PROTECTING RELIGIOUS FREEDOM:
TWO COUNTERINTUITIVE DIALECTICS
IN U.S. FREE EXERCISE JURISPRUDENCE

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SYLLABUS

In this paper, Professor Scharffs addresses two important dialectics regarding freedom of religion in the United States. The first is the dialectic between freedom and equality in interpreting the meaning of free exercise. The second is the dialectic between courts and legislatures in the protection of religious freedom. While the United States Supreme Court has increasingly come to view free exercise of religion as an equalitarian principle, legislatures have emphasized freedom, with the unexpected result that it is the majoritian institutions that have been more committed to protecting the rights of religious minorities than courts have been, a complete reversal of normal expectations concerning the institutional inclinations of legislatures and courts, as well as the traditional rational for judicial review. Professor Scharffs queries what, if any, light this may shed on the current debate in Australia about the merits of an Australian Bill (or Charter) of Rights.

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I. INTRODUCTION

I will focus my remarks today on what is usually described in the United States as the problem of religious exemptions. Imagine that you have religious reasons for resisting the requirements of a state or federal law. Perhaps you are a conscientious objector to military service, having religious (or philosophical) grounds against taking up arms. Perhaps you are a member of a church that uses peyote or other banned substances in your sacramental rituals. Perhaps you seek an exemption from having to work on Saturday, your Sabbath. How does – and how should -- the law go about determining whether or not you are entitled to an exemption from generally applicable laws?

From the perspective of equality, an exemption may not be warranted, if the law treats everyone the same, with perhaps the additional requirement that the law, even though it appears general and neutral on its face, was written to specifically target a particular set of unpopular religious beliefs. From the perspective of liberty, an exemption might be warranted, as long as the burdens on religious exercise are real and the burdens on the state for accommodating the religious exemption are not unduly onerous. The problems of balancing the individual's interest in an exemption against the state's interest in enforcing its laws may be difficult, but this is a type of analysis with which the law is familiar and adept.

Thus, one important question will be whether we see the question of exemptions as presenting a problem that should be viewed primarily through the prism of equality, or through the prism of freedom. In most situations, freedom and equality will both be present as values a court will acknowledge, but it may be that one of these values takes precedence.

II. CONCEPTUALIZING THE FREEDOM-EQUALITY DIALECTIC

There are a variety of ways that we can conceptualize the tension that arises between freedom and equality when examining a request for a religious exemption. One common way of conceptualizing the problem is that we are balancing values.

[Graphic of scales]

We could say that freedom and equality should be afforded equal weight, with one consideration to be balanced against the other.

[Image of scales with equality and freedom weighted on either side.]

On this way of looking at the problem, it is one of correctly balancing the requirements of freedom, which might weigh in one direction, with the requirements of equality, which might weigh in another direction. But sometimes when we are dealing with multiple values the task is not simply one of balancing, since the values may be incommensurable – that is to say they cannot be traded back in forth in terms of some common denominator of value. It is also difficult to balance a specific individualized minority interest in an exemption (which although important to the individual may be quite small on a

societal scale) against a general societal interest in enforcing the laws (which at a high degree of generality always looks very large).

An alternative metaphor would conceive of freedom and equality as different lenses through which we might view a problem.

[graphic of eye glasses]

Here, we could alternate between seeing a problem as one primarily involving freedom and viewing it as something primarily involving equality. This can be useful, and can help us develop empathy for the various interests at stake, but it is not particularly helpful in helping us prioritize when each approach suggests a different outcome. Also, as we all know, it can be disorienting to look thorugh glasses with different magnificantions in the different lenses, or when the lenses are different colors.

This metaphor does illustrate the commonplace truth that often how things look will depend upon the lens through which we view an issue. When we view a problem through the lens of equality it may look one way, whereas when we view it through the lens of freedom it may look quite different.

When we look through an equalitarian lens, we may view an issue in terms of neutrality, nondiscrimination, and equal treatment. These are important baseline values. A legal system that promotes or tolerates discrimination, which treats people differently based upon their religious status – whether in education, legal status, family law such as adoption and inheritance, in economic and professional opportunities, or most egregiously in overt religious persecution – violates the basic baseline requirements of equal treatment. Many religious freedom problems, especially egregious problems such as discrimination or more extreme types of hostility or violence towards religious or other minorities are really problems of equality.

But even when baseline equality exists, when we look at problems through a lens of freedom, we may be more attuned to the special needs of religious groups, especially those who find themselves as minorities in a particular legal system. From the perspective of freedom, sometimes special treatment or accommodation is needed in order for religious liberty to be possible. Whereas an equalitarian perspective may look suspiciously upon religious exemptions from general and neutral laws, when a situation is viewed through a lens of freedom we may be much more sensitive to the need to accommodate and make space for religious beliefs and actions that depart from majoritarian norms.

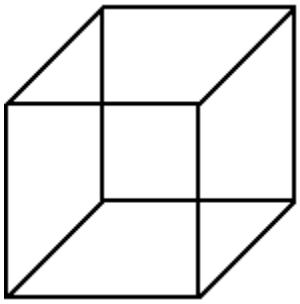
Sometimes it can be difficult to shift perspectives between freedom and equality. But it can be disorienting to look through glasses with different magnificantions in the different lenses, or when the lenses are different colors. We might compare the difficulty to the experience of shifting perspectives when wearing bifocal (or as my ophthalmologist kindly termed them when I turned 40, “progressive”) lenses.

[Image of bifocals with freedom in the top half and
equality in the bottom half of each lens
with discrete horizontal line.]

Each part of bifocal glasses are used for a specific purpose, either viewing things at a distance, or viewing things up close. At first it can be somewhat disorienting to try to shift perspectives between the two different magnifications.

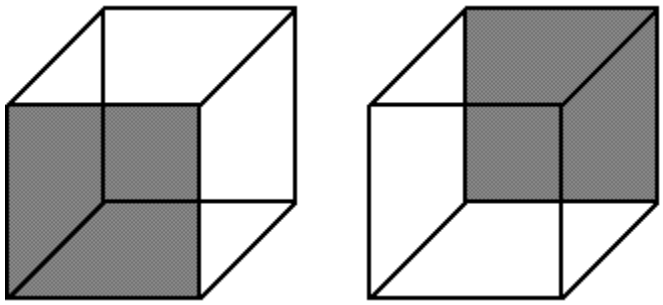
When looking at issues at the intersection of law and religion, usually concerns of both freedom and equality are present and bear upon our analysis, although often one of these values is in the foreground and the other lies in the background of our thinking.

One way that Professor Cole Durham and I have previously tried to illustrate the way in which our perspective of what belongs in the foreground and what is in the background may shift is illustrated by drawing analogy to the "Necker Cube," an optical illusion first published in 1832 by Louis Albert Necker, a Swiss crystallographer.[2]



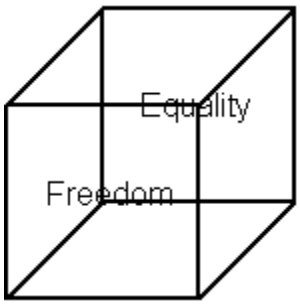
The shifting ways that the Necker Cube is perceived represents in an oversimplified way the notion of a paradigm shift I'm trying to describe. To some viewers, the square at the bottom left of the Necker Cube will naturally appear in the forefront, whereas to other viewers, the square at the top right will appear to be the front face of the cube. Shading different faces of the cube, as shown below, makes it easier to see the alternatives.

[2] "The Necker Cube is an ambiguous line drawing . . . [that] can be interpreted two different ways. When a person stares at the picture, it will often seem to flip back and forth between the two valid interpretations (so-called multistable perception). The effect is interesting because each part of the picture is ambiguous by itself, yet the human visual system picks an interpretation of each part that makes the whole consistent. . . . Most people see the lower-left face as being in front most of the time. This is possibly because people view objects from above, with the top side visible, far more often than from below, with the bottom visible, so the brain 'prefers' the interpretation that the cube is viewed from above." Wikipedia, *Necker Cube*, (last modified 13 March 2005), *at* http://en.wikipedia.org/wiki/Necker_cube .



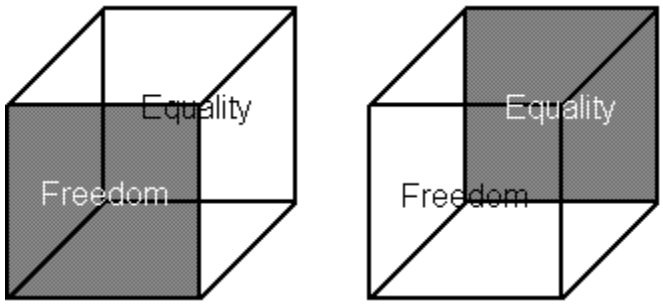
One needs an adroit ability to shift perspectives in order to move easily back and forth between the two ways of viewing the cube.

Although the phenomena involved in perceiving legal issues or relationships will be much more complex, something similar happens when we see things in a way that places either freedom or equality in the front or dominant position on the cube. Imagine that the words “freedom” and “equality” are each written on the face of one of the squares that make up the front and back of the cube.



From one perspective, freedom is in front and equality is on the back side of the cube, whereas from another perspective, equality is in front and freedom is in the background.

It is easier to see this shift when one of the square planes is highlighted and one value, freedom or equality, is thrust to the forefront, and the other value is pushed to the background. Indeed, one value could receive such heavy shading that the other value is largely obscured from view.



When thinking about an issue involving law and religion, one important question is whether the problem is one primarily involving an issue of equality or an issue of freedom. The approach we take to solving the problem will vary significantly based upon what kind of problem we understand it to be.

Another way of imagining (or imaging) how one of these values can be viewed as dominant and the other as secondary or distant is to think of a long road disappearing towards the horizon. One of these values might appear quite large, like a car in the foreground, while the other value might appear quite small, like a car at a distance.

[Image of a road extending to a distant horizon
with freedom in the foreground and equality
in the background and vice versa.]

Both cars (or values) may in fact be the same size, but our perspective may make one appear larger and the other smaller. One value may be held so close that it dominates our entire field of vision, while the other may recede to what artists call the vanishing point, where the road meets the distant horizon.

III. Freedom and Equality in U.S. Establishment Clause and Free Exercise Jurisprudence

Since the end of World War II, the U.S. Supreme Court has decided over a hundred cases directly interpreting the religion clauses of the First Amendment, and thousands of cases have been decided by other federal and state courts.

To a large extent the history of Free Exercise and Establishment Clause jurisprudence can be seen as a struggle for dominance between an approach that emphasizes freedom as the predominant value and an approach that emphasizes equality as the more important value.

One popular way of viewing the two religion clauses in the First Amendment of the U.S. Constitution is to see the Establishment Clause as providing for equal treatment among different religions and between

that which is religious and not religious,[3] whereas the Free Exercise Clause is designed to promote freedom for religion. An alternative reading urges that the clauses must be read together as essential one provision the purpose of which is to protect religious liberty. For example, The Williamsburg Charter, an ecumenical declaration signed by numerous religious, legal and political leaders, states that "the clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the Establishment Clause is prohibition of state sponsorship of religion and at the heart of Free Exercise Clause is the prohibition of state interference with religious liberty."

A. The Move From Freedom to Equality in Establishment Clause Jurisprudence

In the past twenty years, equality has trumped freedom as the predominant value in the Supreme Court's interpretation of the Establishment Clause.

1. Freedom as the Dominant Interpretive Principle

The Establishment Clause, which might more accurately be referred to as the "non-establishment clause," has experienced profound shifts in meaning over the course of its history. When initially adopted, it was part of the general compromise that endowed the federal government with certain limited powers, and retained most power for the states.[4] In this setting, the First Amendment's pronouncement that "*Congress* shall make no law respecting an establishment of religion,"[5] was designed to make it clear that the federal government was not authorized to meddle with established Churches that continued to exist in several of the states.[6]

Originally, the non-establishment principle was conceived fundamentally as a limitation on public power. It was designed to promote liberty by preventing the growth of the governmental institutions that had posed the greatest hazard to religious freedom in the past. Following the demise of established churches, the idea of non-establishment was eventually rooted in the constitutions of the various states. Indeed, the idea has become so deeply entrenched that it comes as a surprise to most Americans to learn that the Establishment Clause was originally designed to protect state establishments.

In the founding era, the "establishment of religion" was understood to "refer to a church which the government funded and controlled and in which it used its coercive power to encourage participation,

[3] The Supreme Court has often stated that the Establishment Clause forbids laws "which aid one religion, aid all religions, or prefer one religion over another." See e.g., Everson v. Board of Education, 330 U.S. 1, 15 (1947); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.").

[4] STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-34(Oxford University Press, 1995); U.S. Const. amend. X.

[5] U.S. Const., amend. I.

[6] For an account of the history of disestablishment between the time of the adoption of the First Amendment in 1791 and the demise of the last established church in Massachusetts in 1833, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic,* 2004 BYU L. REV. 1385.

like the Anglican Church in England or the Roman Catholic Church in southern Europe."[7] Historians note that there were three primary concerns that drove the adoption of the Establishment Clause. First, there was concern about the church exercising the coercive power of government, including the power to enforce criminal laws that reflected the church's denominational and moral requirements.[8] Second, early Americans worried about direct financial support of the church in aid of its worship, rituals, and other denominational activities, through general tax revenue.[9] Third, they were also concerned with control by the state over the church, particularly in its definition of doctrine and selection of leaders.[10]

Concern for the freedom, or autonomy, of both churches and of the state is at the heart of each of these concerns.[11] Early Establishment Clause jurisprudence was in large measure an attempt to work out the contours of these freedom interests. The dominant ideal became "separation of church and state." Indeed, even today the typical American is surprised to learn that the phrase "separation of church and state" does not appear in the First Amendment.

The ideal of separation is reflected most prominently in the metaphor of a wall, which is strewn through Establishment Clause cases. The wall of separation is supposed to divide church and state into their proper spheres, with as little interaction, interference and overlap as possible.[12] The "wall of separation" metaphor is usually traced to Thomas Jefferson, who used the phrase in a letter to the Danbury Baptist Association that he wrote when he was President.[13] But it can also be found in the writings of Roger Williams, the founder of Rhode Island.[14] Jefferson and Williams represent two major strands in the American separationist tradition.[15] Williams, who lived a century earlier, urged separation primarily to

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[7] Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1091 (2002) (citing THOMAS J. CURRY, FAREWELL TO CHRISTENDOM 16, 37, 109 (2001)); *see also* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 191-92 (1986).

[8] *Id.* at 1098

[9] *Id.*

[10] *Id.*

[11] Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. REV. 1217.

[12] Separationists argue that 'the original purpose of the establishment clause was to create an absolute separation of the spheres of civil authority and religious activity by forbidding all forms of government assistance or support for religion." DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 47-48 (1991)

[13] *See* Thomas Jefferson, The Life and Selected Writings of Thomas Jefferson 332 (Adrienne Koch & William A. Peden eds., 1944). For commentary on Jefferson's "wall of separation," *see, e.g.*, Daniel L. Dreisbach & John D. Whaley, What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor, 16 Const. Comment. 627 (1999); Stephen J. Safranek, Can Science Guide Legal Argument? The Role of Metaphor in Constitutional Cases, 25 Loy. U. Chi. L.J. 357 (1994).

[14] Roger Williams was concerned about protecting the garden of religion from the wilderness of the world. Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered, quoted in M. HOWE, THE GARDEN IN THE WILDERNESS 5-6 (1965).

[15] These two broad streams have long represented major positions in American thought. Other sources of support for the separation principle come from (1) groups who fear assimilation or simply being submerged in the dominant culture; (2) those committed to equalitarian pluralism or multiculturalism; and (3) committed secularizers for whom secularism represents a political ideal that should be implemented as an end in itself. These

protect religion from the risks of corruption, apathy and distortion of mission that flow from the religious quest for state power. He wanted to protect the garden of the church from the wilderness of the state.[16] Jefferson, in contrast, was much more a figure of the French Enlightenment, and was concerned to protect the state from control by the forces of organized and often unenlightened religion. Significantly, freedom is a primary focus for both of these early strands of separationist thought. Separation is not an end in itself, but an institutional means of protecting religion and the state from each other in the interest of promoting freedom.

2. *Everson v. Board of Education*: Freedom and Equality as Competing Visions of Establishment Clause

While the Establishment Clause dates back to the earliest days of the American republic, most of the case law under the Establishment Clause has been decided since 1947, when the Supreme Court handed down *Everson v. Board of Education*[17] and held for the first time that the federal Establishment Clause was applicable to the states.[18] The competition between the freedom and equality paradigms that has occupied much of the subsequent Establishment Clause litigation is already prefigured in *Everson.* The question in that case was whether a school board could subsidize school bus transportation for children attending private religious schools.

After quoting the religion clauses, the Court began its analysis by stating, "These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and their posterity."[19] Liberty, or freedom, is clearly the analytical starting point. The Court continues, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[20] The Court states, "No tax in any amount, large or small, may be levied to support any religious activities or institutions, whatever they may be called."[21] Indeed, the Court insists, the wall of separation "must be kept high and impregnable. We could not approve the slightest breach."[22] This strong separationist language emphasized the importance of freedom and independence of church and state, and the Court appeared ready to apply the principle of strict separation to strike down the county reimbursement program.

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various streams intermingle, invoke each other's arguments, and often have rather different positions on how the boundaries between religion and state should be structured.

[16] *Id*.

[17] 330 U.S. 1 (1947).

[18] *Id.* at 16. This is spoken of in technical jargon as "incorporation" of the Establishment Clause into the right to substantive due process under the fourteenth amendment of the U.S. Constitution. Following several scholars, Justice Thomas contends that the text and history of the Establishment Clause argue against the theory of its "incorporation" against the states, Van Orden v. :Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 46 (2004) (Thomas, J., concurring in the judgment); Zelman v. Simmons-Harris, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring), but his resistance to this constitutional *fait accompli* has not found supporters among other members of the Supreme Court.

[19] *Id.* at 8.

[20] *Id.* at 16.

[21] *Id.*

[22] *Id.* at 18.

But instead, the Court changed direction and turned its attention to the equality principle, noting that this was a "general program" that reimbursed the parents of all children, "regardless of their religion."[23] The Court stated that it "must be careful . . . that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief."[24] The Court likened the reimbursement program to the provision of general government services such as police and fire protection, and concluded that if the parents of children who attended religious schools were excluded, the program would not be neutral.[25] The Court concluded that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[26]

In permitting the reimbursement program, the Court shifted emphasis from a freedom principle, emphasizing separation, which would seem to render the program unconstitutional, to an equality principle, which allowed the program because it is general and neutral. The dissenting opinion complained that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[27] Thus, in *Everson* we see side-by-side an early articulation of both the freedom paradigm and the equality paradigm that become and remain the primary competing principles in Establishment Clause jurisprudence.[28]

In the quarter century following *Everson*, Establishment Clause cases were largely about determining how high and impregnable the wall of separation of church and state was required to be. The Court held that "release time" religion courses were impermissible if held on public school premises,[29] but could be allowed if held "off-site."[30] A firestorm of public controversy was unleashed in the early 1960's by decisions that held school prayer[31] and Bible reading[32] to be unconstitutional. In 1970, however, the

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[23] *Id.*

[24] *Id.* at 16.

[25] "[P]arents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18.

[26] *Id.* at 18.

[27] Justice Jackson continues, "[t]he case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent," – consented.'" *Id.*

[28] One can see in *Everson* the beginnings of a rather different "positive freedom" approach. That is, the argument would be that by providing funding for bus transportation, the state was facilitating the exercise of religious freedom by those who wished to opt for religious education. This type of argument, while often evident in cooperationist regimes such as Germany and many other European and Latin American countries, has never taken hold in American constitutional analysis. This is partially because of the no-aid logic of traditional Establishment Clause analysis, and partially because of deeper skepticism about whether expanding state power is the best strategy for expanding individual liberty. In general, this has meant that the equality paradigm rather than positive freedom afforded the most effective arguments for allowing minimal flows of cooperation.

[29] McCollum v. Board of Education, 333 U.S. 203 (1948).

[30] Zorach v. Clauson, 343 U.S. 306 (1952).

[31] Engel v. Vitale, 370 U.S. 421 (1962).

Court held that the wall was not so high as to invalidate the deeply entrenched practices of allowing tax deductions and tax exemptions for religious organizations.[33]

3. Separation and the *Lemon* Test

The Supreme Court wove the holdings of these cases together in the 1971 case *Lemon v. Kurtzman*[34] to formulate what has become known as the three-prong *Lemon* test for evaluating Establishment Clause violations. Under this test, in order to withstand Establishment Clause scrutiny, state action must have a secular purpose; second, it must have a primary effect that neither advances nor inhibits religion; and third, it may not create excessive entanglement between church and state.[35]

The *Lemon* test has often been criticized for its incoherence, and for the crazy-quilt pattern of results it has spawned.[36] But on reflection, this is a not-unexpected consequence of *Lemon*'s effort to fuse the freedom and equality paradigms into a single test. The anti-entanglement prong is clearly aimed at protecting freedom,[37] as is that portion of the primary effect prong that focuses on "inhibiting" religion. Primary effects that "advance" religion, on the other hand, typically have more to do with privileging some or all religions, and in this sense they typically raise equality issues (although they may of course bring greater government regulation in tow). The secular purpose prong is more ambiguous, though it is at core a requirement of state neutrality, which reflects equality concerns in the main. In short, the problem at the core of the *Lemon* test is that it papers over the tension between equality and freedom paradigms.

In the 1970's and 1980's, the *Lemon* test was utilized to reach separationist outcomes in a wide variety of cases, especially in public schools, where the Court has invalidated moments of silence,[38] prayer at extra-curricular activities, [39] graduation prayer,[40] posting of the Ten Commandments,[41] many forms of

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[32] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
[33] Walz v. Tax Commission, 397 U.S. 664 (1970).
[34] 403 U.S. 602 (1971).
[35] *Id.* at 612-13.
[36] *See, e.g.*, Wanda I. Otero-Ziegler, *The Remains of the Wall: From Everson v. Board of Education to Strout v. Albanese and Beyond*, 10 Temp. Pol. & Civ. Rights L. Rev. 207, 241 (2000); Michael W. McConnell & Richard A Posner, *An Economic Approach to Issues of Religious Freedom,* 56 U.Chi. L. Rev. 1, 25-26 (1989).
[37] Avoidance of entanglement and the corresponding protection of religious autonomy has been a key factor in several Establishment Clause cases. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)(holding that church-run schools were exempt from national law requiring schools to recognize labor unions in light of risks of excessive entanglement); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 345-46 (1987) (nonprofit religious organization allowed to engage in preferential hiring of believers in its sponsoring faith, and the exemption from employment discrimination laws that permitted this was justified on the grounds that it would "avoid the entanglement and the chill on religious expression that case-by-case determination would produce").
[38] Wallace v. Jaffree, 472 U.S. 38 (1985).
[39] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[40] Lee v. Weisman, 505 U.S. 577 (1992).
[41] Stone v. Graham, 449 U.S. 39 (1980).

government funding of private religious schools, [42] as well as to ban many displays of religious symbols on public property.[43]

4. Equality as the Dominant Interpretive Principle

a. Alternatives to the *Lemon* Test

In the years since *Lemon*, the power of the equality paradigm has become more and more evident. This has taken many forms. For example, many cases over the past quarter century have been willing to move away from strict separationist models and to allow various kinds of "accommodations" between religion and the state. Accommodationists argue that governmental aid to religious institutions is permitted as long as it is imparted in a nondiscriminatory fashion.[44] In this view, equal treatment and nondiscrimination are the primary Establishment Clause values. Accommodationists explicitly qualify or reject the wall of separation metaphor. Many of them would share Justice Jackson's view that Jefferson's "wall of separation" has become "as winding as the famous serpentine wall" he designed at the University of Virginia.[45] Dissenting in *Wallace v. Jaffree,* Chief Justice Rehnquist went further and wrote, "[t]he 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[46] Accommodation is sympathetic with a degree of interplay and cooperation between church and state. Accommodationists emphasize nondiscrimination and neutrality, values which reflect a concern for equality among religious and secular viewpoints. This position has led to a number of decisions which have accorded greater flexibility with respect to tax exemption and deduction schemes, [47] grants to higher education institutions that are not pervasively religious,[48] funding for secular tasks at

[42] Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985). As described below, the *Ball* and *Aguilar* cases were overruled in the late 1990's as part of the recent reformulation of Establishment Clause doctrine. See text accompany notes 74-79, *infra*.

[43] Stone v. Graham, 449 U.S. 39 (1980); McCreary County v. ACLU, 2005 U.S. LEXIS 5211 (2005); Van Orden v. Perry, 2005 U.S. LEXIS 5215 (2005); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lynch v. Donnelly, 465 U.S. 668 (1984)

[44] See Peter J. Weishaar, School Choice Vouchers and the Establishment Clause 58 Alb. L. Rev. 543, 545 (1994) ("The 'nonpreferential accommodationists' . . . claim that the religion clauses of the Constitution permit various forms of nonpreferential government support for religion. They argue that government may aid all religions, as long as it does not prefer one religion over another."). For a leading articulation of the accommodationist position, see Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

[45] McCollum V. Board of Education, 333 U.S. 203, 238 (1948)(Jackson, J., concurring). *But see* Committee of Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973)(Powell, J.) (rejecting the serpentine wall image and claiming that "the broad contours of our [Establishment Clause] inquiry are now well defined).

[46] 472 U.S. 38, 107 (1985) (Rehnquist, C.J., dissenting) (criticizing a decision that struck down a state statute authorizing a moment of silence in public schools).

[47] Mueller v. Allen, 463 U.S. 388 (1983)(upholding deductions for private school tuition).

[48] Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973);Tilton v. Richardson, 403 U.S. 672 (1971).

religious institutions,[49] and granting religious organizations equal access to public facilities.[50] This accommodationist impulse has helped paved the way for revision of the *Lemon* test, as will be described below.[51]

Another significant development has been the emergence of the so-called "endorsement" approach to Establishment Clause analysis. In 1984, in a concurring opinion in *Lynch v. Donnelly,*[52] Justice O'Connor suggested an alternative to the *Lemon* test, which focused on whether state action impermissibly "endorsed" religion. In *Lynch*, the Court upheld a city-owned holiday display that included a nativity scene, but also included depictions of Santa Claus, reindeer, and other Christmas figures. While the majority applied the *Lemon* test, and held that the display did not have the purpose or effect of advancing religion, Justice O'Connor applied her new test, focusing upon whether the government action, in purpose and effect, communicates a message of "endorsement or disapproval of religion."[53] An endorsement, in her view, "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[54]

In shifting the focus of enquiry to endorsement, Justice O'Connor subtly shifted the focus of the *Lemon* test from freedom to equality. The endorsement approach emphasizes the equalitarian dimension of the first two prongs of the *Lemon* test by narrowing the issue from whether there is a secular purpose and a primary effect that advances religion to the narrower question of endorsement. The latter pays more attention to issues of discrimination and lays stress on whether there is state preference for or identification with religion. Moreover, by ignoring *Lemon*'s "entanglement" prong and the "inhibits religion" half of the primary effect prong, the endorsement test jettisoned those aspects of the *Lemon* test most attuned to the freedom paradigm. The endorsement test has attracted increasing support over time, with a majority of the Court applying it in cases involving holiday season symbols[55] and prayers at high school sports events.[56] Not altogether unsurprisingly, it has seemed more relevant in religious symbol cases than in those involving financial aid in religious settings.

In general, as the Court's use of the tests it has crafted for Establishment Clause analysis has seemed uneven and unpredictable.[57] Sometimes it has ignored such tests altogether. Thus, in *Marsh v. Chambers*,[58] the court sustained legislative prayer by a paid chaplain on the grounds that the 1791

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[49] Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding state payments for costs of administrative and recordkeeping costs associated with state-required tests); Wolman v. Walter, 433 U.S. 229 (1977)(upholding state-administered tests rendered off-site for private school students).

[50] Board of Educ. v. Mergens, 496 U.S. 226 (1990)(sustaining Equal Access Act, 20 U.S.C. §§ 4071-74); Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[51] *See* text accompanying notes 74-79, *infra*.

[52] 456 U.S. 668 (1984) (O'Connor, J., concurring).

[53] *Id.* at 688.

[54] *Id*.

[55] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[56] Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).

[57] *See, e.g.*, Van Orden v. Perry, 125 S.Ct. 2854, 2860-61 (2005).

[58] 463 U.S. 783 (1983).

Congress that adopted the First Amendment engaged in the same practice. In other cases it invokes *Lemon* as if there had never been a question of its applicability. For its critics, the *Lemon* test has been a recurring nightmare: "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[59] In still other cases, the endorsement test bears the burden of analysis. Despite the zig-zag quality of the resulting case law, the general trend has been toward giving greater weight to equalitarian concerns.

b. Restructuring *Lemon*: Recent Aid Cases

In recent years, the two primary areas of controversy involving the Establishment Clause have been first, the presence of religious speech and symbols in public places, and second, government funding that indirectly benefits religious bodies. On their face, the trend in each of these areas appears to be moving in opposite directions. With respect to public religious expression, religion appears to be losing ground, as reflected in recent Supreme Court decisions prohibiting prayer before football games[60] and at graduation ceremonies,[61] a Court of Appeals decision holding that the words "under God" in the Pledge of Allegiance violate the Establishment Clause,[62] and in the recent cases involving public displays of the Ten Commandments.[63]

On the other hand, in cases involving the extent to which public funds can be used in ways that indirectly benefit religion, religion appears to be gaining ground. Whereas in earlier state aid cases decided under the *Lemon* test, aid was restricted to separable secular functions,[64] new cases began to emphasize neutrality and equal treatment between religious and non-religious uses. Thus in 1986, in *Witters v. Washington Dep't of Services for the Blind*,[65] the Supreme Court held that the Establishment Clause did not prohibit the state from providing aid to a blind student eligible for academic support just because he proposed to use this aid to study for the ministry at a Christian Bible college. A series of

[59] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993)(Scalia, J., concurring).
[60] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)
[61] Lee v. Weisman, 505 U.S. 577 (1992)
[62] Newdow v. United States Cong., 292 F.3d 597 (9th Cir., 2002). This case reached the Supreme Court in Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004), but the Supreme Court did not reach the merits of the case, holding instead that the Appellate Court's ruling had to be reversed, because the father who brought suit was not the primary custodial parent of the child supposedly offended by the pledge of allegiance practice, and he therefore lacked standing to bring the case.
[63] McCreary County v. ACLU, 2005 U.S. LEXIS 5211 (2005) (ruling unconstitutional courthouse displays of Ten Commandments on grounds that there was no legitimate secular purpose for displaying them and that the displays violated the neutrality principle); Van Orden v. Perry, 2005 U.S. LEXIS 5215 (2005) (permitting stone Ten Commandments display on grounds that the display is a passive acknowledgement of the historical role religion has played in American life and not an active endorsement of religion).
[64] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding state payments for costs of administrative and recordkeeping costs associated with state-required tests); Wolman v. Walter, 433 U.S. 229 (1977)(upholding state-administered tests in private schools).
[65] 474 U.S. 481 (1986).

further cases began chipping away at what had been an ironclad rule against direct subsidies to religious groups.[66]

This culminated in 1997 in a major revamping of the *Lemon* test. The vehicle for this revision was the case of *Agostini v. Felton.*[67] In that case, the Supreme Court reconsidered its earlier decision in *Aguilar v. Felton,*[68] which had invalidated on Establishment Clause grounds a federal aid program that involved sending public school teachers and employees into religiously affiliated schools to provide remedial instruction and other specialized secular services. The bureaucratic structures developed to respect the "wall of separation" had proven to be costly and inefficient, and the religious schools continued to have a particularly effective track record in dealing with the economically deprived students the federal program was designed to benefit. More significantly, the series of cases that found that rigid application of the "no aid" principle discriminated against religious groups had undermined some of the premises on which the *Lemon* test was based.

Accordingly, the Court, revised its approach to Establishment Clause jurisprudence by reinterpreting the secular purpose and primary effect tests, and folding "entanglement" analysis back into the primary effect test.[69] That is, in assessing a potential Establishment Clause violation, it continued to invoke the first two prongs of the *Lemon* test by assessing (1) whether the state action in question has the *purpose* of advancing or inhibiting religion (or whether, on the contrary, its purpose is secular), and (2) whether the state action has the *effect* of advancing or inhibiting religion. However, the Court concluded that the criteria for assessing impermissible effect had changed. No longer would the Court presume "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[70] Since it was this presumption that had forced the erection of a bureaucratic wall of separation in *Aguilar*, the change in criteria allowed the wall to come down.

With respect to entanglement, the Court took the position that since "the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine 'effect,'"[71] entanglement analysis could be recombined with effect analysis. Not surprisingly, since Justice O'Connor wrote the opinion for the Court, the effect of this reinterpretation of the *Lemon* test was to make it coincide much more closely with Justice O'Connor's endorsement test. Entanglement, with its freedom component is deemphasized. Individual choice remains relevant only in assuring that government aid does not have the effect of inculcating and thus advancing religion.[72] Government aid that steers choice,

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[66] *See, e.g.*, Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (federal assistance to disabled students could be used to pay for a sign language interpreter for a deaf student at a private religious high school without violating Establishment Clause); Rosenberger v. Rector of Univ. of Virginia, 515 U.S. 819 (1995) (Establishment Clause does not prohibit a state university from providing financial assistance magazine published by a Christian student group when such assistance was being provided to a wide array of student publications).
[67] 521 U.S. 203 (1997).
[68] 473 U.S. 402 (1985).
[69] *Id.* 521 U.S. at 203-235.
[70] *Id.* at 203.
[71] *Id.* at 232.
[72] *Id.* at 225-26.

through incentives or other forms of endorsement is impermissible; aid channeled to religious schools or other religious entities by voluntary choice is permissible. But freedom in this picture is overshadowed by the fundamental equalitarian step: the state may not discriminate among programs it funds merely because some are carried out by religious groups.

Agostini paved the way for a number of further decisions that appear to widen the doors open to cooperation between the state and religion. *Mitchell v. Helms*[73] applied the *Agostini* precedent to reverse the earlier Establishment Clause ban on a federal program that loaned secular instructional materials and equipment to religious schools. Then, in a landmark 2002 case, *Zelman v. Simmons-Harris*, the Court upheld a program involving vouchers from the government that parents could use to pay for their children's educations, including at religious schools.[74] In a 5-4 decision, the Court upheld the argument on the basis that religious schools were afforded treatment no less favorable than non-sectarian schools, and based on the fact that the program reflected private choice and was permissible. Like *Agostini*, *Zelman* involved unique needs in an economically distressed environment, but it appears to point to a channel through which massive public financial cooperation could be steered from government via private choice to religious institutions. Only time will tell the extent to which state legislatures will attempt to pursue this option.

Today, the question remains somewhat unsettled whether the same rationale will be applied to permit "faith based initiative" programs. But there are indicators pointing in this direction. In 2003, for example, the Seventh Circuit Court of Appeals permitted a pervasively Christian halfway house to serve as a rehabilitation center under a state prison-parole program.[75] More generally, the Supreme Court's increased concern with prevention of discrimination against religious service providers in the allocation of government support, as signaled by Justice O'Connor's reformulation of the *Lemon* test, has led to a dramatic increase in public funding of religiously affiliated organizations that provide social services. In 2004 the federal government granted 1968 grants to faith-based organizations totaling over $1.3 billion. Compared with 2003 this marks a 20% increase in grants given and a 14% increase in total spending.[76]

c. Religious Symbols

Shifting from funding to religious symbol cases, the latest decisions involve cases about displays of the Ten Commandments in public settings. These cases provide a glimpse of the structure of Establishment Clause argumentation in its latest iteration. Like the various faces of the Necker Cube, the ascendancy of one paradigm seldom means the total eclipse of another. In fact, one sees the paradigms of liberty and equality playing off against each other in judicial disagreements about contested issues.

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[73] 530 U.S. 793 (2000).

[74] Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (emphasizing neutrality in upholding vouchers that could be used at either public or private schools, including religious schools, on the grounds that this was a program of private choice under which the flow of funds to religious schools is "attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits).

[75] Freedom from Religion Foundation v. McCallum, 324 F.3d 880 (7th Cir. 2003).

[76] White House Office of Faith-Based and Community Initiatives, *Grants to Faith-Based Organizations Fiscal Year 2004*, (March 1, 2005), *at* http://www.whitehouse.gov/government/fbci/final-report.pdf.

The Supreme Court decided the cases in question in June, 2005. The cases involved public displays of the Ten Commandments from different parts of the United States. An older display from Texas was held to be permissible in *Van Orden v. Perry*.[77] In this case, involving a large stone display of the Ten Commandments on the state capitol grounds in Texas, the Court ruled 5-4 that the display did not violate the Establishment Clause, emphasizing that the display was one among many other statues and monuments in a park-like setting, that the display had been donated by a private group, and that it had been in place for over 40 years without causing controversy.[78] In contrast, in *McCreary County v. ACLU,*[79] the Court reached the opposite conclusion in another 5-4 decision, holding that Ten Commandment displays in two Kentucky courthouses violated the Establishment Clause, on the grounds that the displays had the non-neutral purpose of promoting one religious viewpoint over others.

The key difference in the two outcomes was the vote of Justice Breyer, who concurred in the respective results but not the reasoning of the respective majority opinions. Justice Breyer criticized the view espoused by the justices who thought the displays violated Establishment Clause principles according to which "neutrality" was the proper standard. He was not opposed to neutrality; he just thought it did not constitute a workable judicial standard. In his view,

> Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are insufficient, both because it is sometimes difficult to determine when a legal rule is "neutral," and because "untutored devotion to the concept of neutrality can lead to invocation or approval or results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[80]

The key factor for Justice Breyer was not an illusory or generalized ideal of neutrality, but a context-sensitive legal judgment based on a variety of factors, including assuring the fullest possible scope of religious liberty and tolerance, demonstrating secularity of purpose, and avoiding divisiveness.[81] The long undisturbed history of the Texas display helped distinguish it from the more politicized efforts to introduce new displays in Kentucky. In effect, Justice Breyer's practical and contextual approach protected countless older memorials from sandblasting or removal, but made it very difficult for newer, politically motivated memorials to survive Establishment Clause scrutiny.

While the Breyer opinion was outcome determinative, the other opinions in the two cases are more helpful in laying bare the core disagreements between different members of the Court. Thus, the anti-display plurality in *McCreary* (the dissent in *Van Orden*) emphasizes the concept of neutrality and concludes that neither the Kentucky nor the Texas displays are neutral. For example, Justice Souter

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[77] Van Orden v. Perry, 125 S.Ct. 2854 (2005)
[78] *Id.*
[79] McCreary County v. ACLU, 125 S. Ct. 2722 (2005)
[80] 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring), *quoting* Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963)).
[81] *Id.* at 2868.

begins his dissent in *Van Orden* by noting that "although the First Amendment's Religion Clauses have not been read to mandate absolute governmental neutrality toward religion, the Establishment Clause requires neutrality as a general rule. . . ."[82] Justice Souter then concludes that, "A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others."[83] Similarly, Justice Stevens concludes that the Texas monument is an endorsement of religion and is "flatly inconsistent" with "this Nation's resolute commitment to neutrality with respect to religion."[84] The paradigm of equality could not be more evident.

In contrast, the pro-display plurality opinion in *Van Orden* disclaimed the usefulness of the *Lemon* test in dealing with a passive monument,[85] and instead said that analysis should be driven by the monument's nature and the Nation's history.[86] It cited the country's 200-year history of official acknowledgement by the government of religion's role in American life, and concluded that the Texas display is typical of such acknowledgments.[87] The Court emphasized that the Texas display was no more prominent than numerous other non-religious displays.[88]

By emphasizing traditional practice, the plurality in effect identified with the older freedom paradigm approach. By emphasizing the "rich American tradition of religious acknowledgements,"[89] the plurality implicitly differentiated the Texas display from impermissible endorsement of religion, thereby opening public space for certain types of religious displays.

The freedom paradigm is even more evident in concurrences by the more conservative justices on the Court. Justice Scalia, joined by Justices Rehnquist and Thomas, argues vigorously on the basis of historical tradition that the Establishment Clause has not required strict neutrality when it comes to favoring religion over nonreligion, or traditional monotheism over other views.[90] , a requirement of "neutrality between . . . religion and nonreligion. In his view, the original meaning of "establishment" was understood "necessarily [to] involve actual legal coercion."[91] In this more conservative view, an impermissible establishment occurs only when state action coerces religious orthodoxy or practice. A display whose maximal impact was to offend those walking by would not violate the Establishment Clause as viewed through the freedom-based conceptual filter.

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[82] *Id.* at 2892.
[83] *Id.* .
[84] *Id.* at 2877.
[85] *Id.* at 2861.
[86] *Id.*
[87] *Id.* at 2861-62.
[88] *Id.* at 2862-63.
[89] *Id.* at 2863.
[90] McCreary County v. ACLU, 125 S.Ct. 2722, 2750-53 (2005) (Scalia, J., dissenting).
[91] *Id.* at 2865, *citing* Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 52 (2005) (Thomas, J., concurring in the judgment); Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

Justice O'Connor's concurring opinion is also noteworthy. In one of her last opinions before retiring from the Court, and after a career in which she often turned to principles of neutrality and endorsement in Establishment Clause cases, Justice O'Connor departed the Court with a ringing endorsement of the concepts of freedom and liberty, which in her case entailed votes against both the Texas and Kentucky Ten Commandments displays.

> The First Amendment expresses our Nation's *fundamental commitment to religious liberty* by means of two provisions – one protecting the *free exercise of religion*, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could *practice their religion freely*. Together with the other First Amendment guarantees – of *free* speech, a *free* press, and the rights to assemble and petition – the Religion Clauses were *designed to safeguard the freedom* of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: *Free people are entitled to free and diverse thoughts*, which government ought neither to constrain nor direct.
>
> Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of *preserving religious liberty* to the fullest extent possible in a pluralistic society. (emphasis added)

It may seem paradoxical that after two decades of favoring an equalitarian paradigm in analyzing Establishment Clause cases, Justice O'Connor sounded a resounding endorsement of freedom as the first principle in the interpretation of the religion clauses in her farewell Establishment Clause decision.

4. The Establishment Clause in Retrospect

Looking back over Establishment Clause developments, a few concluding points are in order. First, while the trends with respect to public religiosity and public funding of religion seem to be going in different directions, in reality both trends illustrate the ascendance of the equality paradigm. When religion is excluded from public life, it is done largely in the name of equality and neutrality, to avoid the impermissible purpose or effect of endorsing or promoting a particular religious viewpoint. Similarly, recent cases eroding the "no aid" principle have justified major flows of public funding to religious organizations through programs involving vouchers, scholarship programs, or other social service programs on the grounds that excluding religious organizations or schools would discriminate against them vis-à-vis secular service organizations, and equality forbids such discrimination.

Part of the explanation of the shifting understanding of the Establishment Clause has to do with transformation of the background institutions of state and society. In the early republic, when the scale of government institutions was small and government services were limited, baseline social expectations from government were limited. In the founding era, it was widely assumed that the best way to promote freedom was to impose sharp constraints on governmental power. As the size of the state has expanded, the benchmarks against which citizens measure equal treatment have changed. For

example, now we assume that the state will provide public education. Refusal to aid the private educational sector, which in an earlier day would have seemed completely normal, increasingly looks like discrimination against those who for reasons of conscience support the public schools through taxation and their private school through tuition. If the state provides assistance to the deaf and blind, it now appears discriminatory to preclude them from using this assistance at religious schools. Similar arguments can be made across the entire domain of faith-based initiatives. In an earlier day, a "no aid to religion" policy would have simultaneously averted state entanglement and provided equal treatment. In a world in which state supported social programs are the norm, denial of access to funding increasingly seems hostile rather than neutral.

Thus, while in the early years of the American Republic, public expressions of religious sentiment were widespread and largely uncontested as a reflection of religious freedom, and public funding of religion was one of the primary evils that the Establishment Clause was meant to prohibit, today there has been a substantial reversal. Equality has replaced freedom as the dominant interpretive value, and in the effort to treat everyone equally, the wall of separation has been significantly eroded. This is not to say that the reinterpreted Establishment Clause allows anything like the level of cooperation in the form of direct subsidies to religion that are common in Europe. But it does recognize that there has been considerable equality-driven convergence toward European models. Religious viewpoints that are not shared by everyone are often suppressed in public settings because of fears of endorsement and unequal treatment, and public funding that benefits religion is allowed on a scale that would have been unimaginable even a generation ago. Both of these trends reflect the rise of the equality paradigm.

There is some irony in these developments. Politically, one would have expected the pressure for greater equality to come from the left, since in American society, it is typically the left-leaning politicians who emphasize equalitarian arguments. Yet pressure for greater cooperation with religion has and continues to come in significant measure from the religious and political right. This is matched by political alignments on the Supreme Court. The new equalitarian arguments often come from the more conservative Justices. It is as though the right has appropriated the rhetoric of equality and turned it against the left. Though the left tends to oppose the cooperationist results, it is hard-pressed to deny the equalitarian arguments that the right has begun to deploy. This paradoxical situation is one further evidence of the ascendancy of the paradigm of equality: even those who favor the paradigm of freedom as a matter of substance find themselves invoking the paradigm of equality as a matter of argumentative strategy.

B. Freedom and Equality in U.S. Free Exercise Jurisprudence

The history of the interpretation of the meaning of the Free Exercise Clause reflects a similar move from viewing freedom as the dominant value at stake, to viewing Free Exercise in a way that emphasizes equality. If anything, the move towards an equalitarian paradigm is even more striking than in the Establishment Clause context. This is all the more remarkable because on its face the *Free* Exercise Clause announces itself as concerned with freedom. Thus, it is nothing short of remarkable, if not alarming, that the Free Exercise Clause has come to be viewed by the Supreme Court primarily as an

equality principle, protecting against overt discrimination and requiring only that laws burdening religion be "general and neutral."

1. The Early Emphasis on Freedom

The Free Exercise Clause began as essentially a limit on federal power. The Free Exercise Clause of the First Amendment to the U.S. Constitution provides that "*Congress* shall make no law . . . prohibiting the free exercise [of religion]." Originally, the emphasis was on the limits placed on Congress. For the first century and a half of its existence, the Free Exercise Clause was not even applied to the states. Initially, it was understood as a rule of law constraint, analogous to the "prescribed by law" constraint in modern limitation clauses that define the outer limits of religious freedom. The basic idea was that religious freedom was promoted by constraining federal power per se.

The Free Exercise Clause was first applied to State in 1940.[92] In the 1960's and 1970's, the Supreme Court utilized what is known as the compelling state interest test to evaluate claims for an exemption from laws that burden religious freedom. The 1963 case *Sherbert v. Verner* involved a woman who was a Seventh-Day Adventist who lost her job because she refused to work on Saturday, her Sabbath day.[93] The state denied her application for unemployment benefits on the grounds that she had refused to accept suitable work "without good cause." The Supreme Court held that denying her unemployment benefits violated the Free Exercise Clause. The Court explained that in denying the benefits the state had placed a "substantial burden" on Mrs. Sherbert's religious exercise, and had imposed on her a constitutionally impermissible decision, requiring her to choose between losing her benefits or violating a cardinal tenet of her faith. Such an imposition could be justified, the Court said, only if the state had a "compelling" or "paramount" interest and, even then, only if the state could demonstrate that there was no "alternative form of regulation" that would avoid infringing on Mrs. Sherbert's ability to exercise religious freedom. The Court ruled that the state had failed to demonstrate such a compelling state interest. This standard of review had the effect of creating a powerful presumption in favor of religious liberty, unless the government could establish a particularly strong reason for a rule that placed a burden on religion.

This strong defense of religious freedom was reinforced by the Supreme Court's 1972 decision in *Wisconsin v. Yoder,* [94] where the Supreme Court granted Amish School children an exemption based upon freedom of religion from a state law requiring compulsory education until the age of sixteen. The Court focused on whether the exemption in question was based upon religious belief or more general cultural factors and concluded that the Amish objection to compulsory education beyond the eighth grade was based upon religious belief. The Court then said that laws that impose burdens on religious

[92] The Free Exercise Clause was first applied to the States in Cantwell v. Connecticut, 310 U.S. 296 (1940), a case in which a Connecticut statute requiring a Jehovah's Witness engaged door-to-door proselytizing to obtain a state license was struck down as a violation of the Free Exercise Clause. The Court wrote, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

[93] Sherbert v. Verner, 374 U.S. 398 (1968).

[94] 406 U.S. 205 (1972).

belief must be subject to heightened scrutiny.[95] As in *Sherbert,* this was held to mean that the state had to show a compelling state interest in order to justify such burdens and, further, that the state has employed the least restrictive available means of effectuating the state interest. In *Sherbert*, the Court held that the State had not met this burden of proof, so the religious exemption was granted.

The compelling state interest test played a formidable role in protecting freedom of religion, albeit not necessarily at the level of Supreme Court adjudication. By creating a strong presumption in favor of religious freedom, it gave those claiming religious freedom rights substantial leverage in negotiating with lower level officials in various government bureaucracies who might otherwise have refused to accommodate religion in the course of carrying out their programs. Moreover, the "least restrictive means" test provided important protections for religious groups. While constitutional analysis often focuses on balancing of religious freedom rights against other weighty government interests, the focus on "alternatives" often points the way toward solutions that work for both religious groups and for the state. As a practical matter, the "least restrictive means" tests (or variations on this theme which insist on narrow tailoring of means to governmental ends) may be one of the most significant aspect of the "strict scrutiny" test and its proportionality counterparts elsewhere.

2. The Erosion of the Freedom Paradigm

Since the 1970's, constitutional developments in the United States have seen a shift from an emphasis on freedom to an emphasis on equality in Free Exercise jurisprudence.[96] While neither value has ever completely eclipsed the other, there has been a notable and, over time, dramatic shift, with equality replacing freedom as the dominant interpretive paradigm. This tendency to see things predominantly in equalitarian terms has transformed the Free Exercise Clause from a guarantor of religious liberty into a narrow principle that emphasizes neutrality and primarily guards against religious discrimination and explicit targeting of religion.

At the level of Supreme Court adjudication, the strength of religious freedom protections began to be eroded by a series of cases in the 1980's. In *United States v. Lee*,[97] the Court rejected a claim that religious beliefs exempted an Amish farmer from paying social security taxes for his employees. The Court found that the state's interest in mandatory participation was indispensable to the fiscal vitality of the system, and that this constituted an overriding interest sufficiently compelling to outweigh what the

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[95] *Id.* at 210-11.

[96] A similar shift has taken place in the Supreme Court's interpretation of the Establishment Clause, which was originally viewed as a limit on the Federal Government's ability to sponsor a state church, which protected the freedom of all churches. In early post-World War II cases through the 1970's, the dominant metaphor in Establishment Clause cases was the "wall of separation," designed to divide church and state into their proper spheres, with as little interaction, interference and overlap as possible. This separation was to serve the dual purposes of protecting the freedom interests of churches from state interference and to protect the freedom interests of the state from religious interference. This paper will focus on the Free Exercise context rather than the Establishment Clause context. For an analysis of the trend from freedom to equality in U.S. Establishment Clause jurisprudence, see W. Cole Durham, Jr. and Brett G. Scharffs, State and Religious Communities in the United States: The Tension Between Freedom and Equality, [complete cite to Japan book]

[97] 455 U.S. 252 (1982).

court recognized as a bona fide religious claim. In *Goldman v. Weinberger*,[98] the Court sustained military regulations that prohibited the wearing of headgear while indoors against a claim by an orthodox Jewish officer asserting the right to wear a yarmulke. Here, as in various prison cases,[99] the Court dealt with the unique demands of specially restricted environments. Congress reversed this regulation in short order, crafting a legislative exemption for religious apparel which was "neat and conservative" and did not "interfere with the performance of the member's military duties."[100] Another significant case rejected Native American claims that a national forest service road construction policy interfered with use of space that various Indian tribes viewed as sacred and used for religious rituals.[101] Here the unique issue was that the land was owned by the government in a proprietary capacity, and the Court believed that even though the federal policy "could have devastating effects on traditional Indian religious practices,"[102] the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires."[103]

This succession of cases showed that protection of religiously motivated conduct was never as absolute as the strong language of the compelling state interest test suggested, but the test itself nonetheless created a strong presumption in support of the freedom paradigm, which had significant effects at the level of practical governmental interaction with religious groups. Freedom remained the baseline from which analysis began.

3. Equality as the Dominant Interpretive Principle

a. General and Neutral Laws: *Employment Division v. Smith*

In 1990, in *Employment Division v Smith,*[104] the Supreme Court took a big step towards viewing free exercise jurisprudence through an equalitarian lens, jettisoning the compelling state interest test in favor of a test that defers to legislative policy except where there is intentional discrimination against religion. In short, it replaced a test designed to afford maximal protection to religious freedom with a test limited to protecting religious equality.

In *Smith*, two drug rehabilitation counselors were fired from their jobs after ingesting peyote, a hallucinogenic drug used in sacramental ceremonies of the Native American Church of which they were members. There was no doubt that the religious use in question was sincere and had a long history, but the state of Oregon denied them unemployment benefits on the basis that they had been fired for work-related misconduct, and maintained that its decision was supported by a compelling state interest.

The majority opinion, written by Justice Scalia, ignored or distinguished earlier precedent and discarded the compelling state interest test. The majority held that a law that burdens religion may override

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[98] 475 U.S. 503 (1986).
[99] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (sustaining prison policies that prevented prisoners from attending weekly Muslim service for security reasons).
[100] Pub. L. 100-180 (amending 45 U.S.C. § 774)
[101] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
[102] *Id.* at 451.
[103] *Id.* at 452.
[104] 494 U.S. 872 (1990).

religious freedom claims, so long as it is general and neutral, and does not specifically target religious belief.[105] Thus, government action that restricts religious freedom is permissible, unless there is evidence of intentional discrimination and unequal treatment against the burdened religion. In the view of the *Smith* majority, unless a law is not general or neutral, or unless it specifically targets religion, the government need not provide an exemption to a law that burden religious exercise.[106] Justice Scalia's approach views free exercise as an equality norm. If laws are general and neutral (i.e., they treat religions equally and religion and non-religion equally), and as long as the laws to not specifically target religion (i.e., treat different religions unequally), then a law survives Free Exercise scrutiny.

In her concurring opinion, Justice O'Connor pointed out that the Court could easily have decided the case without rendering such a sweeping decision. In her view, the state had a compelling state interest in combating illegal and dangerous drugs. Thus, Justice O'Connor argued, the Court could have retained the compelling interest test, and concluded that the state's interests were sufficiently compelling in the particular case to override the religious freedom claim that was being asserted. But this path was not taken.

From Justice Scalia's perspective as a judicial conservative, the motivation for the decision may have been to increase judicial deference to the legislative branch by reducing the range of circumstances in which the judiciary could carve out exemptions to protect religious freedom. In so holding, however, the Court shifted the analytical starting point in free exercise jurisprudence from freedom to equality. Rather than requiring a compelling state interest and narrow tailoring to justify burdens on religious practice, laws that burden religion are permitted if they are general and neutral. Furthermore, the version of equality selected is formal and defective. Formal equality means that all addressees of legislation are treated exactly the same. A suitable substantive conception of equality recognizes that an individual's religion is a factor justifying differential treatment where there is not a compelling reason of sufficient weight to override the religious freedom claim, or where the state's interest can be achieved in some less burdensome way.

b. Discriminatory Laws, Hybrid Rights, and Church Autonomy

The *Smith* decision left open the possibility of some narrow grounds for recognizing religious claims for an exemption from laws that negatively affect religious exercise. First, laws that are not general and neutral would still provide a basis for a free exercise claim. Second, so-called hybrid rights, free exercise claims that implicate other important Constitutional rights, including First Amendment rights such as freedom of speech or freedom of association, could still be evaluated under the compelling state interest standard. Third, the case cited positively and thus left undisturbed the set of Supreme Court cases dealing with religious autonomy.

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[105] *Id.* at 878.

[106] In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), the Supreme Court held that a city ordinance that prohibited the ritual slaughter or sacrifice of animals violated the Free Exercise Clause under the *Oregon v. Smith* standard, because although the ordinance did not specifically mention the Santeria religion, there were so many exceptions for other types of killing animals, it discriminated against the Santeria religion.

The first possibility, laws that target religion even though they appear to be general and neutral, was tested in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), a case involving a city regulation that forbade the ritual slaughter of animals. The Court concluded that these ordinances were specifically targeted at the practices of a particular religious group, Santeria, an Afro-Caribbean religion, and that they were therefore not general or neutral. Although the ordinances did not specifically mention the Santeria religion, there were exceptions for "almost all killings of animals except for religious sacrifice," including hunting, slaughter of animals for food, eradication of pests, and euthanasia. Having concluded that the ordinances were discriminatory, the Court applied "the most rigorous scrutiny" and held that the stated reasons for the ban – preventing cruelty to animals and protecting public health – were unavailing since those reasons applied to the other types of killing that were permitted under the ordinances. *Lukumi* is significant because it makes clear that even after *Employment Division v. Smith*, laws that in fact single out religiously motivated conduct are not neutral and generally applicable. Particularly where statutory schemes provide a variety of exceptions, the Court will look beyond the surface of the law to determine whether there is in fact religious discrimination, and if there is, the compelling state interest will be applied to determine whether there is a free exercise violation.

The second exception to the general and neutral law test articulated in *Smith* would apply in cases involving "hybrid" claims that combined a free exercise claim with other constitutional rights. Although the Supreme Court has yet to decide a case that explicitly relies on the "hybrid rights" theory, the Court has decided cases involving constitutional claims that implicate Free Exercise rights. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court relied upon Freedom of Association to uphold the right of the Boy Scouts to remove an assistant scoutmaster who was openly gay. The Court held that the Boy Scouts had expressly disapproved of homosexual conduct and that their ability to communicate that message would be significantly impeded if they were required to have an openly gay scoutmaster. As a practical matter, many religious groups support the Boy Scouts as part of their youth programs, but would be less likely to do so if gay leadership were required. This might be an example where hybrid rights theory would apply. In general, the hybrid rights theory has not found much traction, because either the other supporting right is sufficiently strong to be effective on its own, in which case it is redundant to assert the hybrid religious claim, or the other right is not sufficient on its own, in which case adding a religious claim probably won't help. This appears to be a case in which two half rights do not add up to a whole.

The third exception involves cases implicating the religious autonomy rights of churches. The idea of avoiding of the judiciary avoiding decisions about religious doctrine undergirds one of the main arguments for *Smith's* neutral and generally applicable rule. The Supreme Court wrote that the judiciary lacks the authority to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[107]

4. Congress's Attempt to Reassert Freedom in Free Exercise Jurisprudence

[107] 494 U.S. at 887.

The public reaction to the *Smith* case was overwhelmingly negative. A broad coalition of religious and civil liberty groups, both conservative and liberal, pressed Congress to enact a statute reinstating the compelling state interest test. Congress responded by nearly unanimously passing the Religious Freedom Restoration Act of 1993 ("RFRA").[108] RFRA provided that the government may not substantially burden one's exercise of religion, even through rules of general applicability, unless it can show that the burden furthers a "compelling governmental interest" and is "the least restrictive means" of furthering that interest.[109] RFRA sought to restore the compelling state interest standard set forth in *Sherbert* and *Yoder* in free exercise cases as a matter of legislation. The basic idea was that Congress could impose a higher "floor" on religious freedom than the Supreme Court required.

But in *Boerne v. Flores*,[110] the Supreme Court ruled that RFRA was unconstitutional, at least as applied to state and local government actions, on the grounds Congress lacked power to pass the legislation in question. It must be remembered that the Constitution grants Congress only certain enumerated powers. RFRA had been enacted on the basis of Section 5 of the Fourteenth Amendment, which empowers Congress to enact legislation designed to "enforce" Fourteenth Amendment protections of the rights to "life, liberty, and property."

Defenders of RFRA contended that the Act fell within the range of measures Congress could enact to enforce religious freedom protections, but the Court disagreed, at least to the extent that Congress was thereby imposing a level of religious freedom protection on the states that went beyond that required by the Supreme Court. In the Court's view, Section 5 of the Fourteenth Amendment gives Congress power to "enforce the provisions" of the Fourteenth Amendment "by appropriate legislation," but not to make "a substantive change in constitutional protections."[111] This upset at least the balance between federal and state power, if not that between the Court and Congress as well.

5. Post-*Boerne* Developments: Reasserting a Freedom Paradigm

Although the *Boerne* decision struck a blow for those who believe Free Exercise cases should be viewed through a prism of freedom, a number of subsequent developments have reasserted freedom as an important Free Exercise value. These responses have taken several forms, including state RFRAs, state constitutional law jurisprudence, subsequent Congressional actions, and the Application of RFRA to the federal government.

a. State RFRAs

As my colleagues Cole Durham and Bob Smith have noted, since the Supreme Court invalidated RFRA in the *Boerne* decision, no less than thirteen states have passed either statutes or state constitutional

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[108] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (2000)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 511 (1997). RFRA was adopted in the House of Representatives by unanimous vote and in the senate by a vote of 97 to 3, and President Clinton promptly signed the legislation. Peter Steinfels, Clinton Signs Law Protecting Religious Practices, N.Y. TIMES, Nov. 17, 1993, at A18.

[109] *Id.* at §3.

[110] 521 U.S. 507 (1997).

[111] *Id.* at 519.

amendments enacting so-called state RFRAs. These states are Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas.[112] These State Religious Freedom Restoration Acts re-institute the compelling state interest test for cases decided in courts of that state.[113] This represents a significant reassertion of the freedom paradigm in Free Exercise cases.

b. State Supreme Court Interpretations of State Constitutional Provisions Protecting Religious Freedom

Second, a number of state supreme courts have held that the level of protection to religious freedom under their state constitutions requires a higher level of protection from religious freedom than that afforded by the Supreme Court's interpretation of the Free Exercise Clause. Some state supreme courts have maintained the compelling state interest test under their state constitutional provisions protecting religious freedom.[114]

According to Durham and Smith, "state supreme courts have shown surprising indifference to *Smith*. To date only eight state courts – Kansas, Maryland, Mississippi, Nebraska, Nevada, New Jersey, Virginia, and Wyoming – have shown any inclination to follow *Smith*. In fact, this may actually be overstating these courts' reliance on *Smith*, as the relevant decisions from Nebraska, Nevada, Virginia and Wyoming do not turn on an interpretation of state constitutional law and thus may simply be following *Smith* in applying the federal Free Exercise Clause to matters within their jurisdictions."[115]

In contrast, at least eleven states – Alaska, Indiana, Maine, Massachusetts, Michigan, Minnesota, Montana, New York, Ohio, Washington, and Wisconsin – "have interpreted their state constitutions' free exercise clause to require strict scrutiny analysis."[116]

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[112] See W. Cole Durham, Jr. and Robert T. Smith, Free Exercise Constraints on Religious Freedom Restoration Acts: Potential Implications For Same Sex Marriage, [manuscript, at 2-3.]

[113] At least thirteen states have provided stronger protection for religious exercise either by statute or constitutional amendment. The states are: Alabama, see ALA. CONST. amend. 622; Arizona, see ARIZ. REV. STAT. ANN. §§ 41-1493 et seq. (West 2003); Connecticut, see CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, see FLA .STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, see IDAHO CODE §§ 73-401 et seq. (Supp. 2002); Illinois, see 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); Missouri, see V.A.M.S. §§ 1.302 & 1.307 (West 2004); New Mexico, see N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, see OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, 71 PA. CONS. STAT. ANN. 2401 et seq.; Rhode Island, see R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, see S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, see TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 et seq. (West 2003).

[114] Courts of at least eleven states have held that their state constitutions provide broader protection for religious exercise than the federal Smith rule. See, e.g., *Humphrey v.* Lane, 728 N.E.2d 1039 (Ohio 2000); In re Browning, 476 S.E.2d 465 (N.C. 1996); State v. Miller, 549 N.W.2d 235 (Wis. 1996); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Rourke v. N.Y. State Dep't of Corr. Servs., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), aff'd, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992); State v. Evans, 796 P.2d 178 (Kan.1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

[115] Durham and Smith, infra, at pg. 5-6 (citations omitted).

[116] Durham and Smith, infra, at 6-7.

Eighteen States – Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Iowa, Kentucky, Louisiana, New Hampshire, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, and West Virginia – "have not yet determined whether they will follow *Smith* or employ strict scrutiny to state free exercise claims. However, in many of these jurisdictions, precedents that antedate *Smith* and applied strict scrutiny are arguably still binding, though the fusion of federal and state standards in many of these cases leaves some uncertainty as to the applicable standard in a post-*Smith/Boerne* setting."[117]

Durham and Smith conclude:

> The bottom line is that only a handful of states have expressly followed *Smith*, and of those, some have done so only in cases in which no state law free exercise claims were asserted or where strict scrutiny protections were still available because of one of the *Smith* exceptions. In contrast, a total of twenty-four states have expressly rejected *Smith* and retained strict scrutiny – thirteen by statute or constitutional amendment, and eleven by judicial enactment. Pre-*Smith* precedents in many of the state that have not squarely faced the issue still point toward a strict scrutiny approach. This means that no more than 11% (32 million) of the U.S. population live in states that expressly follow *Smith*, whereas 58% (173 million) live in the 24 states that have expressly rejected *Smith*.[118]

What is remarkable is that state courts in a variety of ways have been quite resistant to the *Smith* equality paradigm, and have in large measure found mechanisms for asserting under a state law rubric a freedom paradigm that utilizes the compelling state interest test.

c. Congressional Efforts to Reassert Freedom of Religion

At the Congressional level, options have been more limited. After *Boerne* stripped Congress of its ability to invoke Section 5 power, at least to impose an across-the-board compelling state interest test that would put limits on all federal and state action, Congress has been limited to passing much more limited pieces of legislation based on specific enumerated powers. Nevertheless, Congress has been quite persistent and active in reasserting the freedom paradigm notwithstanding the Supreme Court's holdings in *Smith* and *Boerne*. There have been at least three significant Congressional efforts to increase the level of protection of religious freedom above *Smith's* requirement that laws affecting religion be general and neutral.

i. The American Indian Religious Freedom Act Amendment of 1994 (AIRFAA)

Most directly related to *Smith*, Congress passed the American Indian Religious Freedom Act Amendment of 1994 (AIRFAA), a federal law designed to make the religious use of peyote by Native American church members lawful, specifically overturning the results in *Smith*.[119] This is a post-RFRA frontal response to the Supreme Court's holding in the *Smith* case.

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[117] Durham and Smith, infra at 8-9.
[118] Durham and Smith, infra, at 9.
[119] Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2007).

ii. Religious Liberty and Charitable Donation Protection Act of 1998 (RLCDPA)

Another such action was based on federal bankruptcy power. After *Smith*, several bankruptcy courts began to interpret the federal Fraudulent Conveyances Act in a way that caused significant difficulties for religious organizations. Specifically, the Fraudulent Conveyances Act provided that bankruptcy courts could recapture transfers made to third parties without consideration during the three months prior to declaration of bankruptcy. Several courts reasoned that donations to religious organizations were made "without consideration," and began to require churches to return tithing and other religious contributions that had been made by a debtor within the statutory three month period. Congress responded by passing the Religious Liberty and Charitable Donation Act of 1998 (RLCDPA), which provides that "a transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered a transfer [in fraud of creditors]."[120]

iii. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Far more significant on a national scale was Congress' passage in 2000 of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[121] RLUIPA was passed as a direct Congressional response to the Supreme Court holding RFRA unconstitutional in *Boerne.* This was a further attempt by Congress to reinstate the compelling state interest standard, although in a narrower range of situations involving religious challenges to land use regulations such as zoning and historic preservation laws, and to regulations involving "institutionalized persons" in settings such as prisons and mental hospitals. Each of these areas have been the subject of numerous free exercise challenges, for example by churches that want to expand their buildings in the face of restrictive zoning regulations, and by prisoners who wish to engage in religious worship or receive special diets based upon religious conviction in the face of unaccommodating prison policies.

In May 2005 the Supreme Court decided *Cutter v. Wilkinson*,[122] which involved an Establishment Clause challenge to RLUIPA. A group of prisoners in Ohio sued the state, asserting that the state violated RLUIPA by failing to accommodate their religious exercise in prison. The State responded by arguing that Section 3 of RLUIPA, which reinstituted the compelling state interest standard in cases involving prisoners, violated the Establishment Clause by improperly advancing religion. In a unanimous decision, the Supreme Court held that Section 3 of RLUIPA does not violate the Establishment Clause. Noting that the statute does not differentiate among bona fide religious faiths, does not confer privileged status on any particular religious sect, and does not single out any bona fide faith for disadvantageous treatment, the Court concluded that the provision merely removed government imposed burdens on religious exercise. This, in the Court's view, constituted a permissible accommodation of religion, rather than an impermissible advancement or endorsement.

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[120] Pub. L. 105-183 (1998), revising among other provisions 11 U.S.C.A. §§ 544, 548(2).
[121] 114 Stat. 804 (2000).
[122] 125 S. Ct. 2113 (2005).

The *Cutter* decision is significant in confirming that a narrow legislatively crafted religious exemption can withstand Establishment Clause scrutiny. This is not surprising, since the Court has long recognized that there is sufficient play in the constitutional joints to assure that legislation passed in the interest of protecting Free Exercise does not violate the Establishment Clause. As a practical matter, the case is not likely to have broad new implications. The legislative history of RLUIPA indicates that particularly in the prison setting, Congress anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[123] Prisons would appear to be a context where compelling government interests are quite likely to justify the state not meeting broad demands for religious accommodations. Thus, prisoners are not heavily favored by RLUIPA. Nevertheless, the case does represent an acknowledgment that there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[124] RLUIPA confirms that some limited portions of the protection lost under *Smith* and *Boerne* can be protected legislatively.

d. RFRA as Applied to the Federal Government

While RFRA was declared unconstitutional with respect to state and local government action in *City of Boerne,* as yet, the Supreme Court has not squarely faced the issue of whether as applied to the federal government RFRA is constitutional or not. However, the preliminary hints are that it is. As noted above, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court held that RLUIPA did not violate the Establishment Clause. Of course, RLUIPA is much more narrowly drafted than RFRA, but the basic rationale of the case, according to which increasing the level of protection of a prisoners religious freedom rights does not violate the Establishment Clause, would seem to apply in the federal RFRA setting.

In 2006, the U.S. Supreme Court decided a case very much like the peyote case, *Employment Division v. Smith*, but this time the case involved hoasca tea, which contained a hallucinogenic substance illegal under U.S. drug laws and international treaties. Moreover, although the issue of the constitutionality of "federal RFRA" was not formally before the Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006), the fact that the Supreme Court applied RFRA in a manner that allowed religious plaintiffs claiming an exemption from federal drug laws to prevail with no intimation that there might be a constitutional problem that needed to be considered on remand suggests that the Supreme Court is not likely to strike down RFRA's federal reach.

The case involved O Centro Espirita Beneficente Uniao do Vegetal (UDV), a Christian spiritist sect based in Brazil, with an American branch of approximately 130 members. The Church members received communion by drinking a sacramental tea brewed from plants unique to the region in Brazil where the religion originated, which contains a hallucinogen regulated by the Federal Government under the Controlled Substances Act. The government conceded that this practice is a since exercise of religion, but nevertheless sought to prohibit the use of the drug by members of the Church in the United States on the ground that it violated the Controlled Substances Act.

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[123] *Id.* at 2122, *citing* Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-75.
[124] 125 S. Ct. 2113, 2121 (2005).

The religious group responded by arguing that RFRA applied to this case and that it prohibited the Federal Government from substantially burdening a person's exercise of religion unless the Government "demonstrates that application of the burden to the person" represents the least restrictive means of advancing a compelling state interest. The Government argued that it had a compelling state interest in the uniform application of the drug laws and that no exception to the ban on hallucinogenic drugs could be made to accommodate the sect's sincere religious practice. The Supreme Court applied RFRA and concluded that the Government failed to carry its burden of proving that it had a compelling state interest in barring the Church's sacramental use of hoasca tea. The Court stated:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner*, and *Wisconsin v Yoder*." In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. . . .
>
> Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT [the hallucinogenic component of hoasca tea] are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here – the circumscribed, sacramental use of hoasca by the UDV. Congress' determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

The Court also rejected the Government's sweeping claim that it had a compelling interest based upon its obligation to comply with the 1971 United Nations Convention on Psychotropic Substances, a treaty signed by the United States that calls upon signatories to prohibit the use of hallucinogens, including DMT.

> The fact that hoasca is covered by the Convention, however, does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention, to the UDV's sacramental use of the tea. At the present stage, it suffices to observe that the Government did not even submit evidence addressing the international consequences of granting an exemption for the UDV. The Government simply submitted two affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs. We do not doubt the validity of these interests, any more

> than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough. . . .

In conclusion the Court notes that even though the balancing required by RFRA is difficult, it is what Congress has mandated the courts to do in cases such as this.

> The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior governmental interests." We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. See *Smith*. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction state, a compelling interest in barring the UDV's sacramental use of hoasca.

Because the case came before the Court on an appeal from the grant of a preliminary injunction, it has now been remanded to lower courts for adjudication on the merits. As indicated above, however, the Court's opinion contains no hint that the statutory language of RFRA, which was carefully applied by the Court, suffers from any constitutional defects in the federal setting. As a practical matter, neither religious claimants nor federal officials are likely to challenge federal RFRA—the claimants because they seek the most favorable possible protection, and federal officials, because although federal prosecutors might be interested in asserting such a challenge, the top level federal officials charged with making such decisions—the Attorney General and the Solicitor General—have a duty to defend rather than attack federal legislation, and they are particularly unlikely to attack legislation that is as politically popular as RFRA.

6. Some Reflections on U.S. Free Exercise Jurisprudence

The struggle concerning the fate of legislative exemptions designed to accommodate freedom of religion has been the central drama of free exercise jurisprudence over the past twenty years. The U.S. Supreme Court has promoted an equalitarian position, focusing upon whether a law is general and neutral, and whether legislation was specifically targeted at burdening religion. The response of Congress, state courts, and state legislature has in large measure been to reassert freedom as a predominant free exercise value. They have done this by reasserting the compelling state interest test.

These efforts can be viewed as a kind of counter-insurgency to re-establish the role of freedom in free exercise cases.

IV. The Institutional Dialectic: Legislative and Judicial Role Reversal

As Michael McConnell noted in a conference at BYU Law School, the history of the protection of religious freedom is a complete reversal of our normal expectations about the tendencies of legislatures and the assumptions we make about courts. McConnell describes what he calls the "political science model" of the roles of legislatures and courts:

> "Basic political science courses often describe judicial review as fundamental to the protection of individual interests from majority rule. The ability to challenge governmental action in court gives non-majoritarian interests an avenue to overcome the majoritarian pronouncements of the legislatures. The democratic institutions of government represent majority rule, while the courts in our system – or in any system with judicial review – are more amenable to protecting minority interests."[125]

In other words, the political science model posits that legislatures will represent the interests of powerful majorities, and courts are necessary to protect the rights of minorities. According to this model, as Professor McConnell explains, "we would expect to find laws passed by majoritarian legislatures that violate the free exercise of religion, followed by court decisions protecting religious minorities."[126]

The interesting irony is that the history of the protection of religious freedom in the United States tells a story that is almost the exact opposite of what the political science model would suggest.[127] For at least the last 20 years, and even previously, in the U.S., courts, including (or perhaps especially) the U.S. Supreme Court has been an extremely ineffectual institution for protecting religious freedom claims. The legislature, in contrast, as been quite active in trying to assert religious freedom rights, not just for majority religious groups, but for minority groups as well. Indeed, much of the litigation over the past 20 years has been about the constitutionality of Congressional attempts to expand the scope of religious freedom protection.

V. Possible Implications for the Australian Debate About a Bill (or Charter) of Fundamental Rights

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[125] Michael W. McConnell, Religious Freedom, Separation of Powers, and the Reversal of Roles, 2001 BYU L. Rev. 611, 612.

[126] Id.

[127] McConnell observes, "And yet, when we look at the actual record of democratic institutions versus the courts in the United States, it turns out that reality does not conform to the political science model we have been taught. It is very nearly the opposite. Legislatures have shown a remarkable degree of solicitude for minority religious interests, and courts in the United States have repeatedly – not always, but frequently – struck down the efforts of legislatures to protect minority religious groups as unconstitutional." Id. at 612-13.

What, if anything, does this suggest for the current debate in Australia about a Bill (or Charter) of Fundamental rights?

Perhaps little, or even very little. After all, the U.S. situation is in many was different and distinct from the situation in Australia. Perhaps most importantly, the institution of judicial review is quite different, the basic assumptions about the institutional roles of courts and legislatures is quite different, and the history of the interpretation of similar constitutional language regarding religious freedom is quite different. Furthermore, as I understand it, the debate in Australia centers on a legislative rather than a Constitutional change.

Nevertheless, at the risk of oversimplification and with all of the usual caveats and disclaimers that those who hazard into the treacherous territory of comparative law must make, I will cautiously make three observations.

First, it is more difficult today than it was 200 years ago when the U.S. Bill of Rights was enacted, or even 50 years ago, when the key United Nations Human Rights instruments were adopted, to enact protection for religious freedom. Equality has in large measure trumped freedom in the freedom-equality dialectic I have described. Thus, affording religious belief and religiously motivated actions a special measure of protection, as the freedom paradigm would suggest, is politically much more difficult today than it was in earlier generations. Perhaps, the best we can hope for are strong equality protections that afford religious dissenters at least the level of protection that is afforded to dissenters who are motivated by reasons and commitments that are not religious. If this is the case, I for one, would count it an unfortunate development.

Second, it does seem likely that a bill of rights shifts the balance of institutional power somewhat in the direction of courts over the legislature. This may, but does not necessarily, result in a greater level of protection for the rights of minorities. At times, the U.S. Supreme Court has protected the religious freedom rights of minorities, but in recent years I would argue that in the U.S. it has been the majoritarian legislatures rather than the counter-majoritarian courts that have been more active and effective in protecting minority rights. In my opinion, given the differences in the U.S. and Australia in our understandings of judicial review and the ideal of parliamentary superiority, it is difficult to predict how this institutional dialectic is likely to develop in Australia.

Third, an institutional dialectic is sometimes helpful. It is not so much that the political science model is wrong, but rather that it is not always right. Sometimes courts have been important bulwarks upholding individual freedoms for minorities against majoritarian institutions that would trample on minority rights, as the political science model would suggest. In the U.S., the story of the struggle for civil rights, for racial and gender equality, follows the political science model more closely than does the struggle for the protection of religious freedom rights of minorities.[128]

And so, I conclude with a note of optimism and a note of caution. Religious and cultural freedom are among the most important human values, and efforts to afford them institutional protections are to be

[128] The same may be true today in the struggle for gay rights, including the right to gay marriage.

applauded. Thus, I cheer the effort to adopt a Bill or Charter of Rights. On the other hand, Courts are imperfect guarantors of our freedoms, and shifting power to the Courts can – and has in the U.S. – have the effect of making more complex and problematic the endeavor of protecting religious freedom. And so, rather than the customary “three cheers,” I can bring myself only to declare “two cheers” for a Bill or Charter of Rights.