* was the coalescence of five justices—Kennedy plus the four dissenters—on an anti-coercion, rather than neu-

163. *Id.* at 793.
164. *Id.* at 791.
165. 472 U.S. 38 (1985).
166. *Id.* at 55–56.
167. *Id.* at 105–07 (Rehnquist, J., dissenting).
168. 505 U.S. 577 (1992).
169. *Id.* at 580–84.
170. *Id.* at 592–94, 598–99.
171. *See id.* at 606–12.
172. *Id.* at 639–46 (Scalia, J., dissenting).

trality, test for assessing the constitutionality of sponsored school prayer, even though they disagreed on how to apply it. Hence, the four justices in the majority who espoused adherence to neutrality principles must have felt some unease with Kennedy's opinion even though they achieved their desired result in the case.

In the last school prayer case decided by the Rehnquist Court, *Santa Fe Independent School Dist. v. Doe*,[173] a 6–3 majority (including Kennedy) invalidated a high school policy under which students elected by the student body delivered prayers over the school's public announcement system before football games.[174] The Court relied principally on *Lee*'s anti-coercion principle, reasoning that, like with graduation ceremonies, students would want to attend the games but feel compelled to participate in the prayer exercises.[175] Writing for the three dissenters, Rehnquist, among other things, argued that the anti-coercion principle had no application in the case because the prayers constituted private student speech, rather than government-sponsored speech.[176]

Hence, although not completely successful, the Burger Court, followed by the Rehnquist Court, made two substantial strides towards displacing the *Lemon* neutrality principle barring government-sponsored prayer. The first, of course, was the historical-practice exception for legislative prayer carved out by the former Court in *Marsh*.[177] The second was the adoption of the anti-coercion principle in *Lee* and *Santa Fe* for assessing the constitutionality of government-sponsored prayer.[178] Although it did not permit such prayer in environments that could be said to coerce participation by vulnerable youth, it would presumably permit it in school contexts lacking coercive elements and in adult contexts where coercion would presumably be more difficult to establish. And indeed, in its first prayer decision, the Roberts Court relied on both the *Marsh* history and anti-coercion principles to sustain the delivery of highly sectarian invocations in town council meetings.[179] That decision will be discussed further in the next section of this Article.

With respect to religious symbols sponsored by the government, such as plaques, monuments, holiday displays, and memorials with religious elements, the Rehnquist Court also made significant strides towards displacing the neutrality principle to permit sponsorship of them in situations where they did not amount to proselytization or preference for one sect over others. Before Rehnquist assumed the Court's leadership, that body had decided two important symbolism cases. The first dealt with a Kentucky statute requiring public schools to post a Ten Commandments plaque in school classrooms bearing a notation describing its

173. 530 U.S. 290 (2000).
174. *Id.* at 294, 316–17.
175. *Id.* at 310–12.
176. *Id.* at 324–26 (Rehnquist, J., dissenting).
177. *See supra* text accompanying notes 162–64.
178. *See supra* text accompanying notes notes 168–76.
179. *See* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

"secular application" as the cornerstone of the fundamental law of Western Civilization.[180] In *Stone v. Graham*,[181] a bare majority of the Court struck down the law in a fairly summary fashion as lacking a secular purpose in violation of *Lemon*'s requirement to the contrary.[182] The Court reasoned that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," and lacked a legitimate educational function.[183] In a sharply-worded dissent, Rehnquist chided the majority for not according any deference to the legislature's expressed purpose of giving recognition to the secular role played by those commandments in Western legal history.[184]

Some four years later, however, in *Lynch v. Donnelly,*[185] a 5–4 majority of the Court, which included Rehnquist, upheld a Rhode Island city's exhibition of a Christian nativity scene as part of a broader Christmas display containing Santa Claus scenes, a Christmas tree, carolers, and a "Seasons Greetings" banner.[186] Writing for the Court and applying the *Lemon* principles, Chief Justice Warren Burger accepted the City's justification that the display served the secular purposes of celebrating the traditional Christmas holiday and depicting its origins because there was "insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."[187] Moreover, he reasoned, any effect the display had of advancing the Christian religion was merely "indirect, remote and incidental."[188] Providing the critical fifth vote in her concurrence, Justice O'Connor set forth her view that the *Lemon* test should be modified to focus on a government purpose to communicate, and have the effect of communicating, a message of endorsement for a particular religion or religion in general.[189] She found that test was satisfied in the case for reasons similar to those given by Burger.[190] Amongst other things, the four dissenting justices argued that in upholding the nativity display by emphasizing its secular significance, the majority had ironically stripped it of much of its religious importance.[191]

180. *See* Stone v. Graham, 449 U.S. 39, 39–41 (1980).
181. *Id.*
182. *Id.* at 41–43.
183. *Id.*
184. *Id.* at 44–47 (Rehnquist, J., dissenting). Additionally, Chief Justice Burger, along with Justices Blackmun and Stewart, all dissented with statements rather than opinions. *Id.* at 43. Chief Justice Burger and Justice Blackmun stated that they "would grant certiorari and give th[e] case plenary consideration." *Id.* Justice Stewart wrote that he dissented from the "summary reversal of the courts of Kentucky, which," he argued appeared to him, "applied wholly correct constitutional criteria in reaching their decisions." *Id.*
185. 465 U.S. 668 (1984).
186. *Id.* at 671–72, 685–86.
187. *Id.* at 680.
188. *Id.* at 683.
189. *Id.* at 690–94 (O'Connor, J., concurring).
190. *Id.*
191. *Id.* at 705 (Brennan, J., dissenting); *id.* at 726 (Blackmun, J., dissenting).

After Rehnquist assumed leadership of the Court, it returned to the subject of holiday displays in *County of Allegheny v. American Civil Liberties Union*.[192] There, a 5–4 majority of the Court held a stand-alone nativity scene exhibited on the steps of a county courthouse unconstitutional, but a differently constituted 6–3 coalition of justices upheld a display containing a menorah, Christmas tree, and "salute to liberty" sign exhibited down the street at a city-hall entrance.[193] Writing for the 5–4 majority, Justice Harry Blackmun adopted Justice O'Connor's endorsement test as the guiding standard and ruled that the nativity scene had the unlawful effect of communicating a message of government endorsement of Christianity.[194] Justice Kennedy, joined by Rehnquist and two other justices, dissented.[195] Rejecting the endorsement test, Kennedy reasoned the display was constitutional because it did not coerce religious observance, nor was it designed to proselytize observers.[196] As to the menorah display, the "Kennedy 4" issued the lead plurality opinion upholding it on the anti-coercion principle, with Blackmun and O'Connor writing separate opinions upholding it on the basis that the display did not send a message of government endorsement of religion.[197]

The Court did not return to the issue of religious displays until Rehnquist's last year on the bench. In the companion cases of *McCreary County v. ACLU*[198] and *Van Orden v. Perry*,[199] the Court was once again divided on their constitutionality. In the former case, a 5–4 majority held that the display of a Ten Commandments plaque on the walls of certain county courthouses in Kentucky violated the *Lemon* purpose test (albeit O'Connor's endorsement version of it) given that the action's predominant purpose was to emphasize and celebrate its religious message—despite the fact that the counties subsequently turned the exhibits into purportedly secular displays about Western civilization after receiving complaints about them.[200] In a harsh dissent, Justice Scalia, who was joined by Rehnquist and Justice Thomas, once again rejected the endorsement analysis as the guiding standard, as well as the *Lemon* neutrality principle altogether, and would have upheld the displays as permissible government approval of religion in general and even the nation's tradition of monotheism in particular—confining Establishment Clause limits in religious-expression cases to government promotion of the beliefs of a particular religious sect and finding that monotheism did not amount to that given its predominance in America.[201] Declining to go so far, and not issuing a separate opinion, Justice Kennedy joined only the

192. 492 U.S. 573 (1989).
193. *Id.*
194. *Id.* at 602–03.
195. *Id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).
196. *Id.* at 660–65.
197. *Id.* at 623–37 (O'Connor, J., concurring).
198. 545 U.S. 844 (2005).
199. 545 U.S. 677 (2005).
200. *McCreary*, 545 U.S. at 850–53, 861–62.
201. *See id.* at 892–906 (Scalia, J., dissenting).

portions of the Scalia dissent rejecting the majority's reliance on endorsement principles.[202]

In *Van Orden*, a five-justice coalition upheld the display of a six–foot high Ten Commandments monument on the grounds of the Texas capitol building.[203] Writing for a plurality of four justices, Rehnquist, in contrast to Chief Justice Burger's opinion in *Lynch*, emphasized both the religious and historical significance of the Ten Commandments and the view that government could properly sponsor both messages so long as the latter predominated—as he believed it did in that case.[204] Concurring in the judgment, Justice Stephen Breyer was unwilling to concede the principle that government can favor a religious message even if bound up with a secular one, yet believed the principle of government neutrality yielded the same result in the case—relying on the historical and moral purpose of the monument in that setting and the fact that compelling its removal after forty years would evince government hostility towards religion.[205]

Hence, in the religious symbolism area, the Burger and Rehnquist Courts once again made important strides in cutting back on the *Lemon* principle that government cannot show approval for religion even in a non-proselytizing way. *Lynch*, *County of Allegheny*, and *Van Orden* essentially established a "predominant secular purpose" exception even for highly sectarian symbols, with Rehnquist stressing in his plurality opinion in the latter case that a symbol's religious significance need not be discounted in making that determination.[206] Yet Rehnquist's joinder of Scalia's dissent in *McCreary County*, which went further and argued that the government could provide outright approval for even a monotheistic symbol like the Ten Commandments without any consideration of a secular purpose, indicates that Rehnquist may have tempered his *Van Orden* opinion to capture Kennedy's vote (the latter declining to join that portion of Scalia's dissent).[207] And although the anti-coercion test Kennedy applied for a plurality in *County of Allegheny* did not surface in the *McCreary County-Van Orden* opinions, it, along with the "secular purpose" test, presumably remains available for application in future cases.[208] Thus, the Rehnquist Court laid the groundwork for both or either of these approaches to be utilized by the Roberts Court in this area. Indeed, in the two decisions of the latter Court to date implicating governmental displays of religious symbols, various justices invoked the secular purpose principle to suggest those symbols did not present Establishment

202. *Id.* at 885.
203. 545 U.S. at 681–83.
204. *Id.* at 688–92.
205. *Id.* at 698–705 (Breyer, J., concurring).
206. *See supra* text accompanying notes 185–205.
207. *See supra* text accompanying notes 201–04.
208. *See supra* text accompanying notes 203–05.

Clause problems even though that question was not directly before the Court.[209]

In sum, in the major Free Exercise Clause area of religious exemptions, and each of the major Establishment Clause areas of financial aid to religion, religious speaker access to governmental resources, and government sponsorship of prayer or religious symbols, Rehnquist and his Court effected dramatic doctrinal changes to either implement or bring the Court much closer to implementing the narrower vision of those Clauses initially laid out in Rehnquist's *Thomas* dissent.

III. THE ROBERTS COURT'S DEVELOPMENT OF THE REHNQUIST COURT'S BEQUEST, AND ITS IMPACT ON AMERICAN RELIGIOUS LIBERTY

Part II of this Article discussed the dramatic changes in religion-clause jurisprudence wrought by the Rehnquist Court. In the free exercise area, that Court bequeathed to the Roberts Court a state of the law whereby religious exemptions to secular laws are now a matter of voluntary accommodation by legislatures rather than a matter of constitutional right. In the anti-establishment arena, the Rehnquist Court bequeathed a jurisprudence narrowing constraints on government support of religion—i.e., permitting substantial aid and other benefits to flow to religious institutions through facially neutral programs, as well as doctrinal tools in the prayer and symbolism cases to facilitate a movement away from the neutrality ban on governmental sponsorship or approval of such expression. Both bequests constrict the constitutional limits on government action when it comes to religious matters, essentially permitting them to be determined to a much greater degree by democratic-majoritarian choices. This Part will explore what these developments portend for religious liberty in general in America, including their potential impact on minority religious rights, particularly in light of Roberts Court developments to date.

A. Free-Exercise Liberty

The most notable impact of the Rehnquist Court free exercise bequest is that the Roberts Court's docket in this area will be dominated by statutory versus constitutional interpretation cases—decisions applying RFRA, RLUIPA, and religious-accommodation provisions found in other federal laws, such as those mandating such accommodations in the workplace.[210] Of course, constitutional challenges based on the Free Exercise Clause itself will continue to be brought, as in a recent Roberts Court decision finding that it protects the right of churches to determine

209. Salazar v. Buono, 559 U.S. 700 (2010); Pleasant Grove City v. Summum, 555 U.S. 460 (2009); s*ee supra* text accompanying note 26; *infra* text accompanying notes 341–46.

210. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2012).

who their ministers will be without government interference.[211] However, even that case could have been litigated as a RFRA claim had the plaintiffs not chosen to waive that cause of action in favor of a constitutional argument.[212] And because the Free Exercise Clause continues to provide very strong protection against any government actions that target religious beliefs, speech, or practices for special burdens,[213] which government officials usually know and hence seldom do, most free exercise cases will involve challenges to alleged burdens on religion imposed by religiously neutral laws of general applicability. It is these challenges that will now ordinarily be litigated as a statutory accommodation matter given the Rehnquist Court's *Smith* decision, which is evidenced by the fact that of the six free-exercise decisions the Roberts Court decided by the end of its 2015–16 term, five involved statutory exemption rights.[214]

Given this trend of free-exercise rights being determined as a matter of democratic-majoritarian preference (i.e., interpreting what legislatures intended as to the scope of those rights as embodied in religious-exemption laws) instead of judicial interpretation of the Constitution (as it was prior to *Smith*), it seems incumbent to ask what the impact of this development will be on free-exercise liberty in general, and in particular, whether minority rights will be sufficiently protected. This Section will contend that free-exercise liberty will likely enjoy greater protection under a scheme of statutory accommodation than it did even under the pre-*Smith* regime of purportedly treating religious exemptions as a matter of fundamental constitutional right.[215] It will also argue that, contrary to Justice Scalia's observation in *Smith,* that minority-exemption rights will likely suffer as an inevitable consequence of democratic-majority rule, quite the contrary has been, and will likely continue to be, the case.[216]

As to free-exercise liberty as a general matter, as discussed earlier, beginning with the Court's decision in *Sherbert* and for the next thirty years until *Smith* was decided, the Court purported to treat the right to a religious exemption as a matter of fundamental right—applying a compelling-interest test or some other variant of strict scrutiny to government claims that an exemption could not be granted. Yet, as Justice Scalia wrote for the majority in *Smith*, and as several commentators have noted, most claims for exemptions during this era did not succeed—only five out of eighteen, according to one group of scholars (and primarily in the unemployment benefits area).[217] Hence, the strict-scrutiny approach

211. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

212. *See* Brief for the Fed. Respondent at 24–25, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (No. 10-553).

213. *See supra* text accompanying note 31.

214. *See supra* text accompanying notes 222–370.

215. *See supra* text accompanying notes 255–62.

216. *See supra* text accompanying notes 263–81.

217. *See* Micah Schwartzman et al., *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html.

was applied in a way that was far from strict.[218] One could say that instead of strict scrutiny being "strict in theory and fatal in fact" when applied to challenged government actions, as the Court itself has described that standard of review,[219] when applied to free-exercise claims for religious exemptions it was "strict in theory and flaccid in fact." Why this occurred is a matter of debate, but surely it was some skepticism by the Court about how important the allegedly burdened practice was to the exercise of the religion at issue, the severity of that burden, or its concern about the claimed governmental interests in the uniform application of the challenged law (or some combination of all of these factors).[220]

Under the regime of statutory accommodation, however, the Roberts Court appears to be applying the strict-scrutiny standard dictated by RFRA and RLUIPA in the stringent way the Court has in most other areas of constitutional law, such as substantive due process, equal protection, and free speech, where it traditionally has been regarded as "fatal in fact."[221] For instance, in its first statutory accommodation case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[222] despite rejecting the Native American Church's constitutional claim for an exemption from narcotics laws to ingest peyote for sacramental purposes in the *Smith* decision, the newly appointed Chief Justice Roberts, writing for a unanimous Court, upheld the RFRA claim of a small, Brazilian-American church to ingest a similar narcotic for sacramental purposes.[223] The most salient feature of the decision was Roberts' emphasis that under RFRA the government was obligated to prove that it had a compelling interest in applying the drug laws to the particular claimant and generalized claims of the need for a law's uniform application (for instance, to avoid the slippery slope of making other exceptions) would not suffice.[224] Moreover, the Court implied that the government bore a very heavy burden of proving that the denial of an exemption was the least restrictive means of achieving the government's interests where it had made analogous exemptions in related areas, as it had in the narcotics field.[225]

In the Court's next exemption case, *Burwell v. Hobby Lobby*,[226] which again presented the application of RFRA, but this time to the

218. *Id.*

219. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984). However, the Court has been backing off the fatalness of strict scrutiny in the area of affirmative action programs where it has been more inclined to tolerate alleged reverse discrimination, see, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995), and in a couple of cases where it has faced very difficult free-speech issues. *E.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (upholding restriction on speech alleged to assist terrorist groups).

220. *See, e.g.*, Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1054 (2000); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990).

221. *See supra* note 219.

222. 546 U.S. 418 (2006).

223. *Id.* at 423–24, 437–39.

224. *Id.* at 432, 435–36.

225. *Id.* at 429–30.

226. 134 S. Ct. 2751 (2014).

claims of a closely held corporation seeking an exemption from an Affordable Care Act requirement of providing insurance to employees that included contraceptives (which the religious owners objected to because they operated after conception),[227] Justice Samuel Alito wrote the opinion for a 5–4 majority again upholding the exemption claim.[228] The opinion was notable in several respects for its expansive construction of the free-exercise liberty protected by RFRA. The majority first noted that Congress in both RFRA and RLUIPA had expanded the concept of "free exercise" beyond past First Amendment formulations to include practices not compelled by or central to a system of religious belief.[229] It then broadly interpreted "persons" covered by RFRA to include closely-held, for-profit corporations in addition to certain non-profit corporations that all agreed were covered.[230]

With respect to the question of whether the religious beliefs of the company's owners were substantially burdened by having to arrange for health insurance that employees might use to pay for products that could result in post-conception pregnancy terminations (a fairly attenuated chain of causal events), the Court stressed that it was not for judges to question the reasonableness of religious beliefs so long as they were satisfied they were sincerely held.[231] In other words, it appeared to be laying down a rule that courts must defer to a claimant's sincere assertion of a substantial burden. And in its discussion of the government's obligation to implement the least restrictive means of achieving a compelling goal, Justice Alito went so far as to suggest that in some cases that might require it to create and pay for new programs to avoid burdening an individual's religious beliefs.[232] This discussion appeared to prompt a concurring opinion from Justice Kennedy, who, providing the critical fifth vote for the majority position, seemed reluctant to go that far.[233] Finally, and perhaps most significantly, even though by its terms RFRA purports to "restore" the *Sherbert* compelling interest test, the *Hobby Lobby* majority ruled that Congress intended the statute to be read to provide broader protections for religious exercise than had existed in the pre-*Smith* Free Exercise Clause decisions.[234]

Next, in *Holt v. Hobbs*,[235] the Court's first decision applying RLUIPA to a claimed exemption, it upheld a Muslim prisoner's demand to be allowed to grow a one half inch beard that he believed was required by Islam in contravention of a prison policy that prohibited beards for security reasons.[236] This time writing for a unanimous Court, Justice Alito

227. *Id.* at 2759, 2785.
228. *Id.*
229. *Id.* at 2767–68.
230. *Id.* at 2768–69.
231. *Id.* at 2778–79.
232. *Id.* at 2780–81.
233. *Id.* at 2786 (Kennedy, J., concurring).
234. *Id.* at 2761.
235. 135 S. Ct. 853 (2015).
236. *Id.* at 859.

again took a very expansive view of the religious-liberty rights protected by Congress, and as in *Hobby Lobby* noted the "greater protection" afforded them than had previously existed under pre-*Smith* constitutional decisions.[237] Following *Hobby Lobby*, he applied a very deferential approach to the substantial-burden question, finding one based on the sincerity of the plaintiff's belief despite evidence that Islam did not definitively require the growing of a beard.[238] Then, following *O Centro*, Alito stressed that the government bore the burden of showing its interests in security were compelling as to the particularized class of potential claimants, not just in general, and that there were not less-restrictive alternatives to achieve those.[239] And even in the prison context where the Court is traditionally deferential to the government's position, it applied a fairly healthy amount of judicial scrutiny in rejecting its arguments that there were no alternative means of achieving its interests in safety and security.[240]

Further, in *Equal Employment Opportunity Commission v. Abercrombie & Fitch*,[241] the Court was reviewing a decision of the Tenth Circuit which had interpreted Title VII to require job applicants claiming prospective employers failed to accommodate their religious practices prove they provided such employers notice of their accommodation needs. The case involved the claim of a Muslim woman who wore a headscarf that a retailer violated Title VII by declining to hire her because of a "Look Policy" prohibiting the wearing of "caps," even though she had not expressly told it she wore the scarf for religious reasons.[242]

In a virtually unanimous opinion authored by Justice Scalia,[243] the Court rejected the Tenth Circuit's narrow reading of Title VII's accommodation requirements. It held Title VII did not require a showing that the employer had knowledge of the need for accommodation, but rather that its decision not to hire was simply motivated in part by a desire to avoid providing a religious accommodation.[244] As Justice Scalia explained, "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."[245] This highly religion-protective reading of Title VII was too much for even Justice Alito, the author of the similarly protective *Hobby Lobby* and *Holt* decisions. Concurring only in the judgment, Alito argued that the statute re-

237. *Id.* at 860–62.
238. *Id.* at 862–63.
239. *Id.* at 863.
240. *Id.* at 866.
241. 135 S. Ct. 2028 (2015).
242. *Id.* at 2031.
243. Justice Alito agreed with the Court's judgment but not all of Justice Scalia's reasoning, as discussed later in the text. *See id.* at 2034. Justice Thomas filed what was effectively a lone dissent, arguing that simply declining to make a religious exception to a generally applicable policy like the retailer's "Look Policy" did not constitute the sort of intentional religious discrimination barred by Title VII. *Id.* at 2037.
244. *Abercrombie & Fitch*, 135 S. Ct. at 2032–33.
245. *Id.* at 2033.

quired a showing that an employer knew of the need for a religious accommodation in order to impose liability.[246]

Lastly, *Zubik v. Burwell* was a case related to the *Hobby Lobby* decision but it raised slightly different issues.[247] There, unlike the closely held corporation in the latter case challenging a requirement of the Affordable Care Act that it provide certain contraceptive insurance coverage to it employees, the *Zubik* argument was that the Act had exempted certain non-profit religious organizations from having to provide such coverage.[248] However, in order to take advantage of the exemption, those organizations had to file a form stating that they objected to providing such coverage on religious grounds.[249] They challenged this requirement on the reasoning that filing the form would make them complicit in the provision of contraceptive coverage contrary to their religious beliefs.[250]

In a highly unusual move, the Court essentially created its own solution to the plaintiffs' RFRA objections by suggesting a way the coverage could be provided without any involvement of the employers.[251] It then remanded the case back to the lower court for the parties to hammer out the details.[252] While the Court expressly declined to address the claims in the case, including whether filing a form could really be considered a substantial burden on the plaintiffs' free exercise of religion (a claim that appeared to be significantly more attenuated than the plaintiff's claim in *Hobby Lobby* that having to *provide* the insurance violated its beliefs),[253] its efforts to settle the dispute suggested that at least its conservative wing was taking the RFRA claim seriously. Indeed, previous injunctions and other preliminary orders the Court had issued in favor of the religious non-profits in the litigation supported this view.[254]

All of this raises the question of why the Court is construing (or, in the case of *Zubik*, suggesting it would construe) the foregoing accommodation statutes so liberally in favor of free-exercise rights when its record of construing comparable constitutional rights in the pre-*Smith* era was just the opposite? Surely one answer is the view of some members of the Court that Congress has directed it to construe the pertinent statutory rights more broadly than their earlier constitutional counterparts, although not all justices share that opinion.[255] But this cannot account for the entire answer since even the justices who believe Congress was just codifying pre-*Smith* case law joined the Court's broadly written, unani-

246. *Id.* at 2035 (Alito, J., concurring).
247. 136 S. Ct. 1557 (2016).
248. *Zubik*, 136 S. Ct. at 1559, 1561.
249. *Id.* at 1559.
250. *Id.*
251. *Id.* at 1559–60.
252. *Id.* at 1561.
253. *Id.* at 1560.
254. *See* Zubik v. Burwell, 135 S. Ct. 2924 (2015); Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014); Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014).
255. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 n.18 (2014) (describing a debate between the majority and dissent regarding whether Congress directed the Court to construe statutory rights under RFRA more broadly than under the pre-*Smith* constitutional regime).

mous opinions in *O Centro* and *Holt*. Another substantial reason likely lies in the nature of constitutional-versus-statutory adjudication.

As the Court itself has asserted, when interpreting the scope of constitutional rights, it—at least in theory—must proceed carefully and marginally lest an unelected panel of judges unduly displace the democratic will of the people as expressed in laws passed by their representatives.[256] Although many instances can be cited where the Court has arguably appeared to violate this norm, as a general matter, both the Court itself and lower courts have historically seemed reluctant to create fixed and rigid constitutional entitlements.[257] This is because once a right or entitlement is constitutionalized, it becomes difficult to accommodate competing interests should that prove necessary or desirable in practice—requiring laborious judicial adjustment via subsequent decisions that at times must overcome the inertia of *stare decisis*. In other words, uncertainty about the practical ramifications of recognizing a given right usually counsels against expansive constitutional interpretations. This phenomenon likely accounts for much of the Court's reluctance in the pre-*Smith* era to recognize constitutionally based religious exemptions from general laws, even though it was purportedly applying a strict-scrutiny test that theoretically favored such claims.

By contrast, when a court construes and applies statutory rights created by elected representatives of the people, it not only believes that it has a clearer mandate to displace conflicting laws alleged to burden the right, but it knows that if it gets things wrong, the legislature can correct the error *ex-post*. In other words, when a judge is aware that an overly restrictive or overly expansive application of the statutory rights at issue (assessed in relation to the legislative will on a particular subject) can be addressed after the fact by amending the law that created them, she will be more likely to act boldly in applying the law as she believes the legislature directed—even where she might question the wisdom of doing so.

256. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted) (internal quotation marks omitted) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. . . .").

257. Despite the claims of dissenting justices in the Court's recent same-sex marriage decision that the majority was essentially making up a right not contained in the Constitution, see, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting) (opposing the expansion of marriage rights to same-sex couples, arguing "that decision should rest with the people acting through their elected representatives" instead of "five lawyers who happen to be" Supreme Court justices), the Court's evolution on same-sex rights in general does at least illustrate the incremental nature by which that body ordinarily proceeds in creating new constitutional entitlements. *See, e.g.*, *Obergefell*, 135 S. Ct. 2584 (holding that same-sex couples have a fundamental right to marry); United States v. Windsor, 133 S. Ct. 2675 (2013) (striking down portions of the federal Defense of Marriage Act); Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and striking down anti-sodomy laws); Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's Amendment 2); Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting a challenge to anti-sodomy laws, noting that "[t]o hold the act of homosexual sodomy is somehow protected as a constitutional right would be to cast aside millennia of moral teaching."); Baker v. Nelson, 409 U.S. 810 (1972) (dismissing a same-sex marriage case for "want of a constitutional question").

And given the "restoration of liberty" theme embodied in laws like RFRA and RLUIPA, it is not surprising that the Court itself feels more comfortable in construing the right to religious exemptions broadly despite a reluctance to do so earlier as a constitutional matter. In its view, if it accords too much weight to free-exercise rights to the undue detriment of countervailing public interests embodied in general secular laws, Congress can then act to adjust the balance as that body might prefer.[258] If correct, this view means that free exercise liberty, at least in terms of exemptions, will likely be stronger and more robust as a matter of legislative grace than pre-*Smith* constitutional right, as evidenced by the Court's decisions to date in this area.

But not so fast, one might say. It might be contended that there are several problems with this argument. First, legislative grace is just that. It can change to be more restrictive of free-exercise liberty whereas constitutional interpretation is designed to be more stable and enduring, dealing with, as it does, the nation's fundamental law. Second, rulings on federal constitutional rights are generally binding on all levels of government, including at the state and local levels, whereas laws like RFRA and RLUIPA only extend so far as congressional power permits—in the former case, just to federal government actions, and in the latter case, to particularized areas of state and local regulation (i.e., prison administration and local land use decisions).[259] And, lastly, just because the U.S. Supreme Court has construed federal exemption laws broadly does not mean state courts applying their own similar laws will construe them to protect religious-exercise rights more broadly than even the somewhat under-protective pre-*Smith* constitutional law would have required.

As to the first objection, certainly in our democratic system various majorities could narrow statutory free-exercise rights even beyond pre-*Smith* levels if they wished. But if RFRA and RLUIPA are any indication, as well as the state RFRAs and state constitutional free-exercise guarantees discussed earlier, such a political movement is hardly likely—particularly as regards religious exercises by majority faiths. This does raise the question of whether minority faith rights will remain as protected as majority rights, a question answered in the affirmative in the next part of this argument. Moreover, in the unlikely event the majority was intent on voluntarily relinquishing its free-exercise rights, it is doubtful the Court would be willing to apply the Free Exercise Clause vigorously as a countermeasure. History has taught that the Court's willingness to

258. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2761–62 (explaining how Congress amended RFRA in RLUIPA to expand the concept of religious exercise beyond how the Court had previously defined it).

259. *See, e.g.*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-3 (2012) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise . . . ."); Protection of Religious Exercise in Land Use and by Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2012) (protecting prisoners' free exercise rights); James v. City of Boise, Idaho, 136 S. Ct. 685, 687 (2016) (noting that a state supreme court, "like any other state or federal court, is bound by this Court's interpretation of federal law.").

protect individual rights for the most part tracks public opinion, judges being people too.

With respect to the second objection, it is true that, as noted, RFRA only protects religious exercise in the states that are burdened by federal law and RLUIPA only protects against burdens imposed by state and local laws in the area of prison and land administration. Yet, as also noted, some thirty-one states either have counterparts of RFRA or the federal Free Exercise Clause pursuant to which strict scrutiny is applied to burdens imposed by state or local laws, ensuring strong protection in these states for religious exemptions. And with respect to the remaining nineteen states where *Smith* still prevails as to burdens imposed by state or local law, as noted earlier, lower courts have recognized at least two exceptions to its rule of non-protection where the government either recognizes non-religious exemptions or where a free-exercise claim is bound up with other fundamental rights like free speech.

In addition, in the recent *Hosanna-Tabor* decision noted earlier where the Court held that, under the federal Free Exercise Clause, the government could not even incidentally burden decisions of churches regarding who their leaders will be, it distinguished *Smith* on the nebulous grounds that it involved "only outward physical acts" and did not cover a church's internal decisions affecting its faith and mission.[260] It remains to be seen how courts will develop this amorphous "act-decision" distinction, but it could potentially become another major exception to the *Smith* rule of non-protection. In short, even in the minority of states where the level of protection for religious exemptions remains an open question as to burdens imposed by state or local laws that are not covered by RLUIPA, one could argue that exceptions to the *Smith* rule, together with RFRA for federally imposed burdens, still provide a good measure of protection for religious exemptions.

As to the final objection, while true that there is no assurance state courts will construe their religious-exemption laws more broadly than the pre-*Smith* Court construed the First Amendment to provide, it is well known that state courts generally take their cues from the U.S. Supreme Court when interpreting state constitutional or statutory provisions that have analogues at the federal level.[261] Hence, there is every reason to believe that in applying the strict-scrutiny tests for religious-exemption claims demanded by state RFRA laws or state-constitutional counterparts to the Free Exercise Clause, state courts will be heavily influenced by the heavily rights-protective readings of RFRA and RLUIPA the Court is currently rendering.[262] In sum, free-exercise liberty as a general matter is likely to be stronger and more vibrant under the prevailing combined scheme of First Amendment protection for targeted burdens

260. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697 (2012).

261. *See, e.g.*, Barr v. City of Sinton, 295 S.W.3d 287, 300, 305–06 (Tex. 2009) (citing to Supreme Court cases involving the Free Exercise Clause, RFRA, and RLUIPA in a case interpreting Texas's own RFRA statute).

262. *See, e.g., id.* (applying the Supreme Court's interpretations of RFRA to Texas' state RFRA).

placed on religious exercise and statutory protection for related incidental burdens than it was in the pre-*Smith* era when the First Amendment served as the source of both forms of protection.

But, one might reasonably interpose, having a statutorily driven scheme for religious exemptions might be fine for the protection of majority faith practices because it is the same majority—at least through their elected representatives—that are determining who receives exemptions under these laws. What about minority faith practices though? After all, the argument would go, in a democracy, rights are mainly recognized to protect minorities against unfair or discriminatory treatment by majorities.[263] And what assurance would there be that in this area majorities would not limit protection for exemptions to their own faith practices? As support for this skepticism, one would presumably point to Justice Scalia's concluding remarks in the *Smith* majority opinion seeking to further justify the rule of non-protection for exemptions adopted there:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. . . . It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[264]

In other words, Justice Scalia was saying, treating exemptions as a matter of legislative grace rather than constitutional right might very well disadvantage minority faith practices, but, alas, such is the "unavoidable consequence" of living in a system of majority democratic rule.[265]

So was Scalia right? Is the landscape for religious minority rights when it comes to exemptions as dark as he painted it—thus casting serious doubt on the foregoing arguments as to the general vitality of such rights in the statutory era? Well, he certainly was not correct if his remarks are taken as a prognostication of what would happen after the *Smith* decision. Under the prevailing scheme of statutory accommodations as it has in fact developed, minority faith practices are protected just as strongly as majority ones. At the federal level, RFRA[266] and

263. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (discussing "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

264. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

265. *Id.*

266. *See* 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

RLUIPA[267] are both written in broad, general terms to protect the religious exercise of all persons where those laws apply. Indeed, both *O Centro* (RFRA) and *Holt* (RLUIPA) involved the protection of minority faith practices (a small Brazilian-American Church's use of a sacramental drug in the former[268] and a Muslim inmate's growth of a beard in the latter).[269] Moreover, the state RFRA laws and state constitutional provisions discussed earlier are similarly written in broad terms to protect the religious-exercise rights of all people.[270] Hence, Justice Scalia's forecast that minority faiths would be disadvantaged in a scheme driven by voluntary legislative accommodations has proven to be far from accurate in actual practice.

But, one could ask, what if the majority ever ceased being inclusive of minority faiths and decided to repeal or change these laws in order to selectively advantage their religious practices while excluding minority ones? My initial response would be that such a scenario would be highly unlikely in today's world as evidenced by RFRA, RLUIPA, and analogous state laws themselves. Equality of governmental treatment is a societal and legal norm that has been on the rise for years in America and seems to be getting more and more entrenched in our social and political consciousness.[271] Moreover, the country has a venerable history of tolerating religious diversity as evidenced by the founding of America by groups of religious dissenters who themselves sought to get the government out of the business of favoring or disfavoring particular sects by including the Establishment Clause in the Constitution. While the nation has arguably had its moments of religious bigotry (e.g., the proposed Blaine Amendment to cut off public funding to Roman Catholic schools, which failed at the federal level but had analogues adopted by many states),[272] today such incidents seem much less likely to occur.

However, in the improbable event majorities were to repeal the general exemptions granted in laws such as RFRA or the general protection for religious liberty contained in state constitutional provisions that have been interpreted to protect exemptions,[273] and pass laws that provided exemptions exclusively for majority faith practices (either to selec-

267. *See id.* §§ 2000cc–2000cc-5.

268. *See supra* text accompanying notes 222–25.

269. *See supra* text accompanying notes 235–40.

270. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (West 2016) (defining "'free exercise of religion'" as any "act or refusal to act," limited only by the sincerity of the motivating religious belief).

271. *See, e.g.*, Michael Esler, *Equality in American Law*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 105, 116–130 (1998) (surveying historical development of civil equality in American law).

272. *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 295–96 (2008). Indeed, a church is challenging Missouri's version of the Blaine Amendment as violating the Free Exercise Clause in a case to be heard by the Court next Term. *See* Trinity Lutheran Church of Columbia, Inc. v. Pauley, 136 S. Ct. 891 (2016) (granting certiorari).

273. And of course some state constitutions, like the U.S. Constitution, would likely require a supermajority vote to amend their provisions, creating even greater hurdles to selectively advantaging majority faiths. *See, e.g.*, FLA. CONST. art XI, § 5 (requiring a sixty-percent vote by Florida's electors to amend its constitution).

tively advantage them or disadvantage those of minorities), there would be strong arguments that such actions would violate the Constitution. We would first have to ask what such revised laws might look like. Let us hypothesize they said religious practices of Protestant or Catholic faiths, or even Christians in general, that were burdened by government action would be subjected to strict scrutiny—thus preferring majority sects and excluding minority faith practices on their face. Particularly against the background of repealed protections for minority faiths that would presumably be necessary to pass such new laws, they would almost certainly be viewed as attempts to impose direct and targeted burdens on minority faith practices in violation of the *Church of the Lukumi* decision. As previously noted, there the Court applied strict scrutiny to invalidate laws designed to outlaw the animal-sacrifice practices of a particular minority faith because they selectively targeted them for prohibition.[274]

Moreover, changes to laws designed to disadvantage minorities by withdrawing protections previously granted to them, whether of a religious character or not, would be met with a good deal of skepticism by the Court. For instance, in *Romer v. Evans*,[275] the Court struck down a Colorado constitutional amendment that withdrew local protections against sexual-orientation discrimination which had been passed by several of the State's major cities. It ruled the amendment violated the Equal Protection Clause on the grounds that it could only be explained by majority animus towards gay and lesbian minorities.[276] In addition, one main factor the Court has looked at to ensure a religious accommodation does not go so far as to "establish" religion in violation of that clause is that the accommodation is extended equally to all faiths.[277] Hence, redesigned religious exemption laws that applied only to majority faith practices could run into serious Establishment Clause problems. Such facially discriminatory attempts to favor majority faith practices over those of minority faiths, then, would be unlikely vehicles to accomplish the improbable scenario being hypothesized.

But what about subtler attempts by the majority to obtain the same goal, such as protecting majority faith practices with laws that were facially neutral with respect to favored sects but simply singled out practices associated with majority faiths for special treatment? For instance, what about a law that merely exempted any person's religious use of wine from general alcohol regulations, even though Roman Catholics were the only faith adherents to make such use of it? As the Court said in the *Lukumi* case, however, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance

274. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534–35, 546 (1993); *see supra* text accompanying note 31.

275. 517 U.S. 620 (1996).

276. *Id.* at 623–25, 632.

277. *See* Cutter v. Wilkinson, 544 U.S. 709, 723–24 (2005) (holding that RLUIPA's increase of protection to prisoners' religious rights did not violate the Establishment Clause in part because it did "not differentiate among bona fide faiths").

with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[278] There, the Court ruled that judicial scrutiny must go beyond the neutral text of a law if other evidence exists of its discriminatory purpose with respect to religion—such as a clearly discriminatory scope of operation.[279] While *Lukumi* dealt with an attempt to distinguish between an asserted secular-versus-discriminatory purpose for a law that burdened a minority faith practice, it seems likely that a similar analysis would apply to a governmental purpose to prefer majority sects at the expense of minority ones, even though a law was neutral from a sectarian standpoint. Hence, if the government were to repeal general-exemption protections in favor of protecting discrete practices associated with majority faiths, courts would likely determine that they had a discriminatory purpose to favor those faiths and correspondingly disadvantage minority ones.

But, one might also ask, what happens in the minority of states that do not have general protections for religious exercise in place where the level of protection for religious-exemption claims remains an open question as to burdens imposed by state or local laws not covered by RLUIPA? Would it be problematic in at least these jurisdictions to extend religious exemptions solely to majority faiths in contexts where such actions did not appear designed to disfavor minority faith practices—simply because no faiths had yet received such protections? Even without a backdrop indicating a purpose to disfavor minority faiths, laws that on their face selectively provided exemptions to specific majority sects would still be problematic. Even though the Free Exercise Clause speaks mainly to governmental interference with the exercise of religion, the Establishment Clause has been construed to prohibit sectarian favoritism.[280] Moreover, the Equal Protection Clause has been construed to invoke strict scrutiny with respect to any classifications that significantly burden the exercise of a fundamental right.[281] Surely religious exercise would be considered a fundamental right, and a law granting selective exemptions to majority sects might very well be invalidated under that analysis.

Would the type of laws discussed earlier that are neutral as to sects but simply single out faith practices associated with majority sects fare any better where a background context of disfavoring minority faith practices was absent? Once again, such laws would presumably have to be framed to excuse certain conduct (i.e., majority faith practices such as sacramental uses of wine) from legal regulation when engaged in for religious purposes. Hence, a purpose to favor certain religious practices over

278. *Church of the Lukumi*, 508 U.S. at 534.

279. *Id.* at 534–38.

280. *See, e.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (holding that a statute which created a special school district where boundaries were drawn to incorporate only a religious enclave, violated the Establishment Clause); *cf.* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that a sales tax exemption for religious periodicals violated the Establishment Clause, and that the Free Exercise Clause did not require a religious exemption).

281. *See, e.g.*, Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535 (1942).

others would be evident on their face and would likely run into the same problems as laws that explicitly preferred majority sects on their face. In short, even in jurisdictions where general religious-exemption protections did not have to be removed from the books to selectively prefer majority faith practices, strong arguments could be made that laws enacted to accomplish this goal would be unconstitutional.

To summarize, this Section has argued that when it comes to exemptions for secular laws to engage in religious exercise, free-exercise liberty will be stronger and more vibrant than it was under the pre-*Smith* era of claimed constitutional entitlement—both as a general matter of free-exercise protection for majority faiths and also as a matter of comparable protection for minority ones.[282] To be clear, I am not taking the position that this will be good news to all observers. If one were to consider the simpler, less regulated environment of the founding generation who wrote the Free Exercise Clause into the Constitution, one can speculate that it would generally have been supportive of voluntary legislative exemptions designed to lighten incidental burdens placed on religious exercise.[283] In the modern regulatory state, however, with its multitude of secular laws attempting to accommodate sometimes conflicting goals or interests, free exercise exemptions pose more difficult challenges.

In cases where the interests of religionists are in tension with general public interests embodied in laws where the latter would not be significantly impaired by granting religious accommodations, such actions would seem to be both desirable and appropriate. By contrast, in cases where laws seek to further the interests of discrete groups of individuals, such as public accommodation laws barring discrimination in the provision of goods or services with respect to particular minority groups such as gays or lesbians, conflicts between religious beliefs and secular law goals become much more difficult to reconcile.[284] This Article does not seek to provide this reconciliation, which is a complex subject deserving of its own considered treatment, but rather seeks to demonstrate that free exercise rights as a statutory matter are being taken more seriously than they were when based in claims of constitutional entitlement. However, it will be observed that when it comes to reconciling such a difficult clash of interests, legislatures would seem to be in a better and more legitimate position to accomplish this task than individual judges attempting to balance frequently incommensurate interests as a constitutional matter.[285]This consideration alone might be a good reason to support the

282. *See supra* text accompanying notes 215–58.

283. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 557–64 (1997) (O'Connor, J., dissenting) (discussing religious accommodations granted during the pre-constitutional and founding era).

284. *See, e.g.*, Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012) (holding that the New Mexico RFRA statute did not shield a photographer from being in violation of the New Mexico Human Rights Act—a general anti-discrimination law—for refusing to photograph a homosexual wedding due to religious beliefs), aff'd, 309 P.3d 53 (N.M. 2013).

285. *Cf.* Emp't Div. v. Smith, 494 U.S. 872 (1990) (criticizing a system under which judges would "weigh the social importance of all laws against the centrality of all religious beliefs."). A good exam-

Rehnquist-driven transformation of religious exemption rights from a constitutional to legislative grounding, even if one does not approve of how this development appears to have reinvigorated those rights.

B. Anti-Establishment Liberty

As discussed earlier, the Rehnquist Court bequeathed to the Roberts Court precedents, or at least doctrinal principles, permitting greater government aid to religious organizations, as well as sponsorship of religious expression—essentially narrowing the scope of Establishment Clause constraints on government action in this area as Rehnquist had urged in his *Thomas* dissent.[286] In other words, similar to free exercise rights, democratic majority preferences concerning public aid to religious organizations and sponsoring religious expression will be allowed a greater latitude of action, assuming the Roberts Court either maintains the Rehnquist Court positions or extends them further. And as I will discuss in this Part, the Roberts Court appears to be opting for the extension route and narrowing anti-establishment limits on government religious involvement even more.[287]Hence, this Section will also examine the impact of these developments on individual anti-establishment liberty—the right to be free from having the government make laws "respecting an establishment of religion."[288]

Unlike the core of free exercise liberty that looks to preventing undue government interference with the exercise of religion, however, defining the essence of anti-establishment liberty is a much more contestable concept. It is fairly well accepted that the specific phrasing of the Establishment Clause was designed to achieve at least two basic goals: first, to prevent the newly-created federal government from adopting an official religion or church and compelling financial support of it or membership in it; and, second, to bar any interference by the federal government with established religions or churches that some of the states did have until they phased them out in the early nineteenth century.[289] Despite this history, when it first began deciding Establishment Clause cases in the mid-twentieth century, the Court held that the Fourteenth Amendment's Due Process Clause incorporated the Establishment

ple of such a legislative solution to a clash between religionists and the gay rights community recently occurred in Indiana after its legislature passed the State's own RFRA law. After hearing strong protests that the law would be used to discriminate against the LGBT community as to the provision of business services, employment and similar matters, a compromise "fix" was agreed to whereby the law was clarified to prohibit such discrimination while at the same time exempting religious organizations from the prohibition's ambit. *See* Schiff Hardin, LLP, *Indiana Amends Religious Freedom Restoration Act to Prohibit Discrimination*, NAT'L L. REV. (Apr. 10, 2015), http://www.natlawreview.com/article/indiana-amends-religious-freedom-restoration-act-to-prohibit-discrimination. Plainly it would be difficult for judges in the context of constitutional litigation to accomplish such compromises and the various balancing of interests they entail.

286. *See supra* text accompanying notes 49–70.

287. *See supra* text accompanying notes 293–352.

288. *See infra* text accompanying notes 252–315.

289. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1835–37 (2014) (Thomas, J., dissenting).

Clause against state government action in addition to that of the federal government.[290]In various opinions, Justice Thomas has argued that it makes no sense to incorporate anti-establishment limitations against states when the clause was originally designed to protect them from federal interference with their establishments—and hence state and local governments should be able to favor religion more than the federal government.[291]However, most justices have not been swayed by this history and essentially view the clause as, at the least, prohibiting all levels of government from adopting an official religion or church and compelling support for or participation in it.[292]

But as discussed earlier, that is where agreement between various justices (and scholars) ends as to the correct scope of an individual's anti-establishment liberty.[293] To greatly oversimplify for purposes of analysis, one can posit the existence of three main views regarding this scope. On the most narrow view of it, and probably the one held by many Americans in the predominantly Christian founding generation, anti-establishment liberty encompassed only the right to be free from governmental favoritism of particular religious (and especially Christian) sects, but not governmental encouragement of Christianity in general.[294]

290. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 5, 8 (1947) ("[T]he First Amendment which the Fourteenth Amendment made applicable to the states.").

291. *See, e.g.*, Galloway, 134 S. Ct. at 1835 (Thomas, J., concurring) (reaffirming his belief that the Establishment Clause should not have been incorporated).

292. *See, e.g.*, *id.* at 1822 ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.") (majority opinion).

293. *See supra* text accompanying notes 164–67.

294. As the Court has asserted, "Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the [Establishment] Clause was 'not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.'" McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 880 (2005). *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1868, 1871, 1873 (1833), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions69.html ("Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. . . . It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. The situation, too, of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and

Today this view appears to have morphed a bit to permit the government to officially acknowledge a monotheistic God as reflected in Christianity, Judaism and Islam, while still prohibiting favoritism among any monotheistic or other religious sects.[295] I will refer to this as the "narrow view" of anti-establishment liberty.[296] In a nation where more than seventy percent of its adult citizens still identify themselves as being adherents of the Christian faith (including, among other sects, forty-six percent Protestant faiths and twenty-one percent Catholic), some six percent as adherents of non-Christian faiths (including Judaism and Islam), and roughly sixteen percent evincing an adherence mostly to "nothing in particular,"[297] the narrow view is obviously most protective of majoritarian, anti-establishment liberty preferences (in effect allowing the Christian majority to define that liberty narrowly to permit official acknowledgement of the Christian monotheistic God) and least protective of minority anti-establishment rights (essentially saying minorities must tolerate such Christian preferences by the government).[298]

On the broadest view of that liberty, it encompasses the right to have a strict wall of separation between church and state where government can have nothing to do with religion or at least the right to have the government remain neutral towards religion by refraining from either favoring or disfavoring a religious sect or religion in general (hereinafter referred to as the "broad view").[299] It is the latter neutrality principle that has traditionally been favored by the more liberal wing of the Court and that remains embodied in the *Lemon* test discussed earlier.[300] On this view, protections for majoritarian anti-establishment liberty are weakest (in the sense that it constrains majoritarian preferences with respect to governmental involvement with religion), and it is obviously the strongest in protecting minority rights not to have the majority dictating the

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the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."). In other words, although not entirely clear, Story seemed to be suggesting the Establishment Clause was designed to prevent the federal government from favoring a particular Christian sect but not government encouragement of Christianity generally—and particularly encouragement by state governments.

295. In the *McCreary County* decision, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that while perhaps today the Establishment Clause prevents most governmental favoritism of Christianity, it does allow the public acknowledgment of a monotheistic God and related symbols such as the Ten Commandments embodying beliefs broadly shared by Christianity, Judaism and Islam. *See McCreary County*, 545 U.S. at 885-900 (Scalia, J., dissenting).

296. It is important to note that I am making no claims about the proper original understanding of the Establishment Clause or whether, and to what extent, it was properly incorporated against the states via the Fourteenth Amendment. That subject has been the subject of much debate that is beyond the scope of this Article. I am simply positing a narrow view of anti-establishment liberty that seems to be held by certain Supreme Court justices, and doubtless many others, for purposes of analyzing how that group may view the trend towards allowing majoritarian preferences to dictate the role of religion in American public life.

297. *See* GREGORY SMITH ET AL., PEW RES. CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 4 (2015), *available at* http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf.

298. Although this is likely true as a general matter, certainly there would be Christians themselves who would not favor governmental support of Christianity or even religion in general.

299. *See supra* text accompanying notes 156–58.

300. *See supra* text accompanying notes 36–39.

terms of that involvement. Yet, on the flip side, the broad view also constrains the minority's ability to persuade the majority to voluntarily include their faiths alongside majority faiths in governmental preferences of religion—similar to the way minority faiths have successfully had their faiths included in voluntary legislative religious exemption accommodations in the free exercise area.[301]

On a middle-ground view of anti-establishment liberty, it encompasses the right to have the government refrain from favoring a particular religious sect but not from supporting or endorsing religion in general (hereinafter referred to as the "moderate view"). It is the moderate view of anti-establishment liberty that had been endorsed by Rehnquist[302] and that has seemingly been endorsed by many conservative members of the current Court (with, as noted, Justices Scalia and Thomas adopting a more narrow view by arguing that even government sponsorship of Judeo-Christian-Islamic monotheism in particular is constitutional, at least in religious symbolism cases and perhaps others).[303] On this view, protections for majoritarian, anti-establishment liberty are still fairly strong (allowing the majority to at least dictate governmental preferences for religion in general), while minority anti-establishment rights attain a rough equilibrium in being able to dictate equal treatment for their faiths alongside of majority faiths (with the exception, of course, of the 1.6 percent of Americans who identify themselves as being atheists and who would presumably be satisfied solely with the broad view of anti-establishment liberty).[304]

But before examining the impact of the Rehnquist Court and Roberts Court decisions on these various conceptions of anti-establishment liberty, we must first examine what the latter Court has done with the former Court's bequest in the major Establishment Clause areas discussed earlier. With respect to financial aid to religious organizations, the Roberts Court has boldly extended Rehnquist Court precedents in this area.[305] It has not done so, however, by further extending the principle that such aid is constitutional so long as it is provided pursuant to a program that is formally neutral as to religious organizations even though it might result in disproportionate substantive benefits flowing to them, but rather by significantly limiting the classes of plaintiffs who are entitled to maintain Establishment Clause challenges to aid programs.[306]

301. *See supra* text accompanying note 258.

302. *See supra* text accompanying notes 51–56.

303. *See supra* text accompanying notes 197–201. Although, as noted, Rehnquist joined Scalia's approval of the monotheistic symbolism embodied in the Ten Commandments, when Rehnquist himself was writing, he generally limited his arguments to the proposition that government could promote religion in general.

304. This assumes the other twelve percent of "nothing in particular" and two percent of agnostics do not have much of a dog in this fight, which may not be entirely accurate but will be assumed for purposes of argument.

305. *See infra* text accompanying notes 352–53.

306. *Id.*

Hence, in the Roberts Court's first Establishment Clause decision, *Hein v. Freedom From Religion Foundation*,[307] federal taxpayer plaintiffs challenged certain spending by the Executive Branch to fund conferences and speeches at which President George W. Bush and other executive officials extolled the virtues of religious organization participation in the delivery of social and charitable services.[308] To allege the requisite Article III standing to maintain the action, the plaintiffs relied on the Warren Court decision of *Flast v. Cohen*,[309] which created an exception to the general rule that taxpayers complaining about unconstitutional government spending do not suffer sufficient individualized harm to invoke the federal judicial power. In other words, the general rule was that unconstitutional conduct that created generalized harm was a political issue to be addressed at the ballot box and not a judicial matter that traditionally focused on redressing harm to an individual's legal rights.[310] Although the precise basis and scope of the exception was not entirely clear from the *Flast* opinion, the Court held that taxpayers could mount an Establishment Clause challenge to alleged uses of Congress' taxing-and-spending powers to support religious causes.[311] Probably the best justification for the exception, which subsequent Courts never extended beyond Establishment Clause challenges, was that compelled taxing and spending to support officially favored religions in opposition to the religious consciences of dissenters was at the heart of what that clause was all about—at least with respect to taxing and spending by the newly-created federal government.[312]

However, in *Hein*, a deeply fractured Court ruled 5–4 that the federal taxpayer plaintiffs lacked standing to maintain their Establishment Clause challenge on the grounds that the allegedly illegal spending had been done by the Executive Branch rather than Congress, and the lead plurality opinion limited the *Flast* exception to taxing and spending by the latter branch.[313] The thrust of the plurality's reasoning was that it would constitute too much of an intrusion on separation of powers principles for the judiciary to monitor all the various discretionary spending by the Executive Branch that might be challenged as violating the Establishment Clause and that such monitoring of direct acts of taxing and spending by Congress was all that such principles would tolerate.[314]

307. 551 U.S. 587 (2007).

308. *Id.* at 592–96.

309. 392 U.S. 83 (1968).

310. *Hein*, 551 U.S. at 602–04.

311. *Flast*, 392 U.S. at 88, 100–01, 103–06.

312. *Id.* at 103 ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.").

313. *Hein*, 551 U.S. at 592–93, 603–04. Justice Alito's plurality opinion split the difference between Justice Scalia's concurrence in the judgment, which argued for a complete overturning of *Flast*, and the dissent, which argued for both the upholding of *Flast* and for the finding of standing in *Hein*. *See id.* at 615 (Alito, J., plurality opinion); *id.* at 641–43 (Souter, J., dissenting).

314. *Id.* at 609–12 (Alito, J., plurality opinion).

In the Roberts Court's most recent decision on financial aid programs challenged on Establishment Clause grounds, *Arizona Christian School Tuition Organization v. Winn*,[315] it once again declined to reach the merits and ruled that the state-taxpayer plaintiffs lacked standing to bring the action.[316] There, the Arizona legislature had passed a law allowing state taxpayers to take a tax credit for amounts donated to so-called scholarship tuition organizations that would then provide scholarships to private schools, including religious schools.[317] Justice Kennedy, writing for a 5–4 majority, wrote that even though the tax credits were taken against taxes otherwise assessed by the legislature and payable to the state treasury, *Flast* did not apply to provide taxpayer standing.[318] Although the majority's reasoning was not entirely clear, Justice Kennedy appeared to argue that *Flast* did not apply because the legislature had not extracted taxes that were then spent for religious purposes—instead, the legislature had "decline[d] to impose a tax" and had not spent taxpayer money.[319] As the dissenters argued vigorously, however, this reasoning ignored the fact that the Arizona legislature had indeed imposed general taxes from which the credits were being taken and that the tax credits effectively amounted to Arizona telling its taxpayers that they could spend for other purposes monies that were legally due and payable to the state.[320]

Hence, in *Hein* and *Winn*, the Roberts Court substantially narrowed the grounds upon which government spending to support religious causes or organizations can be challenged—at least in federal courts. Under those cases, general-taxpayer standing will not suffice unless Congress or a state legislature appropriates funds from tax revenues and directs that they be spent for religious purposes. As the dissenters in *Winn* complained, these decisions essentially created a "roadmap" for increased governmental aid to religious organizations or causes—through Executive Branch spending or by acts of the legislature providing taxpayers with means to direct such aid through devices such as tax credits or tax deductions.[321]

As the *Winn* majority noted, however, taxpayer standing is not the only way to challenge alleged Establishment Clause violations if a person can allege a direct and personalized injury from it—such as a person in the *Winn* scenario, claiming that the tuition aid flowing to private religious schools had reduced the amount of public funding that would otherwise have been directed to her particular public school.[322] Moreover, although not mentioned by the Court, presumably Establishment Clause,

315. 563 U.S. 125 (2011).
316. *Id.* at 142–44.
317. *Id.* at 130–31.
318. *Id.* at 144–46.
319. *Id.* at 136.
320. *Id.* at 159–68 (Kagan, J., dissenting).
321. *Id.* at 168.
322. *Id.* at 137 (majority opinion).

religious-spending challenges can continue to be maintained in state courts, provided their particular jurisdictional rules permit. But given the high number of Establishment Clause challenges that have historically been brought by taxpayers in federal courts, as detailed by the majority in *Winn* (in the course of explaining, somewhat dubiously, that the Court had simply overlooked standing problems in those earlier cases when it decided them on their merits),[323] it seems likely that *Hein* and *Winn* will result in a higher amount of unchallenged governmental aid to religion than even the Rehnquist Court had made possible with its relaxed constraints in this area. The implications of this development on the various conceptions of anti-establishment liberty will be discussed below.

In the area of government sponsorship of religious expression, the Roberts Court has decided three cases, but only in one did the Court issue a majority holding on the merits of an Establishment Clause claim.[324] That decision, *Town of Greece v. Galloway*,[325] concerned the constitutionality of opening town council meetings with the delivery of mostly sectarian Christian prayers by pastors chosen in a purportedly faith-neutral fashion (by going through the local phone book and calling religious organizations in the order they were listed).[326] In a 5–4 majority opinion authored by Justice Kennedy, the Court upheld the town's practice under both the *Marsh* historical-practice and anti-coercion principles.[327] As to history, Kennedy rejected the main argument that legislative prayer had to be nonsectarian, or at least generically monotheistic, in order to be constitutional.[328] In doing so, he relied on a historical practice of legislative sectarian prayer, the difficulty of defining nonsectarian content, the constitutional problems inherent in the government dictating the contents of prayer, and similar problems inherent in the government dictating the faiths that had to be invited or that the town had to go beyond its borders to find a more diverse array of faiths.[329] Kennedy, did, however, caution that the content of prayers had to be designed "to lend gravity to the occasion and reflect values long part of the Nation's heritage" and could not reflect "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose . . . ."[330]

Justice Kennedy also rejected the argument that prayer in the town council setting is more coercive than in less intimate congressional or state legislative sessions because people show up to seek official action, unlike in larger legislative settings that consist mainly of internal deliber-

323. *Id.* at 144–45 ("[T]hose cases do not mention standing and so are not contrary to the conclusion reached here. When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

324. *See infra* text accompanying notes 323–51.

325. 134 S. Ct. 1811 (2014).

326. *Id.* at 1815–18.

327. *Id.* at 1821–22, 1826–27.

328. *Id.* at 1825–27.

329. *Id.*

330. *Id.* at 1823–24.

ations about law and policy making.[331] He reasoned that town council opening prayers are generally ceremonial in nature, directed at council members themselves, and ordinarily would not dissuade adult citizens from participating against their wills even if they felt offense at them.[332] "Offense," asserted Kennedy, "does not equate to coercion"—seemingly rejecting the endorsement test which the Court often justified on the grounds that non-adherents not be made to feel like political outsiders.[333] But, Kennedy cautioned, the coercive nature of such prayers was a "fact-sensitive" inquiry and "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[334]

In the coercion part of his opinion, Kennedy wrote solely for a plurality of three justices since Justices Thomas and Scalia separately concurred in the judgment on the basis of their *Lee* dissent that the required coercion should be legal compulsion and not psychological pressure—a situation clearly not present in town council prayer settings.[335] Not surprisingly, the four more liberal members of the Court did not agree that sectarian-dominated prayers in such meetings were justified by the country's history or that they were non-coercive.[336]

In *Galloway*, then, the more conservative members of the Roberts Court arguably extended the Rehnquist Court bequest in the area of government sponsored prayer in several significant ways. First, the majority appeared to broaden the *Marsh* historical-practice exception to the *Lemon* neutrality principle beyond legislative prayer by declaring that *Marsh* stood "for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[337] Second, as the majority itself acknowledged, after *Marsh*, the Court made statements indicating that it understood that case to approve nonsectarian legislative prayer only.[338] In *Galloway*, the Court dispensed with this understanding, essentially permitting highly sectarian prayers to be delivered in "historically-approved" settings with their content being determined by the sectarian constituency of the surrounding community.[339] In other words, provided the government were to maintain a facially neutral access policy with respect to such prayers (similar to the financial-aid cases), certain sects could enjoy the disparate benefit of having their particular invocations

331. *Id.* at 1824–28.
332. *Id.* at 1827–28.
333. *Id.* at 1826.
334. *Id.*
335. *Id.* at 1835–38 (Thomas, J., concurring in part and concurring in the judgment).
336. *Id.* at 1841–54 (Kagan, J., dissenting).
337. *Id.* at 1819 (majority opinion).
338. *Id.* at 1821 (quoting Allegheny v. ACLU, 492 U.S. 573, 603 (1989) (quoting Marsh v. Chambers, 463 U.S. 783, 793 n.14 (1983))) ("The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'").
339. *Id.* at 1823.

delivered with the greatest frequency simply by virtue of their dominant numbers in the local community.

Moreover, with the replacement of the moderate Justice O'Connor by the more conservative Justice Samuel Alito, the *Galloway* Court for the first time produced a majority of justices applying the anti-coercion principle to uphold government-sponsored prayer practices.[340] Although the Court did not have to jettison the *Lemon* neutrality principle because of the presence of the *Marsh* historical practice exception, the opinion did appear to move the Court in that direction for future cases which might lack a *Marsh* rationale.[341] In particular, and as noted, both the plurality and concurring opinions on the coercion issue were clear that personal offense at government-sponsored prayer was not sufficient to make it unconstitutional, a point those justices will likely use in future cases to reject the endorsement-test version of *Lemon* neutrality with its focus on the feelings of a reasonable observer as to his or her inclusion in the political community.[342]

In addition to *Galloway*, the Roberts Court has dealt with two other religious-expression cases that implicated the Establishment Clause but did not produce a majority holding. At issue in *Salazar v. Buono*[343] was the constitutionality of a congressional act that transferred a small parcel of a national park displaying a large crucifix honoring war veterans to a private organization in order to avoid Establishment Clause problems.[344] Writing for a plurality of three justices, Justice Kennedy essentially ruled that the lower courts gave too little consideration of the secular purpose of the crucifix to honor deceased soldiers when they enjoined the land transfer as an illicit attempt to avoid their finding that the memorial unconstitutionally endorsed religion—suggesting that the memorial may very well have been constitutional even had there been no land transfer.[345] Justices Scalia and Thomas concurred in the judgment on the grounds that the plaintiff lacked standing to challenge the display,[346] while the four more liberal members of the Court filed various dissents (most of them expressing the view that an Establishment Clause violation existed even with the land transfer).[347] As Kennedy noted in his plurality opinion, the *Buono* case did not present an occasion for the Court to address the proper test for evaluating the memorial's constitutionality because it had been litigated as an endorsement-test matter.[348]

340. *See id.* at 1826–27.

341. *See id.* at 1821 ("The Court [in *County of Allegheny*] sought to . . . recast[] *Marsh* to permit only prayer that contained no overtly Christian references. . . . [But] *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.").

342. *See Marsh*, 463 U.S. at 798, 803.

343. 559 U.S. 700 (2010).

344. *Id.* at 705–09.

345. *Id.* at 718–22.

346. *Id.* at 729–35 (Scalia, J., concurring).

347. *Id.* at 735–60 (Stevens, J., dissenting); *id.* at 760–65 (Breyer, J., dissenting).

348. *Id.* at 711–12 (majority opinion).

Finally, in *Pleasant Grove City, Utah v. Summum*,[349] the Court faced the question of the permissibility of excluding a religious monument from a public-park display that contained a large Ten Commandments monument as part of its celebration of the town's history.[350] Although litigated as a free-speech case where the Court held that the exclusion of the plaintiff's monument was permissible since the display was not a public forum where content discrimination was barred (in effect, the government was the speaker and government speech is not subject to free speech constraints like it is when it regulates private speech),[351] Justices Scalia and Thomas concurred separately, noting the Establishment Clause issue lurking in the shadows of the litigation.[352] They opined, however, that there was no anti-establishment problem based on the secular purpose principle of the *Van Orden* decision discussed earlier.[353]

In the area of government sponsorship of religious symbols, then, *Buono* and *Summum* indicate the willingness of the current conservative majority to apply the secular-purpose exception to the *Lemon* neutrality principle liberally in religious-symbolism challenges, provided they do not outright jettison that principle in favor of a straightforward anti-coercion approach. In my view, given the right case, that majority will be likely to opt for such jettisoning rather than continuing to apply *Lemon* workarounds to implement their more religion-friendly vision of the Establishment Clause.

What, then, do the foregoing extensions of the Rehnquist Court bequest portend for the state of anti-establishment liberty in America? Clearly, if one is a proponent of the broad view of the proper scope of that liberty, requiring at the least that the government remain strictly neutral in religious matters and not favor religion even generally, none of these developments, permitting as they do a greater majoritarian say as to government promotion of religion, augur well. They are clearly moving anti-establishment liberty in the direction of the more constrained view of it embodied by the moderate view (prohibiting sectarian preferences but permitting general religious support), and in some cases towards and even beyond the narrowest view of that liberty (barring preferences for Christian or other sects, but permitting support of a monotheistic Christian God generally) by permitting *de facto* preferences for particular Christian sects.

In the financial-aid area, not only is the Roberts Court conservative majority armed with the Rehnquist Court's facial-neutrality, disparate-religious-benefit principle to uphold government aid programs, but now it also has decreased significantly the number of challenges that can even be made to them as a matter of federal court standing.[354] Theoretically,

349. 555 U.S. 460 (2009).
350. *Id.* at 464–67.
351. *Id.* at 473–81.
352. *Id.* at 482–83 (Scalia, J., concurring).
353. *Id.*
354. *See supra* text accompanying notes 303–21.

then, an aid program benefitting religious schools or other organizations need not even comply with the facial neutrality requirement (i.e., it could funnel benefits exclusively to such organizations, even on a sectarian basis) so long as it is formulated and implemented by an executive-branch official or agency rather than the legislative branch, or the legislative branch crafts the program to provide benefits passed through tax credits or deductions rather than direct spending. It is an open question whether national or local political majorities would support such targeted aid programs, but to the extent they did, they would receive a healthy measure of insulation from judicial attack.

Moreover, even where aid programs can receive judicial review, the facial-neutrality principle, as the Rehnquist Court defined it, is neutral in label only—even where non-religious entities are not likely to need or take the proffered aid, that proffer legitimizes the aid flow to religious ones likely to take it. And the resulting disparate benefit to the latter organizations can effectively end up operating as a sectarian preference depending upon the *de facto* religious demographics of the participant pool—such as Catholic schools receiving public aid in part to proselytize students who ordinarily receive instruction in Catholic faith tenets and beliefs simply because they have traditionally dominated the field of private religious education. As noted earlier, the Court has justified this rather passive judicial approach to policing such flows of aid to religious organizations largely on the theories that courts are ill-equipped to monitor shifting conditions regarding the private funneling of money in indirect-aid programs, and that in both direct-and indirect-aid programs the neutrality requirement mitigates any appearance that the government is favoring religion in general or sects in particular.[355]

As intimated, proponents of the broad view of anti-establishment liberty have likely been disheartened by these developments in financial-aid cases—including some minority faith adherents who might justifiably worry that most of this money, including their own tax dollars, is being used to support majority faith organizations simply by virtue of their dominant numbers in eligible recipient pools. Moreover, even moderate view supporters, who might otherwise cheer more aid flowing to religion in general, might be troubled by the *de facto* sectarian preferences this new jurisprudence tolerates. And even narrow-view supporters, who might not be troubled by the fact that most of this aid is likely being received by Christian organizations in a country still heavily populated by Christian adherents, still might be concerned by the fact that certain Christian sects can be disparately benefited under these approaches in ways that support the propagation of their particular belief systems.

The Roberts Court is similarly moving to the moderate view of anti-establishment liberty in the area of religious expression, as well as pushing past the narrow view in some cases. In the prayer area, the Rehnquist

355. *See supra* text accompanying notes 116–36.

Court's decisions in *Lee* and *Santa Fe*,[356] considered with the Roberts Court decision in *Galloway*,[357] suggest that the conservative majority of the present Court will jettison the *Lemon* neutrality requirement in the next case where the *Marsh* historical tradition exception is not available to decide the case on narrower grounds. Moreover, it will likely supplant that requirement with the anti-coercion test, with some members of that majority allowing for psychological in addition to legal coercion, and other members just legal coercion. This means that while government-sponsored prayer will likely remain unconstitutional in public school or other "captive audience" settings where more impressionable youths might feel compelled to participate in such exercises, in settings consisting of adult audiences, *Galloway* suggests that government-sponsored prayer will be more permissible—so long as it is not designed to coerce participation or proselytize listeners but rather serves some form of ceremonial or solemnizing purpose.[358] As to the content of such prayers, *Galloway* also suggests that they may be highly sectarian in nature given the Court's reluctance to allow government monitoring in order to keep them more generic and inclusive of many faiths. Moreover, that decision also implies that the particular prayers of a dominant local sect may predominate over a given period of time if delivered pursuant to a neutral policy of including whatever sects exist in the local community.[359]

As to sponsored religious symbols, the Rehnquist Court's decision in *County of Allegheny* where a plurality of the more conservative justices applied the anti-coercion test to the holiday displays at issue, and its decision in *Van Orden*, where a similar plurality applied the secular-purpose principle to uphold a display of the Ten Commandments, suggest now that the Roberts Court has a conservative majority commanding this field, things are about to change here as well (as *Buono* and *Summum* also suggest).[360] Either the Roberts Court will jettison the *Lemon* neutrality principle in favor of an anti-coercion analysis to assess such displays, as it will likely do in the prayer area, or it will apply the secular-purpose exception to the neutrality principle more liberally. Under either approach, the government will be permitted to sponsor religious symbols more frequently without discounting their religious significance, provided they are not designed to proselytize observers. Moreover, the *Galloway* discussion regarding the problems associated with government control over religious expression, including the faiths to be represented, suggests that majorities in various geographic locales may select highly sectarian symbols to display, such as the Christian nativity scene or crucifix, so long as their manner of presentation does not convey a governmental effort to proselytize others.[361]

356. *See supra* text accompanying notes 168–76.
357. *See supra* text accompanying notes 323–40.
358. *Id.*
359. *Id.*
360. *See supra* text accompanying notes 341–51.
361. *See supra* text accompanying notes 323–40.

Lastly, although the Roberts Court has not decided any religious-speaker-access cases to date, the Rehnquist Court decisions through *Good News Club* provide it with precedent to allow religious groups access to government facilities and funds for even the most sectarian of expression, such as worship or proselytization, so long as such use is pursuant to a facially neutral policy permitting access to all groups that meet specified use criteria (such as uses for social or civic causes pertaining to community welfare as was the case in *Good News* itself).[362] Moreover, in line with the facial-neutrality, disparate-benefit principle that has come to dominate the financial aid cases, and the application of a similar principle to allow local Christian sects to dominate legislative prayer in *Galloway*, it would seem that access by religious groups would not be problematic even if the use of government facilities or funds came to be dominated by one or more particular religious sects.

As in the area of financial aid, these developments, permitting greater majoritarian say as to whether and what types of religious expression can be sponsored by the government in the public square, must not be welcome news to proponents of a broad view of anti-establishment liberty. On the whole, they portend more numerous prayers and religious symbols being sponsored or hosted by public institutions, as well as increased use by religious groups of resources made generally available by public entities to foster social engagement. And since decisions as to whether to engage in such sponsorship or hosting will ordinarily be made by majority rule (at least through the representatives of the majority), minority proponents of the broad view (both minority faith adherents and non-religionists in general) may uniquely feel a corresponding contraction in their anti-establishment liberty.

However, if the movement towards greater majoritarian say was to stop at the moderate view model, permitting government support for religion in general but not on a sectarian basis, many minority faith adherents, at least, would likely be supportive of such a trend. After all, inclusive or generic appeals to the divine or displays including a variety of faith symbols would presumably meet the approval of many majority and minority faith adherents alike. Yet the Court's reluctance to police the content of government-sponsored religious expression once it is allowed into the public square, or the diversity of religious faiths represented, has meant a much more dramatic shift away from the broad view of anti-establishment liberty and even past the narrow view that would accept the public acknowledgment of a monotheistic God in the Judeo-Islamic tradition but frown on support that favored one Christian sect over another—be it Christian or otherwise.

While the purpose of the Town of Greece in the *Galloway* case was likely not to favor heavily sectarian Christian prayers, the operative effect of its policy did just that.[363] And the logical extension of the facial-

362. *See supra* text accompanying notes 152–55.
363. *See supra* text accompanying notes 323–40.

neutrality principle—demanding neutrality towards different faiths in government purpose but permitting anything but in effect—meant that if that town were dominated by, say, Greek Orthodox churches, then prayers in that specific tradition could dominate the invocations of its town council meetings. Although the Presbyterian, Catholic, Jewish, Muslim, or Hindu resident of Greece, for instance, might have on occasion had their shot at delivering their specific invocation, over time they would likely be listening primarily to their local government meetings opened by unfamiliar (and potentially alienating) references and appeals. And such sectarian domination in the prayer field, made possible by an exclusive judicial focus on a legitimate government purpose to the exclusion of operative effect, might equally occur as the result of majoritarian choices in a given community of the religious symbols it might choose to display in its parks, or even the choices of dominant religious sects to use resources for worship or proselytization that a community might make generally available to foster social or civic engagement.

In sum, there are serious costs to anti-establishment liberty, and particularly to that of minority groups, once the Court abandons the broad view of it and opens wider the gate to majoritarian religious expression without corresponding fences to ensure minority representation. It is the potential cost of sectarian domination in a given community, a cost that might be troubling even to proponents of the narrow view of anti-establishment liberty, who would likely number among themselves the early generations of Americans who adopted the Establishment Clause and acted to free their state governments from sectarian domination.[364]

IV. CONCLUSION

This Article has demonstrated that as the leader of his Court, William Rehnquist was remarkably successful in implementing his vision of a more constrained role for the Free Exercise and Establishment Clauses, which he articulated initially in a lone dissent as an associate justice of the Court. Were he alive today, he would likely be pleased at the vibrancy of free exercise liberty that appears to be taking form as a matter of voluntary democratic choices rather than constitutional command (although certainly not all would share his pleasure). On the anti-establishment side of things, there is little doubt that he would also be pleased at the apparent course of the conservative majority of the Roberts Court to continue his fight to displace the *Lemon* neutrality requirement with a standard permitting increased government support for religion in general, and perhaps even for Western monotheism in par-

364. Indeed, as noted, while many in those early generations would likely have held an even narrower view of anti-establishment liberty than its modern proponents, *see supra* text accompanying notes 285–85, they shared a general disapproval of sectarian favoritism at least among Christian sects.

ticular—a view of anti-establishment liberty that he certainly believed conformed more accurately to the view of the founding generation.

Yet where a disconnect between Rehnquist's views and that generation might be occurring is in the Court's refusal to permit government monitoring and control over the majoritarian sectarian dominance that is developing as a practical result of opening the gates to government approval, at least in purpose, of religion in general on a facially neutral basis. As to this trend, and the operative sectarian preferences that naturally occur under such a scheme in a democracy defined by majoritarian rule, a generally anti-sectarian founding generation—first with respect to the federal government, and shortly thereafter as to remaining state establishments—may not have been so enthusiastic.